

Immigration or Alienage? How States Can Legislate to Protect Undocumented Agricultural Workers

*Adam Hutchinson**

INTRODUCTION

Although the percentage of the American economy contributed to agriculture has declined in the past few decades, the United States Department of Agriculture (USDA) reported that the agricultural sector generated more than \$400 billion gross income in 2017.¹ Similarly, the USDA's Economic Research Services (ERS) estimates that American agriculture employs more than one million people annually.² Of those one million agricultural workers, the ERS further estimates that more than 780,000 are foreign-born.³ Finally, the ERS approximates 528,000 foreign-born crop workers have no official legal status in the United States.⁴ From examining these statistics alone, it is clear that a large-scale drop in the number of foreign-born agricultural workers would cause major disruptions in America's agricultural economy.⁵ Further, such a disruption will disproportionately affect rural states like Kentucky, whose economy is heavily agricultural.⁶

*Soliciting Articles Editor, KY. J. EQUINE AGRIC. & NAT. RESOURCES L.; B.A. 2005, Transylvania University; J.D., expected May 2019, University of Kentucky College of Law.

¹*Gross Cash Farm Income Forecast to Stabilize in 2018*, U.S. DEPT OF AGRIC. ECON. RES. SERV., <https://www.ers.usda.gov/data-products/chart-gallery/gallery/chart-detail/?chartId=76943> [<http://perma.cc/PUT6-UPK3>].

² *Immigration and the Rural Workforce*, U.S. DEPT OF AGRIC. ECON. RES. SERV., <https://www.ers.usda.gov/newsroom/trending-topics/immigration-and-the-rural-workforce/> [<https://perma.cc/JDY4-LMKS>].

³ *Id.*

⁴ *Id.*

⁵ See STEVEN ZAHNISER, TOM HERTZ, PETER DIXON & MAUREEN RIMMER, *Economic Research Service Report Summary*, USDA (May 2012), https://www.ers.usda.gov/webdocs/publications/44981/20515_err135_reportsummary_1.pdf?v=41219 [<http://perma.cc/2479-68XW>].

⁶ It is estimated that Kentucky agriculture produced \$5,400,000,000 in sales in 2016, which is itself down slightly from previous years. This translates to around \$1,200,000,000 net income for Kentucky agriculture during 2016. See UNIV. OF KY. COLL. OF AGRIC., FOOD AND ENV'T, 2016-2017 KENTUCKY AGRICULTURAL ECONOMIC SITUATION AND OUTLOOK, (Erica Rogers ed.), <http://www.uky.edu/Ag/AgEcon/pubs/extoutlook161758.pdf> [<https://perma.cc/QW8Y-4L56>].

While few concrete legislative steps have been taken by the current Congress, rolling back the number of undocumented foreign-born persons in the United States has been a key theme for President Donald Trump's administration.⁷ Therefore, states may be interested in how far they can legislate to protect undocumented immigrants from incursion by federal officials, and what sorts of power the federal government may exercise to compel states to enforce federal immigration policy.⁸ While states whose economies are especially dependent on agriculture may be substantially interested in protecting their undocumented population from incarceration or deportation, every state should seek to ensure their non-residents are treated equitably. That individual states may have interests that differ from federal policy, however, is nothing new.⁹ The entire system of cooperative federalism is built upon the notion that states can function as laboratories of democracy.¹⁰ That is to say, while an individual state may not directly contravene federal legislation or itself legislate in areas exclusively reserved for the federal government, it may try policy approaches to a variety of activities that have not been exclusively set aside for the federal government.¹¹ With particular respect to immigration, this policy approach is typically called "immigration federalism."¹²

Recently, Stella Burch Elias defined immigration federalism broadly as "the engagement by national, state, and local governmental actors in immigration regulation."¹³ This definition is distinct from more narrow ones, which tend to view a state's role

⁷ Jeremy Diamond & Sara Murray, *Trump Outlines Immigration Specifics*, CNN (Aug. 10, 2015), <http://www.cnn.com/2015/08/16/politics/donald-trump-immigration-plans/> [<https://perma.cc/BTF8-LTMJ>].

⁸ See Tal Kopan, *What are sanctuary cities, and can they be defunded?*, CNN (March 26, 2018, 3:40 PM), <https://www.cnn.com/2017/01/25/politics/sanctuary-cities-explained/index.html> [<http://perma.cc/T44R-AHGP>].

⁹ *Id.*

¹⁰ See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 287–92 (1932) (Brandeis, J., Dissenting) (demonstrating how the Oklahoma legislature operated as a laboratory for democracy by implementing policy approaches to go around the federal government when federal legislation caused unreasonable or arbitrary interference and restrictions on states and their citizens).

¹¹ *Id.*

¹² See, e.g., Cristina M. Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 570 (2008).

¹³ Stella Burch Elias, *The New Immigration Federalism*, 74 OHIO ST. L.J. 703, 710–11 (2013).

in immigration as merely an enforcement mechanism used to further the federal immigration policy.¹⁴ Elias, however, asserts that a state's capability to engage in immigration exceeds the promotion of the federal policy; such that states have a certain range of freedom to craft their own particular policies on alienage.¹⁵ For example, with respect to a state's concern of undocumented agricultural workers' status, the state could effectuate legislation or policies—or both—effectively protecting such workers from potential mass deportation.¹⁶

As a matter of law, however, the precise ability of states to ensure the continued availability of their undocumented, foreign-born agricultural workers is unclear. The federal government enjoys undoubted power over immigration and the status of undocumented immigrants, which emanates from its power to “establish an uniform Rule of Naturalization,”¹⁷ as well as its power to conduct national foreign policy.¹⁸ Further, Congress has already heavily legislated the field with the Immigration Reform and Control Act of 1986 (IRCA).¹⁹ In general, states' authority to legislate where Congress possesses inherent powers or has already occupied the legislative field is slim to none.²⁰

Further, after the United States Supreme Court decided that the federal government substantially occupied the field of immigration law in cases such as *Arizona v. United States*, it is unclear what space is left for the states to legislate. As the Court noted, “The framework enacted by Congress leads to the conclusion here . . . that the Federal Government has occupied the field of alien registration.”²¹ Therefore, many contemporary commentators on immigration law consider the field to be completely occupied by Congress.²² If this contention proves

¹⁴ See *id.* (discussing that states have played various roles in immigration federalism, including acting under the supervision of the federal government or concurrently with the federal government to implement immigration policy).

¹⁵ See *id.*

¹⁶ See *id.* at 736.

¹⁷ U.S. CONST. art. I, § 8 cl. 4.

¹⁸ See *Toll v. Moreno*, 458 U.S. 1, 10 (1982).

¹⁹ See *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 148 (2002).

²⁰ *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984).

²¹ *Arizona v. United States*, 567 U.S. 387, 401 (2012).

²² See Elias, *supra* note 13, at 705.

correct, there is little room for something like the broad sense of immigration federalism for which Elias argues.²³

The argument of this Note, however, is that while the available scope of legitimate state power to shape immigration policy may be narrow, the effects of such policy could enhance the efforts of states to ensure the equitable and fair treatment of non-residents and the continued economic productivity of many state economies. This Note defends the thesis that there is still considerable scope for states to shape immigration policy without running afoul of the federal field. In particular, this Note argues that the traditional immigration jurisprudence of the Supreme Court has made a distinction between immigration law—which it has understood as a power reserved exclusively for the federal government—and alienage law, which emerges from police power of the states but may also be exercised by the federal government.²⁴ While immigration law controls the admission, qualifications, and expulsion of non-residents, alienage law itself refers to laws exclusively affecting undocumented persons in any capacity other than their immigration status. So, for example, state laws limiting undocumented individuals from seeking employment or requiring them to comply with certain documentation procedures are alienage laws, not immigration laws.

This Note argues that the distinction between alienage law and immigration law presents a fertile legal ground for states wishing to protect their population of undocumented individuals from incarceration and deportation. In particular, this Note will defend an interpretation of *Arizona v. United States* that emphasizes the silence of the Court on specific matters: the power of the states to work on the margins of the IRCA and other federal immigration legislation. In particular, the Note argues that *Arizona* may reassert federal primacy in immigration law, but it actually expands the scope of state alienage laws. In *Arizona*, the Court muddles the distinction between alienage and immigration law in a manner that may effectively expand the power of states to successfully legislate on issues that have often fallen into the cracks between the two—especially with respect to establishing

²³ *Id.* at 710.

²⁴ See U.S. CONST. amend. X; see also *Arizona*, 567 U.S. at 441. *But see* U.S. CONST. art. IV, § 2, cl. 1.

facets of state law specifically designed for non-residents. One new development in this area that must be addressed is the power of sub-federal jurisdictions to enact laws concerning undocumented persons by creating “sanctuary” jurisdictions. Here, this Note offers no opinion regarding the sanctuary jurisdiction phenomenon. However, it is illustrative of how difficult it is for the federal government to compel sub-federal jurisdictions to enforce federal law.

The Supreme Court has developed a rich jurisprudence detailing when and where the federal government may deploy its power over spending. This Note argues that while Congress may attempt to persuade states to enforce federal rules and regulations through their spending power—by, for example, attaching a certain percentage of federal highway funds to a state’s willingness to set the drinking age at twenty-one²⁵—attaching onerous conditions to funds with the goal of preventing states from exercising their police powers may be considered too coercive by courts.²⁶ Therefore, states wishing to protect undocumented individuals from the vagaries of federal immigration policy have little to fear from Congress, so long as they steer clear of the areas clearly preempted according to *Arizona*.

While this Note does contend that states possess more power than ever to legislate on issues dealing with undocumented immigrants, they must also be careful not to enact alienage laws putting them into direct conflict with federal immigration law. This means that states must be mindful of federal preemption on two fronts. First, they must be mindful that their alienage laws do not actually become immigration laws subject to preemption by federal immigration law. Second, even state legislation that clearly falls into the category of alienage law must be careful to comply with both state and federal law—whether alienage or immigration—if possible. If a state alienage law makes compliance with an applicable federal immigration law impossible, it will

²⁵ See *South Dakota v. Dole*, 483 U.S. 203, 205 (1987).

²⁶ See generally *New York v. United States*, 505 U.S. 144, 149 (1992) (making clear that while the federal government can tie some federal funding to a state’s compliance with a federal regulation or policy, “the Constitution does not confer upon Congress the ability simply to compel the States.”); *Nat’l Fed’n of Indep. Bus. v. Sibelius*, 567 U.S. 519, 578 (2012) (holding that permitting the Federal Government to force the States to implement a federal program would threaten the political accountability key to the federal system).

likely be preempted. Therefore, it is not enough that states hew closely to alienage laws; they must make sure their alienage laws allow for compliance with federal immigration law. Moreover, whether such compliance is even possible will depend upon how we understand federal preemption jurisprudence.

To make this argument, this Note offers a characterization and defense of contemporary federal preemption jurisprudence. This Note will argue that federal preemption doctrine rarely occupies an entire legislative field—forcing out all possible state legislation and that this is especially true in fields that traditionally fall within a state’s police powers to monitor and promote the health and welfare of their citizens. Finally, with the abovementioned view of federal preemption in mind, this Note will recommend that states wishing to protect non-residents stay within the ambit of those traditional police powers.²⁷ Therefore, it will argue that if agriculturally rich states wish to protect their undocumented workers, they should adopt a legislative strategy centering around shrinking the contact foreign-born workers have with federal police forces. In particular, interested states should seek to enact legislation providing for the health and welfare of undocumented immigrants in a variety of ways, including legislation that allows them greater access to local health services and workplace protections.

Part I of this note offers a general outline and interpretation of the Supreme Court’s jurisprudence surrounding the federal preemption of state laws. Part II distinguishes between laws concerning immigration and laws concerning alienage. Since states can legislate on alienage but are probably preempted by federal law on immigration, this section will seek to offer a clear description of the boundary between the two. Further, this discussion will pay particularly close attention to the Supreme Court’s decision in *Arizona*. This case outlines the most recent and, therefore, most useful boundary between alienage and immigration. This section will conclude that *Arizona* actually grants states wide latitude to enact legislation concerning non-resident immigrants.

²⁷ *Developments in the Law – Immigrant Rights & Immigration Enforcement*, 126 HARV. L. REV. 1565, 1597, 1610–11 (2013).

Part III briefly discusses the phenomenon of “sanctuary jurisdictions”—legal jurisdictions in which local officials choose not to cooperate with some federal immigration policies. Sanctuary jurisdictions are deeply controversial both legally and politically.²⁸ Given the Supreme Court’s views on the use of the government’s “Spending Power,” federal officials and agencies will have a difficult time forcing such jurisdictions to comply with federal immigration policy. This protection will likely transfer to jurisdictions wishing to take a more active role in protecting their undocumented populations. Finally, Part IV makes a series of policy recommendations for agriculturally rich jurisdictions wishing to offer legal protection to undocumented workers.

I. THE FEDERAL PRE-EMPTION DOCTRINE

The so-called “Supremacy Clause” of the U.S. Constitution explains that federal laws “shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”²⁹ Consequently, any state or local laws standing in direct opposition to a federally enacted law or regulation³⁰—or ruling by the United States Supreme Court—are invalidated and not legally enforceable. The process by which a federal rule displaces a contrary rule from a lower jurisdiction is called federal preemption. While there are constitutional limits placed on the rules the federal government may formulate and enact, as long as it acts within its constitutional sphere, its pronouncements reign supreme over competing state rules.³¹

In general, there are different ways that Congress may preempt a contrary state or local law. First, Congress may “occupy a given field” of law or regulation, making it impossible for any

²⁸ See, e.g., Hailey Branson-Potts, *Federal Judge Blocks Implementation of Controversial Texas Law Banning ‘Sanctuary Cities’*, L.A. TIMES, (Aug. 30, 2017, 9:25 PM), <http://www.latimes.com/nation/la-na-texas-sanctuary-cities-judge-20170830-story.html> [<https://perma.cc/3FPZ-TE8Q>].

²⁹ U.S. CONST. art. VI, cl. 2.

³⁰ *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984).

³¹ See, e.g., *Fed. Energy Regulatory Comm’n v. Mississippi*, 456 U.S. 742, 759 (1982) (explaining that the “Federal Government may displace state regulation” when such displacement is a valid exercise of Congressional commerce authority).

other jurisdiction to exercise any legal power within it.³² That is if Congress has expressed an intent that a whole field of law or regulation should be governed exclusively by federal power, then any law passed in that field outside of federal law is nullified, absent any other constitutional limitation.³³ This remains true even if a particular competing state or local law does not directly contravene a federal rule.³⁴ For instance, in *Pacific Gas & Electric Company v. State Energy Resource Conservation & Development Commission* the Court in discussing the history of the Atomic Energy Act explained that “Congress . . . intended that the federal government should regulate the radiological safety aspects involved in the construction and operation of a nuclear plant.”³⁵ From this, the Court concluded that “the Federal Government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the States.”³⁶ Thus, the Court held that Congress had exercised its preemptive authority such that any state or local rules—whether expressly contrary to federal policy or speaking to an area of nuclear safety on which the Atomic Energy Act was silent—were preempted.³⁷ As one may gather, when Congress decides to occupy a field, any state or local legislation in that field is automatically invalidated, even if such state or local legislation concerns a specific sub-area Congress did not expressly address.

Congress may also choose to occupy only a portion of a given legislative field. Moreover, it may preempt state or local governments from offering a contrary rule concerning an issue.³⁸ In such a situation, the Court typically reasons that if Congress only exhibits intent to set certain rules for a given field, but not to wholly occupy it, then state and local governments are free to legislate so long as that legislation is not contrary to any stated federal rule.³⁹ Further, state and local regulation must not make it

³² See *Silkwood*, 464 U.S. at 248.

³³ *Id.*

³⁴ *Pacific Gas & Elec. v. State Energy Res. Conservation & Dev. Com'n.*, 461 U.S. 190, 204 (1983) (“Even where Congress has not entirely displaced state regulation in a specific area, state law is preempted to the extent that it actually conflicts.”).

³⁵ *Id.* at 205.

³⁶ *Id.* at 212.

³⁷ *Id.* at 212–13 (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 236 (1947)).

³⁸ See *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 613–14 (1991).

³⁹ *Id.* at 613.

“impossible” to comply with federal regulation in the same field. The Court has explained that “[i]f Congress has not entirely displaced state regulation over the matter in question, state law is still pre-empted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law ...”⁴⁰ If Congress has decided only to preempt particular issues within a given field, state and local governments are free to legislate so long as their legislation does not make it impossible or stand “as an obstacle to the accomplishment of the full purposes and objectives of Congress.”⁴¹ Generally, if state or local law does not conflict with federal law by making compliance with both the federal provision(s) a “physical impossibility,”⁴² or by “stand[ing] as an obstacle to the accomplishment” of Congressional objectives,⁴³ conflict preemption is not implicated.

Finally, it needs to be mentioned that not only substantive laws can be preempted by federal legislation, but also certain methods of complying with a given federal law.⁴⁴ While a sub-federal jurisdiction may not directly legislate in a preempted field or on a preempted issue, its actions will still be preempted if they attempt to enforce a federal rule in a manner that is not consistent with the purposes of such rule.⁴⁵ The Court has stated that “[c]onflict in technique can be fully as disruptive to the system Congress erected as conflict over overt policy.”⁴⁶ Therefore, even when a state or local jurisdiction attempts to enforce a federal law or regulation, its particular method or “technique” of enforcement may be preempted if it somehow conflicts with the federal enforcement policy. For example, this may occur when a state or local jurisdiction attempts to use criminal penalties to enforce a federal policy that is typically a matter of civil law.⁴⁷

⁴⁰ *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984).

⁴¹ *Id.*

⁴² *Pacific Gas & Elec.*, 461 U.S. at 204 (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–143 (1963)).

⁴³ *Id.* (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

⁴⁴ *See, e.g., Amalgamated Ass’n of St., Elec. Ry. And Motor Coach Emp. of America v. Lockridge*, 403 U.S. 274 (1971).

⁴⁵ *Id.* at 286–87.

⁴⁶ *Id.* at 287.

⁴⁷ This is the basis that the *Arizona* Court used to invalidate one particular provision of the Arizona alienage laws in question. *Arizona v. United States*, 567 U.S. 387, 406–07 (2012).

In the context of immigration law, the pre-emptive power of Congress in the eyes of the court becomes the key issue. That is to say, does Congress completely occupy the field so as to exclude any state or local legislation or, alternatively, does the Court view Congress as having only reserved the right to preempt state and local legislation on particular issues within the field of immigration?

The U.S. Constitution grants the federal government broad latitude to promulgate immigration law.⁴⁸ This was not only because courts recognized that the federal government was constitutionally authorized “[t]o establish a uniform Rule of Naturalization,”⁴⁹ but also because it was thought to be within the natural powers of nation-states to control their borders and regulate those who wished to cross them.⁵⁰ Thus, in *Chae Chan Ping v. United States*, the Court held that Congress had near absolute authority to prevent the admission or order the expulsion of any noncitizens because this power is “incident of every independent nation. It is a part of its independence. If it could not exclude aliens it would be to that extent subject to the control of another power.”⁵¹ The Supreme Court's immigration jurisprudence then is based not only on constitutional commands but also on a prevailing political theory concerning the rights of a sovereign and independent nation state.⁵² The Court views immigration controls through the lens of foreign policy and state self-sovereignty; it should come as no surprise then that it would view the federal government as having plenary power over it.⁵³ The assertion of political theory into the heart of the Court's constitutional understanding of the federal government's vast immigration powers should not be dismissed as merely a Nineteenth Century curiosity, however.⁵⁴ As we shall see below, the notion that the federal government enjoys plenary power over immigration as an

⁴⁸ See generally *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

⁴⁹ U.S. CONST. art. I, § 8, cl. 4.

⁵⁰ *Fong Yue Ting v. United States*, 149 U.S. 698, 711 (1893).

⁵¹ See *Chae Chan Ping*, 130 U.S. at 603–04.

⁵² See *Fong Yue Ting*, 149 U.S. at 711 (“The right to exclude or to expel all aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace, being an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence, and its welfare....”).

⁵³ But see Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignties*, 25 VA. J. INT'L L. 121, 122 (1994).

⁵⁴ *Id.* at 123–24.

extension of its absolute power over foreign policy figures heavily into the Court's contemporary immigration jurisprudence.

In exercise of its plenary power over immigration, Congress is free to set standards with respect to border admittance and deportation procedures.⁵⁵ State and local governments lack this power.⁵⁶ Kentucky may not set standards of admission or expulsion for undocumented persons any more than it may commission its own military.⁵⁷ However, the Court has also traditionally set aside an area of law that both federal and sub-federal governments can legislate in with only direct federal preemption on conflicting issues.⁵⁸ This field is *alienage* law.⁵⁹ While immigration law broadly governs the standards for admission and expulsion of illegal immigrants from the United States, alienage law sets legal standards that illegal immigrants must comply with, such as cooperating with police officers who attempt to verify their immigration status upon arrest.⁶⁰ As explored in Part II, while state and local governments may not directly address the field of immigration, the Court appears to be quite deferential toward its ability to broadly legislate on issues of alienage.

II. IMMIGRATION AND ALIENAGE LAW

A. Traditional Alienage Law Jurisprudence

The Court has recognized that the political authority of the United States is not exhausted by the powers of the federal government; the constitutional powers of the governments of the several states must also be considered. While it is clear that under the Court's immigration jurisprudence admission or deportation of undocumented immigrants is exclusively of federal concern,⁶¹ it has carved out a separate space to deal with issues of alienage.

⁵⁵ *Arizona v. United States*, 567 U.S. 387, 394 (2012).

⁵⁶ *Id.* at 395.

⁵⁷ Tamra M. Boyd, *Keeping the Constitution's Promise: An Argument for Greater Judicial Scrutiny of Federal Alienage Classifications*, 54 STAN. L. REV. 319, 322 (2001).

⁵⁸ *See id.* at 320.

⁵⁹ *Id.*

⁶⁰ *Arizona*, 567 U.S. at 414.

⁶¹ *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.").

Alienage laws are those that govern the rights of immigrants.⁶² Further, alienage laws cannot encroach upon the power of the federal government to admit or deport undocumented persons. If such laws do impinge on the federal government's power over immigration, courts would likely view such laws as preempted.⁶³ For instance, laws that restrict the ability of employers to hire undocumented immigrants are, properly speaking, alienage laws and not immigration laws.⁶⁴ Finally, since such laws do not actually affect the federal government's inherent power over immigration or interfere with foreign policy, courts have typically not viewed them as preempted by federal immigration law.⁶⁵

Alienage laws can be enacted at any level of government.⁶⁶ Often, the effect of such laws has disadvantaged non-resident immigrants in some respects, from employment opportunities to housing options. However, the Supreme Court has long held that undocumented or illegal immigrants are "persons" for the purposes of the Equal Protection Clause, thereby subsequently invalidating a plethora of discriminatory laws.⁶⁷ Additionally, the Supreme Court has been unclear on the question of whether alienage itself should be considered a "suspect class" for the purposes of equal protection.⁶⁸ Recently, courts have shied away from designating alienage as a characteristic which creates a suspect class.⁶⁹

Interestingly, in an attempt to resolve whether states are allowed to discriminate on the basis of alienage, the Court defined the immigration powers of the federal government in a way that explicitly makes room for the alienage powers often exercised by the states. In *Torao Takahashi v. Fish and Game Commission*, the Supreme Court held that California could not deny the plaintiff a boating license because he was a non-resident, writing that "[t]he Federal Government has broad constitutional powers in determining what aliens shall be admitted to the United States,

⁶² Victor C. Romero, *Congruence Principle Applied: Rethinking Equal Protection Review of Federal Alienage Classifications after Adanrand Constructors, Inc. v. Peña*, 76 OR. L. REV. 425, 427 (1997).

⁶³ *Arizona*, 567 U.S. at 399.

⁶⁴ See Romero, *supra* note 62.

⁶⁵ See Boyd, *supra* note 57, at 320.

⁶⁶ *Id.*

⁶⁷ *Id.* at 321.

⁶⁸ *Id.* at 337.

⁶⁹ *Id.* at 322–23.

the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization.”⁷⁰ Here, the Court views the role of the federal government in immigration policy as setting standards for naturalization or “legislating the selection, admission, and exclusion of noncitizens.”⁷¹ The distinction between the exclusive power of the federal government over immigration and the shared power of state governments over alienage has been an essential part of the Court's immigration jurisprudence. This distinction was called into question by *Arizona v. United States*.

B. The Status of Alienage Law Since Arizona

In 2012, the Supreme Court called into question the long-settled distinction between immigration and alienage laws in *Arizona v. United States*. Arizona had enacted four separate statutes that the federal government argued were preempted by the Immigration Reform and Control Act of 1986.⁷² The four provisions in contention were: (1) a statutory command that an officer must make a “reasonable attempt” to ascertain the immigration status of anyone that they may stop, detain, or arrest on some “legitimate basis,” as well necessitating the determination of an arrestee’s immigration status before release;⁷³ (2) the creation of a misdemeanor for any persons found not to be carrying their “alien registration document” as commanded by 8 U.S.C. §§ 1304(e), 1306(a);⁷⁴ (3) the creation of a misdemeanor for any “alien” to “knowingly” apply, solicit work in a public place, or perform work as an employee or an independent contractor;⁷⁵ and (4) statutory permission to any state police officer or sheriff to arrest anyone who commits an act the officer believes makes that person deportable.⁷⁶

In particular, provisions (2) and (4) were especially controversial. In order to determine the legal residency of an arrestee or even detainees, Arizona established its state

⁷⁰ *Torao Takahashi v. Fish & Game Comm’n*, 334 U.S. 410, 419 (1948).

⁷¹ *Elias*, *supra* note 13, at 711.

⁷² *Arizona v. United States*, 567 U.S. 387, 393 (2012).

⁷³ ARIZ. REV. STAT. ANN. § 11-1051(B) (Supp. 2012).

⁷⁴ *Id.* § 13-1509 (Supp. 2012).

⁷⁵ *Id.* § 13-2928(C), (F).

⁷⁶ *Id.* § 13-3883(A)(5).

immigration database, which the federal government argued was in direct conflict with its database.⁷⁷ Moreover, provision (4) granted state police and sheriffs the power to arrest persons for actions they believed might make them deportable.⁷⁸ This power gave rise to accusations of racial profiling because—given Arizona's location adjacent to the Mexican border—the officers' judgments as to who was deportable would be made mostly on the basis of skin color.⁷⁹ All four provisions were called into question for their status as immigration and not alienage laws.⁸⁰ As we have seen, while states may engage in alienage lawmaking, immigration lawmaking is the exclusive domain of the federal government.⁸¹ Therefore, if Arizona did attempt to regulate or create rules concerning immigration, then the Supreme Court's traditional immigration jurisprudence would view Arizona's laws as preempted.⁸² Both the U.S. District Court for Arizona and the Court of Appeals for the Ninth Circuit viewed Arizona's laws as immigration and not alienage, therefore enjoining them as preempted by federal immigration law.⁸³

Interestingly, the Supreme Court found that three of the four provisions were preempted by federal immigration law.⁸⁴ However, the Court held that provision (2), which created a misdemeanor for an immigrant not in possession of their registration documents, was not preempted.⁸⁵ In line with its traditional immigration jurisprudence, the Court held that the federal government had near plenary power to regulate immigration not only because of its constitutional mandate to set rules for naturalization but also because "the dynamic nature of relations with other countries requires the Executive Branch to ensure enforcement policies are consistent with this Nation's

⁷⁷ *Arizona*, 567 U.S. at 400.

⁷⁸ Alex Lach, *The Top 5 Reasons Why S.B. 1070 Damages America*, CENTER FOR AMERICAN PROGRESS (June 25, 2012, 9:00 AM), <https://www.americanprogress.org/issues/immigration/news/2012/06/25/11785/the-top-5-reasons-why-s-b-1070-damages-america/> [https://perma.cc/2GNK-TPA7].

⁷⁹ *Id.*

⁸⁰ *Arizona*, 567 U.S. at 394.

⁸¹ *Id.* at 394–95.

⁸² *Id.* at 394.

⁸³ *Id.* at 388.

⁸⁴ *See generally id.*

⁸⁵ *Id.* at 412–13.

foreign policy with respect to those realities.”⁸⁶ The Court affirmed its traditional view that the federal government is granted inherent powers over immigration as an extension of its exclusive powers in foreign policy.⁸⁷ That is, in its immigration jurisprudence the Court continues to rely not so much on the text of the Constitution but on its longstanding political theory concerning what constitutes a self-sovereign nation.⁸⁸ Thus, the Court viewed the creation of a separate immigrant residency database by Arizona to conflict with the federal database and not as a compliment to it.⁸⁹ Moreover, the Court held that provision (4) was preempted because being a non-resident immigrant—even without any documentation or legal status—is not a criminal but civil matter.⁹⁰ Arizona’s attempt to use police officers to enforce a civil matter conflicted with federal immigration policy and, therefore, preempted unless the arrest was made at the behest of federal agents.

With respect to provision (2), the Court held that requiring non-resident immigrants to carry residency documents on their person was not preempted because it was not an immigration law, but an alienage law.⁹¹ Since the provision did not come into direct conflict with pre-existing federal immigration law or attempt to regulate immigration status on its own, it was neither an obstacle to or in contradiction with federal immigration law.⁹² Rather, the Court understood it as imposing a burden upon undocumented individuals that was not in conflict with any federal immigration law and fit schematically within the Federal Immigration and Reform Act of 1986.⁹³

Scholars have argued that the Court’s decision in *Arizona* was a victory for continued federal predominance in immigration,⁹⁴ and that it is a win for enhanced state immigration powers.⁹⁵ The

⁸⁶ *Id.* at 397.

⁸⁷ *Id.* at 395.

⁸⁸ *Id.*

⁸⁹ *Id.* at 400–03.

⁹⁰ *Id.* at 396.

⁹¹ *Id.* at 414–15.

⁹² *Id.*

⁹³ *Id.* at 403.

⁹⁴ Rodriguez, *supra* note 12, at 618.

⁹⁵ Margaret Stock, *Online Symposium: The Court Throws Arizona a Tough Bone* to Chew, SCOTUSBLOG (June 27th, 2012, 4:51 PM),

concern, however, is the potential effect *Arizona* may have on the traditional scheme used by the Court to distinguish immigration from alienage and the implications of that change on the power of states to legislate without being preempted by federal law. When the smoke clears, it seems the *Arizona* court decided to leave the legal distinction between immigration and alienage law relatively unchanged; states may still legislate on issues that apply exclusively to non-resident immigrants so long as they do not interfere with the federal government's power to set standards of inclusion and exclusion. If anything, the *Arizona* Court enlarged the legislative powers of states concerning alienage by holding that alienage laws seeking to promote federal immigration policies are not automatically preempted⁹⁶—at least, insofar as such laws do not use “techniques” that interfere with those approved by Congress. This seems to indicate that when states enact laws consistent with federal immigration policy they are enacting alienage laws. Otherwise, it is difficult to see how the Court could both hold that the standard relationship between immigration and alienage remains unchanged and that state legislation consistent with federal immigration policy is not itself preempted in a wholly occupied field.

<http://www.scotusblog.com/2012/06/online-symposium-the-court-throws-arizona-atough-bone-to-chew/> [https://perma.cc/39BU-DSYU].

⁹⁶ This is what I take the Court's holding on provision (2) above to mean. States may enact measures that are consistent with federal immigration law, so long as the methods they use to enforce such laws also comply with the scheme Congress has enacted to enforce its immigration law. However, since the Court also held tightly to the traditional distinction between immigration law—based on the federal government's plenary powers over foreign policy—and alienage law, based on the police powers granted to the state governments. There are two possible ways to understand the Court's move here. Under one interpretation, states are actually permitted to make laws concerning immigration so long as those laws are identical or sufficiently consistent with existing federal laws. If they differ such laws would automatically be preempted. The second possible interpretation is that the Court is effectively construing any state law that is identical to or sufficiently consistent with an existing federal immigration law as an alienage law. Under this second interpretation, the court would effectively expand a state's lawmaking power by allowing it make alienage law that actually functions as immigration law. The second interpretation is, to me at least, the easiest way to read provision (2) since it is consistent with the federal government's plenary power over immigration as well as the traditional power of the states to legislate alienage. That is to say, the Court has expanded the powers of the state to make alienage law that looks like immigration law so long as it sufficiently mimics existing federal immigration law. Such an interpretation preserves the traditional powers of both entities.

III. ALIENAGE AFTER *ARIZONA* AND SANCTUARY JURISDICTIONS

As previously mentioned, the *Arizona* Court viewed the federal power over immigration law as emanating from its power over foreign policy.⁹⁷ Further, the Court did not contend that the same power is at work concerning alienage law: the power to promulgate alienage law does not come from the power over foreign policy. Instead, alienage law emerges from state police power, as well as that of the federal government. One way to conceptually distinguish the domain of alienage and immigration law is to ask whether a law has a relationship to the management of foreign policy. This distinction helps further clarify the *Arizona* Court's holding that state alienage laws can also be used to enforce federal immigration policy so long as such laws do not use techniques or methods inconsistent with federal enforcement policy.⁹⁸ For agriculturally rich states wishing to protect their non-resident immigrant workforce, it is clear that recent court decisions either support the stable relationship between immigration and alienage law or, perhaps, enhance the power of states to enact protective alienage laws. The Supreme Court's jurisprudence on alienage approves of state power and demonstrates that it is unlikely to find federal immigration law preempts such efforts as long as they do not interfere with the setting of standards for inclusion and exclusion.⁹⁹

Courts are now facing another issue related to the balance of power between states and the federal government when it comes to immigration: whether promulgating alienage laws that tend to make enforcement of federal law more difficult will incur the wrath of the courts. Such an issue is seen most clearly in cities and states that refuse to comply with federal immigration policy, so-called "sanctuary cities" or "sanctuary states."¹⁰⁰ The number of sanctuary jurisdictions is estimated to be somewhere around

⁹⁷ *Arizona*, 567 U.S. at 397.

⁹⁸ *Id.* at 406.

⁹⁹ *Id.* at 399–401.

¹⁰⁰ See Bryan Griffith & Jessica Vaughan, *Maps: Sanctuary Cities, Countries, and States*, CENTER FOR IMMIGRATION STUDIES, (July 27, 2017), <https://cis.org/Map-Sanctuary-Cities-Counties-and-States> [<https://perma.cc/WE54-2YVC>] (offering a limited but working definition of a sanctuary jurisdiction).

300.¹⁰¹ There is no current legal definition of a sanctuary city or state, but for the purposes of this Note, they merely stand as jurisdictions attempting to actively thwart federal immigration policy by either mandating non-compliance with federal immigration law by local government officials or, in some cases, by local private employers. Former Attorney General Jeff Sessions attempted to define sanctuary jurisdictions as those that “violate a federal law requiring local and state governments to share information with federal officials about immigrants’ citizenship or legal status.”¹⁰² At a minimum, a sanctuary jurisdiction must refuse to comply with information requests from federal immigration officials.

A sanctuary jurisdiction is different from the policy approach favored here, which calls for the protection of non-resident agricultural workers. Rather than enacting alienage laws that may attempt to thwart federal immigration policy in spirit, sanctuary jurisdictions refuse to comply with federal immigration policy outright.¹⁰³ It stands to reason then, the legal challenges that the alienage law explained here will be similar to those faced by sanctuary jurisdictions. Moreover, it is likely that those jurisdictions will face more severe legal challenges since they directly defy federal immigration policy. Judging an alienage law approach may be accomplished by examining the success of legal challenges to sanctuary jurisdictions. If sanctuary jurisdictions are able to survive these challenges, then the alienage law approach is likely to survive the most obvious lines of attack.

To date, sanctuary jurisdictions have proven remarkably resilient in the face of federal action attempting to force them to comply through Congress’s “Spending Power.”¹⁰⁴ Article 1, Section 8, Clause 1 of the Constitution states that the federal government has the power to “lay and collect Taxes, Duties, Imposts and

¹⁰¹ Kopan, *supra* note 8.

¹⁰² Maria Sacchetti & Sari Horwitz, *Sessions Memo Defines Sanctuary Cities – and Hints that the Definition May Widen*, WASH. POST, (May 22, 2017), https://www.washingtonpost.com/local/social-issues/sessions-memo-defines-sanctuary-cities--and-hints-that-the-definition-may-widen/2017/05/22/68f8c9ec-3f1a-11e7-9869-bac8b446820a_story.html?utm_term=.cc334a293883 [https://perma.cc/3254-694S].

¹⁰³ Griffith & Vaughan, *supra* note 100.

¹⁰⁴ See, e.g., Sam Levin, *Trump’s Order to Restrict Sanctuary Cities’ Funding Blocked by Federal Judge*, THE GUARDIAN (Apr. 25, 2017, 4:37 PM), <https://www.theguardian.com/us-news/2017/apr/25/trump-sanctuary-cities-funding-executive-order-blocked> [https://perma.cc/LPB3-S5WD].

Excises, to pay the Debts, and provide for the common Defense and general Welfare of the United States ...”¹⁰⁵ This clause has been understood to give Congress not only the power to distribute funds to the several states but also to “attach conditions on the receipt of federal funds.”¹⁰⁶ The most obvious route for a Congressional attempt to compel sanctuary jurisdictions to comply with federal immigration law is to attach requirements to the receipt of federal funds requiring such compliance.

However, in its jurisprudence surrounding the spending power, the Supreme Court has been clear that Congress does not have total discretion to attach whatever kind of restrictions it wishes onto the receipt of federal funds. In *South Dakota v. Dole*, the Court provided some requirements Congress must meet in order to impose restrictions on a state's ability to receive federal funds.¹⁰⁷ Most important for the argument here, though, is that Congress may not make “financial inducements” to states that are “so coercive as to pass the point at which ‘pressure turns into compulsion.’”¹⁰⁸ That is, Congress cannot place so onerous a condition to state funding as to constitute coercion. The restriction against coercion through restriction was reinforced by the Court in *National Federation of Independent Business v. Sebelius*, explaining that the attachment of federal funding to the requirement that states open and operate a health care exchange would permit “the Federal Government to force the States to implement a federal program would threaten the political accountability key to our federal system.”¹⁰⁹ That is, the more severe and substantial the attached penalties are, the more coercive the courts are likely to find that requirement and the more likely it will be invalidated as an overreach of the Congressional spending power.¹¹⁰ This was precisely the rationale used by U.S. District Court Judge William Orrick III when President Trump

¹⁰⁵ U.S. CONST. art. I, § 8 cl. 1.

¹⁰⁶ *South Dakota v. Dole*, 483 U.S. 203, 206 (1987).

¹⁰⁷ *Id.* at 207–08 (explaining that the inclusion of a restriction on the reception of federal funds must: (1) be done in the pursuit of the general welfare; (2) be done unambiguously; (3) be related to some federal interest; and, (4) not be barred by any other provision of the Constitution).

¹⁰⁸ *Id.* at 211.

¹⁰⁹ *Nat'l Fed'n of Indep. Bus. v. Sibelius*, 567 U.S. 519, 578 (2012).

¹¹⁰ *Id.*

attempted to cut off funds from certain sanctuary cities in 2017.¹¹¹ However, if Congress cannot successfully punish such jurisdictions financially, jurisdictions will not likely comply with federal immigration law.

The most obvious way for the federal government to legally compel sanctuary jurisdictions into compliance with federal immigration law is foreclosed, absent a change of heart in the Supreme Court's jurisprudence surrounding Congress's spending power. It is also highly plausible that less drastic measures that do not directly defy federal immigration law will be protected by the same limitations on Congress' spending power.

IV. POLICY RECOMMENDATIONS

As argued at the beginning of this Note, states with agricultural economies will be substantially impacted if their non-resident immigrant workforces are suddenly deported or leave because they are afraid of changes in federal policy. While sanctuary jurisdictions often defy immigration policy for moral reasons, agriculturally rich states have the added motivation of economic self-interest. Quite simply, if their workforces are suddenly depleted by a change in immigration policy or enforcement, such states are likely to suffer grave economic harm. While such jurisdictions may choose to merely defy immigration policy, as sanctuary jurisdictions have, they may also choose to exercise their powers over alienage law to make it more difficult for their non-resident agricultural workforce to come into contact with immigration enforcement. Jurisdictions may choose to create a specific system of laws making it possible for illegal immigrants to lead relatively normal lives without the constant fear of deportation.

Below are a few suggested policies that may help create a jurisdiction-specific set of alienage law to protect non-resident immigrants, as well as the agricultural economy to which they are so vital. These options include a substantial benefit; they are unlikely to be successfully challenged from a legal perspective and,

¹¹¹ Bob Egelko, *Judge Says Trump Can't Punish Cities Over Sanctuary City Policies*, THE S.F. GATE (Apr. 25, 2017, 9:41), <http://www.sfgate.com/nation/article/Judge-says-Trump-can-t-punish-cities-over-11098098.php> [<https://perma.cc/Q23X-P4F3>].

because it does not require open defiance of immigration law, is unlikely to draw the same amount of controversy as a sanctuary jurisdiction. This makes these proposals both more politically possible in jurisdictions harboring some hostility to non-resident immigrants and will be less likely to draw the attention and ire of federal immigration officials. Since the ultimate goal of these recommendations is to offer some form of protection to non-resident and undocumented workers, and the economies of agriculturally rich jurisdictions, the implementation of alienage law seems a more practical strategy than outright defiance. While only a few recommendations are included below, there is room for jurisdictions to do more to protect themselves.

First, it may be prudent to allow non-resident immigrants the opportunity to obtain driver's licenses and other state identification information. Such opportunities cost the jurisdiction little economically but mean a great deal to the non-resident. In part, it allows them the ability to use identification to function and live like any other person within a jurisdiction; it allows them to set up bank accounts and receiving loans and helps to obtain housing and schooling.¹¹² More to the point, it may also allow non-resident immigrants the confidence to interact with law enforcement officers in a more relaxed manner.¹¹³ Since there is an opportunity to obtain driver's licenses, non-resident would be able to put themselves in compliance with the applicable insurance requirements.¹¹⁴ This means they would be able to drive unafraid of being pulled over by police—at least, with little more fear than any other licensed and insured driver.¹¹⁵ Additionally, it may have the added benefit of more drivers within the jurisdiction meeting proper licensing requirements—including relatively minor qualifications like eyesight and knowledge of traffic laws—making roads safer for all drivers.¹¹⁶

Second, jurisdictions should make legal and statutory information available in languages other than English and encourage local businesses to make relevant information available

¹¹² Spencer Garlick, *License to Drive: Pioneering a Compromise to Allow Undocumented Immigrants Access to the Roads*, 31 SEATON HALL LEGIS. J. 191, 195–96 (2006).

¹¹³ *Id.* at 201.

¹¹⁴ *Id.* at 200.

¹¹⁵ *Id.* at 201.

¹¹⁶ *Id.* at 200.

in non-English languages. This is an inexpensive measure that has the obvious benefit of making sure non-resident immigrants are familiar with the laws and ordinances of their respective jurisdiction. Again, the less hostile contact non-residents have with the jurisdiction's legal system, the better to avoid deportation.¹¹⁷ Such a measure has the additional benefit of making it easier for these immigrants to engage in commerce as both owners and customers of businesses.

Third, jurisdictions should make sure that their state labor laws incorporate agricultural workers—including undocumented foreign-born workers—in its minimum wage and worker's compensation laws. This is an especially important measure when attempting to protect agriculturally rich states' economies by securing its undocumented workforce. In order to provide a steady level of workers, jurisdictions should attempt to ensure that their undocumented agricultural workers are paid an amount that allows them to live at a reasonable level, which is important for at least two reasons. First, it ensures that such a jurisdiction remains attractive to undocumented workers as against competing jurisdictions. Second, such a measure is likely to reduce the incentive for non-resident immigrants to engage in illegal activities to supplement their income. Such a measure then furthers the goal of keeping these workers from being deported because of avoidable entanglements with the jurisdiction's legal system. This goal has been the subject of intense debate in New York state and should be seriously considered in other like-minded jurisdictions.¹¹⁸

Further, such protections arguably provide for more stable undocumented immigrant communities by offering the financial means to establish long-term "roots" within the local jurisdiction.¹¹⁹ For instance, if undocumented workers are

¹¹⁷ Susan Shah, Insha Rahman & Anita Khashu, *Overcoming Language Barriers: Solutions for Law Enforcement*, VERA INST. OF JUST. REPORT, 4 (2007). https://www.lep.gov/resources/vera_translating_justice_final.pdf [<https://perma.cc/LGV3-JC3D>].

¹¹⁸ S. S02721, 199th Leg. Assemb., Reg. Sess. (N.Y. 2011), http://assembly.state.ny.us/leg/?default_fld=&bn=S02721&Summary=Y&Actions=Y&Text=Y&Votes=Y [<https://perma.cc/SCC6-FAVD>].

¹¹⁹ Pia M. Orrenius & Madeline Zavodny, *The Effect of Minimum Wages on Immigrants' Employment and Earnings* (Fed. Res. Bank of Dallas, Res. Dep't. Working Paper No. 0805, 2008),

adequately compensated, have attained the necessary identification, and have the required paperwork available to them in their language, they are arguably more likely to purchase homes, invest, and start businesses within the jurisdiction. This would lead to a more stable agricultural workforce. Additionally, providing some jurisdiction-specific form of worker's compensation would lessen the need for undocumented workers to try to use federal programs or benefits, which may lead to violations of federal immigration law. Policies such as this one would serve the purpose of using alienage law to remove undocumented individuals from situations in which they may be deported.

The recommendations above are merely preliminary, ultimately arguing that there is much more jurisdictions could do through their alienage laws to ensure some level of protection for their undocumented workers.

CONCLUSION

As we have seen, the Supreme Court's jurisprudence up to *Arizona* created a large sphere for both the states and the federal government to legislate concerning alienage. Moreover, states can enact laws that affect undocumented non-residents without entering into the preempted sphere of immigration if they do not attempt to set standards for inclusion or expulsion. Further, in *Arizona*, even forays into immigration law are not preempted if they seek to advance federal immigration policy through methods or techniques approved by that policy—implicitly enlarging the sphere of state power over alienage. Finally, we have seen that there is little Congress can do through the Spending Clause to compel jurisdictions to act, especially if there is little Congress can do to compel compliance from jurisdictions in direct defiance of federal immigration law. All of this points to the conclusion that states wishing to protect their undocumented agricultural workforces have considerable latitude, primarily through changes to alienage laws. There are several policy possibilities those jurisdictions could adopt, such as licensing opportunities and the elimination of language barriers. Such jurisdictions may do much

<https://www.dallasfed.org/research/economists/~media/documents/research/papers/2008/wp0805.pdf> [<https://perma.cc/MD55-QR3X>].

more than suggested, and it is recommended they explore protective policies to the fullest extent of their alienage powers.