

The Perils of Pre-Emption: Immigration and the Federalist Paradox

By Gary Endelman and Cynthia Lange* **

1. Introduction

Before we begin, some words of introduction and explanation.

While the power of the federal government to regulate immigration is not specifically mentioned in the Constitution, the Supreme Court has long recognized an implied federal power over immigration as a core attribute of national sovereignty.¹ We know that only the Congress, not the states, can regulate immigration.² The Supremacy Clause makes it crystal clear that federal law trumps state law if Congress wants it that way.³ This includes both federal statutes and the regulations that implement them. Not only Congress but also a duly authorized federal agency acting “within the scope of its constitutionally delegated authority”⁴ may pre-empt contrary state law. Stated most plainly, the intent of Congress is the “ultimate touchstone in every preemption case.”⁵ Well now, perhaps this whole business of preemption is not as simple as it sounds. While Congress dithers, and comprehensive immigration reform remains a slogan for debate and an invitation for demagoguery, states and cities throughout the land rush into the vacuum with their own solutions. To explore this movement and ponder its constitutional legitimacy is the purpose of the essay that follows.

To date, when it comes to state immigration laws and local ordinances, America has suffered from an excess of overheated rhetoric and a paucity of dispassionate analysis. We intend to try to redress the balance, if only in small measure. Our goal is not persuasive advocacy but intellectual honesty that seeks not to take sides but to explore positions that are deeply and honestly held by people of good will who strenuously disagree. America can decide for itself what it thinks. That is why so many footnotes weigh down the textual remarks, knowing that this will make the subject matter more dense, so that this article can be the document of record that scholars, lawyers, judges, legislators and concerned citizens can turn to for their own very different purposes. Beyond this, the sheer number of footnotes and the extensive annotated remarks reflect the authors' personal intellectual journey through all the nuances and inner passages of

*This article is dedicated to the shining memories of Michael Maggio and Joe Vail. For those who were warmed by the pleasure of their company, they will not be soon or easily forgotten.

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¹ See, e.g. *The Chinese Exclusion Cases*, 130 U.S. 581 (1890); *Fong Yue Ting v. U.S.*, 149 U.S. 698 (1893).

² *De Canas v. Bica*, 424 U.S. 351, 358 (1978).

³ U.S. Const. art. VI, § 2.

⁴ *Medronics v. Lohr*, 518 U.S. 470, 485 (1996).

⁵ *Gibbons v. Ogden*, 22 U.S. 1, 211 (1824).

this fascinating but elusive problem. We confess to frequent changes of mind and mood swinging from one predisposition to another, as new research on preemption was uncovered. Rather than eliminating case authority that disagreed with where the essay came out, we chose to keep it in, doing so in the hope that such expanded context will allow the reader to come to his or her own conclusions armed with the intellectual authority necessary to support them. We feel an obligation to our fellow citizens to produce a work that is as serious as the issue we all need to understand.

While we do attempt to review the plethora of state immigration laws, our compendium, by its very nature, is a snapshot in time, more comprehensive than exhaustive, and does not deal with the many similar initiatives that are at various stages of the legislative process for covering them all is not only impossible but manifestly beyond the scope of what we do here. Second, the essay seeks to make such state and local action more comprehensible by setting them in the context of general constitutional principles on preemption taken from all major Supreme Court rulings on the subject. Third, to the extent that the courts have spoken on the constitutional validity or infirmity of recent state and local actions, we probe what these judicial opinions say and why. Fourth, much of what we say will be revised or reaffirmed by the appellate rulings to come and the ultimate pronouncement by the Supreme Court. Any opinions ventured before then can only be tentative at best.

It is equally important to state what the article does not intend to do, namely decide whether state immigration laws and local ordinances are good or bad public policy. That is for others to decide. We have our own thoughts, of course, and they are deeply held, but we have attempted to divorce them from the analysis that follows. Only our readers can tell if the article succeeds or not. Conscious of our limits, we seek merely to explain what preemption is and how it affects the great national conversation now underway. . We hope that we have done that. What happens next is up to you- Gary Endelman and Cynthia Lange.

2. The Federal Law – The Immigration Reform and Control Act

Prior to the Immigration Reform and Control Act of 1986, federal law did not prohibit the employment of foreign nationals who were not authorized to be in the United State, or who were lawfully present but not authorized to work. In 1978, the Select Commission on Immigration and Refugee Policy, led by Theodore Hesburgh, examined the topic of immigration enforcement within the United States. One of the issues that the Hesburgh Commission considered was whether to require a tamper-resistant Social Security card to identify employment eligibility.⁶ Concerns over privacy and perception of a “national I.D.” card and other political impediments prevented the prospect of secure identification from further consideration. Instead, Congress enacted employer sanctions provisions through the Immigration Reform and Control Act of 1986⁷ as a political compromise. IRCA introduced federally imposed civil and criminal penalties against employers who hire undocumented workers. In addition to penalties, IRCA requires employees to demonstrate eligibility by producing specific documentation and requires employers to

⁶ Tamar Jacoby, *An Idea Whose Time Has Finally Come? The Case for Employment Verification*, Migration Policy Institute (Nov. 2005).

⁷ Pub. L. 99-603 (Nov. 6, 1986) (hereinafter “IRCA”).

report the verification process on Form I-9.⁸ IRCA also provides safeguards against discrimination by limiting the extent of inquiry into a job applicant's immigration status.⁹

For this discussion, the most important part of IRCA was its preemption clause.

(2) Preemption - 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, recruit or refer for a fee for employment, unauthorized aliens.¹⁰

With this provision, Congress clearly meant to prevent states and municipalities from imposing civil and criminal penalties upon employers for hiring unauthorized foreign workers; the problem lies in the parenthetical "(other than through licensing and similar laws)."¹¹ The history of this parenthetical is between murky and completely unknown, and as discussed below,¹² courts have read the parenthetical in opposing fashions. What little we do know about the history of the parenthetical is suggested by a House Report on the early stages of IRCA:

The penalties contained in this legislation are intended to specifically preempt any state or local laws providing civil fines and/or criminal sanctions on the hiring, recruitment or referral of undocumented aliens. They are not intended to preempt or prevent lawful state or local processes concerning the suspension, revocation or refusal to reissue a license to any person who has been found to have violated the sanctions provisions in this legislation. Further, the Committee does not intend to preempt licensing or "fitness to do business laws," such as state farm labor contractor laws or forestry laws, which specifically require such licensee or contractor to refrain from hiring, recruiting or referring undocumented aliens.¹³

Another key aspect of this discussion revolves around the E-Verify system. Previously known as the Basic Pilot Program, E-Verify is an online system that allows employers to verify the employment eligibility of new hires by checking their name and other biographic data against databases maintained by the Department of Homeland Security and the Social Security Administration. E-Verify was created in 1996, in the Illegal Immigration Reform and Immigrant Responsibility Act.¹⁴ IIRIRA authorized several electronic employment verification systems, but currently, only E-Verify system is in use. E-Verify was initially only available to employers in the six states with the highest population of unauthorized foreign national residents. E-Verify became available in all fifty states but remained voluntary.¹⁵

⁸ 8 U.S.C. § 1324a(b).

⁹ See 8 U.S.C. § 1324b.

¹⁰ 8 U.S.C. § 1324a(h)(2).

¹¹ *Id.*

¹² See *infra* n. 254 and accompanying text.

¹³ H.R. No. 99-682(I) at 5662.

¹⁴ Pub. L. 104-208 (Sept. 30, 1996) (hereinafter "IIRIRA").

¹⁵ Basic Pilot Extension Act, Pub. L. 108-156 (Dec. 3, 2003).

3. An Overview of Current State Legislation¹⁶

To meet the growing demand for labor following the Civil War, Congress passed laws encouraging immigration.¹⁷ In many communities, however, the subsequent influx of immigrants resulted in a growing animosity towards those newcomers. As Congress had already demonstrated its view on immigration, nativists turned to state and local governments to address the issue.¹⁸ Lawmakers passed overt exclusion and deportation laws in some states, such as California, while others denied civil or economic rights to foreign nationals.¹⁹

Following World War I, the United States again saw a rising tide of anti-immigrant sentiment, and again state and local governments began to act against the influx of foreigners. The states tried to exclude foreign nationals²⁰ from state natural resources,²¹ public works contracts,²² game hunting,²³ certain trades,²⁴ and private employment.²⁵ In more years, states have tried to deny foreign nationals welfare,²⁶ medical,²⁷ and education benefits²⁸ and have tried to restrict the ability of foreign nationals to work as lawyers,²⁹ notaries public,³⁰ civil engineers,³¹ teachers,³² police officers,³³ and civil servants.³⁴

State efforts to regulate immigrants underwent a brief resurgence in the 1990s, particularly concerning those foreign nationals without valid immigration status (so-called "illegal aliens"). Of these efforts, California's Proposition 187 was the most prominent. California voters passed Proposition 187 as a ballot initiative in 1994. It attempted to discourage unauthorized immigration into California by using a comprehensive scheme of classification, reporting, document control, and denial of public benefits. Then-

¹⁶ Also see Appendix 1: a chart detailing currently enacted state laws.

¹⁷ Manheim, Karl. *State Immigration Laws and Federal Supremacy*. 22 Hastings Const. L.Q. 939 (1999).

¹⁸ Wong, William B. *Comment, Iron Curtain Statutes, Communist China, and the Right to Devise*, 32 UCLA L. Rev. 643, (1985). ("Mounting public pressure against aliens resulted in state legislatures enacting statutes that restricted land-ownership rights of resident aliens.")

¹⁹ *Id.*

²⁰ Manheim, Karl. *State Immigration Laws and Federal Supremacy*. 22 Hastings Const. L.Q. 939 (1999).

²¹ See *Takahashi v. Fish & Game Comm'n.*, 334 U.S. 410 (1948); *Oyama v. California*, 332 U.S. 633 (1948).

²² See, *Crane v. New York*, 239 U.S. 195 (1915).

²³ See *Patsone v. Pennsylvania*, 232 U.S. 138 (1914); see also *Ohio ex rel. Clarke v. Deckebach*, 274 U.S. 392 (1927) (prohibiting aliens from maintaining an inherently dangerous enterprise).

²⁴ See *Asakura v. Seattle*, 265 U.S. 332 (1924) (municipal ordinance prohibited the granting of pawnbrokers' licenses to noncitizens).

²⁵ See *Truax v. Raich*, 239 U.S. 33 (1915).

²⁶ See *Truax v. Raich*, 239 U.S. 33 (1915).

²⁷ See *Monmouth Medical Ctr. v. Hau Kwok*, 444 A.2d 610 (N.J. Super. Ct. App. Div. 1982).

²⁸ See *Plyler v. Doe*, 457 U.S. 202 (1982).

²⁹ See *In re Griffiths*, 413 U.S. 717 (1973).

³⁰ See *Bernal v. Fainter*, 467 U.S. 216 (1984).

³¹ See *Examining Bd. of Engrs., Architects & Surveyors v. Flores de Otero*, 426 U.S. 572 (1976).

³² See *Ambach v. Norwick*, 441 U.S. 68 (1979).

³³ See *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982); *Foley v. Connelie*, 435 U.S. 291 (1978).

³⁴ See *Sugarman v. Dougall*, 413 U.S. 634 (1973).

governor of California Pete Wilson was a staunch supporter of the measure, expressly hoping that the initiative would induce foreign nationals to “self-deport.”³⁵ The official ballot argument described the measure as “the first giant stride in ultimately ending the ILLEGAL ALIEN invasion” (emphasis in original).³⁶ Immediately after it was passed, Proposition 187 was challenged in federal court by a number of immigrant rights organizations. Within a week of its passage, the United States District Court of the Central District of California issued a temporary restraining order that prevented the initiative from being enforced. The measure was never enforced, as its legality remained in doubt for three years while the legal challenges against it continued in court. The District Court eventually found that Proposition 187 was preempted by federal law. Governor Wilson appealed the Court’s decision, but his successor, Gray Davis, did not pursue the appeals, which effectively abandoned the law.

The inability or unwillingness of Congress to enact comprehensive immigration reform on the federal law has opened the door wide for state action. As of August 7, 2008, 23 states had enacted legislation, regulations, or executive orders affecting the employment of immigrants and worksite enforcement. One of the unusual things about the state laws being enacted is most of the activity prohibited is already prohibited by the Federal Government’s I-9 rules. The states have simply restated the Federal I-9 laws in slightly different words applying local and state penalties. The result is that employers who do business in multiple states now have to study and understand the ever so slightly different nuances from state to state.

While no two pieces of state rules are exactly the same, they can roughly be grouped into three different categories:

- 1) State laws that impose penalties upon businesses that employ “unauthorized” foreign workers; (different state laws may define this term inconsistently from each other as well as different from federal law)
- 2) State laws requiring employers to certify that they do not employ unauthorized workers; and
- 3) State laws requiring employers to enroll and participate in the E-Verify program.

In many cases, these categories overlap. A state may enact a law requiring employers to participate in E-Verify, and at the same time, impose additional penalties on those employers that utilize unauthorized foreign workers. Individual states have enacted different pieces of legislation in each category. Some states have imposed these types of requirements only on employers who enter into contracts with the state, while other states have imposed some of these requirements on all employers doing business within the state.

State Laws that Impose Penalties Upon Businesses that Employ Unauthorized Workers

One of the ways in which state lawmakers have addressed immigration enforcement at the worksite has been to impose penalties on businesses that employ unauthorized

³⁵ Raine, G., *Wilson Leads Brown in 2nd Straight Poll in a Tight Race*, S.F. Examiner, Sept. 23, 1994, at A4.

³⁶ Mailman, Stanley, *California's Proposition 187 and Its Lessons*. New York Law Journal (p. 3, col. 1) (January 3, 1995).

foreign workers. While federal law already prohibits the employment of unauthorized workers and imposes strict penalties on those who do, the federal government's enforcement mechanisms are considered by many to be overly lax. Lawmakers in a number of states have assessed this situation and have adopted the opinion that if the federal government will not penalize employers that break the law, then the states should do so.³⁷ In some cases, the state measures are structured to supplement federal penalties. These states, such as Florida, Nevada, and Virginia, have not authorized their state officials to investigate violations of the law, but they will impose their own sanctions once the federal government prosecutes someone for employing an unauthorized worker. In states such as Arizona, Mississippi, and South Carolina, lawmakers have empowered their own officials with the authority to investigate whether an employer is violating the law, and if so, to sanction the employer.³⁸ Some states, such as Mississippi³⁹, have also created a new private cause of action for U.S. citizen or permanent resident employees who are terminated while the employer retains an employee who the employing entity knows, or reasonably should have known, is an unauthorized worker.

Arizona. On July 2, 2007, Arizona Governor Janet Napolitano hesitantly signed⁴⁰ the "Legal Arizona Workers Act" into law.⁴¹ The law imposes penalties on employers that knowingly or intentionally employ unauthorized foreign workers. Effective as of January 1, 2008, first time violators who knowingly employ unauthorized workers are subject to a three-year probationary period and may have their business licenses suspended for up to ten days. First time violators who intentionally employ unauthorized workers will be subject to a five-year probationary period and will have their business licenses suspended for a minimum of 10 days. Subsequent violations during the probationary period lead to a permanent revocation of an employer's Arizona business license. As discussed below, the Arizona law also requires all employers doing business in the state to verify the work authorization of all new hires using the E-Verify program. Arizona

³⁷ Arizona Governor Janet Napolitano, Signing Statement, July 2, 2007 (available at <http://azgovernor.gov/documents/sos/2008/07-07-02%20HB%202779%20Statement.pdf>) ("it is now abundantly clear that Congress finds itself incapable of coping with the comprehensive immigration reforms our country needs."); Press Release, "Gov. Sanford Issues Statement on Passage of Immigration Reform," January 30, 2008, (available at <http://www.scgovernor.com/news/releases/4-30-2008.htm>) ("Since Washington has failed to act on this issue, I think that as a state we have to be very clear about not creating incentives for illegal behavior,"); Press Release, "Gov. Blunt Signs Legislation Protecting Missouri Families, Tax Dollars from Illegal Immigration," July 8, 2008 (available at <http://governor.mo.gov/cgi-bin/coranto/viewnews.cgi?id=EkEVVVuZEZRtGiKvyv&style=Default+News+Style&tmpl=newsite>); (quotes Missouri State Representative, Bob Onder as saying, "The federal government has badly failed us by failing to enforce immigration law and secure our borders...With the signing of my bill into law, we provide law enforcement with the tools and training necessary to effectively combat this problem.").

³⁸ See Ariz. Sess. L. ch. 279 (1997); available at <http://www.azleg.gov/FormatDocument.asp?inDoc=/legtext/48leg/1r/laws/0279.htm>; 2008 Gen. Laws Miss. Ch. No. 312; available at <http://billstatus.ls.state.ms.us/documents/2008/html/SB/2900-2999/SB2988SG.htm>; 2008 S.C. Acts 280; available at http://www.scstatehouse.net/sess117_2007-2008/bills/4400.htm.

³⁹ Laws Miss. Ch. No. 312; available at <http://billstatus.ls.state.ms.us/documents/2008/html/SB/2900-2999/SB2988SG.htm>.

⁴⁰ See Governor Napolitano's statement above in Note 19.

⁴¹ Ariz. Sess. L. ch. 279 (1997); available at <http://www.azleg.gov/FormatDocument.asp?inDoc=/legtext/48leg/1r/laws/0279.htm>

lawmakers made a number of technical changes to the Legal Arizona Workers Act in 2008 primarily to clarify the law only applied to employees hired after January 1, 2008 and to clarify the potential sanctions applies to actions occurring solely within the State of Arizona.⁴²

Florida. Since at least 1997, Florida law prohibits any person from knowingly employing, hiring, recruiting, or referring, for employment an unauthorized worker.⁴³ The first violation is a civil violation and upon conviction is punishable by a civil fine of not more than \$500.

Louisiana. On June 23, 2006, Louisiana enacted Act 636, which became effective that day.⁴⁴ The law authorizes state or local government agencies to conduct investigations of an employer's hiring policies if the employment of unauthorized foreign workers is suspected. A government agency may then file a complaint with the state attorney general or local district attorney, who may issue a cease and desist order demanding that the employer fire any undocumented workers. Private citizens may also file complaints with the attorney general or the local district attorneys. If an employer violates the cease and desist order, it can be fined up to \$10,000, unless it can demonstrate that the cease and desist order was erroneously issued. In addition, once an employer violates the cease and desist order, the attorney general or district attorneys may file a complaint with the appropriate licensing board or boards to have the employer's business license suspended or revoked. Businesses that employ less than 10 people are exempt from Act 636.

Mississippi. On March 17, 2008, the state enacted the Mississippi Employment Protection Act.⁴⁵ As discussed below, it requires all employers in Mississippi to register with and utilize the E-Verify program. While the Act penalizes employers that do not participate in E-Verify, it also makes it a felony for any person to perform employment services if he or she is not authorized to work or to accept the employment services of a person knowing that he or she is not authorized to work. Violators are subject to imprisonment for no less than one year and no more than five years or fines between \$1,000 and \$10,000, or both. The Act also created a private cause of action for an employee who is terminated while the employer retains an employee who the employing entity knows, or reasonably should have known, is an unauthorized worker hired after July 1, 2008. In his signing statement, Mississippi Governor, Haley Barbour expressed both the intent behind the new law and his reservations in signing it:

Today, I have signed into law SB 2988, a bill designed to discourage illegal immigration in Mississippi by creating new penalties for hiring illegal immigrants....It is, therefore, very important that the law be written clearly and be interpreted predictably. SB 2988 falls short of that standard, and it also limits

⁴² Ariz. Sess. L. ch. 152 (2008); available at <http://www.azleg.gov/FormatDocument.asp?inDoc=/legtext/48leg/2R/laws/0152.htm>.

⁴³ Fla. Stat. § 848.09 (1995-2008); available at http://www.leg.state.fl.us/Statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=Ch0448/SEC09.HTM&Title=-%3E2007-%3ECh0448-%3ESection%2009#0448.09.

⁴⁴ 2006 La. Acts No. 636; available at <http://www.legis.state.la.us/billdata/streamdocument.asp?did=405939>.

⁴⁵ 2008 Gen. Laws Miss. Ch. No. 312; available at <http://billstatus.ls.state.ms.us/documents/2008/html/SB/2900-2999/SB2988SG.htm>. See also *infra*, footnotes 309 - 315 and accompanying.

compliance to a system of verification that even its provider, the U.S. Government, says is insufficiently reliable.⁴⁶

Missouri. Signed by Governor Matt Blunt on July 7, 2008, House Bill 1549 empowers the state's Attorney General to request from employer's identity information on employees.⁴⁷ Employers must provide such documents within 15 business days after receipt of the request. Failure to do so may result in the suspension of a company's applicable local licenses, permits, and exemptions until the documents are supplied. Employers that are found to have employed unauthorized workers may have their ability to conduct business in Missouri curtailed.

Nevada. Since October 1, 2007, Nevada imposes its own set of sanctions on employers who violate federal immigration laws.⁴⁸ Nevada law empowers the state's Tax Commission to hold hearings concerning any business or individual holding a Nevada business license that has been found by the federal government to employ unauthorized foreign workers. If the Tax Commission finds that the violation of federal immigration law was willful, it can impose administrative fines. However, the validity of Nevada's sanction law is currently in doubt. In an opinion letter issued in March 2008, the state's Attorney General of Nevada stated the administrative fine was pre-empted by IRCA.⁴⁹

New Hampshire. While New Hampshire has prohibited the employment of unauthorized foreign workers since 1976,⁵⁰ the state enacted a law raising the fines for such violations in 2006.⁵¹ Previously, businesses or individuals that employed unauthorized workers could be fined up to \$1,000 a day for each day it employed such workers. Effective January 1, 2007, the fine has been raised to \$2,500 a day

Oregon. Oregon enacted a law that, starting on January 1, 2008, prohibits holders of farm labor contractor licenses from hiring unauthorized foreign workers.⁵² The law authorizes the state's Commissioner of the Bureau of Labor to levy civil fines against any farm labor contractor that employs unauthorized workers. It also allows the Commissioner, or any individual resident of the state, to bring a lawsuit against any person to enjoin them from using the services of an unlicensed farm labor contractor.

South Carolina. On June 4, 2008, South Carolina enacted the South Carolina Illegal Immigration Reform Act.⁵³ The act, which becomes effective in stages over 2009 and 2010, created an implied, no-fee, no-application "employment license" for every

⁴⁶ Mississippi Governor, Haley Barbour. SB 2988 Signing Statement (March 17, 2008) (available at <http://www.governorbarbour.com/news/2008/mar/SB2988.htm>).

⁴⁷ 2008 Mo. Laws LR No. 3681L.12T; available at <http://www.house.mo.gov/billtracking/bills081/billpdf/truly/HB1549T.PDF>.

⁴⁸ 2008 Nev. Stat. 1266, 1270; available at http://www.leg.state.nv.us/74th/Bills/AB/AB383_EN.pdf.

⁴⁹ Letter by Catherine Cortez Masto, Attorney General of Nevada, to Dino DiCianno, Exec. Director, Nevada Dept. of Taxation (March 3, 2008). <http://www.ag.state.nv.us>.

⁵⁰ N.H. Rev. Stat. Ann. § 275-A: 5.

⁵¹ 2008 N.H. Laws 06-2143; available at <http://www.gencourt.state.nh.us/legislation/2006/HB1278.html>.

⁵² 2008 Or. Laws Ch. 160; available at <http://www.leg.state.or.us/07reg/measure/sb0200.dir/sb0202.en.html>.

⁵³ 2008 S.C. Acts 280; available at http://www.scstatehouse.net/sess117_2007-2008/bills/4400.htm.

employer doing business in South Carolina.⁵⁴ If an employer is found to have employed unauthorized workers, the implied employment license may be suspended for between 10 and 30 days. Subsequent violations may lead to longer suspensions or a complete revocation of the implied employment license for at least five years. Such a suspension would effectively put an employer out of business, as an employer may not employ a person unless its employment license is in effect and not suspended or revoked.⁵⁵ Employers that have their implied employment license suspended must also pay a "reinstatement fee" that is equal to the cost of investigating and enforcing the matter that led to the suspension. The act also will require all employers to either (1) participate in E-Verify or (2) only hire employees that possess or qualify for a South Carolina driver's license (or other state license with similarly strict requirements).⁵⁶ The Act also created a private cause of action for an employee who is terminated while the employer retains an employee who the employing entity knows, or reasonably should have known, is an unauthorized worker.⁵⁷

Tennessee. One of the more active states in enacting immigration-related legislation, Tennessee has prohibited the employment of unauthorized foreign workers since at least 1999,⁵⁸ and in 2007, the state legislature passed several new employer sanction and work authorization verification measures. Public Chapter Law 529 (2007) prohibits any individual, corporation, partnership, or other legal entity from knowingly employing an "illegal alien."⁵⁹ The law defines "illegal alien" as a person who is, at the time of employment, neither an alien who is lawfully admitted for permanent residence in the U.S. nor authorized to be employed by the federal Immigration and Nationality Act or the U.S. Attorney General. An employer does not violate Chapter Law 529 with regard to a particular employee if, within 14 days of the date of hire, (in contrast to the three day time frame in IRCA) the employer verifies the employee's work authorization pursuant to the federal Form I-9 requirements and the employee's documentation is later determined to be false or verifies the employee's work authorization using the E-Verify program. Enforcement of the law is complaint-driven, and any state governmental agency, entity, officer, or employee can report suspected violations to the state's Commissioner of Labor and Workplace Enforcement. The Commissioner may institute administrative proceedings against any suspected violators. First-time violators can have their business license suspended until they can demonstrate that they no longer employ unauthorized workers. A second violation within three years will lead to a one-year suspension of an employer's business license.⁶⁰

The Tennessee legislature also enacted a law that prohibits the use of a federal individual taxpayer identification number (ITIN) as a form of identification to prove immigration status as part of an application or an offer of employment.⁶¹ Any employer or contractor who is presented with an individual taxpayer identification number by a potential employee or subcontractor as a form of identification or to prove immigration status must reject it under the new law and instead request the "lawful resident

⁵⁴ *Id.* at Section 41-8-20(A).

⁵⁵ *Id.*

⁵⁶ *Id.* at Section 41-8-20(B).

⁵⁷ *Id.* at Section 41-1-30.

⁵⁸ Tenn. Code Ann. § 50.1.1.

⁵⁹ 2007 Tenn. Pub. Acts ch. 529; available at <http://www.legislature.state.tn.us/bills/currentga/Chapter/PC0529.pdf>.

⁶⁰ *Id.*

⁶¹ 2007 Tenn. Pub. Acts ch. 220; available at <http://tennessee.gov/sos/acts/105/pub/pc0220.pdf>.

verification information" (the documentation that is required by the United States department of Homeland Security when completing the federal employment eligibility verification form, Form I-9). This Tennessee law is peculiar because ITINs, which are issued by the Internal Revenue Service, do not serve as evidence of immigration status under any provision of law. They are issued solely for federal taxation purposes.⁶²

Virginia. On March 11, 2008, Virginia enacted a law providing that the authority of certain business entities to operate in the Commonwealth may be terminated involuntarily or revoked upon the conviction of the business entity for a violation of 8 U.S.C. § 1324a(f) (pattern or practice of hiring or continuing to employ unauthorized workers).⁶³ A business that has its authority to operate terminated or revoked continues to be ineligible to have the authority reinstated for a period of at least one year.

West Virginia. On April 19, 2007, West Virginia made it unlawful for any employer in the state to knowingly employ a person who is not authorized to be employed by law.⁶⁴ Employers must verify a prospective employee's legal status or authorization to work prior to employing the individual or contracting with the individual for employment services. Businesses or individuals that knowingly employ unauthorized workers can be guilty of a misdemeanor and be fined: for a first offense, a fine of not less than \$100 or more than \$1,000 for each violation; for a second offense, a fine of not less than \$500 or more than \$5,000 for each violation; and for a third or subsequent offense, a fine of not less than \$1,000 or more than \$10,000 or confinement in jail for not less than thirty days nor more than one year, or both. Third offences can also lead to the revocation or suspension of the employer's business license. Any employer who knowingly and willfully involves itself in document fraud faces a misdemeanor conviction and up to one year in jail.⁶⁵

Because these state employer sanction laws merely build on existing federal sanctions, at first glance they would appear to pose little risk to employers; if an employer complies with federal immigration laws, they need not worry about these state sanctions. However, in states like Arizona, Louisiana, Mississippi, Missouri, New Hampshire, South Carolina, and Tennessee where state officials are empowered to investigate and enforce the state sanction laws, employers can face significant compliance risks. Federal immigration law enforcement officials are fairly specialized. They only enforce the nation's immigration laws, have done so for decades, and as such, are familiar with the law's often tortuous complexities. State officials, on the other hand, likely have little to no experience with immigration law. While many of the state statutes say that state officials will only rely on a federal determination of a worker's status, determining workers' immigration status is the back end of an investigation, not the front. Businesses operating in these states must now be aware that at any time local authorities may start an investigation of their work force, in some cases based on an anonymous complaint.

⁶² See <http://www.irs.gov/individuals/article/0,,id=96287,00.html>.

⁶³ 2008 Va. Acts ch. 588; available at <http://leg1.state.va.us/cgi-bin/legp504.exe?081+ful+CHAP0588>.

⁶⁴ 2007 W.Va. Acts ch. 144; available at http://www.legis.state.wv.us/Bill_Text_HTML/2007_SESSIONS/RS/BILLS/SB70%20SUB1%20enr.htm.

⁶⁵ *Id.*

State Laws Requiring Employers to Certify That They Do Not Employ
Unauthorized Workers

Another approach state lawmakers have been taking is to require employers complete an attestation or certification that they do not employ unauthorized workers. These requirements closely mirror federal Form I-9 requirements. Employers must attest or certify that they have verified the work authorization of new hires. In some states, employers need only certify that they have complied with the federal Form I-9 requirements. This approach has been limited, with only Colorado imposing such a requirement on all employers in the state. Other states require such certifications from state contractors and subcontractors.

Arkansas. Since August 1, 2007, Arkansas has prohibited its state agencies from entering into contracts with businesses that knowingly employ or contract with "illegal immigrants" to perform work under that contract.⁶⁶ Pursuant to this prohibition, Arkansas requires each business seeking to enter into a contract with a state agency to certify that it does not, at the time of certification, employ or contract with undocumented workers. If the business utilizes any subcontractors, they too must certify to the business that they do not employ any unauthorized workers. Contractors seeking to enter into public contracts must make this certification prior to the awarding of the contract, typically before or during the bidding phase. The certification is completed on the state's Office of Procurement website.⁶⁷ Contractors must provide basic information, and on the web-form, they must choose "Yes" or "No" with regard to the statement, "I, certify that we/I do not employ or contract with an illegal immigrant." Businesses that violate the Arkansas law have sixty days to remedy the violation. If they do not do so, the business will be found in breach of the contract and may be liable to the state for any actual damages incurred.⁶⁸

Colorado. Starting in 2006, lawmakers in Colorado made the state a frontrunner in the state efforts to regulate immigration. Following the failure of a harsh immigration-related ballot initiative in 2006,⁶⁹ former governor Bill Owens called an emergency session of the Colorado General Assembly in July 2006 specifically to address immigration.⁷⁰ The General Assembly passed ten immigration-related bills during that emergency session, and Governor Owens signed each into law. Lawmakers in Colorado went on to enact an additional six immigration-related laws during the 2007 legislative session. Pursuant to one of these laws, HB 1001, a business seeking economic development incentives from

⁶⁶ 2007 Ark. Acts 157; available at <http://www.arkleg.state.ar.us/ftp/acts/2007/public/act157.pdf>

⁶⁷ http://www.arkansas.gov/dfa/procurement/pro_immigrant.html.

⁶⁸ 19-11-105. Illegal immigrants — prohibition — public contracts for services. Section 1 (d))(2)(A) & (B) <http://www.arkleg.state.ar.us/ftp/acts/2007/public/act157.pdf>

⁶⁹ The "Defend Colorado Now" initiative would have amended the Colorado Constitution to deny non-emergency public services that are not required by federal law to unauthorized immigrants. See <http://www.defendcoloradonow.org/amendment/language.html>. Although the measure was a failure, it was not defeated through a public vote. Courts in Colorado ruled that the initiative, for a variety of legal reasons was invalid, and it would not be included on the November 2006 ballot. *Gonzalez-Estay v. Lamm, et al., Colo. S.Ct. Case No. 06A20 (2006)*.

⁷⁰ Myung Oak Kim And Lynn Bartels, *Governor Will Call Legislative Session; Compromise Struck on Immigration*, Rocky Mountain News (June 28, 2006); available at <http://www.rockymountainnews.com/news/2006/jun/28/governor-will-call-legislative-session/?printer=1/>.

the Colorado Economic Development Commission must demonstrate that it verified the work authorization of each of its employees.⁷¹ Employers that fail to do so will receive a notice of non-compliance, be required to repay the total amount of money received within 30 days, and be ineligible to be awarded an economic development incentive for five years after the date the employer has repaid the Commission.

Under another Colorado law, HB 1009, state governmental entities may only issue or renew licenses, permits, certificates, or other authorizations to conduct business to persons who are lawfully present in the U.S. Applicants for professional and commercial licenses must prove their identity with a secure and verifiable document, which will be kept confidential by the agency.⁷² They must also complete an Affidavit of Eligibility, from the state Division of Registrations, stating that they are legally present in the United States.

Effective January 1, 2007, the most comprehensive of the Colorado laws, HB 1017, requires all public and private employers that transact business in Colorado must meet two basic requirements:

- Affirmation - Every employer in Colorado must affirm, in writing, that it has (1) examined the legal work status of the new employee, (2) retained file copies of the employee's identification documents, (3) not altered or falsified the documents presented by the employee, and (4) has not knowingly hired an unauthorized foreign worker. The employer must retain a written or electronic copy of the affirmation for the term of employment of each employee. Employers must make the affirmation within twenty days of hiring a new employee.
- Document retention - The employer must keep a written or electronic copy of the identity documents the employee presented in conjunction with the federal I-9 form. The copies must be retained for the term of employment of each employee. Note that federal regulations do not require the retention of the documents presented by an employee when completing the I-9 form.⁷³

The Colorado Division of Labor may randomly audit employers to ensure compliance with the state's employment verification laws. If the Director of the Division of Labor has reason to believe that an employer is not complying with the employment verification and examination requirements, he or she has the authority to request that the employer submit all retained documentation to the Division. The Division of Labor also accepts complaints from individual Colorado residents and may base a request for documentation on such complaints. Any employer that, with reckless disregard, fails to submit the necessary documentation records to the Division of Labor when requested to do so will be subject to fines of not more than \$5,000 for a first offense and not more than \$25,000 for second and subsequent offenses. Similarly, employers that submit false or fraudulent documentation to the Division with reckless disregard are also subject to the same fines.⁷⁴

⁷¹ 2006 Colo. Sess. Laws 06S-1001; available at http://www.leg.state.co.us/clics2006b/csl.nsf/fsbillcont3/14C7E76CC04CB5BC872571A200819B3A?Open&file=1001_enr.pdf.

⁷² 2006 Colo. Sess. Laws 06S-1009; available at http://www.leg.state.co.us/clics2006b/csl.nsf/fsbillcont3/9DE48E392BF92BAC872571A200818FC8?Open&file=1009_enr.pdf.

⁷³ 2006 Colo. Sess. Laws 06S-1017; available at http://www.leg.state.co.us/clics2006b/csl.nsf/fsbillcont3/C25514D38E296D99872571A20081A029?Open&file=1017_enr.pdf.

⁷⁴ *Id.*

Colorado also prohibits, with HB 1343, the state or any political subdivision of the state from entering into or renewing a public contract for services with an individual or entity that: (1) employs or contracts with an unauthorized worker to perform work under the contract, or (2) contracts with a subcontractor who employs or contracts with an unauthorized worker to do the same.⁷⁵ Any individual or entity that seeks to enter into a contract for the procurement of services with a state agency or a political subdivision of the state must certify to the state that it does not knowingly employ unauthorized workers and has enrolled and participated in E-Verify or a state-administered verification program that largely mirrors the requirements of HB 1017. The law allows for on-site inspections by the Colorado Department of Labor and Employment to investigate whether a contractor is complying with the immigration-related provisions of the public contract. The state agency or political subdivision must terminate the contract if a contractor violates the immigration-related provisions and must notify the Secretary of State.⁷⁶

Iowa. In Iowa, effective July 1, 2007, a business that receives economic development assistance from the state must be subject to contract provisions stating that all of the business's employees are authorized to work in the U.S.⁷⁷ Any business that receives public moneys must adhere to the contract provisions and provide periodic assurances that it continues to comply with the contract provisions.

Massachusetts. On February 23, 2007, Massachusetts Governor Deval Patrick issued Executive Order 481, which prohibits state agencies in the Executive Branch from contracting with businesses that employ unauthorized workers.⁷⁸ Any contractor doing business with an Executive Branch agency must certify, as a condition of receiving funds from the state, that it will not employ unauthorized workers. Currently, all contracts with such agencies must include a Certification Form that is available from the Commonwealth's Office of the Comptroller.⁷⁹ All contracts must also specify that if the employer is found to employ unauthorized workers during the period of the contract, this may be regarded as a material breach of the contract, subjecting the contractor to sanctions, including but not limited to monetary penalties, withholding of payments, contract suspension or termination.

Minnesota. Governor, Tim Pawlenty, issued Executive Order 08-01 on January 7, 2008.⁸⁰ The order requires businesses applying for state economic incentives to certify that they do not employ unauthorized workers. If such applicants participate in E-Verify, Governor Pawlenty's order recommends that use of E-verify be considered an advantageous factor during the selection process.

⁷⁵ 2006 Colo. Sess. Laws 06S-1343, amended by 2008 Colo. Sess. Laws 08-193; available at <http://www.coworkforce.com/lab/pcs/8-17.5-101.pdf>.

⁷⁶ *Id.*

⁷⁷ 2006 Iowa Acts S.J. 1580; available at <http://coolice.legis.state.ia.us/CoolICE/default.asp?Category=billinfo&Service=Billbook&hbill=SF562>.

⁷⁸ Mass. EO 07-481; available at <http://www.lawlib.state.ma.us/execorders/eo481.pdf>.

⁷⁹ See, http://www.mass.gov/?pageID=oscterminal&L=4&L0=Home&L1=Guidance+for+Agencies&L2=Fiscal+Year+Updates&L3=Fiscal+Year+2007&sid=Aosc&b=terminalcontent&f=fy_updates_fy07_fy07-19&csid=Aosc.

⁸⁰ Minn. EO 08-01; available at <http://www.governor.state.mn.us/priorities/governorsorders/executiveorders/PROD008598.html>.

Tennessee. Since 2007, Tennessee prohibits businesses and individuals from entering into public contracts (for goods or services) with the state without first attesting in writing that they will not knowingly utilize the services of illegal immigrants or of any subcontractor who will utilize illegal immigrants.⁸¹ Contractors must update the attestations at least semi-annually during the term of the contract. Contractors must also obtain such semi-annual attestations from any subcontractor utilized to perform work that is the subject of the state contract. Attestations obtained from such subcontractors must be maintained by the contractor and be made available to state officials performing the random checks. If a state contractor is found to have employed unauthorized workers, they will be barred from state contracts for one year.

Texas. Effective September 1, 2007, Texas requires public agencies, state or local taxing jurisdictions, and economic development corporations in the state to require any application for a public business subsidy to include a written statement certifying that the applicant does not and will not knowingly employ unauthorized foreign workers.⁸² The Texas law broadly defines public subsidies to include, among other things, grants, loans, loan guarantees, land price subsidies, tax refunds, tax rebates, and tax abatements. The certifying statement must state that if, after receiving the subsidy, the business is convicted of a violation federal law concerning the employment of unauthorized foreign workers, it must repay the full amount of the subsidy with interest. Public agencies, state or local taxing jurisdictions, and economic development corporations, along with the Texas state attorney general may bring a civil action to recover the amount of the subsidy, along with costs and attorney's fees.

Virginia. On March 11, 2008, Virginia enacted a law that requires all public contracts to contain language stating the state contractor does not, and will not during the performance of the contract for goods and services in the Commonwealth, knowingly employ an unauthorized foreign worker.⁸³ The law became effective July 1, 2008

State Laws Requiring Employers Enroll and Participate in the E-Verify Program

Another method state lawmakers have used to regulate immigration enforcement at the worksite is to require employers to enroll and participate in the E-Verify program. E-Verify is an online program administered by the Department of Homeland Security and the Social Security Administration, which allows employers to confirm the eligibility of new hires by checking the personal information they provide against information contained in federal databases. Under federal law, the program is completely voluntary and an argument can be made that only Congress has the authority to make it mandatory.⁸⁴ In contrast to other states, Illinois has attempted to effectively ban the use of the program within the state.⁸⁵ Recently, the California legislature failed to pass a bill prohibiting cities, counties or the State from participating in E-Verify.⁸⁶

⁸¹ 2006 Tenn. Pub. Acts ch. 878; available at <http://tennessee.gov/sos/acts/104/pub/pc0878.pdf>.

⁸² 2007 Tex. Gen. Laws ch. 80R 3651 HLT-D; available at: <http://www.capitol.state.tx.us/tlodocs/80R/billtext/html/HB01196F.htm>.

⁸³ 2008 Va. Acts. Ch. 0598; available at <http://leg1.state.va.us/cgi-bin/legp504.exe?081+ful+HB1298ER>.

⁸⁴ See, 8 U.S.C. § 1324A(d)(2). See notes 326-329, 336-337 *infra* and accompanying text

⁸⁵ 2007 Ill. Pub. Act 095-0138; *also see supra* n. 89 and accompanying text.

⁸⁶ See Calif. Assembly bill 2076 http://info.sen.ca.gov/pub/07-08/bill/asm/ab_2051-2100/ab_2076_bill_20080619_amended_sen_v95.pdf

Arizona. By requiring every employer in the state to enroll and participate in E-Verify, Arizona has taken one of the most aggressive state-level approaches to regulating immigration enforcement at the worksite.⁸⁷ As discussed above, Arizona's "Legal Arizona Workers Act" is widely considered by some to be the toughest of the state immigration efforts, in that it applies to every employer in the state and places in jeopardy an employer's ability to conduct business.

Of all the states to address immigration enforcement, Colorado⁸⁸ and Mississippi⁸⁹ are the only other states to create a new requirement with which every employer must comply. For employers concerned about compliance, the Arizona law goes much further than Colorado's from a practical standpoint. As discussed above, employers in Colorado must complete and retain an attestation that they have examined the work authorization documents of all new hires, which is already required under federal law.⁹⁰ In practice, this requirement means only that whatever person or department an employer delegates Form I-9 duties to must now sign an additional form. In Arizona, however, employers must now complete an entirely new and additional procedure for every new hire.⁹¹ While in most cases E-Verify may produce instantaneous confirmation of a new hire's authorization to work, in a significant number of cases, it will not. In approximately 6-8% of the cases run through E-Verify employers will receive a "Tentative Non-Confirmation" (TNC). This TNC requires employers to notify new employees and allow them time to resolve the TNC with the appropriate government agency. Employers participating in E-Verify must have procedures in place for handling these TNCs. Individual employees who are delegated E-Verify responsibility must undergo an online training course before being able to use the system. At the very least, Arizona's law means, in practice, that every employer in the state must have access to a computer with an internet connection

Colorado. Colorado prohibits the state or any political subdivision of the state from entering into or renewing a public contract for services with an individual or entity that: (1) employs or contracts with an unauthorized worker to perform work under the contract, or (2) contracts with a subcontractor who employs or contracts with an unauthorized worker to do the same.⁹² Any individual or entity that seeks to enter into a contract for the procurement of services with the state must participate in E-Verify or a state-administered verification program that largely mirrors the Colorado law that applies to all employers. They must also submit a certification demonstrating their participation in the program.⁹³ The law allows for on-site inspections by the Colorado Department of Labor and Employment to investigate whether a contractor is participating in E-Verify

⁸⁷ See Ariz. Sess. L. ch. 279 (1997); available at <http://www.azleg.gov/FormatDocument.asp?inDoc=/legtext/48leg/1r/laws/0279.htm>.

⁸⁸ 2006 Colo. Sess. Laws 06S-1017; available at http://www.leg.state.co.us/clics2006b/csl.nsf/fsbillcont3/C25514D38E296D99872571A20081A029?Open&file=1017_enr.pdf.

⁸⁹ Gen. Laws Miss. Ch. No. 312; available at <http://billstatus.ls.state.ms.us/documents/2008/html/SB/2900-2999/SB2988SG.htm>.

⁹⁰ 2006 Colo. Sess. Laws 06S-1017; available at http://www.leg.state.co.us/clics2006b/csl.nsf/fsbillcont3/C25514D38E296D99872571A20081A029?Open&file=1017_enr.pdf.

⁹¹ See Ariz. Sess. L. ch. 279 (1997); available at <http://www.azleg.gov/FormatDocument.asp?inDoc=/legtext/48leg/1r/laws/0279.htm>.

⁹² 2006 Colo. Sess. Laws 06S-1343, amended by 2008 Colo. Sess. Laws 08-193; available at <http://www.coworkforce.com/lab/pcs/8-17.5-101.pdf>.

⁹³ A standard certification form is available at <http://www.coworkforce.com/lab/pcs/ContractorAffirmation.pdf>.

and the contractor is complying with the other immigration-related provisions of the public contract. If a contractor violates the immigration-related provisions of a public contract, the state must terminate the contract and notify the Secretary of State.

Georgia. The Georgia Security and Immigration Compliance Act sets forth that all public employers and their contractors and subcontractors must register and participate in the “federal work authorization program” (i.e., E-Verify) to verify the status of newly hired employees.⁹⁴ The bill applies only to physical performance of services in the state. The Georgia law is being implemented in three phases. Starting July 1, 2007, all public employers and state contractors or subcontractors with 500 or more employees had to have participated in E-Verify. Unfortunately the State has not clarified whether this number refers to the number of employees working solely within the State of Georgia, or to all employees working for the company in the US. This ambiguity has caused employers to balance the pros and cons of interpreting the law narrowly or broadly. Contractors with 100 or more employees must enroll in E-Verify by July 1, 2008, and the law applies to all state contractors on July 1, 2009.

Illinois. Standing alone among other states, Illinois has effectively banned the use of E-Verify. With HB 1744, Illinois sought to prohibit employers from using E-Verify until the system was able to reach a specified quality-control benchmark; specifically, employers could not use the system until the Department of Homeland Security and Social Security Administration databases are able to resolve 99% of the discrepancy notices they issue within three days, which is generally considered to be an unrealistic goal.⁹⁵ If employers are able to participate in E-Verify, they must meet additional state-mandated training and attestation requirements.

The federal government quickly filed a lawsuit in the U.S. District Court for the Central District of Illinois, challenging the legality of Illinois prohibition.⁹⁶ Currently, the case remains in the preliminary stages of litigation, while the Illinois legislature considers SB 1878 that would partially repeal the challenged law.⁹⁷ The measure passed in the Illinois Senate, but failed to pass in the House before it adjourned in May 2008. The Illinois General Assembly reconvenes in November 2008 at which point it could, in theory, reconsider SB 1878 due to an existing legislative motion to continue.⁹⁸ In the ongoing lawsuit, the state has argued that this is still a possibility.⁹⁹ Illinois has agreed to not enforce the prohibition until the lawsuit is resolved, allowing employers to continue to enroll and participate in E-Verify.¹⁰⁰

⁹⁴ 2006 Ga. Pub. Acts 457; available at http://www.legis.state.ga.us/legis/2005_06/versions/sb529_AP_19.htm.

⁹⁵ 2007 Ill. Pub. Act 095-0138; available at <http://www.ilga.gov/legislation/publicacts/fulltext.asp?Name=095-0138>.

⁹⁶ *United States v. Illinois*, C.D. Ill. 07-3261 (2007).

⁹⁷ Illinois, SB 1878 (2008) (available at <http://www.ilga.gov/legislation/fulltext.asp?DocName=&SessionId=51&GA=95&DocTypeId=SB&DocNum=1878&GAID=9&LegID=34563&SpecSess=&Session=>).

⁹⁸ *See Id.*

⁹⁹ *See United States v. Illinois*, C.D. Ill. 07-3261 (2007), Defendant's Motion to Continue (6-13-08), Doc. #20 (on file with authors).

¹⁰⁰ *Id.*

Minnesota. Governor Tim Pawlenty issued Executive Order 08-01 on January 7, 2008.¹⁰¹ The order requires that any business seeking to enter into a state contract in excess of \$50,000 participate in E-Verify. State agencies must also participate in E-Verify. Businesses applying for state economic incentives do not have to participate in E-Verify, but if they do, they are to be given preferential treatment during the adjudication process.

Mississippi. On March 17, 2008, Mississippi enacted the Mississippi Employment Protection Act.¹⁰² Like in Arizona, the Mississippi Act will require all employers doing business in that state to participate in E-Verify, but Mississippi's law goes even further. While E-Verify is mandated in Arizona, an employer that fails to register for the program does not face any sanction simply by failing to register.¹⁰³ Employers in Mississippi that fail to register for E-Verify can have all state contracts canceled and become ineligible for future state contracts or they can have their business license suspended or both. Starting July 1, 2008, all public employers and private employers with 250 or more employees must participate in E-Verify. Employers with between 100 and 249 employees must enroll in E-Verify by July 1, 2009, those with between 20 and 99 by July 1, 2010, and the law applies to all employers on July 1, 2011. Like Georgia, Mississippi has not clarified whether the number of employees refers to employees working within the state or to all employees nationwide. This has caused employers to make choices of how to interpret the statute while balancing the pros and cons of each choice. The Act also created a private cause of action for an employee who is terminated while the employer retains an employee who the employing entity knows, or reasonably should have known, is an unauthorized worker hired after July 1, 2008.

Oklahoma. On May 8, 2007, Oklahoma enacted the Taxpayer and Citizen Protection Act of 2007.¹⁰⁴ Starting July 1, 2008, the Oklahoma law will require all public employers as well as their contractors and subcontractors to use E-Verify to verify the immigration status of employees. The E-Verify requirement only applies to contracts entered into for the physical performance of services after July 1, 2008. Under the new law, a subcontractor includes a contract employee, staffing agency, or any contractor regardless of its tier. The Act also made the discharge of a U.S. citizen or permanent resident alien by an employer, who, at the time of the discharge, employed an unauthorized alien, an actionable unfair trade practice. On June 4, 2008 the District Court for the Western District of Oklahoma issued a temporary injunction barring the state from enforcing the employment provisions of the act pending a final decision on the merits of a legal challenge brought by the Chamber of Commerce and other business organizations.¹⁰⁵

Rhode Island. On March 27, 2008, Rhode Island Governor, Donald Carcieri issued an executive order directing the state's Department of Administration to require all persons

¹⁰¹ Minn. EO 08-01; available at <http://www.governor.state.mn.us/priorities/governorsorders/executiveorders/PROD008598.html>.

¹⁰² 2008 Gen. Laws Miss. Ch. No. 312; available at <http://billstatus.ls.state.ms.us/documents/2008/html/SB/2900-2999/SB2988SG.htm>.

¹⁰³ See Ariz. Sess. L. ch. 279 (1997); available at <http://www.azleg.gov/FormatDocument.asp?inDoc=/legtext/48leg/1r/laws/0279.htm>.

¹⁰⁴ 2007 Okla. Laws 07-HB1804; available at http://webserver1.lsb.state.ok.us/2007-08bills/HB/hb1804_enr.rtf.

¹⁰⁵ *Chamber of Commerce v. Henry*, W.D.Okla. 08-00109-C.

and businesses, including grantees, contractors and their subcontractors and vendors doing business with the state to register with and utilize E-Verify.¹⁰⁶ The order became effective on May 14, 2008. Violators can have their state contracts terminated and will be banned from future state contracts. Contractors must certify their participation in E-Verify as part of their response to a bid.¹⁰⁷ On September 3, 2008, the ACLU of Rhode Island filed suit in state court seeking to invalidate Governor Carcieri's order.¹⁰⁸ The suit argues that E-Verify is unreliable and can lead to discrimination in the workplace. The ACLUS also argues that Governor Carcieri violated the state's constitution when he promulgated the E-Verify law.¹⁰⁹

South Carolina. The South Carolina Illegal Immigration Reform Act, also discussed above, will require all employers to either (1) participate in E-Verify or (2) only hire employees that possess or qualify for a South Carolina driver's license (or other state license with similarly strict requirements).¹¹⁰ Employers that choose to use E-Verify will be granted a presumption of compliance with all of the Act's provisions, while those that only use the driver's license option will not. An employer seeking to enter into a public contract for the physical performance of services with an annual value in excess of \$25,000 (\$15,000 if the contract is with a political subdivision of the state) will be required to certify compliance with the Act. Employers that fail to participate in E-Verify or do not hire only employees that possess or qualify for a South Carolina driver's license (or other state license with similarly strict requirements) may be fined up to \$1,000 for each violation. As discussed above, the Act also created an implied, no-fee, no-application "employment license" for every employer doing business in South Carolina that may be suspended if an employer is found to have employed unauthorized workers. It also created a private cause of action for an employee who is terminated while the employer retains an employee who the employing entity knows, or reasonably should have known, is an unauthorized worker.

Utah. On March 4, 2008, Utah enacted a law much like Oklahoma's Taxpayer and Citizen Protection Act.¹¹¹ The law will require, starting on July 1, 2009, all public employers as well as their contractors and subcontractors to use E-Verify to verify the immigration status of employees. The E-Verify requirement only applies to contracts entered into for the physical performance of services after July 1, 2009. The Act also created a private cause of action for an employee who is terminated while the employer retains an employee who the employing entity knows, or reasonably should have known, is an unauthorized worker.

In 2008, state legislatures in 17 states introduced legislation that would mandate the use of E-Verify for at least some employers. In public comments, state lawmakers around the country have treated E-Verify as a "silver-bullet" in their efforts to stop the

¹⁰⁶ R.I. EO 08-01; available at

http://www.governor.ri.gov/documents/Immigration_Exec_Order_08-01.pdf.

¹⁰⁷ See <http://www.purchasing.ri.gov/EVFINAL.pdf>.

¹⁰⁸ The Case has yet to be docketed, but the complaint is available at http://www.riaclu.org/documents/RICADVvCarcieriE-Verify_Complaintwaffid_000.pdf.

¹⁰⁹ *Id.*

¹¹⁰ 2008 S.C. Acts 280; available at http://www.scstatehouse.net/sess117_2007-2008/bills/4400.htm.

¹¹¹ 2008 Utah Laws ch. 26; available at <http://le.utah.gov/~2008/bills/sbillenr/sb0081.htm>.

employment of unauthorized foreign workers.¹¹² The assumption is that in today's information age, and electronic program like E-Verify should provide a fail-safe method of ensuring that employers do not employ unauthorized workers. At the same time, commentators have raised significant questions concerning the program's reliability and its implications.¹¹³ According to a 2007 Department of Homeland Security commissioned study, "the database used for verification is still not sufficiently up to date to meet the [E-Verify's enabling statute's] requirement for accurate verification, especially for naturalized citizens."¹¹⁴

4. Municipal Efforts to Regulate Immigration

Not only are state lawmakers now trying to regulate immigration enforcement at the workplace, local municipalities are as well. While it is difficult to measure exactly how many local governments have attempted to regulate immigration worksite enforcement within their borders, the number is significant¹¹⁵ and growing. Three illustrative examples of municipal efforts are those from the city of Hazleton, Pennsylvania, Valley Park, Missouri, and the City of Farmers Branch, Texas.

In the summer of 2006, the city of Hazleton passed the Illegal Immigration Relief Act.¹¹⁶ Among its provisions was a requirement that required businesses seeking contracts with the city to participate in E-Verify and one under which a business that employed unauthorized workers could lose its local business licenses. The law ignited a nationwide controversy, and was even covered in an extensive piece on 60 Minutes.¹¹⁷ Almost immediately, the law was challenged in federal court, and in July 2007, the U.S. District Court for the Middle District of Pennsylvania struck the law down, finding that it was

¹¹² See "Letter from AILA President Kathleen Campbell Walker to the House of Representatives Opposing Recent Deportation-Only Proposals," available at <http://www.aila.org/content/default.aspx?docid=24844>; National Immigration Forum, "Facts on Immigration E-Verify Employment Verification: The Latest Silver Bullet in the Immigration Debate at the Federal and State Level," available at <http://www.immigrationforum.org/DesktopDefault.aspx?tabid=949>.

¹¹³ Jim Harper, *Electronic Employment Eligibility Verification: Franz Kafka's Solution to Illegal Immigration*, Cato Institute (March 8, 2008), available at http://www.cato.org/pub_display.php?pub_id=9256. (E-Verify "would deny a sizable percentage of law-abiding American citizens the ability to work legally. Deemed ineligible by a database, millions each year would go pleading to the Department of Homeland Security and the Social Security Administration for the right to work. By increasing the value of committing identity fraud, EEV would cause that crime's rates to rise."); See also *Id.*

¹¹⁴ Westat Inc., *Findings of the Web Basic Pilot Evaluation*, at xxi (Sept. 2007); available at <http://www.uscis.gov/files/article/WebBasicPilotRprtSept2007.pdf> (accessed August 8, 2008).

¹¹⁵ At least twenty municipalities have enacted policies seeking to address the employment of foreign nationals according to the "Database of Recent Local Ordinances on Immigration," prepared by the Fair Immigration Reform Movement (Updated, March 10, 2007). The database was available until recently at http://64.243.188.204/CCCFTP/local/FIRM_ordinance_update.doc, but has since been removed. Copy available on file with Authors.

¹¹⁶ Available at <http://www.smalltowndefenders.com/090806/2006-18%20Illegal%20Alien%20Immigration%20Relief%20Act.pdf> (last accessed on February 28, 2008).

¹¹⁷ <http://www.cbsnews.com/stories/2006/11/17/60minutes/main2195789.shtml> (last accessed on February 28, 2008).

preempted by federal law.¹¹⁸ The city of Hazleton appealed the decision, and the case is currently being heard by the Third Circuit Court of Appeals. Oral arguments are scheduled for October 31, 2008.¹¹⁹

In 2007 Valley Park, a suburb community outside of St. Louis, Missouri, passed a series of laws that were based on those in Hazleton. Like in Hazleton, the ordinances were quickly the subject of legal challenges. After a series of complex procedural issues, the U.S. District Court for the Eastern District of Missouri upheld the law. In a forceful decision, Judge E. Richard Webber found, as the Court in the Arizona case discussed above, that not only did federal law not preempt Valley Park's laws, stating, "to the contrary, federal law specifically permits such licensing laws as the one at issue."¹²⁰

In November 2006, the City of Farmers Branch, Texas, a suburb of Dallas, enacted an ordinance requiring landlords to verify the immigration status of individuals seeking to rent property.¹²¹ The measure also empowered local authorities to screen individuals in police custody for their immigration status and made English the official language of the city.¹²² Initially there was a dispute as to whether the City Council's closed-door discussion of the measure violated Texas's open-meeting laws, and a petition was drafted attempting to force the Council to repeal the measure. The petition was certified, which prevented the ordinance from being enforced until a voter referendum was held in May 2007.¹²³ Ultimately, the referendum was approved in May 2007.¹²⁴

Almost immediately, the Farmers Branch ordinance was challenged by civil and immigrants' rights organizations.¹²⁵ On May 21, 2007, Judge Sam A. Lindsay of the United States District Court for the Northern District of Texas granted a temporary restraining order enjoining the city from enforcing the ordinance until the court ruled on several plaintiffs' motions for a permanent restraining order.¹²⁶ Later, Judge Lindsay issued a permanent restraining order, preventing the city from enforcing the ordinance.¹²⁷

¹¹⁸ *Lozano v. City of Hazleton*, ___ F.Supp.2d ___, 2007 WL 2163093 at *30 (M.D. Pa., July 26, 2007).

¹¹⁹ *Lozano v. City of Hazleton*, CV 07-3531 (3rd Cir. 2007), calendar notice on file with authors.

¹²⁰ *Gray v. City of Valley Park*, 4:07-cv-00881-ERW (E.D. Mo.).

¹²¹ See *Villas At Parkside Partners d/b/a Villas At Parkside et al. v. The City of Farmers Branch*, 496 F. Supp. 757 (N.D.Tex. June 19, 2007). Recently, Judge Lindsay granted a permanent injunction against Farmers Branch Ordinance 2903.

¹²² *FB Studies Tough Provisions Aimed at Illegal Immigrants Proposals Would Affect Landlords, Employers; Some Say Rules Would Draw Lawsuits*, Dallas Morning Star (August 21, 2006); available at http://www.dallasnews.com/sharedcontent/dws/news/city/carrollton/stories/DN-fbimmigration_21met.ART.North.Edition1.3e0478e.html.

¹²³ *FB Officials Certify Petition on Rental Law Council can Repeal Ordinance or Call Special Election*, Dallas Morning Star (December 27, 2006); available at <http://www.dallasnews.com/sharedcontent/dws/news/localnews/stories/122806dnmetpetition.50169d6b.html>.

¹²⁴ Anabelle Garay, *Anti-Illegal-Immigrant Law OK'd in Texas*, Fort Worth Star-Telegram (May 13, 2007).

¹²⁵ See *Vasquez v. City of Farmers Branch*, 3-06CV2376-R (N.D.Tx. 2006); complaint available at <http://www.aclu.org/immigrants/discrim/27794lgl20061226.html>.

¹²⁶ The TRO Order is available at http://www.aclutx.org/files/memo_granting_tro.pdf.

¹²⁷ Full text of the Court's order is posted at <http://www.aclutx.org/files/080528%20DecJ.pdf>.

Taken together, these three cases, and the one challenging the Arizona law, offer opposing applications of preemption doctrines in immigration cases. These conflicting court opinions only further complicate the already complicated patchwork of state and local regulation of immigration. They also implicate a host of complicated preemption issues, as we will examine in the second portion of this article.

5. Constitutional Issues of Federal Preemption: Supreme Court Precedents

We start at the beginning with the Supremacy Clause,¹²⁸ what does it mean? Simply stated, federal law trumps state law if Congress wanted it that way. A state law that clashes with federal law simply vanishes; it is “without effect.”¹²⁹ This includes both federal statutes and the regulations that implement them. Not only Congress but also a federal agency acting “within the scope of its congressionally delegated authority” may pre-empt contrary state law.¹³⁰ As the Supreme Court taught us, federal regulations will “pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof.”¹³¹ The federal agency can decide for itself that it has exclusive authority over an area¹³² and the courts will not disturb such a determination unless it appears from the statute or companion legislative history that this pre-emptive choice is “not one that Congress would have sanctioned.”¹³³ For preemption to stand, of course, the federal agency must be “acting within the scope of its constitutionally delegated authority.”¹³⁴ If there is a conflict between federal and state law, federal law wins and state law loses.¹³⁵ As we all learned at our mother’s knee at a tender age, preemption

¹²⁸ Article VI, Section 2 of the US Constitution. The Supremacy Clause reflects “a fundamental principle of the Constitution that Congress has the power to preempt state law.” *Crosby v. Nat’l Foreign Trade Council*, 530 US 363, 372 (2000); *See also Toll v. Moreno*, 458 US 1, 10 (1982) (“Our cases have long recognized the preeminent role of the Federal Government with respect to the regulation of aliens within our borders.”); *New Jersey Payphone Ass’n Inc. v. Town of West New York*, 299 F.3d 235(3d Cir.2002) (“The Supremacy Clause of the United States Constitution invalidates state laws that ‘interfere with or are contrary to’ federal law.”) (quoting *Gibbons v. Ogden*, 22 US 1, 211 (1824)). Indeed, so sacrosanct is the Supremacy Clause that to violate it, without more, may be cause sufficient irreparable harm to warrant harsh and immediate judicial intervention. *See Mattox v. Trans World Airlines*, 897 F. 2d 773, 784 (5th Cir. 1990); *See also Morales v. Trans World Airlines*, 504 US 374, 381 (1992) (threatened enforcement of a preempted regulation may eliminate all other possible legal remedies, thus authorizing, indeed compelling, injunctive relief).

¹²⁹ *Maryland v. Louisiana*, 451 US 725, 746 (1981).

¹³⁰ *Louisiana Public Service Comm’n v. FCC.*, 476 US 355, 368-369 (1986).

¹³¹ *City of New York v. FCC*, 486 US 57, 64 (1988).

¹³² *Capital Cities Cable Inc. v. Crisp*, 467 US 691, 700 (1984).

¹³³ *United States v. Shimer*, 367 US 374m 383 (1961); *see also Fidelity Fed. Sav.s & Loan Ass’n v. De La Cuesta*, 458 US 141, 153 (1982).

¹³⁴ *Louisiana Public Service Comm’n v. FCC*, 476 US 355, 368-69(1986).

¹³⁵ *Gibbons v. Ogden*, 9 Wheat 1, 211, 6 L.Ed. 23 (1824). Eloquence is original and that of Chief Justice Marshall is justifiably famous: “The nullity of any act inconsistent with the constitution is produced by the declaration that the constitution is the supreme law...In every such case, the act of Congress, or the treaty, is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it.”*Id.* For history buffs, it is curiously refreshing to find out that ‘ the landmark case of *Gibbons v. Ogden* is sometimes thought of as the first case in which the Supreme Court affirmed the power of preemption.” Stephen Gardbaum, *The Nature of Preemption*, 79 *Cornell L. Rev.* 767, 787-88 (May 1994). Stated in more contemporary terms, we learn from *Crosby v. Nat’l Foreign Trade Council*, 530 US 363, 372 (2000) that a “fundamental principle of the Constitution is that Congress has the power to preempt state law.” This may be precisely why antifederalist opponents who fought ratification of the Constitution howled against

expresses that most basic of constitutional verities, namely that “under our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause.”¹³⁶ It is an enduring expression of the dual sovereignty that so eloquently characterizes the uniquely American character of our federalist system and the continuing, though always changing, role that the States play in it¹³⁷. This sensitivity pervades the entire Constitution¹³⁸, a delicate tension that provides much of its inner balance. So great has been the traditional respect for state sovereignty that, even where Congress has mandated that state law must step back, the secondary but still pertinent fall-back question remains as to how far the scope of preemption properly extends: “We do not, absent unambiguous evidence, infer a scope of preemption beyond that which is clearly mandated by Congress’ language.”¹³⁹ If there is more than one-way to interpret a law, do it in a way that avoids preemption.¹⁴⁰

In all cases, the intent of Congress is the “ultimate touchstone in every preemption case.”¹⁴¹ Once we divine what Congress wanted, preemption naturally follows “whether Congress’ command is explicitly stated in the statute’s language or implicitly contained in its structure and purpose.”¹⁴² When Congress employs explicit preemption language, any state law on the same topic must salute, say “yes sir!” and give way.¹⁴³ Even if Congress did not go to the trouble of inserting an express preemption clause, this does not rule out implied preemption.¹⁴⁴ This does not mean that federal courts will naturally

the Supremacy Clause. See Caleb Nelson, *Preemption*, 86 Va. L.Rev. 225, 274-275 n.161 (March 2000).

¹³⁶ *Tafflin v. Levitt*, 493 U.S. 455 (1990). See also *Gregory v. Ashcroft*, 501 US 452, 457 (1991).

¹³⁷ *Printz et al v. United States*, 521 US 898, 918-19 n.7A (1997) (“It is incontestable that the Constitution established a system of ‘dual sovereignty’”(quoting *Gregory v. Ashcroft*, 501 US 452, 457 (1990)).

¹³⁸ *Lane County v. Oregon*, 74 US 71, 76 (1869); *Texas v. White*, 74 US 700, 725 (1869). See also *Texas v. White*, 74 US 700 (1869). Why maintain this delicate relationship? The Supreme Court gave us the answer in *Atascadero State Hospital v. Scanlon*, 473 US 234, 242 (1985) (The ‘constitutionally mandated balance of power’ between the States and the Federal Government was adopted by the Framers to ensure the protection of our fundamental liberties.”).

¹³⁹ *Cipollone v. Liggett Group Inc*, 505 U.S. 504, 533 (1992). See also *id.* at 517. Scholars see this decision as a central milestone in the evolution of the Supreme Court’s thinking on preemption: “Ever since its 1992 decision in *Cipollone v. Liggett Group*... the Supreme Court has told judges to give express preemption clauses a ‘narrow reading’ at least when they address the states’ traditional powers over health, safety, welfare and morals.” Caleb Nelson, *Preemption*, 86 Va.L. Rev. 225, 291-92 (March 2000).

¹⁴⁰ *Washington Market Co. V. Hoffman*, 101 U.S. 112 (1879); See also *Hawaiian Airlines v. Norris*, 512 US 246, 255-56(1994); cf. *Walker v. Armco Steel Corp.*, 446 US 740, 750 n.9 (1980) (Supreme Court declined to embrace a narrow reading of the Federal Rules of Civil Procedure in order to avoid butting heads with state law).

¹⁴¹ *Retail Clerks v. Schmermerhorn*, 375 US 96, 103 (1963). See also *Allis-Chalmers Corp. v. Lueck*, 471 US 202, 208 (1985) (quoting *Malone v. White Motor Corp.*, 435 US 497 (1978)).

¹⁴² *FMC Corp. v. Holliday*, 498 US 52, 56 (1990). The Court said this many times. See also *Jones v. Rath Packing Co.*, 430 US 519, 525 (1977); *Shaw v. Delta Airlines Inc.*, 463 US 85, 95 (1983); *Fidelity Fed. Sav. & Loan Ass’n. v. De la Cuesta*, 458 US 141, 152-153 (1982). First, last and always, preemption is a question of congressional intent. See also *Schneidewind v. ANR Pipeline Co.*, 485 US 293, 299 (1988).

¹⁴³ *Morales V. Trans World Airlines*, 331 US 218, 230 (1947).

¹⁴⁴ *Freightliner Corp. v. Myrick*, 514 US 280, 288-289 (1995). It matters little if the intent of Congress is made crystal clear or hinted at in the nature and purpose of the statute. See *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 US 624,633 (1973); *Ingersoll-Rand Co. v.*

favor preemption; quite the opposite! Always be guided by the sound maxim that “Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law.”¹⁴⁵ Remember always that the courts are reluctant to infer preemption.¹⁴⁶ In fact, there is a pronounced presumption against preemption unless there is no other possible conclusion or Congress has made its intention crystal clear.¹⁴⁷ Any doubts about the propriety of preemption are to be resolved in favor of the states.¹⁴⁸ This bias against preemption of state law applies only in “a field that the States have traditionally occupied.”¹⁴⁹ Such a predisposition has no place, “when the State regulates in an area where there has been a history of significant federal presence.”¹⁵⁰ This is precisely why the federal court in the Hazleton, Pennsylvania case declined to apply the presumption and enjoined the municipal ordinance.¹⁵¹

It is well settled that preemption occurs where state law conflicts with federal law or stands as an obstacle to the operation of federal law.¹⁵² One easily finds conflict preemption where “compliance with both federal and state regulations is a physical impossibility.”¹⁵³ If obedience to state law blocks full and complete implementation of congressionally-mandated objectives, conflict preemption exists in all its pristine purity, secure in the knowledge that, when the law cannot serve two masters with equal fidelity, faithful service of Congress takes pride of place.¹⁵⁴ Nor can a burdensome state law be rescued with a lofty proclamation of noble purpose.¹⁵⁵ It is not, however, necessary for a federal statute to provide explicitly that state law is pre-empted. If a state law “burdens or

McClendon, 498 US 133, 138 (1990); *FMC Corp v. Holliday*, 498 US 52, 56-57 (1990). In calculating the imperative of preemption, or its absence, courts want to know how the delicate balance between federal and state jurisprudence plays out in the real world; they go beyond the lofty language of the legislative drafters. *Jones v. Rath Packing Co.*, 430 US 519, 526 (1977).

¹⁴⁵ *Maryland v. Louisiana*, 451 US 725, 746 (1981).

¹⁴⁶ *Cipollone v. Liggett Group Inc.*, 505 US 404, 416 (1992).

¹⁴⁷ *Florida Lime & Avocado Growers Inc. v. Paul*, 373 US 132, 142 (1963); *Rice v. Santa Fe Elevator Corp.*, 331 US 218, 230 (1947). See also *Schwartz v. Texas*, 344 U.S. 199, 203 (1952).

¹⁴⁸ *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 US 767, 780 (1947) (opinion of Frankfurter, J).

¹⁴⁹ *Medronic Inc. v. Lohr*, 518 US 470, 485 (1996) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 US 218, 230 (1947)).

¹⁵⁰ *United States v. Locke*, 529 US 89, 108 (2000).

¹⁵¹ *Lozano v. City of Hazelton II*, 496 F. Supp. 2d 477, 2007 U.S. Dist. LEXIS 554320 (MD Pa. July 26, 2007).

¹⁵² *Ray v. Atlantic Richfield Co.* 435 US 151, 158 (1978). On many occasions, and for many reasons, the Supreme Court has reminded all of us that the various categories used in its preemption analysis are not “rigidly distinct.” *English v. General Electric Co.*, 496 US 72, 79 (1990).

¹⁵³ *Florida Lime & Avocado Growers Inc. v. Paul*, 373 US 132, 142-143 (1963). Inclusion of an express preemption clause, such as IRCA has, “does not bar the ordinary working of conflict preemption principles...” *Sprietsma v. Mercury Marine, a Division of Brunswick Corporation*, 537 US 51, 65 (2002). For this precise reason, a state law that escapes from express preemption may still be deemed invalid as a matter of implied preemption. See *Geier v. Am. Honda Motor Co., Inc.*, 529 US 861, 873-74 (2000). Even if an express preemption clause does exist, this “does not mean that the express clause entirely forecloses any possibility of implied preemption.” *Freightliner v. Myrick*, 514 US 280, 288 (1995).

¹⁵⁴ *Hillsborough County Fla. V. Auto. Med. Labs. Inc.*, 471 US 707, 713 (1985), quoting *Hines v. Davidowitz*, 312 US 52, 57 (1941).

¹⁵⁵ *Perez v. Campbell*, 402 US 637, 651-52 (1971).

conflicts in any manner with any federal laws or treaties, “preemption is the necessary and proper result.”¹⁵⁶ As an intriguing aside, there is appellate authority for the proposition that it is not a conflict with IRCA for an employer acting under state law to place an employee on unpaid leave while that employee’s work authorization, or lack of same, is determined.¹⁵⁷ The question then is this: If IRCA does not, for the sake of argument, expressly preempt a state immigration law, is it possible to comply with both state and federal law? Opponents who want such state law struck down on grounds of conflict preemption with IRCA must demonstrate why obedience to the former prevents adherence to the latter.

It is a common misconception that preemption would not be triggered if both Congress and the state legislature were guided by similar objectives or sought to eradicate the same perceived evil. Not so. Preemption can apply even when state and federal laws share a common purpose. We would all do well to remember, “the fact of a common end hardly neutralizes conflicting means.”¹⁵⁸ It is the actual effect of a state law that counts rather than its professed goal or the label placed upon it.¹⁵⁹ If the federal power over a subject is very powerful, even a friendly state law has to give way.¹⁶⁰ It does not matter if the state law wants to achieve a common result. Having identical ultimate aims is no

¹⁵⁶ *De Canas v. Bica*, 424 US 351, 358 (1978).

¹⁵⁷ *Incalza v. Fendi North America Inc.*, 479 F.3d 1005, 1010-11 (9th Cir. 2007). In this case, the court did not decide field preemption since the litigants did not raise it; only conflict preemption was argued. It is also worth noting that neither party argued that IRCA expressly preempted California labor laws protecting undocumented workers. Interestingly, the reason that the Court found no conflict with, and preemption by, IRCA was the fact that, even though the alien’s E visa had expired, the employer could theoretically seek an alternative work visa. Query: Should state immigration laws also create options that give the employer a way out?

¹⁵⁸ *American Ins. Ass’n v. Garamendi*, 539 US 396, 425 (2003) (quoting *Crosby v. Nat’l Foreign Trade Council*, 530 US 363, 379 (2000)). It is well-settled that a “conflict in technique can be fully as disruptive to the system Congress erected as conflict in overt policy.” *Amalgamated Ass’n of Street, Elec. Ry. & Motor Coach Employees v. Lockridge*, 403 US 274, 287 (1971).

¹⁵⁹ *Perez v. Campbell*, 402 US 637, 651-652 (1987) (“We can no longer adhere to the aberrational doctrine...that state law may frustrate the operation of federal law as long as the state legislature in passing its law had some purpose in mind other than one of frustration. Apart from the fact that it is at odds with the approach taken in nearly all our Supremacy Clause cases, such a doctrine would enable state legislatures to nullify nearly all unwanted federal legislation by simply publishing a legislative committee report articulating some state interest or policy—other than frustration of the federal objective—that would be tangentially furthered by the proposed state law.”).

¹⁶⁰ *Charleston & Western Carolina Railway. Co. v. Varnville Furniture Co.*, 237 US 597, 604 (1915) (“ That (the alleged absence of conflict) is immaterial.” Justice Oliver Wendell Holmes thundered with erudite exasperation. He goes on: “When Congress has taken the particular subject matter in hand coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go.” As the Supreme Court none too gently admonished us in *Crosby v. Nat’l Foreign Trade Council*, 530 US 363, 366 (2000), the “fact of a common end hardly neutralizes conflicting means.” Having the same goals does not mean that inconsistent state standards or restrictions will not undermine the integrity and efficacy of federal regulation which must always retain a position of primacy. *Crosby at 379; United States v. Locke*, 529 US 89, 115 (2000) (“the appropriate inquiry still remains whether the purposes and objectives of the federal statutes, including the intent to establish a workable, uniform system, are consistent with concurrent state regulation”). Even where, perhaps especially where, state law seeks to promote a federal objective, conflict lurks in the weeds and preemption can easily and frequently arise. See *CTS Corp. v. Dynamics Corp. of America*, 481 US 69, 82-82 (1987).

defense against preemption. It is entirely possible, indeed even likely, that a state law can promote federal objectives, perhaps powerfully so, and still conflict with federal law, thus ensuring preemption.¹⁶¹ In fact, the very fact that state and federal objectives are the same only heightens the chances for trouble: “Conflict is imminent, “the Supreme Court famously noted when “two separate remedies are brought to bear on the same activity.”¹⁶² It is not just where the state law ends up that counts; it is no less important to consider how it got there. Preemption must issue when even a congenial state law “interferes with the methods by which the federal statute was designed to reach this goal.”¹⁶³ Where preemption is concerned, you can get into as much trouble with your friends as with your enemies!¹⁶⁴

Having said that, it remains worth noting that the willingness to infer preemption may be heavily influenced by the extent to which the challenged state law supplements federal regulation, rather than contradicting it, and the extent to which the federal standard is adopted by state action as its own.¹⁶⁵ For consistency and comity, even where Congress has left room for the States to act, such initiative must always be to support, not displace, the objectives and purposes of the superior federal regime.¹⁶⁶ Nor will it help much if the state attempts to justify its position by arguing that the challenged law seeks to promote a policy objective of surpassing importance. The courts are just as willing to strike down an important state law as a trivial one. Remember this injunction: “The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that federal law must prevail.”¹⁶⁷ Legislative drafters of proposed state law initiatives would do well to remember that, whether implicitly or explicitly, federal law and state law are inextricably intertwined and any attempt to divorce the two cannot but lead down the garden path to constitutional sorrow.¹⁶⁸

¹⁶¹ *CTS Corp. v. Dynamics Corp. of America*, 381 US 69, 82-85 (1987).

¹⁶² *Wisconsin Dept. of Industry v. Gould Inc.*, 475 US 282, 286 (1986) (quoting *Garner v. Teamsters*, 346 US 485, 498-499 (1953); See also *Michigan Cannery & Freezers Ass'n v. Agricultural Marketing & Bargaining Bd.*, 467 US 461, 467 (1984).

¹⁶³ *International Paper Co. v. Ouellette*, 479 US 481, 493 (1987).

¹⁶⁴ See e.g., *Metropolitan Life Ins. Co. v. Massachusetts*, 471 US 724, 739 (1985) (“The preemption provision was intended to displace all state laws that fall within its sphere, even including state laws that are consistent with ERISA’s substantive requirements.” In another ERISA preemption case, this one from the Great State of Georgia, the Supreme Court paused to explain why a New York antidiscrimination law also ran afoul of ERISA preemption: “Legislative ‘good intentions/ do not save a state law within the broad pre-emptive scope...” *Mackey v. Lanier Collection Agency & Serv.*, 486 US 825, 830(1988).

¹⁶⁵ The states retain the authority to “act with respect to illegal aliens ‘where such action mirrors federal objectives and furthers a legitimate state goal.” *American G.I. Forum v. Miller*, 218 Ca. App. 3d 859, 868, 267 Cal. Repr. 371 (Cal.App.4 Dist.1990), 218 Ca.App.3d 859, 267 Ca.Rptr.371), quoting *Plyler v. Doe*, 457 US 202, 225(1982).

¹⁶⁶ *Gade v. Nat’l Solid Wastes Management Ass’n*, 505 US 88, 98-99 (1992); see also *Felder v. Casey*, 487 US 131,138 (1988); *Pilot Life Ins. Co. v. Dedeaux*, 481 US 41, 51 (1987).

¹⁶⁷ *Free v. Bland*, 369 US 663, 666 (1962); See also *Ridgway v. Ridgway*, 454 US 46, 54 (1981).

¹⁶⁸ *Hauenstein v. Lynham*, 100 US 483, 490 (1880) (“The Constitution, laws and treaties of the United States are as much a part of the law of every State as its own laws and Constitution.”)

Believe it or not, multiple state objectives are NOT a defense against preemption.¹⁶⁹ Go figure! Truth be told, it does not end the issue to say that a state is acting within the limits of traditional police powers¹⁷⁰ or for the entirely understandable, even praiseworthy, purpose of advancing or protecting an important, perhaps even vital, state interest. The Sages teach us “any state law, however clearly within a state’s acknowledged power, which interferes with or is contrary to, federal law must yield.”¹⁷¹ What if the state law has several objectives, some of which are impermissible, but others of which can pass constitutional muster-sort of a severability defense against preemption. Does that get us anywhere? Nope. We learned long ago that “a dual impact state regulation cannot avoid ...preemption simply because the regulation serves several objectives rather than one...”¹⁷² At what stage of conflict will preemption occur? In other words, how much of a pain in the neck does a bothersome state law have to be? Can the conflict be speculative or must it be a real and present annoyance? Now that’s an easy one. The pre-empted state law or municipal ordinance must have a “direct and substantial effect”¹⁷³ on the scheme that Congress has set out. Where, however, state law interference has become a clear and present problem, it is not necessary for either Congress or the federal agency to issue a formal statement of pre-emptive intent; under such circumstances, the conflict alone provides sufficient justification for the courts to step in.¹⁷⁴

Say there is neither express preemption nor any significant conflict, is the state law safe? Not really.¹⁷⁵ We now enter the twilight zone of field preemption where even the

¹⁶⁹ While *Plyler v. Doe*, 457 US 202 (1982) was not a preemption case, the Supreme Court did take judicial notice of the fact that “unchecked unlawful migration might impair the State’s economy generally or the State’s ability to provide some important service.” *Id.* at 229 & n. 23(1976). The *Plyler* Court went so far as to cite *De Canas* for the proposition that the states could take legislative action to “deter the influx of persons entering the *United States* against federal law, and whose numbers might have a discernible impact on traditional state concerns.” *Plyler v. Doe*, 457 US 202, 229 no. 23 (citing *De Canas v. Bica*, 424 US 351, 354-56 (1976)).

¹⁷⁰ *Reid V. Colorado*, 187 US 137, 151 (1902) (“Again, the acknowledged police powers of a state cannot legitimately be exerted so as to defeat or impair a right secured by the national Constitution, any more than to defeat or impair a statute passed by Congress in pursuance of the powers granted to it.”).

¹⁷¹ *Felder v. Casey*, 487 US 131, 138 (1988) (quoting *Free v. Bland*, 369 US 663, 666 (1962)).

¹⁷² *Gade v. Nat’l Solid Waste Mgmt. Ass’n*, 505 US 88, 107 (1992).

¹⁷³ *English v. General Electric Co.*, 496 US 72, 84 (1990). Mr. Justice Hughes put it rather more directly when he thundered against preemption unless “the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or stand together.” *Savage v. Jones*, 225 US 501, 535 (1912) (Hughes, J). For those who like their preemption in more measured tones, we offer up Chief Justice Rehnquist in *Rice v. Norman Williams co.*, 458 US 654, 659 (1982) ():“As in the typical preemption case, the inquiry is whether there exists an irreconcilable conflict between the federal and state schemes. The existence of a hypothetical or potential conflict is insufficient to warrant the preemption of a state statute.” In other words, it had better be pretty darn serious!

¹⁷⁴ *Geier v. American Honda Motor Co.*, 529 US 861 (2000).

¹⁷⁵ The potential for preemption cannot be reduced to a rote formula whose mechanical application will completely capture the subtleties of myriad fact patterns whose Byzantine complexity can barely be imagined, much less understood. That is precisely what Chief Justice Burger had in mind when he aptly observed that “No simple formula can capture the complexities of this determination; the complexities of this determination; the conflicts which may develop between federal and state action are as varied as the fields to which congressional action may apply.” *Goldstein v. California*, 412 US 546,561 (1973).

brave at heart may fear to tread¹⁷⁶. Preemption can occur where the federal regulation or statute is so comprehensive that it sucks all oxygen out of the state law and makes clear that the intent of Congress was to leave no room for the States to legislate. IRCA created a “comprehensive scheme” to control employment by the undocumented.¹⁷⁷ It is hard to imagine any area of life or law besides immigration over which the federal writ can be more complete or profound.¹⁷⁸ Do we really want 50 different immigration laws militantly enforced by zealous novices armed with sweeping enforcement powers?¹⁷⁹ Though field preemption is neither easily nor quickly inferred, it may be presumed when the federal law is “sufficiently comprehensive to make reasonable the inference that Congress ‘left no room’ for supplementary state regulation.”¹⁸⁰ In what may be the most overused but least insightful term ever coined, when the planets are so aligned,

¹⁷⁶ *Camps Newfound/Owatonna Inc. v. Town of Harrison*, 520 US 564, 617 (1997) (Thomas, J dissent) (“Furthermore, field preemption is itself suspect, at least as applied in the absence of a congressional command that a particular field be pre-empted. Perhaps recognizing this problem, our recent cases have frequently rejected field preemption in the absence of statutory language expressly requiring it.”).

¹⁷⁷ *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*, 535 137, 147 (2002). It was, said President Reagan, “the most comprehensive reform of our immigration laws since 1952,” and “the product of one of the longest and most difficult legislative undertakings of recent memory.” Statement of the President Upon Signing S. 1200 (Nov. 10, 1986), 22 Weekly Comp. of Pres.Doc. 1534, reprinted in 1986 U.S. C.C.A. N. 5856-1, 4. However incomplete IRCA may be, and regardless of the extent to which it has failed to curb widespread violation of US immigration law, such inadequacies do not justify the states in substituting their judgment for that of the Congress: “Where the federal government ...has enacted a complete scheme of regulation..., states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement the federal law, or enforce additional auxiliary regulations.” *Hines v. Davidowitz*, 312 US 52, 66 (1941). Is not IRCA, by virtue of its character as a “comprehensive and reticulated statute,” *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 US 359 361 (1980), precisely the kind of federal expression that preempts state and local competition? *But see Safeharbor Employer Servs. I, Inc., v. Cinto Velasquez*, 860 So.2d 984, 986 (Fl.Ct.Appl 2003) (“IRCA does not...so thoroughly occupy the field as to require a reasonable inference that Congress left no room for states to act.”). Knowing that Uncle Sam is on top does not necessarily mean that the states have no meaningful support role to play. To quote the esteemed jurist Learned Hand, “it would be undreasonable to suppose that (the federal government’s) purpose was to deny itself any help that the states may allow.” *Marsh v. United States*, 29 F. 2d 172, 174 (2d Cir. 1928). Indeed, rather than serving as a basis to oust state authority, differences between federal and state law may impose upon an Article III court the affirmative duty to harmonize the two: “The proper approach is to reconcile the ‘operation of both statutory schemes with one another rather than holding (the state scheme) completely ousted.” *De Canas*, 424 US at 358 (quoting *Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 US 117, 127 (1973).

¹⁷⁸ *Reno v. Flores*, 507 US 292, 305 (1993) (“Over no conceivable subject is the legislative power of Congress more complete.”) (quoting *Fiallo v. Bell*, 430 US 787, 792 (1977) (quoting *Oceanic Steam Navigation Co. v. Stranahan*, 214 US 320, 229(1909). See also Manheim, Karl, *State Immigration Laws and Federal Supremacy*, 22 Hastings Const.L.Q. 939 (1995) (“Since immigration is plainly a matter of national moment, state interference is not tolerated.”) (Internal citations omitted).

¹⁷⁹ *League of United Latin American Citizens v. Wilson*, 908 F. Supp. 755, 770 (1995) (“Permitting state agents who are untrained- and unauthorized- under federal law to make immigration status decisions, incurs the risk that inconsistent and inaccurate judgments will be made.”).

¹⁸⁰ *Rice v. Santa Fe Elevator Corp.*, 331 US 218, 230 (1947). See also *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dec. Comm’n*, 461 US 190, 204 (1983); *Schneidewind v. ANR Pipeline Co.*, 485 US 293, 300 (1988) (field preemption applies if “pervasiveness of the federal regulation precludes supplementation by the States,” or if “the federal interest is sufficiently dominant”).

Congress is said to have “occupied the field.”¹⁸¹ Now you know. Use a wide-angle lens and look to the “totality of circumstances.”¹⁸² Exclusive federal domain over immigration flows inevitably from the “supremacy of the national power in the general field of foreign affairs.”¹⁸³

However, taken to its logical extreme, comprehensiveness or detailed regulation could, in today’s world, virtually always justify federal preemption of an impertinent state law. After all, aren’t all federal statutes or regulatory regimes pretty complicated? “To infer preemption whenever an agency deals with a problem comprehensively, “the Supreme Court has forthrightly reminded us, “is virtually tantamount to saying that whenever a federal agency decides to step into a field, its regulations will be exclusive.”¹⁸⁴ That is precisely why we would do well to remember that field preemption has its limits: “The mere existence of a federal regulatory or enforcement scheme does not, by itself, imply preemption of state remedies.”¹⁸⁵ While IRCA and the INA are certainly evidence of a comprehensive approach towards the prevention of unauthorized employment,¹⁸⁶ it is not necessarily the case that the very fact of such intense precision is reliable evidence of a Congressional intent to pre-empt all state authority.¹⁸⁷ Do we find in IRCA the “special features warranting preemption,”¹⁸⁸ that must exist as a necessary and proper precondition to judicial intervention? How troubled should we be by the savings clause in IRCA that may carve out a role for the states to play?¹⁸⁹ How far does this extend?

¹⁸¹ Field preemption and conflict preemption are kissin’ cousins. In *Gade v. Nat’l Solid Waste Management Ass’n*, 112 S.Ct. 2374, 2386 n.2(1992), Justice O’Connor quoted approvingly from Justice Souter’s dissent in *English v. General Electric Co.*, 496 US 72 (1990):“Field preemption may be understood as a species of conflict preemption. A state law that falls within a preempted field conflicts with Congress’ intent...to exclude state regulation.” See also *supra* n. 25.

¹⁸² *Ray v. Atlantic Richfield Co.*, 435 US 151, 157-158 (1978).

¹⁸³ *Hines v. Davidowitz*, 312 US 52, 66 (1941) (Supreme Court struck down Pennsylvania’s alien registration law because it “purports to operate in a field in which the individual states of the United States are without authority to legislate.”) *Id.* at 62. For this reason, and from this perspective, the plenary federal power over immigration can profitably be compared to the power of Congress to regulate interstate commerce. In both instances, and for remarkably similar reasons, the nation must speak with one voice: “Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress.” *Cooley v. Board of Wardens*, 12 How.299 (1952).

¹⁸⁴ *Hillsborough County, Florida et.al. v. Automated Medical Laboratories*, 471 US 707, 717 (1985). As Justice Blackmun observed in *English v. General Electric Co.*, 496 US 72, 86 (1990), the “mere existence of a federal regulatory or enforcement scheme...does not , by itself, imply preemption.” After all, if the subject matter is complicated enough, and immigration certainly qualifies, then any federal legislation is going to be spelled out in mind numbing detail, regardless of whether Congress wanted to preempt state law or not.

¹⁸⁵ *English v General Electric Co.*, 496 US 72, 87 (1990) (“Ordinarily, the mere existence of a federal regulatory or enforcement scheme...does not , by itself, imply preemption of state remedies.”).

¹⁸⁶ *Gonzalez v. City of Peoria*, 722 F.2d 468, 474-75 (9th Cir.1983).

¹⁸⁷ *Hoffman Plastic Compounds, Inc., v. N.L.R.B.*, 535 US 137, 147 (2002) (citing *INS v. National Center for Immigrants’ Rights, Inc.*, 502 US 183, 194, n. 8 (1991)).

¹⁸⁸ *Hillsborough County, Florida et al v. Automated Medical Laboratories*, 471 US 707, 719 (1985)

¹⁸⁹ INA Section 274A(h) (2), 8 USC 1324a(h) (2) (2007-08). IRCA’s savings clause cannot be so broad that the exception swallows the rule nor can any such clause immunize offending state laws against the constitutional imperative of preemption where conflict with the expressed will of Congress exists. See *Geier v. American Honda Motor Co. Inc.*, 529 US 861, 869 (2000) (“nothing in the language of the saving clause suggests an intent to save state laws that conflict with”

Does it protect state laws that punish violations of their own prohibitions or is it more limited to act only to redress transgressions of IRCA itself?¹⁹⁰ Now that is a good

federal statutes). Jurisprudential self-restraint would be well served if the courts “decline to give broad effect to saving clauses” if doing so would “upset the careful regulatory scheme established by federal law.” *United States v. Locke*, 529 US 89, 106 (2000). The Supreme Court has repeatedly curbed an overly expansive interpretation of savings clauses for precisely this reason. See, e.g., *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 385, 119 L. Ed. 2d 157, 112 S. Ct. 2031 (1992); *American Telephone & Telegraph Co. v. Central Office Telephone, Inc.*, 524 U.S. 214, 227-28, 141 L. Ed. 2d 222, 118 S. Ct. 1956 (1998). IRCA’s savings clause is an exception to the rule and must not become a substitute for the employer sanctions regime itself. A respect for federalism must not transform the savings clause into “a loophole so broad that it would virtually swallow the preemption clause itself.” *Omega World Travel Inc v. Mummagraphics Inc.*, 469 F.3d 348, 355 (4th Cir. 2006).

¹⁹⁰ The legislative history of IRCA sheds light on what Congress thought it was doing. The House Report that shepherded the legislation along the path to ultimate enactment cautions that IRCA’s pre-emptive clause was not “intended to preempt or prevent lawful state or local processes concerning the suspension, revocation or refusal to re-issue a license to any person who has been found to have violated the sanctions provisions” of IRCA itself. See H.R.Rep. 99-682(I) at 58, as reprinted in 1986 U.S.C.C.A.N. 5649, 5662. Note the critical limitation- only violations of IRCA not violations of state immigration law or municipal ordinance. This is of surpassing salience.

State courts have often been vested with the concurrent authority to decide claims arising under federal law and their action to do so with regard to IRCA has solid constitutional underpinnings. Consider this oracular pronouncement by the Supreme Court in *Dowd Box Co. v. Courtney*, 368 US 502, 507-08 (1962): “We start with the premise that nothing in the concept of our federal system prevents state courts from enforcing rights created by federal law. Concurrent jurisdiction has been a common phenomenon in our judicial history, and exclusive federal court jurisdiction [in] our cases arising under federal law has been the exception rather than the rule.” Like most things in this wacky constitutional melodrama, even the acceptance of concurrent jurisdiction is not absolute: “The presumption of concurrent jurisdiction can be rebutted by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests.” *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 US 473, 478 (1981). In this sense, a strong reliance upon preemption imposes a strain upon the fabric of federalism itself. See Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 229 n.16 (2000). Advocates of state immigration laws may point to the continuing vitality of this federalist heritage as one of their most enduring constitutional justifications, but critics, in turn, may use this same tradition to insist that only by allowing state laws to punish IRCA violations and nothing more can the states honor their rightful role as junior partners and promote the health and welfare of their citizens. Who in the end, is more faithful to the need not to “overlook the body of law relating to the sensitive interrelationship between statutes adopted by the separate, yet coordinate, federal and state sovereignties”? *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Ware*, 414 US 117, 127 (1973). The issue, then, is whether the scales tip in favor of federal exclusivity or local regulation for it is universally accepted and well understood that government actors closest to the people are “created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them...in (its) absolute discretion.” *Hunter v. Pittsburgh*, 207 US 161, 178 (1907).

It is, of course, worth noting that these comments in the House Committee companion report that limit the remit of state laws to violations only of IRCA do not appear in the statute itself. This raises the very real question of the extent to which they bind an Article III court. See *Conn. Nat’l Bank v. Germain*, 503 US 249, 253-54 (1992) (“ We have stated time and time again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.”). If Congress wanted to limit the states to punishing only violations of IRCA, then why did it not say so? Even first year law students know in their bones that “the meaning of a statute

must, in the first instance, be sought in the language in which the act is framed and, if that is plain...the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States*, 242 US 470, 485 (1917). Yet, would an intelligent probing of congressional intent ignore such contemporary legislative history? It is the extent to which we assign value to the House Report, or dismiss it as of minor consequence, that predisposes us to support or banish the state law under our pre-emptive microscope. This is precisely why Chief Justice Rehnquist remarked that "we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill," *Garcia V. United States*, 469 US 70, 76 (1984), which the Supreme Court has relied on as the "considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation." *Zuber v. Allen*, 396 US 168,186 (1982).

It is not that much of an exaggeration to say that the debate over IRCA preemption turns, in no small measure, on the utility or irrelevancy of legislative history. Advocates of state immigration laws find it of surpassing importance that IRCA itself does not limit use of the licensing savings clause to violations of IRCA; we find that only in the companion House Committee Report. Before we argue over what the House Committee Report accompanying IRCA meant, perhaps we should all take a really deep breath and decide if such interpretive hieroglyphics are necessary in the first place. Is the wording of IRCA's savings clause uncertain or ambiguous? Is there some low lying fog that obscures what Congress was trying to tell us? If not, perhaps the House Committee Report is little more than a charming irrelevancy? This may be what the Supreme Court was getting at in *Caminetti v United States*, 242 US 470, 490 (1917): "Reports to Congress accompanying the introduction of proposed laws may aid the courts in reaching the true meaning of the legislature in cases of doubtful interpretation...But...when words are free from doubt, they must be taken as the final expression of the legislative intent...in other words, the language being plain, and not leading to absurd or wholly impracticable consequences, it is the sole evidence of the ultimate legislative intent."(internal citations omitted).

Advocates of pre-emption who rely upon the House Committee Report should do so with their eyes open and in a spirit of humility for legislative history becomes relevant only when statutory ambiguity requires it to be consulted; when confronted with a "straightforward statutory command, there is no reason to resort to legislative history." *United States v. Gonzalez*, 520 U.S. 1, 6 (1997). If the text of IRCA's pre-emption clause does not carry the day, it is unlikely that legislative history will be of much help: "While we now turn to the legislative history as a additional tool of analysis, we do so with the recognition that only the most extraordinary showing of contrary intentions from those data would justify a limitation on the 'plain meaning' of the statutory language." *Garcia v. United States*, 469 US 70, 75 (1984). However probative of intent the House Committee Report may have been, it is the wording of IRCA itself that "necessarily contains the best evidence of Congress' pre-emptive intent." *Sprietsma v. Mercury Marine*, 537 US 51, 62-63 (quoting *CSX Transp.Inc. v. Easterwood*, 507 US 658, 664 (1993)).

If state immigration laws are not limited to redress of federal violations, there is infinitely more constitutional running room for them to operate. That is precisely why they insist on a literal reading of the text and cite to favorable Supreme Court dicta such as *Exxon Mobil Corp., v. Allapattah Services Inc.*, 545 US 546, 568 (2005) where we read that "the authoritative statement is the statutory text, not the legislative history or any other extrinsic material...First, legislative history is itself often murky, ambiguous and contradictory...Second, judicial reliance on legislative materials like committee reports...may give unrepresentative committee members-or worse yet, unelected staffers and lobbyists-both the power and the incentive to attempt strategic manipulations of legislative history to secure results that they were unable to achieve through the statutory text." While the Supreme Court has never said that legislative history is "inherently unreliable" *Id.*, it is certainly true that basing one's constitutional battle plan on such an uncertain ally may not be the wisest appellate strategy for future litigation. While there is "wisely no rule of law forbidding resort to explanatory legislative history..." *Harrison v. Northern Trust Co.*, 317 US 476, 479 (1943), there is also no constitutional imperative flowing from its deployment that would

question! The answer will go far to shape our final judgment on the constitutional imperative of preemption or the lack of it. What we do need to remember is that the savings clause in INA Section 274A(h)(2) is an exception to the general regime of employers sanctions that IRCA put in place and, as such, much be narrowly construed in order not to allow the states a greater role than IRCA itself would grant.¹⁹¹

The constitutional integrity of a competing state law is not inherently subverted by its high specificity. In *New York Dep't of Soc. Services v. Dublino*,¹⁹² the Supreme Court noted that a "detailed statutory scheme" (here relating to a state work requirement for welfare) was "both likely and appropriate, completely apart from any question of pre-emptive intent."¹⁹³ A federal judge inclined against preemption can use *Dublino* as stout authority to sustain a challenged state law. Constitutional prudence born out of respect for our federalist system and the essential role that the states play in it properly reminds us that "a Federal statute should not be given a rigid interpretation that would prevent states from undertaking supplementary efforts towards the very same end."¹⁹⁴ Where the Constitution tolerates, perhaps even encourages, state initiatives, we would do well to remember that "state causes of action are not pre-empted solely because they impose liability over and above that authorized by federal law."¹⁹⁵ The issue is not whether state immigration law imposes stiffer penalties than IRCA but whether state law is allowed to offer any commentary on the subject in the first place. If the States have a role to play, how they perform that role is up to them.¹⁹⁶ This does not mean, however, that the

command attention or inspire precedential reverence. That said, the authors commend the utility of legislative history for much the same reasons that Chief Justice Marshall thought it was useful:

As for the propriety of using legislative history at all, common sense suggests that inquiry benefits from reviewing additional information rather than ignoring it. As Chief Justice Marshall put it, "where the mind labours to discover the mind of the legislature, it seizes every thing from which aid can be derived." *United States v. Fisher*, 6 US 358, 2 Cranch, 358, 386, 2 L.Ed. 304 (1805). Legislative history materials are not generally so misleading that jurists should never employ them in a good faith effort to discern legislative intent. Our precedents demonstrate that the Court's practice of utilizing legislative history reaches well into its past... We suspect that the practice will likewise reach well into the future.

Wisconsin Public Intervenor et.al. v. Mortier, 501 US 597, 610-11 (1991).

¹⁹¹ *Geier v. Honda Motor Co., Inc.*, 529 US 861, 870 (2000) ("Supreme Court has repeatedly declined to give broad effect to savings clauses where doing so would upset the careful regulatory scheme established by federal law.").

¹⁹² *N.Y. Dep't of Soc. Services v. Dublino*, 413 U.S. 405, 415 (1973).

¹⁹³ *Id.*

¹⁹⁴ *American Federation of Labor v. Marshall*, 570 F.2d 1030 (DC Cir. 1978).

¹⁹⁵ *California v. ARC America Corp.*, 490 US 93, 105(1989).

¹⁹⁶ This is precisely why Judge Richard Webber upheld the Valley Park, Missouri ordinance against the charge that it should be invalidated because employers were forced to enroll in E-Verify even though Congress had made such participation wholly voluntary. Having determined that the City of Valley Park could act, Judge Webber left it up to the city fathers to decide exactly how. He also found it probative that such impressment was triggered only after an employer had been caught with dirty hands and sought to reinstate its business license. See "Federal Judge Upholds Ordinance Denying Licenses to Employers Who Hire Illegal Aliens." [http://pubs.bna.com/ip/bna/dlr.nsf/eh/a\)b5u3clw5](http://pubs.bna.com/ip/bna/dlr.nsf/eh/a)b5u3clw5) (February 4, 2008). As with so much else about this debate, there is contrary authority against this general observation. See *State of Louisiana v. Neri Lopez*, 948 So.2d 1121(La.Ct.App.4th Cir. 2006) (criminal penalties imposed by Louisiana law on nonresident aliens and international students who operated a motor vehicle without

States can disregard the policy choices made by Congress and substitute their own judgment. No state, for whatever reason, may depart from federal choices and decide who stays and who goes; if there is anything certain in this volatile world of preemption it is this: Congress, and Congress alone, adopts the immigration standards that everyone else must follow.¹⁹⁷ Only Congress, acting through federal immigration law, can determine the immigration status of those who come to America; any attempt by the States to do so clearly runs afoul of the Supremacy Clause.¹⁹⁸

6. THE DE CANAS PARADIGM; JUST HOW FAR DOES IMMIGRATION EXTEND?

The modern platform for analyzing the constitutional imperative for preemption, or lack of same, was built by the Supreme Court in the landmark ruling styled *De Canas v. Bica*.¹⁹⁹

adequate proof of lawful presence pre-empted because the documentary requirements were deemed to impose a burden that went beyond federal standards); *Louisiana v. Barrientos*, NO. 06-1726(La.24th.Dist. Jan. 31, 2007); available at http://www.aifl.org/lac/chdocs/barrientosdecision_022207.pdf and also posted at <http://bibdaily.com/pdfs/Barrientos%201-31-07.pdf>. (same Louisiana statute also held preempted because it attempts to regulate immigration and conflicts with federal immigration law.

The *Barrientos* court noted that the definitions of “alien student” and “nonresident alien,” are incompatible with federal law. Furthermore, the statute’s identification requirements levied an unreasonable, hence unlawful burden on non-citizens). An interesting review of both cases and related developments can be found in Stephen Yale-Loehr and Ted Chiappari, *Immigration: Cities and States Rush in Where Congress Fears to Tread*, *New York Law Journal* (Feb. 26, 2007) available at https://ammail.bp.com/exchang/Inbox/Column%20on%20local_xF8FF_state%2. It is also worth considering a recent opinion letter by the Attorney General of Nevada who ruled that Assembly Bill 383’s requirement that the Nevada Tax Commission impose an administrative fine on business licensees who employed undocumented workers was pre-empted by IRCA. Why? Because IRCA itself has a schedule of penalties to punish transgressors and Nevada is not at liberty to add to that by imposing a fine of its own that goes beyond what Congress set down. Letter by Catherine Cortez Masto, Attorney General of Nevada, to Dino DiCianno, Exec. Director, Nevada Dept. of Taxation (March 3, 2008); available at <http://www.ag.state.nv.us>.

¹⁹⁷ *De Canas v. Bica*, 424 US 351, 355 (1976).

¹⁹⁸ *Equal Access Education v. Merten*, 305 F. Supp. 2d 585, 601 (E.D.Va. 2001) (the constitutional equation always starts out by asking if the challenged state policies “simply adopt federal standards in which case they are not invalid under the Supremacy Clause, or instead create and apply state standards to assess the immigration status of applicants, in which case the policies may run afoul of the Supremacy Clause.”) This is a restatement of the first preemption test articulated by the Supreme Court in *De Canas v. Bica*, 424 US 351 (1978). See also *Villas at Parkside Partners v. City of Farmers Branch*, No. 3:06-CV-2371L, 2007 U.S. Dist. LEXIS 44234 (N.D.Tex. 2007) (enjoining municipal ordinance 2903 adopted on Jan. 22, 2007). The City of Farmers Branch, Texas, required landlords to verify the citizenship or immigration status of those who sought to rent apartments from them. Where the goof city fathers of Farmers Branch went wrong was that they decided not to adopt federal immigration standards but create some new ones of their own. Bad decision.

¹⁹⁹ *De Canas v. Bica*, 424 US 351 (1978). *De Canas* rightly reminds us that “States, however, possess broad authority under their police powers to regulate the employment relationship to protect resident workers.” *Id.* at 356. Is that what the states are trying to do now or are they really seeking to punish the undocumented by rebranding their efforts with a more acceptable label? At the same time, any overly expansive assertion of state police power runs squarely up against the constitutional reality that “there is simply no jurisdictional authority” for any state to decide for

More than any other single court case, this one teaches the most basic lesson when it comes to preemption, namely that a law that concerns itself with alien employment is not necessarily a regulation of immigration. Remember the Supreme Court in *De Canas* did not think that immigration extended that far: “a determination of who should or should not be admitted into the country.”²⁰⁰ A modest definition of “immigration” gives the states running room. When viewed from this perspective, would it then perhaps be possible to interpret IRCA’s savings clause as an implied delegation by Congress to the states of the exclusive, but nonetheless non-enumerated, federal power to regulate immigration?²⁰¹ Do we not then have to look to the principal or primary purpose of the state law in order to determine whether it can pass constitutional muster? Stated differently, does an otherwise valid state action have to go under the knife solely because it has a tangential effect on federal control over immigration if such statute is largely intended to protect the health, safety and welfare enjoyed by the people of that state?²⁰² It has long been presumed by advocates of preemption that their argument would triumph if the court acknowledged the predominant federal interest in immigration. Is this really the case? If the challenged state law is not a regulation of immigration under the *De Canas* definition, would it not be equally plausible to uphold the state statute and still acknowledge congressional primacy over immigration? Though freely admitting that only Congress sets the immigration rules, Justice Brennan in *De Canas* had no problem in sustaining the California law that sought to curb undocumented labor: “There would not appear, “ the *De Canas* Court reminds us, “to be a similar federal interest in a situation in which the state law is fashioned to remedy local problems and operates only on local employers and only with respect to individuals whom the Federal government has already declared cannot work in this country.”²⁰³ Those who argue that the Supreme Court would arrive at different decision in *De Canas* logically point to IRCA as evidence that Congress wanted to foreclose any state laws to control undocumented laborers. This assumes, however, that the courts would interpret them as immigration laws and not as an exercise of state police powers retained under the 10th Amendment.

itself if an alien has the right to be in the United States. *Gutierrez v. City of Wenatchee*, 622 F. Supp. 821,824 (E.D.Wash.1987).

²⁰⁰ *Id.* at 355. See also Meline MacCurdy, *The Controversy Over Undocumented Non-Citizens: Can States and Localities ‘Regulate’ Immigration?* 12 Bender’s Immigration Bulletin 1621, 1638 (Nov. 15, 2007) (argues for a “conservative reading of the *De Canas*’ Court’s definition of a regulation of immigration); *League of United Latin American Citizens v. Wilson (LULAC I)*, 908 F. Supp. 755, 770 (C.D.Cal.1995) (“While the denial of benefits to persons not lawfully present in the United States may indirectly or incidentally affect immigration by causing such persons to leave the state or deterring them from entering California in the first place, such a denial does not amount to a ‘determination of who should or should not be admitted into the country.’”)

²⁰¹ Meline MacCurdy, *The Controversy Over Undocumented Non-Citizens: Can States and Localities ‘Regulate’ Immigration*, 12 Bender’s Immigration Bulletin 1621, 1631 n.125 (Nov. 15, 2007) (“Of course, Congress routinely delegates its exclusive enumerated powers to states through statutes that employ cooperative federalism...If federal immigration power is itself enumerated, or even if it is not, why could Congress not delegate this power as well?”) Now that is a good question!

²⁰² *Cf.*, *Savage v. Jones*, 225 US 501, 525 (1912) (“But when the local police regulation has real relation to the suitable protection of the people of the state, and is reasonable in its requirements, it is not invalid because it may incidentally affect interstate commerce, provided it does not conflict with legislations enacted by Congress pursuant to its constitutional authority.”).

²⁰³ *De Canas v. Bica*, 424 US 351, 363 (1976) (Brennan, J). It should be remembered that *De Canas* pointedly did not decide that California law was pre-empted due to a fatal conflict with federal policy; that very pregnant question was left “open for inquiry on remand.” *Id.* at 358, 363-65.

So what, proclaim the surprised state solons holding up their hands in mock horror when confronted with the maxim that “the authority to control immigration...is vested solely in the Federal government.”²⁰⁴ This law does nothing of the kind!

So, for example, Georgia can deny driver’s licenses to the undocumented²⁰⁵ and Virginia can prevent illegal alien enrollment in post-secondary educational institutions.²⁰⁶ There is, then, a fundamental distinction between immigrants and immigration; while state law can, and historically frequently has, dealt with wages, working conditions and related police power issues that affect the former, it has, until quite recently, when the unwillingness or inability of Congress to enact comprehensive immigration reform created a huge political vacuum into which the states have inevitably and somewhat uncontrollably rushed, never crossed the line to regulate the latter. Ironically, most Americans and most American politicians also have not recognized the difference between immigration and immigrants, blurring the distinction between the two. That is a primal conceptual deficiency whose continued existence impoverishes the preemption debate, depriving it of the moral clarity, ethical richness and theoretical integrity it so desperately needs and deeply deserves.

De Canas is often held up as a model for Solomonic jurisprudence by those who argue against preemption since the High Court there sustained the validity of California regulation of immigration employment.²⁰⁷ This was a pre-IRCA case decided at a time when control of unauthorized employment by the undocumented was not a central concern of federal immigration law. The issue in *De Canas* was whether the INA pre-empted a California statute that forbade employers from knowingly hiring illegal aliens if this would adversely affect California residents. While the Supreme Court found that the “power to regular immigration is unquestionably a federal power,” the Justices could not find “any specific indication in either the wording or the legislative history that Congress intended to preclude even harmonious state regulation touching on aliens in general.”²⁰⁸ Do not limit *De Canas* to its facts. Such an ill-advised focus on this narrow holding is to ignore at our peril the larger teaching that *De Canas* offers. As noted above, the broader historical importance of this seminal case derives from its fundamental lesson that there is no absolute preemption just because the challenged state law references aliens. Listen to these words and learn them well:

Standing alone, the fact that aliens are the subject of a state statute does not render it a regulation of immigration, which is essentially a determination of who

²⁰⁴ *Traux v. Raich*, 239 US 33, 36 St.Ct. 7, 11 (1915).

²⁰⁵ *John Doe No. 1 v. Georgia Dep’t of Public Safety*, 147 F. Supp. 2d 1369, 1375-76 (N.D.Ga. 2000) (state statute denying undocumented drivers from obtaining a driver’s license not preempted).

²⁰⁶ *Equal Access Education v. Merten*, 305 F. Supp. 2d 585, 601-11 (E.D. Va. 2004).

²⁰⁷ *Rogers et.al. v. Larson*, 563 F. 2d 617, 622 (3d. Cir. 1977) (“*De Canas* nonetheless stands for the general proposition that the subject matter of employment of aliens is not one that permits no other conclusion but that Congress has pre-empted state regulation.”(Ironically, the Third Circuit invalid on preemption grounds a Virgin Islands statute that provided for the replacement of nonimmigrant workers in favor of American citizens or lawful permanent residents).

²⁰⁸ *Id.* at 358.

should or should not be admitted into the country, and the conditions under which a legal entrant may remain.²⁰⁹

It has always been assumed that the Court would decide *De Canas* differently today. After all, would it not be manifestly impossible to maintain with a straight face or clear conscience that unauthorized employment remained “a merely peripheral concern”²¹⁰ of federal immigration law? No one challenged that the meaning of *De Canas* was no longer the same or even seriously questioned it, no one, that is, until Judge Neil Wake who upheld the Arizona state immigration law against a stiff preemption challenge.²¹¹ Judge Wake sustained the ability of the State of Arizona to prohibit businesses from hiring undocumented workers and rescinding their license to conduct business if they did so. Judge Wake reasoned that, contrary to what the Plaintiffs, and virtually the entire immigration bar, had been contending, *De Canas* is not irrelevant just because of IRCA. In a startling display of intellectual pyrotechnics, whose utter novelty is simply impossible to reduce to words, Judge Wake restores *De Canas* to relevancy. In fact, he does more than that. If you follow his logic, *De Canas* is actually MORE relevant now than when the Supreme Court decided it in 1978. Then, there was no indication that Congress explicitly allowed States to use their licensing and similar laws to regulate employment of unauthorized aliens. Now, thanks to the savings clause in IRCA,²¹² Congress has spoken and Arizona can act: ““Because IRCA contains both an express preemption provision and a savings clause, Congress has defined the scope of its preemptive intent

²⁰⁹ *Id.* It should also be noted that, in *De Canas*, California had adopted federal standards to determine immigration status and did not attempt to impose or fashion its own. *League of United Latin American Citizens v. Wilson*, 908 F.Supp. 755, 769 (C.D.Cal. 1995).

²¹⁰ *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 243 (1959).

²¹¹ *Arizona Contractors Association v. Candelaria*, 534 F. Supp.2d 1036, 2008 US Dist. LEXIS 9362 (D.Az. Feb. 7, 2008). For prior history, see *Arizona Contractors Association v. Napolitano*, 2007 U.S. Dist. LEXIS 96194, 2007 WL 4570303 (D.Ariz. Dec. 21, 2007) (appeal of injunction originally dismissed by Judge Wake at 526 F. Supp.2d 968, 2007 U.S. Dist. LEXIS 90694 (Dec. 7, 2007). The Plaintiffs who challenged the Arizona law, and their business allies, certainly thought that the Supreme Court would decide *De Canas* differently today and, for support, pointed to how the High Court had shifted its position on whether the National Labor Relations Act applied to undocumented labor. Before IRCA, the Court answered entirely in the affirmative, relying on the fact that such employment was only “a peripheral concern” of federal immigration law and declared rather emphatically that there was “no reason to conclude that application of the NLRA to employment practices affecting such aliens would necessarily conflict with the terms of the INA.” *Sure-Tan Inc. v. NLRB*, 467 US 883,893 (1983). After IRCA, we find a much different store. Relying on IRCA, the Supreme Court in *Hoffman Plastics Compounds, Inc., v. NLRB*, 535 US 137,151 (2002) concluded that it could not allow an award of back pay to these same undocumented workers: “As we have previously noted, IRCA ‘forcefully’ made combating the employment of illegal aliens central to the policy of immigration law.” *Id.* at 147, citing *INS v. Nat’l Center For Immigrant Rights Inc.*, 502 183, 194 and n.8 (1991). For an excellent articulation of this thesis, See *Business Group Plaintiffs’ Reply In Support of Motion for Preliminary Injunction/Motion for Judgment on the Merits in Arizona Contractors Association Inc. et al. V. Napolitano et al*, Case No. CV07-1355-PHS-NVW at 4 (D.C.Az. Oct. 19, 2007) (on file with the authors courtesy of Plaintiffs’ Counsel Julie Pace of Ballard, Spahr, Andrews & Ingersoll LLP, Phoenix, Arizona). Treating the different challenges to the Legal Arizona Workers Act on a consolidated basis for purposes of appellate review, the Ninth Circuit this past February denied an emergency stay and refused to grant any temporary relief, though it did establish an expedited briefing Schedule. The Court’s order, oral arguments, and all appellate briefs in the case are posted at <http://www.azeir.org/index2.asp>.

²¹² 8 USC 1324A (h) (2); INA § 274A(h).

with respect to laws prohibiting the employment of unauthorized aliens.”²¹³ The savings clause becomes not a symbol of weakness for the states, but a unique and enduring source of strength. It is precisely because IRCA preempted the states from levying civil and/or criminal fines to punish employers who hired undocumented workers while affirming the continued vitality of the business license and fitness for business exemptions that Judge Wake saw a clarified constitutional picture.²¹⁴ We did not know before IRCA if Arizona could use its authority to grant, withhold or revoke business licenses as a tool to curb unauthorized employment; the Supreme Court did not have the benefit of this key indicia of Congressional intent in 1978 when it handed down *De Canas*. Fortunately, we live in a post-IRCA world and Judge Wake sees very clearly, if rather astonishingly, that “employment of unauthorized aliens is neither intrinsically nor historically an exclusive concern of the federal government...”²¹⁵ Maybe, we should not be so surprised after all. This is where the force of the *De Canas* distinction between immigration and employment involving aliens has a powerful practical impact. Judge Wake sees no contradiction between granting plenary federal power over immigration²¹⁶ and sustaining Arizona’s prohibition on the employment of unauthorized aliens. Those critics of his decision who argue that he ignores federal primacy over immigration need to read it more closely. He does not but his decision remains exactly the same.

If Judge Wake’s reinterpretation of *De Canas* prevails on appeal, the terms of the preemption debate will have been dramatically, fundamentally and, one suspects, permanently altered. If Judge Wake’s reinterpretation of the IRCA savings clause is incorrect, and at least one federal court to date disagrees with him²¹⁷, then the Arizona law cannot survive. Moreover, there are those who read the preemptive language of 8 U.S.C § 1324a (h)(2) as being far more transparent and eloquent of a strong Congressional intent to assert exclusive federal control than Judge Wake does. The Attorney General of Tennessee, for example, has characterized the IRCA preemptive language in a forthright manner whose bracing frankness leaves little need to rely on legislative history for clarification: “Congress has added preemptive language to 8 U.S.C. 1324a since the decision in *De Canas*, unmistakably expressing its intention that state laws criminalizing the employment of aliens should be preempted.”²¹⁸ What is important about Attorney General Cooper’s opinion is that, while it recognized that the punishment

²¹³ *Candelaria*, 2008 U.S. Dist. LEXIS 9362 at 8. But see note 63 supra. Can Judge Wake remain faithful to the Supreme Court’s binding caution in *Geyer* and still advance his own unique interpretation? Don’t know.

²¹⁴ See *Freightliner Corp. v. Myrick*, 514 US 280, 288 (1995) (“An express definition of pre-emptive reach of a statute ‘implies’—i.e., supports a reasonable inference—that Congress did not intend to pre-empt other matters.”).

²¹⁵ *Candelaria*, 2008 US Dist.LEXIS9362 at 8.

²¹⁶ *Id.* The comparison to immigration is interstate transportation and foreign affairs, two other subjects where, unlike employment, the need for only one voice is readily apparent.

²¹⁷ *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 524 (M.D.Pa. 2007).

²¹⁸ Robert E. Cooper Jr., Attorney General of Tennessee, *Constitutionality of House Bill 66/Senate Bill 252-Forfeiture of Property of Individuals Who Have Illegally Entered the Country*, Opinion No. 08-88 at 5 (April 8, 2008 (hereinafter Cooper on Forfeiture)). This legislative proposal would have made it a crime for undocumented immigrants to accept compensation for work done in Tennessee. Tennessee Attorney General Cooper found that it conflicted with the Federal Fair Labor Standards Act made applicable to all workers regardless of immigration status as an extension of the Supreme Court’s ruling in *Sure Tan, Inc. v. Nat’l Labor Relations Bd.*, 467 US 883, 891 (1984) (undocumented laborers deemed to be ‘employees’ under the National Labor Relations Act). The complete text of this opinion can be found at www.bibdailly.com (April 11, 2008).

of undocumented laborers, such as through the forfeiture of their real and personal property, which was what this particular pilot initiative from Sen. Joe Haynes (D-Goodlettsville) and Rep. Mike Turner (D-Old Hickory)²¹⁹ would have done, actually “appears to complement federal immigration laws by deterring undocumented aliens from working in Tennessee,”²²⁰ it could still be preempted by IRCA under the Supremacy Clause using the very model in *De Canas* that Judge Wake employed to sustain the Arizona law.

Only Congress, not your friendly state legislature, can classify aliens.²²¹ The exercise of such a power belongs to the federal government since only the Congress can frame the terms of the relationship that exists between the United States and those who enter it from other lands. Such attempts at social definition are beyond the power of the States.²²² Immigration cannot be divorced from foreign policy and any attempt to change the rules of the immigration game will inevitably implicate, often complicate, America’s foreign relations with both friend and foe alike.²²³ It is precisely because Congress alone regulates immigration that any attempt by an individual state to control or limit employment contains within it the potential to infringe upon this exclusively federal domain because preventing aliens from working in a state is very much the same thing as preventing them from coming there in the first place. As Mr. Justice Hughes reminded us much more elegantly and eloquently long ago:

The authority to control immigration-or admit aliens- is vested solely in the Federal government...The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the state would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work. And, if such a policy were permissible, the practical result would be that those lawfully admitted to the country under the authority of the acts of Congress, instead of enjoying in a substantial sense and in their full scope the privileges conferred by the admission, would be segregated in such of the states as chose to offer hospitality.²²⁴

²¹⁹ Erik Schelzig, *Tenn.AG Says Pay Ban Illegal*, www.forbes.com/feeds/ap/2008/04/10/ap4875513.html (April 11, 2008).

²²⁰ Cooper on Forfeiture at 6.

²²¹ *Hines v. Davidowitz*, 312 US 52 (1941). There is an implied federal constitutional power to control immigration and a necessary and proper incident of national sovereignty. See, e.g., *The Chinese Exclusion Case*, 130 US 581 (1889); *Fong Yue Ting v US*, 149 US 698, 711 (1893).

²²² *Matthews v. Diaz*, 426 US 67, 81 (1976) (“For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government.”); See also *Nyquist v. Mandel*, 432 US 1, 7, n.8 (1977). The Supreme Court has traditionally recognized a plenary federal power over immigration. See, e.g., Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress and the Courts*, 22 *Hastings const.L.Q.* 925 (1995). See also *Galvan v. Press*, 347 US 522, 531 (1954) (“that the formulation of (immigration)policies is entrusted exclusively to Congress has become about as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government.”) A sweeping endorsement of federal power over immigration can be found at *Plyler v. Doe*, 457 US 202, 225 (1982).

²²³ See Ira J. Kurzban, *Kurzban’s Immigration Law Sourcebook*, 10th edition 2006-07 at 25.

²²⁴ *Truax v. Raich*, 239 US 33, 42 (1915) (Hughes, J.) Immigration would certainly appear to be one of those special questions “intimately blended and intertwined with responsibilities of the national government...” *Hines v. Davidowitz*, 312 US 52, 66 (1941). It is surely not “peculiarly adapted to local regulation...” *Id.* at 68 n. 22.

It is precisely this dynamic tension between the power to regulate employment under a state's traditional police power, which *De Canas* reminds us is kosher, and the degree to which the practical impact of such regulation impermissibly crosses the line to regulate not immigrants but immigration itself, that determines the constitutional propriety of any challenged state law or municipal ordinance. States or cities that attempt to navigate this delicate balance should do so with their eyes open knowing they are engaged in a high wire act without a constitutional safety net to catch them if and when they fall off. However, those who call most strongly for preemption should realize that impermissible state burdens upon aliens have been deemed to run afoul of the federal mandate to operate a national immigration scheme precisely when this temporary presence had a cognizable and colorable claim under the law. It is when aliens were lawful that the states must act with due circumspection.²²⁵ Does the Supremacy Clause require such constitutional reticence when the patina of legality is absent?

This was not always so. It is certainly true that for the first century of American independence there were no illegal aliens in a national sense for the simple reason that Congress had not yet placed any limits on immigration and would not do so until 1875. This assumes that, prior to the Civil War, the states were not active in seeking to regulate those who sought admission into their respective jurisdictions. Such an assumption would be incorrect. While it is true that the concept of illegal migration was not yet known on the federal level, this does not necessarily mean that immigration controls were not a recognized exercise of state authority. We are not used to examining what Professor Gerald Neuman has called this "lost century of immigration law". See Gerald L. Neuman, *The Lost Century of American Immigration Law (776-1875)*, 93 Colum. L. Rev. 1833 (1973). It is a risky business to say without fear of contradiction that the states cannot have any proper constitutional role to play in regulating immigration without knowing if they had ever exercised such authority in the past. The federalization of US immigration policy is a relatively recent historical development, dating as it does from the late 19th century, largely in response to inadequate and ineffective state and local efforts. Both advocates and opponents of preemption need to step back, take the long view and remember that "Historically speaking, the states controlled immigration policies from the time of colonization well into the end of the last century." Peter Skerry, *Many Borders To Cross: Is immigration the exclusive responsibility of the federal government?* 25 Publius 71 Issue No.3 (June 22, 1995).

²²⁵ *Takahashi v. Fish & Game Comm'n*, 334 US 410, 419(1948). In striking down a California statute that precluded aliens from obtaining fishing licenses, the Court focuses on their lawful residence. The same result for the same reasons, namely lawful presence, prompted the Supreme Court to invalidate a ban on a state attempt to withhold welfare benefits from resident aliens in *Graham v. Richardson*, 403 US 365,377-380(1971). None of these cases dealt with the undocumented; no issues of immigration violation presented themselves. We may, perhaps must, ask ourselves if they have equal application to those whose daily presence is a continuing violation of the very law whose protection they seek. Some scholars doubt it:

If the aim of *Truax-Graham* preemption is to stop state laws from foiling basic federal control by "denying entrance and abode" to those whom Washington has decided to admit, then its logic has no application to those that the federal government has itself attempted to exclude...state-imposed discrimination against legal aliens in theory may at some level be inconsistent with federal purposes. It hardly seems defensible, however, to presume that Congress would not contemplate additional burdens on undocumented aliens...

Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignties*, 35 Va. J. Int'l L. 121,148 (Fall 1994)

Stated more plainly, does the Constitution mandate the same degree of federal pre-eminence with respect to regulation of aliens when they have consciously violated the very law whose protective embrace they now seek? We know that “the States can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States”²²⁶ nor would the Constitution tolerate “state laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States”²²⁷. Yet, does the same conflict with the federal power over immigration exist when the patina of legal admission is absent? Are the undocumented a suspect class whose very status as a discrete and insular minority invites heightened judicial scrutiny? Does the Constitution apply different, perhaps more elastic, limits to the ability of a State to pass a law that acts only on the undocumented than would be the case with lawful resident aliens? When the *Truax* Court evaluated the “reasonableness” of Arizona’s restriction on alien employment, it did so in the context of a lawfully admitted alien who had the right to live where he pleased.²²⁸ Indeed, the unreasonableness of such state inhibition depended largely on the extent to which Arizona sought to cancel the benefits extended by federal law²²⁹. Now, would *Truax* come out differently if there had been no lawful admission? That is the \$64,000 question!²³⁰ After all, as Mr. Justice Stone reminded us long ago, the federal government “has no general police power over aliens.”²³¹ Because it does not, the States have a vital role to play but, in the performance of that role, they must be careful not to cross the line and start reading from the immigration script! The legitimate exercise of police power quickly becomes illegitimate if *sub silentio* it becomes an impermissible regulation of immigration under a different name. While the Nation must speak with one voice on immigration²³², is there room for 50 different voices if the issue relates not to immigration but more properly to those “interests so deeply rooted in local feeling and responsibility?”²³³ Protection of health and safety has historically been viewed as “matters of local concern”²³⁴ where the States “traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort and quiet of all persons.”²³⁵ Does our constitutional calculus change simply because we now deal with the welfare of those who come to us from other lands? We know that the States can neither add to nor subtract from the constraints that Congress has seen fit to impose upon lawfully admitted residents.²³⁶ Is the same true with the undocumented?

²²⁶ *Graham v. Richardson*, 403 US 365, 377-78 (1971).

²²⁷ *Id.* at 378.

²²⁸ *Truax v. Raich*, 239 US 33, 42 (1915).

²²⁹ *Id.*

²³⁰ The authors date themselves and request more contemporary readers to adjust this dollar value for inflation.

²³¹ *Hines v. Davidowitz*, 312 US 52, 75(1941) (Stone, CJ., dissenting) (“The national government has exclusive control over the admission of aliens into the United States but, after entry, an alien resident within a state, like a citizen, is subject to the police powers of the state...”).

²³² It is well-settled that all national policies can only be set by Congress. *See, e.g., United States v. Kimbell Foods, Inc.*, 440 US 715, 726 (1979) (“federal law governs questions involving the rights of the United States arising under nationwide programs”),

²³³ *San Diego Bldg. Trades Council v. Garmon*, 359 US 236, 243-244 (1959).

²³⁴ *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 US 707, 719 (1985).

²³⁵ *Metropolitan Life Ins.Co. v. Massachusetts*, 471 US 724, 756 (1985) (internal quotation marks omitted).

²³⁶ *Takahashi v. Fish & Game Comm’n*, 334 US 410, 419 (1948).

7. HERE COME THE JUDGE: WHAT RECENT FEDERAL COURT RULINGS HAVE TO SAY

Set against this general constitutional backdrop, what has been happening recently? We find a mixed bag really. For advocates of preemption, there is reason for optimism. The Attorney General of Nevada opined that IRCA did indeed supplant a newly enacted state law requirement that the Tax Commission administratively fine business licenses that violated IRCA.²³⁷ There is also the preliminary injunction granted by Federal District Court Judge Sam Lindsay against the attempt of the City of Farmers Branch, Texas, a Dallas suburb, to compel landlords to verify the immigration status of those who sought to rent apartments from them.²³⁸ This case teaches us several interesting things. First, if you are going to argue that your municipal ordinance is not an impermissible regulation of immigration, which the first *De Canas* test does not allow,²³⁹ be sure that you adopt federal immigration standards. Unfortunately for the city fathers of Farmers Branch, they did not do that, apparently finding HUD regulations that determined which noncitizens were eligible for federal housing subsidies more to their liking²⁴⁰. Second, if your scheme does not mirror the definitional standards found in the Immigration and Nationality Act, don't compound the problem by asking private actors, here landlords, to make immigration status determinations.²⁴¹ That only makes things worse and makes federal judges really annoyed. Third, remember that restricting someone's ability to live in your city might be viewed by a skeptical jurist as the same thing as deciding if they are lawfully present in the United States.²⁴² If you want to avoid having to pay court costs to the plaintiffs, that is a good thing to avoid.

If there is one decision that serves as the flagship for preemption it is the preliminary injunction granted against the City of Hazleton by Federal District Judge James

²³⁷ Letter from Nevada Attorney General Catherine Masto to Dinc DiCianno, Exec. Dir. Nevada Dept of Taxation (March 3, 2008) posted at www.ag.state.nv.us.

²³⁸ *Villas At Parkside Partners d/b/a Villas At Parkside et al. v. The City of Farmers Branch*, 496 F. Supp. 757 (N.D.Tex. June 19, 2007) (hereinafter cited as "Farmers Branch"). Recently, Judge Lindsay granted a permanent injunction against Farmers Branch Ordinance 2903. Full text of the Court's order is posted at <http://www.aclutx.org/files/080528%20DecJ.pdf>. Astonishingly, the City of Farmers Branch never relied on or cited IRCA's preemption provision at 8 USC. 1324a in its legal briefs nor would it have helped if it did since Judge Lindsay pointedly noted that the savings clause allowing certain "licensing or similar laws" related solely to employment not the rental of apartment units. See *Villas at Parkside Partners d/b/a Villas At Parkside et al v. The City of Farmers Branch*, Civil Action No. 3:3:06-CV-2371-L(consolidated with CA No. 3:06-CV-2376-L and CA No. 3:07-CV-0061-L) at 9-10 (US Dist. Ct., N.D.TX. Dallas Division) (May 28, 2008). Judge Lindsay did not strike down the City of Farmers Branch most recent immigration ordinance No. 2952 available at <http://www.ci.farmersbranch.tx.us/Communication/Ordinance%20No%202952.doc> only because no one had sought to challenge it in his court. That will change if the City tries to enforce it. See Stephanie Sandoval, *Judge rejects Farmers Branch ordinance on renting to illegal immigrants*, Dallas Morning News (May 29, 2008) available at <http://www.dallasnews.com/sharedcontent/dws/news/localnews/stories/052908dnmetapart>.

²³⁹ *De Canas at 355*.

²⁴⁰ *Farmers Branch at 768*.

²⁴¹ *Id. at 772*.

²⁴² *Id. at 766-67*(approvingly citing *Traux v. Raich*, 249 US 33, 42 (1915)).

Munley.²⁴³ As the first judicial pronouncement and given the national importance of Hazleton as a test case, the importance of Judge Munley’s endorsement of preemption cannot be overstated. Several major elements of the decision merit specific mention. First, Judge Munley held that IRCA expressly preempted the City of Hazleton’s attempt to punish employment of the undocumented²⁴⁴ and went on to find that Hazleton could not find constitutional refuge in IRCA’s savings clause.²⁴⁵ Second, notwithstanding express preemption²⁴⁶, Judge Munley also decreed that Congress completely occupied the immigration field with respect to immigration and that IRCA “leaves no room for state regulation...any additions added by local governments would be either in conflict with the law or a duplication of its terms-the very definition of field preemption.”²⁴⁷ Third, while finding that Hazleton simply had no constitutional prerogative to punish employers for hiring, employing, or recruiting unauthorized aliens, Judge Munley relied upon the carefully circumscribed definition of “immigration” articulated in *De Canas v. Bica*²⁴⁸ to rule that the challenged Hazleton ordinances were “not unconstitutional on that ground. They do not regulate who can or cannot be admitted to the country or the conditions under which a legal entrant may remain.”²⁴⁹ It is internally inconsistent, however, for Judge Munley to refrain from invalidating the Hazleton ordinance on this constitutional ground but, elsewhere in his ruling, refuse to apply the presumption against preemption because “Immigration is an area of the law where there is a history of significant federal presence and where the States have not traditionally occupied the field.”²⁵⁰ If, in the *De Canas* sense, the City of Hazleton was not seeking to regulate immigration, why should it matter if “immigration is a federal concern not a state or local matter?”²⁵¹ Moreover, if the Hazleton ordinance banning the employment of the undocumented was not an impermissible attempt to regulate immigration, a companion tenant registration ordinance that required all would-be renters to first obtain a municipal occupancy permit upon a showing of citizenship and/or lawful residence²⁵² comes closer

²⁴³ *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 2007 U.S. Dist. Lexis 554320 (M.D. Pa. 2007) (hereinafter cited as “*Lozano*”). Oral argument before the Third Circuit in Hazleton is set for October 31 in Philadelphia. *Pedro Lozano v. City of Hazleton*. Case No. 07-3531; District Case No. 06-cv-01586. The authors are very grateful for the generous cooperation of Robin Conrad and Shane Brennan of the National Chamber Litigation Center Inc., the litigation arm of the United States Chamber of Commerce, who have made available the appellate briefs in this vital case.

²⁴⁴ *Id.* at 521.

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 525 n. 49 (“The Supreme Court has explained that field preemption and conflict preemption are not “rigidly distinct.” “Indeed, field preemption may be understood as a species of conflict preemption: a state law that falls within a pre-empted field conflicts with Congress’ intent (either express or plainly implied) to exclude state regulation.” *English v. General Elec. Co.*, 496 U.S. 72, 79 n.5, 110 S. Ct. 2270, 110 L. Ed. 2d 65 (1990).” See also n. 25 supra and accompanying text.)

²⁴⁷ *Id.* at 523. (“We conclude that the Ordinance as it applies to employers is field pre-empted. Immigration is a national issue...Allowing States or local governments to legislate with regard to the employment of unauthorized aliens would interfere with Congressional objectives.”)

²⁴⁸ See *supra* n. 72 and accompanying text.

²⁴⁹ *Id.* at 534 n. 45.

²⁵⁰ *Id.* at 518 n.41.

²⁵¹ *Id.* Given express preemption, Judge Munley’s decision not to apply the presumption against preemption did not alter his bottom line: “If, however, we were to apply the presumption, our ultimate conclusion would not change as Congress has made it sufficiently clear and manifest that federal law pre-empts state law in the area covered by Hazleton’s ordinances.”

²⁵² *Id.* at 530.

to the mark. An offending landlord who allowed occupancy of any apartment without proof of such a permit faced not only fine but also suspension of license.²⁵³ Relying not upon *De Canas* but rather upon the caution in *Plyler v. Doe* that only Uncle Sam can decide who has the right to stay in the United States,²⁵⁴ Judge Munley decided in the end that the Tenant Ordinance was in conflict with federal law, and preempted for that reason, because it “burdens aliens more than federal law by prohibiting them from residing in the city although they may be permitted to remain in the United States.”²⁵⁵

Yet, even though Hazelton was not seeking to regulate immigration as *De Canas* defined it, preemption nonetheless applied. This is a truly stunning conclusion. You can still have preemption even when the state or city is not trying to regulate immigration! Accepting *De Canas* in the definitional sense while setting it aside from a decisional perspective provided Judge Munley and his intellectual progeny with an enormously potent intellectual weapon to use against their foes. Fourth, using *De Canas* to limit what immigration meant did not mean that Judge Munley found the logic of *De Canas* to prevent him from reaching the decision to preempt. Taking judicial notice of IRCA’s passage, Judge Munley compared the INA now to what it was in 1978 and saw a fundamental change: “Instead of employment being only addressed in a proviso to one section of the INA, a complete statutory scheme has now been enacted that addresses the employment of unauthorized workers.”²⁵⁶ It is of surpassing importance to realize that Judge Munley’s willingness to find preemption depended, in no small measure, upon his companion conclusion that the City of Hazelton’s reliance on *De Canas* was “misplaced.”²⁵⁷

Opponents of preemption, on the other hand, and there always seems to be one, can point to several recent federal court rulings upholding local immigration laws.²⁵⁸ One of the most forceful decisions came from a federal district judge in Missouri, E. Richard Webber, who strongly sustained a municipal ordinance revoking the business license of an employer who hired undocumented workers passed by Valley Park, a suburb of Kansas City.²⁵⁹ Several key elements of Judge Webber’s ruling merit specific mention. First, remembering the *De Canas* definitions,²⁶⁰ Judge Webber found that this was not a regulation of immigration but, rather, a regulation of business licensure, something the states had traditionally done: “The Ordinance in question does not address the question of who may or may not enter the United States, and therefore the Court concludes that

²⁵³ *Id.*

²⁵⁴ *Id.* at 532. See *Plyer v. Doe*, 457 US 241 n.6 (“Until an undocumented alien is ordered deported by the Federal Government, no State can be assured that the alien will not be found to have a federal permission to reside in the country.”) (Powell, J., concurring).

²⁵⁵ *Id.* at 532.

²⁵⁶ *Id.* at 524.

²⁵⁷ *Id.*

²⁵⁸ Julia Preston, *In Reversal, Courts Uphold Local Immigration Laws*, New York Times, Feb. 10, 2008 posted at

<http://www.nytimes.com/2008/02/10/us/10immig.html?ei=507&en=5299ea89fe80d038&>.

²⁵⁹ *Gray v. City of Valley Park*, 2008 U.S. Dist. LEXIS 7238 (E.D. Mo. Jan. 31, 2008). For those who do not subscribe to LEXIS, the full text of Judge Webber’s Memorandum and Order can be found at http://lawprofessors.typepad.com/immigration/files/gray_13108.pdf (hereinafter cited as “Webber”).

²⁶⁰ *De Canas v. Bica*, 424 US at 355. The Court defined regulation of immigration as “essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain.”

the Ordinance is a regulation on business licenses, an area historically occupied by the states.”²⁶¹ Since the issuance and revocation of licenses was not a federal responsibility, the presumption against preemption could be relied on in full measure.²⁶² Had Judge Webber thought of the Valley Park ordinance as an intrusion into the federal domain, then his ultimate conclusion would have been far different. Only by divorcing it from the regulation of immigration was Judge Webber able to avoid triggering the presumption against preemption.²⁶³ That, in turn, allowed the assertion of concurrent jurisdiction premised upon a constitutionally permissible exercise of state police powers. Like most opponents of preemption, Judge Webber did not have much use for the importance of legislative history and, because he did not find IRCA’s savings clause particularly ambiguous, looked to it only with the greatest reluctance that he did not bother to conceal.²⁶⁴ Judge Webber was not particularly impressed by the House Report on IRCA as a limitation on the power of the City of Valley Park to act.²⁶⁵ He found nothing in IRCA that required a prior violation of federal immigration law as a condition precedent to the invocation of the licensing exemption.²⁶⁶ Focusing exclusively on “the plain wording” of the relevant federal statute, here IRCA’s preemption clause, which “necessarily contains the best evidence of preemptive intent,”²⁶⁷ Judge Webber had no hesitancy in coming to two fundamental conclusions: First, because IRCA was clear as to what Congress meant, the “ambiguity in the legislative history is irrelevant”²⁶⁸ Second, that the “plain meaning” of IRCA’s preemption language “clearly provides for state and local governments to pass licensing laws which touch on the subject of illegal immigration.”²⁶⁹

Rather than finding that *De Canas v. Bica* had been overtaken by events, Judge Webber, like his colleague Judge Wake²⁷⁰, found it to be suffused with undiminished relevance, particularly its transformational observation that the Court has never held that “every state enactment which in any way deals with aliens is a regulation of immigration and thus preempted by this constitutional power...”²⁷¹ It is ironic that this case, which has stood as the modern test for preemption, has allowed the States to find in it the

²⁶¹ *Webber* at 15.

²⁶² See *supra* n. 22 and accompanying text.

²⁶³ *Webber* at 14-15. The relevant Supreme Court case here is *United States v. Locke*, 529 US 89, 108 (2000) (Washington State law attempting to regulate national and international commerce deemed preempted under Supremacy Clause).

²⁶⁴ *Webber* at 20. Judge Webber’s approving citation of *Garcia v. United States*, 469 US 70, 75 (1984) tells you all you have to know about where he would come out: “While we now turn to the legislative history as an additional tool of analysis, we do so with the recognition that only the most extraordinary showing of contrary intentions from those data would justify a limitation on the ‘plain meaning’ of the statutory language.”

²⁶⁵ See *supra* n. 66.

²⁶⁶ *Webber* at 21 (“There is no requirement in the statute that a finding be made by the federal government that a person has employed, or referred for a fee for employment, unauthorized aliens, only those who are subject to penalty.”) See also n.15 (“However, nowhere in the legislative history cited by the Plaintiffs, nor, more importantly, within the language of the statute, is this requirement stated.”).

²⁶⁷ *Spietsma v. Mercury Marine*, 537 US 51, 62-63(2002).

²⁶⁸ *Webber* at 21.

²⁶⁹ *Id.*

²⁷⁰ See *supra* n. 84 and accompanying text.

²⁷¹ *De Canas v. Bica*, 424 US 351, 355 (1978).

constitutional filigree for state immigration laws²⁷². Using *De Canas* as his lens, Judge Webber finds in the IRCA preemption savings clause, support and sustenance for what the City of Valley Park was trying to do: "Therefore the Court concludes that IRCA does not manifest an intent of Congress to occupy the entire field of immigration law."²⁷³ Why should this matter if licensing regulation was not an attempt to intrude into the immigration domain in the first place? After all, is it consistent to argue first that such licensure policies were not immigration law and then to turn round and conclude that field preemption did not exist? Why is it relevant whether Congress wanted to keep immigration law for itself since the City of Valley Park was not seeking to regulate that anyway? Another justification offered up by Judge Webber to sustain the challenged Valley Park ordinance is that "the emphasis on preventing the hiring of illegal aliens is a goal shared by the Federal and local law."²⁷⁴ While such a conclusion has obvious, even compelling, logical appeal, it is simply contrary to weight of precedential authority.²⁷⁵ The proper question now is not whether the challenged ordinance helps or hurts a shared objective but whether the Constitution allows any role for the City of Valley Park in the first place.

At least Judge Webber gave the litigants a hearing. Last December, US District Judge James Payne in Oklahoma refused to deal with the challenge brought against the Oklahoma law on the merits. In an angry epistle literally brimming with righteous indignation, Judge Payne figuratively shut the courthouse door in the face of anonymous plaintiffs who acknowledged they were here illegally but did not challenge the right of the United States to keep them out.²⁷⁶ Grounding his reluctance not on any principled opposition to preemption but rather as a discretionary reticence against entertaining a plea for intervention from those who came before him with "unclean hands"²⁷⁷, Judge Payne found a lack of standing and went no further: "These illegal alien Plaintiffs seek nothing more than to use this Court as a vehicle for their continued unlawful presence in this country."²⁷⁸ We learn little from this case other than the importance of standing and the need to remember that, however unattractive or offensive their conduct is, the

²⁷² A good example of how the States are actually reinterpreting the *De Canas* for their own purposes can be seen in a 2007 opinion rendered by Arizona Attorney General Terry Goddard upholding the constitutionality of Proposition 300, which took effect on December 7, 2006. Under this new law, only citizens, permanent residents and others lawfully present in the United States were eligible to receive adult education services. At issue was the possibility that such a requirement had to give way to the Workforce Investment Act of 1998. With the *De Canas* distinction as his guide, Attorney General Goddard pointed out that "Proposition 300 does not permit state or local employees to determine who should or should not be admitted to the country or who should remain here. The statute merely requires that the Department limit the provision of adult education services...Thus, ARS 15-232 is not an invalid immigration regulation" Terry Goddard, Opinion No. 107-005(R07-005, April 6, 2007) available at <http://www.azag.gov/opinions/2007.html>.

²⁷³ *Webber* at 23.

²⁷⁴ *Webber* at 33.

²⁷⁵ See *supra* n. 31-35 and accompanying text.

²⁷⁶ *National Coalition of Latino Clergy et al v. Henry*, Case No. 07-CV-613-JHP, 2007 U.S. Dist. LEXIS 94871 (N.D.Ok. Dec.2007). For those who lack LEXIS access, the text is also available at http://www.tulsaworld.com/webextra/content/2007/pdfs/show_case_doc.pdf (hereinafter cited as "*Payne*").

²⁷⁷ *Precision Instrument Mfg. Co. v. Automotive Machinery Co.*, 324 US 806, 814 (1945).

²⁷⁸ *Payne* U.S. Dist. LEXIS 94871 at 16.

undocumented do not by their disobedience sacrifice a rightful claim to the equal protection of the law.²⁷⁹

Judge Robin Cauthron, a federal judge in the Western District of Oklahoma, was a bit more patient than Judge Payne, though state authorities might not agree in this instance that such patience was a virtue. He granted a preliminary injunction postponing the enforcement of two key employer-related portions of the Oklahoma Taxpayer and Citizen Protection Act of 2007 explicitly finding that they conflicted with, and were preempted by, IRCA.²⁸⁰ Judge Cauthron pointedly noted that Oklahoma was not at

²⁷⁹ See *Plyler v. Doe*, 457 US 202(1982). To be fair, Judge Payne explicitly recognized this in his opinion, *Payne* at 15, but sought to distinguish the facts of the instant case with those at issue in *Plyler* on the ground that the latter presented dependent minor children who had not come here voluntarily but were brought to this country by their parents. *Payne* at 16. Candor compels the authors to admit that the *Plyler* court made much the same distinction. *Plyler v. Doe* at 220.

²⁸⁰ *Chamber of Commerce of the United States et al v. Henry*, No. CIV-08-109-C, 2008 US Dist. LEXIS 44168 (W.D.Ok. June 4, 2008). The text of the injunction order itself may be read at <http://www.uschamber.com/assets/nclc/henrypreliminjunction.pdf>. Sections 7 and 9 were struck down. Section 7 required all state contractors use E-Verify for any state contract entered into on or after July 1, 2008. They also created a private right of action for any US citizen or lawful permanent resident who lost his or her job to an undocumented replacement. Section 9 penalized an offending state contractor who relied on unauthorized labor by mandating tax withholding of state income tax at the top marginal rate and by making such contractor liable for all taxes that were required to be withheld. Judge Cauthron held that the imposition of such a tax penalty was precisely a “form of civil sanction” expressly prohibited by IRCA’s preemption clause. *Id.* at 13-14.

Oral argument before the Tenth Circuit is on the way but the exact date has yet to be set. *Chamber of Commerce of the United States of America et.al. v. Edmondson et al.*, Case No. 08-6127 (10th Circuit).The outlines of Oklahoma’s appellate argument are plain for all to see. They acknowledge federal control over immigration and rest squarely upon the continued vitality and viability of the *De Canas* paradigm. There is no reason, so says the State of Oklahoma to the Tenth Circuit Court of Appeals, why IRCA and the Oklahoma Taxpayer and Citizen Protection Act of 2007 (“HB 1804”) cannot co-exist in pure bliss and utter constitutional harmony: “Even though HB 1804 involves immigration, “we are told by Appellant’s brief, “it does not regulate immigration in the sense contemplated by *De Canas v. Bica*...Therefore, the presumption against preemption applies.” Appellants’ Opening Brief at 35 (Aug. 25, 2008) (internal citations omitted). There is no conflict with IRCA, you see, because Oklahoma is not imposing any penalties for the employment of unauthorized aliens. What are they doing you ask? Several things, all of which fall within the unchallenged ambit of the State’s police powers: (1) penalizing a failure to withhold taxes in violation of the Oklahoma tax code. Appellants’ Opening Brief at 38; and (2) imposing sanctions on an employer who fails to withhold income taxes from an independent contractor, money that should rightly go into the state treasury. *Id.* The goal of HB 1804 is not to police or punish the hiring of an undocumented alien but, rather, to make the offending employer pay the price of not withholding tax monies that any regular employer must withhold.

If the employer does not want to play by the rules that govern all business conduct, fine, but that employer has to pay for not doing so. *Id.* at 39. What about requiring state contractors to sign up for E-Verify? Isn’t that in conflict with the voluntary nature of the federal program? Not really. After all, IRCA does not speak to who can contract with the State of Oklahoma and surely it is up to Oklahoma to decide who is qualified to do business for the provision of state services. After all, these services are paid for by Oklahoma taxpayers, not by Congress. One can, so the State argues to the Tenth Circuit, look in vain throughout all of IRCA and you will not find any prohibition on the ability of any State to require a state contractor to sign up for E-Verify. *Id.* at 41-42. Besides, what IRCA prohibits is precisely what HB 1804 does not do, or so says the Appellants’ brief at 43: “There are no fines, no liquidated damages, no civil penalties, no threat of

liberty to turn E-Verify into a compliance tool: "federal law prohibits use of the Status Verification Systems to verify employment eligibility."²⁸¹ He found that an Oklahoma employer could not obey IRCA and Oklahoma law at the same time, placing the hapless business in the untenable position of complying with state law at the cost of flouting the will of Congress.²⁸² What is perhaps most surprising is that Judge Cauthron dealt with the *De Canas* limitation by ignoring it; the decision is never mentioned, not even to distinguish or explain away. It is as if *De Canas* never happened. IRCA has replaced it as the proof text for constitutional analysis. With *De Canas* out of the way, any possible restrictions that it placed on the scope or meaning of immigration are also eliminated. This liberates Judge Cauthron to equate immigration with immigrants, erasing the delicate distinction that *De Canas* had been so careful to delineate.

The rulings by US District Judge Neil Wake in Phoenix upholding the Legal Arizona Workers Act²⁸³ are Ground Zero in the legal fight against preemption. Much as Judge Munley has become the poster child for preemption, Judge Wake is clearly the symbol for state immigration initiatives. To understand where he ends up, we must look at where he starts out, namely the belief that the Arizona law was not a radical departure but, rather, the reinvigoration of precedent that predates IRCA.²⁸⁴ From this perspective, Arizona was only reclaiming what had been its right before Congress got into the act. Precisely because he saw the Arizona law not as a break with the past but as a link with an older tradition, Judge Wake had no hesitation in applying the presumption against preemption that operated in those areas within traditional state domain.²⁸⁵ Precisely

criminal prosecution." What a contractor has done in the past will neither be reviewed nor disturbed. The focus is all and only on going forward if, but only if, the contractor wants a juicy state contract; then, E Verify comes along. *Id.* Since this is neither a civil nor criminal penalty, there is no need for pre-emption: "Oklahoma's law does not penalize contractors who wish to hire illegal aliens. It simply adds a requirement from those who wish to contract with the State." *Id.* at 44.

It will be interesting to see how the Chamber of Commerce responds to this attempt by state authorities to recast the character of their law and change the terms of the debate. This is precisely where the constitutional battle will be waged both before the 10th Circuit and the US Supreme Court where this case is ultimately heading.

²⁸¹ *Id.* at 15. See also the caution from Judge Munley in *Lozano v. Hazleton*, 2007 WL 2163090 at 45: "8 USC § 1373 ...does not establish a verification mechanism." Text of 8 U.S.C. §1373 at http://www.law.cornell.edu/uscode/html/uscode08/usc_sec_08_00001373----000-.html Interestingly, both E-Verify and federal responses to state inquiries pursuant to 8 U.S.C. §1373 rely on the same database, the federal Verification Information System, formerly known as the Alien Status Verification Index. See an excellent explanation of this in Plaintiffs' Motion for Preliminary Injunction at 26-27 in *Arizona Contractors Ass'n v. Napolitano*, Case No. CV07-1355-PHX-NVM.

²⁸² *Id.*

²⁸³ *Arizona Contractors Association Inc v. Candelaria*, 534 F. Supp. 2d 1036, 2008 US Dist. LEXIS 9362 (D.Az. Feb. 7, 2008). (hereinafter cited as "*Candelaria*"). See also *supra* n. 83.

²⁸⁴ *Id.* at 3. Surveying the legal scene at the time of IRCA's enactment, Judge Wake reminds us that "Indeed, at least twelve states had employer sanctions statutes that prohibited 'knowing' employment of unauthorized aliens. US IMMIGRATION POLICY REPORT AND THE NATIONAL INTEREST, STAFF REPORT OF THE SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY 565 (1981)."

²⁸⁵ *Id.* at 5. ("where 'federal law is said to bar state action in fields of traditional state regulation...(courts proceed) on the assumption that the historic police powers of the States were

because Judge Wake saw the purpose of the Arizona law as the regulation of employment, not a regulation of immigration, he found no express preemption and sustained the compulsory nature of the E-Verify requirement which, after all, applied to all new hires and primarily affected those who were not undocumented workers.²⁸⁶ He found no problem with making employers sign up for E-Verify. In both cases, it was not E-Verify that was really at the heart of the matter but how the court viewed the basic nature of the challenged state or local statute. Compare this understanding to Judge Munley's conclusion that the E-Verify requirement in the Hazleton ordinance was preempted.²⁸⁷ There, Judge Munley did find preemption because the law sought to prohibit unauthorized employment by the undocumented; since the E-Verify requirement was in aid of this constitutionally impermissible goal, it too had to go. By contrast, Judge Wake did not think that Arizona had ventured into forbidden ground and, ineluctably upheld mandatory E-Verify as a regulation of employment, which it had every right to do.²⁸⁸

Adopting the limited *De Canas* definition of immigration²⁸⁹, one can posit, as Judge Wake does, that the Arizona law only limited what the undocumented could do after they crossed state lines and did not attempt to limit, control, or classify them when they first entered the United States. Indeed, the Arizona law, seen in this light, neither adds to nor takes away from any rights or protections that the undocumented previously exercised or enjoyed. That is why Judge Wake finds the compulsory E-Verify registration to be outside the area of concern: "The Act's E-Verify requirement simply designates the procedure for verifying the existing classification of a person. E-Verify and I-9...do not substantively classify persons as work authorized. Aliens do not gain, lose or change status in the United States when they are processed through E-Verify."²⁹⁰ At first glance, this logic seems diametrically opposed to what the Supreme Court articulated in *Truax v. Raich*.²⁹¹ What difference you ask? In *Truax*, Arizona sought to take away the rights of those that federal law allowed to come; here, there had been no such welcome. The very presence of the undocumented in Arizona depended upon their ability to remain in the shadows.

Further instructive contrasts between *Lozano* and *Candelaria* can be drawn. Judge Munley would only allow the City of Hazleton to revoke business licenses for IRCA violations, not merely transgressions of state or local law.²⁹² By contrast, Judge Wake thought that Arizona was merely trying to "suspend or revoke a permission to do

not...superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'...Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc., 519 US 316, 325...(1997) (quoting *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins.Co.*, 514 US 645, 655...(1995)).

²⁸⁶ *Id.* at 10. See also an insightful and concise exposition of E-Verify and preemption ably articulated by Ben Stanley, *Preemption Issues Arising From State and Local Laws Mandating Use of the Federal E-Verify Program*, 13 *Bender's Immigration Bulletin* 433, 434 (April 15, 2008) (hereinafter cited as "*Stanley*"). Stanley makes the excellent point that there were no penalties in the Arizona law for failure to use E-Verify only for the employment of those who did not have the right to work. What was there to preempt?

²⁸⁷ *Lozano*, 496 F. Supp. 2d at 519-21.

²⁸⁸ *Stanley* at 434 n.8.

²⁸⁹ See *supra* n. 72 and accompanying text.

²⁹⁰ See *Candelaria* at 10.

²⁹¹ See *supra* n. 92 and accompanying text.

²⁹² *Lozano*, 496 F. Supp. At 519-20.

business in the state. It therefore falls within the plain meaning of IRCA's savings clause."²⁹³ What does this mean for E-Verify you ask? Simple really. If Hazleton can only punish violations of federal law, since Congress has left it up to employers whether they want to sign up for E-Verify or not, Hazleton would never be able to punish an employer who similarly declined to register.²⁹⁴ The City Fathers cannot compel what Congress has made voluntary²⁹⁵. By contrast, precisely because Judge Wake did not see any reason why Arizona could not tell businesses who came there how to behave, taking away their license for not using E-Verify did not seem unusual or suspect in any way or for any reason.²⁹⁶

What about field preemption? Here too Judges Munley and Wake go down a very different path. Once again, Judge Wake reminds us that regulation of employment is primarily a state issue, not one that Congress has sought to²⁹⁷ keep all for itself. Judge Munley set up a "no win" situation where the Hazleton Ordinance had to fail. If the Ordinance simply repeated what IRCA said, it was essentially the same thing. Who needed it? Hence, field preemption must follow. If the Ordinance was different from IRCA, conflict preemption struck it down! Hazleton lost either way.²⁹⁸ For Judge Munley, IRCA was the end point for the Hazleton Ordinance, the mirror against which one determined how much freedom of action the Constitution would grant. That is why when he writes in *Lozano* "Under federal law, participation in Basic Pilot is not mandatory. Under IIRIRA (Illegal Immigration Relief Act), participation in the Basic Pilot is at times mandatory,"²⁹⁹ the conflict is clear and fatal. By contrast, Judge Wake views the voluntary nature of E-Verify as a brake solely upon the ability of Congress to make registration compulsory, not on the ability of the Arizona Legislature to do so. To Judge Wake, "voluntary participation refers to how E-Verify is to operate in the context of the federal system."³⁰⁰ He does not for a moment doubt that Congress did not intend to "make E-Verify mandatory at the national level for the national sanctions law."³⁰¹ For Judge Munley, that would have been the end of it; Judge Wake goes on to take a fateful next step: "Without more, they do not raise an inference that Congress intended to prevent the states from mandating use of the system in their licensing law."³⁰² (Emphasis added). It was not accidental that Judge Wake uses this term to characterize the Arizona law. For him, Arizona was not regulating immigration, not second guessing Congress. For him, Arizona was doing what states have always done, what the Constitution not only allowed them to do, but, indeed, expected and required them to do. For these purposes, there was no reason why E-Verify in Arizona had to be voluntary.

How about legislative history? Here we see a vivid illustration of how close reliance on, or summary dismissal of, legislative history is absolutely vital to an informed

²⁹³ *Candelaria*, 2008 U.S. Dist. LEXIS at 20.

²⁹⁴ Stanley at 435.

²⁹⁵ Illegal Immigration Reform and Immigrant Responsibility Act, Omnibus Consolidated Appropriations Act, 1997, Pub.L. No. 104-208, div.C, 110 Stat. 3009(Sept. 30, 1996). IIRIRA is a big law, so just look at Section 402(a), 110 Stat. at 30009-656("the Attorney General may not require any person or other entity to participate in (E-Verify).").

²⁹⁶ *Id.*

²⁹⁷ *Candelaria*, 2008 U.S. Dist. LEXIS 9362 at 20.

²⁹⁸ Stanley at 435.

²⁹⁹ *Lozano*, 496 F. Supp. 2d at 527.

³⁰⁰ *Candelaria*, 2008 US Dist 9362 at 13.

³⁰¹ *Id.*

³⁰² *Id.*

understanding of the dueling judicial approaches to preemption of state and local immigration laws.³⁰³ What does IRCA's savings clause mean? How far does it go? How binding is it on the courts faced with these preemption challenges? Judge Wake is not a big fan of legislative history: "The language of the statute that Congress approved, not language from the House Report concerning the statute controls."³⁰⁴ Even if legislative history did count, Judge Wake does not believe that it would help the preemption argument to any appreciable extent. Why? He offers three reasons: (1) the House Judiciary Committee's Report was not before the Senate when it approved IRCA; (2) the language of IRCA offers little or no reason to contend that the licensing exemption is linked inexorably to a pre-existing federal violation; (3) any attempt to use the House Committee Report to overcome the plain wording of the IRCA savings clause itself would, in his view, be forthrightly and properly condemned at "precisely the kind of excess that the modern view of legislative history illegitimizes."³⁰⁵ Step into the world of Judge James Munley and legislative history has a friend: "In addition to being counterintuitive to the plain language of the provision, Hazleton's interpretation is contrary to its legislative history. In House Report No. 99-682(I), the United States Congress provides its interpretation of the type of "licensing" permitted under the statute. The "licensing" that the statute discusses refers to revoking a local license for a violation of the federal IRCA sanction provisions, as opposed to revoking a business license for violation of local laws."³⁰⁶ What is an annoying, potentially subversive, irrelevancy in one instance becomes a trusted compass to reaching the right result in another. That the two decisions arrived at different places in the end on the journey to preemption is hardly surprising; indeed, given their polar opposite views on legislative history, it was virtually preordained.

On September 17th, 2008, the Ninth Circuit Court of Appeals told Judge Wake that he had it right.³⁰⁷ They upheld him on all of his essential rulings. Yes, the Arizona law came within the scope of the exemption to IRCA pre-emption.³⁰⁸ Yes, Arizona could make E Verify mandatory.³⁰⁹ After all, the fact that Congress did not want to force all employers to sign up did not indicate that Arizona could not do so.³¹⁰ There was no indication in the legislative history of IRCA that state immigration laws could only punish violations of IRCA itself³¹¹ nor was Arizona really trying to define who could work under US immigration law and who could not; rather, their objective as defined by the Ninth Circuit Panel was far more modest, namely to determine who was fit to do business in their state as judged by the employment of undocumented workers and who was not fit to do so.³¹² Taking a step back, we can see that the true importance of the Ninth Circuit

³⁰³ See *supra* n. 66 and accompanying text.

³⁰⁴ *Candelaria*, 2008 US Dist. LEXIS at 7.

³⁰⁵ *Candelaria*, 2008 US Dist. LEXIS at 7-8.

³⁰⁶ *Lozano*, 496 F.Supp 2d at 519-520.

³⁰⁷

[http://www.ca9.uscourts.gov/ca9/newopinions.nsf/F05A5F67FDA9AEE6882574C7005021AB/\\$file/0717272.pdf](http://www.ca9.uscourts.gov/ca9/newopinions.nsf/F05A5F67FDA9AEE6882574C7005021AB/$file/0717272.pdf). The full text of *Chicanos Por La Causa v. Napolitano*, No. 07-17272, D.C. No. CV-07-01355-NXW can also be found in the September 17th issue of <http://www.bibdaily.com>

³⁰⁸ *Id.* at 11, 17.

³⁰⁹ *Id.* at 4.

³¹⁰ *Id.* at 22.

³¹¹ *Id.* at 20.

³¹² *Id.* at 19.

affirmation of Judge Wake lay in its refusal to extend the modest parameters of the *De Canas* paradigm.” We conclude that , because the power to regulate the employment of unauthorized aliens remains within the states’ historic police powers, an assumption of non-preemption applies here.”³¹³

8. IN THE TRENCHES: HOW TO RESPOND IN THE REAL WORLD

With the rise of state attempts to regulate immigration at the worksite, businesses face a daunting task. While immigration compliance has always been a complicated matter, at least it was consistent across the country: when a business hired someone in Alaska, it would perform the same Federal I-9 procedure as it would when it hired someone in Florida. That situation has now changed. Crafting an immigration compliance program now requires businesses to consider a variety of differing and sometimes conflicting state laws. Until courts strike down these state laws under preemption grounds or Congress enacts broader, clearer preemption language,³¹⁴ the current situation will persist. For the time being, businesses should consider the following:

1. **Awareness** – Businesses, and the attorneys that represent or counsel them, must make attempts to remain aware of the various state efforts to regulate immigration at the worksite. Any attempt to craft a Form I-9 and other compliance programs must take into account recent state developments (as well as constantly changing Federal rules). In addition, businesses must be aware of potential private causes of action by terminated employees in those states that have created such suits for U.S. citizen and permanent resident workers who are terminated while the employer retains unauthorized workers.
2. **Compliance Programs** – While businesses in the past may have managed to craft and implement effective I-9 compliance programs without turning to outside

³¹³ Id.

³¹⁴ See the “New Employee Verification Act” (NEVA) (HR 5515) 110th Cong. 2nd Session. NEVA would, at Section 101(b) would amend the preemption section of the Immigration and Nationality Act to read:

- `(A) PREEMPTION- The provisions of this section preempt any provision of any law of any State or political subdivision thereof or any contract entered into by any State or political subdivision thereof which--
- `(i) imposes civil or criminal sanctions upon employers for actions governed by the Act;
 - `(ii) requires, authorizes or permits a system of verification of the immigration status of employees or employment applicants;
 - `(iii) requires, authorizes, or permits the use of a federally mandated employment verification system for any other purpose other than that required by Federal law, including verifying status of renters, determining eligibility for receipt of benefits, enrollment in school, obtaining or retaining a business or other license provided by the unit of government, or conducting a background check; or
 - `(iv) requires or prohibits the use of an immigration status employment verification system for any purpose, except as required by Federal law, including without limitation, such purposes as--
 - `(I) a condition of receiving a government contract;
 - `(II) a condition of receiving a business license; or
 - `(III) the basis of assessing a penalty.

counsel, businesses today are increasingly seeking special expertise to help to implement new programs to comply with the additional complexity created by the patchwork of state laws. Corporate employers increasingly view compliance as a core function, sometimes devoting entire divisions or business units to it. Also, large employers need to develop a worksite enforcement strategy that can guard against problems and minimize the impact of an ICE raid.

3. **E-Verify** – If they have not done so already, businesses must now reconsider whether they should or must participate in E-Verify. Businesses should also consider the different ways in which it may be able to use E-Verify. The E-Verify system is now fairly customizable in order to provide the flexibility businesses need. When considering whether to participate in E-Verify a business should survey their client/customer list to see if, or where, they do business as state contractors. Some of the most common issues employers struggle with are:

Who does E-verify apply to? What employees must be sent through E-Verify? While clearly only new employees should be run through the system, employers must now grapple with the following scenarios:

- **Transfers:** Employers who hire an employee in a non-E-Verify State and then transfer the employee to an E-Verify state may be concerned about whether the enforcing state will consider this an attempt to circumvent its E-Verify requirement.. The E-Verify state may claim the employer never intended to employ the new hire outside the reach of its E-Verify law and that the transfer was in bad faith. This question requires an employer analyze the specific state’s laws in question as well as consider the federal E-Verify requirements.³¹⁵
- **Acquisitions** – If an employer acquires another company, and does not assume the I-9s, but rather treats the employees as new employees, and completes new I-9s, does that trigger an E-Verify requirement? Clearly, assuming the I-9s and treating the employees of an acquisition
- **Teleworkers** - Many companies struggle with how to categorize “remote workers” who work from home, and away from any company facility. E-Verify requires a “hiring location” to enroll. Employers that are trying to meet state law requirements often struggle with how to enroll in E-Verify and verify those “remote workers”.

4. **Extraterritoriality of State immigration Laws** – A prevalent question in light of the myriad of state laws, is how far can the state laws reach. Can the State

³¹⁵ In general, the federal processes governing the use of E-Verify dictate that an employee only be entered into the system once: at the time of hire. E-Verify cannot be used to re-verify an existing employee’s work authorization. See USCIS, E-Verify Memorandum of Understanding, available at <http://www.uscis.gov/files/nativedocuments/MOU.pdf>; USCIS, “E-Verify User’s Manual,” available at http://www.uscis.gov/files/nativedocuments/E-Verify_Manual.pdf.

regulate activity outside their state boundaries? For example, currently some states require a company that enters into a contract with the state, to promise it will run all new employee's through E-Verify, even if the company is doing business outside the state boundaries³¹⁶. This aspect of state laws has not yet been tested, but it clearly requires an employer to consider the effect of entering into contracts with multiple states that have slightly different requirements, which could potentially be imposed in all locations where the company does business.

5. **Managing Sub-Contractors** – Some state laws now impose oversight responsibility over an employer's sub-contractors. These new rules create additional liability and new responsibility for business. Often business will look to a sub-contractor to help take responsibility for aspects of a project. Now businesses will need to rethink how much oversight they will exercise over a sub-contractor and whether to restructure the relationship. This raises legal issues such as co-employment concerns among others. For example, a business may decide to review its subcontractor's I-9s or ask a subcontractor to show it is running E-Verify for all new hires. All of these decisions require careful analysis and legal strategy.
6. **Advocacy** - Immigration enforcement is a very new issue to most state legislatures. Many simply do not realize that their attempts to get tough on illegal immigration actually create complex, confusing and burdensome business regulations that affect everyone living within their borders. By trying to educate state legislators, the business community could make significant strides towards sensible reform that doesn't unduly burden business while still achieving desired goals.
7. **Litigation**- Employers may also consider the possibility of litigating state law issues. For example, the US Chamber of Commerce successfully litigated against the Oklahoma law. Other employer groups have attempted to seek federal court review of the constitutionality of the Arizona law.

9. THROUGH THE LOOKING GLASS: THE THIRD PHASE OF US IMMIGRATION

The core rationale at the very heart of the prairie fire sweeping across the legislative landscape is that the States must act because Congress will not. This logic may yet prove to be the movement's undoing. In her signing statement, Arizona Governor Janet Napolitano acknowledged that immigration "is a federal responsibility" but signed the Arizona immigration law anyway because "Congress finds itself incapable of coping with the comprehensive immigration reform our country needs."³¹⁷ Is the failure of Congress to act an unspoken delegation of its power over immigration to the States or is it, rather, an expression of the need for Congress to retain that authority and exercise it in a more

³¹⁶ See *supra*, notes 80, 101 and accompanying text; see also, www.mmd.admin.state.mn.us/immstatFAQ.htm.

³¹⁷ HB 2779: Fair and Legal Employment Act, Signing Statement, (July 2, 2007) () (available at http://azgovernor.gov/dms/upload/NR_07207_Employer%20Sanctions%20Release.pdf)

effective manner or indeed exercise it at all?³¹⁸ Stated differently, is not Congressional action the only constitutionally permissible antidote for Congressional inaction? Does it not place states like Arizona in an impossible constitutional position to argue that, on the one hand, their challenged laws are not a regulation of immigration and then contend, on the other, that only the States can regulate immigration because Congress is sitting on its hands? Arguably, it should not matter what Congress does if all the States were doing is to exercise their historic police powers. One suspects that the constant bemoaning of a lack of comprehensive immigration reform on the federal level is an implicit, though hugely eloquent, admission that the states really are getting into the immigration business despite their loud and frequently professed protestations to the contrary. At the very essence of this confusion is the lack of clarity surrounding the distinction between regulation of immigration, which only Washington DC can do, and the regulation of immigrants which arguably the States can do. *De Canas* has pointed out the importance of the difference but how it plays out in practice still remains very much to be determined. It is precisely in these interstices that the constitutional struggle will be conducted.

Mississippi offers a glimpse of where the states might be going. Of all the state immigration laws, the Mississippi Employment Protection Act³¹⁹ may be the most intriguing and, from the perspective of showing an exit from the preemption paradox, the most consequential. The singularity of the Mississippi approach lies not in making E-Verify mandatory or in absolving offending employers from liability so long as they have signed up. Such features are common in state immigration laws. Interestingly, in his signing statement, Mississippi Governor Haley Barbour gave E-Verify something less than a ringing endorsement.³²⁰ The singularity of the Mississippi approach lies in making it a felony for an undocumented worker to “accept or perform employment for compensation.”³²¹ Upon conviction, the alien employee may be imprisoned for up to 5 years and fined from \$1000-\$5000, or both.³²² While Governor Barbour’s signing statement contends “the intent of SB 2988 is to hold employers accountable for their actions,”³²³ it is the poor alien not the US employer who faces the grim possibility of life behind bars.³²⁴ The IRCA preemption provision³²⁵ warns the states not to levy civil or criminal sanctions upon employers not the undocumented themselves. Mississippi does

³¹⁸ See *United States v. Valenzuela-Bernal*, 468 US 858, 864 (1982) (“One cannot discount the importance of the Federal Government’s role in the regulation of immigration.”)

³¹⁹ 2008 Gen. Laws Miss. Ch. No. 312; available at <http://billstatus.ls.state.ms.us/documents/2008/html/SB/2900-2999/SB2988SG.htm>. (hereinafter cited as SB 2988).

³²⁰ Statement of Governor Haley Barbour on Senate Bill 2988, <http://www.governorbarbour.com/news/2008/mar/SB2988.htm> (March 17, 2008) (“I am concerned about mandating the E-Verify system as the sole source from which an employer in Mississippi can verify a potential employee’s eligibility, especially since the federal government itself has said E-Verify is not a reliable system.”).

³²¹ SB 2988 at Section 2(c)(i). The undocumented laborer must be acting “in reckless disregard” of the fact that he or she lacks proper work authorization. There is no statutory definition of this threshold concept.

³²² *Id.*

³²³ Statement of Governor Haley Barbour on Senate Bill 2988, <http://www.governorbarbour.com/news/2008/mar/SB2988.htm> (March 17, 2008)

³²⁴ David Bacon, *In Mississippi, Work is Now a Felony for Undocumented Immigrants*, available at http://www.truthout.org/docs_2006/printer_042208B.shtml (April 20, 2008).

³²⁵ 8 USC §1324a(h)(2) (2007).

not contradict IRCA so much as ignore it. It does not seek to disturb the IRCA mandate but to add to it so that the policy choice made by Congress is left intact. In effect, we return to a pre-IRCA world when it was unlawful to work absent proper papers but not a crime to hire them if the undocumented job seeker was lucky enough to sneak in. The so-called “Texas Proviso” lives again, if only in the sovereign state of Mississippi. Is that the way out for states that wish to act but fear constitutional retribution?

Whether state and local immigration laws survive in the long run will depend, in no small measure, on the extent of judicial willingness to enlarge the very limited definition of “immigration” set forth in *De Canas v. Bica*.³²⁶ If this is expanded so that our understanding of “immigration” continues far beyond the initial entrance into the United States to include what the undocumented can do after arrival, then the scope for the exercise of state police powers will be correspondingly diminished. If, on the other hand, the *De Canas* definition remains largely intact, the prospects for preemption will inevitably grow dim. A modest definition of immigration is simply inconsistent with preemption on any large or consistent scale. It is also fair, perhaps even necessary, to ask if such a narrow interpretation reflects the extent to which immigration, both legal and illegal, has become intertwined with all aspects of American life to an extent not even imagined in 1976. From this perspective, it is easy to see how and why the Supreme Court thought that immigration stopped at the nation’s borders when they decided *De Canas*; it is far more tenuous to believe that it does today. From the perspective of 2008, over three decades after *De Canas*, it seems clear that our national comprehension of immigration, and what it really means to the domestic economy, must be significantly updated with a resulting constitutional reinterpretation.

Before IRCA, federal control over immigration was linked to federal control over foreign affairs. Immigration priorities were largely understood within the context of seeking entry to the United States. It was getting here that was the key constitutional issue³²⁷. Above all else, what really counted was the power of Congress to say NO! As part of international law, and as a necessary and proper attribute of national sovereignty, the courts looked first to uphold the power of the federal government to exclude undesirable aliens in order to defend the nation and regulate its relations with other countries.³²⁸ The authority exercised by Congress over immigration devolved, at its most elemental level, to the “plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.”³²⁹ Precisely because it was linked at the hip to foreign affairs, national immigration policy was suffused with a perspective that faced away from the United States and kept a sharp eye out for those who sought to come. “Over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens.”³³⁰ Before IRCA, when the courts rarely intervened, they did so because they accepted the “power of Congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country...”³³¹

³²⁶ See *supra* n. 72 and accompanying text.

³²⁷ See, e.g., *Kleindeinst v. Mandell*, 408 US 753,762 (1972) (nonresident aliens have no constitutional right of entry).

³²⁸ See, e.g., *The Chinese Exclusion Case*, 130 US 581, 609 (1889); *Fong Yue Ting v. United States*, 149 US 698 (1893).

³²⁹ *Boutilier v. Immigration and Naturalization Service*, 387 US 118, 123 (1967).

³³⁰ *Oceanic Navigation Co. V. Stranahan*, 214 US 320, 339 (1909).

³³¹ *Lem Moon Sing v. United States*, 158 US 538m 547 (1895).

This was the paradigm when the Supreme Court decided *De Canas v. Bica*, a mental model that looked outward to the rest of the world and largely defined immigration policy in that context and for this purpose. Now, we are prepared to understand why the *De Canas* Court defined immigration in such a modest way with such limited effect. IRCA changed all that, turning around immigration policy to face inward for perhaps the first time. In a direct and forceful manner, IRCA transformed the battle against the employment of the undocumented into the fundamental “policy of immigration law.”³³² No longer was immigration something that most American companies could avoid. Indeed, if IRCA has accomplished anything, it has served not to reduce the lure of employment in the United States but, rather, to make immigration a daily fact of life that many employers simply cannot escape. Ironically, precisely because it caused American immigration policy to have a domestic focus, something not previously the case, IRCA has actually served to establish the necessary precondition for state and local immigration initiatives. This is precisely the opposite of what advocates for preemption continue to claim. The reason they do so, and the reason why most recent court decisions have gone against them, is that they do not distinguish between immigration and immigrants, assuming falsely that primacy over one requires dominion over the other as an organic constitutional phenomenon. Once the people not the policy become the main event, the rationale for preemption begins to slip away and the momentum gathers for the robust exercise of state police powers. This is precisely what has happened and this is the very reason why state immigration laws continue to pay homage to IRCA seeing in it the very symbol not of their irrelevance but their newfound strength. This can only be reversed if we no longer have the limited view of immigration that the Supreme Court embraced in *De Canas v. Bica* but substitute a more contemporary appreciation of what immigration means and how the consequences of legal and illegal migration continue to make themselves felt in all sectors of American life long after the immigrants arrive.

While the need for preemption of state and local immigration laws may not have changed, the rationale for it must be conceived anew. The old ways will not do, the challenge is before us in a way that was simply not present before. Now, for the advocates of preemption to prevail, they must explain why federal control over immigration must necessarily carry with it federal control over immigrants. For preemption to triumph, those who argue for it must persuade the courts that what the undocumented do after they get here is as constitutionally significant as whether they can come at all. To simply shout loudly for federal control over immigration is to miss the point. There is no reason why any of the states or localities that have rushed into the immigration arena cannot freely admit that they have no power over immigration nor any interest in challenging federal exclusivity here. Their concern is conduct by aliens not their exclusion or admission. That has yet to be recognized by those who decry state and local action. More than anything else, that is why the argument for preemption has not enjoyed the success that almost all experts had predicted. The question is whether traditional preemption must now give way to a joint federal/state partnership as its logical successor.

The resurgent vitality of state immigration laws, while seemingly a new phenomenon, is actually a return to a much older American tradition that characterized immigration policy during the first century of our national existence when there were no federal immigration

³³² *INS v. National Center for Immigrant Rights Inc.*, 402 US 183, 194 n.8 (1991).

statutes but many state and local requirements that had to be cleared before the new arrivals landed.³³³ The fact that Congress did not place any limits on immigration until 1875 does not mean that immigration went unregulated. While it is true that the concept of illegal migration was not yet known at the federal level, the imposition of immigration controls in pre-Civil War America up through the close of Reconstruction remained a recognized exercise of state authority. While the United States may have maintained an “open door” policy, the individual states most assuredly did not.³³⁴ This era was replaced by the era of exclusive federal dominance over immigration policy. The failure of Congress to enact comprehensive immigration reform in 2007 may well come to be seen as the end of this second phase of American immigration history. We may now be entering a third phase characterized by a partnership between the states/localities and the federal government as both parties seek to come to terms with the evolving implications of mass immigration, both legal and illegal, on an unprecedented scale within the context of a shifting global economy. Perhaps, for this reason, and in this light, the not so subtle federal encouragement of state E-Verify laws takes on a wider meaning.

Whether we approve or disapprove of such laws³³⁵, the extent to which the states are acting as agents in support of a federal initiative makes the whole E-Verify issue a poster child for this third phase of US immigration history. In this new phase, preemption may no longer be necessary to ensure federal dominance and *that* would be a change. State immigration laws may render the supremacy clause unnecessary. There is no doubt that the Department of Homeland Security (DHS) wants E-Verify to expand and not so secretly welcomes those state laws that require employers doing business within their respective borders to sign up;³³⁶ however, it is by no means constitutionally clear that a federal agency has the right or ability to substitute its preferences for a formal decision by the Congress to extend E-Verify and mandate universal application. If DHS lacks such authority, as the separation of power clearly suggests, just how constitutionally

³³³ See Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833 (1993).

³³⁴ Gary Endelman, *E Pluribus Unum: Well Maybe Not Everybody- Towards A Re-Examination of Birthright Citizenship*, 11 Bender's Immigration Bulletin 307, 315-317 (April 1, 2006).

³³⁵ State E-Verify laws that rely on the Social Security Number Verification Service contradict federal law which only sanctions utilization of the SSNVS to verify information for annual wage reports. See Social Security Administration, *Social Security Verification Service (SSNVS) Handbook* (Sept. 2007) available at http://www.ssa.gov/employer/ssnvs_handbk.htm.

³³⁶ DHS makes no secret of its desire to spread the gospel of E Verify. Listen to what Secretary Michael Chertoff thinks about the Arizona law :

Likewise, we're continuing to promote the use of E-Verify. The state of Arizona ...in the last couple days had its new rule requiring E-Verify use sustained by the federal courts, and we are beginning to see that illegal workers are picking up and leaving, because they recognize this system is an impediment to their continued illegal activities and illegal employment in this country...So, this is not an easy task to undo a problem that's arisen over 30 years, but I think we've really been making some substantial progress with the help of state and local governments

Statement of Secretary Chertoff, Joint Press Conference with Attorney General Michael Mukasey, Feb. 22, 2008. Published on the US Dept. of Homeland Security website at http://www.dhs.gov/xnews/releases/pr_1203722713615.shtm

significant is such agency cheerleading?³³⁷ What the E-Verify debate does show is the extent to which state immigration laws function as a powerful tool for the implementation of a federal objective, thus making preemption surprisingly antiquated. Even though the political realities in Congress have, until now, prevented Uncle Sam from compelling employers to sign up for E-Verify,³³⁸ a change in the foundation federal statute may no longer be the only or even the best way to spread the application of E-Verify throughout the land. Who needs a Capital Hill bloodbath when you can get what you want anyway through state action? The point is that the logic of traditional preemption seems oddly out of place here. The displacement of state authority, which is what preemption is all about, seems far less urgent; far from being an impediment to national policy or preferences, state immigration laws allow Congress to get done what it would like to do but cannot. Congress may shrink from demanding that all American employers sign up for E-Verify but Mississippi or Arizona are more than willing to step up to the plate.

Indeed, it may well be said that such a joint effort is inextricably woven into the basic fabric of the Constitution itself as James Madison reminded us in Federalist No. 44 when he noted that one of the prime justifications for the Supremacy Clause was the fact that the “members and officers of the State governments...will have an essential agency in giving effect to the federal Constitution.”³³⁹ Critics of state and local immigration laws assume that, since immigration is a federal responsibility, the states have no role to play. This may be so but it does not have to be. It might well be just as logical to contend that, so long as they take their lead from the Congress, state and local immigration initiatives do not, to borrow Alexander Hamilton’s felicitous phrase in Federalist No. 32, “imply any direct contradiction or repugnancy in point of constitutional authority.”³⁴⁰ Whatever rationale the states use to justify their activism, the inability or unwillingness of Congress to cobble together a national solution is constitutionally irrelevant. If state verification regimes impermissibly conflict with IRCA, the presence or absence of comprehensive immigration reform should not make a difference. So long as states and cities adopt federal immigration standards, the courts have every reason to assume that their laws will not conflict with the Constitution.³⁴¹ The true problem may be not that the states seek for themselves a greater role to play but that, in doing so, they create inconsistent and conflicting standards whose resolution can only come through an enlightened and robust

³³⁷ Plaintiffs/Appellants’ Consolidated Reply Brief in *Arizona Contractors Ass’n v. Candelaria*, Nos.07-17272, 07-17274, 08-15357m 08-15359, 08-15360 (9th Cir. 2008) at 12 n.9.

Plaintiffs/Appellants also properly question whether DHS support for expansion of E-Verify equates to a formal agency interpretation of the statute which it clearly is not. *Id.*

³³⁸ Congress created the E-Verify program, then known as the Basic Pilot Program, as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub.L. 104-208, Div.C, 110 Stat.3009-546 (September 30, 1996). Section 402 of IIRIRA provides that entities “may elect to participate” in the program but goes on to forbid the Attorney General from requiring such participation as a matter of law.

³³⁹ James Madison, *Federalist Paper No.44: Restrictions on the Authority of the Several States*, *New York Packet* (January 25, 1788) reprinted at <http://usgovinfo.about.com/library/fed/blfed44.htm> (last visited on May 26, 2008).

³⁴⁰ Alexander Hamilton, *Concerning the General Power of Taxation, Federalist No.32, Independent Journal* (January 2, 1788); reprinted at <http://www.constitution.org/fed/federa32.htm> (last visited on May 26, 2008).

³⁴¹ *Brady v. Fourteenth Court of Appeals*, 795 S.W.2d 712, 715 (Tex. 1990) (“Statutes are given a construction consistent with constitutional requirements, when possible, because the legislature is presumed to have intended compliance with the state and federal constitutions.”); *see also United States v. Mississippi Dep’t of Public Safety*, 321 F. 3d 495, 500(5th Cir. 2003) (“There is a time-honored presumption that a statute is a constitutional exercise of legislative power.”).

exercise of Congressional leadership. This too is something that Framers warned of and which they pointed to as the very reason why the Constitution authorized Congress to set a uniform standard for naturalization in the first place.³⁴² Indeed, this is the bedrock problem facing those states who want to pass immigration laws similar to Oklahoma and Arizona, namely how to do so without their sheer numbers, and the inherent diversity that must inevitably result, posing a real and present danger to the federal objective that IRCA expresses.³⁴³

There is no question that the phrase "Laws of the United States" for purposes of the Supremacy Clause encompasses both federal statutes themselves and federal regulations that are properly adopted in accordance with the authority delegated to the implementing agency by the Congress. As noted *supra* in Note 4, the Supreme Court has long recognized that "a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation."³⁴⁴ However, the key is always a prior policy decision by Congress that articulates the federal objective which enforcement then falls to the relevant agency. In the absence of such an informed choice by Congress, a decision by the Executive Branch to alter the scope or character of a law in a meaningful way, whether by Executive Order or through federal regulation, constitutes a serious breach of the separation of powers. Is this not what precisely what is happening when, in the absence of a Congressional authorization to mandate universal participation by employers in E-Verify, the President through an executive order imposed E-Verify on federal contractors,³⁴⁵ converts the basic nature of the program from voluntary to compulsory? If the whole point of preemption is to make sure that Congress makes fundamental policy choices, then it should make no difference whether it is the State of Arizona or the President of the United States who attempts to jump in and substitute their views for the considered judgment of the only branch of our federal government entrusted by the Constitution to make the laws. Must we not say now, as the Supreme Court said over a century ago, "Confusion would necessarily result from control possessed and exercised by two independent authorities?"³⁴⁶

The choices that the States make will often not be the same ones that Congress made in 1986, a caution worth remembering when we also recall that IRCA emerged only after a

³⁴² James Madison, *The Powers Conferred by the Constitution Further Considered*, *Federalist No. 42*, *The New York Packet* (January 22, 1788) reprinted at <http://www.yale.edu/lawweb/avalon/federal/fed42.htm> (last visited on May 27, 2008) ("In one State, residence for a short term confirms all the rights of citizenship; in another, qualifications of greater importance are required. An alien, therefore, legally incapacitated for certain rights in the latter, may, by previous residence only in the former, elude his incapacity; and thus the law of one State be preposterously rendered paramount to the law of another, within the jurisdiction of the other... The new Constitution has accordingly, with great propriety, made provision against them and all others proceeding from the defect of the Confederation on this head, by authorizing the general government to establish a uniform rule of naturalization throughout the United States.").

³⁴³ See *Bonito Boats Inc. v. Thunder Craft Boats Inc.*, 489 US 141, 161 (1989) (preemption exists where "prospect of all 50 States establishing similar" immigration regimes would create a "substantial threat" to federal goals.); *Buckman v. Plaintiffs' Legal Comm'n.*, 531 US 341, 350(2001) (discordant impact of "50 States' tort regimes"). A consistent approach to immigration can be undermined by a "patchwork of state...law, rules and regulations." *Rowe v. N.H. Motor Transp. Ass'n*, 128 S.Ct. 989, 996 (2008).

³⁴⁴ See *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 368-369; 90 L. Ed. 2d 369, 106 S. Ct. 1890 (1986).

³⁴⁵ Exec. Or. 13465, 73 FR 33285.

³⁴⁶ *Easton v. Iowa*, 188 US 220, 231-323(1903).

“carefully crafted compromise which at every level balances specifically chosen measures discouraging illegal employment with measures to protect those who might be adversely affected.”³⁴⁷ For this reason, perhaps it is best to depart from the stale argument as to whether the *De Canas* doctrine remains valid or even relevant and pose a slightly different, but hopefully more insightful question, one that reflects this new third phase: Does *De Canas* mean the same thing today as it did in the 1970’s before IRCA? Rather than overturning precedent, as the High Court is understandably and traditionally loath to do, would it not be more likely, and provide more enduring guidance, for the Justices to retain *De Canas* as a model but change the way in which it is applied? This has happened before in recent times. Remember how the Supreme Court before IRCA held that undocumented workers could seek protection under the National Labor Relations Act?³⁴⁸ Later, after IRCA, the Court did not depart from its basic holding but refined its understanding of how far *Sure-Tan* can or should extend by holding that reinstatement with back pay went too far.³⁴⁹ The traditional terms of argument about preemption may no longer be capable of sufficient nuance to satisfy the surprising realities of the emerging federal-state partnership; a more layered frame of reference with more flexible assumptions may need to be built. Much as illegal migration on a mass scale is both a national and local concern, so the solution may need to be one whose diverse character best reflects the talents of the entire body polity on all levels. This is something we never seen before in American history and the resolution of such a profound readjustment may well dominate our national life well into the 21st century.

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³⁴⁷ *Nat’l Ctr. For Immigrants’ Rights, Inc., v. INS*, 913 F.2d 1350, 1366 (9TH Cir. 1966), *rev’d on other grounds*, 502 US 183 (1991).

³⁴⁸ *Sure-Tan Inc., v. NLRB*, 467 US 883 (1984).

³⁴⁹ *Hoffman Plastic Compounds Inc. v. NLRB*, 536 US 137 (2002).

STATE VERIFICATION AND EMPLOYER SANCTION LAWS*

State Law		Attestation Requirements		E-Verify Requirements		State Penalties for Federal Immigration Violations	
State	Legislation	Is an attestation required? If so, what are the requirements?	Date Effective	Is participation in E-Verify required? If so, when and for whom?	Date Effective	What penalties does the state impose for immigration violations?	Date Effective
Arizona	<p>HB 2779 (2007) as amended by HB 2745 (2008)</p> <p>Text of Legal Arizona Workers Act (as amended) is available at: http://www.azleg.gov/FormatDocument.asp?inDoc=/legtext/48leg/2r/bills/hb2745h.htm</p> <p>The Arizona Department of Revenue issued a notice summarizing the law and provided instructions on E-Verify's use. The Notice is available at http://www.azleg.gov/Employer_Notice.asp.</p> <p>Maricopa County has an entire website dedicated to HB 2779 - http://www.maricopacountyattorney.org/lawa/faq.html</p>			<p>All employers in the state must participate in E-Verify. <i>(Lawsuit dismissed. Appeal pending).</i></p> <p>State contractors and applicants for economic incentives must demonstrate enrollment in E-Verify.</p> <p>If possible, a list of E-Verify participating employers will be posted on state AG's website.</p>	01/01/08	<p>Businesses that employ undocumented workers may have their business license suspended or revoked.</p>	01/01/08
Arkansas	<p>Act 157</p> <p>Act 157 link: http://www.arkleg.state.ar.us/ftproof/acts/2007/public/act157.pdf</p> <p>The necessary certification process must be completed on the state's Office of Procurement website. The Office's website is: http://www.arkansas.gov/dfa/procurement/pro_immigrant.html</p>	<p>State contractors for services must certify online, before or during the bidding phase, that they do not employ or contract with undocumented workers.</p>	08/01/07			<p>A businesses that violates Act 157, will have sixty days to remedy the violation. If it does not do so, the business will be found in breach of the contract and may be liable to the state for any actual damages incurred.</p>	08/01/07

*This area of immigration law is in constant flux, as new laws are introduced and lawsuits challenging these state laws move through the courts. 1
 This chart may be used for information purposes only. It does not constitute legal advice and should not be construed to do so.
 Prepared by Fragomen, Del Rey, Bernsen & Loewy, LLP. Last updated on September 4, 2008.

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State	Legislation	Is an attestation required? If so, what are the requirements?	Date Effective	Is participation in E-Verify required? If so, when and for whom?	Date Effective	What penalties does the state impose for immigration violations?	Date Effective
Colorado	<p>HB 1001</p> <p>Link: http://www.leg.state.co.us/clics2006b/cs_lnsf/fsbillcont3/14C7E76CC04CB5BC872571A200819B3A?Open&file=1001_enr.pdf</p> <p>A PowerPoint presentation on HB 1001 and other immigration related laws given by the Colorado State Deputy Controller is available http://www.colorado.gov/dpa/dfp/sco/contracts/aliens/Contracts and Illegal Alien Laws - CFMA 11-2-06_files/v3_document.htm.</p>	Employers must verify the work authorization and prove the legal status of employees in order to qualify for an economic development incentive awarded by the Colorado Economic Development Commission.	10/01/06			Noncomplying employers will be required to repay the total amount of money received within 30 days, and be ineligible for any other incentives for 5 years after the date the employer repaid the Commission.	10/01/06
Colorado	<p>HB 1009</p> <p>Applicants for Licensure must complete an Affidavit of Eligibility, from the state Division of Registrations. The affidavit is available at http://www.dora.state.co.us/registrations/Affidavit.htm.</p> <p>Link to statute: http://www.leg.state.co.us/clics2006b/cs_lnsf/fsbillcont3/9DE48E392BF92BAC872571A200818FC8?Open&file=1009_enr.pdf</p>	Applicants for professional and commercial licenses must prove identity with a secure and verifiable document and complete an affidavit stating they are legally present in the U.S.	01/01/07				

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STATE VERIFICATION AND EMPLOYER SANCTION LAWS*

State Law		Attestation Requirements		E-Verify Requirements		State Penalties for Federal Immigration Violations	
State	Legislation	Is an attestation required? If so, what are the requirements?	Date Effective	Is participation in E-Verify required? If so, when and for whom?	Date Effective	What penalties does the state impose for immigration violations?	Date Effective
Colorado	<p>HB 1017</p> <p>Link: http://www.leg.state.co.us/clics2006b/cs_l.nsf/fsbillcont3/3AA3B9AB73D8D621872571A30054F323?Open&file=1015_enr.pdf</p> <p>Colorado Department of Revenue published an FYI on HB 1015; it is available at http://www.revenue.state.co.us/fyi/html/income64.html.</p>	Each employer in the state must: (1) affirm, in writing, that it has examined the legal work status of the new employee, retained file copies of his or her ID documents, not altered or falsified those documents, and not knowingly hired an unauthorized foreign worker; and (2) retain a written or electronic copy of the affirmation and a written or electronic copy of the identity documents the employee presented in conjunction with the Form I-9. The copies must be retained for the term of employment of each employee.	01/01/07			Any employer that, with reckless disregard, fails to submit the necessary documentation records to the Division of Labor when requested to do so will be subject to fines of not more than \$5,000 for a first offense and not more than \$25,000 for second and subsequent offenses.	01/01/07
Colorado	<p>HB 1343</p> <p>Amended by HB 1073 and SB 193</p> <p>Link: http://www.leg.state.co.us/clics2006b/cs_l.nsf/fsbillcont3/C25514D38E296D99872571A20081A029?Open&file=1017_enr.pdf</p> <p>A Fact Sheet and a "Complete Guide" to HB1017, including sample affirmation forms, are available at: http://www.coworkforce.com/lab/evr/default.asp</p>	Any business that seeks to enter into a contract for the procurement of services with a state agency must certify to the state that it does not knowingly employ unauthorized workers and that it participates in either : E-Verify or a state verification program administered by the Department of Labor and Employment	<p>08/07/066</p> <p>The option of using E-Verify or the state-program became effective on 05/13/08</p>	Any individual or entity that seeks to enter into a contract for the procurement of services with a state agency must participate in either : E-Verify or a state verification program administered by the Department of Labor and Employment.	<p>08/07/06</p> <p>The option of using E-Verify or the state-program became effective on 05/13/08</p>	If a contractor violates a provision of the contract, the state agency may terminate the contract. If so, the contractor may be liable for actual and consequential damages to the state agency.	08/07/06

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State Law		Attestation Requirements		E-Verify Requirements		State Penalties for Federal Immigration Violations	
State	Legislation	Is an attestation required? If so, what are the requirements?	Date Effective	Is participation in E-Verify required? If so, when and for whom?	Date Effective	What penalties does the state impose for immigration violations?	Date Effective
Florida	<p>Fl. Statutes 448.09</p> <p>Link: http://www.leg.state.fl.us/Statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=Ch0448/SEC09.HTM&Title=-%3E2007-%3ECh0448-%3ESection%2009-0448.09</p>					Unlawful for any person knowingly to employ, hire, recruit, or refer, for employment an unauthorized worker. First violation shall be punishable by a civil fine of not more than \$500.	Since at least 1977
Georgia	<p>SB 529</p> <p>Link: http://www.legis.state.ga.us/legis/200506/versions/sb529_AP_19.htm</p> <p>Georgia Department of Labor has published rules implementing SB 529. They are available at: http://www.dol.state.ga.us/spotlight/sp_sb_529_new_rules.htm. The rules became effective June 18, 2007. Sample contractor and subcontractor affidavits are available on the website.</p>	Public employers and state contractors and subcontractors must participate in E-Verify. State contractors and subcontractors must complete an affidavit stating they participate in E-Verify.		<p>All public employers and their contractors and subcontractors (for services only) must register and participate in the “federal work authorization program” (i.e., E-Verify) to verify the status of newly hired employees.</p> <p>SB 529 becomes effective in three phases:</p> <ul style="list-style-type: none"> - July 1, 2007 for public employers and state contractors or subcontractors with 500 or more employees. - July 1, 2008 for state contractors with 100 or more employees. - July 1, 2009 for those with 99 or fewer employees. 	<i>See column to left</i>		

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STATE VERIFICATION AND EMPLOYER SANCTION LAWS*

State Law		Attestation Requirements		E-Verify Requirements		State Penalties for Federal Immigration Violations	
State	Legislation	Is an attestation required? If so, what are the requirements?	Date Effective	Is participation in E-Verify required? If so, when and for whom?	Date Effective	What penalties does the state impose for immigration violations?	Date Effective
Idaho	EO 2006-40 Executive order 2006- 40 (http://gov.idaho.gov/mediacenter/execorders/eo06/eo_2006-40.html); Link to Rules - http://adm.idaho.gov/purchasing/ManualsForms/VendorGuide.pdf	State contracts (and bids for contracts) are subject to a condition that the contractor does not knowingly employ unauthorized workers and takes steps to verify that it does not employ unauthorized workers.	2006				
Illinois	HB 1744 Text - http://www.ilga.gov/legislation/publicacts/fulltext.asp?Name=095-0138 . The standard attestation and a complaint form are available at http://www.state.il.us/agency/idol/laws/Law55.htm			Prohibits employers from using E-Verify until DHS and SSA are able to resolve, within three days, 99% of the tentative nonconfirmation letters they issue. Employers using E-Verify must meet training, notice, and attestation requirements. (<i>Lawsuit pending</i> – The prohibition is suspended due to litigation. The training, notice, and attestation requirements took effect on January 1, 2008.)	<i>See column to left</i>		

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Illinois	HB 1743			Employers that participate in E-Verify may not take employment related actions, such as refusing to hire an applicant, without properly following the program's procedures.	01/01/08		
Iowa	SF 562 Link: http://coolice.legis.state.ia.us/Cool-ICE/default.asp?Category=billinfo&Service=Billbook&hbill=SF562	A business that receives economic development assistance from the state must be subject to contract provisions stating that all of the business's employees are authorized to work in the U.S. Any business that receives public moneys must adhere to the contract provisions and provide periodic assurances that it continues to comply with the contract provisions.	07/01/07				

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Louisiana	SB 753 Link: http://www.legis.state.la.us/billdata/streanddocument.asp?did=405939					The state attorney general or local district attorney may issue a cease and desist order to an employer that has hired undocumented workers. Penalties for violating the cease and desist order can range up to \$10,000. Employers that violate the cease and desist order may have their business license suspended or revoked. Businesses that employ fewer than 10 people are exempt.	06/23/06
Massachusetts	Executive Order 481 Link: http://www.lawlib.state.ma.us/execorders/eo481.pdf Certification Form Available at http://www.mass.gov/?pageID=oscterminal&L=4&L0=Home&L1=Guidance+for+Agencies&L2=Fiscal+Year+Updates&L3=Fiscal+Year+2007&sid=Aosc&body=terminalcontent&f=fy_updates_fy07_fy07-19&csid=Aosc	State agencies in the Executive Branch are prohibited from contracting with businesses that employ unauthorized workers. Any contractor doing business with an Executive Branch agency must certify, as a condition of receiving funds from the State, that it will not use unauthorized workers.	02/23/07			If a contractor hires an unauthorized alien it may be regarded as a material breach, subjecting the contractor to sanctions, including but not limited to monetary penalties, withholding of payments, contract suspension or termination.	02/23/07

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State	Legislation	Is an attestation required? If so, what are the requirements?	Date Effective	Is participation in E-Verify required? If so, when and for whom?	Date Effective	What penalties does the state impose for immigration violations?	Date Effective
Minnesota	<p>Executive Order 08-01</p> <p>Link - http://www.governor.state.mn.us/priorities/governorsorders/executiveorders/PROD008598.html</p> <p>A standard certification form is available on the Department of Administration's website at: http://www.mmd.admin.state.mn.us/pdf/immstatcert.pdf</p> <p>An FAQ is available at www.mmd.admin.state.mn.us/immstatFAQ.htm</p>	Businesses applying for state economic incentives must certify that they do not employ unauthorized workers, and if such applicants participate in E-Verify, it would appear that they should be given preferential treatment.	01/29/08	Any business seeking to enter into a state contract in excess of \$50,000 must participate in E-Verify. They must certify that they do so on a standardized form found on the state's Department of Administration website.	01/29/08		

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State	Legislation	Is an attestation required? If so, what are the requirements?	Date Effective	Is participation in E-Verify required? If so, when and for whom?	Date Effective	What penalties does the state impose for immigration violations?	Date Effective
Mississippi	<p>SB 2988</p> <p>Full text of the law is available http://billstatus.ls.state.ms.us/documents/2008/html/SB/2900-2999/SB2988SG.htm</p> <p>The governor's signing statement, expressing reservations about the law is available http://www.governorbarbour.com/news/2008/mar/SB2988.htm</p>			<p>All employers in Mississippi must use E-Verify. Effective as follows:</p> <ul style="list-style-type: none"> • July 1, 2008 - All public employers, all public contractors and subcontractors, and private employers 250 or more employees. • July 1, 2009 - Private employers with between 100 and 250 employees. • July 1, 2010 - Private employers with between 30 and 99 employees. • July 1, 2011 - All private employers. 	See Column to Left	<p>-Employers that do not use E-Verify by the applicable effective date may (1) have all state contracts terminated and become ineligible for public contracts for three years; (2) have any license, permit, or certificate allowing it to do business in Mississippi suspended for one year; or (3) both.</p> <p>-Employers that discharge an authorized worker while retaining an unauthorized one may be civilly liable to the discharged employee</p>	See Column to Left
Missouri	Mo.Stat. §285.025	Any business or individual seeking state tax abatements, loans, or tax credits must affirm that it does not employ unauthorized workers.	08/28/99			Any business or individual that receives a tax credit or abatement or loan while employing an unauthorized worker can be guilty of a class A misdemeanor	08/28/99

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State	Legislation	Is an attestation required? If so, what are the requirements?	Date Effective	Is participation in E-Verify required? If so, when and for whom?	Date Effective	What penalties does the state impose for immigration violations?	Date Effective
Missouri	HB 1549 Link - http://www.house.mo.gov/billtracking/bills081/billpdf/truly/HB1549T.PDF	Any employer that receives a state contract or grant in excess of \$5,000 or a state-administered tax credit, tax abatement, or loan from the state must by sworn affidavit affirm their participation in E-Verify.	01/01/09	Employers receiving a state contract or grant in excess of \$5,000 or a state-administered tax credit, tax abatement, or loan from the state must participate in E-Verify.	01/01/09	State AG may request employment verification documents. If an employer is found to have employed unauthorized workers or does not supply documents, it may have its ability to transact business in Missouri suspended.	01/01/09
Nevada	AB 383 Full text as passed available http://www.leg.state.nv.us/74th/Bills/A/B/AB383_EN.pdf The state attorney general, in an opinion, has said that AB 383 is unenforceable - http://www.bibdaily.com/pdfs/2008_MARCH_NV_AG.pdf					The Nevada Tax Commission may hold a hearing concerning any person who holds a state business license who has been found to have engaged in the unlawful hiring or employment of an unauthorized alien. For willful violations, an administrative fine may be imposed.	10/01/07 <i>State AG issued an opinion finding AB 383's sanctions preempted by federal law.</i>
New Hampshire	HB 1278 Link: http://www.gencourt.state.nh.us/legislation/2006/HB1278.html					Prohibits an employer from employing an alien whom the employer knows is not authorized to work. Violations are now punishable by a fine of \$2,500 for each day of non-compliance.	01/01/07

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State	Legislation	Is an attestation required? If so, what are the requirements?	Date Effective	Is participation in E-Verify required? If so, when and for whom?	Date Effective	What penalties does the state impose for immigration violations?	Date Effective
Oklahoma	<p>HB 1804</p> <p>Link: http://webserver1.lsb.state.ok.us/2007-08bills/HB/hb1804_enr.rtf</p> <p>A link with information on HB 1804 and public employers is available on the state's Office of Personnel Management website - http://www.ok.gov/opm/Employment_Eligibility_Requirements_Effective_11_01_07.html</p> <p>Sample State contract that discusses the E-Verify requirements (at page 6) available http://www.dcs.state.ok.us/Solicitations.nsf/84aa51fea272678286256c63004b3542/167441d6f6ef0cd08625740100743ff9/\$FILE/5800000407%20%203-20-08.pdf</p>			<p>Public employers and state contractors and subcontractors must use a "status verification system" to verify the immigration status of employees. E-Verify and the Social Security Number Verification Service (SAVE) are acceptable. Only applies to contracts entered into for the physical performance of services after the effective date of the Act and only to new employees hired after the effective date.</p> <p>Due to a federal lawsuit, the implementation of the E-Verify requirement has been enjoined. Oklahoma may not enforce the law until the court has made a final decision on the merits of the lawsuit.</p>	<p>It was 07/01/08 but it has been enjoined until further notice. (see column to left)</p>		

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Oregon	SB 202 Text available http://www.leg.state.or.us/07reg/measures/sb0200.dir/sb0202.en.html					Prohibits holders of farm labor contractor licenses from hiring unauthorized aliens. The bill would allow the Commissioner of the Bureau of Labor, or any individual, to bring suit against any person to enjoin them from using the services of a farm labor contractor who employs unauthorized aliens.	01/01/08
Pennsylvania	HB 2319 Link: http://www.legis.state.pa.us/CFDOCS/Legis/PN/Public/btCheck.cfm?txtType=PDF&sessYr=2005&sessInd=0&billBody=H&billTyp=B&billNbr=2319&pn=4052					State contractors are prohibited from knowingly employing, or knowingly permitting their subcontractors to employ, unauthorized workers. Contractors or subcontractors that violate the Act shall repay the grants or loans provided by the state, possibly with interest.	08/11/06.

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Rhode Island	EO 08-01 Link - http://www.governor.ri.gov/documents/Immigration_Exec_Order_08-01.pdf Contractors must certify their participation in E-Verify as part of their response to a bid according to the document at this link - http://www.purchasing.ri.gov/EVFINAL.pdf			All persons and businesses, including grantees, contractors and their subcontractors, and vendors doing business with the State of Rhode Island must register with and utilize E-Verify. They must certify their participation in E-Verify as part of a response to a offer for a bid. In a lawsuit challenging EO 08-01, a Rhode Island Superior Court has ruled that it will not issue a restraining order during the pendency of the suit. See http://www.southcoasttoday.com/apps/pbcs.dll/article?AID=2008809160321	05/15/08		

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South Carolina	HB 4400 Link: http://www.scstatehouse.net/sess117_2007-2008/bills/4400.htm	Any business seeking to enter into a state contract for services valued annually in excess of \$25,000 (\$15,000 if with a political subdivision of the state) must certify compliance with the state's verification law. <i>Effective for:</i> -State contractors with more than 500 employees on January 1, 2009. -State contractors with 100 to 499 employees on July 1, 2009. -All state contractors on January 1, 2010.	<i>See Column to Left</i>	All employers must either (1) participate in E-Verify or (2) only hire employees that possess or qualify for a South Carolina driver's license (or other state license with similarly strict requirements). Employers that use E-Verify are entitled to a presumption of compliance with all of HB 4400's provisions, while those that only use the driver's license option will not. <i>Effective for:</i> -Employers with more than 100 employees on July 1, 2009. -All employers on July 1, 2010.	<i>See Column to Left</i>	Employers that fail to participate in E-Verify or do not hire only employees that possess or qualify for a South Carolina driver's license may be fined up to \$1,000 for each violation. Employers found to have employed unauthorized workers may have employment license suspended for a period between 10 and 30 days. Subsequent violations may lead revocation of employment license	07/01/09 for employers of more than 100 employees and 07/01/10 for all employers
Tennessee	HB 111 Link: http://tennessee.gov/sos/acts/104/pub/pc0878.pdf	Prohibits a contractor from contracting with state without first attesting in writing that it will not knowingly utilize the services of unauthorized workers or of any subcontractor who will utilize unauthorized workers.	01/01/07			Contractors that employed undocumented workers will be barred from state contracts for one year.	01/01/07

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Tennessee	Executive Order # 41 Text available here: http://www.state.tn.us/sos/pub/execorders/exec-orders-bred41.pdf The Tennessee Department of Finance and Administration has information regarding HB 111 (Public Act 878) and Executive Order 41, including a FAQ, is available here: http://state.tn.us/finance/Exec_Order/index.html . The necessary contract language required by HB 111 and Executive Order 41 is available here: http://state.tn.us/finance/Exec_Order/doc_Files/Contract_Language.pdf .	Implemented HB 111 early for executive agencies.	10/01/06				
Tennessee	SB 903 / HB 1274 Text available here: http://tennessee.gov/sos/acts/105/pub/pc0220.pdf					Prohibits the use of a federal individual taxpayer identification number (ITIN) as a form of identification to prove immigration status as part of an application for, or an offer of, employment.	05/24/07

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Tennessee	SB 202/HB 729 Text available here: http://tennessee.gov/sos/acts/105/pub/pc0220.pdf					Businesses are prohibited from knowingly employing an "illegal alien." First-time violators have their business license temporarily suspended. Subsequent violations that occur within 3 years of the first offense will have their business license suspended for one year. Businesses are exempt if they use E-Verify or properly complete Form I-9 for all new hires.	01/01/08
Texas	HB 1196 Link: http://www.capitol.state.tx.us/tlodocs/80R/billtext/html/HB01196F.htm	Any application for a public business subsidy must include a written statement certifying that the applicant does not and will not knowingly employ unauthorized foreign workers. Public subsidy is broadly defined.	09/01/07			If, after receiving the subsidy, the business is convicted of a violation federal law concerning the employment of unauthorized foreign workers, it must repay the full amount of the subsidy with interest.	09/01/07

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Utah	SB 81 Link: http://le.utah.gov/~2008/bills/sbillenr/sb0081.htm			Public employers and state contractors and subcontractors must use a "status verification system" to verify the immigration status of employees. E-Verify and the Social Security Number Verification Service (SAVE) are acceptable. Only applies to contracts entered into for the physical performance of services after the effective date of the Act and only to new employees hired after the effective date.	07/01/09		
Virginia	HB 1298 Link: http://leg1.state.va.us/cgi-bin/legp504.exe?081+ful+HB1298ER	All public contracts for goods or services must contain language stating that the contractor does not, and shall not, knowingly employ an unauthorized foreign worker as defined in IRCA.	07/01/08				

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Virginia	HB 926 Link - http://leg1.state.va.us/cgi-bin/legp504.exe?081+ful+HB926ER					Business entities that are convicted of a pattern or practice of employing unauthorized foreign national workers may have their ability to conduct business in Virginia terminated or revoked for at least one year. Businesses must report any such conviction to the State Corporation Commission.	07/01/08
West Virginia	SB 70 Link: http://www.legis.state.wv.us/Bill_Text_HTML/2007_SESSIONS/RS/BILLS/SB70.SUB1.enr.htm					It is unlawful for any employer in the state to knowingly employ an unauthorized worker. Employers will be required to verify a prospective employee's legal status or authorization to work prior to employing the individual. Fines range from \$100 to \$10,000 depending on the number of offenses. Confinement for up to thirty days is possible for multiple offenders.	06/16/07

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