

NATIONAL ISSUES, LOCAL COSTS:  
THE TREND TOWARD STATE AND LOCAL CONTROL OF IMMIGRATION

by

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## Introduction

In 2006, an estimated 11 million to 12 million illegal immigrants were believed to be living in the United States,<sup>1</sup> an increase of approximately 3 million since 2000.<sup>2</sup> This trend has prompted the federal government to explore new methods of tougher enforcement, such as adding 670 more miles to the border fence between the United States and Mexico.<sup>3</sup> However, Congress has been unable to pass legislation which would address the root problem, the need for immigration reform. Political and philosophical differences have led to a stalemate in any progress toward resolving the complex issues associated with dramatic increases in numbers of illegal aliens. The states, which have borne much of the costs associated with illegal immigration, have become frustrated with Federal inaction and have begun to take matters into their own hands.

While it is clear that state law enforcement agents have authority to enforce federal laws<sup>4</sup>, some attempts by states to control immigration through state laws have been struck down on the basis of the Supremacy Clause and the Equal Protection Clause.<sup>5</sup> However, in response to increasing numbers of undocumented immigrants and the seeming inability of the federal government to enforce federal immigration laws, an increasing number of states have undertaken the task of regulating immigration by adopting laws which address numerous issues related to employment, public benefits, health, education, and other areas of concern.<sup>6</sup> This paper will discuss some of the effects of illegal immigration, its impact on local communities, and states' attempts to control employment of undocumented workers. Finally, it will advocate federal legislation that would address immigration issues and pre-empt state efforts to regulate in this area.

## Recent Events

A review of recent events illustrates the widespread nature of states' efforts to regulate immigration. In 2006, Colorado's Supreme Court struck down a law which called for a voter initiative to approve a measure which would prevent "non-emergency" social services to illegal immigrants because the measure mixed the issues of benefits and taxation.<sup>7</sup> In a special session following this decision, the Colorado legislature approved a new bill to prohibit illegal immigrants from receiving non-emergency state services, and a separate bill which would force employers to confirm that their employees are authorized to work in the U.S.<sup>8</sup> Under this bill, employers who intentionally employ illegal employees would be denied tax benefits.<sup>9</sup>

In a similar move, Georgia lawmakers passed the Georgia Security & Immigration Compliance Act on April 17, 2006,<sup>10</sup> which requires adults to provide evidence of legal status if they are seeking U.S. benefits. The Act authorizing employers and companies with state contracts to examine the legality of their employees' immigration status<sup>11</sup> or risk having their state income tax deductions denied.<sup>12</sup> Under the same law, Georgia police are mandated to inspect the legal status of people they arrest.<sup>13</sup>

Many other states have enacted legislation dealing with a variety of issues with respect to illegal immigrants. For example, Arizona and Illinois require U.S. citizenship or legal immigrant classification to receive health benefits,<sup>14</sup> Wyoming will not provide state scholarships to non-citizens,<sup>15</sup> and a bill that would have created a College Assistance Migrant Program at New Mexico State University was vetoed by the governor.<sup>16</sup> Tennessee prohibits companies from state contracts for a year if they hired non-citizens.<sup>17</sup> Louisiana allows state agencies to review hiring policies of contractors suspected of hiring illegal immigrants, permits the reviewing agency to terminate the employment of undocumented workers, and to fine employers not willing to comply.<sup>18</sup> Pennsylvania bans illegal aliens from grants or loans financed by the states.

Not all state and local immigration laws are as detrimental to immigrants. For example, California passed Proposition 187 which would prevent social services for immigrants in 1994 before it was ruled unconstitutional in 1997.<sup>19</sup> Recently California approved legislation to extend benefits to immigrant workers, including housing and income benefits.<sup>20</sup> Evanston, Illinois, became one of the municipalities to consider what have come to be known as "sanctuary laws." A draft resolution approved by the City Council on January 4, 2008, would prohibit city employees and police from inquiring into a person's immigration status, "unless it is required by a law or deemed integral to a police investigation."<sup>21</sup>

A more detailed discussion of local immigration initiatives is found in a subsequent section of this paper.

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## **The Failure of Immigration Reform 2007**

The Comprehensive Immigration Reform Act of 2007<sup>22</sup> called for the legalization of all illegal immigrants currently in the country, a guest worker program with special provisions provided to farm workers, tighter border enforcement, and a new verification system for all U.S. employers and workers.<sup>23</sup> After extensive debate, it failed to pass, as had numerous earlier reform attempts. Jeff Sessions, senator from Alabama said that those supporting the bill were simply “trying to work a compromise to pass something” and urged members to instead pass legislation that “will work” in their next attempt.<sup>24</sup> President Bush expressed disappointment that Congress was not able to address the American people’s concern over ineffective immigration laws when he stated “A lot of us worked hard to see if we couldn’t find a common ground – it didn’t work.”<sup>25</sup>

Congress was unable to agree on what provisions would make the Comprehensive Immigration Reform Act of 2007 an appropriate law.<sup>26</sup> Many illegal immigrants die in their efforts to cross the border, which makes enforcement a humanitarian as well as economic concern.<sup>27</sup> According to Senator David Vitter of Louisiana, the American people are asking for enforcement results, not promises.<sup>28</sup> Thus, one of the conflicts that must be resolved is the drafting of a law that is both humane and enforceable.

One reason for the bill’s failure was the influence Nativists and other groups exerted on the Congressional leaders. Approximately 300 anti-immigration groups have surfaced since 2005, with the Ku Klux Klan being one of the most notorious.<sup>29</sup> Another group, called the Federation for American Immigration Reform (FAIR), provided more than 30 testimonials to Congress since 2000. Many of these groups used a variety of resources over several days before bill was voted on to emphasize the threat of terror and risk, potentially influencing the decisions of those voting.<sup>30</sup>

Nativist groups are not the only groups that attempted to influence the outcome of the Act. On April 17, 2007, representatives from 20 major organizations were present on Capitol Hill to support the Strive Act, which was a component of the Comprehensive Immigration Reform Act. One of these groups, the Coalition for Comprehensive Immigration Reform, acts as a national umbrella for 333 groups. It supported the bill because of the potential benefits it would bring, even though it disagreed with the guest worker provisions.<sup>31</sup> Labor unions opposed the measure because they believed that immigration reform would cut wages and opportunities for Americans.<sup>32</sup> The National Urban League, a civil rights organization, opposed the Comprehensive Immigration Reform Act of 2007, stating that any new temporary worker visa should be coupled with a requirement that black, white, Hispanic, Asian, or Native American workers have the highest priority to be selected for employment.<sup>33</sup>

The political climate played a key role in the failure of the Comprehensive Immigration Reform Act of 2007. President Bush lost support from members of the Republican Party and Democrats no longer were willing to negotiate with them.<sup>34</sup> While President Bush chastised members of his own party for failure to support immigration reform, conservative Senators proposed a series of amendments which led to key parts of the bill being toughened. Republican Senator Lindsey Graham of South Carolina stated “[t]he American people have a low opinion of us because we can’t seem to do the things that we need to do because we’re too worried about us and not them.”<sup>35</sup>

Perhaps the biggest reason for the bill’s failure was an amnesty provision, which called for the legalization of immigrants who entered illegally and are currently living in the United States. Dianne Feinstein and Barbara Boxer, both Democratic Senators from California, were divided on the issue. Feinstein stated, “[w]hat we have in America is in effect an amnesty. We certainly can’t pick up 12 million people, and we certainly can’t deport 12 million people.”<sup>36</sup> Boxer believed the Act would have led to “a permanent pool of insecure, low-paid workers whom [she believed would] never leave the country, even though they are supposed to...”, a situation which could lead to exploitation of these immigrants.<sup>37</sup>

California Republican Congressman and chairman of the House Immigration Reform Caucus Brian Bilbray said that the Department of Homeland Security is unable to secure the border, while T.J. Bonner, president of the National Border Patrol Council states “...our elected representatives [are] once again waiving the white flag on the issues of illegal immigration and border security.”<sup>38</sup> Eventually, a majority of the Senate would not agree to vote on the Bill, ensuring its failure.<sup>39</sup>

## **New Employee Verification Act of 2008 (H.R. 5515)**

New legislation introduced on February 28, 2008, would amend the Immigration and Nationality Act (INA) to require employers to verify the identity and work eligibility of all new employees by using a new electronic verification system, which would be coordinated through the Social Security Administration. The bill contains antidiscrimination provisions which would make it an unfair immigration-related employment practice “to terminate or undertake any adverse employment action due to an initial disapproval” or “to use the verification system for screening of an applicant prior to an offer of employment.”<sup>40</sup>

Susan Meisinger, President and CEO of Society for Human Resource Management (SHRM), says that “[i]t is time to go beyond E-Verify and to provide employers the option of enrolling in a more secure system. That is why we have endorsed the New Employee Verification Act (NEVA) as it offers a far superior alternative.”<sup>41</sup>

Critics are concerned, though, that if this Act passes it could have the effect of driving undocumented workers underground, and that it “could cost the government an estimated \$770 million a year in lost tax revenues.”<sup>42</sup> It could also give unscrupulous employers leverage to keep undocumented workers from complaining about wages and working conditions, and make them more vulnerable to exploitation.<sup>43</sup>

## **Economic Impact of Immigration**

The primary reason that illegal immigration is the topic of nationwide debate is the growth in the Hispanic segment of the population in recent years. According to the Pew Hispanic Center, a national research group, the Hispanic segment of the population grew by 9,094,495, between 2000 and 2006, a 25.8% increase.<sup>44</sup> Hispanics who were foreign born comprised an estimated 39.1% of this growth, while native born Hispanics made up the remaining 60.9%.<sup>45</sup>

Hispanics comprised a significant portion of the workforce in several job categories in 2006. An analysis of the occupations of Hispanics in the United States shows that 60.4% of those who are foreign born worked in one of five of the following occupation groups: construction trades (16.3%), production (13.0%), building and grounds cleaning and maintenance (12.5%), food preparation and serving (9.5%), and transportation and material moving (9.1%). By comparison, only 35.4% of native born Hispanics hold jobs in these five categories.<sup>46</sup> Agriculture, an industry which has historically relied on migrant workers for labor supply, employed a lower percentage of the total number of Hispanic workers; however, 41.8% of persons working in farming, fishing, and forestry in 2006 were Hispanic.<sup>47</sup>

By 2050, “[t]he Latino population, already the nation’s largest minority group, will . . . account for most of the nation’s population growth from 2005 to 2050. Hispanics will make up 29% of the U.S. population in 2050, compared with 14% in 2005.”<sup>48</sup>

Undocumented immigrants play an important role in the national, state, and local economies in the United States. Illegal workers pay taxes in the form of sales, property and payroll taxes, including Social Security, Medicare, and unemployment withholding.<sup>49</sup> A recent study shows that immigrants have contributed about \$30 billion a year to the U.S. economy.<sup>50</sup> Depending on the state, they may also have a positive impact on state and local economies. In the state of Oregon in 2007, for example, \$134 to \$187 million was paid by undocumented workers in the form of income and property tax. Additionally, the employers of these undocumented workers paid \$97 to \$136 million in taxes.<sup>51</sup> During the same year, undocumented workers in Iowa paid \$40 to \$62 million in state taxes and \$50 to \$77.8 million into Social Security and Medicare.<sup>52</sup> Interestingly, a 2007 survey conducted by Pew Hispanic Center found that 75% of Hispanics feel that illegal immigration helps the U.S. economy.<sup>53</sup>

A 2007 report issued by the American Immigration Law Foundation stated that immigrants increase the U.S. GDP by about \$37 billion each year due to providing employment opportunities.<sup>54</sup> Illegal immigrants fill positions that are less desired, most commonly because of other workers finding higher paying jobs,<sup>55</sup> with some industries being more dependent on their availability than others. For example, it is estimated that 70% of the agricultural workers in the country are undocumented workers; their hard work is essential to the functioning of this industry.<sup>56</sup> Some employers intentionally hire illegal immigrants with the intention of avoiding higher wages, benefits, and taxes, which can decrease the costs associated with their products or services.<sup>57</sup>

Illegal immigration has numerous negative impacts at the state and local levels. Among these are the financial costs illegal immigrants may have on a state or local government through education, health care, and law enforcement. Not all state or local economies can offset these costs with the tax revenue they receive because undocumented workers generally have lower incomes and therefore pay fewer taxes.<sup>58</sup> For example, recent estimates show that “annual costs for unauthorized immigrants in Colorado were between \$217 million and \$225 for education, Medicaid, and corrections.”<sup>59</sup> For the same time period, estimated state and local taxes paid by unauthorized immigrants was estimated to be between \$159 and \$194 million.<sup>60</sup>

The federal government requires health providers that receive federal funding must provide a certain level of health services to all residents, regardless of immigration status or ability to pay. Because immigrants, “both authorized and unauthorized, are less likely than their native-born counterparts to have health insurance,”<sup>61</sup> this can create an economic drain, which can lead to a state and local emergency. “[I]n 2000, county governments that share a border with Mexico incurred almost \$190 million in cost for providing uncompensated care to unauthorized immigrants [which] represented about one-quarter of all uncompensated health costs” during that year.<sup>62</sup>

According to a recent report from the Congressional Budget Office, “[e]ducation is the largest single expenditure in state and local budgets.”<sup>63</sup> Education has become one of the highest immigration-related costs since the *Plyler v. Doe*<sup>64</sup> ruling that children may not be excluded from public education due to immigration status. Steven A. Camarota, research director at the Center for Immigration Studies, estimates that educating illegal aliens costs about \$15 billion a year, with that figure doubling if the children then become involved in other school activities.<sup>65</sup>

According to census data released in 2006, approximately four percent of the overall school-age population was comprised of unauthorized immigrants.<sup>66</sup> These numbers increase the demand on public school budgets. For example, during the 2003-2004 school year, Minnesota spent an estimated \$79 to \$118 million educating 9,400-14,000 unauthorized

immigrant children; New Mexico spent an estimated \$67 million educating 9,200 unauthorized immigrant children during the same time period.<sup>67</sup>

The increased cost of law enforcement also imposes a large cost on state and local governments as they apprehend and detain illegal aliens until they are taken into custody by federal authorities or deported. In 1999, California, Arizona, New Mexico, and Texas spent a combined cost of \$108 million on law enforcement activities involving illegal immigrants.<sup>68</sup>

The increased number of illegal aliens and the impact this has had on state and local expenditures to provide social services, education, and jobs make the issue of immigration reform a topic of heated public debate. There are numerous laws, from federal to state to local, which attempt to regulate immigration. Some seem to be appropriate exercises of concurrent jurisdiction, while others appear to either exceed Constitutional authority or to conflict with laws of other jurisdictions.

## **Federal Laws**

### ***The Immigration and Nationality Act (INA)***

The Immigration and Nationality Act of 1952 (INA) is the primary federal law that regulates immigration status.<sup>69</sup> The INA has been amended numerous times since its original enactment, but still remains the primary source of immigration law.<sup>70</sup> One INA amendment, known as the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), specifically authorizes state and local law enforcement officials to arrest and detain a person who “(1) is an alien illegally present in the United States; and (2) has previously been convicted of a felony in the United States and deported or left the United States after such conviction. . . .”<sup>71</sup> The amendment limits this authority; however, by requiring the state or local law enforcement officials to “obtain appropriate confirmation from the Immigration and Naturalization Service of the status of such individual and only for such period of time as may be required for the Service to take the individual into Federal custody for purposes of deporting or removing the alien from the United States.”<sup>72</sup> It is assumed that, since the Immigration and Naturalization Service (INS) was dismantled and its functions merged into the Department of Homeland Security (DHS), the status of a detained person must now be confirmed through DHS.

### ***Immigration Reform and Control Act of 1986 (IRCA)***

The Immigration Reform and Control Act of 1986<sup>73</sup> made it unlawful for an employer to hire an undocumented worker and established a process for verifying the work eligibility of all employees. Any person “hiring, recruiting, or referring an individual for employment in the United States” must examine that individual’s documentation which establish “both employment authorization and identity” and which “reasonable appears on its face to be genuine.”<sup>74</sup> One of the goals of the IRCA was to reduce the number of illegal aliens in the United States workforce, but it proved ineffective. Some experts estimate that the number of illegal immigrants increased by 9 million between 1989 and 2006.<sup>75</sup>

According to one scholar, the main drawback of the IRCA “was that it did not include a secure worker identity or work authorization system, without which all other control measures were less effective and often counterproductive.”<sup>76</sup> One proposed solution was the introduction of the Basic Pilot Program, which is a voluntary internet-based employment verification system operated by U.S. Citizenship and Immigration Services (USCIS) in partnership with the Social Security Administration.<sup>77</sup> At this point, participation in the Basic Pilot Program, now known as E-Verify, remains voluntary for most employers.

### ***Immigration Act of 1990 (IMMACT 90)***

The Immigration Act of 1990<sup>78</sup> amended the INA to establish immigration priorities based on certain preference. “IMMACT 90 primarily reformed the rules pertaining to the *legal* entry of foreign nationals [and] augmented the regulations enacted by IRCA.”<sup>79</sup> The Act defines three categories of preference for the allocation of immigrant visas, with specified numerical limitations in each. The preference allocations are for family-sponsored immigrants<sup>80</sup>, for employment-based immigrants<sup>81</sup>, and a new category for diversity immigrants<sup>82</sup>. The most noticeable change of IMMACT 90 was the increase by approximately 35% in the numerical limitation system, or overall immigration allowed.<sup>83</sup>

The 1990 Act also established the U.S. Commission on Immigration Reform, later known as the Jordan Commission after its chair Barbara Jordan, to “assess how immigration affects our society, how immigration laws function, and how to assess the demographics of the immigrant population.”<sup>84</sup> In its report, the Commission stated the belief that the key to limiting illegal immigration lies in establishing a better employment eligibility system that was provided in IRCA. As a part of its findings, the commission recommended the

development and implementation of a simpler, more fraud-resistant system for verifying work authorization. The current system is doubly flawed: it is too susceptible to fraud, particularly through the counterfeiting of documents; and it can lead to increased discrimination against

foreign-looking or foreign-sounding authorized workers. In examining the options for improving verification, the Commission believes that the most promising option for secure, non-discriminatory verification is a computerized registry using data provided by the Social Security Administration [SSA] and the INS.<sup>85</sup>

## **Constitutional Authority for Local Control of Immigration**

### ***Authority of States to Enforce Federal Law***

“The foundation for state and local enforcement authority in the realm of immigration law is derived from a state’s inherent power, subject to federal preemption, to make arrests for violations of federal law.”<sup>86</sup> As a general rule, courts have found that there is no intent to preempt state enforcement authority unless the federal statute’s regulatory scheme is so pervasive that it implies exclusive federal authority. With regard to federal immigration laws, only the Ninth Circuit has held that such a regulatory scheme is evidenced in the Immigration and Naturalization Act. In *Gonzales v. Peoria*,<sup>87</sup> the Ninth Circuit distinguished states’ authority to enforce civil provisions of the INA from their authority to enforce criminal provisions. That court found that INA with respect to such civil issues as “authorized entry, length of stay, residence, status, and deportation, constitute[d] such a pervasive regulatory scheme, as would be consistent with the exclusive federal power over immigration.”<sup>88</sup> In contrast, the Court found that statutes relating to criminal activity by aliens are relatively simple in their terms, and “therefore [it] cannot be inferred that the federal government has occupied the field of criminal immigration enforcement.”<sup>89</sup> Following this reasoning, the Ninth Circuit held that state and local police authority to enforce immigration law is “limited to criminal violations.”<sup>90</sup>

In a Tenth Circuit case, a plaintiff challenged his arrest by a local police officer, Pratt, which was based upon the officer’s suspicion that the plaintiff was an illegal alien and not because he was committing a crime.<sup>91</sup> The plaintiff Alvarez moved to suppress evidence acquired after the arrest, alleging that the policeman had exceeded his authority under 8 U.S.C 1252c. The arrest did not meet the three conditions required by the statute, in that Pratt did not know that Alvarez had previously been convicted of a felony and deported. The Court, however, stated that “in the absence of express preemptive language, federal courts should be ‘reluctant to infer pre-emption.’”<sup>92</sup>

Until recently, the United States Department of Justice (DOJ) agreed with the Ninth Circuit’s interpretation. The DOJ issued an opinion in 1996 that the INA precluded state police from arresting aliens “on the basis of civil deportability”<sup>93</sup> but reversed itself in a memorandum dated April 3, 2002, concluding that states have authority to arrest aliens, subject to compliance with Fourth Amendment. The memorandum explains that the states’ authority in this realm is not based on delegated federal power but in the arrest authority under the states’ “status as sovereign entities.”

### ***Authority of States to Regulate Immigration***

The Supreme Court has consistently held that the “[p]ower to regulate immigration is unquestionably a federal power.”<sup>94</sup> As early as 1849, the Supreme Court was called upon to determine the extent to which a state may control or tax aliens entering into the United States.<sup>95</sup> Two cases, *Smith v. Turner* and *Norris v. Boston*, known together as “The Passenger Cases”,<sup>96</sup> were argued and decided collectively because of the similarity of facts and issues. The states of Massachusetts and New York imposed a per passenger taxes upon ships carrying immigrants, effectively giving the states the power to decide which persons could enter the United States and which would be turned away. The Court based its decision on the Commerce Clause, reasoning that if states have the power to tax passengers and other contents of ships, that the Constitution will have failed in one of its central purposes, to regulate commerce. “These provisions impose restrictions on the exercise of the commercial power, which was exclusively vested in Congress; and it is as binding on the States as any other exclusive power with which it is classed in the Constitution. ... Except to guard its citizens against diseases and paupers, the municipal power of a State cannot prohibit the introduction of foreigners brought to this country under the authority of Congress ... If this power to tax passengers from a foreign country belongs to a State, a tax, on the same principle, may be imposed on all persons coming into or passing through it from any other State of the Union.”<sup>97</sup>

Twenty-five years after the Passenger Cases decision, the state of California enacted a statute giving its Commissioner of Immigration the authority to determine whether or not an arriving passenger should be allowed to land. The Constitutionality of this statute was challenged by a Chinese immigrant who was held as a prisoner after the captain of the ship on which she had arrived refused to pay the Commissioner a bond for her. The U.S. Supreme Court based its decision on the federal government’s exclusive authority to deal with foreign nations rather than on the Commerce Clause, holding that the “passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the States. It has the power to regulate commerce with foreign nations: the responsibility for the character of those regulations, and for the manner of their execution, belongs solely to the national government. If it be not otherwise, a single State can ... embroil us in disastrous quarrels with other nations.”<sup>98</sup>

## *Using Non-Immigration State Statutes to Regulate Immigration*

Police in some states have begun to enforce non-immigration related state laws in creative ways to regulate immigration. In 2005, police chiefs in two New Hampshire cities arrested illegal immigrants for trespassing and mischief, reasoning that if illegal aliens are on any property they are guilty of violating state trespass laws, since these persons don't have the legal right to be there or anywhere else in the U.S.<sup>99</sup> Garrett Chamberlain, a police chief in New Ipswich, N.H. who believes that this exercise of local police power is legitimate, states "[e]ver since I took a stand, [illegal immigrants] avoid my town like the plague. If every illegal avoids my town, then I think we've won part of the battle."<sup>100</sup> However, the charges were thrown out by state court Judge L. Phillips Runyon III, who wrote "The criminal trespass charges against the defendants are unconstitutional attempts to regulate in the area of enforcement of immigration, violations, an area where Congress must be deemed to have regulated with such civil sanctions and criminal penalties as it feels are sufficient."<sup>101</sup>

## **Challenging States' Authority to Regulate Immigration**

### *State and Local Immigration Legislation in the Twenty-First Century*

"In the continued absence of a comprehensive federal reform of the United States' challenged immigration system, states have displayed an unprecedented level of activity [in 2007] – and have developed a variety of their own approaches and solutions."<sup>102</sup> In 2007, a combined total of 1,562 bills were introduced in the legislatures of all 50 states. "Of these bills, 244 became law in 46 states."<sup>103</sup> These new laws cover a wide range of issues, from education to voting. Twenty states adopted 31 laws regulating employment of aliens, 19 states passed 32 laws related to public benefits, and 31 states enacted laws covering identification, drivers' licenses, or other types of licenses.<sup>104</sup> Challenges to state immigration regulation have relied on various Constitutional theories, including preemption<sup>105</sup>, Equal Protection<sup>106</sup>, and the Commerce Clause.

### *Preemption*

The Supreme Court recognizes that not every state statute "which in any way deals with aliens is a regulation of immigration and thus per se preempted..."<sup>107</sup> and "the fact that aliens are the subject of a state statute does not render it a regulation of immigration, which is essentially a determination of who should or should not be admitted into the country."<sup>108</sup> For that reason, state laws related to employment have been interpreted as an exercise of their "police powers to regulate the employment relationship to protect workers within the State,"<sup>109</sup> and therefore not a violation of the Supremacy Clause.

Two recent cases in Arizona challenged the Constitutionality of Arizona's new Legal Arizona Workers Act (the Act).<sup>110</sup> The Act<sup>111</sup> requires Arizona employers to use E-Verify, which is voluntary under federal law, and gives the Superior Court the power to suspend or revoke business licenses of employers who intentionally or knowingly employ unauthorized aliens.<sup>112</sup>

Plaintiffs asserted that the Act was preempted by the IRCA, which imposes sanctions on employers of unauthorized aliens. The District Court discussed the principle of preemption and the circumstances in which a state law would conflict with federal law.

Where Congress has enacted a federal law on a given subject, but evinces no express or implied intention to preempt the field, states retain the power to regulate in the area concurrently with the federal government... A state law conflicts with federal law "where compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress..."<sup>113</sup>

The Court referred to the language of IRCA in determining whether the Arizona Act would be preempted by the IRCA. The language of 8 U.S.C. § 1324a(h)(2) reads "The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." The District Court held that the Act was a licensing law "because it sets out criteria and a process to suspend or revoke a permission to business in the state,"<sup>114</sup> because the statute fell within the meaning of IRCA's savings clause, and is therefore not preempted. Plaintiffs' petition for an injunction to prevent the enforcement of the Legal Arizona Workers Act pending appeal was denied.<sup>115</sup>

### *Equal Protection*

Using an Equal Protection analysis to challenge state regulation of the employment of undocumented aliens has also met with little success. As one author noted, "[u]ndocumented alien adults do not enjoy the same constitutional protections as legal aliens,"<sup>116</sup> because illegal entry into the United States is a criminal violation punishable by deportation. For this reason, "classifications that discriminate against undocumented aliens are subject to rational basis review"<sup>117</sup> rather than the more onerous strict scrutiny analysis afforded classification based on membership in a suspect class. However, with respect to

minor children of undocumented aliens, the Court has applied an intermediate scrutiny test to laws that would discriminate against their access to public schools.<sup>118</sup>

### Commerce Clause

The Commerce Clause presents a more compelling argument for the federal government asserting control over immigration. Due to the nature of legislative processes, states legislatures have adopted immigration laws which have varying requirements and different consequences for non-compliance. One such conflict between the laws of Arizona and the laws of Illinois illustrates the difficulty that multi-state employers will face if they are required to comply with state immigration laws in all the jurisdictions in which they conduct business. Arizona requires that employers use the E-Verify Program (formerly known as the Basic Pilot Program) under A.R.S. 23-214.<sup>119</sup> Illinois, recognizing that the program has been shown to be inaccurate in many cases, passed a statute which prohibits employers from “enrolling in any Employment Eligibility Verification System, including the E-Verify program...until the ... databases are able to make a determination on 99% of the tentative non-confirmation notices issued to employers within 3 days, unless otherwise required by federal law.”<sup>120</sup> Few recent cases challenging immigration state laws have been based on Commerce Clause, although several Nineteenth Century decisions were based on the premise that Congress has sole authority to regulate the imposition of taxes on arriving immigrants, based on this clause.<sup>121</sup>

### Conclusion

In recent cases challenging state authority to regulate immigration, many courts have held that the states have concurrent jurisdiction unless there is a clear conflict with a federal immigration statute. Cases in which the plaintiffs base challenges on the Equal Protection clause have also been unsuccessful, since illegal aliens are not entitled to protected class status.

It would seem that a Constitutional challenge based on the Commerce Clause would present the most compelling arguments against state regulation of immigration. States continue to have authority under their police powers to regulate commerce within their borders. However, that authority is limited in that a state’s laws may not place an “undue burden” on interstate commerce.<sup>122</sup> With the increasing numbers of state regulations dealing with the employment of aliens, it will soon become an undue burden for multi-state employers to keep abreast of the changes and to comply with different and sometimes conflicting reporting and verification requirements for work eligibility. It is time for Congress to step up and exercise its Commerce Clause authority by passing immigration reform legislation.

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### Footnotes

<sup>1</sup> D. Broder, D, *A Texas-Sized Disconnect On Borders*, THE WASHINGTON POST, June 25, 2006,7.

<sup>2</sup> *On the Fence*,. ST. LOUIS POST-DISPATCH, Jan. 20, 2008, B1.

<sup>3</sup> *Id.*

<sup>4</sup> 8 U.S.C. 1252c.

<sup>5</sup> *Plyler v. Doe*, 457 U.S. 202 (1982).

<sup>6</sup> National Conference of State Legislatures Immigrant Policy Project, 2007 Enacted State Legislation Related to Immigrants and Immigration, November 29, 2007, <http://www.ncsl.org/print/immig/2007Immigrationfinal.pdf>

<sup>7</sup> *Gonzales-Estay v. Lamm*, 138 P.3d 773 (Colo. 2006).

<sup>8</sup> K. Kelley, *A Deal in Colorado on Benefits for Illegal Immigrants*, THE NEW YORK TIMES, July 12, 2006, A18.

<sup>9</sup> V. Richardson, *Colorado OKs denying services to illegals*, THE WASHINGTON TIMES, July 12, 2006, A06.

<sup>10</sup> J. Seper, *States stepping up to tackle immigration laws; Bills seek stricter enforcement*, THE WASHINGTON TIMES, July 18, 2006, A03.

<sup>11</sup> *Id.*

<sup>12</sup> C. Cowan and B. Grow, *Taking Matters in Their Own Hands; States such as Georgia are cracking down on illegal labor as reform stalls on the Hill*, BUSINESS WEEK, May 1, 2006, 64.

<sup>13</sup> Richardson, *supra* note 11.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> Shane Goldmacher, *California conservatives turn to voters for change*, SACRAMENTO BEE, March 20, 2008.

<sup>20</sup> W. Roche Jr., *Number of state-level immigration laws is growing*, LOS ANGELES TIMES, Main News; August 6, 2007, A15.

<sup>21</sup> Deborah Horan, *Probes of legal status a no-no?* CHICAGO TRIBUNE, January 11, 2008, 7.

<sup>22</sup> S. 1348, available at <http://thomas.loc.gov/cgi-bin/query/z?c110:S.1348>:

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<sup>23</sup> <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2007/06/08/MNGSVQBV4D1.DTL&hw=immigration+reform&sn=011&sc=247>

<sup>24</sup> <http://www.cnn.com/2007/POLITICS/06/28/immigration.congress/index.html>

<sup>25</sup> <http://www.whitehouse.gov/news/releases/2007/06/20070628-7.html>

<sup>26</sup> *It's No Time to Dawdle on Immigration Reform Talk*, NEW YORK DAILY NEWS, Suburban, March 1, 2007, 3.

<sup>27</sup> *Immigration Reform Faces Major Snag*, NEW YORK DAILY NEWS, Jan. 7, 2007, Suburban, 30.

<sup>28</sup> <http://www.whitehouse.gov/news/releases/2007/06/20070628-7.html>

<sup>29</sup> *Supra* note 5

<sup>30</sup> ??? – You have the article from the Southern Poverty Law Center

<sup>31</sup> *Immigration Act Needs Work, Says Its Boosters*. (2007, April 19). Daily News (New York), Suburban P.3.

<sup>32</sup> <http://blogs.usatoday.com/oped/2007/06/demise-of-immig.html?loc=interstitialskip>

<sup>33</sup> Editorial/*Immigration Reform; Don't Blow It*. (2007, June 12). Philadelphia Inquirer, Editorial, P-com, Opinion, P.A22

<sup>34</sup> [http://www.nytimes.com/2007/06/28/washington/28cnd-immig.html?\\_r=3&oref=slogin&oref=slogin&oref=slogin](http://www.nytimes.com/2007/06/28/washington/28cnd-immig.html?_r=3&oref=slogin&oref=slogin&oref=slogin)

<sup>35</sup> *Immigration Act Needs Work, Says Its Boosters*, NEW YORK DAILY NEWS, April 19, 2007, P3.

<sup>36</sup> *Supra*, note 23.

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<sup>38</sup> Brian Bilbray, *No Amnesty for Illegals*, USA Today, May 24, 2007, A12.

<sup>39</sup> <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:SN01348:@@L&summ2=m&#major%20actions>

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<sup>42</sup> Rob Hotakainen, *Illegal workers target of federal job bill*, Kansas City Star, May 20, 2008, at A1.

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<sup>44</sup> Statistical Portrait of Hispanics in the United States, 2006, Table 2 Population Change by Race and Ethnicity: 2000 and 2006, Pew Hispanic Center, <http://pewhispanic.org/files/factsheets/hispanics2006/Table-2.pdf>

<sup>45</sup> Statistical Portrait of Hispanics in the United States, 2006, Table 4 Change in the Hispanic Population by Nativity: 2000 and 2006, <http://pewhispanic.org/files/factsheets/hispanics2006/Table-4.pdf>

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<sup>49</sup> Bruce Fein, *Concocted Crisis?* THE WASHINGTON TIMES, Jan. 15, 2008, A13.

<sup>50</sup> Johan Goldberg, *You can't say that*, USA TODAY, July 3, 2007, 9A.

<sup>51</sup> *Undocumented Immigrants as Taxpayers*, The Immigration Policy Center, available at <http://immigrationpolicy.org/images/File/factcheck/Undocumented%20as%20Taxpayer%2011-29-07.pdf>

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<sup>58</sup> Stephen Dinan, *U.S. not offsetting costs of illegals, report says*, The Washington Times, Dec. 7, 2007, A3.

<sup>59</sup> *The Impact of Unauthorized Immigrants on the Budgets of State and Local Governments*, A C.B.O. Paper, Congressional Budget Office, 9, available at [www.cbo.gov/ftpdocs/87xx/doc8711/12-6-Immigration.pdf](http://www.cbo.gov/ftpdocs/87xx/doc8711/12-6-Immigration.pdf)

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<sup>61</sup> *Id.*, 8.

<sup>62</sup> *Id.*, citing *Medical Emergency: Costs of Uncompensated Care in Southwest Border Counties*, available at [www.bordercounties.org](http://www.bordercounties.org).

<sup>63</sup> C.B.O. Paper, *supra* note 59, at 7.

<sup>64</sup> 457 U.S. 202 (1982).

<sup>65</sup> Dinan, *supra* note 59.

<sup>66</sup> *Id.*, at 8.

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

<sup>68</sup> *Id.*, at 9.

<sup>69</sup> 8 U.S.C. §1101 et seq.

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<sup>76</sup> Ray Marshall, *Getting Immigration Reform Right*, CHOICES (July-August, 2007).

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<sup>80</sup> 8 U.S.C. § 1153(a).

<sup>81</sup> 8 U.S.C. § 1153(b).

<sup>82</sup> 8 U.S.C. § 1153(c).

<sup>83</sup> WEISSBRODT & DANIELSON, *supra* note 83, at § 1-7.1.

<sup>84</sup> *Id.*, at § 1-7.6.

<sup>85</sup> *U.S. Immigration Policy: Restoring Credibility*, 1994 Executive Summary of U.S. Commission on Immigration Reform report.

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

<sup>90</sup> *Id.* at 476.

<sup>91</sup> *United States v. Vasquez-Alvarez*, 176 F.3d 1294 (10<sup>th</sup> Cir., 1999).

<sup>92</sup> *Id.*, at 1297, citing *Building & Constr. Trades Council of Metro. Dist. v. Associated Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 281, 224 (1993).

<sup>93</sup> Memorandum of Understanding, available at <http://www.aclu.org/FilesPDFs/ACF27DA.pdf>

<sup>94</sup> *De Canas v. Bica*, 424 U.S. 351 (1976).

<sup>95</sup> *The Passenger Cases*, 48 U.S. 283, 7 How. 283 (1849).

<sup>96</sup> 48 U.S. 283 (1849).

<sup>97</sup> *Id.* at 406.

<sup>98</sup> *Chy Lung v. Freeman*

<sup>99</sup> Vallis, M. (2006, July 13). U.S. cities taking illegal immigration into own hands; Businesses to be fined. *National Post*. News; Pg. A 15. Retrieved January 23, 2008 from the National Post using Ebscohost Elite search.

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<sup>104</sup> *Id.*, p. 2.

<sup>105</sup> *Chy Lung v. Freeman*

<sup>106</sup> *Plyler v. Doe*, 457 U.S. 202 (1982).

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<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 356.

<sup>110</sup> *Arizona Contractors Assn. v. Napolitano*, 534 F. Supp. 2d 1036 (D. Ariz. Feb. 7, 2008), known as “Arizona Contractors I, and *Arizona Contractors v. Candelaria*, 534 F. Supp. 2d 1036 (D. Ariz., Feb. 19, 2008), known as “Arizona Contractors II”.

<sup>111</sup> A.R.S. §§ 23-211 to 23-214.

<sup>112</sup> *Arizona Contractors v. Candelaria*, 534 F. Supp. 2d 1036, 1040 (D. Ariz., Feb. 19, 2008).

<sup>113</sup> *Id.*, citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941), at 1045.

<sup>114</sup> *Id.*, at 1046.

<sup>115</sup> 2008 U.S. Dist. LEXIS 16555, Feb. 19, 2008.

<sup>116</sup> Marisa Ann Tostado, *Alienation: Congressional Authorization of State Discrimination Against Immigrants*, 31 LOY. L.A.L. REV. 1033, 1048 (1998).

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<sup>117</sup> *Id.* At 1049.

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<sup>119</sup> The text of the statute reads, “After December 31, 2007, every employer, after hiring an employee, shall verify the employment eligibility of the employee through the basic pilot program.”

<sup>120</sup> 820 I.L.C.S. 55/12.

<sup>121</sup> *Smith v. Turner*; *Norris v. City of Boston (The Passenger Cases)*, 48 U.S. 283 (1849); *Chy Lung v. Freeman*, 92 U.S. 275 (1876); *Henderson v. Mayor of New York*, 92 U.S. 259 (1876).

<sup>122</sup> *Wickard v. Filburn*, 317 U.S. 111 (1942), *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources*, 112 S.Ct. 2019 (1992).