

Facts About Federal Preemption

How to analyze whether state and local initiatives are an unlawful attempt to enforce federal immigration law or regulate immigration

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■ Introduction

Increasingly, lawmakers in states and localities within the United States are proposing, and in some cases enacting, laws and ordinances that would, in effect, enforce existing federal immigration law or create new immigration law. The localities claim that they simply are passing laws pertaining to the state or locality's power to regulate licensing, contracting, or the like. These state and local laws — which their authors dress up as laws to regulate housing, employment, and local law enforcement — are in actuality attempts to regulate immigration. Almost all of the proposed state and local initiatives are preempted by the federal government's exclusive authority to regulate immigration and are therefore unconstitutional.¹

This fact sheet explains general preemption principles and provides immigrant rights advocates with analytical tools for determining whether anti-immigrant initiatives proposed in their states and localities can be legally challenged on preemption grounds.²

Generally, the federal government has exclusive control over immigration.

For over a century, the U.S. Supreme Court consistently has ruled that the federal government has broad and exclusive power to regulate immigration. Although the power to regulate immigration is not expressly enumerated in the U.S. Constitution, the federal government's authority over immigration policy is supported by both enumerated and implied constitutional powers.³ Indeed, in a series of cases in the late nineteenth century upholding provisions of the Chinese Exclusion Acts, the Supreme Court described the federal immigration power in sweeping terms, as a plenary power not

¹ For more information about state and local anti-immigrant initiatives introduced in 2006, see Tanya Broder, STATE AND LOCAL POLICIES ON IMMIGRANT ACCESS TO SERVICES: PROMOTING INTEGRATION OR ISOLATION? (NILC, May 2007), www.nilc.org/immspbs/sf_benefits/statelocalimmppolicies06-07_2007-05-24.pdf.

² Preemption principles are based on the Supremacy Clause, Art. VI, cl. 2 of the United States Constitution, which states that the U.S. Constitution and laws of the U.S. are the "supreme law of the land." "A fundamental principle of the Constitution is that Congress has the power to preempt state law." See *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000) (citing U.S. Const., art. VI, cl. 2; *Gibbons v. Ogden*, 9 Wheat. 1, 211 (1824); *Savage v. Jones*, 225 U.S. 501, 533 (1912); and *California v. ARC America Corp.*, 490 U.S. 93, 101 (1989)).

³ Enumerated powers that implicate the immigration power include: The Commerce Clause, Art. I, Sec. 8, cl. 3 of the U.S. Constitution; the Naturalization Clause, Art. I, Sec. 8, cl. 4; the Migration and Importation Clause, Art. I, Sec. 9, cl. 1; and the War Power, Art. I, Sec. 8, cl. 11. The Supreme Court has also found implied federal constitutional powers to regulate immigration as an incident of Sovereignty — see, e.g., *The Chinese Exclusion Case*, 130 U.S. 581 (1889); *Fong Yue Ting v. U.S.*, 149 U.S. 698, 711 (1893) — and as an incident of an implied Foreign Policy Power. See Ira J. Kurzban, *KURZBAN'S IMMIGRATION LAW SOURCEBOOK*, 10th edition 2006–07, at 25.



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subject to normal judicial restraints.⁴ In subsequent decisions the Court has repeatedly confirmed Congress's full and exclusive authority over immigration.⁵ 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.⁶

When is a state or local law preempted by federal law?

In *De Canas v. Bica*, the Supreme Court articulated three tests to determine whether federal law preempts a state or local statute relating to immigration.⁷ The tests for determining preemption are:

1. **Constitutional preemption:** Is the state or locality attempting to regulate immigration?
2. **Field preemption:** Did Congress intend to occupy the field and oust state or local power?
3. **Conflict preemption:** Does the state or local law stand as an obstacle to or conflict with federal law, making compliance with both the state and federal law impossible?

A state statute or local ordinance that fails any one of these three tests is preempted by federal law, is unconstitutional, and is therefore invalid.⁸

■ Constitutional Preemption

What is the constitutional preemption standard?

To determine whether a state or local statute fails this standard, ask: Does it constitute a “regulation of immigration”? — which means: Does the state or local ordinance make “a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain”?⁹ Any state or local law that regulates immigration is preempted because the federal government has exclusive authority to regulate immigration, regardless of whether Congress has enacted any legislation in that same subject matter.¹⁰

Why would a state or local law that regulates immigration be preempted by federal law?

The answer to this question is: Because of the need to have a uniform national policy towards immigration. The regulation of immigration implicates exclusively federal concerns, including foreign policy, the maintenance of uniform rules of commerce and for acquiring U.S. citizenship,

⁴ See *The Chinese Exclusion Case*, *supra* note 3; *Fong Yue Ting*, *supra* note 3.

⁵ See *DeCanas v. Bica*, 424 U.S. 351, 354–55 (1976) (“Power to regulate immigration is unquestionably exclusively a federal power.”); see also *Kleindienst v. Mandel*, 408 U.S. 753 (1972); *Fiallo v. Bell*, 430 U.S. 787 (1977); *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952).

⁶ See *DeCanas*, 424 U.S. at 355–56; see also *Graham v. Richardson*, 403 U.S. 365 (1971) (state statute restricting benefits to LPRs held unconstitutional); *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 142 (1963); *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410, 419 (1948).

⁷ See *id.*; see also *LULAC v. Wilson*, 908 F. Supp. 755, 768 (C.D. Cal. 1995).

⁸ *Id.*

⁹ *DeCanas*, 424 U.S. at 355; see also *Equal Access to Education v. Merten*, 305 F. Supp. 2d 585, 601-602 (E.D. Va. 2004) (further explaining the first of the three preemption tests in *DeCanas* as: whether the state’s policies “simply adopt federal standards, in which case they are not invalid under the Supremacy Clause, or instead create and apply state standards to assess the immigration status of applicants, in which case the policies may run afoul of the Supremacy Clause”).

¹⁰ *Id.* at 356.

respect for treaties and concern for reciprocity in the treatment of U.S. citizens abroad, and defense in time of war.¹¹

What are examples of state statutes that have been preempted by federal immigration law?

Where a California law allowed a state official to classify arriving immigrants, the U.S. Supreme Court held the law to be unconstitutional because “[t]he passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not the states.”¹²

A federal court found unconstitutional a California law, Proposition 187, that required state and local law enforcement agencies, social services agencies, and health care and public education personnel to (1) verify the immigration status of persons with whom they came in contact; (2) notify certain individuals of their immigration status; (3) report those individuals to state and federal authorities; and (4) deny those individuals health care, social services, and education.¹³ The court found that the “verification, notification and cooperation/reporting requirements” in Prop. 187 “directly regulated immigration” by “creating a comprehensive scheme to detect and report the presence and effect the removal” of undocumented immigrants.¹⁴

More recently, an ordinance enacted by the city of Farmers Branch, Texas, that required landlords to verify the citizenship or immigration status of individuals seeking to rent from them, as well as request from them and review “original documents of eligible citizenship or immigration status” before entering into a lease or rental agreement, was found to be a “regulation of immigration.”¹⁵ The court held that, because the ordinance required private persons and city officials to “make immigration status decisions based upon a scheme that did not adopt federal immigration standards,” it was an impermissible regulation of immigration because it would “affect the ‘conditions under which a legal entrant may remain’” by excluding “certain legal residents from renting an apartment in [Farmers Branch].”¹⁶

■ Field Preemption

What is the field preemption standard?

A state or local statute is field-preempted if it is an attempt to legislate in a field that is occupied by the federal government. This test requires an assessment of whether the state or local statute is attempting to legislate in a field in which Congress intended a “complete ouster” of state power, even if that state or local statute does not conflict with federal law.¹⁷

¹¹ See, e.g., *The Chinese Exclusion Case*, 130 U.S. at 605–06.

¹² See *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1876) (court found state statute unconstitutional that allowed the state commissioner in California to classify arriving immigrants, and found that it interfered with Congress’s right to regulate foreign nationals).

¹³ *LULAC v. Wilson*, 908 F. Supp. 755, 769–71 (C.D. Cal. 1995).

¹⁴ *Id.* at 769. Not all state laws involving immigrants are preempted. For example, in *LULAC v. Wilson*, the court upheld the benefit denial provisions of Prop. 187 because those provisions could be implemented “without impermissibly regulating immigration,” since state agencies could verify eligibility for services and benefits through federal determinations of immigration status through SAVE.

¹⁵ See *Villas at Parkside Partners v. City of Farmers Branch*, No. 3:06-CV-2371L, 2007 U.S. Dist. LEXIS 44234 (N.D. Tex. 2007) (granting a preliminary injunction enjoining Farmers Branch Ordinance 2903 adopted on Jan. 22, 2007).

¹⁶ *Id.* at 8–10.

¹⁷ *DeCanas*, 424 U.S. at 356–57.

Has Congress preempted the field of immigration?

Yes. In fact, immigration law is one area in which the federal government has comprehensively legislated and fully occupied the field.¹⁸ The U.S. Constitution gives Congress and the federal government exclusive power over immigration, naturalization, and deportation.¹⁹ “Congress has fully occupied the field of immigration regulation through enactment and implementation of the” Immigration and Nationality Act (INA).²⁰

How would you determine if a state statute relating to immigrants is field-preempted by federal law?

Not every state law concerning immigrants is field-preempted.²¹ To determine if the federal government intended to completely oust the state or locality from legislating in the area of immigration, it is necessary to look at the actual wording (statutory language) or legislative history of the Immigration and Nationality Act (INA).

What are examples of state statutes that would be field-preempted?

- A state employment statute was not field-preempted by federal law where Congress had *not yet acted* to occupy the field.²² In *DeCanas*, the Supreme Court held that absent congressional action, a California state law that prohibited employers from knowingly hiring a worker who was not a lawful resident of the U.S. if that employment “would have an adverse effect on lawful resident workers” was not unconstitutional because Congress had not (at that time) legislated in the field of the employment of unauthorized workers.²³ Congress later *did* occupy the field of employment of unauthorized workers when it enacted the Immigration Reform and Control Act (IRCA) of 1986.²⁴
- Under current federal immigration law, where an initiative attempts to regulate the employment and hiring of unauthorized workers, one would first look at the plain wording of the INA to determine if Congress intended to oust the state from regulating the employment of unauthorized workers.²⁵ The employment and hiring of unauthorized workers is an area that is expressly preempted by federal immigration law because the INA specifically states that any state or local law is preempted from imposing civil or criminal sanctions (other than through licensing and

¹⁸ *Id.* at 357.

¹⁹ *Hines v. Davidowitz*, 312 U.S. 52, 62 (1941); *see also DeCanas*, 424 U.S. at 354, 356.

²⁰ *LULAC*, 908 F. Supp. 755, 775–76, *citing Gonzales v. City of Peoria*, 722 F.2d 468 (9th Cir. 1983) (“We assume that the civil provisions of the [INA] regulating authorized entry, length of stay, residence status, and deportation, constitute such pervasive regulatory scheme, as would be consistent with the exclusive federal power over immigration.”).

²¹ The following are cases in which courts have found that the state laws in question did not regulate immigration: *see Equal Access Education v. Merten*, 305 F. Supp. 2d 585, 601–11 (E.D. Va. 2004) (Virginia policy preventing undocumented students from enrolling in post secondary institutions is not preempted); *John Doe No. 1 v. Georgia Dep’t of Public Safety*, 147 F. Supp. 2d 1369, 1375–76 (N.D. Ga. 2001) (state statute denying undocumented persons a state driver’s license is not preempted); *Gao v. Jenifer*, 185 F.3d 548 (6th Cir. 1999). State laws that have a “purely speculative and indirect impact on immigration” are not preempted as impermissible attempts to regulate immigration. *See DeCanas* at 355; *LULAC* at 769.

²² *DeCanas* at 354–55.

²³ *Id.* at 357.

²⁴ The Immigration Reform and Control Act of 1986 (IRCA) amended the Immigration and Nationality Act to include the employer sanctions provisions and preemption language. 8 U.S.C. 1324a(h)(2) expressly preempts any state or local law from imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or refer or recruit for a fee for employment, unauthorized aliens.

²⁵ *See DeCanas* at 358.

similar laws) upon those who employ, or refer or recruit for a fee for employment, unauthorized workers.²⁶

- Where a licensing or similar business permit law regulates the employment and hiring of unauthorized workers, the law would also be preempted by federal law.²⁷
- Where an ordinance creates a separate scheme of reporting and investigating violations of immigration law or would create a separate state system for determining immigration status, the ordinance would be preempted because the state or locality would be operating in a field occupied by Congress.²⁸
- Where the state or local initiative attempts to regulate immigration law (as did the California law, Prop. 187, discussed above), it would also be preempted under this field preemption test.²⁹

■ Conflict Preemption

What is the conflict preemption standard?

A state or local statute is conflict-preempted if it (1) burdens or conflicts “in any manner with any federal laws or treaties” or (2) stands “as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”

When is a state statute conflict-preempted by federal law?

A state statute is preempted under this third test if it impedes federal objectives, including by “interfer[ing] with the methods by which the federal statute was designed to reach [a] goal.”³⁰ In other words, a state statute is preempted “if it conflicts with federal law making compliance with both state and federal law impossible.”³¹

What are examples of state laws that are preempted by federal law?

- An ordinance that creates an entirely new immigration enforcement scheme — including a new investigation, auditing, and reporting system — would conflict with and interfere with federal law.
 - For example, in the *LULAC* case, the court found that the classification, notification, and cooperation/reporting requirements directly contradicted federal immigration law, because the INA specifically sets out a “sole and exclusive procedure for determining the

²⁶ *Id.* State and local employer sanctions laws are generally preempted. IRCA’s legislative history notes that the statute’s reference to “licensing” encompasses “lawful state or local processes concerning the suspension, revocation or refusal to reissue a license to any person who has been found to have violated the sanctions provisions” of IRCA or “licensing or ‘fitness to do business laws,’ such as state farm labor contractor or forestry laws, which specifically require such licensee or contractor to refrain from hiring, recruiting or referring undocumented” workers. See H.R. Rep. 99-682(I), 1986 U.S.C.C.A.N. 5649, 5662.

²⁷ The legislative history of IRCA further explains that the preemption provisions in 8 U.S.C. 1324a(h)(2) on the penalties for the hiring and continued employment of unauthorized workers is not “intended to preempt or prevent lawful state or local processes concerning the suspension, revocation or refusal to re-issue a license to any person who has been found to have violated the sanctions provisions” of IRCA. See H.R. Rep. 99-682(I), 1986 U.S.C.C.A.N. 5649, 5662.

²⁸ *LULAC v. Wilson*, 908 F. Supp. 755 (C.D. Cal. 1995).

²⁹ *Id.*

³⁰ *De Canas*, 424 U.S. at 363, citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *International Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987).

³¹ *LULAC*, 908 F.Supp. at 768, citing *Michigan Canners & Freezers v. Agricultural Marketing and Bargaining Board*, 467 U.S. 461, 469 (1984); *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 142-43 (1963).

deportability of an alien.”³² The court found that Prop. 187’s provisions created “a new, wholly independent procedure, pursuant to which state law enforcement, welfare, health care, and education officials — rather than federal officials and immigration judges — are required to determine the deportability of aliens and effect their deportation.” The court held that Prop. 187’s “classification, notification and cooperation/reporting provisions delegate to state agents tasks which federal law delegates exclusively to federal agents” and therefore “are in direct conflict with and are preempted by federal law.”³³

- A state law or local ordinance that would use or create standards different from those established under federal immigration law to determine a person’s immigration status would be in conflict with federal immigration law.
 - For example, a state law in Louisiana entitled “Operating a Vehicle Without Lawful Presence in the United States,” which makes it unlawful for any “alien student” or “nonresident alien” to drive a car in Louisiana without proof that he or she is lawfully present in the U.S., was found by a state court to be preempted as regulating and conflicting with federal immigration laws.³⁴ Another state court in Louisiana held that the statute defined “nonresident alien” and “alien student” in ways which were “incompatible with the federal scheme.”³⁵
- Even if a state or local ordinance does not directly conflict with federal law but makes it impossible to comply with federal law because it supplants federal law, that ordinance would be preempted.
 - For example, in 1939 the state of Pennsylvania enacted an Alien Registration Act that required every non-U.S. citizen over 18 to register once a year with the state, pay a fee, receive an “alien registration card” and carry it at all times, and show the card when demanded by policy or the state Department of Labor. The card was required before the person could register a motor vehicle.³⁶ The U.S. Supreme Court held that because the federal government had enacted a federal law requiring noncitizens to be registered, the state could not enact its own registration law that conflicted with or was inconsistent with the federal law.³⁷

Therefore, immigrant rights advocates should determine if initiatives introduced or enacted in their states or localities create new requirements for certain classes of immigrants or new requirements for employers that would interfere with or conflict with current federal immigration law. Such ordinances would be preempted by federal law.³⁸

³² *Id.* at 777.

³³ *Id.*

³⁴ *See State of Louisiana v. Neri Lopez*, 948 So. 2d 1121 (La. Ct. App. 4th Cir. 2006). Because La. R.S. 14:100.13 imposes a requirement regarding who must carry documents that exceeds what federal law requires, and the penalties it imposes are harsher than those provided for in federal law, the court found the statute preempted because it is an unconstitutional regulation of immigration law as well as because it conflicts with federal law.

³⁵ *See also State of Louisiana v. Barrientos*, No. 06-1726 (La. 24th Jud. Dist. Ct. Jefferson Parish Jan. 31, 2007).

³⁶ *Hines v. Davidowitz*, 312 U.S. 52, 59 (1941).

³⁷ *Id.* at 66–67.

³⁸ State and local initiatives may also be challenged on other constitutional grounds, such as Equal Protection. *See Graham v. Richardson*, 403 U.S. 365 (1971); *see also Plyer v. Doe*, 457 U.S. 202 (1982). This fact sheet is limited to potential challenges to such initiatives on federal preemption grounds alone.