Nature Abhors a Vacuum: State and Local Governments Get Sucked into the Immigration Vortex

by H. Lawrence Hoyt



It is no secret that Congress today is largely paralyzed into inaction on many significant national issues. This includes immigration reform, which virtually everyone agrees is necessary. There the agreement ends. Although the Bush Administration attempted to get Congress to adopt comprehensive reform through a package of improvements to federal enforcement, as well as set realistic targets for immigration for unskilled workers (agricultural and other classifications), no such legislation was passed by Congress.[1] President Obama had campaigned on the need for comprehensive immigration reform, with details very similar to those sought by President Bush, but thus far, to no avail.[2]

Legislators at the state and local government level have sought to fill the gap through laws addressing the real and perceived ills brought about by the presence of undocumented aliens. Ever-increasing numbers of States are considering immigration-related legislation and adopting laws that govern employment, education, and other major areas of interface between state governments and persons located within their borders.[3] This is perhaps not surprising, as one commentator recently observed, the "reality...is that... the motivations behind most immigration reform proposals are overwhelmingly local. Indeed, once one moves past the largely symbolic concerns about legality and the rule of law, the arguments surrounding immigration reform start to resemble those that might be raised to advocate for a new urban policy agenda."[4]

This article is intended to cover the most recent actions of State and local governments regarding the presence of illegal immigrants in their jurisdictions, and that of the courts reviewing such actions. Immigration law in its entire federal context is too broad and complex a topic to be covered in this article. Interested readers are invited to further their inquiry into the larger issues concerning immigration through other sources.

Federal Law and the States

Prior to 1996, the only federal immigration law that directed or controlled the action of States and their local governments was the Immigration Reform and Control Act of 1986 (IRCA).[5] Beyond State and local police enforcement of federal criminal laws, including immigration-related federal offenses, the IRCA included a general requirement that all employers obtain, at hiring, documentation that could be used to determine the legal status of the new employee. This provision, commonly referred to as the "I-9 process" (based upon the appellation of the Form provided by the Immigration and Naturalization Service, or INS) required State and local governments, as employers, to obtain identification and employment eligibility documents from job applicants prior to finalizing the employment.[6]

Congress later enacted the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) to respond to public concern about the provision of federal "welfare" benefits, chiefly the federal Aid to Families with Dependent Children (AFDC) program, by substantively limiting the entitlement of citizens to those benefits, and, moreover, prohibiting undocumented persons from obtaining such benefits.[7] Congress went further, limiting the provision, by State and local governments, of public benefits of various types that were at least partially federally funded: public housing and housing assistance, healthcare, disability benefits, post-secondary education,

and unemployment assistance.[8] Exceptions were created for emergency healthcare services and for treatment of communicable diseases. States and local agencies were still able to receive reimbursement for these eligible services from by the Department of Health and Human Services through the federal Medicaid program.[9]

In addition to limitations on the provision of "public benefits," States and local jurisdictions were prohibited from awarding public contracts and grants to undocumented persons where federal funding was involved. The same applied to commercial and professional licenses, although the federal funding for these was likely more attenuated. State and local compliance was required through eligibility determinations involving establishment of both identity and lawful presence.[10]

The States Step In

The federal "vacuum" naturally invited State and local attempts at solutions. The perceived inadequacies of the current federal framework involve "the Four Es." Immigration laws—beyond those dealing with deportation of undocumented undesirables—involve the protection of various perquisites and life activities of citizens and other lawfully present persons, in which the participation by illegal aliens is deemed problematic. These areas include *employment* (undocumented persons taking jobs away from Americans), *education* and other public benefit *entitlement* programs[11] (costing taxpayers' funds), and *elections* (voter identification laws to reduce the chances that ineligible persons are able to cast ballots). [12]

In light of federal inaction, State and local governments have been under pressure from their citizenries to do something protectionist. This pressure is not surprising: in previous extended economic downturns in U.S. history, similar pressures have been brought to bear, engendered by public feelings that foreigners were taking away jobs from "real Americans" and were receiving taxpayer-funded benefits to live here.[13] There has been a lengthy history of state law solutions seeking to address these problems. California voters approved an initiated law in 1994 that attempted to ban the provision of many public benefits and services to undocumented persons.[14] Although Proposition 187 never took effect after having been reviewed by a federal district court and found wanting,[15] the issue had gained public notoriety. Although there was no direct connection, it was hardly coincidental that Congress approved the PRWORA two years later.[16] In 2006, the Colorado legislature adopted wide-ranging limitations on the provision of employment, education, and entitlements for, and the participation in elections by, undocumented persons.[17] These laws, for the most part, simply codified existing federal law; thus, to date, none have been the subject of a challenge in any reported federal or state case.

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Preemption & State Laws

Much of the litigation involves "the Four Es," particularly employment. Federal courts first analyze whether the restrictions at issue constitute a "regulation of immigration" (express preemption), and if not, whether they are otherwise preempted by federal law (implied preemption, either "field" or "conflict"). The "regulation of immigration" is *per se* preempted, based upon the grant of authority in the U.S. Constitution to the federal government to determine who may be admitted into the United States and under what conditions they may remain here.

The touchstone leading case, *De Canas v. Bica*,[18] involved itinerant farm workers who were immigrants, but not necessarily unlawfully present in the U.S. They sued farm labor contractors over their compliance with a California statute that prohibited employment of any "...alien who is not entitled to lawful residence in the United States...."[19] Criminal penalties were imposed on employers who violated the statute. The U.S. Supreme Court held that this was not a "regulation of immigration."[20] The Court held that Congress had not occupied the field regarding the employment of aliens in the U.S. States had broad police powers to regulate employment within their borders, and no preemption would be presumed against State regulation of employment of aliens. Even though the Immigration and Naturalization Act (INA) (prior to the changes made by PRWORA, noted above) provided that the employment of an illegal alien would not subject the employer to penalties for harboring such person,[21] the Court found this provision was not concerned with the employment relationship; therefore, there was no evident intent of Congress to preempt the States with respect to the regulation.[22]

In analyzing a claim that a State law is preempted by federal law, the courts rely on two "cornerstones": first, the purpose of Congress in the federal enactment, determined initially from the language of the statute itself (and if ambiguous, then from its legislative history and the regulatory actions of the relevant federal agency). Second, there is a presumption against preemption where the State law's subject matter is one the States have traditionally regulated under the police power.[23]

A significant number of the State and local laws and regulations enacted in recent years concerning unauthorized aliens have sanctioned employers for knowingly, or with reckless disregard of the facts, hiring undocumented immigrant workers that are found to be

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unlawfully present in the United States. Arizona began the current cavalcade of such legislation in 2007.

The Legal Arizona Workers Act of 2007. At the time the Arizona legislature approved the Legal Arizona Workers Act of 2007 (LAWA), it was the most far-reaching limitation on the employment of undocumented workers of any State. LAWA prohibited all employers from hiring, or contracting for work with, any person who the employer knew or should have known was not lawfully present in the country.[24] The Act also mandated that all employers utilize the federal E-verify program[25] for verification of the lawful presence of any potential employee or person providing contract work.[26] The sanctions against employers for violating LAWA were the revocation of "all" state and local business licenses and tax deductions for any location of the business where the illegal aliens were employed.[27]

A coalition of business and civil rights organizations sued the State seeking to enjoin the enforcement of LAWA, claiming it violated the Supremacy Clause in the U.S. Constitution and was preempted by the INA, as amended by the IRCA and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). The principal issue was whether the employer sanctions were within a "savings clause" in the IRCA, 8 U.S.C. § 1324a(h)(2), which otherwise expressly preempted any State or local law or regulation, civil or criminal, against employers of unauthorized aliens. This "savings clause" permitted State or local "licensing and similar laws" to be effective notwithstanding the general preemption law.[28] A secondary issue involved the mandated use of E-verify, instead of the I-9 process that is the minimum mandated by federal law.[29] The plaintiffs asserted that, despite the voluntary availability of E-verify for all employers nationally, the mandate by the State for its use, and the ensuing "flood" of E-verify inquiries, would cause the federal Department of Homeland Security to re-order its discretionary priorities in the expenditure of its limited funds and personnel. Accordingly, they claimed, this provision was impliedly preempted due to its conflict with the INA, IRCA, and IIRIRA.

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The district court dismissed the case, finding no merit in either claim.[30] The U.S. Court of Appeals for the Ninth Circuit likewise dismissed the appeal, finding the State law to be within the latitude permitted by Congress.[31] Certiorari review was granted by the U.S. Supreme Court, and in May, 2011, it issued its opinion affirming the Ninth Circuit decision.[32] In its *Whiting* decision, the Supreme Court recited the historical development of federal law regarding the employment of unauthorized aliens through the INA/IRCA/IIRIRA trilogy. It noted that, since the enactment of the IIRIRA's amendment in 8 U.S.C. §1324a(h)(2) (which generally preempted State regulation of the employment of such aliens, save through State or local license regulations "or other similar laws"), eight other States had adopted such laws or regulations.[33] The appellant business and civil rights organizations argued that the "licensing" statute adopted in LAWA was nothing of the sort. It did not create any licensing for any particular activity in Arizona; rather, it provided for the suspension and revocation of a whole host of State and local licenses when a business was found to have violated LAWA's anti-undocumented alien provision.[34]

The Court, however, found Arizona had successfully explored the bounds of the savings clause. The opinion of the majority-plurality (Justice Thomas joined certain portions, and then concurred in the result for the rest) confined its analysis to the express language of the savings clause, reciting very little other immigration caselaw in building that analysis. It seemed, despite the vigorous dissent of Justice Breyer, the Court believed that this was a very simple case, one in which Arizona had simply accepted Congress' invitation to adopt and enforce a licensing law that would sanction employers, but not employees, for hiring illegal aliens. The arguments over the mandated use of E-verify received even shorter shrift by the majority-plurality. The Court did recite the lengthy history of how the federal government dealt with employee identity and verification requirements of employers through the I-9 process of IRCA, and the Basic Pilot Program (and two other now-non-existent federal database programs), now called "E-verify."[35] Because Congress invited employers to use E-verify on a voluntary basis, providing a presumption against the intent to violate the INA where the employer followed through on the E-verify results concerning each employee, there was little reason for the Court to find that Arizona's mandated use of E-verify by employers was preempted. The dissent was concerned with the overuse of E-verify and the possibility that this would overwhelm federal resources; however, the United States, in its brief in the case, stated that it did not share those concerns.[36]

Support Our Law Enforcement and Safe Neighborhoods Act. The Arizona legislature, prompted to action by the experience and news reports of significant increases in illegal border crossings into the State from Mexico, adopted a number of statutes by way of Senate Bill 1070, immediately amended by House Bill 2162 (the amended legislation will be referred to as "SB1070").[37] Governor Jan Brewer signed the enactment into law as soon as it was sent to her in April 2010. The U.S. Department of Justice sued the State before SB1070's effective date, argu-

ing that many of the Act's provisions were *per se* unconstitutional.[38]

In July 2010, the federal district court ruled on the federal government's motion for preliminary judgment, undertaking an analysis of each challenged provision separately due to the inclusion in the legislation of a severability clause.[39] The court granted the preliminary injunction, enjoining the enforcement of four statutes from SB1070, including the portion of Section 5(C) enacting A.R.S. § 13-2928(C), making it a crime for an unauthorized alien to solicit, apply for, or perform work.[40]

In April 2011, in *U.S. v. Arizona*, the Ninth Circuit affirmed the preliminary judgment issued as to the four criminal statutes that were the subject of Arizona's appeal.[41] Section 5(C), the criminal statute penalizing undocumented persons from seeking or obtaining employment, was held to be preempted as it violated the comprehensive federal scheme in IRCA that imposed penalties solely on knowing violations of its employment provisions by employers, not employees — the result of a conscious decision by Congress to exclude employees from criminal liability. A State could not, then, impose penalties upon employees where Congress had refused to do so.[42]

On the provision requiring that a law enforcement officer make a reasonable attempt to determine the immigration status of a person stopped, detained, or arrested if there was a reasonable suspicion that the person was unlawfully present in the U.S., and requiring verification of the immigration status of any person arrested,[43] the court interpreted this to require law enforcement officers to verify, with the federal government, the immigration status of *all* arrestees before they were released, regardless of whether or not reasonable suspicion existed that the arrestee was an undocumented alien. Such detained persons whose immigration status was checked remained detained until the person's status was "determined" by the officer or, in the case of arrest, until the status was verified.[44] The court referred to a portion of the INA, 8 U.S.C. §1357(g), that set forth detailed guidance on the performance of immigration status verification functions by state officers, and found that this statute was controlling in the instant case.[45] Since Arizona did not obtain or require a written agreement with the U.S. Attorney General on its officers' immigration enforcement functions under the State law, the court found the State law was preempted.

Turning its attention to the provision creating a state criminal violation for failure to carry alien registration documents,[46] the court held, first, that this was outside the area of traditional State police power authority and, therefore, there was no presumption against preemption. Given the lack of an express federal delegation of authority to the States in this area, and the likelihood that individual State enforcement of such criminal statutes would create an obstacle to the federal government's objectives, this statute was also preempted.[47]

Last, the provision authorizing the warrantless arrest of a person where there was probable cause to believe the person had committed a public offense that made the person removable from the United States[48] was held preempted. The court interpreted this to mean, effectively, that a law enforcement officer could arrest, without a warrant, a person where the officer had probable cause to believe that that person committed an offense that made him removable from the U.S. under federal immigration laws. As a result, this statute directly conflicted with 8 U.S.C. §1252(c), which limited the arrest authority in such circumstances to felonies, and which required affirmative confirmation, by the Department of Homeland Security, of the person's removable status prior to arrest. The Arizona statute was not limited in either of these respects.[49]

Oklahoma's Taxpayer and Citizen Protection Act of 2007.[50] In *Chamber of Commerce of the U.S. v. Edmondson*,[51] the U.S. Court of Appeals for Tenth Circuit considered three Oklahoma provisions in light of a claim that each was preempted by the INA (as amended by the IRCA). The statutes mandated the use of E-verify for all persons and employers who received any State or local government contracts; imposed a disqualification from government contracts for any employer found to have violated that provision (Section 7(B));[52] made the retention of an unauthorized alien employee, when terminating an employee who was authorized to work in the U.S., a "discriminatory act" subject to a civil suit and damages (Section 7(C));[53] and imposed a special tax withholding requirement on entities that contracted with any person for work without subjecting that independent contractor to the E-verify process (Section 9).[54]

The Tenth Circuit's opinion contains an excellent recitation of the history of federal employee identity and authorization to work verification requirements.[55] There, the excellence of the opinion ends. There were three different opinions on Section 7B, and the district court's injunction against enforcement was reversed on the basis of two opinions, one of which was jurisdictional, the other finding it to be a valid state mandate of the use of E-verify (for the reasons relied on subsequently by the U.S. Supreme Court in its 2011 decision, *Chamber of Commerce of the United States v. Whiting*).[56] Section 7(C) was unanimously held to have been expressly preempted because it imposed civil sanctions on employers that were not within the §1324a(h)(2) savings clause for licensing-type laws.[57] Section 9 was preempted because it imposed the E-verify requirements on independent contractors, conflicting with the provisions of the IIRIRA where Congress intentionally excluded such contractors from compliance.[58]

Beason-Hammon Alabama Taxpayer and Citizen Protection Act.[59] On August 1, 2011, the United States filed a complaint for declaratory and injunctive relief, seeking to permanently enjoin the enforcement of provisions of Alabama's House Bill 56, which would otherwise become effective on September 1, 2011. In late September 2011, the district court, in *U.S. v. Alabama*, issued its order

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partially granting and partially denying the government's motion.[60]

The employment provisions the government sought to enjoin included: H.B. 56 § 11(a), making the application for, or solicitation or performance of work by, an unauthorized alien a criminal misdemeanor; H.B. 56 § 16, removing business tax deductions from the Alabama tax code for any wages paid to an unauthorized alien, and penalizing any attempt to claim the same; and H.B. 56 § 17, which established a civil cause of action against an employer who failed to hire, or discharged, a U.S. citizen or an alien who was properly authorized to work, while hiring or retaining an unauthorized alien.

The court held all three employment-related provisions in H.B. 56 were preempted. Similar to the decision in *U.S. v. Arizona*, the imposition of criminal sanctions on unauthorized aliens as employees conflicted with the Congressional decision to sanction only employers for violating IRCA's prohibition against hiring such persons.[61] Further, the criminalization of such work "'[stood] as an obstacle to the accomplishment and execution of the objectives of Congress.'"[62] Concerning H.B. 56 §16, the court found that prohibiting a business tax deduction for wage expenses solely because the employee was determined to be an unauthorized alien was a civil sanction against the employment of that person, and as such, it was expressly preempted and fell outside the savings clause of 8 U.S.C. §1324a(h)(2).[63] Likewise, the creation, in H.B. 56 § 17, of a civil cause of action against an employer for "discrimination" against employees authorized to work in the U.S., was an expressly preempted employer sanction.[64]

The additional provisions of the law that the federal government claimed were preempted were:

- H.B. 56 § 10, creating a criminal misdemeanor violation under Alabama law for the willful failure to complete or carry an alien registration document if the person was in violation of 8 U.S.C. § 1304(e) or 8 U.S.C. § 1306(a) and was unlawfully present in the United States.
- H.B. 56 § 12(a), which required a law enforcement officer to make a reasonable attempt, when practicable, to determine the citizenship and immigration status of a person stopped, detained or arrested, when reasonable suspicion existed that the person was an alien unlawfully present in the U.S.

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- H.B. 56 § 13, making it unlawful for a person to 1) conceal, harbor or shield an alien unlawfully present in the U.S., or attempt or conspire to do so; 2) encourage an unlawful alien to come to the State of Alabama; or 3) to transport (or attempt or conspire to transport) an unlawful alien.
- H.B. 56 § 18, providing that if a person was arrested for driving without a license, and the officer was unable to determine that the driver had a valid driver's license, the driver was to be transported to the nearest magistrate and a reasonable effort made to determine the citizenship of the driver. If found to be unlawfully present in the U.S., the driver was to be detained until prosecution or until handed over to federal immigration authorities.
- H.B. 56 § 27, which barred Alabama courts from enforcing a contract to which a person who was unlawfully present in the U.S. was a party. The section did not apply to contracts for lodging for one night, contracts for the purchase of food, contracts for medical services, or contracts for transportation for an alien to return to his or her country of origin.
- H.B. 56 § 30, making it a felony for an alien not lawfully present in the U.S. to enter into a "business transaction" with the State of Alabama or any political subdivision thereof.

The court held that Section 10 was not preempted. It distinguished *Hines v. Davidowitz*,[65] finding that the Alabama statute did not create a separate state system of alien registration; rather, it referenced the federal system, and then created a state crime of failing to comply with the federal statute requiring the carrying of alien registration documents. This did not interfere with the federal objectives, and thus, was neither expressly nor impliedly preempted. In this respect, the court here disagreed with the Ninth Circuit decision of *U.S. v. Arizona*.[66]

Section 12(a) was likewise found not preempted. Again, the court disagreed with the Ninth Circuit's *U.S. v. Arizona* decision, holding that the requirement for state and municipal law enforcement officers to attempt to verify the immigration status of each person detained or arrested was not expressly preempted, nor did it conflict with the inapposite requirement of 8 U.S.C. §1357(g) for States to enter into written agreements with the U.S. Attorney General for state officers to perform immigration functions.[67] Section 13 (alien harboring and transportation) was preempted; according to the court, that section created "an Alabama-specific harboring scheme that 'remove[s] any federal discretion and impermissibly places the entire operation—

from arrest to incarceration—squarely in the State's purview.'"[68] Section 18, the mandatory law enforcement verification of immigrant status of detained persons, was not preempted. There was no express preemption and Congress had invited such state actions through the verification provision in 8 U.S.C. § 1373(c).[69]

Section 27 (no state court enforcement of contracts between any party and an unauthorized alien) was not preempted as there was no federal legislation on the matter, and contract law and contractual enforcement was generally an area occupied by States (thus, no presumption of preemption).[70] Section 30 (ban on doing business with those not lawfully present in the U.S.) was interpreted to mean such persons could not be issued motor-vehicle license plates, driver's licenses (or non-driver ID cards), or business licenses. This was an area inherently in the authority of States, so without express conflicting federal legislation, there was no preemption.[71]

Utah's 2011 Immigration Accountability and Enforcement Act. In 2011, the Utah legislature adopted two "omnibus" immigration regulation bills. House Bill 116, the Utah Immigration Accountability and Enforcement Act, as amended by H.B. 497 (the Utah Illegal Immigration Enforcement Act),[72] included provisions that, among other things, (1) created a "guest worker program" through a federally-approved waiver of immigration control regulations, permitting otherwise undocumented persons to obtain work permits for employment in Utah; (2) prohibited employers from knowingly employing an unauthorized alien who did not hold a permit; (3) made it unlawful for an "employing entity" to discharge an employee who was a U.S. citizen or permanent resident alien and replace that employee with an employee who the employer knew, or should have known, was an unauthorized alien; and (4) required law enforcement officers to verify the immigration status of a person arrested or booked for certain offences. The legislation has been challenged in a class action lawsuit brought by individuals and civil rights, minority—cultural, and labor union organizations. Their complaint, *Utah Coalition of La Raza v. Herbert*,[73] seeks declaratory and injunctive relief on the basis that the provisions are expressly preempted by federal immigration statutes.[74]

Georgia's Illegal Immigration Reform and Enforcement Act of 2011.[75] In April, the Georgia Legislature enacted House Bill 87, the Illegal Immigration Reform and Enforcement Act of 2011, scheduled to take effect in July 2011. Section 8 authorized law enforcement officers to investigate the immigration status of criminal suspects where the officer had probable cause to believe the suspect committed another criminal offense. If the officer determined that the suspect was in the United States illegally, he could detain the suspect, transport him to a state or federal detention facility, or notify the Department of Homeland Security. Section 7 prohibited the smuggling or transporting of illegal aliens or "inducing an illegal alien to enter into [Georgia]" while committing another criminal offense. Section 19 required Georgia agencies and political subdivisions to accept only "secure and verifiable" identity documents for official purposes, and provided criminal penalties for those who "knowingly" accepted other documentation.

In *Georgia Latino Alliance for Human Rights v. Nathan Deal*, a group of business associations, non-profit organizations, and certain individuals filed suit, seeking declaratory and injunctive relief against various provisions of the Act, claiming it violated the U.S. Constitution's Supremacy Clause, the Fourth Amendment, and the Fourteenth Amendment. The district court issued its decision on the pending limited motion for preliminary injunction on June 27, 2011.[76] The court enjoined the requirement for law enforcement officers to verify the immigration status of criminal suspects where the suspect did not have an approved form of identification, in the absence of an 8 U.S.C. §1357(g) agreement with the U.S. Attorney General (but finding no *per se* Fourth Amendment violation);[77] enjoined the enforcement of the statute prohibiting harboring or transporting unauthorized aliens as preempted;[78] and upheld the prohibition against the use of "consular ID cards" for any official state or local government purpose (finding no due process violation; no private property interests were involved, and it to be an area of inherently state law).[79]

Local Laws

Hazleton, Pennsylvania passed an Illegal Immigration Relief Act Ordinance (IIRAO) that prohibited the recruitment for work, hiring, and employment of an unauthorized worker (as an employee or independent contractor), defined to include any person who was not legally permitted to work based upon a federal, state, or local law. In *Lozano v. City of Hazleton*,[80] the U.S. Court of Appeals for the Third Circuit held that the "presumption against preemption" for State and local legislation in an area of traditional state police power authority—here, the regulation of the employment relationship—was applicable, and, thus, no field preemption applied.[81] The employer business license suspension sanction for violations of the ordinance was within the type of licensing sanctions that were covered by the licensing laws savings clause in 8 U.S.C. § 1324a(h)(2), and was not expressly preempted by IRCA.[82] However, the court found the ordinance was preempted because it conflicted with the federal government's objective of a uniform system of enforcement of its employment prohibition provisions.[83]

In addition to the employment provisions, the IIRAO, Section 5, and the companion Rental Registration Ordinance prohibited contracting to provide rental housing to an unauthorized alien. The court ruled that these ordinances were not entitled to the presumption against preemption, since they amounted to an attempt "to regulate residence based solely on immigration status. Deciding which aliens may live in the United States has always been the prerogative of the federal government."[84] Because immigrant status was the only focus of these ordinances, the court found this to be a "regulation of immigration" and,

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therefore, preempted. "Whether Hazleton inadvertently stumbled into this exclusively federal domain, or decided to defiantly barge in, it is clear that it has attempted to usurp authority that the Constitution has placed beyond the vicissitudes of local governments."[85]

Keller v. City of Fremont[86] involved a challenge to a Fremont, Nebraska ordinance that made it unlawful for any person or business entity to knowingly or recklessly lease or rent property to an illegal alien unless expressly permitted by federal law; required tenants and occupants to obtain an occupancy license from the local police department prior to occupying any leased or rented dwelling unit; required the police department to contact the federal government to determine whether each potential occupant was lawfully present in the country; and required all businesses to register with the E-Verify Program. In *Gray v. City of Valley Park,*[87] an ordinance prohibited all business entities in the city from knowingly employing unauthorized aliens. Business owners had to swear an affidavit as part of the business license application that their business did not employ unauthorized aliens. The penalty for violation was a suspension of the license, and the inability to do business in the city during the suspension. The court found the requirements came within the licensing savings provision of the preemption statute, 8 U.S.C. § 1324a(h)(2).

The City of Farmers Branch, Texas has tried, repeatedly, to defend its ordinances that regulate the provision of rental housing to unauthorized aliens. First, an ordinance required proof of citizenship or authorized immigration status of all family members who would reside in a rental unit. The landlord's inspection of these documents had to be recorded and maintained. Criminal fines were imposed for violations. The court's review of the first ordinance held it to be a "regulation of immigration" and preempted accordingly, based upon its clear intent to prevent the presence of unauthorized aliens in the city.[88] The City's next enactment was a requirement that every prospective renter of a property in the city get a rental license from the City building inspector. The application process included a requirement for an affidavit that the applicant was a U.S. citizen. For non-citizens, City verification under 8 U.S.C. §1373(c) would be undertaken. License revocation occurred if the person was unauthorized, and the landlord would be required to evict the tenant. The federal district court found this ordinance, too, was invalid as a regulation of immigration, noting that the attempt to regulate rental housing was fundamentally different than regulating employment. "Restrictions on residence directly impact immigration in a way that restrictions on employment or public benefits do not."[89] The court also found that the residential occupancy (renter's) license was not a covered public benefit that could be restricted by state or local law.[90]

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Conclusion

State and local regulation of the impacts of illegal immigration is fraught with many traps for the unwary. The laws and ordinances upheld by the courts have cleaved closely to the provisions of federal law, using federal definitions and federal agency determinations as the salient criteria for establishing violations of the laws or ordinances.[91] Employment regulations involving required business licensing have been clearly approved by numerous courts. The unsuccessful laws have either used determinations of State or local officials regarding immigrant status, or have strayed into subjects that verge on the regulation of the presence of immigrants in the U.S., something that is reserved exclusively for the federal government and its agents. This has been particularly true for the attempts at regulating the provision of rental housing.[92] Legislation on these wide-ranging subjects is often the result of the advance of a doctrine of "inherent state authority," something that has yet to be tested in the U.S. Supreme Court, but the theory may get its first outing there if *certiorari* review is granted from the Ninth Circuit's ruling in *U.S. v. Arizona*.[93]

Regardless of how these laws fare in the courts, often the goal of ridding a state of unauthorized aliens is achieved simply through the debate and enactment of the law. A recent observer commented:

> As anti-immigrant ordinances and failed attempts at comprehensive immigration reform make headlines, a strong societal narrative that immigrants are undeserving and unworthy prevails. Indeed, loud voices call expressly for worse treatment of immigrants in their daily interactions with the world, spouting a cynical and farfetched belief that rather than reforming or enforcing immigration law, the United States can induce mass self-deportation by imposing misery on immigrant families.[94]

Unfortunately, if negative impacts from illegal immigration continue to be perceived by the citizenry at large, whether through real problems or through demagoguery, there will continue to be pressure on State and local legislators to come up with legislative solutions.[95] The opportunity for counsel for States and local jurisdictions to weave laws and ordinances through the intricate federal fence will thus also continue.[96]

Notes

1. *See* National Immigration Law Center's statement on the federal comprehensive immigration reform failure, http://www.nilc.org/immlawpolicy/cir/index.htm.
2. Adele Nicholas, *Lack of Comprehensive Immigration Reform Leads to Mixed State Laws*, INSIDE COUNSEL (Jan. 2011), http://www.insidecounsel.com/2011/01/01/lack-of-comprehensive-immigration-reform-leads-to-mixed-state-laws#0_undefined.
3. *Immigration Policy Report*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Sept. 19, 2011), noting that between January and June 2011 alone, State legislatures considered 1,592 bills related to immigration, 40 legislatures approved a total of 162 laws, and five of those States' legislation included omnibus laws regulating immigration-related activities. *See* http://www.ncsl.org/default.aspx?TabId=23362.
4. Rick Su, *Immigration as Urban Policy*, 38 FORDHAM URB. L.J. 363, 372 (2010).
5. Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified as amended at 8 U.S.C. §1101). *See* Careen Shannon, *Regulating Immigration at the State Level: A Focus on Employment*, 3 ALB. GOV'T. L. REV. 218, 220-23 (2010), for a description of federal/state relationships in immigration prior to IRCA.
6. 8 U.S.C. § 1324a(b)(3).
7. Pub. L. No. 104-193, 110 Stat. 2105 (1996). AFDC was re-named "Temporary Assistance for Needy Families," or TANF.
8. 8 U.S.C. § 1621.
9. *See* 8 U.S.C. §§ 1611(b)(1)(D) and 1621(b)(4) The U.S. Attorney General was delegated the responsibility for creating a list of programs and services that would continue to be eligible for federal reimbursement notwithstanding the lack of recipient citizenship documentation, where the programs/services were delivered to all persons irrespective of their income or assets. The initial action of the Attorney General, which has never been replaced or updated, is *Final Specification of Community Programs Necessary for Protection of Life or Safety Under Welfare Reform Legislation*, A.G. Order No. 2353-2001, 66 Fed. Reg. 3613, 3615-16 (Jan. 16, 2001).
10. For each of these limitations, verification of documentation of eligibility is essential, and PRWORA delegated the responsibility for determining appropriate documentation and verification of identity and lawful presence in the United States to the U.S. Attorney General. 8 U.S.C. § 1642.
11. 8 U.S.C. §§ 1621-24; *see also,* COLO. REV. STAT. § 24-76.5-103 (2011) and UTAH CODE ANN. § 63G-12-402 (2011). The federal Systematic Alien Verification for Entitlements (SAVE) program, 8 U.S.C. § 1642, 6 C.F.R. § 37.13, of the Department of Homeland Security is required to be used to check the documents of persons applying for federally-funded benefits, and for state- and local-funded benefits for those states that have legislated in this area.
12. Voting regulations, often a part of State immigration reform laws, generally are concerned with approved documents required for voter registration, and sometimes, at the polls also. *See, e.g.*, COLO. REV. STAT. §§ 1-2-204 and 1-13-704.5 (2011). The requirement that voters show photo ID at the polling place has been upheld by *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008). Generally, States expected the federal Real ID Act of 2005 (Pub. L. 109-13, 119 Stat. 231) to assist in limiting voter registration fraud; however, the compliance date for States has now been extended to 2014 (partial compliance) and 2017 (full compliance.) 49 U.S.C. § 30301, 6 C.F.R. § 37.5.
13. *See generally*, Abigail E. Langer, "*Men Made It, but They Can't Control It*": *Immigration Policy During the Great Depression, Its Parallels to Policy Today, and the Future Implications of the Supreme Court's Decision in Chamber of Commerce v. Whiting*, 43 CONN. L. REV. 1645, 1657-59 (2011). *See also*, MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 8, 72 (Princeton University Press 2005). Undocumented immigrants may actually pay more in taxes than the value of any benefits they receive. *See, e.g.*, *A Conversation about the Economic Effects of Immigration on African Americans*, American Immigration Council: Immigrants and Government Benefits, http://www.immigrationpolicy.org/perspectives/conversation-about-economic-effects-immigration-african-americans.
14. Proposition 187, the "Save Our State" Initiative, was passed in the November 8, 1994 general election by a vote of 59% to 41%. It banned public education, cash, other public assistance, and healthcare (other than emergencies) services paid from public funds for undocumented persons. Agencies that rejected applicants for such assistance were required to report the unsuccessful applicants to the police and to the State Attorney General.
15. League of United Latin Am. Citizens v. Wilson, 908 F. Supp. 755 (C. D. Cal. 1995).
16. The U.S. Supreme Court, in *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1974 n. 1 (2011), finds that, contemporaneous with the California voters' action, eleven other States had enacted bans on the employment of unauthorized aliens within their state.
17. H.B. 06-1343 (adding COLO. REV. STAT. § 8-17.5-102 (2006), requiring vendors seeking public contracts and grants to certify their use of E-Verify in hiring), S.B. 06S-007 (adding COLO. REV. STAT. § 1-13-704.5 (2006), which criminalized the attempt to vote by anyone knowing he was ineligible to vote in that election), H.B. 06S-1002 (amendments to COLO. REV. STAT. tit. 25, expanding emergency and communicable disease healthcare access through the addition of a protected class, "immigration status"), H.B. 06S-1009 (amending COLO. REV. STAT. § 24-34-107 to add limits to the issuance of professional and commercial licenses, essentially identical to existing federal law, using federal E-Verify program for identification and lawful presence verification), H.B. 06S-1017 (adding COLO. REV. STAT. § 8-2-122, which required employer affidavits of compliance with I-9 and the retention of documents for future inspection, and criminalized violations), and H.B. 06S-1023 (adding COLO. REV. STAT. § 24-76.5-103 (2006), which subjected the provision of state or local public benefits to the requirements of a federal statute, 8 U.S.C. § 1621).

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18. 424 U.S. 351 (1976).
19. CAL. LABOR CODE, § 2805(a) (enacted 1971, repealed 1988).
20. 424 U.S. at 355-56.
21. 8 U.S.C. § 1321.
22. 424 U.S. at 360-61.
23. Wyeth v. Levine, 555 U.S. 555 (2009) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)). *See also* Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 1977 (2011).
24. ARIZ. REV. STAT. § 23-212(A) and § 23-212.01(A) (2007).
25. *Id.* at §23-212(I) and §23-212.01(I) (2007).
26. For purposes of the Act, employment included contracting with an individual independent contractor.
27. ARIZ. REV. STAT. § 23-212(F) (2007).
28. 8 U.S.C. §1324a(h)(2): "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."
29. 8 U.S.C. §1324a(b).
30. Ariz. Contractors Ass'n, Inc. v. Candelaria, 534 F. Supp. 2d 1036 (D. Ariz. 2008).
31. Chicanos Por La Causa, Inc. v. Napolitano, 558 F.3d 856 (9th Cir. 2009).
32. *Cert. granted sub nom Chamber of Commerce of the United States v. Candelaria*, No. 09-115, __ U.S.__, 130 S. Ct. 3498 (2010); *aff'd. sub nom Chamber of Commerce of the United States v. Whiting*, 561 U.S.___, 131 S.Ct. 1968 (2011).
33. *Id.* at 1975-76 n. 2.
34. Justice Breyer, in his dissent, notes the breadth of the Arizona sanction: "Arizona calls its state statute a 'licensing law,' and the statute uses the word 'licensing.' But the statute strays beyond the bounds of the federal licensing exception, for it defines 'license' to include articles of incorporation and partnership certificates, indeed *virtually every* state-law authorization for *any* firm, corporation, or partnership to do business in the State. (A.R.S.)*§ 23-211(9)(a)*; cf. (A.R.S.)*§ 23-211(9)(c)* (excepting professional licenses, and water and environmental permits)." *Id.* at 1987 (emphasis in original).
35. *Id.* at 1974-75, 1976-77, 1982-83.
36. *Id.* at 1986.
37. Support Our Law Enforcement and Safe Neighborhoods Act, 2010 Arizona Session Laws, Chapters 113 & 211.
38. U.S. v. Arizona, 703 F. Supp. 2d 980 (D. Ariz. 2010) (order granting preliminary injunction in part), *aff'd*, U.S. v. Arizona, 641 F.3d 339 (9th Cir. 2011), *petition for cert. filed*, (U.S. Aug. 10, 2011) (No. 11-182). The federal government did not seek to enjoin several provisions, listed at 703 F. Supp. 2d at 986-87.
39. 703 F. Supp. 2d at 986.
40. *Id.* at 1000-1002.
41. U.S. v. Arizona, 641 F.3d 339 (9th Cir. 2011), *petition for cert. filed*, (U.S. Aug. 10, 2011) (No. 11-182).
42. 641 F.3d. at 357-360 (citing *Nat'l Ctr. for Immigrants' Rights, Inc. v. I.N.S.*, 913 F.2d 1350 (9th Cir. 1990), *rev'd on other grounds*, 502 U.S. 183 (1991)).
43. 703 F. Supp. 2d at 993-98.
44. *Id.* at 995.
45. *Id.* at 988, 995-96.
46. *Id.* at 998-99.
47. *Id.* at 998-1000.
48. *Id.* at 1004-06.
49. *Id.* at 988, 1004-006.
50. 2007 Okla. Sess. Law. Serv., Ch. 112, § 2 (West).
51. 594 F.3d 742 (10th Cir. 2010).
52. OKLA. STAT. tit. 25, § 1313(B)(2) (2007).
53. OKLA. STAT. tit. 25, § 1313(C)(1) (2007).
54. OKLA. STAT. tit. 68, § 2385.32 (2007).
55. 594 F.3d at 751-54.
56. *Id.* at 771-72.
57. *Id.* at 765-66, 777.
58. *Id.* at 769. *See* 8 U.S.C. § 1324a(a)(1)(A); 8 C.F.R. § 274a.1(f), (g); H.R. Rep. No. 99-682(I) at 57.
59. Ala. House Bill 56, enacted June 2, 2011; Ala. Laws Act 2011-535.
60. 2011 U.S. Dist. LEXIS 112362, No. 2:11-CV-2746-SLB (D. Ala. Sept. 28, 2011).
61. *Id.* at *63-68.
62. *Id.* at *78, quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).
63. *Id.* at *143-44.
64. *Id.* at *147-150.
65. *Id.* at *40-43.
66. *Id.* at *30-61.
67. *Id.* at *84-131.
68. *Id.* at *135 (quote from the motion of the United States).
69. *Id.* at *155-158.
70. *Id.* at *158-161.
71. *Id.* *172-180.
72. 2011 Utah Laws, Chap. 21.
73. No. 2:11-cv-00401-CW (D. Utah, May 11, 2011) (order granting TRO against enforcement pending action on motion for preliminary injunction).
74. The complaint is available online at http://www.aclu.org/files/assets/UCLR_v_Herbert_complaint.pdf.
75. Georgia House Bill 87 (2011).
76. No. 1:11-CV-1804-TWT, 2011 U.S. Dist. LEXIS 69600 (N.D. Ga., June 27, 2011).
77. *Id.* at *29-38, *48-51.
78. *Id.* at *38-48.
79. *Id.* at *54-56. An initial report and a longer-term prediction both indicate that the mere presence of the Georgia law has had, and will continue to have if enforced, serious negative consequences for Georgia's agricultural economy. *See Farm labor shortages may cost Georgia economy $391 million*, ATLANTA JOURNAL-CONSTITUTION, Oct. 4, 2011 at http://www.ajc.com/news/georgia-politics-elections/report-farm-labor-shortages-1194039.html, and Tom Baxter, *How Georgia's Anti-Immigration Law Could Hurt the State's (and the Nation's) Economy*, Center for American Progress, Oct. 04, 2011 at http://www.americanprogress.org/issues/2011/10/georgia_immigration.html.
80. 620 F.3d 170 (3rd Cir. 2010); opinion vacated and remanded, *Hazleton v. Lozano*, 2011 U.S. LEXIS 4259 (U.S. June 6, 2011).
81. 620 F.3d at 206.
82. *Id.* at 208-10.
83. *Id.* at 210-19.
84. *Id.* at 220.
85. *Id.*
86. Keller v. City of Fremont, No. 8:10-cv-0270-LSC-FG3, 4:10-cv-3140-LSC-FG3, 2011 U.S. Dist. LEXIS 2733 (D. Neb. Jan. 5, 2011) (motion for prelim. inj. pending).

87. Gray v. City of Valley Park, No. 4:07CV00881, 2008 U.S. Dist. LEXIS 7238 (E.D. Mo. Jan. 31, 2008), *aff'd*, 567 F.3d 976 (8th Cir. 2009).
88. Villas at Parkside Partners v. City of Farmers Branch, 577 F. Supp. 2d 858 (N.D. Tex. 2008).
89. Villas at Parkside Partners v. City of Farmers Branch, 701 F. Supp. 2d 835, 855 (N.D. Tex. 2010).
90. *Id*. at 856-57.
91. *See, e.g.*, the discussion of the careful crafting of the Legal Arizona Workers Act to dovetail with the INA, IRCA, and IIRIRA in *Chamber of Commerce v. Whiting*, 131 S.Ct. 1968 (2011).
92. *See also* Garrett v. City of Escondido, 465 F. Supp. 2d 1043, 1053 (S.D. Cal. 2006) (the ordinance, by attempting to prevent the presence of unauthorized aliens in the city, was an impermissible "regulation of immigration" preempted by federal law).
93. U.S. v. Arizona, 703 F. Supp. 2d 980 (D. Ariz. 2010) (order granting preliminary injunction in part), *aff'd*, U.S. v. Arizona, 641 F.3d 339 (9th Cir. 2011), *petition for cert. filed*, (U.S. Aug. 10, 2011) (No. 11-182). For an excellent discussion of the doctrine, see Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State And Local Arrests, and the Civil–Criminal Line*, 58 UCLA L. Rev. 1819, 1824-832 (2011).
94. David B. Thronson, *Custody and Contradictions: Exploring Immigration Law as Federal Family Law in the Context of Child Custody*, 59 Hastings L.J. 453, 462 (2008) (internal citations omitted). In fact, a portion of the Alabama omnibus immigration laws not reported above, requiring public school students to document a lawful presence, has now taken effect in the wake of the Alabama federal district court's ruling. News accounts report that significant numbers of Hispanic families have removed their children from the Alabama public school systems. *See, e.g., Illegal Immigration Crackdown Has Hispanic Students Disappearing from Alabama Schools*, The Blaze/Associated Press, Oct. 02, 2011 at http://www.theblaze.com/stories/illegal-immigration-crackdown-law-has-hispanic-students-disappearing-from-alabama-schools.
95. The trend has definitely been towards more State regulations on immigration. *See* National Conference of State Legislatures, *Immigration Policy Report*, noting the following rise in immigration legislation in the States: in 2005, 300 bills were introduced; 38 laws were enacted and 6 vetoed; in 2006, 570 bills were introduced, 84 laws were enacted and 12 resolutions adopted; in 2007, 1,562 bills were introduced, 240 laws were enacted and 50 resolutions adopted; in 2008, 1,305 bills were introduced, 206 laws were enacted and 64 resolutions adopted; in 2009, more than 1,500 bills were introduced, 222 laws were enacted and 131 resolutions adopted; in 2010, more than 1,400 bills were introduced, 208 laws were enacted, and 138 resolutions adopted. As of June 30, 2011, 40 State legislatures had enacted 162 laws and adopted 95 resolutions for a total of 257. *See* http://www.ncsl.org/default.aspx?TabId=23362. **M**

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