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The Local Dilemma: Preemption and the Role of Federal Standards in State and Local Immigration Laws

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THE LOCAL DILEMMA: PREEMPTION AND THE ROLE OF FEDERAL STANDARDS IN STATE AND LOCAL IMMIGRATION LAWS

Nathan G. Cortez*

I. INTRODUCTION

In the tug-of-war between federal and state or local laws that touch immigration, we must not lose sight of the practical underpinnings to the legal hydraulics. After all, the Supremacy Clause declares the federal Constitution and the laws of the United States to be the supreme law of the land for a reason. A patchwork of fifty state immigration schemes would simply be untenable. Yet, even in our current state of equilibrium—which has carved out an amorphous role for state and local governance—any state or local laws that target immigrants must, necessarily, identify different categories of immigrants and ultimately distinguish between those who are lawfully present in the United States and those who are not. Courts have often told states simply to rely on “federal standards.” But this task requires state and local governments to wade into the morass of federal immigration statutes, regulations, and guidance documents—a venture with a very low margin of error, and one that is not for the timid.

Recently, state and local governments have become much less timid. Driven by palpable frustration with the federal government’s regulation and enforcement of immigration—or more precisely, the lack thereof—state and local governments have enacted a persistent stream of immigration-related laws, addressing everything from education to employment to driver’s licenses. Although the U.S. Supreme Court has clearly stated that the “[p]ower to regulate immigration is unquestionably exclusively a federal power,” state and local governments are not powerless to act.

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2. U.S. CONST. art. VI, cl. 2.
5. DeCanas, 424 U.S. at 354.
The Supreme Court "has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus per se pre-empted." 

The trick for courts has always been deciding where to draw the line. Despite decades of pronouncements from the legislative, executive, and judicial branches, the role of state and local governments in immigration remains stubbornly undefined, teetering between permissible exercises of authority to regulate education, employment, and other traditional state concerns, and impermissible encroachments on federal authority. 

This Article examines one particular strand in the tug-of-war. Can otherwise permissible state and local laws avoid preemption simply by referring to or relying on federal immigration standards? If so, how must state and local laws manifest their reliance? Should we trust state and local agents to adhere faithfully to the seemingly impenetrable web of federal standards? Or is the likelihood too great that state and local actors will systematically misapply federal standards, effectively creating their own?

One case highlights the precarious position of state and local policies targeting immigration. The 2004 decisions in Equal Access Education v. Merten illustrate the role federal standards play in the preemption analysis. This case raises serious concerns about the wisdom and propriety of asking state or local agents to make determinations of immigration status—even if they are directed to use federal standards. Given the recent wave of local immigration-related ordinances, it is time to reevaluate the role of federal standards in Equal Access Education and other judicial opinions.

I begin in Part II by discussing the role of federal standards in the Equal Access Education opinions. In Part III, I analyze how two seminal cases, DeCanas v. Bica and League of United Latin American Citizens v. Wilson, laid the foundation for the federal standards analyses in later cases. In Part IV, I scrutinize the recent wave of local immigration-related ordinances, highlighting how courts have handled the federal standards question. In Part V, I argue that state and local laws should not avoid preemption by simply citing to or relying on federal standards, absent a clear finding that state or local agents will not systematically misapply federal standards.

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6. Id. at 355 (emphasis added).
7. This Article does not tackle the question of whether Congress should, as a policy matter, explicitly delegate more responsibility to sub-federal governments to regulate discrete immigration issues that might affect them. For that debate, see Olivas, supra note 4, and Peter H. Schuck Taking Immigration Federalism Seriously, 2007 U. Chi. Legal F. 57.
II. FEDERAL STANDARDS AND THE VIRGINIA PUBLIC COLLEGES OPINIONS

On September 5, 2002, Virginia Attorney General Jerry Kilgore sent an Immigration Law Compliance Update Memorandum to Virginia’s public colleges and universities, declaring that “illegal and undocumented aliens should not be admitted into our public colleges and universities at all.” Kilgore also strongly encouraged all public employees at these schools to report to the Immigration and Naturalization Service (“INS”) any information that may suggest that a student is not “lawfully present” in the United States. The memorandum explicitly acknowledged that this policy was not legally binding, conceding that, “as strictly a legal matter, institutions have broad discretion to decide what documentation they will request of applicants, and how they will treat applicants who are not lawfully present in the United States.” Nevertheless, the memorandum strongly encouraged public colleges and universities in Virginia to reject outright any applications from “illegal and undocumented aliens.”

In justifying the policy, Kilgore pointed to national security concerns, citing the terrorist attacks of September 11, 2001. As Virginia Attorney General, Kilgore had well-known political aspirations: In 2005, he ran as the Republican candidate for Governor of Virginia, eventually losing the election to Democrat Tim Kaine. Earlier in Kilgore’s tenure as Virginia Attorney General, the Virginia Department of Motor Vehicles had been criticized for issuing driver’s licenses to eight of the September 11th hijackers. Thus, the 2002 memorandum was a convenient political vehicle through which Kilgore could demonstrate his commitment to national security.

14. Id. at 5.
15. Id.
16. Id. at 3 (“As our national response to the attacks of September 11 continues, it has become increasingly clear that the Immigration and Naturalization Service (INS) and the higher education community must pay closer attention to the presence of foreign students and exchange visitors on their campuses.”).
18. See, e.g., Brooke A. Masters, Hijackers Exploited DMV Loophole, WASH. POST, Sept. 21, 2001, at A15 (stating that four of the hijackers on American Airlines Flight 77 that crashed into the Pentagon had Virginia driver’s licenses); Dale Russakoff, States Move to Halt Fraud in Licensing of Drivers; Sept. 11 Attacks Exposed Weaknesses Nationwide, WASH. POST, Aug. 8, 2002, at A3 (noting that eight of the September 11th hijackers had Virginia driver’s licenses).
But the memorandum also served a more immediate purpose for Virginia. It asked somewhat rhetorically, "[i]f a person is an illegal alien, why would he not be deported instead of being allowed to attend college here?" 19 The Virginia Attorney General answered that the INS does not adequately enforce federal immigration laws. 20 This memorandum, then, also served as Virginia's response to the perception that the federal government was not effectively regulating immigration.

In September 2003, five high school students and Equal Access Education, an educational rights group for immigrants, challenged the memorandum in federal district court in the Eastern District of Virginia. 21 The five students initially tried to proceed anonymously—given their concerns of being reported to federal authorities—but after the court denied this attempt, 22 only two students chose to identify themselves for purposes of the litigation. 23

The two students could not have been of the mold Virginia Attorney General Kilgore had in mind when issuing his *Immigration Law Compliance Memorandum*, with its self-stated goal of fortifying national security. One student, Brian Marroquin, was born in Guatemala and entered the United States on a tourist visa with his parents when he was just three years old. 24 Marroquin's parents left Guatemala fearing reprisals for participating in student protests, as Marroquin's grandfather and uncle were apparently murdered for similar political activities. 25 Shortly after arriving in the United States, Marroquin's parents filed applications for political asylum. 26 Almost a decade later, while these applications were still pending, they filed additional applications for asylum 27 under the Nicaraguan Adjustment and Central American Relief Act of 1997 ("NACARA"), a special program for certain immigrants from former Soviet bloc countries. 28 Marroquin grew up attending public schools in Arlington, Virginia, enrolling in gifted student programs, and volunteering for

20. Id. at 4–5 ("The answer to the question resides in part with the difficulties, priorities, and abilities of the Immigration and Naturalization Service (INS) in enforcing this nation's immigration laws.").
21. *Doe v. Merten*, 219 F.R.D. 387 (E.D. Va. 2004). The plaintiffs were represented by attorneys from the Mexican American Legal Defense and Educational Fund (MALDEF) and the Washington, D.C.-based law firm Arnold & Porter LLP. As an attorney at Arnold & Porter, I represented the students on a pro bono basis, along with several other attorneys at the firm.
22. Id. at 396.
26. Id.
27. Id.
his church and other local organizations.  

The other plaintiff, Fredy Vasquez, was born in El Salvador, and had a similar upbringing in northern Virginia. When the plaintiffs filed suit, Vasquez enjoyed Temporary Protected Status ("TPS"), which allowed him to work legally in the United States.

Both plaintiffs graduated from Virginia public high schools with credentials and accomplishments that made them competitive for admission to Virginia’s public colleges and universities. When the Virginia Attorney General issued the Immigration Law Compliance Memorandum in September 2002, Marroquin and Vasquez had either applied or intended to apply to the schools eventually named in the complaint, including George Mason University, James Madison University, Northern Virginia Community College, the University of Virginia, Virginia Commonwealth University, Virginia Polytechnic Institute and State University ("Virginia Tech"), and the College of William and Mary.

The suit alleged that by denying admission to applicants based on their actual or perceived immigration status, the Virginia schools violated the Supremacy, Due Process, and Foreign Commerce Clauses of the U.S. Constitution. Following a motion to dismiss, in Equal Access Education v. Merten ("Equal Access Education I"), the court found that Marroquin, Vasquez, and Equal Access Education all had standing to challenge the Attorney General’s policy. The court dismissed the Due Process and Foreign Commerce Clause claims, but engaged in a lengthy analysis of the Supremacy Clause claims. Plaintiffs argued that federal law should preempt the Virginia Attorney General’s policy because (i) it

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30. Id.
33. Of course, the Supreme Court’s decision in Plyler v. Doe, 457 U.S. 202 (1982), guaranteed even undocumented immigrants the right to a public education.
35. Id. at 4–6. After the Virginia Attorney General issued the memorandum, Northern Virginia Community College stated publicly that it would not follow the policy and thus would not consider immigration status in the admissions process. See Peter Whoriskey, NVCC Allowing Illegal Immigrants to Enroll; College Defends Policy After State Attorney General Urges Admissions Ban, WASH. POST, Dec. 5, 2002, at T23 (quoting the NVCC Vice President of Academic and Student Services as saying “We’re not trying to open our doors to terrorists or people who were trying to sneak across our borders. We are trying to serve residents who have been here for many years.”).
36. U.S. CONST. art. VI, cl. 2.
41. Id. at 594–600.
42. Id. at 601–14.
attempted to regulate immigration, (ii) Congress left no room for such
state intervention, and (iii) it conflicted with federal immigration law.\footnote{43}

In scrutinizing these claims,\footnote{44} the court applied the three tests estab-
lished by the U.S. Supreme Court in \textit{DeCanas v. Bica}.\footnote{45} In \textit{DeCanas}, the
Court held that federal law did not preempt a California statute barring
employers from "knowingly employ[ing] an alien who is not entitled to
lawful residence in the United States if such employment would have an
adverse effect on lawful resident workers."\footnote{46} In upholding the statute,
the Court established its three famous tests, asking: (i) whether the state
policy or action attempts to "regulate immigration";\footnote{47} (ii) whether Con-
gress intends to "occupy the field" and completely ouster state interven-
tion in the area;\footnote{48} and (iii) whether the state policy or action conflicts
with federal law, such that compliance with both federal and state law is
impossible, or such that the policy "stands as an obstacle to the accom-
plishment and execution of the full purposes and objectives of Con-
gress."\footnote{49} The Court in \textit{DeCanas} concluded that federal law did not
preempt the California statute under the three tests.\footnote{50} However, a state
law or policy is preempted if it fails just one \textit{DeCanas} test.\footnote{51}

In \textit{Equal Access Education I}, the court held that Virginia's policy would
not fail the first \textit{DeCanas} test unless the schools failed to adopt "federal
standards" in assessing the immigration status of applicants.\footnote{52} The court
explained that

\begin{quote}
If [plaintiffs] ultimately can show that defendants have failed to
adopt federal immigration standards in implementing their policies
of denying admission to illegal aliens, and instead have either implicit-
ly or explicitly developed their own, different standards, then defen-
dants' alleged policies would amount to a regulation of
immigration under the first \textit{DeCanas} test.\footnote{53}
\end{quote}

In applying the second \textit{DeCanas} test, the Court found that Congress
did not intend to fully ouster policies like Virginia's.\footnote{54} In a perfunctory
analysis, the court held that federal law "does not preclude state institu-
tions from using federal standards to deny admission to illegal aliens."\footnote{55}
The Court reasoned that Congress had not demonstrated "a clear and
manifest purpose . . . to oust non-conflicting state laws and policies in the

\begin{footnotes}
\item[43.] Merten Complaint, supra note 34, at 8.
\item[44.] \textit{Equal Access Educ.}, 305 F. Supp. 2d at 601.
\item[46.] \textit{Id.} at 352 (citing \textit{CAL. LAB. CODE} § 2805).
\item[47.] \textit{Id.} at 354–56.
\item[48.] \textit{Id.} at 356–63.
\item[49.] \textit{Id.} at 363–65.
\item[50.] \textit{Id.} at 351.
\item[51.] Villas at Parkside Partners v. City of Farmers Branch, 496 F. Supp. 2d 757, 765
\textit{(N.D. Tex. 2007)}.
\item[53.] \textit{Id.}
\item[54.] \textit{Id.} at 604.
\item[55.] \textit{Id.} at 604.
\end{footnotes}
area of alien access to post-secondary education.”

Thus, in the court’s view, federal law did not preempt decisions by state colleges and universities to deny admission to illegal or undocumented immigrants, so long as the schools used federal immigration standards to do so.

Finally, the court held that Virginia’s policy would not conflict with federal law and thus fail the third DeCanas test unless the schools were using state-created immigration standards. Thus, at the motion to dismiss stage, the court held that if plaintiffs could prove at summary judgment or at trial that the Virginia schools were using immigration standards other than those prescribed by the federal government, the policy would not only constitute an impermissible regulation of immigration under the first DeCanas test, but would also be an impermissible classification system in conflict with federal law under the third DeCanas test. In the court’s view, then, preemption hinged upon whether Virginia schools were using federal immigration standards when reviewing applications for admission.

By allowing this specific claim to survive defendants’ motions to dismiss, the plaintiffs were allowed to gather evidence as to how the schools were determining whether applicants were “illegal,” “undocumented,” or otherwise not “lawfully present,” as directed by the Virginia Attorney General’s memorandum. Yet the court never reached the merits on this issue. At the summary judgment phase, in the subsequent Equal Access Education decision ("Equal Access Education II"), the court held that none of the plaintiffs had standing to pursue their claims, reversing its prior decision. In the process, the court did not opine on whether the Virginia schools were in fact using non-federal standards in determining the immigration status of applicants.

Some authors have misconstrued the court’s opinion as holding that the schools actually used federal standards, or that the policy did not in fact violate the Supremacy Clause. The court explicitly stated that it did not reach the merits on these issues, and that schools’ activities may very well violate the Supremacy Clause if the schools were using state-created

56. Id. at 607.
57. Id. at 604.
58. Id. at 608.
59. Id.
60. Id. at 603.
63. Id. at 672 (noting that “nothing in this memorandum opinion takes a position on the merits issues in this case”).
standards or were systematically misapplying federal standards.\textsuperscript{66}

In fact, the discovery process revealed that many Virginia schools were not using federal immigration standards—effectively creating their own standards—or were regularly misapplying federal standards, or both.\textsuperscript{67} For example, some schools misunderstood entire categories of immigration established under federal law; some classified certain applicants as "unlawfully present" even though the federal government would have reached the opposite conclusion; some school policies failed to identify a single federal standard to be used in determining the status of applicants; and most school employees making these determinations either received no training or woefully inadequate training.\textsuperscript{68}

The court itself acknowledged that "some defendants have made mistakes in determining an applicant's immigration status," even though the court’s opinion could not address whether those mistakes were systematic enough to constitute impermissible state-created standards.\textsuperscript{69} Nevertheless, in its final footnote, the court felt it was "worth noting that some defendants . . . have responded to plaintiffs' concerns about the potential for mistakes by sensibly instituting training for admissions officers and putting in place an appeal process for applicants who claim they have been misclassified as illegal aliens."\textsuperscript{70} This final footnote was a small consolation prize in an opinion that left an important factual issue unsettled—an issue courts have struggled with before and after \textit{Equal Access Education}.

III. FEDERAL STANDARDS IN TWO SEMINAL CASES

Of course, other courts have struggled to determine the precise role federal standards should play in the preemption analysis, and whether state and local actors should have any authority to determine someone's immigration status. For example, in \textit{DeCanas v. Bica}, a California statute levied fines between $200 and $500 for each incident in which an employer "knowingly" employed immigrants "not entitled to lawful residence in the United States."\textsuperscript{71} The statute provided no guidance on how employers should try to determine whether workers were entitled to "lawful residence in the United States."\textsuperscript{72} In implementing the statute,
the California Director of Industrial Relations passed regulations stating that:

An alien entitled to lawful residence shall mean any non-citizen of the United States who is in possession of a Form I-151, Alien Registration Receipt Card, or any other document issued by the United States Immigration and Naturalization Service which authorizes him to work.\textsuperscript{73}

However, neither the lower courts nor the U.S. Supreme Court passed judgment on the adequacy or constitutionality of these regulations.\textsuperscript{74} Nor did they address whether California could fairly expect employers to make these determinations, or the likelihood that employers would systemically and consistently misapply the federal standards cited in the regulations. The courts seemed to be satisfied that the California regulations simply required employers to use federal standards.

In \textit{League of United Latin American Citizens v. Wilson} ("\textit{LULAC I}"),\textsuperscript{75} the district court thoroughly analyzed how federal immigration standards should be used by state and local agents. In \textit{LULAC I}, the court assessed whether federal immigration law preempted California's Proposition 187, a comprehensive voter initiative passed in 1994 that limited undocumented immigrants' access to public benefits and services.\textsuperscript{76} As described by the court, Proposition 187 required state agents

\begin{quote}
To question all arrestees, applicants for medical and social services, students, and parents of students about their immigration status; to obtain and examine documents relating to the immigration status of such persons; to identify "suspected" "illegal" immigrants present in California; to report suspected "illegal" immigrants to state and federal authorities; and to instruct people suspected of being in the United States illegally to obtain "legal status" or "leave the country."
\end{quote}

Thus, Proposition 187 called on state agents to independently judge who may receive state benefits, who must be reported to the authorities, and who may lawfully remain in the United States.\textsuperscript{78} The court found a limited, carefully circumscribed role for state agents to determine who may receive government benefits, but struck down the other provisions.\textsuperscript{79}

In assessing the constitutionality of these separate requirements, the court distinguished "determining" immigration status from merely "verifying" immigration status, and further distinguished using federal standards from using independent or state-created standards.\textsuperscript{80} First, the

\begin{footnotes}
\item[73] \textit{Id.} at 364 (citing \textsc{Cal. Code Regs.} tit. 8, § 16209).
\item[74] \textit{DeCanas}, 424 U.S. at 364–65.
\item[76] \textit{Id.} at 764–65.
\item[77] \textit{Id.} at 769.
\item[78] \textit{Id.} at 769–70.
\item[79] \textit{Id.} at 770–71.
\item[80] \textit{Id.}
\end{footnotes}
court clarified that state agents are often authorized to verify immigration status when reviewing applications for federal and/or state benefits such as Medicaid, Aid to Families with Dependent Children ("AFDC"), and Food Stamps. In such cases, state agents can verify immigration status by accessing federal databases such as SAVE—the Systematic Alien Verification for Entitlements program. These joint federal-state programs allow state agents to "perform a ministerial rather than a discretionary function in verifying immigration status." As the court noted, verifying immigration status by referring to federal databases is much different than making independent judgments of who is lawfully present in the United States. The court emphasized that because state agents are untrained and unauthorized to make these determinations, such policies risk that "inconsistent and inaccurate judgments will be made." Of course, this analysis begs the question of whether state agents can ever appropriately determine a person's immigration status by referring to federal standards without relying on a separate, authoritative federal determination of status. If granted any discretion to interpret and apply federal standards, can we trust state agents to faithfully apply these standards? Given the complexity of these determinations, there is a high likelihood that any program requiring state agents to apply federal immigration standards would be rife with errors. Nevertheless, the court in LULAC I upheld several of the benefits denial provisions in Proposition 187 under the DeCanas tests because state regulations implementing the new law "could" require agents to rely on federal determinations and "could" deny state agents the discretion to use non-federal standards.

Likewise, the court in Equal Access Education put faith in the ability of state agents to apply federal immigration standards so long as Virginia's formal policy directed them to do so. Professor Benson has been one of the few authors to appreciate the irony of the court's holding. She notes that "several pages of the opinion are devoted to deciphering exactly what [Marroquin's] status was under federal law," and that "[i]n spite of the obvious challenges the court itself faced in determining status based on federal standards, and the strong possibility of error, the court held that states are entrusted with the power of determining who is illegal based upon federal standards." In fact, Marroquin's own attorneys and immigration experts had difficulty ascertaining his true immigration sta-

81. Id. at 770.
83. LULAC I, 908 F. Supp. at 770.
84. Id.
85. Id.
86. Id. at 770–71, 787.
89. Id. at 733–34.
Moreover, as an epilogue to the court’s decision that Marroquin was not “lawfully present,” a spokesman for U.S. Citizenship and Immigration Services told the Washington Post that the federal government considers someone with Marroquin’s work permit to be lawfully present in the United States.91

If a federal judge (and admittedly, several lawyers and immigration experts) struggled to ascertain the status of just one immigrant, how can we expect state agents—or more acutely, private employers or landlords—to ascertain the immigration status of dozens, or even hundreds, of immigrants? In Equal Access Education II, the court did acknowledge that the Virginia policy may be preempted by federal law if the schools misapplied federal standards “in a systemic and pervasive manner.”92 The court recognized that a school would effectively be using state-created standards if it made frequent and systematic errors in applying federal standards.93

In the aftermath of Equal Access Education II, some schools changed their admissions policies despite the court ultimately dismissing the case for lack of standing. For example, George Mason University decided not to condition either admission or enrollment on immigration status because of the difficulties in making immigration determinations.94 George Mason’s Dean of Admissions stated that, “[t]he idea that universities would need to develop expertise in the very complex area of immigration law is both problematic and probably unrealistic.”95 He explained that determining whether applicants were lawfully present did not fit school officials’ roles as educators.96

Nevertheless, the Virginia Attorney General’s 2002 Immigration Law Compliance Update Memorandum remains available on the web site of the Virginia State Council for Higher Education,97 despite the high likelihood that at least some schools are systematically misapplying federal immigration standards. These 2004 opinions by the Eastern District of Virginia foreshadowed the legal and practical difficulties raised by the recent wave of local immigration-related ordinances—particularly the question of whether local ordinances can avoid preemption simply by citing to federal immigration standards.

90. Equal Access Educ., 325 F. Supp. 2d at 662. As counsel for Marroquin, we discovered during the litigation that Marroquin, as a minor, was the derivative beneficiary of his father’s pending asylum application, which changed our earlier position that he was not lawfully present in the United States.
91. Argetsinger, supra note 24.
93. Id. at 660.
94. Argetsinger, supra note 24.
95. Id.
96. Id.
97. See Virginia Attorney General Memorandum, supra note 11, at 1.
IV. FEDERAL STANDARDS AND THE RECENT LOCAL GOVERNMENT ORDINANCES

With the growing perception that the federal government is unable and perhaps unwilling to crack down on illegal immigration, and with Congress deadlocked on immigration reform, state and local governments are entering the fray in unprecedented numbers. For example, the National Conference of State Legislatures reports that states proposed at least 1,404 separate pieces of immigration-related legislation in the first half of 2007, with 182 bills passing in 43 states—more than double the number of laws enacted in all of 2006. More strikingly, these numbers do not include the recent wave of local ordinances, such as those passed in Hazleton, Pennsylvania; Riverside, New Jersey; and Farmers Branch, Texas. These three ordinances have recently taken their turns in court where, again, the parties have struggled with the proper role, if any, state and local actors should play in immigration and whether the use of federal standards effectively saves sub-federal laws from preemption.

One of the earliest efforts came in July 2006, when the city of Hazleton, Pennsylvania, passed the Illegal Immigration Relief Act Ordinance, prohibiting businesses from hiring or contracting with "illegal aliens," and fining landlords $1,000 for renting to an "illegal alien." In August and September 2006, the city passed additional ordinances further outlining and expanding the prohibitions.

The initial ordinance targeted "illegal aliens," defining the term as "any person whose initial entry into the United States was illegal and whose current status is also illegal as well as any person who, after entering legally, has failed to leave the United States upon the expiration of his or her visa." The ordinance did not cite any federal laws or regulations to define "illegal alien," nor did it describe how employers and landlords should determine who is an "illegal alien." Before the ordinance passed in July 2006, Hazleton received a legal opinion from attorneys with the Congressional Research Service, a federal agency within the U.S. Library of Congress, that the ordinance might be preempted by federal law because it refers to "illegal aliens," even though federal law does not define
or even use this term.\textsuperscript{102}

Hazleton revised its definition of "illegal alien" in the September 2006 version of the ordinance, stating that an "illegal alien" is an "alien who is not 'lawfully present' in the United States according to" the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101.\textsuperscript{103} The amended ordinance further declared that the city could not conclude that a person is an "illegal alien" unless a city representative verified with the federal government under 8 U.S.C. § 1373(c) that the person is not "lawfully present."\textsuperscript{104} The updated ordinance also referred to federal statutes in defining "unlawful worker."\textsuperscript{105} Thus, Hazleton tried to amend the ordinance to rely both on federal standards and on federal determinations of immigration status.

In August 2006, the American Civil Liberties Union ("ACLU") and the Puerto Rican Legal Defense and Education Fund filed suit on behalf of several plaintiffs in federal district court in the Middle District of Pennsylvania.\textsuperscript{106} In October 2006, the court granted a temporary restraining order enjoining Hazleton from enforcing the ordinance pending the legal challenge.\textsuperscript{107} A year later, in Lozano v. City of Hazleton, the court found that the ordinance’s employment provisions conflicted with specific federal laws.\textsuperscript{108} More strikingly, the court held that federal law also preempted the rental provisions because they not only conflicted with federal law in classifying and regulating certain classes of immigrants, but because only the federal government, through formal removal hearings, can conclusively determine whether someone is entitled to remain in the United States.\textsuperscript{109}

On the latter issue, the court listed all the valid federal immigration statuses that would trigger sanctions under the Hazleton ordinance.\textsuperscript{110} For example, the ordinance would have denied housing to asylum applicants, aliens who had filed for adjustments of status or suspensions of deportation, parolees, and aliens granted "deferred action"—all of whom the federal government allows to work (and presumably live) in the United States.\textsuperscript{111}

More importantly, the court found that Hazleton’s requirement that city employees examine immigration documents and determine whether immigrants are lawfully present in the United States conflicted with fed-

\begin{footnotes}
\item[103.] Hazleton, Pa., Ordinance 2006-18, supra note 100, § 3D.
\item[104.] Id.
\item[105.] Id. § 3E.
\item[106.] Complaint at 1, Lozano v. City of Hazleton, 496 F. Supp. 2d 477 (M.D. Pa. 2007) (No. 06CV01586), 2006 WL 4385736.
\item[108.] Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 527-29 (M.D. Pa. 2007).
\item[109.] Id. at 531–33.
\item[110.] Id. at 531.
\item[111.] Id.
\end{footnotes}
eral law, because only the federal government can determine conclusively who may remain in the United States under carefully prescribed formal procedures set forth in federal statutes and regulations.112 In the court’s view, proceedings before immigration law judges are the “sole and exclusive procedure” for determining whether an alien may be admitted to or removed from the United States.113 The court found that simply relying on either the SAVE database or a federal employment verification pilot program would not suffice to establish definitively which individuals the federal government would seek to remove from the country.114 Quoting Justice Blackmun’s concurrence in *Plyler v. Doe*, the court acknowledged that “the structure of the immigration statuses makes it impossible for the State to determine which aliens are entitled to [lawful] residence, and which eventually will be deported.”115 The court also quoted Justice Powell’s concurrence that “[u]ntil an undocumented alien is ordered deported by the Federal government, no State can be assured that the alien will not be found to have a federal permission to reside in the country.”116 In so holding, the court reached a much different conclusion than the court in *Equal Access Education* regarding whether—as a legal or practical matter—state and local actors can independently determine a person’s immigration status simply by referring to federal standards.117

Just twelve days after Hazleton passed its ordinance, Riverside, New Jersey, passed a substantially similar ordinance entitled “Riverside Township Illegal Immigration Relief Act.”118 Like Hazleton’s ordinance, Riverside’s version banned employers and renters from doing business with “illegal aliens,” threatening to suspend the licenses of business owners for at least five years, and threatening to fine landlords $1,000 for each violation.119 Also, like the initial Hazleton ordinance, Riverside’s ordinance provided no guidance to employers and landlords on how to identify “illegal aliens.”120 But unlike Hazleton’s ordinance, Riverside’s version did not even attempt to define “illegal alien.”121 Riverside initially amended the ordinance, but again failed to elaborate what it meant by the term “illegal alien.”122 Finally, a third version of the ordinance adopted Hazleton’s definition of “illegal alien,” citing to the INA and conditioning local enforcement on verifying immigration status with federal authorities.

112. *Id.* at 533 (citing 8 U.S.C. § 1229a(a)(1) (2000) (“An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien.”)).
113. *Id.* (citing 8 U.S.C. § 1229a(a)(3)).
114. *Id.* at 532.
115. *Id.* (citing *Plyler v. Doe*, 457 U.S. 202, 236 (1982)).
116. *Id.* (citing *Plyler*, 457 U.S. at 241 n.6).
119. *Id.*
120. *Id.*
121. *Id.*
under 8 U.S.C. § 1373(c).  

The final version of the Riverside ordinance resembled the later versions of the Hazleton ordinance, making it similarly vulnerable to attack on federal preemption grounds. In August 2006, a church and several Latino clergy challenged the constitutionality of the ordinance in federal district court in the District of New Jersey. In October 2006, a coalition of Riverside businesses, landlords, and residents sued the township in state court. After several months of briefing, Riverside Township repealed the ordinance, citing its escalating legal expenses and the adverse ruling in *Lozano v. City of Hazleton*.  

The third ordinance to draw national publicity was passed in Farmers Branch, Texas. In November 2006, the Farmers Branch City Council passed Ordinance 2892, prohibiting property owners and managers from renting to “noncitizens.” Violations were punishable as misdemeanors and subject to a $500 fine per day. Unlike the Hazleton and Riverside ordinances, the Farmers Branch ordinance did not refer at all to “illegal aliens.” Instead, it targeted “noncitizens,” defining the term as anyone who is not a “citizen” or a “national” of the United States.  

The Farmers Branch ordinance required property owners and managers to gather and review “evidence of citizenship or eligible immigration status” from prospective renters before entering into rental or lease agreements. To prove citizenship or “eligible immigration status,” the ordinance required prospective renters to provide documents that would be acceptable to prove “citizenship status” to U.S. Immigration and Customs Enforcement (“ICE”). This ostensibly simple citation to federal standards—with Farmers Branch vowing to accept immigration documentation that is acceptable to ICE—was nonetheless muddled by text in the preamble explaining that immigration determinations under the ordinance were meant to be consistent with regulations used by the U.S. Department of Housing and Urban Development (“HUD”) to determine who is eligible for federally subsidized housing. Like the Hazleton and...
Riverside ordinances, the Farmers Branch ordinance was strategically revised during litigation, but the amended version continued to cite to both ICE and HUD standards.\textsuperscript{133}

In December 2006 and January 2007, four different lawsuits challenging the ordinance were filed against the City of Farmers Branch—three in federal court and one in state court.\textsuperscript{134} The three federal suits were consolidated before Judge Lindsay in the Northern District of Texas, who granted a temporary restraining order in May 2007 after voters had overwhelmingly approved the final amended version of the ordinance.\textsuperscript{135} In June 2007, in \textit{Villas at Parkside Partners v. City of Farmers Branch}, the federal court granted plaintiffs' preliminary injunction enjoining Farmers Branch from enforcing the ordinance.\textsuperscript{136}

The court scrutinized the ordinance under the familiar three test in \textit{DeCanas}, but found it necessary to apply only the first test, asking whether the ordinance was an impermissible "regulation of immigration."\textsuperscript{137} In applying this test, the court cited \textit{Equal Access Education I} for the proposition that states must simply adopt federal standards to avoid preemption.\textsuperscript{138} Nevertheless, the court held that the Farmers Branch ordinance was preempted because it relied on the wrong federal standards.\textsuperscript{139} The ordinance adopted HUD regulations for determining which noncitizens are eligible for federally subsidized housing.\textsuperscript{140} Of course, as the court recognized, these HUD regulations "simply determine which noncitizens are eligible for federal housing subsidies"; they "do not determine whether a person is legally or illegally in the United States."\textsuperscript{141} Indeed, the HUD regulations prohibit certain individuals who are otherwise lawfully present in the United States from receiving federal housing assistance.\textsuperscript{142} For example, HUD regulations prohibit temporary alien visitors, tourists, diplomats, and students from receiving federally subsidized housing.\textsuperscript{143} By bootstrapping the ordinance to HUD regulations, the ordinance effectively prohibited groups of "legal noncitizens" from

\begin{footnotes}
\item 133. Farmers Branch, Tex., Ordinance 2903 (Jan. 8, 2007), \textit{available at} \url{http://www.ci.farmers-branch.tx.us/Communication/Proposed%20Ordinance%202903.doc}.
\item 134. The three federal cases were \textit{Villas at Parkside Partners v. City of Farmers Branch}, No. 3:06-CV-02371 (N.D. Tex. filed Dec. 22, 2006); \textit{Vasquez v. City of Farmers Branch}, No. 3:06-CV-2376 (N.D. Tex. filed Dec. 26, 2006); and \textit{Barrietos v. City of Farmers Branch}, No. 3:07-CV-00061-G (N.D. Tex. filed Jan. 11, 2007). The state case was filed as \textit{Ramos v. City of Farmers Branch}, No. 06-12227 (116th Dist. Ct., Dallas County, Tex. filed Dec. 4, 2006).
\item 137. \textit{Id.} at 764–72.
\item 138. \textit{Id.} at 766.
\item 139. \textit{Id.} at 768–72.
\item 140. Farmers Branch, Tex., Ordinance No. 2892 (Jan. 8, 2007), \textit{supra} note 127 (citing HUD regulations at 24 C.F.R. §§ 5.500–528 (1996)).
\item 141. \textit{Villas at Parkside Partners}, 496 F. Supp. 2d at 768.
\item 142. \textit{Id.} (citing 42 U.S.C. § 1436a(a)(1) (2000)).
\item 143. \textit{Id.}
renting apartments in Farmers Branch. As the court noted, "a landlord who rents to certain noncitizens who are legally in the country temporarily, such as students, would be subject to criminal sanctions." The court found this scheme to be inconsistent with federal immigration standards, and thus preempted it as an attempt to "regulate immigration" under the first DeCanas test.

The court also took exception to the provisions requiring property owners and managers to collect and review documents in order to verify the citizenship or immigration status for each prospective renter. Citing LULAC I, the court found that these requirements burdened private citizens, particularly because the ordinance required them to use non-federal standards.

V. ARE FEDERAL STANDARDS ENOUGH TO AVOID PREEMPTION?

Can state and local immigration-related laws avoid federal preemption simply by using federal immigration standards? And what does it mean to use federal standards? Is this merely a requirement that the state statute or local ordinance explicitly refer to or cite federal standards? Or does it require courts to determine the likelihood that state or local actors will systematically misapply federal standards? Should courts presume, before a law is enacted, that state and local actors are qualified to faithfully apply the complex web of federal immigration statutes, regulations, and guidelines? Or should courts presume the opposite?

In *Equal Access Education*, the court suggested that Virginia’s policy would be constitutional if the schools simply relied on "federal standards." However, in dicta, the court tied this analysis to the second-order question of whether the schools made so many mistakes in applying federal standards that they effectively used their own, state-created standards. In *DeCanas*, the Supreme Court seemed satisfied that the California regulations cited to federal immigration standards, but the Court did not scrutinize whether employers would systematically misapply these standards. In *LULAC I*, the court distinguished verifying immigration status, such as through a federal database like SAVE, from independently determining immigration status, precisely because of the high likelihood that determinations by state agents would be inconsistent and inaccurate.

144. Id. at 769.
145. Id.
146. Id.
147. Id. at 770–72.
148. Id.
150. Id.
The recent local ordinance cases in Pennsylvania, New Jersey, and Texas spotlight the legal and practical difficulties of simply referring to federal immigration standards and entrusting these determinations to state and local actors. In Farmers Branch, the court struck down the rental ordinance because it cited to the wrong federal standards and objected to the burden it placed on property owners and managers to ascertain the immigration status of rental applicants.

Yet the strongest rebuke came from the court in Lozano v. City of Hazleton, which invalidated the ordinance not only because it conflicted with federal standards, but because it found that only the federal government, through formal removal hearings, can conclusively determine whether someone is entitled to remain in the United States. Citing Plyler v. Doe, the Lozano court found that simply relying on federal databases would not establish definitively which individuals the federal government would seek to remove from the country. Thus, according to the Lozano court, federal law leaves virtually no room for state and local actors to determine a person's immigration status, even if the state or local law instructs them to rely on federal standards (or even federal databases).

Hector Villagra also argues persuasively that simply using federal standards does not rescue a state or local law from conflicting with and thus being preempted by federal immigration law. Villagra argues that the court in Equal Access Education misapplied the first DeCanas test by asking whether the state had adopted federal standards, rather than asking whether the state scheme had a direct and substantial impact on immigration. Thus, Villagra observes, "a state cannot gain the power to engage in regulation of immigration simply by incorporating federal standards." Even state and local laws that rely on federal standards would be preempted under the Supremacy Clause if the laws "impermissibly delegated to state and local employees the discretion to make independent judgments about the application of federal immigration law."

Echoing the distinction made by the court in LULAC I, and by the plaintiffs in Equal Access Education, Villagra also distinguishes between verifying eligibility for state benefits and verifying immigration sta-

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154. Id. at 770-72.
156. Id. at 532.
157. See id.
159. Id. at 315 n.103 (citing DeCanas v. Bica, 424 U.S. 351, 355 (1976)).
160. Id. at 315 n.103.
161. Id. at 315.
Benefit programs frequently require state and local government personnel to determine whether applicants are eligible for state benefits by asking if they possess an immigration status that qualifies for benefits under federal law. If an applicant cannot show an immigration status that qualifies for benefits, state and local personnel make no further inquiry. As Villagra observes, "[t]here is no need to verify the applicant's actual (as opposed to proffered or claimed) immigration status." Verifying proof of eligibility is thus significantly different from verifying immigration status, which requires ascertaining the applicant's actual immigration status.

In Virginia, the Attorney General asked admissions officers and other personnel at public colleges and universities to ascertain whether applicants were lawfully present in the United States, not merely whether applicants were eligible for enrollment according to federal immigration law. Yet, as Professor Benson notes, even if the Virginia Attorney General did require schools to use specific federal laws and standards, it is unrealistic to expect admissions officers to determine the immigration status of applicants without making significant errors. Moreover, asking school employees to report students to federal authorities only raises the magnitude of these errors.

As Professor Benson notes, "[t]he terms temporary protected status, refugee, asylum applicant, F-1, G-4, J-2, deferred action, and parolee are just a handful of labels for the varied categories in our immigration laws." Thus, state and local attempts to place the burden of determining immigration status on state agents, local landlords, or employers fail to grasp the complexities of our immigration system. Perhaps this harsh reality is the most persuasive policy reason that federal law should occupy the entire field of determining immigration status. As Professor Olivas notes, "shifting immigration enforcement powers to sub-federal levels will more likely lead to weaker federal enforcement." As Olivas notes, and as I have argued in this Article, "it is bad policy and will lead to bad

164. For example, only certain classes of immigrants are eligible for state Medicaid benefits. See 42 U.S.C. § 1320b-7(b)(2) (1999). In general, an applicant must be a "qualified" alien, a nonimmigrant under the Immigration and Naturalization Act, or an alien paroled into the United States. 8 U.S.C. § 1621 (1998).
165. Villagra, supra note 158, at 314.
166. Id.
167. Id.
168. See Virginia Attorney General Memorandum, supra note 11, at 11.
170. Id. at 734 (internal citations omitted).
171. Mr. Villagra argues this point with regard to Arizona’s Proposition 200, a comprehensive initiative approved in 2004 by Arizona voters to address the perceived problems with immigration. Villagra, supra note 158, at 315.
172. Olivas, supra note 4, at 35.
VI. CONCLUSION

In the tug-of-war between federal and sub-federal laws that touch immigration, local governments have recently tugged with great force, driven by their palpable frustration with the federal government's failure to regulate effectively. But federal courts have tugged back with equal muscle, striking down local ordinances that either butchered federal standards or delegated responsibility to local actors to make determinations of immigration status. These recent cases have cited the Virginia public colleges case for the lesson that state or local laws that touch immigration must rely on federal standards to avoid preemption.

Yet another important lesson from the Virginia case was that states effectively would be using non-federal immigration standards if they systematically misapplied federal standards. The court in Lozano v. City of Hazleton grasped this concept, holding that only federal immigration judges can conclusively determine who is lawfully present. These cases teach that if there is a place for state and local governments in the legal tug-of-war over immigration, it is in verifying eligibility for state or local benefits. State or local actors should not be relied upon to make independent, discretionary determinations of immigration status, even if they are directed to use federal standards.

173. Id.