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## NOTES

### SMALL TOWN DEFENDERS OR CONSTITUTIONAL FOES: DOES THE HAZLETON, PA ANTI-ILLEGAL- IMMIGRATION ORDINANCE ENCROACH ON FEDERAL POWER?

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INTRODUCTION .....	884
I. THE CASE OF HAZLETON, PA .....	886
A. <i>Hazleton's History of Immigration and the Circumstances         Surrounding Passage of the Ordinance</i> .....	886
B. <i>The Ordinance</i> .....	888
II. FEDERAL EXCLUSIVITY IN IMMIGRATION AFFAIRS .....	891
A. <i>Early Justifications for Federal Exclusivity over Immigration</i> ...	891
B. <i>The Foreign Policy Rationale for Federal Exclusivity</i> .....	893
C. <i>De Canas v. Bica</i> .....	895
III. THE HAZLETON ORDINANCE'S EMPLOYMENT PROVISION .....	898
A. <i>Is It an Immigration Regulation?</i> .....	898
B. <i>Is the Employment Provision Preempted by Federal Statute?</i> ....	900
IV. THE HAZLETON ORDINANCE'S LANDLORD PROVISION .....	903
A. <i>Is It an Immigration Regulation?</i> .....	903
B. <i>Is the Landlord Provision Preempted by Federal Statute?</i> .....	906
CONCLUSION.....	909

The federal government has failed us, so we, the elected officials of small-town America, are getting tough with illegal immigration. I'm Lou Barletta, and I'm a small town defender.

- Lou Barletta,  
Mayor of Hazleton, PA<sup>1</sup>

Power to regulate immigration is unquestionably exclusively a federal power.

- Justice Brennan  
*De Canas v. Bica*<sup>2</sup>

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<sup>1</sup> *CBS Evening News: Pennsylvania Mayor Speaks About Illegal Immigrants* (CBS television broadcast Oct. 17, 2006), <http://www.cbsnews.com/stories/2006/10/17/freespeech/main2099190.shtml>.

<sup>2</sup> 424 U.S. 351, 354 (1976).

## INTRODUCTION

On July 30, 2006, a small Pennsylvania town eighty miles northwest of Philadelphia put its frustration with illegal immigration to work by enacting a novel ordinance which has already served as a model for dozens of municipalities around the country. Fed up with what they viewed as the federal government's failure to control illegal immigration, members of the Hazleton City Council passed an ordinance aiming to make their city "one of the most difficult places in the United States for illegal immigrants."<sup>3</sup> The ordinance targets employers and landlords of undocumented immigrants and establishes English as the city's official language.<sup>4</sup> Now, for the first time in this country's long history of regulating immigration, federal courts must decide what role America's cities and towns may play in effecting immigration policy.<sup>5</sup>

If upheld, these ordinances could dramatically alter the level of immigration enforcement and "profoundly change immigration law" in this country.<sup>6</sup> Since Hazleton first passed its ordinance, over sixty local governments in twenty-one states have considered anti-immigrant ordinances, with at least fifteen approving similar measures.<sup>7</sup> Escondido, California, near San Diego, also requires landlords to verify the immigration status of their tenants or face civil and criminal penalties.<sup>8</sup> Other towns seeking to drive out their undocumented immigrant neighbors include Valley Park, Missouri; Taneytown, Maryland; and Farmer's Branch, Texas, a Dallas suburb.<sup>9</sup> Pahrump, Nevada "went so far as to ban flying a foreign flag, unless a U.S. flag flies above it."<sup>10</sup> Altoona, Pennsylvania has decided to follow its in-state neighbor's lead even though it has never had a problem with illegal immigration.<sup>11</sup> With so many municipalities seeking to establish themselves as players in the immigration debate, the impact of these ordinances could prove to be substantial.

Legal challenges to these measures have spread almost as rapidly as the ordinances themselves. Critics of the ordinances have cited a host of

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<sup>3</sup> Julia Preston, *Pennsylvania Town Delays Enforcing Tough Immigration Law*, N.Y. TIMES, Sept. 2, 2006, at A11 (quoting Mayor Louis J. Barletta of Hazleton, Pennsylvania).

<sup>4</sup> Miriam Jordan, *City's Rules on Illegal Immigrants Draw First Lawsuit of Its Kind*, WALL ST. J., Aug. 16, 2006, at B10.

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

<sup>6</sup> Kim Cobb et al., *The Immigration Debate; Small Towns Clamping Down*, HOUS. CHRON., Nov. 19, 2006, at A1.

<sup>7</sup> Sean D. Hamill, *Altoona, with No Immigrant Problem, Decides To Solve It*, N.Y. TIMES, Dec. 7, 2006, at A34.

<sup>8</sup> Editorial, *Bad Plan, Escondido: A City Ordinance That Turns Landlords into Immigration Snitches Is Poor Policy. It's a Job Best Left to the Feds*, L.A. TIMES, Nov 2, 2006, at A18.

<sup>9</sup> Cobb et al., *supra* note 6.

<sup>10</sup> *Id.*

<sup>11</sup> Hamill, *supra* note 7.

constitutional problems ranging from Due Process and Equal Protection to the Supremacy Clause. At bottom, regardless of any Fourteenth Amendment problems, the future of local immigration regulation turns on the scope of federal preemption. Even more important than the prospect of preemption by federal statute is the possibility that the Constitution itself preempts local regulation of immigration. For about a century and a half, the Supreme Court has held that immigration regulation is exclusively the business of the federal government.<sup>12</sup> If the Hazleton ordinance and its progeny intrude on this exclusively federal power, then no degree of consistency with Equal Protection or Due Process requirements can save them. This Note explores whether municipalities have the power to regulate the employment and housing of immigrants, leaving aside any issues of discrimination that these particular ordinances may present.

Opponents of these local measures may be tempted to reflexively dismiss them as obvious intrusions on federal power,<sup>13</sup> but the relevant precedent is slightly more complicated. While consistently and emphatically affirming federal exclusivity over the regulation of immigration, the Supreme Court has also indicated that not every state law targeting undocumented immigrants encroaches on this federal domain.<sup>14</sup> This Note seeks to sort out the precedent and clarify whether and to what extent municipalities may punish the landlords and employers of undocumented immigrants without offending the Constitution. This Note argues that punishing both the employers and landlords of illegal immigrants constitutes a regulation of immigration best left to the federal government.

Part I examines the Hazleton statute including the circumstances and motives of its enactment. Part II relates the development and scope of the federal exclusivity doctrine and the rise of *De Canas v. Bica*,<sup>15</sup> which called into question the doctrine's applicability to regulations like the Hazleton ordinance. Part III explores the constitutionality of the employer restrictions and concludes that the Hazleton approach is unconstitutional under a traditional understanding of federal exclusivity and the Supremacy Clause. Hazleton's employer restrictions amount to an unconstitutional regulation of immigration because the express object is to control the influx of aliens in the town. The Supreme Court has held in *De Canas v. Bica* that local

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<sup>12</sup> See, e.g., *Henderson v. Mayor of New York*, 92 U.S. 259, 273 (1875). The Supreme Court had already invalidated a New York immigration regulation as unconstitutional in 1849, see *Passenger Cases*, 48 U.S. (7 How.) 283, 572-73 (1849), but the Court was so divided that it did not issue an opinion of the court.

<sup>13</sup> See, e.g., Laura Parker, *Court Tests Await Cities' Laws on Immigrants*, USA TODAY, Oct. 9, 2006, at 3A (quoting Yale Law School professor Michael Wishnie as arguing that "[t]he line of cases stretches back 150 years in a range of situations that are analogous to what is happening now . . . [and] has made it clear that the regulation of immigration is exclusively a federal function").

<sup>14</sup> See *infra* notes 103-108 and accompanying text.

<sup>15</sup> 424 U.S. 351, 354 (1976).

governments can regulate employment of illegal immigrants,<sup>16</sup> but not where the avowed purpose of the act is to control the influx of immigrants. The employer provision also conflicts with federal law, which already occupies the field regulating the employment of illegal immigrants and expressly forecloses that option to the states.

Part IV addresses the housing provision of the ordinance and explains why local regulation in this area is impermissible. This provision regulates conduct even more closely associated with immigration than the employer provision and is therefore even more susceptible to constitutional attack. The landlord sanctions also conflict with current congressional law and more clearly implicate the concerns underlying the federal exclusivity doctrine. Like the employer provision, the landlord provision fails under current law.

## I. THE CASE OF HAZLETON, PA

### A. *Hazleton's History of Immigration and the Circumstances Surrounding Passage of the Ordinance*

Hazleton's leading role in the small town attack on undocumented immigrants is not without irony. It was in Pennsylvania that Benjamin Franklin famously remarked over two hundred and fifty years ago that German Pennsylvanians could not assimilate and, if not diverted elsewhere, would soon corrupt the language and government of the colony.<sup>17</sup> Franklin's prediction never came to pass, but his fear of foreigners and foreign ways outlived him.

Founded in the early-nineteenth century, Hazleton was itself largely built by immigrants – mostly the Irish, Italians, and Eastern Europeans who came to mine for anthracite coal.<sup>18</sup> Spurred by the immigrant arrivals, Hazleton originally thrived as a reasonably progressive town.<sup>19</sup> The coal mines fueled much of the city's growth, and the largely immigrant population also contributed to the opening of silk and garment mills.<sup>20</sup> The population peaked at 38,000 in the 1940s and then steadily declined as mining and textile jobs eventually dried up.<sup>21</sup> Even in the town's formative days locals complained about the language and customs of the foreign-born workers,<sup>22</sup> but the early immigrant population fueled Hazleton's heyday and laid the town's

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<sup>16</sup> See *infra* Part II.C.

<sup>17</sup> Letter from Benjamin Franklin to Peter Collinson (May 9, 1753), in *THE POLITICAL THOUGHT OF BENJAMIN FRANKLIN* 72, 78 (Ralph L. Ketcham ed., 1965).

<sup>18</sup> Michael Powell & Michelle Garcia, *Pa. City Puts Illegal Immigrants on Notice*, *WASH. POST*, Aug. 22, 2006, at A3.

<sup>19</sup> See *id.* (indicating that, in 1891, Hazleton “became the third [city] in the nation to electrify”).

<sup>20</sup> See *id.*

<sup>21</sup> Ellen Barry, *City Vents Anger at Illegal Immigrants*, *L.A. TIMES*, July 14, 2006, at A1.

<sup>22</sup> See Peter Alotoic, Editorial, *Welcome to Pittsburgh!*, *PITTSBURGH POST-GAZETTE*, Oct. 29, 2006, at H-4; Powell & Garcia, *supra* note 18.

foundation. Even Hazleton mayor and poster boy for the small town anti-illegal-immigration movement, Lou Barletta, is a descendant of Italian immigrants.<sup>23</sup> Now, descendants of Hazleton's immigrant forebears seek to drive new immigrants out. Some critics see the Hazleton ordinance as an affront to the city's immigrant heritage.<sup>24</sup>

While critics of the ordinance point to the town's roots, supporters claim they need look no further than the violent crimes and burdened social services that have accompanied the most recent immigration influx. The town's population declined to just 23,000 according to the 2000 Census, but has already jumped back up to over 30,000.<sup>25</sup> The wave has left one school built for only 1,800 students with some 2,500 students to accommodate.<sup>26</sup> At trial in March 2007, Hazleton maintained that its education budget for teaching English as a second language has ballooned from \$500 per year to \$875,000 in just the last two years, while unreimbursed health care costs have increased 60% over the same period.<sup>27</sup> The most important catalyst for Barletta, however, occurred on May 10, 2006, when police arrested four Dominican immigrants in connection with the fatal shooting of a 29-year-old Hazleton resident.<sup>28</sup> Earlier that day in an unrelated incident, a fourteen-year-old illegal immigrant fired a gun at a playground.<sup>29</sup> Barletta admits that he has no statistics to support his claim that illegal immigration itself contributes to increased crime,<sup>30</sup> but he finds these sad slayings evidence enough.

His critics, however, do have numbers. They maintain that the town's ten percent increase in crime merely keeps pace with the increase in population.<sup>31</sup> In fact, the Pennsylvania State Police Uniform Crime Reporting System indicates a *reduction* in the overall number of arrests in Hazleton from 2001 to 2005.<sup>32</sup> The numbers do show an increase in theft and drug-related crimes, but also a concomitant decrease in the "number of reported rapes, robberies, homicides and assaults."<sup>33</sup> Pro-immigration members of the community also dispute the claim that Hazleton's newest arrivals put a drain on the economy. Hazleton landlords and businesses contrast the town's current three-year

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<sup>23</sup> Alotoic, *supra* note 22.

<sup>24</sup> See *Immigration Debate Stews in Pennsylvania Melting-Pot: Town Built on Diversity May Become Test Case for Legal Residency Laws*, GRAND RAPIDS PRESS, July 4, 2007, at A10 ("Hazletonians ought to know better than most that America has always been a melange.").

<sup>25</sup> Barry, *supra* note 21.

<sup>26</sup> *Id.*

<sup>27</sup> Julia Vitullo-Martin, Editorial, *Save Our Cities*, WALL ST. J., Mar. 30, 2007, at W13.

<sup>28</sup> See Powell & Garcia, *supra* note 18.

<sup>29</sup> *Id.*

<sup>30</sup> *Lozano v. City of Hazleton*, 459 F. Supp. 2d 332, 336 (M.D. Pa. 2006).

<sup>31</sup> Powell & Garcia, *supra* note 18.

<sup>32</sup> Barry, *supra* note 21.

<sup>33</sup> *Id.*

running budget surplus with its \$1.2 million deficit back in 2000.<sup>34</sup> President of the Greater Hazleton Chamber of Commerce Donna Palermo points out that “Latino immigrants built 50 to 60 businesses in the city’s downtown” and probably account for the 125% increase in the value of many Hazleton homes.<sup>35</sup> Mayor Barletta himself boasted as recently as October of 2005 that Hazleton’s economy had reached its “healthiest state in decades.”<sup>36</sup>

This debate is rather typical, as interested parties in cities and towns across the country trade barbs over the effect of illegal immigration on crime and the economy. Immigration supporters emphasize immigrant heritage and positive economic benefits while their antagonists complain of burdened social services and increased crime.

### B. *The Ordinance*

Hazleton first passed the Illegal Immigration Relief Act Ordinance on July 13, 2006.<sup>37</sup> Asserting that “illegal immigration leads to higher crime rates, contributes to overcrowded classrooms and failing schools” and burdens public services,<sup>38</sup> the ordinance purports to “abate the nuisance of illegal immigration by diligently prohibiting the acts and policies that facilitate [it].”<sup>39</sup> As originally enacted, the ordinance threatened to suspend the business license of any employer of “illegal aliens” for five years for the first violation and ten years for any subsequent violation.<sup>40</sup> Despite the seriousness of the penalty, the ordinance provided employers with no mechanism for identifying the immigration status of their employees nor any grace period for correcting a violation. The ordinance prohibited “illegal aliens” from leasing or renting property and subjected anyone who “knowingly allows an illegal alien to use, rent or lease their property” to a fine of \$1,000 for every day an illegal immigrant is allowed to rent the property.<sup>41</sup> Neither provision provided a definition for the term “illegal alien.” Finally, the ordinance declared English as the “official language of the City” and required all official city business to be conducted in English only.<sup>42</sup>

The ordinance was almost immediately challenged in federal court. Faced with an uphill legal battle, the Hazleton City Council revised the ordinance in

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<sup>34</sup> Vitullo-Martin, *supra* note 27. Opponents of municipal immigration reduction policies also claim that cities around the country that welcome immigrants experience the greatest prosperity. *Id.*

<sup>35</sup> Barry, *supra* note 21.

<sup>36</sup> *Id.*

<sup>37</sup> Preston, *supra* note 3.

<sup>38</sup> Hazleton, Pa., Ordinance 2006-10, § 2(A) (July 13, 2006), available at <http://clearinghouse.wustl.edu/chDocs/public/IM-PA-0001-0003.pdf>.

<sup>39</sup> *Id.* § 2(B).

<sup>40</sup> *Id.* § 4.

<sup>41</sup> *Id.* § 5.

<sup>42</sup> *Id.* § 6.

August and September of 2006.<sup>43</sup> The law was divided into three separate ordinances: the Official English Ordinance,<sup>44</sup> a registration ordinance,<sup>45</sup> and a revised Immigration Relief Act.<sup>46</sup>

The new ordinances put a finer point on the previously blunt instrument, but maintain the express purpose of driving illegal aliens from the town. In response to charges that the term “illegal alien” was undefined and inconsistent with federal alienage classifications, the new Immigration Relief Act defines the term as an alien not lawfully present in the United States according to “United States Code title 8, section 1101 et seq.”<sup>47</sup> Whereas the original ordinance had established no procedure for determining immigration status, the city may now conclude that a person is an “illegal alien” only after verifying immigration status with the federal government.<sup>48</sup> In order to minimize the discriminatory impact of the ordinance and offer some much needed protection to lawful immigrant residents of the town, the revised ordinance also invalidates any complaint based primarily on national origin, ethnicity, or race,<sup>49</sup> and creates a private cause of action for unfairly discharged employees.<sup>50</sup>

Rather than suspending business licenses for years upon any employment of unlawful workers, the amended law provides for suspensions only in cases where the employer does not correct the infraction within three days, and any suspensions that do ensue will only last until one business day after the violation has ended.<sup>51</sup> The ordinance also prohibits the city from suspending the business permit of an employer that has “verified the work authorization of the alleged unlawful worker(s) using the Basic Pilot Program” created by Congress.<sup>52</sup>

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<sup>43</sup> *U.S. Judge Blocks Ban on Illegal Immigrants*, L.A. TIMES, Nov. 1, 2006, at A14.

<sup>44</sup> Hazleton, Pa., Ordinance 2006-19 (Sept. 9, 2006), available at <http://www.smalltowndefenders.com/public/node/6> (follow “Download the English Official Language Ordinance (PDF)” hyperlink). Although challenged on First Amendment grounds, the official language ordinance does not facially raise serious legal problems. *E.g.*, *Alexander v. Sandoval*, 532 U.S. 275 (2001) (upholding an Alabama policy of administering driver’s license examinations in English only).

<sup>45</sup> Hazleton, Pa., Ordinance 2006-13 (Aug. 15, 2006), available at <http://www.smalltowndefenders.com/public/node/6> (follow “Download the Landlord/Tenant Ordinance (PDF)” hyperlink).

<sup>46</sup> Hazleton, Pa., Ordinance 2006-18 (Sept. 8, 2006), available at <http://www.smalltowndefenders.com/public/node/6> (follow “Download the amended Illegal Immigration Reform Act (PDF)” hyperlink).

<sup>47</sup> *Id.* § 3(D).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* § 4(B)(2).

<sup>50</sup> *Id.* § 4(E).

<sup>51</sup> *Id.* § 4(B).

<sup>52</sup> *Id.* § 4(B)(5).

The new ordinance also revises the landlord provisions. Under a section entitled “Harboring Illegal Aliens,” it is unlawful “to let, lease, or rent a dwelling unit to an illegal alien, knowing or in reckless disregard” of the alien’s illegal status.<sup>53</sup> The new law substitutes a license suspension for the first violation and a fine of \$250 per day for any subsequent violation for the old law’s draconian \$1,000 per day fines.<sup>54</sup> The registration ordinance requires landlords to obtain a rental license before leasing to their tenants.<sup>55</sup> The city only suspends the license if the landlord fails to correct the violation within five business days.<sup>56</sup>

Most of the changes introduced in the revised ordinance seek to overcome potential Due Process and Equal Protection problems. The requirement that the city verify immigration status before it acts is a clear attempt to provide greater procedural safeguards, as are the modest attempts to define “illegal alien” and the grace period allowing an employer to correct a violation. The invalidation of complaints based on ethnicity and the private right of action afforded those wrongfully discharged of employment aim to remedy any Equal Protection problems. Still, the express purpose of the Hazleton ordinance remains the same: stopping the influx of illegal immigration.<sup>57</sup> The new ordinance also targets the same conduct as the original ordinance; the penalties for the conduct have merely been reduced. Even if the revisions do bring the ordinance in conformity with the requirements of Due Process and Equal Protection, the Hazleton ordinance still comes dangerously close to encroaching upon a domain long reserved to the federal government. As a result, Hazleton and the many other towns following the Hazleton model must ultimately confront the nation’s longstanding tradition of federal exclusivity over immigration affairs.<sup>58</sup>

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<sup>53</sup> *Id.* § 5.

<sup>54</sup> *Id.* § 5(B)(4)-(8).

<sup>55</sup> Hazleton, Pa., Ordinance 2006-13, § 6(a) (Aug. 15, 2006), available at <http://www.smalltowndefenders.com/public/node/6> (follow “Download the Landlord/Tenant Ordinance (PDF)” hyperlink) (requiring a rental license for landlords). A landlord must pay a \$5 annual license fee to rent property. *Id.* § 7(a). Each occupant of rental property must pay a one time fee of \$10 to obtain an occupancy permit. *Id.* § 7(b). An owner who allows occupancy without obtaining an occupancy permit must pay \$1,000 per occupant plus \$100 per occupant per day, and the same penalty applies to an occupant who allows another to occupy rented property without the owner’s knowledge. *Id.* § 10(b).

<sup>56</sup> Hazleton, Pa., Ordinance 2006-18 § 5(B)(4) (Sept. 8, 2006), available at <http://www.smalltowndefenders.com/public/node/6> (follow “Download the amended Illegal Immigration Reform Act (PDF)” hyperlink).

<sup>57</sup> *See id.* § 2.

<sup>58</sup> On July 26, 2007, the United States District Court for the Middle District of Pennsylvania ruled that the Hazleton ordinance is unconstitutional. *Lozano v. City of Hazleton*, No. 3:06cv1586, 2007 WL 2163093, at \*61-62 (M.D. Pa. July 26, 2007). Notwithstanding the town’s attempts to offer greater procedural protections in the revised ordinance, the district court found the Hazleton ordinance violative of Due Process. *See id.*



## II. FEDERAL EXCLUSIVITY IN IMMIGRATION AFFAIRS

The Supreme Court has held consistently since 1875 that the power to regulate immigration belongs exclusively to the federal government, yet the power is nowhere enumerated in the text of the Constitution.<sup>59</sup> Courts and commentators have instead identified the source of federal power over immigration in the Foreign Commerce Clause,<sup>60</sup> federal authority over foreign affairs,<sup>61</sup> the Naturalization Clause,<sup>62</sup> and in “extraconstitutional theories of inherent national sovereignty.”<sup>63</sup> A proper understanding of the possible scope of federal exclusivity in this area requires a look into the historical evolution of the federal exclusivity doctrine, the various justifications for the doctrine’s development, and any instances where state regulation has coexisted with federal immigration regulation.

### A. *Early Justifications for Federal Exclusivity over Immigration*

The Supreme Court definitively established the doctrine of federal exclusivity over immigration regulation in the companion cases of *Henderson v. Mayor of New York*<sup>64</sup> and *Chy Lung v. Freeman*.<sup>65</sup> In *Henderson*, the New York statute in question required every foreign passenger arriving on the state’s shores to pay a bond “as an indemnity against his becoming a future charge to the state,” unless the ship-owner paid a fixed sum.<sup>66</sup> Justice Miller, writing for the Court in both decisions, found a textual toehold for the exclusive immigration power in the Commerce Clause. He reasoned that if commerce includes admission of a vessel into the country’s ports, then it must

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at \*47. The court also held that the ordinance violates the Supremacy Clause of the Constitution, because both the landlord and employer provisions have been preempted by federal statute. *See id.* at \*42. Perhaps because it struck the ordinance down on these other grounds, the court did not extensively examine the constitutional dimension of federal exclusivity over immigration regulation. Given the weight of authority supporting this constitutional preemption of local immigration regulation, *see infra* Part II, it remains the greatest objection to the Hazleton ordinance, notwithstanding the *Lozano* court’s decision to rule on other grounds.

<sup>59</sup> Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493, 494 (2001).

<sup>60</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>61</sup> *See Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952) (“It is pertinent to observe that any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government.”); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936).

<sup>62</sup> U.S. CONST. art. I, § 8, cl. 4.

<sup>63</sup> Wishnie, *supra* note 59, at 532.

<sup>64</sup> 92 U.S. 259, 273 (1875).

<sup>65</sup> 92 U.S. 275, 280 (1875); *see also* Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833, 1886 (1993).

<sup>66</sup> *Henderson*, 92 U.S. at 267.

necessarily comprehend also the vessel's cargo and passengers.<sup>67</sup> Justice Miller explained that immigrants contribute their wealth and labor to the country's manufacturing and agriculture industries.<sup>68</sup> Since immigration so closely relates to commerce, the Court held that it is within the commerce power given to Congress to regulate. Reasoning that federal power over foreign commerce is exclusive,<sup>69</sup> the Court concluded that the power over immigration which derives from it must also be exclusive.<sup>70</sup> The Court insisted that uniformity of immigration policy is essential,<sup>71</sup> and held that states cannot, consistent with the Constitution, regulate immigration. Thus, the doctrine of federal exclusivity in immigration affairs was initially derived from the Commerce Clause.<sup>72</sup>

In the infamous *Chinese Exclusion Case*,<sup>73</sup> the Supreme Court articulated another theory of exclusive federal power over immigration: the "inherent sovereignty of the nation."<sup>74</sup> The Supreme Court there upheld an act of Congress "prohibiting Chinese laborers from entering the United States."<sup>75</sup> In upholding the act, the Court reasoned that the Constitution "delegated" to the government of the United States the sovereign powers belonging to independent nations.<sup>76</sup> The Court then concluded that the "power of exclusion

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<sup>67</sup> *Id.* at 270.

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

<sup>69</sup> *See id.* at 272-73. For a distinction between congressional power over interstate commerce and foreign commerce, see *Bowman v. Chicago & Nw. Ry. Co.*, 125 U.S. 465, 482 (1888) ("The organization of our state and Federal system of government is such that the people of the several states can have no relations with foreign powers in respect to commerce or any other subject, except through the government of the United States . . . . The same necessity perhaps does not exist equally in reference to commerce among the States.").

<sup>70</sup> *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875) ("The passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the States. It has the power to regulate commerce with foreign nations: the responsibility for the character of those regulations, and for the manner of their execution, belongs solely to the national government.").

<sup>71</sup> *Henderson*, 92 U.S. at 273.

<sup>72</sup> The Court identified the same source of federal power again in *The Head Money Cases*. *See Edye v. Robertson*, 112 U.S. 580 (1884) (involving an Act of Congress requiring the owner of a vessel arriving in the United States to pay fifty cents for every passenger arriving into the country who was not a United States citizen). There the Court reaffirmed its earlier holding that the Commerce Clause granted Congress power over immigration, to the exclusion of the states. *Id.* at 591.

<sup>73</sup> *Ping v. United States*, 130 U.S. 581 (1889).

<sup>74</sup> *Wishnie*, *supra* note 59, at 549.

<sup>75</sup> *Ping*, 130 U.S. at 589.

<sup>76</sup> *Id.* at 609.

of foreigners [was] an incident of sovereignty.”<sup>77</sup> As this “power of exclusion” is inherent in national sovereignty, it therefore “cannot be abandoned or surrendered” to any other parties.<sup>78</sup>

In subsequent cases, the Court at times looked beyond the text of the Constitution and rested its sovereignty theory on accepted international law.<sup>79</sup> This inherent sovereign power authorized the federal government not only to exclude foreigners from entry to the country, but also to forcefully remove them once here.<sup>80</sup> A nation’s right to expel immigrants is “as absolute and unqualified as the right to prohibit and prevent their entrance into the country.”<sup>81</sup> Well into the twentieth century, the Supreme Court still recognized the “exclusion of aliens [as] a fundamental act of sovereignty.”<sup>82</sup>

#### B. *The Foreign Policy Rationale for Federal Exclusivity*

Closely related to the inherent sovereignty theory is the relationship between immigration and foreign policy.<sup>83</sup> Though first developed in combination with the inherent sovereignty theory, the foreign policy rationale perhaps has greater currency today than the earlier theories. This justification for the doctrine better explains the potential problems of local immigration regulation. Accordingly, the foreign policy rationale for federal exclusivity deserves greater attention than the foreign commerce and inherent sovereignty theories.

*Ekiu v. United States* upheld a federal immigration regulation, in part because “the Constitution has committed the entire control of international relations” to the federal government.<sup>84</sup> Though no particular provision of the Constitution expressly delegates all foreign policy-related powers to the national authority, the Supreme Court identified several foreign policy-related clauses, including the Executive’s powers to make treaties and appoint ambassadors and Congress’s powers to establish a uniform rule of naturalization, define and punish felonies committed on the high seas, declare

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<sup>77</sup> *Id.* In justifying the statute as an inherent act of sovereignty, the Court stated that the national government has the power to protect against foreign aggression, whether “such aggression and encroachment come . . . from the foreign nation acting in its national character or from vast hordes of its people crowding in upon us.” *Id.* at 606.

<sup>78</sup> *Id.* at 609.

<sup>79</sup> *See, e.g., Ekiu v. United States*, 142 U.S. 651, 659 (1892) (“It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.”).

<sup>80</sup> *See Ting v. United States*, 149 U.S. 698 (1893).

<sup>81</sup> *Id.* at 707.

<sup>82</sup> *See, e.g., Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950).

<sup>83</sup> Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 FLA. ST. U. L. REV. 965, 991 (2004).

<sup>84</sup> *Ekiu*, 142 U.S. at 659.

war, grant letters of marque and reprisal, and create an army and navy.<sup>85</sup> By invoking a host of constitutional provisions granting powers over foreign relations to the federal government, the Court tied the notion of a federal foreign affairs power to the actual text of the Constitution.<sup>86</sup>

Although the foreign policy rationale for federal exclusivity over immigration developed relatively late, the historical support for the justification is strong.<sup>87</sup> China, for example, understandably took offense to the Chinese exclusion laws and boycotted American goods.<sup>88</sup> The practice of excluding black seamen by the South in the 1800s similarly enraged Great Britain.<sup>89</sup> Perhaps most significantly, anti-immigrant legislation in California in the early-twentieth century infuriated Japan, drawing the White House into direct talks with the country to smooth things over.<sup>90</sup> California's xenophobic fit continued, however, "poisoning relations between the United States and Japan for years," and possibly contributing to Japan's decision to enter World War II.<sup>91</sup>

One modern example of the impact immigration policy may have on foreign policy is the relationship between the United States and Mexico.<sup>92</sup> In 2001 President Bush engaged in a series of discussions with then Mexican President Vicente Fox.<sup>93</sup> While Fox sought greater opportunities for undocumented Mexican workers in the United States, Bush sought a revised guest worker program.<sup>94</sup> President Fox had made immigration reform one of his top priorities in his campaign for the presidency; thus, Fox's popularity in Mexico declined after September 11th turned American popular opinion against the guest worker program.<sup>95</sup> To regain voter confidence, Fox opposed the United States invasion of Iraq, putting a strain on U.S.-Mexico relations for some time.<sup>96</sup>

The relationship between immigration policy and foreign relations not only ties immigration to the powers of the federal government, but it also calls for

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<sup>85</sup> *Ting*, 149 U.S. at 711-12.

<sup>86</sup> *See id.*

<sup>87</sup> *See* Karl Manheim, *State Immigration Laws and Federal Supremacy*, 22 HASTINGS CONST. L.Q. 939, 956-57 (1995).

<sup>88</sup> *Id.* at 957.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *See* Pham, *supra* note 83, at 992 ("One credible estimate, based on the 2000 census data, is that there are 4.5 million undocumented Mexican nationals present in the United States. United States immigration policies toward these undocumented migrants has spilled over to affect its political relations with Mexico.").

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 992-93.

<sup>96</sup> *Id.* at 993.

national uniformity in that area. If immigration policy affects the nation's foreign relations, then the national government should adopt a uniform system.<sup>97</sup> Courts have long indicated that foreign policy must be uniform throughout the United States. The states exist to regulate local concerns, but, in foreign relations, the United States are "one people, one nation, one power."<sup>98</sup> In the words of Madison, "[i]f we are to be one nation in any respect, it clearly ought to be in respect to other nations."<sup>99</sup>

The link between immigration and foreign policy does not necessarily mean that the federal government should have exclusive control over every policy with any conceivable impact on immigration. First, it is not entirely accurate to say that the Constitution vests all authority over foreign relations in the national government. As one commentator has pointed out, the Constitution does give the states some limited role in foreign affairs by permitting them, with the consent of Congress, to engage in war, enter compacts with foreign nations, lay duties or imposts on exports and imports, and keep troops or ships of war in time of peace.<sup>100</sup> However, this enumeration of limited state powers in foreign activity strongly suggests that the states do not possess any foreign affairs powers that are not enumerated in the text of the Constitution.<sup>101</sup> Second, a given local ordinance affecting immigration could conceivably have no impact on foreign policy.<sup>102</sup> Still, the foreign policy rationale is today the most frequently invoked and probably the most satisfying doctrinal justification for the constitutional preemption of state and local immigration regulation.

### C. *De Canas v. Bica*

Notwithstanding the force of the federal exclusivity doctrine, in the latter part of the twentieth century, the Supreme Court upheld for the first time a

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<sup>97</sup> *Id.* at 991.

<sup>98</sup> *Ping v. United States*, 130 U.S. 581, 606 (1889); *see also* *United States v. Pink*, 315 U.S. 203, 233 (1942) ("Power over external affairs is not shared by the States; it is vested in the national government exclusively."); *United States v. Belmont*, 301 U.S. 324, 331 (1937) ("[I]n respect of our foreign relations generally, state lines disappear. As to such purpose the State . . . does not exist."); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 317 (1936) ("The Framers' Convention was called and exerted its powers upon the irrefutable postulate that though the states were several their people in respect of foreign affairs are one.").

<sup>99</sup> THE FEDERALIST NO. 42, at 279 (James Madison) (Jacob E. Cooke ed., 1961).

<sup>100</sup> *Wishnie*, *supra* note 59, at 539.

<sup>101</sup> *Id.* ("The grant of enumerated, conditional foreign affairs powers to the states, however, strongly suggests that the Constitution contemplates no exercise of unenumerated foreign affairs powers by the states, even with congressional approval.").

<sup>102</sup> *See* *Neuman*, *supra* note 65, at 1897 ("To the extent that immigration regulation today turns on [issues of crime, poverty and disease among immigrants] (which is substantial), the equation of immigration with foreign policy is a fiction.").

local regulation aimed at immigrants. In *De Canas v. Bica*,<sup>103</sup> the Court upheld a California statute imposing criminal sanctions on employers who knowingly employ illegal aliens.<sup>104</sup> After first reaffirming that the “[p]ower to regulate immigration is unquestionably exclusively a federal power,”<sup>105</sup> the Court pointed out that it “never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus *per se* pre-empted by this constitutional power.”<sup>106</sup>

*De Canas* established three tests to determine whether a local regulation related to immigration interferes with federal power. The first test is whether the statute constitutes a regulation of immigration.<sup>107</sup> According to the Court, the “purely speculative and indirect impact” that the local ordinance may have on immigration did not mean that it encroached on federal authority.<sup>108</sup> Regulation of employment to protect state workers lies within the broad authority of the state’s police power.<sup>109</sup> Additionally, the Court failed to see how remedying a local employment problem could implicate federal interests in foreign affairs or immigration.<sup>110</sup> The “regulation of immigration,” according to the Court, “is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain.”<sup>111</sup> The California statute at issue, therefore, did not, at least according to the Court, fit within this narrow definition.

Under the second test, a court must invalidate even an otherwise constitutionally permissible regulation affecting immigration where Congress has already occupied that field.<sup>112</sup> In other words, even if a statute is not negatively preempted by the Constitution, it may be preempted by positive Congressional action. *De Canas* again took a rather narrow view of occupation of the field, holding that applicable federal law concerned only the “conditions of admission to the country and the subsequent treatment of aliens

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<sup>103</sup> 424 U.S. 351 (1976).

<sup>104</sup> *Id.* at 355-56.

<sup>105</sup> *Id.* at 354.

<sup>106</sup> *Id.* at 355.

<sup>107</sup> *See id.*

<sup>108</sup> *See id.* at 355-56 (“[I]f . . . local regulation has some purely speculative and indirect impact on immigration, it does not thereby become a constitutionally proscribed regulation of immigration . . .”).

<sup>109</sup> *Id.* at 356. The Court emphasized that the immigrants subject to the California statute were not in the country lawfully. *Id.* at 355. The police power would not, presumably, authorize the state to target immigrants *legally* residing in the country. *See* *Graham v. Richardson*, 403 U.S. 365, 379 (1971) (“The assertion of an authority to deny to aliens the opportunity of earning a livelihood *when lawfully admitted to the State* would be tantamount to the assertion of the right to deny them entrance and abode . . .” (quoting *Truax v. Raich*, 239 U.S. 33, 42 (1915)) (emphasis added)).

<sup>110</sup> *See De Canas*, 424 U.S. at 363.

<sup>111</sup> *Id.* at 355.

<sup>112</sup> *Id.* at 357.

lawfully in the country.”<sup>113</sup> A state statute dealing with the treatment of aliens not lawfully in the country sits in a different field. The Court also seemed to work from a presumption against preemption, remarking that neither the “wording [n]or the legislative history of the [Immigration and Nationality Act]” revealed any “specific indication” that Congress intended to preempt regulation of “the employment of illegal aliens in particular.”<sup>114</sup>

Finally, where the Constitution does not otherwise preempt a local regulation and Congress has not occupied the field, a statute is still preempted if it conflicts with the accomplishment or execution of a congressional objective.<sup>115</sup> The Court did not address this question, however, because the court of appeals had not reached it below.<sup>116</sup>

When *De Canas* came down, Congress had not yet imposed sanctions on those who employed illegal immigrants.<sup>117</sup> The California statute was subsequently preempted when Congress passed the Immigration Reform and Control Act of 1986, which did impose such sanctions.<sup>118</sup> While congressional action since *De Canas* may well have altered the power of states to punish those who employ illegal aliens, *De Canas* remains important because it appears to give states some degree of latitude, albeit ill-defined, in regulating local matters affecting immigration. Notwithstanding the longstanding rule that the federal government alone has the sovereign authority and constitutional power to regulate immigration directly, *De Canas* may have authorized state and local governments such as Hazleton to regulate immigration through the backdoor, so long as Congress has not already spoken on the specific subject regulated.<sup>119</sup> After *De Canas* muddied the waters, the Hazleton ordinance cannot be automatically disposed of as a naked attempt to regulate immigration. Instead, a court must now apply the three tests to each provision of the ordinance and grapple with the *De Canas* notion that

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<sup>113</sup> *Id.* at 359.

<sup>114</sup> *Id.* at 358.

<sup>115</sup> *Id.* at 363.

<sup>116</sup> While the analysis in *De Canas* is often articulated as three tests, it is also possible to divide the analysis into two parts: constitutional preemption and statutory preemption. The statutory preemption analysis encompasses the occupation of field and conflicts inquiries plus a determination of express statutory preemption.

<sup>117</sup> *See De Canas*, 424 U.S. at 354 n.4 (noting resolutions pending before Congress which would occupy the field).

<sup>118</sup> 8 U.S.C. § 1324a(h)(2) (2000); *see Wishnie, supra* note 59, at 531 n.196. The Court in *De Canas* did recognize that a congressional act targeting employers of undocumented aliens could preempt a similar state law. *See De Canas*, 424 U.S. at 357.

<sup>119</sup> *See Plyler v. Doe*, 457 U.S. 202, 228 n.23 (1982) (“Despite the exclusive federal control of this Nation’s borders, we cannot conclude that the States are without any power to deter the influx of persons entering the United States against federal law, and whose numbers might have a discernible impact on traditional state concerns.”).

regulation of the employment of immigrants is not necessarily a regulation of immigration.<sup>120</sup>

### III. THE HAZLETON ORDINANCE'S EMPLOYMENT PROVISION

#### A. *Is it an immigration regulation?*

Applying the first test from *De Canas*, and indeed all of the immigration cases preceding it, any provision of the Hazleton law that constitutes a regulation of immigration is unconstitutional. If taken at face value, *De Canas* seems to answer this question head on: regulation of the employment of undocumented immigrants is *not* a regulation of immigration. When the constitutional foundation of the federal exclusivity principle and its previous characterizations are considered, however, the question becomes more difficult.

The *De Canas* Court's narrow definition of a "regulation of immigration"<sup>121</sup> is not entirely consistent with many other pronouncements of the federal courts and the Supreme Court itself. The federal government's authority to regulate immigration "has always been cast in comprehensive terms."<sup>122</sup> The Court has also stated that "*the treatment of aliens*, in whatever state they may be located, [is] a matter of national moment."<sup>123</sup> "[T]he authority to control immigration is . . . vested solely in the Federal Government, rather than the states . . ."<sup>124</sup> In *Harisiades v. Shaughnessy*, the Court articulated perhaps its most expansive definition of immigration regulation, reasoning that "*any policy toward aliens* is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations."<sup>125</sup> While a city-wide ban on the employment of illegal immigrants may not involve a decision about who may enter the

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<sup>120</sup> The district court did not explicitly apply the *De Canas* framework, but instead analyzed preemption of the ordinance only in terms of statutory preemption – that is, express preemption, occupation of the field, and conflict preemption. See *Lozano v. City of Hazleton*, No. 3:06cv1586, 2007 WL 2163093, at \*29-42 (M.D. Pa. July 26, 2007) (finding both the employment and landlord provisions preempted by federal statute). The court summarily disregarded the plaintiffs' argument that the Hazleton ordinance is a constitutionally impermissible regulation of immigration. See *id.* at \*35 n.45 ("Based upon [the *De Canas* Court's] definition of 'regulation of immigration' however, we find that the laws are not unconstitutional on that ground. They do not regulate who can or cannot be admitted to the country or the conditions under which a legal entrant may remain."). For reasons discussed below, see *infra* Parts III.A and IV.A, the court should not have been so dismissive of the plaintiffs' claim that the ordinance is preempted under the first test in *De Canas*.

<sup>121</sup> See *supra* note 111 and accompanying text.

<sup>122</sup> *United States v. Hernandez-Guerrero*, 147 F.3d 1075, 1077 (9th Cir. 1998).

<sup>123</sup> *Hines v. Davidowitz*, 312 U.S. 52, 73 (1941) (emphasis added).

<sup>124</sup> *Hampton v. Mow Sun Wong*, 426 U.S. 88, 101 n.21 (1976) (emphasis added).

<sup>125</sup> *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952) (emphasis added).



country or govern the conduct of *lawful* entrants, as discussed in *De Canas*, such conduct is probably an effort to control immigration and certainly a policy toward aliens. The more federal-friendly characterizations of the regulation of immigration would seem, then, to include a law, such as Hazleton's, targeting those who employ illegal immigrants.

Elsewhere, the Court has invalidated state regulation of the employment of *legal* immigrants, pointing out that the "authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the State would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work."<sup>126</sup> While the Court in *De Canas* reasoned that states do not interfere with this authority by prohibiting the employment of individuals whom the federal government has not provided a right to work in this country,<sup>127</sup> it is equally reasonable to conclude that such state action still constitutes a regulation of immigration. If denying aliens an opportunity to work amounts to a constructive denial of entrance and abode, then the denial would appear to regulate immigration. The fact that Congress has already denied such aliens abode does not change the nature of the local regulation. If it too denies abode, then it too regulates immigration. Under this view, the Hazleton employer sanctions would be improper even if consistent with federal action.

As long as *De Canas* remains good law, however, states and local governments may prohibit the employment of illegal aliens in at least some circumstances. Still, there remains a possibility that *De Canas* does not reach the Hazleton ordinance. The California statute there at issue only barred employment of illegal aliens "if such employment would have an adverse effect on lawful resident workers."<sup>128</sup> The Court repeatedly emphasized that the statute was "fashioned to remedy local problems."<sup>129</sup> Compare the California statute to Hazleton's avowed objective of stopping illegal immigration. Given that Hazleton has supported the ordinance with only anecdotal accounts of recent crime and still less evidence of a deleterious effect on the economy, the aim of the ordinance must be to rid the city of illegal aliens first and regulate employment second. When the local government "candidly acknowledges an objective to control the influx of aliens," as Hazleton does, a court could find a direct regulation of

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<sup>126</sup> *Graham v. Richardson*, 403 U.S. 365, 379 (1971) (quoting *Truax v. Raich*, 239 U.S. 33, 42 (1915)).

<sup>127</sup> See *De Canas v. Bica*, 424 U.S. 351, 355-56 (1976); Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignities*, 35 VA. J. INT'L L. 121, 148 (1994) ("If the aim of *Truax-Graham* preemption is to stop state laws from foiling basic federal control by 'denying entrance and abode' to those whom Washington has decided to admit, then its logic has no application to those that the federal government has itself attempted to exclude.").

<sup>128</sup> *De Canas*, 424 U.S. at 352 (quoting CAL. LAB. CODE § 2805 (1971)).

<sup>129</sup> *Id.* at 363.

immigration.<sup>130</sup> Where a “local objective is convincingly stated,”<sup>131</sup> any impact on immigration would be only indirect, and a local regulation would instead stand.

While focusing on the purpose and findings of the ordinance provides a relevant distinction between the statute in *De Canas* and the Hazleton ordinance, the distinction has limited practical value. Placing any reliance on the stated purpose may do little more than provide a drafting guide for cities seeking to control the influx of immigration. By simply renaming the ordinance and restating its goals, a designing town might seek to control the influx of illegal immigrants through employment regulation. After all, “almost any law can be couched in terms of legitimate local concern.”<sup>132</sup> Rather than taking a regulation’s express purpose at face value, a court could invalidate such regulations where “the local interest is illusory or poorly served, or where the impact on federal interests is substantial.”<sup>133</sup> Courts are not the most competent bodies to determine whether a particular regulation effectively fulfills its stated purpose, so requiring them to second-guess a legislative body could be problematic. Thus, it is better to limit the distinction to the stated purpose of the ordinance, even if creative legislatures and crafty city councils might ultimately skirt such a rule.

In short, the “regulation of immigration” test from *De Canas* is unnecessarily narrow. Federal interests would probably be better served if local governments were barred from crafting any policy toward aliens. As long as *De Canas* stands, however, a local regulation that officially regulates an area of traditional local concern such as employment should still be invalid if its express purpose is to control the influx of immigration. Since the Hazleton ordinance openly purports to control immigration in the town by punishing employers of illegal immigrants, a court should distinguish it from the California statute in *De Canas* and find it violative of the first test in *De Canas*. Since a rule making such a distinction might be easy to circumvent, perhaps the Supreme Court should reconsider *De Canas* and hold any state or local policy toward aliens to unconstitutionally encroach on federal authority.

B. *Is the Employment Provision Preempted by Federal Statute?*

The second and third *De Canas* inquiries are based on traditional principles of statutory rather than constitutional preemption. Since *De Canas*, Congress has created its own scheme for punishing employers of illegal immigrants.<sup>134</sup> In doing so, Congress expressly preempted “any State or local law imposing civil or criminal sanctions (*other than through licensing and similar laws*)

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<sup>130</sup> Manheim, *supra* note 87, at 967 (citing *De Canas*, 424 U.S. at 255).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> See *supra* note 118 and accompanying text.

upon those who employ . . . unauthorized aliens.”<sup>135</sup> The federal government has now occupied the field regulating the employment of illegal aliens,<sup>136</sup> yet, by express exemption from the preemption provision, it seems to plainly authorize cities and states to influence the employment of unauthorized immigrants through licensing requirements.

The Hazleton ordinance does not impose civil or criminal sanctions beyond suspension of a business permit. Recall that the punishment for employment of unlawful workers under the revised ordinance is a suspension of the employer’s business permit.<sup>137</sup> If the employment provision fits within the licensing restrictions option authorized by Congress, there is no express preemption.<sup>138</sup> Thus, at first glance, suspending a business license for employing undocumented workers appears to be a straightforward application of the exemption. The exemption states simply “licensing and similar laws.” The question is whether suspending a business license for violating *local* immigration regulations is the type of licensing law Congress intended to exempt from the preemption provision.

When viewed in context of the purpose of the preemption clause and the relevant legislative history, express preemption of the Hazleton employment provision makes more sense. As recognized by the district court in the *Hazleton* litigation, exempting the Hazleton provision from express preemption would allow local governments to “impose any rule they choose on employers with regard to hiring illegal aliens as long as the sanction imposed is to force the employer out of business by suspending its business permit – what we would call the ‘ultimate sanction.’”<sup>139</sup> It makes little sense to prohibit cities and states from imposing any sanction on businesses except the “ultimate sanction” of closing shop.<sup>140</sup>

The legislative history to the preemption clause clarifies what Congress did intend to exempt from the statute’s preemptive force. The report by the House Committee on the Judiciary states that the act is “not intended to preempt or prevent lawful state or local processes concerning the suspension, revocation or refusal to reissue a license to any person who has been found to have

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<sup>135</sup> 8 U.S.C. § 1324a(h)(2) (2000) (emphasis added).

<sup>136</sup> See *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300 (1988) (recognizing that Congress has set up a “comprehensive scheme prohibiting the employment of illegal aliens in the United States”).

<sup>137</sup> See *supra* notes 40, 51 and accompanying text.

<sup>138</sup> One may wonder why the first test from *De Canas* would be necessary if Congress authorized state and local action. The Court has made it clear, however, that a direct regulation of immigration is invalid even where Congress purports to authorize it. *E.g.*, *De Canas v. Bica*, 424 U.S. 351, 355-56 (1976) (intimating that “Congress itself is powerless to authorize or approve” a constitutionally proscribed regulation of immigration).

<sup>139</sup> *Lozano v. City of Hazleton*, No. 3:06cv1586, 2007 WL 2163093, at \*30 (M.D. Pa. July 26, 2007).

<sup>140</sup> See *id.* (reasoning that “[s]uch an interpretation renders the express preemption clause nearly meaningless”).

violated the sanctions provisions *in this legislation*.<sup>141</sup> In other words, Congress intended to preempt all local sanctions except suspension, revocation, or refusal of a license to any business violating *federal* immigration laws. Because Congress only intended to authorize licensing restrictions dependent on federal law, and because permitting licensing restrictions tied to local immigration regulations would gut the preemption clause entirely, the Hazleton landlord provision is expressly preempted.

The final test from *De Canas* asks whether the local law conflicts with congressional objectives.<sup>142</sup> Implied conflict preemption exists “where state law ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’”<sup>143</sup> The Hazleton employer provision interferes with congressional objectives where it attempts to punish certain employment relationships exempted by federal law. The ordinance requires all businesses to ensure that any person they employ or refer for employment in any capacity has legal working status.<sup>144</sup> The federal scheme, by contrast, contains an exemption for unions that refer individuals for employment without a fee,<sup>145</sup> and does not require employers to verify the immigration status of casual domestic workers and independent contractors.<sup>146</sup> Where the Hazleton employment provision punishes conduct protected under the federal scheme, the regulations are in conflict and the local law should be declared void.

As the district court in *Lozano v. City of Hazleton* recognized, by ignoring certain interests Congress decided to protect, Hazleton has struck a “different balance between the rights of businesses and workers and the goal of preventing illegal employment.”<sup>147</sup> That the federal government has lately managed that balance to favor business and worker rights over preventing illegal employment is clear in the enforcement context. In 2003, the Office of the Chief Administrative Hearing Officer did not issue a single precedent

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<sup>141</sup> H.R. REP. NO. 99-682(I), at 5662 (1986) (Conf. Rep.) (emphasis added), *cited in Lozano*, 2007 WL 2163093, at \*31.

<sup>142</sup> *See supra* note 115 and accompanying text.

<sup>143</sup> *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

<sup>144</sup> *See Hazleton, Pa., Ordinance 2006-18 § 4(A)* (Sept. 8, 2006).

<sup>145</sup> *See 8 C.F.R. § 274a.1(e)* (2007) (excluding “union hiring halls that refer union members or non-union individuals who pay union membership dues” from the entities subject to federal sanctions).

<sup>146</sup> *See id.* § 274a.1(f) (defining an “employee” as “an individual who provides services or labor for an employer for wages or other remuneration but does not mean independent contractors . . . or those engaged in casual domestic employment”); *see also Lozano v. City of Hazleton*, No. 3:06cv1586, 2007 WL 2163093, at \*37 (M.D. Pa. July 26, 2007) (identifying as a source of conflict the Hazleton ordinance’s requirement that employers verify the categories of workers exempted under federal law).

<sup>147</sup> *Lozano*, 2007 WL 2163093, at \*38.

decision in employer sanctions cases.<sup>148</sup> In 2004, employers of unauthorized immigrants received a grand total of three civil fine notices.<sup>149</sup> Hazleton's effort to hold local business's feet to the fire to slow down immigration thus not only conflicts with federal statute but also counters the recent policy of the federal executive.

In short, the Hazleton employer provision fails under field preemption, express preemption, and conflict preemption. Congress has enacted a comprehensive scheme regulating the employment of undocumented workers, and the Hazleton ordinance does not honor the balance struck by that scheme. Hazleton has a colorable claim to congressional authorization in the licensing and other law exemption to express preemption, but such a reading would all but nullify the express preemption provision and contradict the expressed legislative intent. Thus, the Hazleton ordinance's employer provision is invalid under all three tests from *De Canas*.

#### IV. THE HAZLETON ORDINANCE'S LANDLORD PROVISION

##### A. *Is It an Immigration Regulation?*

Like the employer provision, the landlord provision is constitutionally preempted under the first test in *De Canas* if it constitutes a regulation of immigration. All of the factors discussed in Part III with respect to the landlord provision apply here as well. The provision certainly represents a "policy toward aliens"<sup>150</sup> and seeks to control<sup>151</sup> the influx of immigrants in the city. Forbidding a largely fortuneless class of persons from renting property in the city effectively denies them the ability to live there entirely and as such also serves to deny them "abode."<sup>152</sup> The express purpose of this provision is as baldly anti-immigration as the employer provision. Yet, again much like the employer provision, forbidding "illegal aliens" from renting property does little more than reinforce federal law.

For these reasons, much of the analysis of the employer provision in Part III applies to the landlord provision. The most obvious difference between the two provisions is the sheer novelty of the landlord provision. While the Supreme Court has already addressed to some extent whether state regulation of the employment of illegal immigrants is permissible, a flat ban on leasing to illegal immigrants has apparently never been tried. Thus, *De Canas* does not apply quite as directly to the landlord provision.

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<sup>148</sup> Jeffrey L. Ehrenpreis, *Controlling Our Borders Through Enhanced Employer Sanctions*, 79 S. CAL. L. REV. 1203, 1208 (2006).

<sup>149</sup> *Id.* at 1209.

<sup>150</sup> See *supra* note 125 and accompanying text.

<sup>151</sup> See *supra* note 124 and accompanying text.

<sup>152</sup> See *supra* note 126 and accompanying text.

When viewed in light of the theoretical justifications for the federal exclusivity doctrine, the landlord provision appears even more offensive to federal interests than the employer provision. As discussed in Part II, one of the primary justifications for denying the states the authority to regulate immigration is the foreign policy dimension of such regulations.<sup>153</sup> The Supreme Court has recognized that:

One of the most important and delicate of all international relationships . . . has to do with the protection of the just rights of a country's own nationals when those nationals are in another country. Experience has shown that international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted, or permitted, by a government.<sup>154</sup>

It follows that the "possibility of inquisitorial practices and police surveillance . . . might . . . affect our international relations."<sup>155</sup> The federal government alone has the power to subject aliens to any such practices, and necessarily so, because only the federal government is capable of adequately assessing any foreign policy repercussions.<sup>156</sup>

It is true, to repeat, that the Hazleton ordinance only subjects to this treatment individuals whom the federal government already prohibits from entering the country. However, legislation relating to immigrants is not the only aspect of the power to regulate immigration. Enforcement of the law represents another key component. It is worth noting that to date the federal government has declined to forcefully remove undocumented aliens from their homes on any meaningful scale.<sup>157</sup> A sudden extirpation of some twelve million foreign nationals<sup>158</sup> would not go unnoticed by our neighbors. Whether such a move would nonetheless be a wise policy decision is irrelevant. That policy choice clearly belongs to the President and to Congress. Hazleton may be a small town, but the aggregate effect of enforcing dozens or even hundreds of similar ordinances around the country could leave the citizens of many of America's neighbors homeless within our borders. Our neighbors would certainly take notice.

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<sup>153</sup> See *supra* note 83-102 and accompanying text.

<sup>154</sup> *Hines v. Davidowitz*, 312 U.S. 52, 64 (1941).

<sup>155</sup> *Id.* at 74.

<sup>156</sup> See *Manheim*, *supra* note 87, at 948 ("[States] are often insensitive to the delicate international and immigration policy issues at stake in alien regulation. As a result, they may overreact to social problems perceived caused by the presence of aliens, often with repercussions on national interests.").

<sup>157</sup> That is, while the federal government certainly does from time to time conduct raids to seek out and deport illegal immigrants, the number of immigrants removed in this manner is slight in comparison with the total number of illegal aliens present in the country.

<sup>158</sup> See Patrik Jonsson, *Immigration Crackdown Debated*, CHRISTIAN SCI. MONITOR, Nov. 3, 2006, at 2 (estimating number of undocumented workers in America at 12 million).

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The federal government has been slow to respond to the growing problem of illegal immigration in part because so many interests are at stake, not the least of which is this international relations aspect of any sudden change in policy. States are not capable of adequately weighing the foreign policy dimension in crafting immigration policy; small towns like Hazleton, even less so.

Peter Spiro offers a careful and reasoned critique of the foreign policy rationale for federal exclusivity over immigration,<sup>159</sup> which bears some relevance here. Spiro relies heavily on his observation that “state governments have become increasingly active on the international stage.”<sup>160</sup> Other countries are by now familiar enough with American federalism to realize that the federal government does not necessarily endorse any given local policy. To the extent that a foreign actor can retaliate against a state through economic action or otherwise, state action in immigration matters will not affect the United States’ foreign relations.<sup>161</sup>

This argument may have some force when applied to serious international players like California, Texas, and New York, which also happen to be traditional targets for immigrants,<sup>162</sup> but Spiro’s rationale has no application at all to towns like Hazleton. It is hard to imagine Hazleton having any meaningful relations whatsoever with any foreign powers. Furthermore, even a close neighbor and international partner like Mexico would have difficulty distinguishing the simultaneous actions of fifty separate towns across the country from official United States policy. If a substantial number of Mexican nationals were affected by the ordinances, Mexico would look to Washington for answers. As another commentator observes, “it is one thing for California and Massachusetts to attempt to participate [in international relations] but quite another if every state from the west coast to the east and every locality from Poughkeepsie to Peoria wants to have a piece of the action.”<sup>163</sup> The obvious foreign relations dimension to the Hazleton landlord provision cries out for the provision’s invalidation. The aggregate effect of dozens of these ordinances around the country could indeed be embroilment with members of the international community.

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<sup>159</sup> See generally Peter J. Spiro, *Foreign Relations Federalism*, 70 U. COLO. L. REV. 1223 (1999); Spiro, *supra* note 127.

<sup>160</sup> Spiro, *supra* note 127, at 161.

<sup>161</sup> *Id.* at 163 (“If . . . Japan recognizes California as a distinct entity, then it may direct its return fire accordingly, assuming that California is sufficiently exposed as to present a target.”).

<sup>162</sup> Recent history has seen a shift from the near monopoly these larger states have had over incoming immigration, as many immigrants are now targeting middle America. See e.g., Cobb et al., *supra* note 6 (“Though immigrants historically have settled in a half-dozen states, including Texas, California, Florida, and New York, the foreign-born population doubled from 1990 to 2000 in much of the Midwest and Southeast.”).

<sup>163</sup> Emily Chiang, *Think Locally, Act Globally? Dormant Federal Common Law Preemption of State and Local Activities Affecting Foreign Affairs*, 53 SYRACUSE L. REV. 923, 957 (2003).

Even though the ordinance does not appear to conflict with federal determinations regarding who may enter this country, it does clash with the federal government's exclusive power to remove those who are here unlawfully. If "immigration" means anything more than the mere act of crossing the border, it must include the establishment of habitation in some form. The natural definition of the word "immigrate" is "[t]o enter *and settle* in a country or region to which one is not native."<sup>164</sup> The word "immigration" is nowhere found in the Constitution and should not be analyzed as if it were. Still, the natural meaning of the term as courts have used it for a century and a half coupled with the structure and justifications for our constitutional system of federalism all indicate that forbidding a class of aliens from residing within a city is a regulation of immigration which belongs exclusively to the national authority. Thus the Hazleton landlord provision should fail under the first test of *De Canas*.

B. *Is the Landlord Provision Preempted by Federal Statute?*

While Congress has expressly preempted some forms of employer sanctions on the local level and expressly permitted others,<sup>165</sup> the Immigration and Nationality Act does not expressly address the possibility of local regulations punishing landlords who rent to undocumented immigrants. The Hazleton landlord provision thus requires a closer look at federal law to determine whether Congress has already occupied the field or pursued goals with which the Hazleton provision might conflict.

Congress has not imposed any sanctions on landlords for renting to illegal immigrants, but it has developed its own conception of harboring illegal aliens. Under a section entitled "Bringing in and harboring certain aliens," the Immigration and Nationality Act ("INA") punishes anyone who knowingly or recklessly "conceals, harbors, or shields from protection" any alien not lawfully within the United States.<sup>166</sup> The Hazleton ordinance also purports to prohibit the "harboring" of illegal aliens, as evidenced by the plain title of the landlord provision: "Harboring Illegal Aliens."<sup>167</sup> Coincidence of title, of course, does not end the matter, but the similarity does reflect the extent to which Congress has already considered punishment of those who enable certain immigrants to continue their unlawful residence within this country.

The INA does not provide a definition for "harbor," and the most natural reading of the term probably does not include renting or leasing property.

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<sup>164</sup> AMERICAN HERITAGE DICTIONARY 877 (4th ed. 2000) (emphasis added); *see also* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1130 (1993) (defining "immigrate" as to come to a country "for the purpose of permanent *residence*" (emphasis added)).

<sup>165</sup> *See supra* Part III.B.

<sup>166</sup> 8 U.S.C. § 1324(a)(1)(A)(iii) (2000).

<sup>167</sup> Hazleton, Pa., Ordinance 2006-18 (Sept. 8, 2006), *available at* <http://www.smalltowndefenders.com/public/node/6> (follow "Download the amended Illegal Immigration Reform Act (PDF)" hyperlink).



Some federal courts have held, however, that simply affording shelter to an illegal alien with knowledge of or reckless disregard of the alien's unlawful status is punishable under the statute.<sup>168</sup> That the INA's harboring provision appears to reach some individuals who shelter illegal aliens suggests that Congress intended to address any problems created by such provision of shelter. It can no longer be said, as the Court did in *De Canas*, that the INA is only concerned with "the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country."<sup>169</sup> The Act clearly regulates the conduct of illegal aliens as well, in addition to their interaction with the American public in general and their provision of shelter in particular. The enlarged scope of the INA suggests that Congress intended to wholly occupy the relevant field<sup>170</sup> and draw the harboring of illegal aliens "within . . . [that] central aim of federal regulation."<sup>171</sup>

Under the third test in *De Canas*, a state or municipal regulation is also preempted if it conflicts with federal law.<sup>172</sup> At first blush it is hard to see how a local regulation operating in accordance with federal alienage classifications could be anything but consistent with federal law. The Hazleton law appears to prohibit conduct that Congress has already condemned. A closer look, however, reveals that this test instead favors preemption of the Hazleton landlord provision.

One of the Supreme Court's most recent considerations of foreign affairs preemption is instructive here. In *Crosby v. National Foreign Trade Council*,<sup>173</sup> the Court considered a Massachusetts law which prohibited Massachusetts residents from buying goods or services from those doing business with the Burmese government.<sup>174</sup> Congress had also imposed economic sanctions on Burma. After declining to consider the presumption against preemption,<sup>175</sup> the Court found conflict preemption even though both the Massachusetts law and the federal law pursued the same end. The Court noted the discrepancy of sanctions in the two laws and indicated that "[s]anctions are drawn not only to bar what they prohibit but to allow what

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<sup>168</sup> *E.g.*, *United States v. Aguilar*, 883 F.2d 662 (9th Cir. 1989) (holding a church official liable under the harboring provision for inviting an illegal alien to stay in an 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 a defendant liable for providing illegal aliens with an apartment and defining "harboring" as "afford[ing] shelter," regardless of intent to avoid detection).

<sup>169</sup> *De Canas v. Bica*, 424 U.S. 351, 359 (1976).

<sup>170</sup> *See id.*

<sup>171</sup> *Id.* (quoting *San Diego Unions v. Garmon*, 359 U.S. 236, 244 (1959)) (alterations in original).

<sup>172</sup> *See supra* note 115 and accompanying text.

<sup>173</sup> 530 U.S. 363 (2000).

<sup>174</sup> *Id.* at 366.

<sup>175</sup> *Id.* at 374 n.8.

they permit, and the inconsistency of sanctions here undermines the congressional calibration of force.”<sup>176</sup> The Court continued, declaring “[c]onflict is imminent,’ when ‘two separate remedies are brought to bear on the same activity.’”<sup>177</sup>

When Congress seeks to “steer a middle path,”<sup>178</sup> any local regulation imposing different sanctions or punishing different individuals for the same conduct has the potential for interfering with a carefully-balanced federal policy. Even if “tied to federal classifications,” a local regulation that “appear[s] to do nothing more than enhance the effectiveness of federally-mandated controls [has] at least the potential to upset what might be a careful and intentional balance on the part of the federal government not to enforce the letter of the law.”<sup>179</sup> The suspension of a license for renting to illegal immigrants is in one sense a new sanction for conduct similar to that already prohibited by Congress. The Hazleton ordinance exerts a greater amount of pressure on the town’s population to force illegal aliens out of their homes. Such pressure upsets the carefully “calibrated” force of current federal policy and thereby conflicts with federal law.

The Hazleton ordinance does more than apply a different sanction to similar behavior, however; it also implicates a more benign form of activity. When Congress opted for a mens rea requirement of knowledge or recklessness, it implicitly declined to require individuals to actively ascertain the immigration status of anyone they may be housing. That choice is as much a decision to safeguard those who unknowingly harbor illegal aliens as a decision to punish those who do so knowingly or recklessly. The choice to punish only those with a high mens rea represents Congress’s refusal to enlist in immigration enforcement every member of the public who might be providing housing to another. Hazleton nominally imposes the same mens rea requirement, but the registration ordinance effectively requires landlords to proactively determine the immigration status of their tenants. Such a requirement essentially converts landlords into the town’s agents and orders them to ferret out illegal aliens or pay a price. Congress excluded such a tactic from its harboring provision. The city council’s decision to punish those whom Congress has decided to leave unpunished therefore conflicts with federal law and renders the provision invalid.

The federal government does not mean for the harboring provision of the INA to reach innocent landlords of illegal aliens. Whether leasing or renting to unlawful immigrants is punishable under the INA is not crystal clear, but the fact that the federal government has apparently declined to target landlords under the Act suggests a choice on the part of the Executive Branch to leave landlords alone. Federal officials have discretion to not deport those who are

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<sup>176</sup> *Id.* at 380.

<sup>177</sup> *Id.* (quoting *Wisconsin Dept. of Indus. v. Gould Inc.*, 475 U.S. 485, 498-99 (1953)).

<sup>178</sup> *Hines v. Davidowitz*, 312 U.S. 52, 73 (1941).

<sup>179</sup> *Spiro*, *supra* note 127, at 159 n.149.

deportable and to not punish conduct punishable under the INA.<sup>180</sup> By threatening to punish a practice heretofore left untouched by Congress and federal officials, the Hazleton landlord provision disrupts federal policy. Thus, the provision is preempted both under the conflict and occupation of the field tests for statutory preemption.

#### CONCLUSION

The fate of the Hazleton ordinance could determine the future of immigration law in the United States. With some five dozen local governments poised to adopt the Hazleton model<sup>181</sup> if upheld in court, and others surely waiting in the wings, the validity of the ordinance will have an impact which reaches far beyond the confines of Mayor Lou Barletta's tiny town. What's more, if the courts permit the country's cities and towns to regulate these activities on their own, the political pressure on an idle and divided Congress to enact comprehensive immigration reform could seriously subside. Immigration reform in this country may currently hang on the *Hazleton* test case.

For nearly a century and a half the Supreme Court has asserted that only the federal government has the authority to regulate immigration. Under the most common-sense understanding of immigration, both the employer and landlord provisions regulate immigration and thereby meddle in federal matters. Both provisions aim to quell the influx of immigration in the town. Both provisions, if adopted on the multi-city scale contemplated, have the potential for upsetting the United States' relations with other powers. The foreign policy rationale for the federal exclusivity doctrine thus militates against upholding the ordinance.

*De Canas v. Bica* may have given states some leeway in this area, but where a law's purpose of controlling immigration is primary and the purpose of regulating traditional local concerns only secondary, the regulation should fail. Perhaps the wisest course would be a reformulation of the *De Canas* holding which would broaden the definition of immigration regulation and accordingly limit local power in this area. At a minimum, a court should distinguish the Hazleton ordinance from the statute in *De Canas*, because it openly attempts to control immigration at the city level.

The Hazleton ordinance not only regulates immigration in a manner inconsistent with federal exclusivity over foreign affairs; it also conflicts with congressional pronouncements and recent executive policy. Under each test from *De Canas*, both the employer and landlord provisions of the Hazleton ordinance thus violate the Supremacy Clause of the Constitution. In their

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<sup>180</sup> In fact, in the district court proceedings, Professor Stephen Yale-Loehr of Cornell Law School testified that "the federal government frequently exercises its discretion not to try to remove persons from the country even though they may lack lawful immigration status." *Lozano v. City of Hazleton*, No. 3:06cv1586, 2007 WL 2163093, at \*41 n.56 (M.D. Pa. July 26, 2007).

<sup>181</sup> See *supra* note 7 and accompanying text.

attempt to defend small-town America from the perceived threat of illegal immigration, Lou Barletta and his fellow Hazletonians have attacked the balance of power struck by the Constitution. If the principles of federalism established by the Framers and long-recognized by the courts are to be maintained, the Hazleton ordinance must be struck down.