

# THE LIMITS OF STATE AND LOCAL IMMIGRATION ENFORCEMENT AND REGULATION<sup>†</sup>

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The number of aliens unlawfully residing in the United States has grown to an estimated eleven million in 2009.<sup>1</sup> Dissatisfaction with federal efforts to control unauthorized immigration has led some states and localities to consider, and in some cases implement, measures intended to deter the presence of unauthorized aliens within their jurisdictions.<sup>2</sup> Although some states and localities, which are concerned with the presence of unauthorized aliens, have been content to communicate with federal immigration enforcement officers under limited circumstances, other jurisdictions have taken a more active role, including through direct enforcement of federal immigration laws. Some states and localities have gone further, but refrain from taking a more active role in deterring illegal immigration. Others have worked cooperatively with the federal government to actively enforce federal immigration law. Some jurisdictions have taken a more robust approach to deterring illegal immigration by imposing their own regulatory restrictions upon unauthorized aliens' access to employment and housing.

Because immigration is largely the province of federal law and regulation, the ability of states and localities to regulate the presence and rights of aliens, within their jurisdictions, is quite limited. Indeed, to the extent that states and localities may regulate immigration-related matters, such measures must be consistent with federal law. This article will examine how federal laws and constitutional doctrines—notably, preemption, equal

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<sup>1</sup> Immigration has grown rapidly since 1990, with some claiming that in recent years there has been the highest level of immigration in U.S. history. See, e.g., Mary C. Waters & Tomás R. Jiménez, *Assessing Immigrant Assimilation: New Empirical and Theoretical Challenges*, 31 ANN. REV. SOC. 105, 111 (2005), <http://www.sociology.ohio-state.edu/classes/soc367/payne/Immigrant%20Assimilation.pdf>. However, some have observed that illegal immigration has leveled off and indeed decreased in recent years. See STEVEN A. CAMAROTA & KAREN JENSENIUS, A SHIFTING TIDE: RECENT TRENDS IN THE ILLEGAL IMMIGRANT POPULATION, BACKGROUND 1 (2009), <http://www.cis.org/articles/2009/shiftingtide.pdf>.

<sup>2</sup> Not every jurisdiction has taken the same view with respect to unauthorized aliens present within their territory. Some jurisdictions, for example, have adopted formal or informal “sanctuary” policies which limit the role that state or local law enforcement may play in the enforcement of immigration laws, and have otherwise eschewed policies which distinguish between the authorized and unauthorized alien populations. Supporters of such policies have argued that enforcing federal immigration requirements is solely the responsibility of the federal government. Other arguments raised against state or local enforcement of federal immigration law have been based on humanitarian arguments, concern over allocation of local law enforcement resources, and worry that such measures would undermine community relations.

protection, and procedural due process—circumscribe the ability of states and localities to enact and enforce measures affecting immigration.

### I. PREEMPTION DOCTRINE

The ability of states and localities to pursue measures intended to deter the presence and effects of unauthorized aliens in their jurisdictions is significantly limited by the preemptive effect of federal immigration law. The Supreme Court has long recognized that authority to regulate the entry and removal of aliens “is unquestionably exclusively a federal power.”<sup>3</sup> Moreover, the comprehensive framework established by the federal government to regulate the presence of aliens in the United States may serve to preempt state and local measures, which directly address the alien population.

The Supremacy Clause of the Constitution provides that federal laws and treaties act as “the supreme Law of the Land . . . [the] Laws of any State to the Contrary notwithstanding.”<sup>4</sup> Accordingly, when Congress acts within the scope of its constitutional authority, the law it enacts may invalidate otherwise permissible state or local action within that field.<sup>5</sup> Generally, state or local action in a given area may be preempted by federal law when: (1) Congress enacts a statute that expressly prohibits a state or locality to regulate the field (express preemption); (2) Congress intends to occupy a field in its entirety, as evidenced by creating a comprehensive regulatory scheme, which would implicitly leave no room for state or local regulation (field preemption); or (3) when there is a direct conflict between federal law and the state or local law (conflict preemption).<sup>6</sup> However, “federal regulation . . . should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter

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<sup>3</sup> *DeCanas v. Bica*, 424 U.S. 351, 354 (1976); *see Fong Yue Ting v. United States*, 149 U.S. 698, 705 (1893); *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875); *Henderson v. Mayor of New York*, 92 U.S. 259, 270 (1875); *Smith v. Turner*, 48 U.S. 283, 390 (1849).

<sup>4</sup> U.S. CONST. art. VI, cl. 2.

<sup>5</sup> *Gibbons v. Ogden*, 22 U.S. 1, 210–11 (1824); *see, e.g., Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992); *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981); *Jones v. Rath Packing Co.*, 430 U.S. 519, 543 (1977).

<sup>6</sup> *See, e.g., Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984); *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 203–04 (1983).

permits no other conclusion, or that the Congress has unmistakably so ordained.”<sup>7</sup>

Although federal immigration law initially addressed the conditions for naturalization and the entry and removal of foreign nationals,<sup>8</sup> the scope of federal regulation of immigration-related matters has grown considerably over the years. Through the Immigration & Nationality Act (INA) of 1952,<sup>9</sup> as amended, the federal government has created a pervasive scheme, regulating not only the entry, removal, and naturalization of aliens, but also the conditions of aliens’ continued presence in the United States, including employment eligibility. On one hand, the INA grants certain rights and benefits to specified categories of legal aliens. On the other hand, the INA establishes an enforcement regime to deter the unlawful presence of non-citizens through employer sanctions, criminal penalties, civil sanctions, and removal from the country.

The scope of immigration-related matters addressed by federal law may significantly curtail the ability of states and localities to regulate aliens within their jurisdictions. As the Supreme Court opined in the 1941 case of *Hines v. Davidowitz*, “states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary [immigration] regulations.”<sup>10</sup> This does not mean that the states are wholly incapable of regulating the activities of aliens within their borders. Indeed, the Supreme Court has never held that “every state enactment which in any way deals with aliens is a regulation of immigration and thus *per se* preempted.”<sup>11</sup> State or local action in the field of immigration, which has been directly authorized by federal law, for example, would not be subject to invalidation on preemption grounds. Further, the Supreme Court recognized in the 1976 case of *DeCanas v. Bica*, that state regulation of matters only tangentially related to immigration would, “absent congressional

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<sup>7</sup> Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963).

<sup>8</sup> Although the U.S. Constitution calls for Congress to “establish an uniform Rule of Naturalization,” U.S. CONST. art. I, § 8, cl. 4, there is no similar provision explicitly empowering the federal government to regulate immigration. Nonetheless, ever since the passage of the Alien Act of 1798, Congress has regulated the entry of foreign nationals into the United States. Act of June 25, 1798, ch. 58, § 1, 1 Stat. 570, 570–71 (1961).

<sup>9</sup> Immigration & Nationality Act (INA) §§ 101–507, 8 U.S.C. §§ 1101–1537 (2006).

<sup>10</sup> 312 U.S. 52, 66–67 (1941).

<sup>11</sup> *DeCanas v. Bica*, 424 U.S. 351, 355 (1976) (emphasis added).

action, . . . not be an invalid state incursion on federal power.”<sup>12</sup> Accordingly, preemption claims against state action that do not conflict with federal law can only be justified when the “complete ouster of state power . . . was ‘the clear and manifest purpose of Congress.’”<sup>13</sup>

The ability of a state or locality to regulate the activity of non-citizens within its borders largely depends upon whether the activity it seeks to regulate has been preempted. For example, state or local action in the field of immigration would not be subject to challenge on preemption grounds when such action is authorized by federal statute. In contrast, the ability of states and localities to act in the field of immigration in the absence of express congressional authorization may be substantially limited by preemption concerns. The permissibility of a state or local regulation affecting aliens may depend upon the nature, scope, and purpose of the measure.

#### *A. Preemption of State and Local Enforcement of Federal Immigration Laws*

As mentioned above, establishing the regulatory regime for the entry and removal of aliens is exclusively a federal power. The rules regarding the entry, presence, and removal of foreign nationals are established solely by federal immigration law. Some have argued that federal exclusivity is vital because uniformity in immigration enforcement is crucial for the exercise of sovereign authority.<sup>14</sup> However, enforcement of the federal immigration law need not be a solely federal activity; limited state or local enforcement activity may occur when such activity is not preempted by federal law.<sup>15</sup> States and localities may have greater leeway to arrest and detain persons for criminal

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<sup>12</sup> *Id.* at 356.

<sup>13</sup> *Id.* at 357.

<sup>14</sup> Hiroshi Motomura, *Federalism, International Human Rights, and Immigration Exceptionalism*, 70 U. COLO. L. REV. 1361, 1364 (1999); Michael A. Olivas, *Immigration-Related State Statutes and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement*, 28 IMMIGR. & NAT'LITY L. REV. 243, 250 (2007); Cecilia Renn, Comment, *State and Local Enforcement of the Criminal Immigration Statutes and the Preemption Doctrine*, 41 U. MIAMI L. REV. 999, 1023 (1987).

<sup>15</sup> See Cristina M. Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 586, 609–10 (2008) (arguing that contemporary immigration control is a multi-sovereign scheme that involves state efforts to help integrate immigrants into the community through assimilative efforts and punitive means like immigration enforcement and restrictions on benefits and privileges).

violations of federal immigration law than for civil violations. The ability of states and localities to enforce the civil provisions of the INA, however, appears to be more limited.

*B. Preemption of State Enforcement of the Criminal and Civil Provisions of the Immigration & Nationality Act*

The INA, in its regulatory scheme, contains both criminal and civil enforcement provisions. Thus, some activities, such as alien smuggling,<sup>16</sup> unauthorized entry into the United States,<sup>17</sup> and the reentry of aliens previously excluded or removed from the United States are criminal violations punishable by both fines and imprisonment.<sup>18</sup> However, other violations incur only civil penalties, the most significant being failure to remove from the country.<sup>19</sup> There has been relatively little Article III jurisprudence delineating the extent to which states can enforce both the criminal and civil provisions of the INA. However, there does appear to be some recognition that even absent direct Congressional authorization, state and local officers may enforce the criminal provisions of the federal immigration laws.<sup>20</sup> The ability of states and localities to enforce the civil provisions of the INA in the absence of express federal authorization, however, is much less clear. Although it appears certain that states and localities could not remove aliens from the country on account of an immigration violation, for example, there are somewhat conflicting rulings regarding states' and localities' ability to arrest and detain aliens for civil violations of the INA without direct congressional authorization.

In *Gonzales v. City of Peoria*, the United States Court of Appeals for the Ninth Circuit expressly ruled that the federal immigration laws do not preempt a state or locality's claim to enforce the criminal provisions of the federal immigration laws.<sup>21</sup> Thus, under *Gonzales*, state and local officers, when authorized

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<sup>16</sup> INA § 274(a)(1)(A)(i), 8 U.S.C. § 1324(a)(1)(A)(i) (2006).

<sup>17</sup> INA § 275(a), 8 U.S.C. § 1325(a).

<sup>18</sup> INA § 276(a), 8 U.S.C. § 1326(a).

<sup>19</sup> INA § 274D(a), 8 U.S.C. § 1324D(a).

<sup>20</sup> See 722 F.2d 468, 474 (9th Cir. 1983); see also Memorandum from the Dep't of Justice, Office of Legal Counsel on Handling of INS Warrants of Deportation in Relation to NCIC Wanted Person File to Legal Counsel, Fed. Bureau of Investigation 4–5, 4 n.11 (April 11, 1989), [http://www.aclu.org/pdfs/immigrants/1989\\_olc\\_opinion.pdf](http://www.aclu.org/pdfs/immigrants/1989_olc_opinion.pdf); Assistance by State and Local Police in Apprehending Illegal Aliens, 20 Op. Off. Legal Counsel 26, 29 (1996).

<sup>21</sup> 722 F.2d at 474.

by state or local law, are not necessarily preempted constitutionally from stopping an individual, when there is reasonable suspicion of a violation of the criminal provisions of the INA, or when effecting arrests, there is probable cause to believe an individual has violated, or is in the midst of violating, an INA criminal provision.<sup>22</sup> The Ninth Circuit made this conclusion partially because it saw state enforcement of the criminal provisions of the INA as being consistent with the states' traditional role in enforcing federal criminal laws and being in consonance with the states' police power to arrest individuals for committing any criminal violation.<sup>23</sup> It also drew on the holding from *DeCanas* that "[a]lthough the regulation of immigration is unquestionably an exclusive federal power, it is clear that this power does not preempt every state activity affecting aliens."<sup>24</sup> After concluding that the locality in question only claimed "to enforce the criminal provisions of the federal immigration laws," the circuit court determined that there was no preemption.<sup>25</sup> It reached this by noting that the criminal provisions were so "few in number and relatively simple in their terms" that they need not and were not supported by the type of "complex administrative structure," which would lead to the conclusion that Congress intended such provisions to preempt state enforcement.<sup>26</sup> However, the Ninth Circuit emphasized that it understood the state authorization to be "limited to criminal violations."<sup>27</sup> While *Gonzales* stated unambiguously that, "nothing in federal law precluded Peoria police [the locality in question] from enforcing the criminal provisions of the Immigration and Naturalization Act," the circuit court was clear that this holding only extended to criminal provisions, such as an illegal entry into the United States, and directed local police not to arrest someone for illegal presence in the United States, which is only a civil violation of the INA.<sup>28</sup> At least one district court, outside of the Ninth Circuit, has adopted this holding, concluding

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<sup>22</sup> *Id.* at 475.

<sup>23</sup> *Id.* at 474 (citing *Ker v. California*, 374 U.S. 23, 37 (1963); *Miller v. United States*, 357 U.S. 301, 305 (1958); *Johnson v. United States*, 333 U.S. 10, 15 n.5 (1948)) (noting that "the general rule is that local police are not precluded from enforcing federal statutes"); see Linda Renya Yanez & Alfonso Soto, *Local Police Involvement in the Enforcement of Immigration Law*, 1 HISP. L.J. 9, 29 (1994).

<sup>24</sup> *Gonzales*, 722 F.2d at 474 (quoting *DeCanas v. Bica*, 424 U.S. 351, 354-55 (1976)).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 475.

<sup>27</sup> *Id.* at 476.

<sup>28</sup> *Id.* at 477; see INA § 237(a)(1)(B), 8 U.S.C. § 1227(a)(1)(B) (2006).

that state enforcement of the criminal provisions of the federal immigration law is not preempted when the state affirmatively claims authority to do so.<sup>29</sup>

The Tenth Circuit, on the other hand, has gone further by claiming that a state police officer has “general investigatory authority to inquire into possible immigration violations.”<sup>30</sup> In that case, *United States v. Salinas-Calderon*, the Tenth Circuit concluded that during a lawful stop of a vehicle, a state trooper had the authority to detain the passengers, after he made some inquiries regarding their immigration status.<sup>31</sup> While making this conclusion, the court did not address the question whether state law had claimed the authority to enforce the federal immigration laws. However, in *United States v. Santana-Garcia*, the Tenth Circuit not only determined that state law did not claim authority to enforce the federal immigration laws, but also that it was not necessary because state officers had “implicit authority within their respective jurisdictions ‘to investigate and make arrests for violations of federal law, including immigration laws.’”<sup>32</sup>

State enforcement of the civil provision of the federal immigration laws is more controversial than criminal enforcement. During the Clinton Administration, the Department of Justice’s Office of Legal Counsel (OLC) had at one time viewed civil enforcement as a strictly federal responsibility, primarily basing this conclusion on the dictum of *Gonzales* and other cases that assumed state enforcement is limited to criminal provisions and federal law, which imposed serious restrictions “upon the authority of federal officers to make warrantless arrests for purposes of civil deportation.”<sup>33</sup> However, during the George W. Bush Administration, the OLC reversed itself, and concluded that state officers had “inherent authority” to enforce the civil provisions of the federal immigration laws.<sup>34</sup> The OLC

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<sup>29</sup> See *Farm Labor Org. Comm. v. Ohio State Highway Patrol*, 991 F. Supp. 895, 903 (N.D. Ohio 1997).

<sup>30</sup> *United States v. Salinas-Calderon*, 728 F.2d 1298, 1301 n.3 (10th Cir. 1984).

<sup>31</sup> *Id.*

<sup>32</sup> 264 F.3d 1188, 1194 (10th Cir. 2001).

<sup>33</sup> See Assistance by State and Local Police in Apprehending Illegal Aliens, *supra* note 20, at 32; Jeff Lewis et al., *Authority of State and Local Officers to Arrest Aliens Suspected of Civil Infractions of Federal Immigration Law*, 7 BENDER’S IMMIG. BULL. 944, 944 (2002).

<sup>34</sup> Memorandum from the Dep’t of Justice, Office of Legal Counsel on Non-preemption of the Authority of State and Local Law Enforcement Officials to Arrest Aliens for Immigration Violations to Unknown 5 (Apr. 3, 2002),

determined that its previous 1996 opinion was mistaken, noting that the assumption in *Gonzales* that civil enforcement authority did not extend to states was dictum, and that the restriction on warrantless arrests applied equally to both civil and criminal investigations.<sup>35</sup> The Tenth Circuit, on the other hand, has issued several opinions holding that state officers have general authority to investigate and make arrests for violations of federal immigration laws.<sup>36</sup>

The federal appellate courts appear equally uncertain of this issue. As noted by the OLC, in its 2002 opinion, when the Ninth Circuit made its analysis in *Gonzales* that the federal immigration laws did not preempt state enforcement of the criminal provisions, it only assumed, in its analysis, that the pervasiveness of the federal regulatory scheme preempted state enforcement of the INA's civil provisions.<sup>37</sup> However, while none of these opinions distinguished between the civil and criminal provisions of the INA, these cases dealt with criminal investigations.<sup>38</sup> Thus, there is still uncertainty whether state officers have "inherent authority" to enforce the civil provisions of the federal immigration laws.

### C. *Express Authorization for State and Local Enforcement of Federal Immigration Law*

Although federal preemption generally bars state and local enforcement of the civil provisions of the federal immigration laws, preemption is no bar when Congress has evinced intent to authorize such enforcement.<sup>39</sup> In exercising its powers to regulate

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<http://www.aclu.org/FilesPDFs/ACF27DA.pdf>.

<sup>35</sup> *See id.* at 7 (determining that states and localities have inherent authority to enforce both the criminal and civil provisions of the federal immigration laws).

<sup>36</sup> *See Santana-Garcia*, 264 F.3d at 1194; *United States v. Vasquez-Alvarez*, 176 F.3d 1294, 1295 (10th Cir. 1999); *United States v. Salinas-Calderon*, 728 F.2d 1298, 1301 n.3 (10th Cir. 1984).

<sup>37</sup> Memorandum from the Dep't of Justice, *supra* note 34, at 5; *see Gonzales v. City of Peoria*, 722 F.2d 468, 474-75 (9th Cir. 1983).

<sup>38</sup> *See, e.g., Santana-Garcia*, 264 F.3d at 1189; *Vasquez-Alvarez*, 176 F.3d at 1295; *Salinas-Calderon*, 728 F.2d at 1300.

<sup>39</sup> Conversely, state action may be preempted where Congress explicitly manifests its intent in law. *See, e.g., INA* § 271A(h)(2), 8 U.S.C. § 1324a(h)(2) (2006) (prohibiting states from imposing civil or criminal sanctions upon those who employ or recruit unauthorized immigrants); *INA* § 287(d), 8 U.S.C. § 1357(d) (requesting state and local police to report to the federal government arrests related to controlled substances when the suspect is believed to be unlawfully in the country); *INA* § 288, 8 U.S.C. § 1358 (instructing federal

immigration, Congress may delegate to the states, among other things, the activities of arresting, holding, and transporting unauthorized immigrants.<sup>40</sup> Indeed, Congress already has created avenues for the participation of state and local officers in the enforcement of the federal immigration laws. However, although Congress may authorize state officers to enforce immigration laws, it cannot compel states or commandeer state officers to do so.<sup>41</sup>

Section 287(g) of the INA authorizes the Attorney General (now the Secretary of Homeland Security) to enter:

a written agreement with a State, or any political subdivision of a State, pursuant to which an officer or employee of the State or subdivision, who is determined by the Attorney General to be qualified to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States (including the transportation of such aliens across State lines to detention centers), may carry out such function at the expense of the State or political subdivision and to the extent consistent with State and local law.<sup>42</sup>

This provision permits the Secretary of Homeland Security to enter agreements (commonly referred to as “287(g) agreements”), with state or local entities, authorizing state and local officers to assist in the enforcement of federal immigration laws, including through the investigation, arrest, and detention of aliens on account of immigration violations. The statute permits the tailoring of 287(g) agreements to fulfill the needs of states and localities. For example, although state or local officers may be authorized to enforce federal immigration laws pursuant to a 287(g) agreement, there is no statutory requirement that these officers stop performing their normal duties.<sup>43</sup>

In order for such an agreement to be made, certain criteria must be fulfilled, however. The 287(g) agreement must articulate “the specific powers and duties that may be, or are required to be,” performed by state or local officers, as well as the length of

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immigration authorities to rely on state and local police for the enforcement of local laws within immigrant stations).

<sup>40</sup> See INA § 287(g)(1), 8 U.S.C. § 1357(g)(1). *But see* Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179, 196–201 (2005) (arguing that local police do not need 287(g) authorization to effect arrests for suspected civil immigration violations).

<sup>41</sup> *Printz v. United States*, 521 U.S. 898, 925 (1997).

<sup>42</sup> INA § 287(g)(1), 8 U.S.C. § 1357(g)(1).

<sup>43</sup> See generally INA § 287(g), 8 U.S.C. § 1357(g).

the authorization.<sup>44</sup> Only certain types of enforcement activities may be carried out by state or local authorities; for example, while INA § 287(g) contemplates the entering of agreements allowing non-federal officers to investigate, arrest, or detain aliens for immigration violations, the statute does not authorize such persons to remove aliens from the United States. Additionally, state or local officers operating under a 287(g) agreement are required to “have knowledge of, and adhere to Federal law” governing the immigration enforcement functions they are authorized to perform.<sup>45</sup> Further, a federal official is required to supervise the authorized state or local officers in the performance of their immigration enforcement functions.<sup>46</sup> INA § 287(g)(10)(A) specifies that nothing in the statutory provision requires a 287(g) agreement for a state officer to communicate with the federal government “regarding the immigration status of any individual” or to cooperate with the federal authorities in identifying, apprehending, detaining, or removing aliens unlawfully present in the United States.<sup>47</sup>

Besides INA § 287(g), a few other provisions of federal immigration law authorize state or local enforcement of immigration laws in certain circumstances. INA § 103(a)(10) allows the federal government to call upon state and local officers in an “immigration emergency.”<sup>48</sup> Specifically, the relevant provision provides:

In the event the Attorney General determines that an actual or imminent mass influx of aliens arriving off the coast of the United States, or near a land border, presents urgent circumstances requiring an immediate Federal response, the Attorney General may authorize any State or local law enforcement officer, with the consent of the head of the department, agency, or establishment under whose jurisdiction the individual is serving, to perform or exercise any of the powers, privileges, or duties conferred or imposed by this chapter or regulations issued thereunder upon officers or employees of the Service.<sup>49</sup>

Thus, under INA § 103(a)(10), state and local officers may enforce both the civil and criminal provisions of the federal immigration laws (1) when expressly authorized to do so by the federal government, (2) when given consent by the head of their

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<sup>44</sup> INA § 287(g)(5), 8 U.S.C. § 1357(g)(5).

<sup>45</sup> INA § 287(g)(2), 8 U.S.C. § 1357(g)(2).

<sup>46</sup> INA § 287(g)(3), 8 U.S.C. § 1357(g)(3).

<sup>47</sup> INA § 287(g)(10)(A)–(B), 8 U.S.C. § 1357(g)(10)(A)–(B).

<sup>48</sup> See INA § 103(a)(10), 8 U.S.C. § 1103(a)(10).

<sup>49</sup> *Id.*

state or local agency, and (3) upon a federal determination of an emergency due to a mass influx of aliens.<sup>50</sup> Any authority so given to state or local officers under this provision can only be exercised for the duration of the emergency.<sup>51</sup>

Title 8 U.S.C. § 1252c also expressly authorizes state and local officers, to the extent permitted by state and local law, to arrest and detain criminal aliens who have unlawfully reentered the United States following removal in violation of INA § 276.<sup>52</sup> Section 1252c states in part:

[T]o the extent permitted by relevant State and local law, State and local law enforcement officials are authorized to arrest and detain an individual 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,

but only after the State or local law enforcement officials 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>53</sup>

Section 1252c(b) also mandates that federal immigration authorities cooperate with states and localities to assure that information in control of the federal authorities that would assist state and local law enforcement officials in carrying out the duties of section 1252c be made available.<sup>54</sup>

Congress appears to have authorized arrest authority for state and local law enforcement officers under INA § 274, which establishes criminal penalties for the smuggling, transporting, concealing, and harboring of unauthorized aliens.<sup>55</sup> INA § 274(c) states:

No officer or person shall have authority to make any arrests for a violation of any provision of this section except officers and employees of the Service designated by the Attorney General, either individually or as a member of a class, and all other officers whose duty it is to enforce criminal laws.

The clause “and all other officers whose duty it is to enforce

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<sup>50</sup> *Id.*

<sup>51</sup> *See id.*

<sup>52</sup> 8 U.S.C. § 1252c(a) (2006).

<sup>53</sup> *Id.*

<sup>54</sup> § 1252c(b).

<sup>55</sup> INA § 274(a)(1)(A)(i)–(iii), 8 U.S.C. § 1324(a)(1)(A)(i)–(iii).

criminal laws” has been interpreted to expressly permit federal, state, and local law enforcement authorities to make arrests for violations of INA § 274(c).<sup>56</sup>

As demonstrated in these provisions, the INA and related federal laws contemplate a role for state and local enforcement officers in the enforcement of federal immigration laws, at least in certain contexts. However, it is circumspect. Even in light of the view that the federal immigration law does not preempt all state attempts to enforce at least some provisions of the INA, Congress believed that it had to expressly authorize state and local enforcement of both 8 U.S.C. § 1252c and INA § 274, demonstrating its view that federal officers are the primary enforcement agents of the federal immigration laws.<sup>57</sup> Moreover, because INA § 287(g) requires state and local officers to be expressly authorized and supervised by the federal government before obtaining civil enforcement powers, this indicates that Congress contemplated that state and local enforcement is meant to play a role auxiliary to federal enforcement. Thus, at most, state and local enforcement of the federal immigration laws is supplementary and subordinate to federal enforcement.

*D. Preemption of State Regulation of the Employment of  
Unauthorized Immigrants*

While states cannot directly regulate the admission and removal of unauthorized immigrants from the United States, or, for that matter, directly remove unauthorized aliens from the United States, states and localities can, in some circumstances, regulate certain activities of aliens within the United States without running afoul of the Supremacy Clause. The degree to which state or local measures restricting the employment of unauthorized aliens are preempted is the subject of ongoing litigation and conflicting rulings.

Prior to 1986, federal immigration law did not directly address the employment of unauthorized aliens. However, with the enactment of the Immigration Reform and Control Act (IRCA)

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<sup>56</sup> In *Gonzales v. City of Peoria*, 722 F.2d 468, 475 (1983), the legislative history of INA § 274(c) led the Ninth Circuit to conclude that state officers may enforce all criminal immigration matters. The court determined that when Congress removed language from a draft bill limiting the enforcement of section 274 to federal officers and inserted specific language authorizing local enforcement, “it implicitly made the [local] enforcement authority as to all three [criminal] statutes [(i.e., sections 274, 275, and 276)] identical.” *Id.*

<sup>57</sup> See generally 8 U.S.C. § 1252c; INA § 274, 8 U.S.C. § 1324.

that year, Congress established a comprehensive scheme to prohibit and punish the unlawful employment of aliens.<sup>58</sup> As added by IRCA, INA § 274A generally prohibits the hiring, referring, recruiting for a fee, or continued employment of unauthorized immigrants.<sup>59</sup> Violators are subject to cease and desist orders, civil monetary penalties, and, for serial offenders, criminal fines and/or imprisonment for up to six months.<sup>60</sup>

While INA § 274A(h)(2) expressly preempts state or local laws that impose civil or criminal sanctions of the kind regulated by INA § 274A, it exempts from preemption state or local regulation of such practices by means of business licensing and similar means.<sup>61</sup> However, there is still some debate as to the scope of this exemption. Some jurisdictions appear to conclude that this exemption applies to all state laws that seek to sanction the unlawful hiring of unauthorized aliens by revocation of business licenses. For example, in *Chicano Por La Causa, Inc. v. Napolitano*, the Ninth Circuit held that the Legal Arizona Workers Act, a state law that allowed state courts to suspend or revoke the business licenses of firms that were found to employ unauthorized aliens, was not preempted by INA § 274A(h)(2) because the state law fell within the savings clause that exempts state licensing schemes from express exemption.<sup>62</sup> A similar holding was made in *Gray v. City of Valley Park*, where the District Court for the Eastern District of Missouri upheld an ordinance revoking the business licenses of firms that hired unauthorized aliens, because it concluded that the law fell within the ambit of the savings clause of INA § 274A(h)(2).<sup>63</sup>

However, there is a competing interpretation. In *Lozano v. City of Hazleton*, the District Court for the Middle District of Pennsylvania struck down a local ordinance that prohibited the hiring of unauthorized aliens, because the court determined that the savings clause did not apply to all state or local laws that revoked business licenses; rather, the savings clause only permitted a state or locality to revoke a business license *after* a business had been found to be in violation of INA § 274A.<sup>64</sup> This appears to be the minority view, however, and it does seem that

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<sup>58</sup> Pub. L. No. 99-603, 100 Stat. 3359 (1986).

<sup>59</sup> INA § 274A(a)(1)(A), 8 U.S.C. § 1324a(a)(1)(A).

<sup>60</sup> See INA § 274A(e)(4)–(5), 8 U.S.C. § 1324a(e)(4); INA § 271A(f), 8 U.S.C. § 1324a(f).

<sup>61</sup> INA § 274A(h)(2), 8 U.S.C. § 1324a(h)(2).

<sup>62</sup> 558 F.3d 856, 860 (9th Cir. 2009).

<sup>63</sup> No. 4:07cv00881 ERW, 2008 WL 294294, at \*31 (E.D. Mo. Jan. 31, 2008).

<sup>64</sup> 496 F. Supp. 2d 477, 520 (M.D. Pa. 2007).

most jurisdictions view direct state regulation of hiring to be exempted from preemption, so long as the state sanction is limited to business license revocation.

Regardless of the scope of this savings clause, it is clear that as a result of the amendments made to the INA by IRCA, states and localities are preempted from imposing any additional criminal or civil sanctions upon the unlawful employment of non-citizens. Notwithstanding the debate as to the precise scope of the preemption exemption, states appear limited in the way they can punish unlawful hiring practices, namely “through licensing and similar laws.”<sup>65</sup> However, even though the INA does not appear to expressly preempt states and localities from adopting licensing measures to deter the employment of unauthorized aliens, the INA also does not expressly authorize such practices. Thus, some measures may still be unenforceable on field or conflict preemption grounds.

An example of field preemption can be found in the way some federal courts have handled the question as to whether states or localities can make mandatory the use of a voluntary employment eligibility system called E-Verify. E-Verify, originally called the “Basic Pilot” program, was first authorized in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.<sup>66</sup> The program allows employers to voluntarily verify the identities of prospective employees and whether they are authorized to be employed.<sup>67</sup> E-Verify attempts to match the information submitted by the employers to the Social Security numbers found in the Social Security Administration’s (SSA) primary database, the Numerical Identification File (Numident).<sup>68</sup> If the worker self-identifies as a United States citizen and the submitted information does not match any records in Numident, the employer is notified that there is a SSA tentative non-confirmation finding.<sup>69</sup> If the worker self-identifies as a non-citizen, and there is a match in Numident, the SSA proceeds to forward the information to the United States Citizenship and Immigration Service (USCIS), to confirm the worker’s work

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<sup>65</sup> INA § 274A(h)(2), 8 U.S.C. § 1324a(h)(2).

<sup>66</sup> Pub. L. No. 104-208, 110 Stat. 3009-546 (1996).

<sup>67</sup> U.S. Citizenship and Immigration Services, E-Verify, <http://www.uscis.gov> (follow “E-Verify Homepage”) (last visited Dec. 28, 2009).

<sup>68</sup> *Id.*

<sup>69</sup> ANDORRA BRUNO, CONGRESSIONAL RESEARCH SERV., ELECTRONIC EMPLOYMENT ELIGIBILITY VERIFICATION 2 (2009), [http://assets.opencrs.com/rpts/R40446\\_20090313.pdf](http://assets.opencrs.com/rpts/R40446_20090313.pdf).

authorization.<sup>70</sup> If USCIS cannot confirm work authorization, the employer is notified that the worker has received a USCIS tentative non-confirmation finding.<sup>71</sup>

Although federal law makes the use of E-Verify voluntary in most circumstances, some states have made its use by employers mandatory in some circumstances.<sup>72</sup> Arizona's requirement is the most comprehensive because it requires all employers to use E-Verify for all hirings.<sup>73</sup> This provision was later subjected to a field preemption challenge, but has since been upheld.<sup>74</sup> The Ninth Circuit held that the Arizona provision did not conflict with federal policy because, although Congress made E-Verify use voluntary on a national level, "that did not in and of itself indicate that Congress intended to prevent states from making participation mandatory."<sup>75</sup> The court opined that if Congress wanted to preempt mandatory participation, it could have done so explicitly.<sup>76</sup> Having determined that "Congress plainly envisioned and endorsed an increase in its usage," it concluded that the Arizona provision's requirement "that employers participate in E-Verify is consistent with and furthers this purpose, and thus does not raise conflict and preemption clause concerns."<sup>77</sup> In other words, courts will view state attempts to regulate immigration indirectly more positively if it appears that the state is merely complementing federal policy rather than dictating it.

Another factor that may lead a court to determine that a state law or local ordinance is preempted is whether the law or ordinance "focuses directly upon . . . essentially local problems and is tailored to combat effectively the perceived evils."<sup>78</sup> In *DeCanas*, which was decided prior to the enactment of IRCA, the Supreme Court of the United States upheld a California statute

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<sup>70</sup> *Id.* at 3.

<sup>71</sup> *Id.*

<sup>72</sup> See National Council of State Legislatures, Immigrant Policy Project: E-Verify FAQ, <http://www.ncsl.org/programs/immig/EVerifyFAQ.htm> (last visited Dec. 28, 2009) (reporting that twelve states require the use of E-Verify, the federal employment eligibility verification system, for public and/or private employers).

<sup>73</sup> ARIZ. REV. STAT. ANN. § 23-214(A) (2008).

<sup>74</sup> See *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856, 860 (9th Cir. 2009).

<sup>75</sup> *Id.* at 866–67.

<sup>76</sup> *Id.* at 867.

<sup>77</sup> *Id.*

<sup>78</sup> *DeCanas v. Bica*, 424 U.S. 351, 351 (1976); see *Hoffman Plastic Compounds, Inc. v. Nat'l Labor Relations Bd.*, 535 U.S. 137, 146 (2002); *Sure-Tan, Inc. v. Nat'l Labor Relations Bd.*, 467 U.S. 883, 897–98 (1984).

restricting the employment of unauthorized immigrants, stating that:

Employment of illegal aliens in times of high unemployment deprives citizens and legally admitted aliens of jobs; acceptance by illegal aliens of jobs on substandard terms as to wages and working condition can seriously depress wage scales and working conditions of citizens and legally admitted aliens; and employment of illegal aliens under such conditions can diminish the effectiveness of labor unions.<sup>79</sup>

Because INA § 274A recognizes the ability of states and localities to, at least in certain circumstances, deny business permits to entities that employ unauthorized aliens, such measures appear more likely to survive legal challenges when they are narrowly tailored and based on legitimate purposes (i.e., protecting adequate wages and proper working conditions).

Even if the state or local regulation of the employment practice is not preempted in all circumstances, the manner and scope of the regulation may nevertheless trigger preemption. For example, if a state or local licensing restriction was based upon an independent assessment of an employee's immigration status, such a measure may be challenged on field or conflict preemption grounds,<sup>80</sup> as the INA vests designated federal authorities with responsibility for determining an alien's immigration status (subject to judicial review in certain circumstances).<sup>81</sup> State or local measures penalizing businesses that employ unauthorized immigrants may also be subject to preemption if they impose more stringent alienage verification requirements than those required by the federal government.<sup>82</sup> Moreover, a state or local scheme that uses a lower *scienter* requirement for employing unauthorized aliens than that required by the federal government for civil or criminal sanction would likewise seem to be ripe for preemption.<sup>83</sup>

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<sup>79</sup> 424 U.S. at 356–57.

<sup>80</sup> See *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 769–71 (C.D. Cal. 1995) (finding that a voter-approved California initiative requiring state personnel to verify immigration status of persons with whom they came into contact was preempted, in part, because it required the state to make an independent determination as to whether a person was in violation of federal immigration laws).

<sup>81</sup> See, e.g., INA § 103, 8 U.S.C. § 1103 (2006); INA § 240, 8 U.S.C. § 1229a; INA § 242, 8 U.S.C. § 1252; INA § 287, 8 U.S.C. § 1357.

<sup>82</sup> INA § 274A(a)(1), 8 U.S.C. § 1324a(a)(1) (requiring employers to participate in a paper-based employment verification system known as the “I-9 System”).

<sup>83</sup> See *id.* A state or locality would likely be preempted from penalizing businesses that recklessly or negligently hire an unauthorized immigrant, given

*E. Preemption of State or Local Restrictions on Tenancy or Leasing Residencies*

In recent years, some localities have considered and/or adopted measures to restrict unlawfully present aliens from renting or occupying dwelling units.<sup>84</sup> Most, or all, such measures that have been adopted have immediately been subject to legal challenge, including on preemption grounds.

Federal immigration law does not directly address non-federally funded housing and tenancy rights of aliens, and the regulation of land and private property has traditionally been done by states and localities. Some have argued that there should therefore be a presumption that local ordinances restricting unauthorized aliens' ability to rent or occupy housing units are not preempted by federal law. In support of this argument, proponents of these ordinances have often cited to the Supreme Court's decision in the 1996 case of *Medtronic, Inc. v. Lohr*, where it recognized that a presumption against preemption of state law exists "particularly . . . 'in a field which the States have traditionally occupied.'"<sup>85</sup> However, the presumption against preemption does not apply in situations "when the State regulates in an area where there has been a history of significant federal presence."<sup>86</sup> Accordingly, whether or not there is a presumption against preemption of local regulation on the tenancy or leasing rights of unauthorized aliens, may depend upon whether the regulation is interpreted as primarily being focused on zoning issues or instead focused on immigration-

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that federal law only penalizes employers who knowingly hire such persons (except when the employer fails to comply with federal employment verification requirements).

<sup>84</sup> Although these measures have received significant media attention, it appears that few local restrictions on unauthorized aliens' access to housing have actually been implemented. See S. KARTHICK RAMAKRISHNAN & TOM WONG, IMMIGRATION POLICIES GO LOCAL: THE VARYING RESPONSES OF LOCAL GOVERNMENTS TO UNDOCUMENTED IMMIGRATION 15–16 (2007), <http://www.law.berkeley.edu/files/RamakrishnanWongpaperfinal.pdf> (finding that less than 1% of all municipalities have enacted measures addressing unauthorized immigration). But see AUDREY SINGER ET AL., BROOKINGS INST., IMMIGRANTS, POLITICS, AND LOCAL RESPONSE IN SUBURBAN WASHINGTON 2, 10, 17 (2009), [http://www.brookings.edu/~media/Files/rc/reports/2009/0225\\_immigration\\_singer/0225\\_immigration\\_singer.pdf](http://www.brookings.edu/~media/Files/rc/reports/2009/0225_immigration_singer/0225_immigration_singer.pdf) (discussing the effects of a local ordinance mandating officers investigate immigration status of arrestees and restricting unauthorized aliens' access to some local benefits).

<sup>85</sup> 518 U.S. 470, 485 (1996).

<sup>86</sup> *United States v. Locke*, 529 U.S. 89, 108 (2000).

related matters.<sup>87</sup>

Preemption grounds may be used to challenge restrictions on unauthorized immigrants who rent or occupy a dwelling, especially if violators are subject to civil or criminal penalties. The INA provides the framework that determines if an alien is to be excluded or removed from the United States and entrusts the federal government with the exclusive authority to exclude or remove aliens. In addition, § 274 of the INA criminalizes smuggling, harboring, and transporting of unauthorized aliens.<sup>88</sup> Courts have generally interpreted the scope of § 274 broadly, which may lead a court to conclude that “harboring” includes the renting of property to an unauthorized alien or otherwise permitting him to dwell in an occupancy, at least when it is done in knowing or reckless disregard of the immigrant’s unauthorized status.<sup>89</sup>

Arguments may be raised that any state or local restriction on the housing of unauthorized aliens that imposes civil or criminal penalties constitutes “additional or auxiliary regulations” to federal immigration laws that restrict and punish the harboring of unauthorized aliens.<sup>90</sup> This argument is perhaps most persuasive when an individual is subject to *criminal* penalties for violating a non-federal dwelling restriction, but some courts may consider it auxiliary to the federal scheme even when only non-

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<sup>87</sup> See *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 518 n.41 (M.D. Pa. 2007) (finding no presumption against preemption of local ordinance imposing tenancy restrictions on unauthorized aliens, because the regulation involved immigration-related matters, “an area of the law where there is a history of significant federal presence and where the States have not traditionally occupied the field”).

<sup>88</sup> INA § 274(a)(1)(A), 8 U.S.C. § 1324(a)(1)(A).

<sup>89</sup> *E.g.*, *United States v. Aguilar*, 883 F.2d 662, 690 (9th Cir. 1989) (finding that a church official violated the harboring provision when he invited an illegal alien to stay in an apartment behind his church, and interpreting the harboring statute as not requiring an intent to avoid detection); *United States v. Rubio-Gonzalez*, 674 F.2d 1067, 1073 (5th Cir. 1982) (suggesting that “harboring” an alien is a broader concept than other smuggling provisions relating to the concealment of an alien or the shielding of an alien from detection); *United States v. Acosta De Evans*, 531 F.2d 428, 430 (9th Cir. 1976) (upholding harboring conviction of defendant who provided illegal aliens with apartment, and concluding that harboring provision was not limited to clandestine sheltering only); see CRISTINA RODRÍGUEZ ET AL., *MIGRATION POLICY INST., TESTING THE LIMIT: A FRAMEWORK FOR ASSESSING THE LEGALITY OF STATE AND LOCAL IMMIGRATION MEASURES* 24–27 (2007), [http://www.migrationpolicy.org/pubs/NCIIP\\_Assessing%20the%20Legality%20of%20State%20and%20Local%20Immigration%20Measures121307.pdf](http://www.migrationpolicy.org/pubs/NCIIP_Assessing%20the%20Legality%20of%20State%20and%20Local%20Immigration%20Measures121307.pdf) (discussing merits and weaknesses of arguments that federal alien smuggling statute preempts local restrictions on renting to unauthorized aliens).

<sup>90</sup> *Hines v. Davidowitz*, 312 U.S. 52, 66–67 (1941).

criminal penalties are imposed. In light of *DeCanas*, however, it could be argued that housing restrictions are only tangentially related to immigration, even when taking “harboring” into consideration, and thus not subject to preemption. Thus far, courts do not appear to have considered such claims when reviewing challenges against local ordinances restricting housing to unauthorized aliens.

The manner and scope of local restrictions on unauthorized aliens’ tenancy and leasing rights may also raise preemption concerns.<sup>91</sup> As previously discussed, federal immigration law generally vests specific federal entities with responsibility for determining the immigration status of aliens.<sup>92</sup> Accordingly, it could be argued that states and localities are preempted from making an independent assessment that an alien has violated federal immigration laws, and thereafter using that assessment as a basis to deny the alien the right to rent or occupy property.<sup>93</sup> A more serious preemption challenge would be posed if a denial of housing access turned on a state or locality using a different alien classification system than that employed by the federal government (e.g., if a state or locality denied residency to any alien who entered the United States unlawfully, even though some such aliens—those aliens who unlawfully entered the United States but were subsequently granted asylum—have legal immigration status under federal law).<sup>94</sup> For example, a district court has held that federal law preempts a state or locality from imposing blanket denials of housing to all aliens presently lacking legal immigration status because this restriction would deny housing to some persons, such as aliens who have been

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<sup>91</sup> See *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984); see also *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 203–04 (1983).

<sup>92</sup> See INA § 287(g), 8 U.S.C. 1357(g).

<sup>93</sup> On the other hand, states and localities would not appear to be preempted from using a federal determination of unlawful presence as a ground for restricting an alien’s access to housing, though such a denial might be preempted or constitutionally barred on other grounds.

<sup>94</sup> See, e.g., *Vazquez v. City of Farmers Branch*, Nos. 3:06-CV-2371-L, 3:06-CV-2376-L, 3:07-CV-0061-L, 2007 WL 1498763, \*4–\*9 (N.D. Tex. May 21, 2007) (making an initial determination that a housing ordinance was preempted because it relied on different categorizations of alienage than those used in federal immigration laws); *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 769–70 (C.D. Cal. 1995) (finding that a voter-approved California initiative requiring state personnel to verify immigration status of persons with whom they came into contact was preempted, in part, because it required the state to make an independent determination as to whether a person was in violation of federal immigration laws).

paroled into the country; those who have applied for legal immigration status and remain in the United States pending consideration of their application; and those who are permitted to stay in the United States despite their immigration status.<sup>95</sup>

## II. EQUAL PROTECTION

The Fourteenth Amendment's Equal Protection Clause states that no state shall "deny to any person within its jurisdiction the equal protection of the laws."<sup>96</sup> In most cases, courts employ the "rational basis test" to assess the validity of state or local measures, which distinguishes between the treatment owed to different categories of people.<sup>97</sup> This standard is highly deferential. However, a more rigorous standard is employed in instances where either a "suspect class" is discriminated against (i.e., discrimination on the basis of race, ethnicity, or national origin) or when a "fundamental right" is implicated.<sup>98</sup> In such instances, courts will apply the "strict scrutiny" standard, which requires that the discrimination or curtailment of the fundamental right be justified by a compelling government interest.<sup>99</sup> Other standards of review fall between the "rational basis" and "strict scrutiny" standard, such as "intermediate scrutiny" for gender discrimination.<sup>100</sup>

All persons in the United States are entitled to "equal protection" under the Fourteenth Amendment, including aliens. The level of scrutiny a court will give to a statute that discriminates against aliens depends on the classification of the aliens affected. For example, the Supreme Court has ruled that laws that discriminate against permanent resident aliens are subject to "strict scrutiny" review.<sup>101</sup> On the other hand, it would appear that state regulations targeting unauthorized aliens do not warrant the same degree of scrutiny, and would only be reviewed under the "rational basis" test.<sup>102</sup> However, the Supreme Court has found elevated equal protection review to

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<sup>95</sup> See *Lozano v. Hazleton*, 496 F. Supp. 2d 477, 530–31 (M.D. Pa. 2007).

<sup>96</sup> U.S. CONST., amend. XIV, § 1.

<sup>97</sup> *Gulf, C. & S. F. Ry. Co. v. Ellis*, 165 U.S. 150, 165–66 (1897).

<sup>98</sup> NORMAN REDLICH ET AL., *CONSTITUTIONAL LAW* 699 (2008).

<sup>99</sup> *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).

<sup>100</sup> *Craig v. Boren*, 429 U.S. 190, 218–19 (1976).

<sup>101</sup> *Graham v. Richardson*, 403 U.S. 365, 371–72 (1971).

<sup>102</sup> *League of United Latin Am. Citizens v. Bredesen*, 500 F.3d 523, 532–33 (6th Cir. 2007); *LeClerc v. Webb*, 419 F.3d 405, 415 (5th Cir. 2005) (stating that nonimmigrant aliens are not a suspect class for equal protection purposes).

extend to state laws that affect one specific category of unauthorized aliens.<sup>103</sup> In *Plyler v. Doe*, the Supreme Court considered whether states could deny free public education to minors unlawfully residing in the United States and concluded that attempts to do so would be unconstitutional.<sup>104</sup> In *Plyler*, a Texas statute was enacted that would have deprived unauthorized child aliens from receiving free public elementary and secondary education.<sup>105</sup> The Court held that the Equal Protection Clause of the Fourteenth Amendment protected unauthorized aliens of minor age from such treatment.<sup>106</sup> Although the Supreme Court found that unauthorized aliens were not a “suspect class” and public education was not a “fundamental right,” the Court concluded that denying public education would unfairly inflict a hardship on a discrete class of children who were not accountable for their unauthorized immigration status.<sup>107</sup>

The *Plyler* Court applied an elevated form of review that shared similarities with the “intermediate scrutiny” standard when it considered the permissibility of the Texas statute. Using this elevated standard, the Court considered whether the statute furthered a substantial state goal. The Court ruled that the statute did not legitimately further the state’s putative interests—namely, to conserve the state’s educational resources, to prevent an influx of unauthorized immigrants, and to maintain high-quality public education.<sup>108</sup> Thus, the Court struck down the Texas statute.<sup>109</sup> However, it should be noted that the Court emphasized the aliens’ minor status in its analysis.<sup>110</sup> It appears that state laws affecting adult unauthorized aliens are reviewed under the “rational basis” standard.

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<sup>103</sup> The federal government’s plenary authority over immigration and naturalization gives it far wider latitude in terms of regulating aliens than the states. See *Matthews v. Diaz*, 426 U.S. 67, 84–85 (1976) (“The equal protection analysis also involves significantly different considerations because it concerns the relationship between aliens and the States rather than between aliens and the Federal Government.”). However, “undocumented status, coupled with some articulable federal policy, might enhance state authority with respect to the treatment of undocumented aliens.” *Plyler v. Doe*, 457 U.S. 202, 226 (1982).

<sup>104</sup> 457 U.S. at 202.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 210.

<sup>107</sup> *Id.* at 202.

<sup>108</sup> *Id.* at 227–30.

<sup>109</sup> *Id.* at 230.

<sup>110</sup> *Id.*

A. *Equal Protection Limitations Against State Regulation of Employment or Renting or Leasing Property*

Equal Protection concerns may potentially be raised against state or location restrictions on the employment of, or renting or leasing of property to, unauthorized aliens. Thus far, however, such challenges have proven unsuccessful even in situations where a measure has been struck down by the courts on other grounds. For example, in 2007, a federal district court ruled that an ordinance that limited the employment and housing of unauthorized aliens did not violate the Equal Protection Clause, after concluding that the ordinance did not facially discriminate against a suspect class, and was otherwise rationally related to the legitimate government interest of combating crime and protecting community resources.<sup>111</sup>

The constitutional limits upon state or local restrictions on aliens' ability to obtain private housing have not been fully adjudicated. In 1886, the Supreme Court recognized that the Equal Protection Clause applied to state classifications based on alienage.<sup>112</sup> Nevertheless, in the following decades the Court upheld several state laws that denied rights because of alienage (regardless of whether the alien was lawfully present in the United States<sup>113</sup>) partly because states were able to demonstrate that these measures advanced a "special public interest."<sup>114</sup> Some of these decisions are now widely viewed as having questionable precedential value.<sup>115</sup> As the Supreme Court itself noted in 1979,

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<sup>111</sup> *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 542 (M.D. Pa. 2007).

<sup>112</sup> *See Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

<sup>113</sup> *See Ohio ex rel Clarke v. Deckebach*, 274 U.S. 392, 393, 397 (1927) (upholding local ordinance prohibiting the issuance of a license permitting the operation of a pool hall to an alien); *Frick v. Webb*, 263 U.S. 326, 332–33 (1923); *Webb v. O'Brien*, 263 U.S. 313, 325–36 (1923) (upholding states' ability to deny aliens the right to own or lease agricultural lands); *Porterfield v. Webb*, 263 U.S. 225, 233 (1923); *Terrace v. Thompson*, 263 U.S. 197, 220 (1923); *Heim v. McCall*, 239 U.S. 175, 189, 194 (1915) (upholding state law that prohibited the hiring of non-nationals for public works projects); *Patsone v. Pennsylvania*, 232 U.S. 138, 143–45 (1914) (upholding state conviction for violation of a law that prohibited an alien from owning a firearm).

<sup>114</sup> *See Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 420 (1948); *see also* Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignties*, 35 VA. J. INT'L L. 121, 149–51 (1994).

<sup>115</sup> *See, e.g., Takahashi*, 334 U.S. at 427 (finding that a California statute denied aliens equal protection when it prohibited lawfully present aliens from receiving fishing licenses, and the state's special interest in conserving public fishing could not justify the statute); *Sei Fujii v. California*, 242 P.2d 617, 630 (Cal. 1952) (finding a California law restricting land ownership by aliens to violate the Fourteenth Amendment and also concluding that earlier Supreme

over time, “the Court’s decisions gradually have restricted the activities from which States are free to exclude aliens.”<sup>116</sup>

Regardless, it appears well-settled, even after *Plyler*, that restrictions imposed on unauthorized aliens are more likely to pass constitutional muster than those imposed on citizens or lawfully present aliens, at least when such measures do not affect children.<sup>117</sup> As a result, it appears less likely that state or local restrictions on the employment of unauthorized aliens (most of whom would presumably be adults) would be subject to Equal Protection challenges than measures restricting the ability of unauthorized aliens to occupy housing, which may equally affect both adult unauthorized aliens and their children.

Restrictions based on alienage which affect U.S.-born children of unauthorized aliens might be particularly susceptible to constitutional challenge. In *Oyama v. California*, the Supreme Court held that a California law prohibiting the ownership of land by aliens was unconstitutional because it required the citizen child of aliens to prove that his parent did not purchase property in the child’s name—a burden not imposed upon the children of U.S. citizens.<sup>118</sup> Thus, it would appear that, contingent on the manner and scope of a state or local housing restriction on unauthorized aliens, a U.S. citizen could file an *Oyama*-like challenge if adversely impacted by the rule (e.g., a citizen child or spouse of an unauthorized alien whose property rights are impaired on account of family membership).

### III. PROCEDURAL DUE PROCESS

#### The Due Process Clause of the Fourteenth Amendment

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Court decisions upholding alien land laws were not in accord with subsequent Court jurisprudence).

<sup>116</sup> *Ambach v. Norwick*, 441 U.S. 68, 73 (1979).

<sup>117</sup> Compare *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (finding state classifications based on alienage, as such, to be “inherently suspect and subject to close judicial scrutiny”), with *Plyler v. Doe*, 457 U.S. 202, 219 n.19 (1982) (finding that the unauthorized presence of illegal aliens is not a “constitutional irrelevancy,” and such aliens do not constitute a “suspect class”).

<sup>118</sup> 332 U.S. 633, 636, 644 (1948). It should be noted that the California alien land law was ruled unconstitutional only as applied. *Id.* at 640. The Supreme Court did not reach the broader question of whether state prohibitions against alien ownership of real property was constitutional, nor did the Court expressly overrule precedent which upheld alien land laws. However, Justice Black (joined by Justice Douglas) and Justice Murphy (joined by Justice Rutledge) in concurrences, argued that the California statute unconstitutionally abridged the property rights of aliens. *Id.* at 647 (Black, J., concurring); *id.* at 650 (Murphy, J., concurring).

provides that no state may “deprive any person of life, liberty, or property, without due process of law.”<sup>119</sup> The Supreme Court has long recognized that the Due Process Clause, contained in both the Fifth and Fourteenth Amendments,<sup>120</sup> “applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.”<sup>121</sup>

States and localities may not arbitrarily interfere with the fundamental interests protected by the Due Process Clause. Thus, in order for states and localities to do so, there must be fair and just procedures. “Procedural due process rules are meant to protect persons not from the deprivation, but from the *mistaken or unjustified* deprivation of life, liberty, or property.”<sup>122</sup> The procedures required to withstand a due process challenge turn on the circumstances involved and the interests at stake. In *Mathews v. Eldridge*, the Supreme Court outlined the standard for assessing due process, holding that:

[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: *First*, the private interest that will be affected by the official action; *second*, the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and *finally*, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.<sup>123</sup>

Although the precise requirements for due process depend on the particular circumstances, states and localities must nevertheless provide persons with some type of process to contest the deprivation of a protected interest. For example, two essential requirements of due process in circumstances where a protected interest may be deprived are notice and a hearing before an impartial tribunal.<sup>124</sup> Depending on the circumstances,

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<sup>119</sup> U.S. CONST. amend. XIV, § 1.

<sup>120</sup> U.S. CONST. amends. V, XIX, § 1. Both the Fifth and Fourteenth Amendments protect persons from government action depriving them of life, liberty, or property. However, the Fifth Amendment concerns obligations owed by the federal government, whereas the Fourteenth Amendment covers activities by state and local governments.

<sup>121</sup> *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); see *Plyler*, 457 U.S. at 210 (1982) (“Aliens, even aliens whose presence in this country is unlawful, have long been recognized as ‘persons’ guaranteed due process of law by the Fifth and Fourteenth Amendments.”).

<sup>122</sup> *Carey v. Piphus*, 435 U.S. 247, 259 (1978) (emphasis added).

<sup>123</sup> 424 U.S. 319, 335 (1976) (emphasis added).

<sup>124</sup> See, e.g., *id.* at 333 (“[S]ome form of hearing is required before an individual is finally deprived of a . . . [protected] interest.”); *In re Murchison*, 349

due process may require other procedural protections to diminish the likelihood of mistake or unfairness arising during process.<sup>125</sup>

The procedural protections of the Due Process Clause only apply when government action directly deprives someone of a protected interest;<sup>126</sup> it “does not apply to the indirect adverse effects of governmental action.”<sup>127</sup> While indirect government action that results in a deprivation of a protected interest may pose a claim against the government or another party, the claim would have to rely on another legal theory, not based on procedural due process.

#### *A. Procedural Due Process Limitations on State Regulations of Employment*

Procedural due process may also act as a basis for challenging state and local ordinances regulating the employment of unauthorized aliens. For example, an employer’s liberty interest, namely “the right of the individual to contract, [and] to engage in any of the common occupations of life,” may be at stake if his business license was revoked for hiring unauthorized aliens.<sup>128</sup> Moreover, procedural due process must be satisfied before depriving the employer of his property interest in his business license.<sup>129</sup> However, the Supreme Court has specifically held that

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U.S. 133, 136 (1955) (“A fair trial in a fair tribunal is a basic requirement of due process.”); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (describing notice of a proposed deprivation of interest as “[a]n elementary and fundamental requirement of due process . . .”).

<sup>125</sup> In many circumstances, due process may require an opportunity to confront and cross examine adverse witnesses, discovery of evidence being used by the government to support its action, an obligation by the decision-maker to base his or her ruling solely upon the administrative or judicial record, and a right to be represented and assisted by counsel. See CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. Doc. No. 103-6, at 1795–1800 (Johnny H. Killian & George A. Costello eds., 1996), available at <http://www.gpoaccess.gov/constitution/pdf/con025.pdf>.

<sup>126</sup> See, e.g., *O’Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 789–90 (1980) (finding that nursing home residents had no constitutional right to a hearing before a state or federal agency revoked the home’s authority to provide them with nursing care at government expense); *Legal Tender Cases*, 79 U.S. 457, 551 (1870) (“[The Due Process Clause] has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power. It has never been supposed to have any bearing upon, or to inhibit laws that indirectly work harm and loss to individuals.”).

<sup>127</sup> *O’Bannon*, 447 U.S. at 789.

<sup>128</sup> *Board of Regents of State Colls. v. Roth*, 408 U.S. 564, 572 (1972).

<sup>129</sup> *Bell v. Burson*, 402 U.S. 535, 539 (1971); see *College Savs. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675 (1999) (“The assets

there is no property interest in the issuance of a new license.<sup>130</sup>

Thus, states and localities must provide some type of process to employers who wish to challenge any deprivation of a protected liberty or property interest. This would require, at a minimum, notice and a hearing before an impartial tribunal, during which they could challenge the state or local findings regarding their employment practices.<sup>131</sup> State and local measures that provide procedural protections like those given to businesses by the federal government under INA § 274A, appear more likely to survive a procedural due process challenge than those that do not.<sup>132</sup>

*B. Procedural Due Process Limitations on State Regulations on Renting and Leasing Property*

State or local measures seeking to prohibit unauthorized aliens from leasing property also appear to implicate “property” interests protected by the Due Process Clause. The right to “maintain control over [one’s] home, and to be free from governmental interference, is a private interest of historic and continuing importance.”<sup>133</sup> Imposing the termination of a lease between a property owner and lessee deprives one or both of the parties of several property-related interests, including the right of sale, the right of occupancy, the right to unrestricted use and enjoyment, and the right to receive rents.<sup>134</sup> In addition, those

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of a business (including its good will) unquestionably are property, and any state taking of those assets is unquestionably a ‘deprivation’ under the Fourteenth Amendment. But business in the sense of *the activity of doing business, or the activity of making a profit* is not property in the ordinary sense . . . .”); *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 465 (1921) (“[C]omplainant’s business . . . is a property right, entitled to protection against unlawful injury or interference . . .”).

<sup>130</sup> *Bell*, 402 U.S. at 539.

<sup>131</sup> *See supra* note 124.

<sup>132</sup> Under INA § 274A, before an employer is sanctioned for unlawful employment practices relating to unauthorized immigrants, the employer must be provided with notice of the proposed action and a hearing before an administrative law judge in which the basis of the proposed order may be challenged. The judgment of the administrative law judge is subject to administrative appellate and judicial review. INA § 274A(e)(3)(A)–(B), 8 U.S.C. § 1324(e)(3)(A)–(B) (2006).

<sup>133</sup> *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53–54 (1993) (holding that the Due Process Clause compels the government to give notice and meaningful opportunity to be heard before seizing real property subject to civil forfeiture).

<sup>134</sup> *See id.* at 54; *see also* *Greene v. Lindsey*, 456 U.S. 444, 450–51 (1982) (recognizing that tenants have a significant property interest in “the right to

compelled to pay fines for leasing real property to unauthorized aliens are deprived of an additional property interest. Incarceration would also deprive offenders of a liberty interest. Thus, state or local measures prohibiting the housing of unauthorized aliens appear likely to deprive property owners and/or tenants of an interest protected by the Due Process Clause. Accordingly, it would appear that states and localities enacting such measures must provide procedural protections to minimize the occurrence of unfair or mistaken deprivations of protected interests.

#### CONCLUSION

Although there are many constitutional limitations constraining what state and localities can do to regulate immigration within its borders, federal immigration laws do provide states and localities some role, albeit auxiliary, in its enforcement. States and localities may, for example, enforce the federal immigration laws under the 287(g) program if they are willing to submit to federal supervision. Moreover, it does appear that a state may enforce the criminal provisions of the federal immigration laws, at least in situations where affirmatively authorized by state law. However, the role of state officers will be, at most, supplementary to that of the federal authorities, and is in many ways determined by the scope of federal enforcement.

In comparison, there are fewer barriers that states and localities must overcome in order to regulate the economic activity of unauthorized aliens. Because of this, many recent constitutional challenges against state or local prohibitions on hiring and leasing property to unauthorized aliens have failed. But in most of these cases, states and localities can only exercise immigration enforcement and regulatory powers when furthering some other state interest, such as the state interest in regulating employment conditions and ensuring quality housing within its jurisdiction. In other words, the primary purpose of the state or local regulation cannot be aimed at a desire, or a perceived need to regulate immigration directly.

As Congress expands the legal regime governing aliens' presence within the United States, state authorities must tailor, and in many ways diminish, their role in immigration enforcement in order to comply with federal primacy in the field.

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continued residence in their homes”).

Although the current federal regime provides states and localities with leeway to regulate employment and the leasing of property to illegal aliens, this is only because Congress has either explicitly permitted states to do so or has yet to regulate directly, and it may be the case that some future act of Congress will bring these areas solely under federal jurisdiction.