State and Local Restrictions on Employing, Renting Property to, or Providing Services for Unauthorized Aliens: Legal Issues and Recent Judicial Developments

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Summary

An estimated 37 million foreign-born persons currently reside in the United States, almost a third of whom may be present without legal authorization. The reaction of state and local jurisdictions to unauthorized immigration has varied. In some cases, states and localities have adopted measures intended to deter unlawfully present aliens from arriving and settling within their jurisdictions, including by restricting such aliens' access to work, housing, and benefits. Typically, such measures have sought to (1) limit the hiring and employment of unauthorized aliens, including through the denial of permits to persons that employ unauthorized aliens and the regulation of day labor centers; (2) restrict the ability of unlawfully present aliens to rent or occupy dwellings within the state or locality; and/or (3) deny unlawfully present aliens access to state or local services or benefits.

State or local restrictions upon unlawfully present aliens' access to employment or housing and eligibility for public benefits have been challenged on various grounds, including on the grounds that they (1) are preempted by federal law, including the Immigration and Nationality Act (INA), and thus unenforceable by federal or state courts; (2) deprive persons of equal protection of the law in violation of the Fourteenth Amendment to the U.S. Constitution; (3) deprive persons of property or liberty interests without providing them due process in violation of the Fourteenth Amendment; and (4) run afoul of federal civil rights statutes, including the Fair Housing Act, Title VII of the Civil Rights Act, and 42 U.S.C. § 1981. The outcomes of such challenges have varied, depending upon the specific restrictions at issue and the jurisdiction of the courts reviewing the restrictions. However, based upon the cases decided to date, these challenges appear to be more significant with regard to state and local restrictions on employing or renting property to unlawfully present aliens than they are with regard to state and local restrictions on unlawfully present aliens' access to public services and benefits. This term, the Supreme Court is considering the case of *Chamber of Commerce v. Whiting*, which involves arguments as to whether federal law preempts a 2007 Arizona statute that requires employers to use the federal government's E-Verify system to determine the work eligibility of employees and suspends or revokes the business licenses of entities found to have hired unauthorized aliens.

This report discusses the constitutional issues raised by state and local laws intended to deter the presence of unauthorized aliens by limiting their access to housing, employment, and public benefits, as well as the implications that federal civil rights statutes might have for the implementation and enforcement of these laws. It also discusses recent federal court cases addressing the constitutionality of such measures. The report does not discuss recent state laws that seek to deter the presence of unauthorized aliens by requiring state law enforcement to enforce federal immigration law, or that criminalize conduct that may facilitate the presence of unauthorized aliens within the state. Such laws are discussed in a separate report, CRS Report R41221, *State Efforts to Deter Unauthorized Aliens: Legal Analysis of Arizona's S.B. 1070*, by (name redacted), (name redacted), and (name redacted).

Contents

Contacts

Introduction

In recent years, some states and localities have considered, and in a few cases enacted, measures intended to deter the presence of aliens who entered and/or remain in the United States without legal authorization. Typically, these measures have sought to (1) limit the hiring and employment of unauthorized aliens, including through the denial of permits to persons that employ unauthorized aliens and the regulation of day labor centers; (2) restrict the ability of unlawfully present aliens to rent or occupy dwellings within a state or locality's jurisdiction; and/or (3) deny unlawfully present aliens access to state or local services or benefits. More recently, some states have arguably gone further by imposing criminal or civil penalties upon activities that may facilitate unauthorized immigration.[1]

Several such measures have been challenged in court, including on federal preemption and Fourteenth Amendment grounds. Legal challenges brought in federal court concerning restrictions on employment, in particular, have led to conflicting court rulings. In some cases, the relevant state or local measure has been upheld as constitutionally and legally valid.[2] In other cases, the measure has been struck down.[3] In still other instances, the parties have reached a settlement agreement that precludes enforcement of the contested law; the government has repealed the challenged provision; or the presiding court has enjoined the enforcement of the challenged provisions pending trial.[4]

These cases illustrate the difficulties that states and localities face in attempting to regulate the presence and rights of aliens within their jurisdictions in a manner consistent with federal law. Over time, the courts have narrowed the legal bases upon which states and localities may enact legislation affecting aliens. State and local authority to regulate aliens has also been limited, directly or impliedly, by the growing scope of federal immigration law. With the enactment of federal employer sanctions, welfare reform, and other recent immigration laws, Congress has left increasingly few opportunities for states and localities to legislate. Significantly, these laws have not only broadened the substantive regulation of aliens (e.g., employment eligibility), but also established discrete procedures for determining alien eligibility for employment and certain benefits. Perhaps ironically then, even as new state and local measures to deter illegal

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[1] *See generally* CRS Report R41221, *State Efforts to Deter Unauthorized Aliens: Legal Analysis of Arizona's S.B. 1070*, by (name redacted), (name redacted), and (name redacted) (discussing Arizona statute criminalizing conduct that may facilitate unauthorized immigration, including alien smuggling and the hiring of persons picked up along busy roadways).

[2] *See, e.g.*, Chicanos Por La Causa, Inc. v. Napolitano, 558 F.3d 856 (9th Cir. 2009) (Arizona statute that would require use of E-Verify, as well as suspend or revoke the licenses of businesses that hire unauthorized aliens), *cert. granted*, Chamber of Commerce of U.S. v. Candelaria, 130 S. Ct. 3498 (2010); Gray v. City of Valley Park, No. 4:07CB00881 ERW, 2008 U.S. Dist. LEXIS 7238 (E.D. Mo., Jan. 31, 2008) (municipal ordinance providing for the suspension or revocation of the licenses of businesses that hire unauthorized aliens).

[3] *See, e.g.*, Lozano v. City of Hazleton, 620 F.3d 170 (3d Cir. 2010) [hereinafter "*Lozano II*"] (municipal ordinance that would require use of E-Verify, suspend or revoke the licenses of businesses that hire unauthorized aliens, and prohibit rental of private housing to unlawfully present aliens); Chamber of Commerce of the United States of Am. v. Edmondson, 594 F.3d 742 (10th Cir. 2010) (upholding the district court's determination that a measure allowing employees to sue for reinstatement, back pay and attorneys' fees was expressly preempted).

[4] *See, e.g.*, *Gray*, 2008 U.S. Dist. LEXIS 7238, at *15 (noting that Valley Park had repealed an ordinance prohibiting the rental of private dwellings to unlawfully present aliens); Garrett v. City of Escondido, 465 F. Supp. 2d 1043 (S.D. Cal. 2006) (granting a temporary restraining order against enforcement of the ordinance, which prohibited the rental of housing to unlawfully present aliens).

immigration are motivated in part by a perceived lack of federal enforcement of immigration law,[5] the degree to which states and localities may regulate immigration-related matters has arguably been curbed by the growing breadth of federal immigration law. Conflicting court rulings regarding the permissibility of state and local measures targeting unlawfully present aliens have further contributed to this legal ambiguity. In particular, the U.S. Courts of Appeals for the Third, Ninth, and Tenth Circuits have reached differing conclusions as to whether federal law preempts state or local measures that would require employers within their jurisdiction to use E-Verify, the online federal employment eligibility verification system, to check the work authorization of employees.[6] This term, the Supreme Court is considering the case of *Chamber of Commerce v. Whiting*, which involves arguments as to whether federal law preempts an Arizona statute that requires employers to use the federal government's E-Verify system to determine the work eligibility of employees and suspends or revokes the business licenses of entities found to have hired unauthorized aliens.[7]

This report discusses the constitutional issues raised by state and local laws intended to deter the presence of unauthorized aliens by limiting their access to housing, employment, and public benefits, as well as the implications that federal civil rights statutes might have for the implementation and enforcement of these laws. It also discusses recent federal court cases addressing the constitutionality of such measures. A separate report, CRS Report R41221, *State Efforts to Deter Unauthorized Aliens: Legal Analysis of Arizona's S.B. 1070*, by (name redacted), (name redacted), and (name redacted), discusses state laws that require state and local police to enforce federal immigration law or criminalize conduct that may facilitate unauthorized immigration.

Factual Background

An estimated 37 million foreign-born persons currently reside in the United States, almost a third of whom may be present without authorization.[8] Over the past two decades, the number of aliens who unlawfully reside in the United States has grown significantly, from an estimated 3.2 million in 1986 to a high of more than 11 million in 2008.[9] While this number dropped to 10.8 million in 2009 and the level of unauthorized migration into the United States has declined in recent years,[10]

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[5] *See, e.g.*, Mark B. Evans, *Text of Gov. Brewer's Speech After Signing SB 1070*, TUCSON CITIZEN, Apr. 23, 2010, *available at* http://tucsoncitizen.com/mark-evans/archives/236 ("The bill I'm about to sign into law – Senate Bill 1070 – represents another tool for our state to use as we work to solve a crisis we did not create and the federal government has refused to fix.").

[6] *Chicanos Por La Causa*, 558 F.3d at 867; *Lozano II*, 620 F.3d at 214; *Edmondson*, 594 F.3d at 768-69. There is also an apparent circuit split as to whether measures providing for the suspension or revocation of the business licenses of employers who hire or employ unauthorized aliens are preempted. However, there are substantive differences between the specific state or local measures underlying the courts' decisions that could, in part, account for differences in outcomes.

[7] Chamber of Commerce of the United States of Am. v. Whiting, No. 09-115. Oral arguments in this case were held on December 8, 2010.

[8] The other two-thirds of foreign-born U.S. residents are legal permanent residents (i.e., "legal immigrants") or naturalized citizens. *See* CRS Report RL33874, *Unauthorized Aliens Residing in the United States: Estimates Since 1986*, by (name redacted).

[9] *See* CRS Report RL33874, *Unauthorized Aliens Residing in the United States: Estimates Since 1986*, by (name redac ted), supra note 8. *See also* Jeffrey S. Passel, Pew Hispanic Center, *Trends in Unauthorized Immigration: Undocumented Inflow Now Trails Legal Inflow*, Oct. 2, 2008, *available at* http://pewhispanic.org/files/reports/94.pdf.

[10] *See, e.g.*, Jeffrey S. Passel and D'Vera Cohn, Pew Hispanic Center, *U.S. Unauthorized Immigration Flows Are Down*
(continued...)

some states and localities, concerned about the perceived negative effects of illegal immigration, have enacted measures intended to deter the presence of unauthorized aliens within their jurisdiction.

Since early 2006, some states and localities have considered legislation that would (1) limit the hiring and employment of unauthorized aliens, including through the denial of permits to persons that employ unauthorized aliens and the regulation of day labor centers; (2) restrict the ability of unlawfully present aliens to rent or occupy dwellings within a state or locality's jurisdiction; and/or (3) deny unlawfully present aliens access to state or local services or benefits. Although local measures to restrict unlawfully present aliens' access to employment or housing have received considerable attention, relatively few of the measures reportedly introduced appear to have been enacted.[11] State action on these matters has arguably been more significant, with several states adopting measures that restrict employers from hiring or employing unauthorized aliens or aliens' eligibility for public benefits.[12] No state appears to have enacted legislation specifically barring unlawfully present aliens from renting private dwellings,[13] although such measures have been enacted by some localities.

Relevant Immigration-Related Legal Issues

State or local restrictions upon unlawfully present aliens' access to employment or housing and eligibility for public benefits have been challenged upon various grounds. Among other things, plaintiffs challenging such restrictions have alleged that they: (1) are preempted by federal immigration law and thus unenforceable by federal or state courts; (2) deprive persons of equal protection of the law in violation of the Fourteenth Amendment to the U.S. Constitution; and/or (3) deprive persons of property or liberty interests without providing them due process of law in violation of the Fourteenth Amendment.

The following sections describe the legal concepts of preemption, equal protection, and procedural due process in more detail, particularly as they may apply to state and local regulation of unlawfully present aliens within their jurisdiction.

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Sharply Since Mid-Decade, Sept. 1, 2010, *available at* http://pewhispanic.org/reports/report.php?ReportID=126. The increase in the number of unlawfully present aliens was particularly marked in the period between 2000 and 2005, when an estimated 850,000 people entered the United States each year without authorization. However, it subsequently dropped to 550,000 persons annually in 2005-2007 and 300,000 persons annually in 2007-2009. *Id.*

[11] *See* S. Karthick Ramakrishnan and Tom (Tak) Wong, University of California – Riverside Campus, "Immigration Policies Go Local: The Varying Responses of Local Governments to Undocumented Immigration," Nov. 9, 2007, *available at* http://www.law.berkeley.edu/files/RamakrishnanWongpaperfinal(1).pdf (finding that less than 1% of all municipalities have enacted measures addressing unlawfully present aliens); Emily Gunn, et al., "Assessment of Local Ordinances to Reduce Illegal Immigration," Texas A & M University, George Bush School of Government and Public Service (2008) (on file with author) (finding 21 localities that had passed legislation between 2006 and early 2008 restricting unlawfully present aliens' access to employment or housing).

[12] *See, e.g.*, National Conference of State Legislatures, Immigration Enactments Database, *available at* http://www.ncsl.org/default.aspx?TabId=19209.

[13] Some states have, however, enacted statutes that would prohibit "harboring" unlawfully present aliens. *See, e.g.*, 21 OKLA. ST. § 446 (B) (2010) ("It shall be unlawful for any person to conceal, harbor, or shelter from detection any alien in any place within the State of Oklahoma, including any building or means of transportation, knowing or in reckless disregard of the fact that the alien has come to, entered, or remained in the United States in violation of law.").

Preemption

The doctrine of preemption derives from the Supremacy Clause of the Constitution, which establishes that federal law, treaties, and the Constitution itself are "the supreme Law of the Land."[14] Thus, one essential aspect of the federal structure of government is that states can be precluded from taking actions that are otherwise within their authority if federal law is thereby thwarted. "States cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations."[15] An act of Congress may preempt state or local action in a given area in any one of three ways: (1) the statute expressly states preemptive intent (express preemption); (2) a court concludes that Congress intended to occupy the regulatory field,[16] thereby implicitly precluding state or local action in that area (field preemption); or (3) state or local action directly conflicts with or otherwise frustrates the purpose of the federal scheme (conflict preemption).[17] The delineation between these categories, particularly between field and conflict preemption, is not rigid.[18]

The power to set rules for which aliens may enter and remain in the United States is undoubtedly federal, and the breadth and detail of regulation Congress has established in the Immigration and Nationality Act (INA) of 1952,[19] as amended, precludes substantive state regulation concerning which noncitizens may enter or remain. With the INA, Congress established a comprehensive framework to regulate the admission and removal of aliens, as well as the conditions of aliens' continued presence in the United States.[20] Later, Congress enacted the Immigration Reform and Control Act (IRCA) of 1986,[21] which amended the INA to establish a system to combat the employment of unauthorized aliens. The Supreme Court has characterized this system as "central to the policy of immigration law."[22] On the one hand, the INA sets forth various categories of legal aliens and grants certain rights to aliens falling within those categories. On the other hand, the INA establishes an enforcement regime to deter the unlawful presence of aliens, including through the use of employer sanctions, criminal and/or civil penalties, and deportation.

Nevertheless, the Supreme Court has never held that "every state enactment which in any way deals with aliens is a regulation of immigration and thus, *per se*, pre-empted by this constitutional

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[14] U.S. CONST. art. VI, cl. 2.

[15] Hines v. Davidowitz, 312 U.S. 52, 66-67 (1941) (internal citations omitted).

[16] Congressional intent to "occupy the field" to the exclusion of state law can be inferred when "[1] the pervasiveness of the federal regulation precludes supplementation by the States, [2] where the federal interest in the field is sufficiently dominant, or [3] where the object sought to be obtained by the federal law and the character of obligations imposed by it ... reveal the same purpose." Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 300 (1988) (internal quotations omitted).

[17] *See, e.g.*, Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 373 (2000); English v. Gen. Elec. Co., 496 U.S. 72, 78-79 (1990); Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248-49 (1984); Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 203-04 (1983).

[18] *See English*, 462 U.S. at 79 n.5 ("By referring to these three categories, we should not be taken to mean that they are rigidly distinct. Indeed, field pre-emption may be understood as a species of conflict pre-emption: A state law that falls within a pre-empted field conflicts with Congress' intent (either express or plainly implied) to exclude state regulation."); *Crosby*, 530 U.S. at 373 n.6.

[19] 8 U.S.C. § 1101 et seq.

[20] *See, e.g.*, Hoffman Plastic Compounds, Inc. v. Nat'l Labor Relations Board, 535 U.S. 137, 147 (2002).

[21] P.L. 99-603 (1986).

[22] *Hoffman Plastic Compounds*, 535 U.S. at 147 (internal quotations omitted).

power, whether latent or exercised."[23] In the 1976 case of *De Canas v. Bica*, the Court held that state regulation of matters within their jurisdiction that were only tangentially related to immigration would, "absent congressional action[,] ... not be an invalid state incursion on federal power."[24] The Court further indicated that field preemption claims against state action that did not conflict with federal law could only be justified when the "complete ouster of state power ... was the clear and manifest purpose of Congress."[25] Still, the *De Canas* Court recognized that, even in situations where federal immigration law "contemplates some room for state legislation," a state measure might nonetheless be unenforceable on conflict preemption grounds if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in enacting the INA."[26]

Equal Protection

The Equal Protection Clause of the Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws."[27] However, being entitled to "equal protection" does not mean that persons are entitled to "equal treatment,"[28] and not all classifications distinguishing between persons are invalid under the Equal Protection Clause. Generally, the standard of judicial review applied to state and local laws that treat different categories of persons differently—the "rational basis" test—is highly deferential to the government.[29] Under this test, persons challenging the constitutionality of a law must show that it is not rationally related to a legitimate government interest.[30] In contrast, if a distinction disadvantages a "suspect class" or relates to a "fundamental right," a reviewing court will apply "strict scrutiny." Under strict scrutiny, the state or locality must demonstrate that the distinction is justified by a compelling government interest.[31] Other tests falling between rational basis review and strict scrutiny have also been applied on occasion, depending upon the nature of the classifications involved.[32]

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[23] De Canas v. Bica, 424 U.S. 351, 355 (1976). Indeed, during the nineteenth century, when federal regulation of immigration was far more limited in scope, state legislation limiting the rights and privileges of certain categories of aliens was common. *See* Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833 (1993). Many of these restrictions would now be preempted by federal immigration law.

[24] *De Canas*, 424 U.S. at 356.

[25] *Id.* at 357.

[26] *Id.* at 363 (internal quotations omitted). *See also Crosby*, 530 U.S. at 373 (2000) (quoting *Hines*, 312 U.S. at 67). *De Canas* concerned a California statute that imposed sanctions on employers who hired unlawful aliens if that employment adversely affected lawful workers. When Congress added federal employer sanctions to the INA in 1986, it expressly preempted state or local laws that sanctioned employers (other than through licensing or similar laws) for hiring unauthorized workers. *See* INA § 274a(h)(2), 8 U.S.C. § 1324a(h)(2).

[27] U.S. CONST., amend. XIV, § 1.

[28] *See, e.g.*, Tigner v. Texas, 310 U.S. 141, 147 (1940) (noting that the Constitution does not require things which are "different in fact or opinion to be treated in law as though they were the same").

[29] *See, e.g.*, Abdulah v. Comm'n of Insurance, 907 F. Supp. 13 (D. Mass. 1995) (quoting *New Orleans v. Dukes*, 427 U.S. 297, 303-04 (1976).

[30] *See, e.g.*, Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973).

[31] *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 11 (1967) (racial classifications must be shown to be necessary to some "legitimate overriding purpose"); McLaughlin v. Florida, 379 U.S. 184, 192, 194 (1964) (racial classifications "bear a far heavier burden of justification" than other classifications and are invalid absent an "overriding statutory purpose").

[32] *See, e.g.*, United States v. Virginia, 518 U.S. 515 (1996) (requiring the state to provide an "exceedingly persuasive justification" for its policy of maintaining an all-male military academy).

All persons in the United States are entitled to equal protection under the Fourteenth Amendment, and states are limited in the degree to which they may restrict persons' rights and privileges because they are unauthorized aliens.[33] In the 1982 case of *Plyler v. Doe*, the Supreme Court held that a Texas statute that would have prohibited students who were unauthorized aliens from receiving free public elementary and secondary education violated the Constitution.[34] The Court first determined that the Equal Protection Clause of the Fourteenth Amendment protects unlawfully present aliens.[35] Then, finding that unauthorized immigrants are not a "suspect class" and education is not a "fundamental right," but also sensitive to the hardship that could result to a discrete class of children who were not accountable for their being present in the United States without authorization, the Court evaluated the Texas statute under an "intermediate" standard of review, requiring that the statute further a "substantial state interest." Ultimately, it found that none of the interests alleged by the state as justifications for the statute—which included conserving the state's educational resources, preventing an influx of illegal immigrants, and maintaining high-quality public education—constituted such an interest.[36] As a result, the Court struck down the Texas statute.

Procedural Due Process

The Fourteenth Amendment provides that no state may "deprive any person of life, liberty, or property, without due process of law."[37] The Supreme Court has long recognized that the Due Process Clause contained in the Fifth and Fourteenth Amendments[38] "applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent."[39]

Procedural due process operates to ensure that states and localities do not arbitrarily interfere with certain key interests (i.e., life, liberty, and property). However, procedural due process rules are not meant to protect persons from the deprivation of these interests, *per se*. Rather, they are intended to prevent the "*mistaken or unjustified* deprivation of life, liberty, or property" by ensuring that states and localities use fair and just procedures when taking away such interests.[40] The type of procedures necessary to satisfy due process can vary depending upon the

[33] Because of its broad plenary power over immigration and naturalization, the federal government has significantly greater leeway than states in the measures that it may take with respect to aliens. *See* Mathews v. Diaz, 426 U.S. 67, 84-87 (1976). "The equal protection analysis also involves significantly different considerations because it concerns the relationship between aliens and the States rather than between aliens and the Federal Government." *Id*. at 84-85. However, the Supreme Court has suggested that "undocumented status, coupled with some articulable federal policy, might enhance state authority with respect to the treatment of undocumented aliens." Plyler v. Doe, 457 U.S. 202, 226 (1982).

[34] 457 U.S. at 231.

[35] *Id*. at 210.

[36] *Id*. at 230.

[37] U.S. CONST., amend. XIV, § 1.

[38] Both the Fifth and Fourteenth Amendments protect persons from government action depriving them of life, liberty, or property. However, the Fifth Amendment concerns obligations owed by the federal government, whereas the Fourteenth Amendment covers those owed by state and local governments.

[39] Zadvydas v. Davis, 533 U.S. 678, 693 (2001). *See also, e.g.*, *Plyler*, 457 U.S. at 210 ("Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments.").

[40] Carey v. Piphus, 435 U.S. 247, 259 (1978).

circumstances and interests involved. In *Mathews v. Eldridge*, the Supreme Court announced the prevailing standard for assessing the requirements of due process, finding that:

> Identification of the specific dictates of due process generally requires consideration of three distinct factors: *first*, the private interest that will be affected by the official action; *second*, the risk of erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional or substitute procedural safeguards; and *finally*, the Government's interest, including the function involved and the administrative and fiscal burdens that the additional or substitute procedural requirements would entail.[41]

Although the requirements of due process may vary depending on the particular context, states and localities must provide persons with the ability to contest the basis upon which they are to be deprived of a protected interest. This generally entails notice of the proposed deprivation and a hearing before an impartial tribunal.[42] Additional procedural protections, such as discovery of evidence or an opportunity to confront adverse witnesses, may also be required in certain circumstances to minimize the occurrence of unfair or mistaken deprivations of protected interests.[43]

The procedural protections of the Due Process Clause apply only to direct government action that deprives a person of a protected interest.[44] They "do[] not apply to the indirect adverse effects of governmental action."[45] While persons who are indirectly affected by government action may, in some cases, possess a legal cause of action against the government or another party, this cause of action generally would not be based upon a procedural due process claim.

Issues Raised by State or Local Restrictions on the Employment of Unauthorized Aliens

The ability of states and localities to restrict the hiring or employment of unauthorized aliens may depend upon the form that those restrictions take, although any such restrictions could potentially be subject to preemption and procedural due process challenges.[46]

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[41] 424 U.S. 319, 335 (1976) (emphasis added).

[42] *See, e.g.*, Mullane v. Central Hanover Trust Co., 339 U.S. 306, 314 (1950) (describing notice of a proposed deprivation of a protected interest as "[a]n elementary and fundamental requirement of due process"); *Mathews*, 424 U.S. at 333 ("[S]ome form of hearing is required before an individual is finally deprived of a ... [protected] interest."); *In r*e Murchison, 349 U.S. 133, 135 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process.").

[43] *See* CONGRESSIONAL RESEARCH SERVICE, CONSTITUTION OF THE UNITED STATES: ANALYSIS AND INTERPRETATION, Fourteenth Amendment: Rights Guaranteed: The Requirements of Due Process, *available at* http://www.crs.gov/conan/default.aspx?doc=Amendment14.xml&mode=topic&s=1&t=5|1|3.

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

[45] *O'Bannon*, 447 U.S. at 789.

[46] State and local measures could also potentially be challenged on the grounds that they deprive employees who are racial or ethnic minorities of equal protection in violation of the Fourteenth Amendment. However, to date, there does not appear to have been a successful challenge on these grounds. *See, e.g.*, *Gray*, 2008 U.S. Dist. LEXIS 7238, at *69-
(continued...)

Preemption

With IRCA, Congress amended the INA to establish a comprehensive federal scheme regulating the employment of unauthorized aliens. Section 274A of the INA generally prohibits the hiring, referring, recruiting for a fee, or continued employment of aliens who lack legal authorization to work in the United States. Violators may be subject to cease and desist orders, civil monetary penalties or, in the case of serial offenders, criminal fines and/or imprisonment for up to six months. Subsection (h)(2) of INA § 274A, in particular, expressly preempts

> … any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.[47]

This provision means that states and localities cannot constitutionally enact measures that would impose "civil or criminal sanctions"—other than through "licensing and similar laws"—upon employers of unauthorized aliens.

Neither "civil or criminal sanctions" nor "licensing and similar laws" is defined by IRCA. However, courts have found that state and local measures creating a private right of action against employers who discharge authorized workers while retaining unauthorized workers impose civil sanctions and are expressly preempted.[48] They have also found that "licensing and similar laws" include laws pertaining to the issuance of business licenses, not just those pertaining to the issuance of professional licenses.[49] Such laws have, thus, been found not to be expressly preempted, although they could potentially be impliedly preempted, as discussed below. The "inclusion of an express pre-emption clause does *not* bar the ordinary working of [implied] pre-emption principles,"[50] and measures that fall within the savings clause of an express preemption

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*70 (finding that employers lacked standing to assert an equal protection claim on behalf of their employees); Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 540-42 [hereinafter "*Lozano I*"] (finding that the "ordinances do not implicate a fundamental right or use a suspect classification" and that plaintiffs failed to demonstrate discriminatory intent in enacting the ordinance). The Third Circuit did not address this issue on appeal.

[47] INA § 274A(h)(2); 8 U.S.C. § 1324a.

[48] *Edmondson*, 594 F.3d at 765 (upholding the district court's determination that a measure allowing employees to sue for reinstatement, back pay and attorneys' fees was expressly preempted). The district court also found that taxing employers who hired unauthorized aliens at the maximum rate and revoking any government contracts they held were expressly preempted. *See* Chamber of Commerce of the United States of Am. v. Henry, No. CIV-08-109-C, 2008 U.S. Dist. LEXIS 44168, at *20 (W.D. Okla., June 4, 2008). However, these findings were reversed on appeal. *Edmondson*, 594 F.3d at 765-66.

[49] Some plaintiffs and commentators have argued that measures allowing for the revocation of business licenses should be excluded from the scope of "licensing and similar laws" and, therefore, subject to express preemption. For example, on appeal, the plaintiffs in *Lozano* argued that "IRCA's express pre-emption provision would be toothless if a state or municipality could effectively circumvent the general prohibition on imposing sanctions by imposing sanctions of this severity … [T]he loss of a business license is the 'death penalty' for a business, and the express pre-emption clause would be swallowed by its exception if a law regulating business licenses is held to be a licensing law." 620 F.3d at 208. *See also* Mark S. Grube, *Preemption of Local Regulations Beyond Lozano v. City of Hazleton: Reconciling Local Enforcement with Federal Immigration Policy*, 95 CORNELL L. REV. 391, 413 (2010) (noting the apparent incongruity between prohibiting a $250 fine and allowing a business to be shut down). The district court in *Lozano* found for the plaintiffs on this argument. *Lozano I*, 496 F. Supp. 2d at 519. However, this holding was reversed on appeal, and no other court appears to have found for plaintiffs on similar arguments. *See, e.g.*, *Chicanos Por La Causa*, 558 F.3d at 865; *Gray*, 2008 U.S. Dist. LEXIS 7238, at *31.

[50] Sprietsma v. Mercury Marine, a Division of Brunswick Corporation, 537 U.S. 51, 65 (2002) (internal quotations omitted). *See also* Geier v. Am. Honda Motor Co., 529 U.S. 861 (2000) (recognizing that a state law that falls within an (continued...)

provision could still potentially be found unconstitutional either because Congress has evidenced an intent to occupy the field or because the state or local enactment conflicts with or otherwise frustrates the purpose of federal law. It is also possible that state and local measures could be found to be expressly preempted if they would sanction employers who purportedly employ unauthorized aliens, but have not been found by federal authorities to have violated the INA.[51] However, most courts to date appear to have addressed this as conflict preemption, rather than express preemption.[52]

In determining whether state and local measures targeting employers of unauthorized aliens through "licensing and similar laws" are constitutional, courts generally apply a presumption against preemption because the regulation of employment has traditionally been within states' police powers.[53] This presumption appears to apply even though federal regulation of the employment of unauthorized aliens expanded significantly with the enactment of IRCA. As the Third Circuit recently noted:

> We are aware, of course, that the landscape of federal immigration law has changed dramatically since the Court decided *De Canas*. In enacting IRCA, Congress clearly made the regulation of the employment of unauthorized aliens a central concern of federal immigration policy. However, while this sea change in the federal regulatory scheme is incredibly important for purposes of our substantive analysis, it does not negate the operation of the presumption against pre-emption. The applicability of the presumption turns on a state's *historic* police powers. By definition, that means that the presumption depends on the *past* balance of state and federal regulation, not the present.[54]

Notwithstanding this presumption, depending upon their terms and the jurisdiction of any reviewing courts, state or local measures could still potentially be found to be impliedly preempted. The "pervasiveness" of the INA's provisions regarding employment of unauthorized aliens could potentially lead a court to find that Congress has preempted the field. However, the exclusion of "licensing and similar laws" from the express preemption of INA § 274A(h)(2) could

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express preemption savings clause is still subject to the ordinary workings of implied preemption principles).

[51] *See, e.g.*, *Lozano II*, 496 F. Supp. 2d at 519 (finding that an ordinance providing for the suspension or revocation of the business licenses of employers who hire unauthorized aliens was expressly preempted because it would have relied upon its own requirements, not those of INA § 274A, in determining which employers had hired unauthorized aliens), *rev'd*, 620 F.3d at 210-11.

[52] *Lozano II*, 620 F.3d at 210-14 (finding that an ordinance providing for the suspension or revocation of the business licenses of employers who hire unauthorized aliens was preempted on conflict grounds because it would have relied upon its own requirements, not those of INA § 274A, in determining which employers had hired unauthorized aliens). *See also* Ariz. Contractors Ass'n v. Candelaria, 534 F. Supp. 2d 1036, 1045-48 (D. Ariz. 2008) (relying on the plain meaning of INA § 274A(h)(2) and its legislative history to reject plaintiffs' argument that state or local measures are expressly preempted unless they would impose licensing sanctions only upon employers who have already been found liable in completed federal proceedings under IRCA), *affirmed by Chicanos Por La Causa*, 558 F.3d at 866 (finding that, for purposes of determining whether the statute in question is expressly preempted, "plaintiffs' reading of the second sentence, as permitting enforcement only of state licensing regulations conditioned on federally adjudicated violations, is contradicted by the third sentence, which recognizes states can condition an employer's 'fitness to do business' on hiring documented workers"); *Gray*, 2008 U.S. Dist. LEXIS 7238, at *36 ("There is no requirement in the statute that a finding be made by the federal government that a person has employed, recruited, or referred for a fee for employment, unauthorized aliens, only that those are the individuals who are subject to penalty.").

[53] *See, e.g.*, Meditronic, Inc. v. Lohr, 518 U.S. 470 (1996) (discussing the presumption against preemption); *Gray*, 2008 U.S. Dist. LEXIS 7238, at *25 (characterizing the regulation of business as being within states' historic police powers).

[54] *Lozano II*, 620 F.3d at 206-07 (finding that the district court erred in failing to accord this presumption against preemption when reviewing the Hazleton ordinance).

perhaps be said to indicate that Congress has not evidenced an intent to wholly occupy the regulatory field with respect to alien employment, and, thus far, few courts have found that state or local restrictions on the employment of unauthorized aliens are precluded on field preemption grounds.[55]

Conflict preemption, in contrast, has been the primary focus of parties' arguments and judicial analysis to date. State and local measures could potentially be found to be unconstitutional on conflict preemption grounds if their requirements can be characterized as inconsistent or incompatible with federal law. Preemption challenges might, thus, be raised against state or local measures that (1) establish standards independent from those contained in the INA for determining whether a person has employed an unauthorized alien, and impose sanctions upon persons who violate these standards;[56] (2) rely on state or local determinations that employers have violated the INA requirements concerning work eligibility, instead of relying upon federal determinations;[57] (3) establish state and local procedures for verification of employees' work eligibility that differ from federal procedures (e.g., giving employers less time to resolve the status of an employee whose eligibility has been questioned than is provided for in federal law);[58] (4) sanctioning persons for employing unauthorized aliens using a lower *scienter* (i.e., degree of awareness) threshold than provided for in federal law;[59] or (5) imposing verification requirements

[55] *But see Lozano I*, 496 F. Supp. 2d at 521-25 (finding that the ordinance in question was field preempted). The Third Circuit did not adopt this analysis on appeal, but instead focused on conflict preemption. *See Lozano II*, 620 F.3d at 213 n.34 (noting the possibility of field preemption, but focusing on conflict preemption).

[56] *See, e.g.*, *Lozano II*, 620 F.3d at 209-10 (focusing on conflict preemption when striking down a local measure that would sanction employers for violating local law regarding the employment of unauthorized aliens, not federal law).

[57] Courts taking the view that such measures are preempted have generally based their findings on the grounds that employment authorization depends upon immigration status, which can only be determined by the federal government because of the government's broad discretion in determining which unauthorized aliens to take action against and/or the difficulties inherent in determining whether particular aliens are unlawfully present. *See e.g.*, *Lozano II*, 620 F.3d at 210-19. In fact, the Third Circuit has even gone so far as to suggest that the federal courts have the final say in determining whether an alien is unlawfully present in the United States. *Lozano II*, 620 F.3d at 197-98 ("[W]hile any alien who is in the United States unlawfully faces the prospect of removal proceedings being initiated against her/him, whether s/he will actually be ordered removed is never a certainty until all legal proceedings have been concluded."). It should also be noted that state or local measures that call for state or local personnel to determine the immigration status of individual aliens have traditionally been viewed as regulations of immigration that are *per se* preempted. *See, e.g.*, League of United Latin Am. Citizens v. Wilson, 908 F. Supp. 755, 769-71 (C.D. Cal. 1995) (finding that California's Proposition 187, which would have required state personnel to verify the immigration status of persons with whom they came into contact, was preempted, in part, because it required the state to make an independent determination as to whether a person was in violation of federal immigration law); Villas at Parkside Partners v. The City of Farmers Branch, 577 F. Supp. 2d 858, 869-70 (N.D. Tex. 2008) (finding that an ordinance that relied upon classifications used by the U.S. Department of Housing and Urban Development in determining eligibility for housing subsidies to determine who could rent private housing constituted an impermissible regulation of immigration because it did not rely on the INA's classification of aliens' status). However, the situation could potentially be viewed differently if state or local personnel relied on federal determinations of immigration status, such as those provided pursuant to 8 U.S.C. § 1373(c). This statutory provision requires that "[t]he Immigration and Naturalization Service … respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information." 8 U.S.C. § 1373(c).

[58] *See, e.g.*, *Lozano II*, 620 F.3d at 214-15 ("[T]he [ordinance in question] contravenes congressional objectives by altering the verification scheme created by IRCA, and supplemented by IIRIRA and subsequent legislation."). *But see Gray*, 2008 U.S. Dist. LEXIS 7238, at *50 (finding that a municipal ordinance was not conflict preempted because it gave employers three days to respond to allegations that they had hired unauthorized workers, while federal law provides an 18-day period after receipt of a "tentative nonconfirmation" of an employee's eligibility).

[59] For example, a state or locality would likely be preempted from penalizing a business solely because it has hired an unauthorized alien, given that federal law only penalizes employers who *knowingly* hire such persons (except in cases where the employer fails to comply with the prescribed employment verification requirements). *See* INA § 274A(a)(1); (continued...)

upon persons who would not qualify as "employers" under federal law.[60] However, it should be noted that not all differences between state and local measures and federal law would necessarily constitute grounds for finding conflict preemption,[61] and reviewing courts could potentially interpret the relevant provisions of federal law differently in determining whether state and local measures are preempted on conflict grounds.

Courts have, for example, reached differing conclusions as to the constitutionality of state and local measures requiring employers to use E-Verify, the online federal employment eligibility verification system, to check the work authorization of employees, because of their differing interpretations of federal law. The U.S. Court of Appeals for the Third Circuit has held that such measures are preempted on conflict grounds because, when Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996 and established the pilot program that developed into E-Verify, it expressly prohibited the Secretary of Homeland Security from "requir[ing] any person or other entity to participate" in the program.[62] Because of this prohibition, the Third Circuit found that state and local measures requiring the use of E-Verify conflict with federal law and frustrate congressional intent regarding the use of E-Verify.[63] In contrast, the U.S. Courts of Appeals for the Ninth and Tenth Circuits have found that state and local measures requiring use of E-Verify are not conflict preempted because Congress intended for E-Verify to be used widely and/or did not prohibit states and localities from requiring the use of E-Verify.[64] The Supreme Court heard oral arguments on this issue, as well as whether measures

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8 U.S.C. 1324a(a)(1).

[60] *See, e.g.*, *Edmondson*, 594 F.3d 769-70 (striking down an Oklahoma statute that would have required verification by persons who employ independent contractors or domestic help because such persons are not defined as "employers" and, thus, are not subject to verification requirements under federal law); *Lozano II*, 620 F.3d at 216 (same). *But see Gray*, 2008 U.S. Dist. LEXIS 7238, at *45 (upholding a local ordinance imposing verification requirements upon persons who employ independent contractors after finding that the federal regulations excluding persons who hire independent contractors from the definition of "employer" do not constitute a reasonable interpretation of the governing statute and are, thus, unenforceable). IRCA does not itself define "employer," although regulations promulgated under its authority provide such a definition. *See* 8 C.F.R. § 274a.1(f)-(h) (defining "employee," "employer," and "employment").

[61] *See Lozano II*, 620 F.3d at 210 ("We … have concerns about the district court's approach, … because it did at times equate difference with conflict."). *See also Gray*, 2008 U.S. Dist. LEXIS 7238 at *53 (suggesting that discrepancies in time frames between state or local measures and federal ones do not necessarily mean that state or local measures are preempted, so long as state or local procedures are "tolled" while federal procedures play out).

[62] P.L. 104-208, div. C, tit. IV, subtit. A, § 402(a) (1996) (codified, as amended, at 8 U.S.C. § 1324a note). *But see* Chamber of Commerce of the United States of Am. v. Napolitano, 648 F. Supp. 2d 726 (Md. 2009) (upholding the legality of Executive Order 13465 and the Federal Acquisition Regulation, which require government contractors to use E-Verify). Key to the court's reasoning in *Chamber of Commerce* was that (1) the President, not the Secretary of Homeland Security, imposed the "requirement" to use E-Verify on federal contractors and (2) no one is "required" to use E-Verify because "the decision to be a government contractor is voluntary." *Id.* at 733. It should be noted that IIRIRA also states that "any person or other entity that conducts any hiring (or recruitment or referral) in a State in which a pilot program is operating may elect to participate in that pilot program," and this language has been found to preempt states and localities from *prohibiting* employers within their jurisdiction from participating in E-Verify. *See* United States v. Illinois, No. 07-3261, 2009 U.S. Dist. LEXIS 19533 (C.D. Ill., Mar. 12, 2009).

[63] *Lozano II*, 620 F.3d at 214.

[64] *Chicanos Por La Causa*, 558 F.3d at 867 ("Though Congress did not mandate E-Verify, Congress plainly envisioned and endorsed an increase in its usage."); *Edmondson*, 594 F.3d at 767-69. The Ninth Circuit, in particular, has emphasized the significance of Congress's failure to prohibit use of E-Verify: "Congress could have, but did not, expressly forbid state laws from requiring E-Verify participation. It certainly knew how to do so because, at the same time, it did expressly forbid 'any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.'" *Chicanos Por La Causa*, 558 F.3d at 867. *See also Gray*, 2008 U.S. Dist. LEXIS 7238, at *58 ("The court does not see (continued...)

that would suspend or revoke the licenses of businesses that hire unauthorized aliens are preempted, this term.[65]

Additionally, even when state or local measures requiring employers to verify the work authorization of employees mirror the specific provisions of federal law, there is also the possibility that these measures could nonetheless be found to be preempted on conflict grounds if the broader policies they would promote are inconsistent with federal policies, or if the proliferation of similar local measures would have effects that are inconsistent with federal policies. The Third Circuit, in particular, recently found that the federal verification requirements established in IRCA reflect a deliberate balancing by Congress of policies relating to (1) deterring undocumented immigration (through the imposition of sanctions upon employers who hire unauthorized aliens); (2) minimizing the burdens imposed upon employers by the employment verification process; and (3) protecting aliens who are authorized to work and others who might be perceived as "foreign" from discrimination.[66] It thus found that a local verification requirement, which it viewed as imposing additional burdens upon employers and which failed to provide its own protections against discrimination, was conflict preempted because it promoted deterrence over minimizing the burdens on employers and preventing discrimination.[67] While the ordinance in question also diverged from federal law in its requirements, the Third Circuit's view that Congress intended all three policies to be promoted equally when it enacted IRCA could, if widely adopted, potentially lead courts to strike down state and local verification requirements that do not conflict with federal law in their provisions regarding deterrence, but that do not include protections against discrimination.[68] Similarly, state or local measures could also be found

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Congress's decision not to make the program mandatory as restricting a state or local government's authority under the police powers."). Although the Eighth Circuit issued a decision in *Gray*, its decision did not reach the merits of this argument. *See* Gray v. City of Valley Park, 567 F.3d 976 (8th Cir. 2009).

[65] *See supra* note 7.

[66] *Lozano II*, 620 F.3d at 211 (noting that undermining the balance of policy interests struck by federal law constitutes a "significant conflict"); *Edmondson*, 595 F.3d at 768-69. *See also* Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141 (1989) (Florida law preempted because it struck a balance between the encouragement of invention and free competition in patented ideas different from that struck by federal patent law); Rogers v. Larson, 563 F.2d 617, 626 (3d Cir. 1977) (Virgin Islands law preempted because it struck a balance between ensuring an adequate labor force and protecting citizens' jobs different from that struck in federal immigration law). *See also* 132 Cong. Rec. H10583-01 (daily ed., Oct. 15, 1986) ("[We should] put the burden of enforcing the law on the Government, where it belongs, not on private employers."); H.R. Rep. No. 99-682 (II), at 4 ("[I]f there is to be sanctions enforcement and liability, there must be an equally strong and readily available remedy if resulting employment discrimination occurs.").

[67] *Lozano II*, 620 F.3d at 219 ("Simply put, Hazleton has enacted a single regulatory scheme that is designed to further the single objective of federal law that it deems important—ensuring unauthorized aliens do not work in the United States. It has chosen to disregard Congress's other objectives. … Regulatory 'cherry picking' is not concurrent enforcement and it is not constitutionally permitted."). *See also* Immigrants Rights, Inc. v. INS, 913 F.2d 1350, 1366 (9th Cir. 1990), (characterizing IRCA as "a carefully crafted political compromise which at every level balances specifically chosen measures discouraging illegal employment with measures to protect those who might be adversely affected"), *rev'd on other grounds*, 502 U.S. 183 (1991).

[68] *Lozano II*, 620 F.3d at 218 ("To be consistent with federal law, states and localities that use regulatory enactments to sanction employers who have been found guilty of employing unauthorized aliens under IRCA must impose *sanctions of equal severity* on employers found guilty of discriminating."). From this decision, it would appear that a state or local measure could not rely on the protections against discrimination provided for in federal law, but instead must include its own protections. *But see Gray*, 2008 U.S. Dist. LEXIS 7238, at *49-*50 (ordinance need not prohibit discrimination in the same way that IRCA does). Some plaintiffs have also suggested that "harsh" employer sanctions encourage discrimination and, therefore, disrupt the balance between deterring illegal immigration, minimizing employers' burdens, and preventing discrimination established by federal law. However, the Ninth Circuit has rejected this claim as "essentially speculative," at least when made in a facial challenge. *Chicanos Por La Causa*, 558 F.3d at (continued...)

to be conflict preempted if a court determines that the enactment of similar measures by other jurisdictions would have effects that are inconsistent with federal policy.[69] It is also possible that a statute which is not unconstitutional on its face could be found to be unconstitutional as applied.[70]

Moreover, there is the possibility that, because of its terms, a state or local measure could be found to constitute a "regulation of immigration," rather than a regulation affecting aliens. In *De Canas*, the Supreme Court noted that while the latter may be permissible, the former is always preempted because the power to regulate immigration is exclusively federal.[71] Some plaintiffs and commentators have asserted that state and local licensing and/or verification requirements constitute impermissible regulations of immigration because they would deter the employment of aliens, and persons generally cannot enter or remain in the United States without the ability to earn a livelihood.[72] Courts have, thus far, declined to adopt this reasoning,[73] and may be unlikely to do so given the precedent of *De Canas*. The *De Canas* Court rejected arguments that a California statute restricting the employment of unlawfully present aliens was *per se* preempted as a regulation of immigration, and instead suggested that states and localities could have legitimate interests in restricting employment of unauthorized aliens within their jurisdiction.[74] However, the INA's regulation of the employment of aliens has expanded since *De Canas* was decided, and arguments that licensing and/or verification provisions constitute impermissible regulations of immigration could perhaps be made with more success in future litigation, especially in situations where the state or local measure is not narrowly tailored and/or based on legitimate purposes.

In contrast, state or local regulations prohibiting *or* establishing day labor centers would, on their face, appear to raise fewer preemption issues.[75] Nothing in federal law addresses day labor

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[69] *See, e.g.*, *Lozano II*, 620 F.3d at 213. *See also* Rowe v. N.H. Motor Transp. Ass'n, 552 U.S. 364 (2008) (reasoning that allowing one state to implement its own monitoring stem "would allow other States to do the same … easily lead[ing] to a patchwork of state … laws, rules, and regulations").

[70] United States v. Salerno, 481 U.S. 739, 745 (1987) ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid."); *Chicanos Por La Causa*, 558 F.3d at 861 ("If and when the statute is enforced, and the factual background is developed, other challenges to the Act as applied in any particular instance or manner will not be controlled by our decision.").

[71] 424 U.S. at 355. *See also* Henderson v. Mayor of City of New York, 92 U.S. 259, 274 (1875) (holding that states are not permitted to restrict immigration because it "has been confided to Congress by the Constitution"). The Court in *De Canas* characterized a "regulation of immigration" as one that attempts to determine "who should and should not be admitted into the country, and the conditions under which a legal entrant may remain." 424 U.S. at 355.

[72] *See, e.g.*, *Lozano I*, 496 F. Supp. 2d at 518; Karla Mari McKanders, *Welcome to Hazleton! "Illegal" Immigrants Beware: Local Immigration Ordinances and What the Federal Government Must Do About It*, 39 LOY. U. CH. L.J. 1, 32 (2007).

[73] *See, e.g.*, *Lozano I*, 496 F. Supp. 2d at 524 n.45; *Gray*, 2008 U.S. Dist. LEXIS 7238, *25.

[74] *De Canas*, 424 U.S. at 356-57 ("Employment of illegal aliens in times of high unemployment deprives citizens and legally admitted aliens of jobs; acceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens; and employment of illegal aliens under such conditions can diminish the effectiveness of labor unions.").

[75] To date, most legal challenges to day labor centers appear to allege that their establishment and/or operation violates federal laws regarding the employment of unauthorized aliens, the harboring of unlawfully present persons, and/or aiding and abetting violations of the INA. *See, e.g.*, Karunakarum v. Town of Herndon, 70 Va. Cir. 208 (2006) (finding that the plaintiffs had standing to challenge a day labor center on these grounds).

centers, much less expressly preempts state or local measures concerning them,[76] and both zoning and employment matters are within states' historical police powers.[77] Moreover, certain restrictions upon the operation of day labor centers, in particular, could plausibly be characterized as targeting "essentially local problems" and tailored to "combat effectively the perceived evils," as would appear to be permitted under *De Canas*.[78] Depending upon their implementation, however, particular state or local measures could potentially be subject to preemption challenges on an as-applied basis. Restrictions upon day labor centers or solicitations of or by day laborers could also raise other constitutional issues that are outside the scope of this report, such as infringement of the rights to freedom of speech and association provided for in the First Amendment.[79]

Procedural Due Process

State and local restrictions on the hiring and employment of unauthorized aliens could also be challenged on procedural due process grounds, depending upon the form such restrictions take. If, for example, a state or locality revoked the business permit of an entity that employed or hired unauthorized aliens, the employer's interests under the Due Process Clause would be implicated. The granting of a business license can accord the licensee a property interest that may not be *revoked* unless certain procedural due process requirements are met,[80] although no such property interest exists which guarantees the *issuance* of a license.[81] Additionally, the liberty interest protected by the Due Process Clause extends to the "right of the individual to contract, to engage in any of the common occupations of life,"[82] and this interest would appear to be abridged by state and local measures penalizing employers on account of the employment contracts they enter.

State and local measures could be found unconstitutional if they fail to provide employers with the ability to contest the basis upon which they are to be deprived of protected property or liberty interests.[83] This would generally entail notice of the proposed deprivation and a hearing before an

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[76] However, had it been enacted, the Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005 would have amended the INA to require that day labor centers verify the immigration status of all clients, as well as expanded the INA's provisions regarding smuggling, transporting, and harboring undocumented aliens so as to reach certain types of conduct by day labor centers. H.R. 4437, 109th Cong.

[77] Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (zoning); *Gray*, 2008 U.S. Dist. LEXIS 7238, at *25 (regulation of employment).

[78] *See* 424 U.S. at 356-57.

[79] *Compare* Xiloj-Itzep v. City of Agoura Hills, 29 Cal. Rptr. 2d 879 (Cal. App. 1994) (upholding a municipal ordinance prohibiting occupants of vehicles from soliciting work from any person within the public right-of-way because it constituted a valid non-content based restriction on speech) *and* Coalition for Humane Immigrant Rights of Los Angeles v. Burke, No. CV 98-4863-GHK 2000, 2000 U.S. Dist. LEXIS 16520 (C.D. Cal. Sept. 12, 2000) (striking down a similar provision as a content-based restriction of speech because it was too broad geographically and left no alternatives for solicitation).

[80] Bell v. Burson, 402 U.S. 535, 539 (1971). In addition, "[t]he assets of a business (including its good will) unquestionably are property, and any state taking of those assets is unquestionably a 'deprivation' under the Fourteenth Amendment ... [, although] business in the sense of *the activity of doing business*, or *the activity of making a profit* is not property in the ordinary sense. " College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 675 (1999) (emphasis in original). *See also* Duplex Printing Press Co. v. Deering, 254 U.S. 443, 465 (1921) ("[C]omplainant's business ... is a property right, entitled to protection against unlawful injury or interference.").

[81] *Bell*, 402 U.S. at 539.

[82] Board of Regents v. Roth, 408 U.S. 564, 572 (1972).

[83] It is less clear that *employees* would be denied due process by state or local measures. As a general rule, the procedural requirements of the Due Process Clause are triggered by a *direct* deprivation of a protected interest by the (continued...)

impartial tribunal, during which they could challenge state or local findings regarding their employment practices. Additional procedural protections could potentially also be required. However, based upon the case law to date, employers would not necessarily be found to have been denied procedural due process if the state or local measure does not (1) provide employers with guidance on how to determine employees' work eligibility; (2) give employers the opportunity to review the contents of any third-party complaints against them which trigger state or local investigations; or (3) afford the employer a chance to contest, before state or local officials, any federal determinations that an employee is not authorized to work.[84] State and local measures that provide employers with procedural protections similar to those accorded to businesses by the federal government under INA § 274A may be more likely to withstand a procedural due process challenge than those measures that do not.[85]

Issues Raised by State or Local Restrictions upon Tenancy or Dwelling

State and local measures barring unlawfully present aliens from renting or occupying private dwellings raise issues under both the preemption doctrine and the Fourteenth Amendment. These issues are, however, potentially more significant than those raised by state or local restrictions on employment because denial of housing can be seen as a regulation of immigration.[86]

Preemption

State or local measures barring unlawfully present aliens from renting or occupying private dwellings within the jurisdiction could be susceptible to preemption challenges. Some have argued that such measures constitute impermissible "regulation of immigration" and are thus, *per se*, preempted.[87] The *De Canas* Court described a "regulation of immigration" as one that

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government. *See supra* notes 45-46 and accompanying text. Persons who are *indirectly* affected by the government's deprivation of a third party's protected interest(s) "have no constitutional right to interject themselves into the dispute." *O'Bannon*, 447 U.S. at 788. However, one district court has found that a local measure providing for the suspension or revocation of the business license of employers who hire or employ unauthorized aliens deprives employees of due process. *Lozano I*, 496 F. Supp. 2d at 533-37. This question was not addressed in the Third Circuit's opinion in *Lozano*, and no other court appears to have reached this conclusion.

[84] *See, e.g.*, *Chicanos Por La Causa*, 558 F.3d at 867-69; *Gray*, 2008 U.S. Dist. LEXIS 7238, at *84-*97.

[85] Before the federal government may sanction a business for unlawful employment practices relating to unauthorized aliens, the business must be provided with notice of the proposed action and a hearing before an administrative law judge in which the basis for the proposed order may be challenged. The administrative judge's decision is subject to administrative appellate and judicial review within specified time periods. INA § 274A(e); 8 U.S.C. § 1324a(e).

[86] Villas at Parkside Partners v. The City of Farmers Branch, 701 F. Supp. 2d 835, 855 (N.D. Tex. 2010) ("Local regulation that conditions the ability to enter private contract for shelter on federal immigration status is of a fundamentally different nature than the sorts of restrictions on employment or public benefits that have been found not to be preempted regulations of immigration [in certain cases].").

[87] *See, e.g.*, *Villas at Parkside Partners*, 577 F. Supp. 2d at 869. *But see* Garrett v. City of Escondido, 465 F. Supp. 2d 1043, 1055 (S.D. Cal. 2006) (rejecting plaintiffs' claim that restrictions on ability to rent property were tantamount to regulation of immigration). Where regulation of immigration is involved, there is no possibility of concurrent enforcement even if the state or local measure "mirrors" the federal one. *See, e.g.*, *Lozano II*, 620 F.3d at 222. The court in *Lozano* further suggested that the local measure in question could not mirror the federal harboring provisions, discussed below, because these provisions have not been construed to reach the landlord/tenant relationship. *Id.* at 222-
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attempts to determine "who should and should not be admitted into the country, and the conditions under which a legal entrant may remain,"[88] and at least one court has noted that it is "difficult to conceive of a more effective method of ensuring that persons do not enter or remain in a locality than by precluding their ability to live in it."[89] Some courts have found that state or local measures constitute impermissible regulations of immigration because they classify persons using their own categories, instead of those used in the INA, when determining which aliens may rent housing, and/or they rely upon state or local personnel to determine individuals' immigration status.[90] Other courts have found that such measures are impermissible regulations of immigration because denying persons an abode is tantamount to denying them permission to remain in the country.[91] This argument might have less force in situations where the state or local measure relies on federal classifications and authorities in determining eligibility. However, the potential effects of similar restrictions in other areas could raise additional concerns.[92]

Even if state or local measures barring unlawfully present aliens from renting or occupying private dwellings do not constitute regulations of immigration that are, *per se*, preempted, they could still be found to be unconstitutional because of field or conflict preemption. The INA, particularly its provisions regarding harboring, could potentially be seen as preempting the field.[93] Section 274 of the INA criminalizes various activities relating to the bringing in and harboring of aliens who are not authorized to enter or remain in the United States, as well as certain other activities related to the transportation of unlawfully present aliens or the encouragement or inducement of unlawfully present aliens to reside in the United States. Courts have generally interpreted this provision broadly, and it could be construed to cover renting property to an illegal alien or otherwise permitting him to dwell in a residence, at least when it is done in knowing or reckless disregard of the alien's illegal status.[94] There is also the possibility of conflict preemption

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[88] 424 U.S. at 355-56.

[89] *Lozano II*, 620 F.3d at 220-21.

[90] In one early case, a federal district court struck down California's Proposition 187, which would have relied on state screening to prevent unlawfully present aliens from receiving certain public benefits, because it classified individuals differently than the federal government did, and it relied upon state agents' determinations of immigration status. League of United Latin Am. Citizens, 908 F. Supp. at 770-72. More recently, a district court in Texas found that an ordinance that would have relied on classifications used by the U.S. Department of Housing and Urban Development (HUD) in determining eligibility for housing subsidies to determine who could rent private housing was preempted because it did not rely on the INA's classification of aliens' status. Villas at Parkside Partners, 577 F. Supp. 2d at 870 ("The court determines that the city's reliance on the HUD regulations and documents demonstrates that the city is doing more than adopting federal immigration requirements; the city adopts federal regulations regarding housing benefits to noncitizens and uses those regulations to define which noncitizens may rent an apartment in Farmers Branch."). The court was particularly concerned that there are certain persons who are lawfully in the country, but who are not entitled to federal housing assistance (e.g., alien visitors, tourists, diplomats, and students temporarily in the United States). *Id.*

[91] *See Villas at Parkside Partners*, 577 F. Supp. 2d at 868 (quoting *Truax v. Raich*, 239 U.S. 33, 42 (1915) ("The assertion of an authority to deny 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.")); *Lozano II*, 620 F.3d at 220. The fact that people could potentially reside within the jurisdiction by purchasing homes or staying with friends would not necessarily save a challenged measure from being found to be preempted. *See, e.g.*, *Lozano II*, 620 F.3d at 221.

[92] *See, e.g.*, *Lozano II*, 620 F.3d at 221.

[93] *Garrett*, 465 F. Supp. 2d at 1056.

[94] *E.g.*, United States v. Aguilar, 883 F.2d 662 (9th Cir. 1989) (finding that a church official violated the harboring provision when he invited an illegal alien to stay in an apartment behind his church, and interpreting harboring statute as not requiring an intent to avoid detection); United States v. Rubio-Gonzalez, 674 F.2d 1067 (5th Cir. 1982) (continued...)

because of the broad discretion that the federal government has regarding which aliens to remove and/or the burden that state or local verification requirements would place on the federal government.[95] Imposing burdens on aliens whose unauthorized presence the federal government has declined to sanction could be said to frustrate the federal scheme, as could "requiring" the federal government to devote resources to activities based upon state or local—as opposed to federal—priorities.[96]

Equal Protection

State or local measures could also potentially be challenged on the grounds that they deprive prospective tenants, in particular, of equal protection in violation of the Fourteenth Amendment, although the outcome of such challenges remains somewhat uncertain, at least where no U.S.-born children of unlawfully present aliens are involved. The degree to which states and localities may restrict persons' ability to obtain private housing on account of alienage remains unsettled. As early as 1886, the Supreme Court recognized that the Equal Protection Clause applied to state classifications based on alienage.[97] Nevertheless, during the early part of the twentieth century, the Supreme Court upheld a number of state laws denying rights and privileges to persons on account of their alienage (regardless of whether such aliens were lawfully present in the United States),[98] in part because states were able to demonstrate a "special public interest" that was advanced through such measures.[99]

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(suggesting that "harboring" an alien is a broader concept than other smuggling provisions relating to the concealment of an alien or the shielding of an alien from detection); United States v. Acosta De Evans, 531 F.2d 428 (9th Cir. 1976) (upholding harboring conviction of defendant who provided illegal aliens with an apartment, and concluding that harboring provision was not limited to clandestine sheltering only). *See also* Cristina Rodriguez, et al., Migration Policy Institute, National Center on Immigrant Integration Policy, *Testing the Limit: A Framework for Assessing the Legality of State and Local Immigration Measures*, at 24-27 (discussing merits and weaknesses of argument that federal alien smuggling statute preempts local restrictions on renting to unauthorized aliens). A reviewing court might consider arguments that state or local measures barring persons from renting property to unauthorized aliens, or otherwise prohibiting such persons from occupying a dwelling unit, constitute "additional or auxiliary regulation[s]" to a federal scheme. This argument is probably strongest in cases where *criminal* penalties are imposed upon persons who violate a non-federal dwelling restriction, but it may also be applicable in cases where non-criminal penalties are imposed. *Compare* We Are America/Somos America, Coalition of Arizona v. Maricopa County Bd. of Sup'rs, 594 F. Supp. 2d 1104, 1114 (D. Ariz. 2009) (finding that Arizona's human smuggling statute was not preempted by federal law) *and* State v. Barragan-Sierra, 196 P.3d 879, 890-91 (Ariz. Ct. App. 2008) (same) *with* Garrett v. City of Escondido, 465 F. Supp. 2d 1043 (S.D. Cal. 2006) (granting temporary restraining order against local ordinance imposing civil and criminal penalties upon persons renting property to unauthorized aliens, in part because serious field preemption concerns were raised due to the existence of the federal alien smuggling statute) *and* State of New Hampshire v. Barros-Batistele, Case No. 05-CR-1474, 1475 (N.H. Dist. Ct., Aug. 12, 2005) (same).

[95] *Garrett*, 465 F. Supp. 2d at 1057.

[96] *See, e.g.*, United States v. Arizona, 703 F. Supp. 2d at 995-96 (finding that the provision of Arizona's S.B. 1070 requiring state and local officials to verify the immigration status of all stopped persons who are suspected of being unlawfully present aliens was preempted, in part, because of the burden it imposed on the federal government).

[97] *See* Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

[98] *E.g.*, Heim v. McCall, 239 U.S. 175 (1915) (upholding state law barring noncitizens from being employed on public works projects); Patsone v. Pennsylvania, 232 U.S. 138 (1914) (upholding conviction of person under state law prohibiting an alien from owning a rifle or shotgun); Clarke v. Deckebach, 274 U.S. 392 (1927) (upholding local ordinance barring an alien from being licensed to operate a pool hall); Frick v. Webb, 263 U.S. 326 (1923); Porterfield v. Webb, 263 U.S. 225 (1923) (upholding states' ability to deny aliens the right to own or lease agricultural lands); Terrace v. Thompson, 263 U.S. 197, 220 (1923) (same); Webb v. O'Brien, 263 U.S. 313 (1923) (same).

[99] *See* Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 420-21 (1948); *see also* Peter J. Spiro, *The States and*
(continued...)

However, these decisions came at an earlier period of Fourteenth Amendment jurisprudence, and over time "the [Supreme] Court's decisions gradually have restricted the activities from which States are free to exclude aliens."[100] Although none of the Court's earlier decisions has been expressly overruled, in at least some cases their precedential value has been questioned.[101] Nevertheless, it appears well established, even following the Court's decision in *Plyler*, that states may impose greater restrictions upon the rights of unauthorized aliens than may be imposed upon citizens or legal immigrants, at least where the direct subjects of regulation are not children.[102] At least one federal district court has found that an ordinance regulating the leasing of housing to unauthorized aliens did not violate the Equal Protection clause because it did not facially discriminate against a suspect class because of race, ethnicity, or national origin, and it was otherwise rationally related to a legitimate government interest in reducing crime by unauthorized immigrants and safeguarding community resources.[103] This decision was not appealed.

In contrast, alienage-based restrictions that directly or indirectly affect the legal rights of those children or spouses of unlawfully present aliens who lawfully reside in the United States might face more significant legal challenges. In the 1948 case of *Oyama v. California*,[104] the Supreme Court found that a California statute banning alien landholding impermissibly discriminated against the citizen child of an alien, because it required the child to prove that his alien parent did not purchase property in the child's name to circumvent alien ownership restrictions—a burden not imposed upon the children of U.S. citizens.[105] Depending on the manner and scope of a state or local housing restriction on unlawfully present aliens, the measure could trigger an *Oyama*-like challenge by a U.S. citizen directly or indirectly affected by the rule, such as a citizen child or spouse of an illegal immigrant whose property rights are impaired on account of family membership.

Procedural Due Process

Additionally, state or local measures that would bar unlawfully present aliens from renting or occupying private dwellings could implicate property interests of landlords and/or tenants that are

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Immigration in an Era of Demi-Sovereignties, 35 VA. J. INT'L L. 121, 149-51 (1994).

[100] Ambach v. Norwick, 441 U.S. 68, 72-73 (1979).

[101] *See Takahashi*, 334 U.S. at 410 (1948) (finding that a California statute barring issuance of fishing licenses to lawfully present aliens who were ineligible for citizenship denied such aliens equal protection, and could not be justified as protecting a special interest of the state in conserving public fishing); Sei Fujii v. State 242 P.2d 617 (Cal. 1952) (finding a California law restricting land ownership by aliens violated the Fourteenth Amendment, and also concluding that earlier Supreme Court decisions upholding alien land laws were not in accord with subsequent Court jurisprudence).

[102] *Compare* Graham v. Richardson 403 U.S. 365, 372 (1971) (finding state classifications based on alienage, as such, to be "inherently suspect and subject to close judicial scrutiny") *with Plyler*, 457 U.S. at 219 n.19 (finding that the unauthorized presence of illegal aliens is not a "constitutional irrelevancy," and such aliens do not constitute a "suspect class").

[103] *Lozano I*, 496 F. Supp. 2d at 542.

[104] 332 U.S. 633 (1948).

[105] It should be noted that the Court only ruled that the California alien land law unconstitutional as applied in the case before it. It did not reach the question of whether states could constitutionally bar aliens from owning real property, nor expressly overrule earlier Court decisions upholding alien land laws. In separate concurrences, Justice Black (joined by Justice Douglas) and Justice Murphy (joined by Justice Rutledge) argued that the California statute unconstitutionally abridged the property rights of aliens. *Id.* at 647 (Black, J., concurring); *id.* at 650 (Murphy, J., concurring).

affected by the Due Process Clause.[106] The right to "maintain control over ... [one's] home, and to be free from governmental interference, is a private interest of historic and continuing importance."[107] A government measure requiring the termination of a lease between a property owner and lessee deprives one or both of the parties of several property-related interests, including "the right of sale, the right of occupancy, the right to unrestricted use and enjoyment, and the right to receive rents."[108] In addition, some measures barring persons from leasing real property to unlawfully present aliens are enforced through the imposition of monetary penalties upon offenders.[109] Those who are compelled to pay such fines are deprived of an additional property interest. Ordinances that subject violators to incarceration would also deprive offenders of a liberty interest.[110] State or local measures prohibiting the rental of housing to unlawfully present aliens therefore appear likely to deprive property owners and/or tenants of an interest protected by the Fourteenth Amendment's Due Process Clause.[111] Accordingly, states and localities enacting such measures must provide procedural protections to minimize the occurrence of unfair or mistaken deprivations of protected interests, such as providing landlords with notice and an opportunity for a hearing before suspending their licenses and providing tenants with the opportunity to challenge their designation as unlawfully present.[112]

Issues Raised by State or Local Restrictions on Public Benefits or Services

Some localities have attempted to deter the presence of illegal aliens within their borders via the denial of services and/or benefits.[113] Such denials may be less prone to legal challenges than

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[106] Depending upon their terms, such measures could also be challenged as depriving landlords and/or tenants of due process on other grounds, most notably on the grounds that they are "void for vagueness." The void-for-vagueness doctrine requires that a "penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." Kolender v. Lawson, 461 U.S. 352, 357 (1983). At least one court has found that a local restriction on renting to unlawfully present aliens was void for vagueness because it did not define "eligible immigration status" and was not specific about its document requirements. *Villas at Parkside Partners*, 577 F. Supp. 2d at 876-77.

[107] United States v. James Daniel Good Real Property, 510 U.S. 43, 53-54 (1993) (holding that the Due Process Clause compels the government to give notice and a meaningful opportunity to be heard before seizing real property subject to civil forfeiture).

[108] *Id.*; Greene v. Lindsey, 456 U.S. 444, 450-51 (1982) (recognizing that *tenants* have a significant property interest in "the right to continued residence in their homes"); *Garrett*, 465 F. Supp. 2d at 1057-59 (noting that *landlords* could potentially lose rent and have to undertake eviction proceedings because of the ordinance in question).

[109] *See, e.g.*, *Garrett*, 465 F. Supp. 2d at 1048 (subjecting repeat offenders to a monetary penalty of up to $1,000 per day per violation and/or a jail term of six months).

[110] *See, e.g.*, *id*.

[111] Although some state or local housing restrictions may directly affect the property interests of both tenants and lessors, others may not. For example, a state or locality may choose to impose civil penalties upon persons who lease real property to unauthorized aliens, while imposing no direct penalty upon an alien who leases or occupies such property. An unauthorized alien might not be able to challenge such a measure on procedural due process grounds, as the government action only affects the alien's property interests *indirectly* (e.g., if a property owner breaks a lease with an unauthorized alien tenant to avoid incurring a civil fine). While the alien may have a cause of action against the government or, more directly, the lessor (e.g., for breach of the lease agreement), he or she may not be able to raise a procedural due process claim against the government. *See supra* notes 45-46 and accompanying text.

[112] *See, e.g.*, *Garrett*, 465 F. Supp. 2d at 1057-59 (noting serious due process concerns regarding an ordinance that failed to provide such protections).

[113] *See e.g.*, Ariz. Stat. § 15-232 (restricting adult education services to U.S. citizens, legal residents or persons (continued...)

measures pertaining to employment and housing, partly because such measures appear less likely to raise preemption and equal protection challenges and partly because federal law expressly requires or authorizes states and localities to deny certain benefits to unlawfully present aliens. The outcome of any such challenge thus seems likely to hinge upon the scope of the benefits being denied, as well as whether the state or local measure in question would involve state or local personnel making independent assessments of persons' immigration status when determining whether to deny benefits.[114]

The degree to which states and localities may deny services or benefits based on unlawful presence in the United States remains unclear. During the 1970s and early 1980s, the U.S. Supreme Court decided a series of cases on governmental authority to discriminate against aliens in providing government benefits. Collectively, these cases set forth the following basic constitutional principles: state governments generally cannot discriminate between aliens who are authorized to live here indefinitely and U.S. citizens when setting eligibility requirements for state benefits;[115] states have broader, but still limited, authority to discriminate against aliens who are here without authorization;[116] and the federal government, by contrast, has wide discretion to discriminate both between citizens and legal aliens, as well as between classes of legal aliens.[117]

After these cases were decided, Congress enacted the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), which both established a general rule as to which benefits *must be denied* to aliens unlawfully residing in the United States and delineated which local public benefits *must be provided* regardless of immigration status. PRWORA prohibits many classes of noncitizens, legal and illegal alike, from receiving assistance. Generally, unlawfully present aliens are denied federal benefits and may qualify for state benefits only under laws passed by the states after the PRWORA's enactment.[118] The class of benefits denied is broad and includes: (1) grants, contracts, loans, and licenses, and (2) retirement,

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otherwise lawfully present in the United States); Ariz. Stat. §§ 15-1803 and 15-1825 (restricting in-state tuition and state financial aid for state university and community colleges to the same); Ariz. Stat. Rev. § 46-803 (denying child care assistance to unlawfully present aliens); Colo. Rev. Stat. § 24-76.5-103 (requiring agencies and state political subdivisions to verify the lawful presence in the United States of any applicant for state or local benefits excluding services needed for emergency medical conditions); Nick Miroff, *Pr. William Passes Resolution Targeting Illegal Immigration*, WASH. POST, July 11, 2007, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/07/10/AR2007071002093.html (describing a resolution passed by the Board of Supervisors of Prince William County, Virginia, which, among other things, required the County Executive to provide the Board with a plan outlining which benefits the county has the discretion to deny to those who are illegally present). Services recommended for restriction included: adult services to allow elderly and disabled individuals to remain in their homes; in-home services; rental and mortgage assistance; substance abuse program; and elderly/disabled tax relief programs.

[114] *See, e.g.*, *Wilson*, 908 F. Supp. 755, 769-71 (finding that a California measure constituted a regulation of immigration, in part, because it relied upon determinations about aliens' immigration status made by state and local personnel).

[115] *See* Graham v. Richardson, 403 U.S. 365 (1971) (declaring state-imposed welfare restrictions on legal immigrants unconstitutional, both because the state statutes violated the Fourteenth Amendment's equal protection clause and because they encroached upon the exclusive federal power to regulate immigration).

[116] *See Plyler*, 457 U.S. 202 (recognizing that unlawfully present aliens are due lesser constitutional protection than legal aliens are). For discussion of the *Plyer* decision, see CRS Report 97-542, *The Right of Undocumented Alien Children to Basic Education: An Overview of Plyler v. Doe*, by (name redacted)

[117] *See* Mathews v. Diaz, 426 U.S. 67, 84 (1976) (declaring that the federal government's broad plenary power over immigration and naturalization provides the government with leeway to draw distinctions among aliens in providing benefits, so long as the distinctions are not "wholly irrational").

[118] *See* 8 U.S.C. § 1621(d) (defining the term "federal public benefit").

welfare, health, disability, housing, food, unemployment, postsecondary education,[119] and similar benefits. There are, however, exceptions to the aforementioned bars, including exceptions for:

- treatment under Medicaid for emergency medical conditions (other than those related to an organ transplant);
- short-term, in-kind, emergency disaster relief;
- immunizations against immunizable diseases and testing for and treatment of symptoms of communicable diseases; and
- services or assistance (such as soup kitchens, crisis counseling and intervention, and short-term shelters) designated by the Attorney General as: (i) delivering in-kind services at the community level, (ii) providing assistance without individual determinations of each recipient's needs, and (iii) being necessary for the protection of life and safety.[120]

The PRWORA also expressly bars unlawfully present aliens from most state and locally funded benefits. The restrictions on these benefits parallel the restrictions on federal benefits.[121] As such, unauthorized aliens are generally barred from state and local government contracts, licenses, grants, loans, and assistance.[122] However, states and localities are prohibited from denying benefits and/or services for emergency medical care, disaster relief, and immunizations.

Although federal law has established a general framework as to what services may or may not be denied to unlawfully present aliens, courts have generally yet to weigh in on the issue of when localities may make lawful presence a requirement for services to be made available.[123] Some of the services states and localities may attempt to deny to unlawfully present aliens could include bus tours for senior citizens, leadership training programs for adults, rental and mortgage assistance, drug treatment, health care for the uninsured, access to libraries and parks, and use of day labor centers. Courts will have to interpret how broadly the term "local public benefit" should be interpreted and whether denial of particular benefits is consistent with congressional purpose. This interpretation may depend on which services can be construed as encouraging illegal

[119] As discussed previously, the U.S. Supreme Court has held that the children of unlawfully present aliens cannot be denied equal access to public elementary and secondary schools. *See supra* notes 34 to 36 and accompanying text.

[120] In 2001, the Attorney General promulgated regulations under the authority of PRWORA that specified the types of community programs, services, and assistance for which all aliens are eligible under these provisions of PRWORA. *See* U.S. Dep't of Justice, Final Specification of Community Programs Necessary for Protection of Life or Safety Under Welfare Reform Legislation, 66 Fed. Reg. 3613 (Jan. 16, 2001). These include programs involving activities intended to protect life and safety generally, which some commentators have suggested include day labor centers. *See* Margaret Hobbins, *The Day Laborer Debate: Small Town, U.S.A. Takes on Federal Immigration Law Regarding Undocumented Workers*, 6 CONN. PUB. INT. L.J. 111, 136-37 (2006).

[121] 8 U.S.C. § 1621.

[122] 8 U.S.C. § 1621(c) (defining "state or local public benefit").

[123] *See, e.g.*, Roe 1 v. Prince William County, 525 F. Supp. 2d 799 (E.D. Va. 2007) (finding that the possibility of future harms with respect to denial of services was too speculative to confer standing upon plaintiffs). In some cases, state or local actions have been challenged on the grounds that they provide public benefits to unlawfully present aliens in violation of PRWORA. *See, e.g.*, Day v. Bond, 500 F.3d 1127 (10th Cir. 2007) (finding that plaintiffs lacked standing to challenge a Kansas statute allowing certain unlawfully present aliens to receive in-state tuition at public institutions of higher education); Martinez v. Regents of the University of California, 50 Cal. 4th 1277 (2010) (finding that a California statute allowing certain unlawfully present aliens to receive in-state tuition at public institutions of higher education was not preempted); *Karunakarum*, 70 Va. Cir. 208 (plaintiffs alleged that operation of a day labor center constituted provision of public benefits to unlawfully present aliens in violation of federal law).

immigration. While services such as health care for the uninsured or rental assistance arguably fall within the purview of "local public benefit," others such as access to parks or libraries are less clear cut. Implementation of the denial of services to unlawfully present aliens could also raise issues, particularly if state or local personnel would determine alien eligibility for benefits by means other than that provided for in federal law.[124]

Potential Limitations Imposed by Federal Civil Rights Statutes

Some state and local measures restricting the hiring or housing of unauthorized aliens could also potentially conflict with existing federal anti-discrimination laws. Under Title VII of the Civil Rights Act,[125] employers are prohibited from discriminating on the basis of race, color, religion, sex, or national origin.[126] The Supreme Court has ruled that, with respect to Title VII, "the term 'national origin' does not embrace a requirement of United States citizenship."[127] In reaching this result, the Court reasoned that national origin refers to the country in which someone is born or from which his or her ancestors came. Because individuals who share the same national origin do not necessarily share the same citizenship status, the Court determined that Title VII's prohibition on national origin discrimination does not necessarily make it illegal for employers to discriminate on the basis of citizenship status or alienage. Any state or local measure restricting the hiring or employment of unauthorized aliens must comply with Title VII requirements.[128] Thus, for example, a local ordinance that authorized the enforcement of an employment complaint that alleged violations solely on the basis of an employee's race or national origin would not be legally enforceable.

However, it is possible that an ordinance restricting the employment of unauthorized aliens could, when implemented, encourage violations of Title VII in situations where discrimination on the basis of citizenship would have the purpose or effect of discriminating on the basis of national origin. For example, employers who are concerned about inadvertently hiring unlawful workers may become reluctant to hire individuals from certain ethnic backgrounds, and such reluctance could have the unlawful effect of discriminating on the basis of national origin. In other cases, an employer might use a citizenship test as a pretext to disguise what is in fact national origin discrimination. As the Court has noted, "Title VII prohibits discrimination on the basis of citizenship whenever it has the purpose or effect of discriminating on the basis of national

[124] The Systematic Alien Verification for Entitlements (SAVE) system is intended to provide federal, state, and local government agencies with information on immigration status that is necessary to determine noncitizen eligibility for public benefits. Issues could arise if a state or local measure attempted to rely on some means other than SAVE to determine immigration status and/or eligibility.

[125] 42 U.S.C. §§ 2000e *et seq.*

[126] *Id.* at §2000e-2. INA § 274B contains a similar prohibition with respect to employment-based discrimination on the basis of national origin or citizenship. 8 U.S.C. § 1324b.

[127] Espinoza v. Farah Mfg. Co., 414 U.S. 86, 88 (1973).

[128] Title VII contains a preemption provision that states, "Nothing in this title shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title." 42 U.S.C. § 2000e-7. In other words, state laws that conflict with Title VII are preempted.

origin."[129] In an effort to comply with such ordinances, therefore, some employers may engage in practices that could give rise to legal challenges under Title VII.[130]

Like Title VII, the Fair Housing Act (FHA) prohibits discrimination in the sale or rental of housing on a number of grounds, including national origin.[131] In the housing context, as in the employment context, courts have found that citizenship discrimination does not automatically constitute national origin discrimination under the FHA, although they have held that the FHA would prohibit citizenship discrimination if such discrimination had the purpose or effect of discriminating on the basis of national origin.[132] As a result, any state or local measure that authorizes the enforcement of housing complaints based solely on the national origin of a dwelling's inhabitants would be impermissible.[133] Further, if landlords who are attempting to comply with an ordinance barring the tenancy of unlawfully present aliens engage in national origin discrimination, then such actions may give rise to legal challenges under the FHA.

Thus far, only one federal court appears to have directly addressed whether a local ordinance intended to deter the housing of unlawfully present aliens constitutes a violation of the FHA. In *Lozano v. City of Hazleton*,[134] the district court dismissed the plaintiffs' facial challenge, concluding that the plaintiffs had failed to show that there was no set of circumstances under which the ordinance would be valid. The court did, however, leave the door open to a possible "as applied" challenge to the local ordinances in question, noting, "Because the statutes have not yet gone into effect, we cannot know whether they would have the discriminatory effect that plaintiffs claim."[135] The plaintiffs did not appeal.

It is also possible that an employment or housing ordinance aimed at unauthorized aliens could give rise to violations of 42 U.S.C. § 1981. This provision, which was originally enacted as part of the Civil Rights Act of 1870, states that:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Although the Supreme Court has held that an alien is a "person" for purposes of § 1981,[136] the Court has not addressed whether *unauthorized* aliens are encompassed within the statute's

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[129] *Farah*, 414 U.S. at 92.

[130] The possibility of this occurring may, however, be minimized by the fact that IRCA's penalties for discrimination on the basis of citizenship status and national origin are the same as its penalties for knowingly hiring an unauthorized alien. *Compare* 8 U.S.C. § 1324a(e)(4)(A)(i)-(iii) *with* 8 U.S.C. § 1324b(g)(2)(B)(iv)(I)-(III).

[131] 42 U.S.C. § 3604(a).

[132] *See, e.g.*, Espinoza v. Hillwood Square Mut. Asso., 522 F. Supp. 559 (D. Va. 1981).

[133] Like Title VII, the FHA contains a preemption provision that states, "Nothing in this title shall be construed to invalidate or limit any law of a State or political subdivision of a State, or of any other jurisdiction in which this title shall be effective, that grants, guarantees, or protects the same rights as are granted by this title; but any law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under this title shall to that extent be invalid." 42 U.S.C. § 3615.

[134] *Lozano I*, 496 F. Supp. 2d 477.

[135] *Id.* at 546.

[136] *Takahashi*, 334 U.S. at 419.

definition of "person." The Court, however, has held that unauthorized aliens are "persons" in the context of the Fourteenth Amendment,[137] and, therefore, might be inclined to make a similar finding with respect to the definition of "person" under § 1981. If unauthorized aliens are protected from discrimination by governmental actors under the statute, then states or localities that pass employment or housing ordinances aimed at unauthorized aliens may be liable for violations of § 1981. Indeed, a federal district court held in the *Lozano* case that a local ordinance intended to deter the employment and housing of unauthorized aliens was a violation of § 1981.[138] The Third Circuit did not address this issue on appeal.

In addition, although the Supreme Court has held that § 1981 prohibits alienage discrimination by governmental actors,[139] the Court has never addressed the question of whether § 1981 bars alienage discrimination by private actors. Until 1991, when Congress amended § 1981, the federal courts of appeals that had considered the issue were split with regard to this question. Since the amendments to § 1981, some courts have confirmed that the statute applies to private discrimination against aliens.[140] As a result, it is possible, but not certain, that a court might find that an employer or landlord who, in complying with a state or local measure, refused to employ or rent to an unauthorized alien was in violation of § 1981.

Recent Developments in Arizona

The State of Arizona has enacted several measures that place it in the vanguard of recent attempts to test the legal limits of state and local measures intended to deter unauthorized immigration. The Legal Arizona Workers Act of 2007 would, among other things, require employers to use E-Verify to check the work authorization of employees and suspend or revoke the licenses of employers found to have hired unauthorized aliens.[141] It has been challenged by several parties on various grounds, including that it is preempted by federal law and deprives employers of due process. Its E-Verify and licensing provisions, in particular, have been upheld by the district court and the U.S. Court of Appeals for the Ninth Circuit.[142] The plaintiffs appealed to the Supreme Court, which granted certiorari. Oral arguments in the case were heard on December 8, 2010, on the issue of whether these provisions are expressly or impliedly preempted.[143]

More recently, Arizona has arguably gone further in seeking to deter the presence of unauthorized aliens by enacting a measure in April 2010 that is commonly referred to as S.B. 1070. In addition to requiring state and local police to facilitate the detection of unauthorized aliens in their daily

[137] *Plyler*, 457 U.S. at 210.

[138] *Lozano I*, 496 F. Supp. 2d. at 547-48.

[139] *Takahashi*, 334 U.S. at 419.

[140] *See, e.g.*, Anderson v. Conboy, 156 F.3d 167, 169 (2nd Cir. 1998).

[141] Relatedly, in 2004, Arizona voters enacted Proposition 200, which (1) required individuals to produce proof of citizenship before registering to vote or applying for public benefits; (2) made it a misdemeanor for public officials to fail to report persons who apply for benefits who are unable to produce documentation of citizenship; and (3) created a private right of action for Arizona citizens who believe public officials have given benefits to undocumented persons. The Ninth Circuit recently affirmed a lower court's holding that Proposition 200's provisions regarding voter identification are unconstitutional under the Elections Clause of the U.S. Constitution. *See* Gonzalez v. Arizona, No. 08-17094, No. 08-17115, 2010 U.S. App. LEXIS 22071 (9th Cir. 2010). The benefits provisions had been separately challenged. *See* Friendly House v. Napolitano, 419 F.3d 930 (9th Cir. 2007) (finding that plaintiffs lacked standing).

[142] *Chicanos Por La Causa*, 558 F.3d 856, *aff'g Ariz. Contractors Assn.*, 534 F. Supp. 2d 1036.

[143] *See supra* note 7.

enforcement activities, S.B. 1070 would also criminalize certain conduct that may help bring about the presence of unlawfully present aliens within the state, including: willful failure to complete or carry an alien registration document; certain activities relating to the transport or harboring of unlawfully present aliens; and the application for, solicitation of, or performance of work within the state by unauthorized aliens.[144] A federal district court has enjoined enforcement of many provisions of S.B. 1070—including those requiring state and local law enforcement to attempt to ascertain the immigration status of certain persons within their custody reasonably suspected to be unlawfully present—in response to the federal government's suit alleging that these provisions are preempted.[145] A decision on the merits in this suit is still pending, as is the State of Arizona's appeal to the Ninth Circuit of the district court's grant of a preliminary injunction barring enforcement of many provisions of S.B. 1070. Private parties have also filed suit challenging S.B. 1070, including on the grounds that it would "cause widespread racial profiling."[146] For more on S.B. 1070 see CRS Report R41221, *State Efforts to Deter Unauthorized Aliens: Legal Analysis of Arizona's S.B. 1070*, by (name redacted), (name redacte d), and (name redacted).

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[144] The text of S.B. 1070, as amended by H.B. 2162, can be viewed at http://www.azleg.gov/alispdfs/council/SB1070-HB2162.PDF.

[145] United States v. Arizona, 703 F. Supp. 2d 980 (D. Ariz. 2010).

[146] *See, e.g.*, Friendly House v. Whiting, No. CV 10-1061, Complaint (D. Ariz., filed May 17, 2010), at 6, *available at* http://www.aclu.org/files/assets/az_sb1070_complaint_20100517.pdf.