University of Miami Law Review

Volume 66
Number 3 *Volume 66 Number 3 (Spring 2012)*

Article 8

4-1-2012

The Right U.S. Immigration Enforcement Solution: "Make Haste Slowly"

Michael J. Larson

The Right U.S. Immigration Enforcement Solution: "Make Haste Slowly"*

MICHAEL J. LARSON[a1]

---

* *See* Victor Davis Hansen, *Beware of 'Comprehensive' Anything*, TOWNHALL, http://townhall.com/columnists/victordavishanson/2010/02/18/beware_of_comprehensive_anything (last visited November 1, 2011).

[a1] J.D. Candidate 2012, University of Miami School of Law; B.A. & B.S. 2005, California State University, Fresno. The author would like to thank his family and friends for their invaluable insight and thoughtful feedback on earlier drafts of this article.

INTRODUCTION

The national immigration debate has hit a wall. Despite nearly universal agreement that something must be done to address the violent and porous Mexican border and the estimated 10.8 million illegal immigrants that reside in the United States,[1] neither political party has been able to muster the votes needed to achieve coveted "comprehensive" immigration reform. Promises of sweeping top-to-bottom change in immigration policy ultimately disintegrate, as the issue of amnesty versus deportation derails any reform effort.[2]

Due to the vacuum created by a lack of a federal leadership, states have begun to enter the immigration arena with aggressive legislation aimed at reducing the presence of illegal immigrants.[3] Initially, this state legislation took the form of civil "employer sanction" laws directed at employers who knowingly or intentionally employed undocumented workers.[4] But recently, Arizona paved the way for an unprecedented expansion of state immigration law when it passed Senate Bill 1070 ("S.B. 1070"), which essentially makes it a state crime to violate existing federal immigration statutes.[5]

Despite Washington D.C.'s failure to pass comprehensive immigration reform, the Obama White House has not ignored immigration. Rather, the administration has sought to *selectively* strengthen federal enforcement, concentrating its efforts on identifying and removing "dangerous" aliens and targeting employers that hire illegal immigrants. For example, in July 2009, the Department of Homeland Security (DHS) modified the "287(g) program," which authorizes federal agencies to enter into Memoranda of Agreement with state and local police to assist federal immigration authorities in the "carrying out of immigration enforcement." The modifications to 287(g) reflect the new priority enforcement scheme.[6] Expansion of other DHS enforcement tools like Secure Communities,[7] which also targets "criminal aliens," has allowed

---

1. *Estimates of the Unauthorized Immigrant Population Residing in the United States*, DEP'T OF HOMELAND SEC. (Jan. 2009), http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2009.pdf.

2. *See* Robert Pear & Carl Hulse, *Immigration Bill Fails to Survive Senate Vote*, N.Y. TIMES (June 28, 2007), http://www.nytimes.com/2007/06/28/washington/28cnd-immig.html.

3. Julia Preston, *Political Battle on Immigration Shifts to States*, N.Y. TIMES (Dec. 31, 2010), http://www.nytimes.com/2011/01/01/us/01immig.html; *see infra* Part II.

4. *Id; see, e.g.*, ARIZ. REV. STAT. ANN. § 23-211 to 23-214 (2011).

5. *See* S.B. 1078, 2010 Ariz. Sess. Laws 0113, amended by 2010 Ariz. Sess. Laws 0211 (H.B. 2162, 49th Leg., 2d Sess. (Ariz. 2010)).

6. *See* Jon D. Feere, *Memorandum: The Obama Administration's 287(g): An Analysis of the New MOA*, CENTER FOR IMMIGR. STUD. (Oct. 2009), http://www.cis.org/articles/2009/undermining287g.pdf.

7. *See Secure Communities*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, http://www.ice.gov/

Immigration and Customs Enforcement (ICE) to bring deportation levels to new highs.[8] DHS has also increased its number of employer audits, resulting in record fines imposed on companies that hire illegal immigrants.[9] The Obama administration has even expanded the E-Verify system—an Internet-based tool that allows an employer to determine employee work eligibility in the United States—by implementing a George W. Bush Executive Order that mandates all federal contractors use the system.[10]

Not included in the current federal immigration enforcement model: any delegation of immigration enforcement to the states. Hence, the Obama Justice Department is challenging the recent tide of state immigration legislation, joining in a suit against Arizona's employer-sanction law,[11] and directly suing Arizona over its criminal enforcement measure, S.B. 1070.[12] In each instance, the Justice Department asserts that federal law preempts state immigration laws, because the federal government has "preeminent authority" in immigration enforcement.[13]

The problem with the Obama administration's immigration enforcement policy is that it substitutes Congress' priorities and strategies for immigration enforcement with its own. An exclusively federal enforcement scheme or one tailored to target *only* criminal aliens has no

---

secure_communities/ (last visited Nov. 1, 2011). Secure Communities is a joint venture by ICE, DOJ, and local law enforcement that uses DOJ and ICE records and biometric technology to identify and process criminal aliens who have been taken into custody by local law enforcement. *Id.* "If fingerprints match DHS records, ICE determines if immigration enforcement action is required, considering the immigration status of the alien, the severity of the crime and the alien's criminal history." *Id.*

8. *See* Miriam Jordan, *Deportations Hit Record Number*, WALL ST. J. (Oct. 7, 2010), http://online.wsj.com/article/SB10001424052748704689804575536301580024586.html; *see also* Peter Slevin, *Illegal Immigrant Deportations Up Under Obama*, CBSNEWS (July 26, 2010), http://www.cbsnews.com/stories/2010/07/26/politics/washingtonpost/main6715205.shtm (reporting a record 392,862 illegal immigrants deported in fiscal year 2010, nearly a ten percent increase from 2008 and nearly 25 percent greater than the 2007 figure).

9. *See* Jordan, *supra* note 8 (reporting in fiscal year 2010, DHS scrutinized the employment records of more than 2,200 companies, up from 1,400 the previous year.)

10. *See* Cam Simpson, *Worker Status Checks to Start: Federal Contractors Required to Use Electronic System to Verify Employees' Eligibility*, WALL ST. J. (Sept. 8, 2009), http://online.wsj.com/article/SB125236773673291025.html. DHS Secretary Janet Napolitano, who signed Arizona's mandatory E-Verify provision into law as Governor of the state, describes E-Verify "a[s] [a] smart, simple and effective tool that reflects [DHS's] continued commitment to working with employers to maintain a legal workforce." *Secretary Napolitano Strengthens Employment Verification with Administration's Commitment to E-Verify*, DEP'T OF HOMELAND SEC. (July 8, 2009), http://www.dhs.gov/ynews/releases/pr_1247063976814.shtm.

11. *See* ARIZ. REV. STAT. ANN. § 23-211 to 23-214 (2011).

12. S.B. 1070, 2010 Ariz. Sess. Laws 0113, amended by 2010 Ariz. Sess. Laws 0211 (H.B. 2162, 49th Leg., 2d Sess. (Ariz. 2010)).

13. *See* United States v. Arizona, 703 F. Supp. 2d 980 (D. Ariz. 2010); Chicanos Por La Causa, Inc. v. Napolitano, 558 F.3d 856, 860 (9th Cir. 2009) *aff'd sub nom.* Chamber of Commerce of the U.S. v. Whiting, 131 S. Ct. 1968 (2011).

support in federal immigration law. Yet the Executive branch continues to distort traditional federal preemption analysis asserting that it is their priorities and strategies that are determinative, not Congress'. Making matters worse, President Obama continues to promise he will pursue comprehensive immigration reform,[14] a process history suggests will be plagued by months of debate and appeasement of special interests resulting in legislation that "look[s] nothing like what was intended."[15] To stem illegal immigration, the Obama White House must abandon its exclusively federal and selective enforcement model.

The long-term answer to illegal immigration is a uniform federal policy centered on intense Federal, State, and local enforcement. An attrition through enforcement model, characterized by (1) greater enforcement of current federal immigration law; (2) cooperative partnerships with state and federal agencies; and (3) vigorous enforcement of state immigration laws that discourage illegal immigrant settlement, represents a realistic alternative strategy to border fences, mass deportation or amnesty, or a reset strategy of comprehensive immigration reform. This scheme stands on solid legal footing, as Congress has endorsed a joint enforcement strategy, not an exclusively federal model where states are forced to rely on a detached bureaucracy to deal with their largely local problems.

Part I of this note, to provide a backdrop for the contemporary debate over state enforcement of immigration law, examines the evolution of federal immigration law with a focus on employer sanctions and the history of federal and state cooperation in immigration enforcement. It also presents recent attempts by the Obama administration to undermine such collaboration with its new selective enforcement model. Part II discusses the expansion of immigration laws at the state level, with specific regard to Arizona's "employer sanction" law and S.B. 1070. Part III describes and analyzes the ongoing legal battles surrounding Arizona's influential immigration laws, and argues that federal immigration laws do not expressly or impliedly preempt such state laws. Finally, Part IV discusses the fantasy of comprehensive immigration reform, and proposes that the right solution to the illegal immigration problem is an attrition model focused on greater federal enforcement of current law, unfettered state and federal cooperation, and the enforcement of state

14. Ashley Southall, *Obama Vows to Push Immigration Change*, N.Y. TIMES (Oct. 25, 2010), http://thecaucus.blogs.nytimes.com/2010/10/25/in-appeal-to-hispanics-obama-promises-to-push-immigration-reform/.

15. Victor Davis Hanson, *Beware of 'Comprehensive' Anything*, TOWNHALL, http://townhall.com/columnists/VictorDavisHanson/2010/02/18/beware_of_comprehensive_anything/page/full/ (last visited Nov. 1, 2011).

immigration laws—all of which will discourage additional illegal entrants and increase self-deportation.

I. THE EVOLUTION OF FEDERAL IMMIGRATION LAW

A. *Immigration Reform and Control Act of 1986*

In 1986, after nearly ten years of debate by Congress and the recommendations of several special commissions and task forces, President Reagan signed the Immigration Reform and Control Act ("IRCA") into law.[16] IRCA prohibits "knowingly or intentionally hiring or continuing to employ" an illegal immigrant.[17] It was the first federal employer sanctions law aimed to "reduce the demand for illegal alien labor."[18] Although the law contained several enforcement tools, President Reagan believed "the employer sanctions program [was] the keystone and major element" of the legislation.[19] With this crucial component, Congress hoped to reduce the "pull" forces that U.S. employers exerted on the international labor market.[20]

One of IRCA's well-known enforcement mechanisms is the I-9 system, which provides a means for employers to verify the identity and employment authorization of employees.[21] It requires employers to examine and verify the authenticity of certain identity documents (such as a passport or social security card) provided by new employees.[22] If the employer is satisfied with the documentation, it must fill out a "Form I-9" attesting to the employee's eligibility to work.[23]

Beyond the I-9 system, IRCA uses employer sanctions as further means to reduce the employment magnet that attracts illegal aliens to the U.S.[24] An employer who knowingly hires an illegal immigrant can face civil fines up to $10,000.[25] If an employer fails to verify the eligibility of an employee, it can be fined anywhere from $100 to $1,000 for each

16. Pub. L. No. 99-603, 100 Stat. 3359 (codified at 8 U.S.C. § 1324a–1324b).

17. Chicanos Por La Causa, Inc. v. Napolitano, 558 F.3d 856, 860 (9th Cir. 2009) *aff'd sub nom.* Chamber of Commerce of the U.S. v. Whiting, 131 S. Ct. 1968 (2011); 8 U.S.C. § 1324a(a).

18. Barry R. Chiswick, *Illegal Immigration and Immigration Control, in* U.S. IMMIGRATION POLICY REFORM IN THE 1980s 45, 45 (Francisco L. Rivera-Batiz et al. eds., 1991).

19. *Statement on Signing the Immigration Reform and Control Act of 1986*, RONALD REAGAN PRESIDENTIAL LIBR., http://www.reagan.utexas.edu/archives/speeches/1986/110686b.htm (last visited Oct. 15, 2011).

20. LINA NEWTON, ILLEGAL, ALIEN, OR IMMIGRANT: THE POLITICS OF IMMIGRATION Reform 47 (2008); *see* Michael D. Hoefer, *Background of U.S. Immigration Policy Reform, in* U.S. IMMIGRATION POLICY REFORM IN THE 1980s, *supra* note 18, at 20.

21. *See* 8 U.S.C. § 1324a(b).

22. *Id.*

23. *Id.*

24. Michael D. Hoefer, *Background of U.S. Immigration Policy Reform, in* U.S. IMMIGRATION POLICY REFORM IN THE 1980s; *see supra* note 18, at 20.

25. 8 U.S.C. § 1324a(e)(4).

employee it failed to validate.[26] The most serious offenders, employers engaging in a "pattern or practice" of hiring illegal aliens, face a criminal penalty in the form of fines up to $3,000 per unauthorized alien hired and up to six months in prison.[27]

IRCA does contain an express preemption provision invalidating "any state or local law imposing civil or criminal sanctions (*other than through licensing and similar laws*) upon those who employ, recruit or refer for a fee for employment, unauthorized aliens."[28] But the legislative history of IRCA reveals little about the intended scope of the savings clause.[29] Seizing this apparent ambiguity, several state and local governments around the country have passed their own employer sanction provisions.[30]

B. *Illegal Immigration Reform and Immigrant Responsibility Act of 1996*

Despite the groundbreaking provisions of IRCA, the number of illegal immigrants coming and staying in the United States continued to grow rapidly. According to DHS estimates, between 1985 and 1989, 1.2 million illegal immigrants arrived in the United States.[31] That number grew to 2.1 million between 1990 and 1994.[32] By 1996, the number of undocumented aliens in the U.S. stood at 5 million, and was growing by nearly 500,000 each year.[33] Congress, then in the hands of a Republican majority, decided to take up the issue of illegal immigration once again.[34]

---

26. § 1324a(e)(5).

27. § 1324a(f)(1).

28. § 1324a(h)(2) (emphasis added).

29. *See, e.g.*, 8 U.S.C. § 1324a; H.R. Rep. 99-682(I), at 56–58, *reprinted in* 1986 U.S.C.C.A.N. 5649, 5660–62. The House Report specifically exempts two types of state actions: "Lawful state or local processes concerning the suspension, revocation or refusal to reissue a license to any person who has been found to have violated the sanctions provisions in [IRCA]; [and] Licensing or 'fitness to do business laws', such as state farm labor contractor or forestry laws, which specifically require [an employer] to refrain from hiring, recruiting or referring undocumented aliens." *Id.*

30. *See Immigrant Policy Project: E-Verify FAQ*, NAT'L COUNC. OF ST. LEGIS., http://www.ncsl.org/IssuesResearch/Immigration/ImmigrantPolicyProjectEVerifyFAQ/tabid/13127/Default.aspx#table (last visited Nov. 1, 2011) (reporting that seventeen states require the use of E-Verify for public and/or private employers); *see also infra* Part II.

31. Michael Hoefer, et al., *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2005*, DEP'T OF HOMELAND SEC., *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/ILL_PE_2005.pdf.

32. *Id.*

33. Steven A. Camarota, *New INS Report: 1986 Amnesty Increased Illegal Immigration*, CENTER FOR IMMIGR. STUDIES (Oct. 12, 2000), http://www.cis.org/articles/2000/ins1986amnesty.html.

34. NEWTON, *supra* note 20, at 53. When IRCA was passed in 1986, Congress was controlled by Democrats, *id.* at 45.

Congress believed that compliance with the employee verification portions of IRCA needed to be less burdensome for employers.[35] However, IRCA's failure may have been due to a lack of enforcement. Of the $850 million allocated to the Immigration and Naturalization Service ("INS") under IRCA for enforcement (a 70 percent increase over its previous budget), most went to the Border Patrol and not to the enforcement of sanctions.[36] By design, Congress hoped that employers would "regulate themselves and only repeat offenders would face serious fines."[37]

Nonetheless, in the spring of 1996, to address the shortcomings of IRCA, Congress passed (by a wide margin)[38] the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA").[39] Most relevant to this discussion, IIRIRA directed the Attorney General (now the Secretary of Homeland Security) to create three pilot programs aimed at improving the I-9 employee eligibility system.[40] One of the programs, the Basic Pilot Program, was initially only made available to a handful of states with high numbers of illegal immigrants.[41] However, in 2003, Congress reauthorized the Basic Pilot Program and expanded it to all fifty states.[42] At that time, the other two experimental pilot systems were discontinued.[43] Since 2003, the Basic Pilot Program has been extended several times[44] and in 2007 it was re-named "E-Verify."[45]

1. E-VERIFY

E-Verify is not an I-9 system replacement (at least not yet); all employers still must use the I-9 system for new employees, regardless of whether they choose to use E-Verify.[46] E-Verify allows an employer,

35. Juan P. Osuna, *Breaking New Ground: The 1996 Immigration Act's Provisions on Work Verification and Employer Sanctions*, 11 GEO. IMMIGR. L.J. 329, 335 (1997).

36. *Id.* at 52.

37. *Id.*

38. *Id.* at 59 (the IIRIRA passed the House "with a vote of 333 to 87" and the Senate "by 97 to 3.").

39. Illegal Immigration Reform and Immigrant Responsibility Act [hereinafter IIRIRA], Pub. L. No. 104–208, 110 Stat. 2009 (codified in various sections of 8 and 18 U.S.C.). The final act was passed on September 30, 1996, included as Division C of the 1997 Omnibus Appropriations Act; *see* NEWTON, *supra* note 20, at 59.

40. IIRIRA §§ 401–405.

41. *See* Lindsay L. Chichester & Gregory P. Adams, *The State of E-Verify: What Every Employer Should Know*, FED. LAW., July 2009, at 50, 50.

42. *See* Basic Pilot Program Extension and Expansion Act of 2003, Pub.L. No. 108–156, §§ 2, 3, 117 Stat. 1944.

43. Lozano v. City of Hazleton, 620 F.3d 170, 200 (3d Cir. 2010).

44. *See* Chicanos Por La Causa, Inc. v. Napolitano, 558 F.3d 856, 861–62 (9th Cir. 2009).

45. *E-Verify: History and Milestones*, DEP'T OF HOMELAND SEC., http://www.uscis.gov/portal/site (last visited Nov. 1, 2011).

46. *Companion to Form I-9*, USCIS, http://www.uscis.gov (navigate to the URL and follow

through a free Internet-based system, "to actually authenticate applicable [identity] documents rather than merely visually scan them for genuineness."[47] After a new employee provides an employer his or her identify information on the I-9 form, the employer simply enters their information into an online form. That data is submitted to DHS for comparison to DHS and Social Security Administration ("SSA") databases to check the employee's eligibility to work.[48]

If the information submitted is verified, the employer receives an electronic confirmation of the newly hired employee's eligibility.[49] However, if DHS cannot confirm the worker's eligibility the employer receives a "tentative nonconfirmation" (often due to mismatch in the Social Security Number provided by the worker and the person's name in SSA's database).[50] If a tentative nonconfirmation is received, the employer must notify the employee, who can then contest its findings.[51] If the employee does not contest the tentative nonconfirmation in eight business days, the tentative findings become final and the employee must be terminated or the employer is subject to sanctions.[52]

Initially, use of E-Verify was voluntary. In fact, Congress "specifically prohibited the Secretary of Homeland Security from requiring" participation by any person or entity.[53] In 2008, however, the Bush administration issued amended Executive Order 13465,[54] mandating all federal departments and agencies require their contractors to use E-Verify.[55] Once in office, President Obama delayed the regulation's effective date on three occasions because of a lawsuit filed by the U.S. Chamber of Commerce.[56] Finally, on September 8, 2009, after the lawsuit was

---

this trail: click on E-Verify, then What is E-Verify?, followed by Companion to Form I-9) (last visited Jan. 13, 2011).

47. *Lozano*, 620 F.3d at 200.

48. *See* Companion to Form I-9, *supra* note 46; *Instant Verification of Work Authorization*, USCIS, http://www.uscis.gov (navigate to URL and follow this trail: click on E-Verify, then What is E-Verify?, followed by Instant Verification of Work Authorization) (last visited Oct. 13, 2011); IIRIRA § 403(a)(3).

49. *See* IIRIRA § 403(a)(4).

50. *See id.*; Chichester & Adams, *supra* note 41, at 51.

51. *See* IIRIRA § 403(a)(4).

52. *See* IIRIRA § 403(a)(4); Naomi Barrowclough, *E-Verify: Long-Awaited 'Magic Bullet' or Weak Attempt to Substitute Technology for Comprehensive Reform*, 62 RUTGERS L. REV. 791, 797 (2010).

53. *Lozano*, 620 F.3d at 201.

54. On June 6, 2008, President Bush signed Executive Order 13,465, which further amended Executive Order 12,989. *See* Exec. Order No. 13,465, 73 Fed. Reg. 33,285 (2008).

55. *Frequently Asked Questions: Federal Contractors and E-Verify*, USCIS, http://www.uscis.gov/portal/site/uscis (last visited Oct. 12, 2011).

56. *See* Chichester & Adams, *supra* note 41, at 52.

dismissed,[57] the regulation was allowed to take effect.[58] It was considered the first "significant expansion" of E-Verify.[59]

2. 287(G) PROGRAM

Another important component of IIRIRA was the addition of INA § 287(g),[60] a program that allows state and local law enforcement agencies (hereinafter "LLEAs") to assist federal immigration authorities in immigration enforcement.[61] The "287(g) program," as it is called, was the first federally sanctioned cooperation effort with LLEAs in the enforcement of federal immigration statutes.[62] Specifically, 287(g) authorizes the "secretary of DHS to enter into agreements with state and local law enforcement agencies, permitting designated officers to perform immigration law enforcement functions, provided that the local law enforcement officers receive appropriate training and function under the supervision of ICE officers."[63] Law enforcement functions, under 287(g), can include the "investigation, apprehension, or detention of aliens in the United States."[64]

LLEAs derive their authority to enforce immigration laws under 287(g) from a Memorandum of Agreement ("MOA") with ICE.[65] These MOAs are written agreements that define the scope and limitations of the authority to be designated" to the LLEA.[66] Although the details of a MOA can be negotiated between ICE and the LLEA, most "confirm the inherent authority of the [LLEAs] to question, arrest, and detain suspected criminal immigration offenders."[67] The basic provisions of a MOA are outlined in a DHS MOA and Standard Operating Procedures

---

57. *See* Chamber of Commerce v. Napalitano, 648 F. Supp. 2d 726 (D. Md. 2009).

58. *Exemptions and Exceptions*, USCIS, http://www.uscis.gov/portal/site/uscis/ (last visited Oct. 11, 2011); *see* 73 Fed. Reg. 67,651 (last visited Nov. 14, 2008).

59. Cam Simpson, *Worker Status Checks to Start: Federal Contractors Required to Use Electronic System to Verify Employees' Eligibility*, WALL ST. J. (Sept. 8, 2009), http://online.wsj.com/article/SB125236773673291025.html.

60. 8 U.S.C. § 1357(g)(1)–(9) (2006).

61. CHARLES GORDON, ET AL., IMMIGR. LAW & PROC. 8-108 Detention of Noncitizens § 108.02 (2011).

62. *Id.*

63. *Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, http://www.ice.gov/news/library/factsheets/287g.htm (last visited Oct. 15, 2011).

64. 8 U.S.C. § 1357(g)(1).

65. *See* GORDON, *supra* note 62.

66. *Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, http://www.ice.gov/news/library/factsheets/287g.htm (last visited Nov. 15, 2011).

67. Nicholas D. Michaud, comment, *From 287(g) to SB 1070: The Decline of the Federal Immigration Partnership and the Rise of State-Level Immigration Enforcement*, 52 ARIZ. L. REV. 1083, 1094 (2010).

template.[68] Before a LLEA officer can participate in the 287(g) program they must complete a background check, have two years' experience in their current position, be free of pending disciplinary actions, and complete a four-week training program run by ICE.[69]

Curiously, the federal government did not enter into any 287(g) agreements with LLEAs until 2002.[70] After 2006, however, "increased interest in interior immigration enforcement" by the Bush administration and "more dedicated funding for federal 287(g) program efforts brought substantial growth to the program."[71] As of this writing, 69 LLEAs in 24 states have active MOAs with ICE.[72]

The 287(g) program, from a number of prospectives, has been a success. DHS officials view the 287(g) program as a "force multiplier" for ICE.[73] From 2007–2008, "more than 120,000 suspected illegal immigrants were identified through the program, and most ended up in deportation proceedings.[74] In fiscal year 2008, "287(g) officers identified 33,831 aliens who were removed from the United States by ICE . . . , which represents 9.5% of all ICE removals" during that period.[75] In Arizona, 287(g) officers from Maricopa County helped ICE deport more than 26,000 immigrants, representing nearly a quarter of all 287(g) deportations.[76]

The 287(g) program is not without critics. Many on the political Left assert that 287(g) encourages racial profiling and leads to civil rights violations. In an open letter to President Obama in 2009, hundreds of civil-rights and immigrant-rights groups urged the President to end the program, saying that it was being used "to target communities of color, including disproportionate numbers of Latinos for arrest," particu-

---

68. *See* Feere, *supra* note 6.

69. *Id.*

70. *The Performance of 287(g) Agreements*, DEP'T OF HOMELAND SEC. OF?CE OF INSPECTOR GEN (Mar. 2010), http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_10-63_Mar10.pdf. (A report to the Secretary of DHS on the performance of 287(g) agreements mandated by the "Consolidated Security, Disaster Assistance, and Continuing Appropriations Act of 2009, and accompanying House Report 110–862.").

71. *Id.*; *see* Miriam Jordan, *New Curbs Set on Arrests of Illegal Immigrants: Revamped 287g Program Will Target Only Serious Crimes, not Minor Infractions; Sheriff Arpaio Refuses to Ease Up*, WALL ST. J. (July 11, 2009), http://online.wsj.com/article/SB124726259338825191.html.

72. *Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. Immigr. & Customs Enforcement, http://www.ice.gov/news/library/fact sheets/287g.htm (last visited Nov. 1, 2011).

73. *Performance of 287(g) Agreements*, *supra* note 70.

74. Jordan, *supra* note 71.

75. *Performance of 287(g) Agreements*, *supra* note 70.

76. Associated Press, *Pre-Arizona Immigration Law, Arpaio Helped Deport 26K Illegals*, FOXNEWS (July 28, 2010), http://www.foxnews.com/politics/2010/07/28/pre-arizona-immigration-law-arpaio-helped-deport-g-illegals/.

larly through pretexual traffic stops.[77] DHS's own Inspector General reported in March 2009 that the 287(g) program was "poorly supervised" and provided insufficient civil rights training to LLEAs."[78] Other critics suggest that 287(g) has a "chilling effect" on cooperation from immigrant communities, as aliens fear deportation if they initiate contact with LLEAs.[79]

Supporters of 287(g) claim the program is a successful tool to detain and remove illegal immigrants. They contend claims of racial profiling and fears over a "chilling effect" due to 287(g) enforcement are overblown.[80] Additionally, proponents argue that the program is a logical expansion of immigration because "[i]t is much more likely that a local police officer, rather than a federal officer, will come into contact" with an immigration law offender.[81]

C. *Additional Encouragement of Federal, State and Local Cooperation*

Other examples of Congress' intention to give the states a greater role in immigration enforcement, beyond 287(g), include 8 U.S.C. § 1644, passed as part of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996.[82] Section 1644 provides: "Notwithstanding any other provision of Federal, State, or local law, no State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from [ICE] information regarding the immigration status, lawful or unlawful, of an alien in the United States."[83]

To stress the importance of local and state involvement in determining an individual's immigration status, Congress also passed 8 U.S.C. § 1373.[84] The statute forbids any restriction of communications between federal, state, and local law enforcement officers regarding a person's citizenship or immigration status.[85] Another subsection of § 1373 requires federal immigration authorities to "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 . . . by

77. *Letter to President Obama Demanding an End to the 287(g) Program*, DETENTION WATCH (Aug. 25, 2009), http://www.detentionwatchnetwork.org/node/2458.

78. Associated Press, *supra* note 76; *see Performance of 287(g) Agreements*, *supra* note 70.

79. Michaud, *supra* note 67, at 1100–01.

80. *Id.*

81. Feere, *supra* note 6.

82. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified in various sections of 8, 25, and 42 U.S.C.).

83. 8 U.S.C. § 1644 (2006).

84. Enacted as part of IIRIRA.

85. *See* 8 U.S.C. §1373(a)–(b).

providing the requested verification or status information."[86]

Moreover, when Congress passed IIRIRA, it made clear that states should, even without an explicit agreement with the federal government (i.e. a 287(g) MOA), be free to collaborate with ICE. Specifically, section 1357(g)(10) provides that an agreement is not needed for LLEAs "(A) to communicate with the [DHS/ICE] regarding the immigration status of any individual, including reporting knowledge that a particular alien is not lawfully present in the United States; or (B) otherwise to cooperate with the [DHS/ICE] in the *identification, apprehension, detention, or removal of aliens* not lawfully present in the United States.[87] All these federal measures indicate Congress envisioned a cooperative partnership between federal immigration agencies and LLEAs to curb illegal immigration—not a purely federal enforcement scheme or a scheme that targets *only* criminal aliens.

D. *Our Current Federal Immigration Enforcement Scheme: Federal Exclusivity and "Dangerous Criminal Aliens"*

In July 2009, the Obama administration announced that it was expanding the 287(g) program by entering into eleven new MOAs with LLEAs.[88] At first glance, the expansion announcement seemed to be an unexpected blow to the program's critics. However, a closer looks reveals that the program's growth was accompanied by a fundamental restructuring that removed much of the program's teeth.[89] Secretary Napolitano said the "reforms" would "support[ ] local efforts to protect public safety by giving law enforcement the tools to identify and remove dangerous criminal aliens" and that "promote consistency across the board to ensure that all of our state and local law enforcement partners are using the same standards in implementing the 287(g) program."[90]

To implement the "reforms" to the 287(g) program, DHS revised the MOA template, which all current and future participant LLEAs must

---

86. *See* § 1373(c).

87. 8 U.S.C. § 1357(g)(10) (2006) (emphasis added). Section 1357(g)(10) states "*[n]othing* in this subsection shall be construed to require an agreement under this subsection in order for any officer or employee of a State or political subdivision of a State" to cooperate or communicate with DHS regarding immigration enforcement ("identification, apprehension, detention, or removal" of unlawful aliens). *Id.* (emphasis added).

88. *Secretary Napolitano Announces New Agreement for State and Local Immigration Enforcement Partnerships & Adds 11 New Agreements*, DEP'T OF HOMELAND SEC. (July 10, 2009), http://www.dhs.gov/ynews/releases/pr_1247246453625.shtm.

89. *Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, http://www.ice.gov/news/library/factsheets/287g.htm (last visited Nov. 15, 2011).

90. *See* Secretary Napolitano, *supra* note 88.

sign.[91] The new 287(g) template stresses the targeting of criminal aliens that "pose the greatest risk to public safety and community."[92] It requires that LLEAs "pursue all criminal charges that originally caused the offender to be taken into custody" before ICE will begin a deportation proceeding, and mandates more stringent background checks for LLEA officials that wish to participate in the program.[93] Essentially, the program's purpose has been redefined to suggest that the 287(g) program was designed to facilitate the "removal of criminal aliens."[94]

The new template prioritizes 287(g) enforcement efforts based on a three-tiered model. "Level 1," or top-priority aliens, are those "who have been convicted of or arrested for major drug offenses and/or violent offenses such as murder, manslaughter, rape, robbery, and kidnapping," and "Level 2" aliens are those "who have been convicted of or arrested for minor drug offenses and/or mainly property offenses such as burglary, larceny, fraud, and money laundering."[95] The lowest level priority aliens consist of those "who have been convicted or arrested for other offenses."[96] As ICE has ultimate managerial control over each 287(g) program, it appears that DHS will force LLEAs to focus on Level One and Two "criminal aliens," while rejecting the deportation of "low priority" illegal immigrants.[97]

In addition to the new "dangerous criminal alien" prioritization scheme, the new template also adds the following policy:

> ICE will assume custody of an alien 1) who has been convicted of a State, local or Federal offense only after being informed by the alien's custodian that such alien has concluded service of any sentence of incarceration; 2) who has prior criminal convictions and when immigration detention is required by statute; and 3) when the ICE Detention and Removal Field Office Director or his designee decides on a case-by-case basis to assume custody of an alien who does not meet the above criteria.[98]

In order for ICE to initiate a removal proceeding of an alien, the alien must first be convicted of a crime and have a prior criminal conviction,

---

91. *See Dep't Homeland Sec., Immigration & Customs Enforcement, Template: Revised Memorandum of Agreement*, IMMIGR. & CUSTOMS ENFORCEMENT (Aug. 25, 2009), http://www.ice.gov/doclib/detention-reform/pdf/287g_moa.pdf [hereinafter New Template]; *see* Feere, *supra* note 6.

92. *Fact Sheet: Updated Facts on ICE's 287(g) Program*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, http://www.ice.gov/news/library/factsheets/287g-reform.htm (last visited Nov. 13, 2011).

93. *Id.*

94. New Template, *supra* note 91, at 1.

95. *Id.* at 17.

96. *Id.*

97. Feere, *supra* note 6.

98. New Template, *supra* note 91, at 2.

or only when ICE decides on a "case-by-case basis." These new requirements appear to be aimed at calming 287(g) critics, like the American Civil Liberties Union ("ACLU"), who argue that minor offenses should not be used to initiate removal proceedings against aliens.[99]

There are several troubling aspects to these 287(g) reforms, as the changes to the MOA appear to transform it into a "stay here illegally until someone is seriously injured" program.[100] First, when Congress created the program, as part of the IIRIRA, it did not make a distinction between criminal or dangerous aliens and other removable aliens. The plain text of 8 U.S.C. § 1358(g) says that the 287(g) program shall be used "in relation to the investigation, apprehension, or detention of *aliens* in the United States."[101] No distinction or prioritization of deportable aliens is made. Second, the legislative history of the program suggests that the "redefining and narrowing of the scope of 287(g)" is improper.[102] The co-author of 287(g), U.S. Representative Lamar Smith, asserts the goal of the program was not to limit LLEAs to detaining aliens who have committed serious offenses, but rather to enable LLEAs to enforce immigration laws against *all* removable aliens.[103]

Despite Congress' clear intent, the Obama administration has fundamentally altered the program, enabling ICE to reject the transfer of illegal aliens that do not meet the strict new prioritization and prosecution schemes. LLEAs, by virtue of the new MOA template, are being forced to ratchet back their enforcement of immigration laws, thus allowing aliens that commit "minor offenses" to escape removal. The prosecution requirements in the new template are also not found in the text of 8 U.S.C. § 1357.

What seems clear in all the MOA changes is an inherent distrust by the Obama administration of LLEAs.[104] Instead of facilitating greater cooperation with LLEAs, the new template puts LLEAs in a straightjacket. By unilaterally changing the 287(g) program, outside of the legislative process and contrary to congressional intent, the Obama administration has undermined local law enforcement's ability to address illegal immigration in their communities. In short, the policy aims of the Obama administration have trumped Congress' clear intent for 287(g).

In addition to the overhaul of the 287(g) program, the Obama Jus-

99. Michaud, *supra* note 67, at 1107.

100. Feere, *supra* note 6.

101. 8 U.S.C. § 1357(g) (emphasis added).

102. Feere, *supra* note 6. Senator Chuck Grassley, an author of the bill, also asserts that the program was meant to detain all illegal immigrants, not just dangerous criminal offenders; *see* Michaud, *supra* note 68, at 1104–05.

103. Feere, *supra* note 6.

104. *Id.*

tice Department has sought to quash state-level enforcement of immigration laws. Arizona, the leader of state-level immigration enforcement, has received the most attention from Attorney General Eric Holder. The Department of Justice ("DOJ") filed an amicus brief and argued before the Supreme Court in hopes of defeating an Arizona law, passed in 2007, that mandates all the state's employers to use E-Verify.[105] Additionally, when Arizona passed S.B. 1070 the DOJ filed suit against the state, arguing that the federal government's authority in immigration enforcement is "preeminent."[106] These legal challenges illustrate the Obama administration's position that federal immigration laws preempt any state-level immigration enforcement.

By its expansion of E-Verify and a renewed commitment to increasing deportations of high priority aliens, one could argue that the Obama administration is fostering a "culture of compliance" to reduce illegal immigration.[107] However, one could also argue with equal force its stripping of 287(g) and its hostility toward state-level enforcement of immigration laws signify an immigration policy driven by politics, not principle. Focusing solely on employer enforcement (via employer sanctions) and the removal of only "criminal" aliens, while attacking state legislation that targets illegal immigrants directly, is a far easier sell to President Obama's political base than a strategy of all-out enforcement at both the federal and state level.

The central problem with the Obama administration's current strategy is that it replaces Congress' cooperative enforcement model, with an exclusively federal enforcement strategy. But as 8 U.S.C. §§ 1373, 1644, and 1357(g) all make clear, Congress did not intend the federal government to shoulder the entire burden of immigration enforcement—the states have an important role to play.

---

105. Brief for the United States as Amicus Curiae Supporting Petitioners, Chamber of Commerce of the U.S. v. Whiting, No. 09-115 (2010), *available at* http://www.justice.gov/crt/about/app/briefs/commercebr_sctmerits.pdf. Transcripts and audio of oral argument in the case is available at http://www.supremecourt.gov/oral_arguments/argument_audio_detail.aspx?argument=09-115. The Supreme Court eventually ruled against the DOJ in Chamber of Commerce of the U.S. v. Whiting, 131 S. Ct. 1968 (2011), *see supra* note 207.

106. *Justice Department Files Suit Against Arizona Immigration Law*, FOXNEWS (July 6, 2010), http://www.foxnews.com/politics/2010/07/06/justice-department-file-suit-arizona-early-tuesday/. The DOJ also sued Alabama and South Carolina when they passed their own S.B. 1070-like laws in 2011. *See* Press Release, Dep't of Justice, Department of Justice Challenges South Carolina's Immigration Law (Oct. 31, 2011) (on file with author).

107. *See* Mahsa Aliaskari, Targeting Employers: Workplace Enforcement and the Culture of Compliance, GREENBERG TRAURIG (July 2010), http://www2.gtlaw.com/practices/immigration/compliance/pdf/GTAlert_TargetingEmployersCultureCompliance_July2010.pdf.

II. THE RISE OF STATE IMMIGRATION LAWS

"The federal government's failure to enforce our border has functionally turned every state into a border state." – Oklahoma State Representative Randy Terrill

In the wake of lax federal immigration and border enforcement and the fruitless pursuit of all-or-nothing comprehensive reform, several states have decided to take immigration enforcement into their own hands. These new enforcement laws can be generally divided into two categories: (1) civil employer sanction laws, and (2) criminal provisions aimed at the identification and removal of illegal immigrants.

A. *Civil Employer Sanction Laws*

As discussed earlier, when Congress created E-Verify, it did not make participation in the program mandatory. Rather, for over a decade after its inception most employers could freely choose whether to take the extra step of verifying an employee's identity documentation.[108] Before the federal government entertained the idea of making the program's use mandatory for federal contractors, states began to legislate on E-Verify citing their traditional police power in terms of regulating illegal alien employment.[109]

This trend originated in 2007, when Arizona passed the Legal Arizona Workers Act ("LAWA").[110] In 2008, Mississippi and South Carolina each passed statutes requiring all employers in the state to use E-Verify.[111] In 2010, Utah joined in and passed the Private Employer Verification Act ("PEVA") requiring all employers with 15 or more employees to use E-Verify.[112]Additionally, several other states passed legislation mandating use of E-Verify by state contractors and large private employers.[113] As LAWA is the most debated and litigated state employer sanction law, a detailed discussion of its provisions is presented below.

---

108. *See supra* Part I.B.1.

109. *Id.*

110. *See* Aliaskari, *supra* note 107.

111. Barrowclough, *supra* note 52, at 799.

112. *See* Aliaskari, *supra* note 107.

113. *See Immigrant Policy Project: E-Verify FAQ*, *supra* note 30 (reporting that a total of seventeen states require the use of E-Verify for public and/or private employers); *see also E-Verify: State and Federal Legislation*, LAW LOGIX, http://www.lawlogix.com/E-Verify_Federal_and_State_Legislation_Map.html (last visited Nov. 1, 2011).

1. LEGAL ARIZONA WORKERS ACT

Faced with one of the fastest growing illegal immigrant populations in the country[114] and with a sizable undocumented workforce,[115] the LAWA was signed by then Arizona Governor Janet Napolitano in July 2007[116] and took effect on January 1, 2008.[117] LAWA applies to all businesses in the state of Arizona, regardless of size or nature, and makes it a violation to "knowingly" or "intentionally" hire unauthorized aliens.[118] Under the law, employers must verify the legal status of new and existing employees.[119] Employers check the legal status of their employees using the federal E-Verify program.[120] Anyone can submit a complaint to the Arizona Attorney General or any of Arizona's county attorneys if they believe an employer is illegally employing undocumented workers.[121] Once a complaint is verified, the county attorney is instructed to initiate proceedings against the employer.[122] LAWA requires that state officials use the "federal government's determination of the employee's lawful status," not their own.[123]

Under LAWA, first-time offenders who knowingly employ illegal immigrants may have their business licenses suspended for up to ten days.[124] Those employers who are found to have intentionally hired illegal aliens *must* have their licenses suspended for at least ten days.[125] Additionally, violators are placed on "probation" and must file quarterly reports with their county attorney providing notice of new hires.[126] A second offense could result in permanent revocation of the employer's Arizona business license.[127]

---

114. *See* Steven Camarota, *Center for Immigration Studies on the New Arizona Immigration Law, SB 1070*, CENTER OR IMIGR. STUD. (Apr. 2010), http://www.cis.org/print/announcment/AZ-immigration-SB1070 (reporting Arizona's illegal immigration population increased from "330,000 in 2000 to 560,000 by 2008.").

115. *Id.* (In 2007, "12 percent of workers in Arizona [were] illegal immigrants.").

116. *See* Careen Shannon, *Regulation Immigration at the State Level: A Focus on Employment*, 3 ALB. GOV'T L. REV. 218, 231 (2010).

117. *Id.*

118. *See* ARIZ. REV. STAT. ANN. § 23-212 (2010).

119. § 23-214.

120. *Id.*

121. § 23-212(B).

122. § 23-212(C)–(D).

123. § 23-212(H); Chicanos Por La Causa, Inc. v. Napolitano, 558 F.3d 856, 861 (9th Cir. 2009).

124. §§ 23-212 to 23-212.01.

125. Chicanos Por La Causa, Inc., 558 F.3d at 861 (9th Cir. 2009).

126. *Id.*

127. *Id.* § 23-212 (F)(2); *see infra* Part III for a discussion of the legal battles surrounding LAWA, centered on federal preemption.

B. *State Criminal Statutes aimed at Illegal Immigration (S.B. 1070–type legislation)*

State laws that create criminal offenses for violations of federal immigration law (which are often incorporated by reference in the state laws) are another growing immigration enforcement mechanism.[128] Generally, these statutes require state law enforcement, in conjunction with a lawful stop or arrest, to determine the immigration status of an individual, if they have "reasonable suspicion" that the person is in the country illegally.[129] Additionally, these laws often make it a misdemeanor for aliens not to carry their alien authorization paperwork, in accordance with federal law.[130]

Arizona was the first to pass a bill of this type in 2010, when it enacted the Support Our Law Enforcement and Safe Neighborhoods Act, popularly known as S.B. 1070.[131] S.B. 1070's passing ignited a fierce debate over fears of racial profiling.[132] Despite uncertainty over the legal footing of the Arizona law, underscored by a DOJ lawsuit, and notwithstanding the outcry from civil rights and ethnic groups over fears of racial profiling, several other states have passed S.B. 1070-like legislation.[133]

1. S.B. 1070

After enacting LAWA in 2007, Arizona took another bold step in its self-described "attrition through enforcement" strategy when it passed Senate Bill 1070 in April 2010.[134] S.B. 1070 was promoted as another means to discourage and deter illegal immigrants from entering or residing in Arizona and in response to fears that drug cartel-related violence in Mexico was spilling over into Arizona.[135] The overarching motivation for Arizona to pass S.B. 1070, however, was unquestionably the perception that the federal government had failed to effectively

128. *See* Kim Severson, *Immigrants Are Subject of Tough Bill in Georgia*, N.Y. TIMES (Apr. 15, 2011), http://www.nytimes.com/2011/04/16/us/ (reporting that 30 states have considered S.B. 1070-like bills, although some have died in committee).

129. *See* Michaud, *supra* note 67, at 1114.

130. *See* 8 U.S.C. § 1304(e).

131. S.B. 1070, 2010 Ariz. Sess. Laws 0113, amended by 2010 Ariz. Sess. Laws 0211 (H.B. 2162, 49th Leg., 2d Sess. (Ariz. 2010)).

132. *See* Jordan, *supra* note 71.

133. *See South Carolina immigration law challenged by Justice Dept.*, MSNBC (Oct. 31, 2011), http://www.msnbc.msn.com/id/45109242/ns/us (reporting that Alabama, Georgia, Utah, South Carolina, and Indiana have passed their own Arizona-like immigration laws).

134. *See* S.B. 1070 § 1, 2010 Ariz. Sess. Laws 0113.

135. *See Id.*; *see also* Randal C. Archibold, *Arizona Enacts Stringent Law on Immigration*, N.Y. TIMES (Apr. 23, 2010), http://www.nytimes.com/2010/04/24/us/politics/24immig.html (discussing Arizona's motivations in passing S.B. 1070).

address illegal immigration. When signing the bill into law on April 23, 2010, Arizona Governor Janice Brewer said, "[S.B. 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."[136]

Two key components of S.B. 1070 are (1) cooperative enforcement mandates imposed on Arizona's LLEAs (chiefly found in Section 2 of the law, codified at §11-1051), and (2) a series of criminal statutes drafted to mirror federal immigration statutes (found in Section 3 of SB 1070, codified at Ariz. Rev. Stat. Ann. § 13-1509).

The principle and most controversial of the cooperative enforcement mandates is the charge that LLEAs, in conjunction with a "lawful stop, detention or arrest, . . . where reasonable suspicion exists that the person is an alien and is unlawfully present in the United States" must make "a reasonable attempt . . . to determine the immigration status of the person."[137] The law does not define the amorphous "reasonable suspicion" standard, but it does state that "race, color, or national origin" cannot be considered in the statute's enforcement.[138]

The law also dictates that if a person is arrested, their immigration status must be verified pursuant to 8 U.S.C. § 1373(c), before they can be released.[139] Practically, this is accomplished by contacting ICE to have it check DHS databases.[140] The law does not articulate what should occur after contacting ICE. If ICE determines that the person is an undocumented immigrant, it can choose to detain the individual or it can simply decide not to pursue removal.[141] As the state officers have no power under federal law or S.B. 1070 to remove the illegal alien, if ICE chooses not to pursue any additional investigation, the alien is essentially off the hook for their immigration violations. No matter what ICE does, the LLEA official will have likely met his or her burden of making "a reasonable attempt" to determine the person's "immigration status," under S.B. 1070.[142]

---

136. *Statement by Governor Jan Brewer*, 2010 Legis. Bill Hist. AZ S.B. 1070 (Apr. 23, 2010), http://azgovernor.gov/dms/upload/PR_042310_StatementByGovernorOnSB1070.pdf. A week after signing the bill into law, Governor Brewer also signed a set of amendments to the Senate Bill. *See* H.B. 2162, 49th Leg., 2d Sess. (Ariz. 2010). S.B. 1070 is not a freestanding statute; instead, it adds some new sections to Arizona's statues and it also amends preexisting statutes.

137. ARIZ. REV. STAT. ANN. § 11-1051(B) (2011).

138. *Id.* At the time of SB 1070 signing, Governor Brewer issued an Executive Order mandating additional training for Arizona LLEAs on what constitutes "reasonable suspicion." Statement by Governor Jan Brewer, *supra* note 136.

139. ARIZ. REV. STAT. ANN. § 11-1051(B).

140. *See* Julie Myers Wood, *Julie Meyers Wood Discusses Arizona's Controversial Immigration Law*, 2010 Emerging Issues 5019, May 6, 2010; *see also* ARIZ. REV. STAT. ANN. § 11-1051(E).

141. *Id.*

142. ARIZ. REV. STAT. ANN. § 11-1051(B).

Section 3 of S.B. 1070 states that "a person is guilty of willful failure to complete or carry an alien registration document if the person is in violation of [8 U.S.C. Sections] 1304(e) or 1306(a)."[143] Essentially, Section 3 makes it a state crime to violate federal law; the state law is said to "mirror" its federal counterpart. Violating the alien registration provision is a class 1 misdemeanor, with a maximum fine of one hundred dollars and a maximum jail sentence of twenty days.[144] A second offense is punishable up to thirty days in jail.[145] In the enforcement of Section 3, an alien's immigration status may be determined only by ICE, Customs and Border Protection ("CBP"), or a LLEA official, in particular a 287(g) trained officer, that has been "authorized by the federal government to verify or ascertain an alien's immigration status.[146] In essence, this provision prevents an LLEA official from making an independent "alienage determination."[147]

Opposition to S.B. 1070's passing was immediate and fierce, and filled with demagoguery. Before the law was to take effect,[148] civil rights and immigrant rights groups in and out of Arizona attacked the law and called for an economic boycott of the state.[149] The ACLU, along with other civil and ethnic rights organizations, filed a class-action lawsuit against Arizona, calling the law "extreme" and claiming it "invite[d] the racial profiling of people of color, violate[d] the First Amendment and interferes with federal law."[150] Other opponents of the law equated it to "Nazism."[151]

The White House was also quick to speak out against S.B. 1070. President Obama said the law could lead to those who appear to be ille-

143. § 13-1509(A). Under the federal statutes listed, an alien that fails to register or carry their immigration papers is guilty of a misdemeanor. *See* 8 U.S.C. §§ 1304(e), 1306(a).

144. § 13-1509(H).

145. *Id.*

146. § 13-1509(B); *see* Myers Wood, *supra* note 140.

147. *See* Myers Wood, *supra* note 140.

148. S.B. 1070 was scheduled to take effect July 29, 2010, ninety days after the legislative session ended in Arizona, Archibold, *supra* note 135.

149. *Furor Grows over Ariz. Law Against Immigrants*, MSNBC (Apr. 27, 2010), http://www.msnbc.msn.com/id/36778647/ns/politics-white_house/; *Calls To Boycott Arizona Grow Over New Immigration Law*, L.A. TIMES (Apr. 28, 2010), http://articles.latimes.com/2010/apr/28/local/la-me-0428-arizona-boycott-20100428 (discussing an increase in call for a boycott of Arizona in neighboring California).

150. *ACLU & Civil Rights Groups File Legal Challenge To Arizona Racial Profiling Law*, ACLU (May 17, 2010), http://www.aclu.org/immigrants-rights-racial-justice/aclu-and-civil-rights-groups-file-legal-challenge-arizona-racial-pr.

151. Archibold, *supra* note 135 (Cardinal Roger M. Mahony, of the Catholic Church, said S.B. 1070's alien registration provisions were like "Nazism"). Swastikas were also painted on the windows of the Arizona capital by protestors of the law. *See Furor Grows over Ariz. Law Against Immigrants*, *supra* note 149.

gal immigrants being "harassed or arrested."[152] He also said, "If you are a Hispanic American in Arizona . . . now suddenly if you don't have your papers, and you took your kid out to get ice cream, you're going to get harassed."[153] The DOJ also criticized S.B. 1070—even before it read the law.[154] Attorney General Holder said the law's enforcement was susceptible to abuse and racial profiling.[155] Despite the intense rhetoric surrounding the law, it quickly became apparent that the courts would have the last word.[156]

III. THE LEGAL BATTLE OVER STATE IMMIGRATION ENFORCEMENT

The recent rise of state and local immigration laws has not gone unchallenged in the courts; a wide variety of groups have questioned their validity. Besides the Federal Government, plaintiffs have included civil and immigrant rights groups (e.g. the ACLU) and pro-business groups (e.g. the U.S. Chamber of Commerce).[157] A recurring argument in each case is that the Federal Government has plenary power in the immigration realm, and therefore state and local governments cannot legislate in the field. This argument is grounded on the doctrine of federal preemption. As Arizona's immigration laws have received the most attention from the media, politicians, and academics, an analysis of the legal challenges surrounding those laws is presented. As foundation for that discussion, a brief overview of federal preemption is offered.

A. *Overview of Federal Preemption*

The Supremacy Clause of the United States Constitution declares that "the Laws of the United States . . . shall be the supreme Law of the land."[158] The preemption doctrine "is a necessary outgrowth of the Supremacy Clause." Under the doctrine, state law that conflicts with

152. *Obama denounces SB 1070 after meeting Calderón*, ARIZ. DAILY STAR (May 20, 2010), http://azstarnet.com/news/local/border/article_d6dcabeb-5eb0-5fa0-8dc5-db45d6b3a338.html.

153. *Editorial: Obama's Race-Baiting*, WASH. TIMES (May 3, 2010), http://www.washingtontimes.com/news/2010/may/3/obamas-race-baiting/.

154. *Holder Admits to Not Reading Arizona's Immigration Law Despite Criticizing It*, FOXNEWS (May 14, 2010), http://www.foxnews.com/politics/2010/05/13/holder-admits-reading-arizonas-immigration-law-despite-slamming/. "I have not had a chance to—I've glanced at it," was Attorney General Eric Holder's response at a House Judiciary Committee hearing when asked whether he had read Arizona's new immigration law. Adding insult to injury, the Congressman responded, "I'll give you my copy of it if you would like." *id.*

155. *Id.*

156. *See* Nathan Thornburgh, *Arizona Gears Up for a Protracted Immigration Fight*, TIME (Apr. 26, 2010), http://www.time.com/time/nation/article/0,8599,1984432,00.html.

157. *See, e.g.*, Gray v. City of Valley Park, 579 F.3d 976 (8th Cir. 2009); Villas at Parkside Partners v. City of Farmers Branch, 701 F. Supp. 2d 835 (N.D. Tex. 2010); Chamber of Commerce v. Edmondson, 594 F.3d 742 (10th Cir. 2010).

158. U.S. CONST. art. VI, cl. 2.

federal law is invalid.[159] In preemption cases, and "particularly in those in which Congress has legislated . . . in a field which the States have traditionally occupied, . . . [courts] start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[160]As such, congressional intent is the "ultimate touchstone of pre-emption analysis."[161]

Federal preemption can be either express or implied.[162] Express preemption occurs when the language of the federal statute explicitly "declares a law's pre-emptive effect, and in "such cases [a court] is to identify the domain expressly pre-empted."[163] To accomplish that task, courts are to focus on the "plain wording" of a statute's preemption clause.[164] Implied preemption can be broken down into two categories: field and conflict preemption.[165] Courts find implied field preemption when "the depth and breadth" of federal regulation in the legislative field is so pervasive that there is no room for state regulation.[166] Implied conflict preemption occurs when it is impossible to comply with both federal and state law or if state law would impede the "full purposes and objectives of Congress."[167] Conflict preemption only applies if there is an "actual conflict," not if there is only a "hypothetical or potential conflict."[168]

In *DeCanas v. Bica*, the Supreme Court presented a framework for preemption analysis in the immigration context.[169] The issue in the case was whether federal immigration law preempted a state law that prohibited the knowing employment of illegal immigrants. The *DeCanas* Court started their analysis with the principle that the "[p]ower to regulate immigration is unquestionably exclusively a federal power."[170] But the Court held "not every state enactment which in any ways deals with aliens is a regulation of immigration and thus per se pre-empted by this

159. Maryland v. Louisiana, 451 U.S. 725, 746 (1981).

160. Wyeth v. Levine, 129 S. Ct. 1187, 1194–95 (2009) (internal quotation marks and citations omitted).

161. Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992) (internal quotation marks and citations omitted).

162. Chicanos Por La Causa, Inc. v. Napolitano, 558 F.3d 856, 863 (9th Cir. 2009).

163. Lozano v. City of Hazleton, 620 F.3d 170, 203 (3d Cir. 2010) (internal quotation marks and citations omitted).

164. *Id.*

165. *Cipollone*, 505 U.S. at 516 (1992).

166. Chicanos Por La Causa, 558 F.3d 856, 863 (9th Cir. 2009).

167. *Id.*

168. *Id.*

169. DeCanas v. Bica, 424 U.S. 351 (1976).

170. *Id.* at 354.

congressional power."[171] The Court took a narrow view of "immigration regulation," explaining that it "is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain."[172]

The *DeCanas* Court also declared that states have the authority, under their traditional police powers, to regulate the "employment relationship." And that a state is justified in "attempting to protect its fiscal interests and lawfully resident labor force from the deleterious effects on its economy resulting from the employment of illegal aliens."[173] Ultimately, the Court upheld the state law, because it found preemption would only be appropriate if that was Congress' "clear and manifest purpose."[174]

However, the *DeCanas* decision and its holding that states can regulate illegal aliens, "at least where such action mirrors federal objectives and furthers a legitimate state goal,"[175] was handed down *before* Congress passed IRCA.[176] Thus, the critical question is whether *DeCanas* is still relevant in a court's preemption analysis of state immigration laws that regulate illegal alien employment, or did Congress' subsequent assertions of federal power render *DeCanas* irrelevant. Stated differently, did the passing of IRCA make illegal alien employment a central rather than "peripheral concern" of the Federal Government, thus relegating the states to a limited role in immigration enforcement?[177]

B. *The Legal Battle over LAWA*

Shortly after LAWA was signed into law in 2007, various civil rights and business organizations filed several suits against Arizona claiming the law was unconstitutional.[178] The plaintiffs' principle argument was that the law was expressly and impliedly preempted by IRCA

171. *Id.* at 355.

172. *Id.*

173. *Id.* at 356–57.

174. *Id.* at 357 (quoting Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 146 (1963).

175. Plyler v. Doe, 457 U.S. 202, 225 (1982); *see also* Lozano v. City of Hazleton, 620 F.3d 170, 206 (3d Cir. 2010) (stating *DeCanas* "holds that the federal authority to regulate immigration is exclusive, but states are not necessarily precluded from regulating (consistent with federal law) certain local issues affecting the rights of aliens, unless Congress has indicated an intent to preclude such regulation.") (internal quotation marks omitted).

176. *See supra* Part I.A.

177. DeCanas v. Bica, 424 U.S. 351, 361 (1976); *see Lozano*, 620 F.3d at 206–07.

178. *See* Ariz. Contractors Ass'n v. Napolitano (*Arizona Contractors I*), 526 F. Supp. 2d 968 (D. Ariz. 2007); Ariz. Contractors Ass'n v. Candelaria (*Arizona Contractors II*), 534 F. Supp. 2d 1036, 1040–41 (D. Ariz. 2008) *aff'd sub nom.* Chicanos Por La Causa, Inc. v. Napolitano, 558 F.3d 856 (9th Cir. 2009).

and IIRIRA.[179] The Arizona Federal District Court heard the consolidated cases and rejected the preemption arguments.[180]The plaintiffs successfully appealed to the Ninth Circuit Court of Appeals.[181]

1. NINTH CIRCUIT COURT OF APPEALS DECISION: *CHICANOS POR LA CAUSA V. NAPOLITANO*

The plaintiffs' first argument in their facial challenge to the LAWA was that IRCA expressly preempts LAWA, since it is not a "licensing or other similar law" exempted under IRCA's savings clause.[182] They asserted that Congress did not intend the savings clause to be used by a state to create its own "adjudication and enforcement system independent of federal enforcement of IRCA violations."[183]

The Ninth Circuit started its analysis of the express preemption claim by determining whether to apply an assumption against preemption to LAWA, and concluded that the LAWA was entitled to a presumption against preemption. In reaching this conclusion, the Court relied on the often cited principle: when Congress acts in an area that has traditionally been occupied by the states, it must be assumed that the "historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[184] Further, the Court cited *DeCanas* and its conclusion that state regulation of unauthorized employment of illegal aliens was "within the mainstream of the state's police powers."[185]

The Court rejected the plaintiffs' argument that *DeCanas* was no longer good law. In support of their argument, plaintiffs claimed that the Supreme Court, in *Hoffman Plastic Compounds, Inc. v. NLRB*, made clear that in passing IRCA Congress intended the employment of unauthorized workers to be "central to the policy of immigration law."[186] But, the Court dismissed *Hoffman's* relevance, stating it did not "concern state law or the issue of preemption."[187] Thus, the Court concluded

179. *See Arizona Contractors II*, 534 F. Supp. 2d at 1049–57.

180. *See* 534 F. Supp. 2d 1036.

181. Chicanos Por La Causa, Inc. v. Napolitano, 558 F.3d 856 (9th Cir. 2009).

182. *See* Chicanos Por La Causa, 558 F.3d at 863; 8 U.S.C. § 1324a(h)(2); *see also supra* Part I.A.

183. Chicanos Por La Causa, 558 F.3d at 864.

184. *Id.*

185. *Id.* at 865 (quoting DeCanas v. Bica, 424 U.S. 351, 356 (1976) (internal quotation marks omitted).

186. Chicanos Por La Causa, Inc. v. Napolitano, 558 F.3d 856, 865 (9th Cir. 2009) (quoting Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 147 (2002) (internal quotation marks omitted).

187. *Id.* (the Court explained that *Hoffman* "considered whether the National Labor Relations Board ("NLRB") could award backpay to an unauthorized worker, and the Court held it could not. The [Supreme] Court said that the NLRB had impermissibly 'trench[ed] upon federal statutes and

the assumption of "non-preemption" applied.[188]

Next, the Court turned to the plain language of the savings clause. Plaintiffs argued that Congress intended the word "license" in the savings clause to only encompass a license to engage in a certain profession (like medicine or law), not a license to conduct business.[189] In rejecting this narrow view of the term "license", the Court turned to a dictionary definition of the word: "a permission, usually revocable, to commit some act that would otherwise be unlawful."[190] The Court found that LAWA's definition of the term was similarly broad, and "in line with the terms traditionally used" and therefore fell "within the savings clause."[191]

Still, the plaintiffs asserted that IRCA's legislative history proved that Congress did not intend for a state to impose any employer sanctions until the federal government had determined an illegal immigrant's status.[192] They relied on this sentence of the House of Representatives Report to make their argument: "[IRCA] is not intended to preempt or prevent lawful state or local processes concerning the suspension, revocation or refusal to reissue a license to *any person who has been found to have violated the sanctions provisions in this legislation.*"[193]

The plaintiffs interpreted the latter portion of the sentence to mean that a state could sanction an employer only *after* the federal government had imposed sanctions under IRCA. But the Court found that the next sentence in the report, "the Committee does not intend to preempt licensing or 'fitness to do business laws,' . . . which specifically require such licensee . . . to refrain from hiring, recruiting or referring undocumented workers," clearly showed that Congress did not intend to preempt state laws like LAWA.[194] Ultimately, the Court held that LAWA was not expressly preempted, because it did not "attempt to define who is eligible or ineligible to work" but rather was "premised on enforcement of federal standards embodied in federal immigration law."[195]

---

policies unrelated to the [National Labor Relations Act]' by awarding backpay to an unauthorized alien worker who was improperly terminated from his employment for participating in union-related activities." Thus, the Court dismissed any notion that *Hoffman* affected the continuing vitality of *DeCanas*. (quoting Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 140–41, 144 (2002).

188. *Id.*

189. *Id.*

190. *Id.* (quoting BLACK'S LAW DICTIONARY 938 (8th ed. 2004)).

191. Chicanos Por La Causa, Inc. v. Napolitano, 558 F.3d 856, 865 (9th Cir. 2009).

192. *See id.*

193. *Id.* (quoting H.R. Rep. No. 99-682, pt. 1, at 58 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5662) (emphasis added).

194. *Id.*

195. *Id.*

The plaintiffs' second argument in the case was that LAWA's mandatory E-Verify provision was preempted, principally by the IIRIRA, because it conflicted with Congress' intent to make E-Verify's use voluntary.[196] The plaintiffs asserted that making E-Verify mandatory would "impede" Congress' purpose in creating a "non-burdensome" system."[197] The Court dismissed this argument as it viewed Congress' numerous expansions of E-Verify since its inception as evidence that "[it] plainly envisioned and endorsed an increase in its usage." Therefore, the Court found LAWA's mandate, that all state employers use E-Verify, only furthered Congress' purpose, so it did not raise any conflict preemption issues.[198] Plaintiffs also asserted that LAWA was conflict preempted because using E-Verify increases "discrimination against workers who look foreign."[199] The Court rejected this claim, because the plaintiffs failed to provide any evidence that using E-Verify is any more discriminatory than its "paper" alternative, the I-9 system.[200]

2. ANALYSIS OF *CHICANOS POR LA CAUSA V. NAPOLITANO*

In upholding the district court on every count, the Ninth Circuit held that LAWA was facially constitutional and in doing so delivered a key victory to Arizona and other states that have passed E-Verify "employer sanction" laws. A crucial aspect of the Ninth Circuit's decision was its assumption that state regulation of illegal alien employment was a historic police power, and therefore deserving of a presumption against preemption by federal law. In reaching this conclusion, the Court reaffirmed *DeCanas* and its three-part analysis of state laws that regulate illegal alien employment.[201]

First, the Court found that Arizona was not regulating immigration; rather, LAWA was "premised on enforcement of federal immigration law."[202] Second, the Court found that mandating state employers to use E-Verify, along with a threat of business license sanctions, was not contrary to Congress' "full purposes and objectives" in passing IRCA or IIRIRA.[203] Third, the Court determined that LAWA did not conflict with or stand as an obstacle to Congress' objectives in immigration

196. Chicanos Por La Causa, Inc. v. Napolitano, 558 F.3d 856, 866 (9th Cir. 2009); *see supra* Part I.B.

197. 558 F.3d at 866.

198. *Id.* at 867.

199. *Id.*

200. *Id.*

201. *See* Rick Su, *Notes on the Multiple Facets of Immigration Federalism*, 15 TULSA J. COMP. & INT'L L 179, 184 (2008).

202. Chicanos Por La Causa, Inc. v. Napolitano, 558 F.3d 856, 866 (9th Cir. 2009).

203. *Id.* at 863, 866–67.

enforcement.[204]

The Court's interpretation of IRCA's savings clause was consistent with its plain meaning. Congress intended states to continue to have the power, through "licensing and similar laws," to regulate employers.[205] The plaintiffs' contention that LAWA was not a licensing law because it imposed a condition on maintaining a license is inconsistent with the IRCA's legislative history. The House Report states, "[IRCA's preemption provision] does not . . . preempt licensing or 'fitness to do business laws,' such as state farm labor contractor laws or forestry laws, which specifically required such licensee or contractor to refrain from hiring, recruiting or referring undocumented workers."[206] It is clear that Congress did not believe that a license law ceased to be a license law simply because it operated to suspend or revoke licenses. Thus, the *Chicanos Por La Causa* Court correctly found no preemption.

The Ninth Circuit's preemption analysis, in the state immigration law context, is the right approach.[207] *Chicanos Por La Causa* correctly gave significant weight to *DeCanas* and the balance it struck between federal power and state autonomy in immigration enforcement. In a *facial* challenge to a statute's constitutionality, the burden on a plaintiff is extremely high, because it "must establish that no set of circumstances exists under which the [statute] would be valid."[208] *Likely* or *potential* conflicts with federal law are not sufficient to find preemption.[209] *Chicanos Por La Causa's* narrow preemption analysis emphasizes the role

204. *Id.* at 866–68.

205. 8 U.S.C. § 1324a(h)(2) (2006).

206. H.R. Rep. No. 99-682, pt. 1, at 58 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5662.

207. Further proof of this point came when the Supreme Court affirmed the Ninth Circuit's *Chicanos Por La Causa* decision in Chamber of Commerce of the U.S. v. Whiting, 131 S. Ct. 1968 (2011). The Supreme Court held that (1) LAWA fell under IRCA's saving clause, thus is was not expressly preempted; (2) Arizona's licensing law was not impliedly preempted by federal immigration law; and (3) LAWA's mandatory E-verify use provision did not conflict with federal law, rather it was consistent with federal law and policy. *See* Chamber of Commerce of the U.S. v. Whiting, 131 S. Ct. 1968, 1973–87 (2011). *Whiting* serves to reaffirm *De Canas* and its recognition that the "[s]tates possess broad authority under their police powers to regulate the employment relationship to protect workers within [their borders]," and that prohibiting the knowing employment of illegal immigrants "is certainly within the mainstream of [state] police power." *Id.* at 1974 (internal quotations and citations omitted).

208. United States v. Salerno, 481 U.S. 739, 745 (1987).

209. *See* Rice v. Norman Williams Co., 458 U.S. 654, 659 (1982). Unlike the narrow approach to implied preemption taken by the Ninth Circuit, the Third Circuit, in Lozano v. City of Hazleton, 620 F.3d 170, 213 (3d Cir. 2010), relied on possible conflicts between the local and federal law. The basis for conflict between Hazleton's employer sanction ordinance and IRCA was that the ordinance would be a burden on employers, via its adjudication process and its incentives to use E-Verify. *Id.* The Court declared that a "patchwork" of state and local laws would undoubtedly burden employers. *Id.* However, the Court could supply no evidence of this burden on employers, *id.* at 211–17, as the ordinance had never taken effect, *id.* at 181. Similarly, no evidence was supplied to show that the ordinance would have a discriminatory effect on foreign workers, *see id.*

states have in immigration enforcement and enhances their ability to exercise their "traditional police power" to reduce the costs of illegal immigration. In contrast, a broad preemption analysis, as forwarded by the Obama DOJ, inevitably leads to a wholly federal enforcement scheme. This leaves states powerless to address illegal immigration and thus totally reliant on the federal government and its massive bureaucracy to address their local concerns.

C. *The Legal Battle over S.B. 1070*

On July 6, 2010, just weeks before S.B. 1070 was to take effect the DOJ sued the state of Arizona and its Governor, Janice Brewer, asserting that the law was unconstitutional.[210] On the same day the DOJ asked the Arizona Federal District Court to enjoin the law's enforcement.[211] Despite all the rhetoric about racial profiling from the DOJ and the Obama White House,[212] the motion to enjoin the law did not make an equal protection claim; rather the United States' arguments were based solely on federal preemption.[213] One day before the law was to take effect the court issued its opinion on the injunction.[214]

1. *UNITED STATES V. ARIZONA*

At the beginning of the Court's analysis of S.B. 1070, it acknowledged that Arizona passed the law to combat "rampant illegal immigration, escalating drug and human trafficking crimes and serious public safety concerns." Then, the Court declared that since S.B. 1070 contained a severability clause,[215] it would not enjoin the entire statute, but instead discuss each section individually.[216] In the end, Judge Bolton enjoined four provisions of S.B. 1070, including the law's principle cooperative enforcement provisions found in Section 2, ARIZ. REV. STAT. ANN. § 11-1051(B), and the alien registration requirement that mirrored federal law, Section 3, ARIZ. REV. STAT ANN. § 13-1509.[217]

---

at 217–18. For the *Lazano* Court, the fact that the ordinance had no penalties for discrimination was enough to hold it invalid, *id.* at 218.

210. *Justice Department Files Suit Against Arizona Immigration Law*, *supra* note 106 (DOJ asked the court to "preliminarily and permanently prohibit the state from enforcing the law"); *see* United States v. Arizona, 703 F. Supp. 2d 980, 990 (D. Ariz. 2010).

211. *Justice Department Files Suit Against Arizona Immigration Law*, *supra* note 106.

212. *See supra* Part II.B.1.

213. Complaint, United States v. Arizona, CV 10-04143 (D. Ariz. July 6, 2010).

214. *See* United States v. Arizona, 703 F. Supp. 2d 980, 986 (D. Ariz. 2010) (released July 28, 2010).

215. S.B. 1070, 2010 Ariz. Sess. Laws 0113, 382.

216. United States v. Arizona, 703 F. Supp. 2d 980, 986 (D. Ariz. 2010).

217. *Id.* at 987.

Only the Court's decision regarding Section 2 and 3 are discussed below, as they are most relevant to this article.

The Court first discussed the second sentence of ARIZ. REV. STAT. ANN. § 11-1051(B): "[a]ny person who is arrested shall have the person's immigration status determined before the person is released." The United States argued that this sentence must be read alone, separate from the first sentence of subsection B, which calls for the determination of a person's immigration status only upon reasonable suspicion that they are in the country unlawfully.[218] Arizona argued that the first two sentences of § 11-1051(B) should be read together, as legislators did not intend to "compel [Arizona LLEAs] to determine and verify the immigration status of every single person arrested."[219] The Court accepted the Government's argument, and read the two sentences independently. Thus, under the Court's interpretation of the subsection's second sentence, S.B. 1070 required a "mandatory determination of immigration status for all arrestees."[220]

The United States argued that such a provision conflicted with federal immigration law because it would burden "lawful immigrants"—an outcome contrary to Congress' concern for a "uniform" system of "rules governing the treatment of aliens."[221] The Court agreed and also noted that requiring LLEAs to check the immigration status of every person who is arrested in the state would burden and restrict the liberty of "lawfully-present aliens" while their status was checked after an arrest.[222] Further, the Court adopted the United States' argument that the provision would burden the federal government as it would have to respond to an "influx of requests for immigration status[es]."[223] Such a burden, the Court reasoned, would shift federal resources away from "federal priorities."[224]

Next, the Court examined the first sentence of § 11-1051(B):

> "For any lawful stop, detention or arrest made by a law enforcement official or a law enforcement agency of this state . . . where reasonable suspicion exists that the person is an alien and is unlawfully present in the United States, a reasonable attempt shall be made, when

218. 703 F. Supp. 2d at 994. The first sentence of ARIZ. REV. STAT. ANN. § 11-1051(B) states: "For any lawful stop, detention or arrest made by a law enforcement official or a law enforcement agency of this state . . . where reasonable suspicion exists that the person is an alien and is unlawfully present in the United States, a reasonable attempt shall be made, when practicable, to determine the immigration status of the person."

219. 703 F. Supp. 2d at 994.

220. *Id.*

221. *Id.*

222. *Id.* at 995.

223. *Id.*

224. United States v. Arizona, 703 F. Supp. 2d 980, 995 (D. Ariz. 2010).

practicable, to determine the immigration status of the person."[225]

The United States asserted the same arguments that it did in opposition to the second sentence of subsection B, and once again the Court accepted both arguments: (1) such a provision would burden "lawfully-present" aliens, and (2) the requirement would burden federal agencies with massive amounts of immigration status requests, thus redirecting federal resources away from the government's priorities.[226]Additionally, the Court accepted the United States' contention that the first sentence of subsection B would have a detrimental effect on lawfully-present aliens, because it would allow law enforcement to check a person's immigration status even in conjunction with minor violations, such as "jaywalking . . . or riding a bicycle on a sidewalk."[227]

Next, the Court turned its attention to Section 3 of S.B. 1070, which states: "a person is guilty of willful failure to complete or carry an alien registration document if the person is in violation of 8 [U.S.C. §§] 1304(e) or 1306(a)."[228] The Government argued that Section 3 was pre-empted because it conflicted with the federal scheme of alien registration. The Court cited *Hines v. Davidowitz*,[229] a 1941 Supreme Court decision, for the proposition that the federal government's authority, in the field of alien registration, was complete and that states could not enforce their own laws that "conflict or interfere with, curtail or complement, the federal law."[230] Although the Court acknowledged that Section 3 did not add any additional requirements to its federal counterparts, thus not affecting the "uniformity" of alien registration requirements, it nonetheless found Section 3 likely preempted by federal law because it added state penalties to the federal scheme.[231]

2. Analysis of *United States v. Arizona*

The U.S. District Court analysis of S.B. 1070 is troubling for several reasons. First, the Court, while upholding some of the periphery provisions of the law, struck down the most meaningful and likely effective portions: the cooperative enforcement provisions of Section 2 and the alien registration requirements of Section 3. Second, in large part, the Court adopted the government's arguments "straight from the [DOJ]

225. Ariz. Rev. Stat. Ann. § 11-1051(B).

226. 703 F. Supp. 2d at 996.

227. *Id.* at 997.

228. Ariz. Rev. Stat. Ann. § 13-1509.

229. Hines v. Davidowitz, 312 U.S. 52 (1941).

230. United States v. Arizona, 703 F. Supp. 2d 980, 998–99 (D. Ariz. 2010) (quoting Hines v. Davidowitz, 312 U.S. 52, 66 (1941).

231. *Id.* at 999.

brief."[232] Third, the decision appears to suggest that federal and state cooperation, to ensure full compliance with federal immigration laws, is contrary to the federal government's purpose. Such a conclusion begs the question: "How can simply informing federal authorities of the presence of an illegal alien, which represents the full extent of [S.B. 1070's] limited scope of state-federal interaction, possibly interfere with federal priorities and strategies—unless such priorities and strategies are to avoid learning of the presence of illegal aliens?"[233]

The Court's analysis is flawed, particularly regarding Section 2(B) of S.B. 1070. First, the Court adopted the government's assertion that the first and second sentences of Section 2(B) must be read independently. However, even if this reading of the subsection is correct, the Court's argument that Section 2 will divert federal immigration resources from their "priorities" is erroneous. The United States declared that its "top enforcement priority" was "dangerous aliens."[234] This priority scheme may hold true in the context of 287(g) programs (under DHS's new template that is *contrary* to Congress' original intent),[235] but outside that context, the federal immigration statutes contain no qualifying "priority" language.

The cooperation outlined in the 287(g) program (§ 1357(g)(1–9)), is only one type of state participation in immigration enforcement Congress envisioned. In § 1357(g)(10), Congress provided for communication and cooperation between federal and state authorities requiring *no* agreement.[236] Further, § 1373(c), which is incorporated by S.B. 1070, states that federal authorities must "respond to an inquiry by . . . 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."[237] Nonetheless, the Court held that the states are held to the Executive's selective immigration enforcement scheme; rather than the plain language of federal immigration law and Congress' intent.

---

232. Julie Myers Wood, *Flawed Analysis Blocks Parts of 2010 Arizona Immigration Law*, S.B. 1070, 2010 Emerging Issues 5271 (Aug. 18, 2010).

233. United States v. Arizona, No. 10–16645, 2011 WL 1346945, at *30 (9th Cir. Apr. 11, 2011) (Bea, J., dissenting).

234. *See* Complaint, *supra* note 213, at 3.

235. *See supra* Part I.B.2.

236. *See* 8 U.S.C. § 1357(g)(10) (states are empowered "to communicate with the Attorney General regarding the immigration status of any individual," § 1357(g)(10)(A), and are also free "otherwise to cooperate with the Attorney General in the *identification, apprehension, detention, or removal* of aliens not lawfully present in the United States," § 1357(g)(10)(B) (emphasis added).

237. 8 U.S.C. § 1373(c) (2006) (emphasis supplied).

The Court also believed Section 2 would "burden" the federal government with an influx of immigration status requests from LLEAs. In discussing the "burden" on ICE, the Court did acknowledge that § 1373(c) requires the federal government to respond to local and state inquiries on an individual's immigration status.[238] But instead of following Congress' clear intent, "[the Court] allowed the federal government to create a self-made quota on [ICE's] response requirements by stating that if the number of requests is too high because requests are mandatory, the state requirements [are] preempted."[239] This reasoning is not grounded in federal law; rather it is grounded in a misguided Executive's immigration policy.

In further support of its "burden" argument, the Court cited to *Buckman Co. v. Plaintiffs' Legal Committee*, for the principle that state laws, which "create an incentive for individuals to "submit a deluge of information that [a federal agency] neither wants nor needs, resulting in additional burden on the [agency]," are impliedly preempted.[240] The Court's reliance on *Buckman* is improper. The *Buckman* court was not concerned with a federal agency having to process "more of the same information" that it was already required to accept; instead it was concerned with the federal bureaucracy's ability to digest new types of "additional" information.

There is no question that S.B. 1070, if fully implemented, would result in an increase in demand for ICE immigration status checks. However, the "type of information that will be provided to [ICE] is not unique or unusual. [Rather], it is just more of the same information already provided on a voluntary basis throughout the country every single day."[241]

The Court also found that Section 2 would restrict the liberty of lawfully-present aliens.[242] The Court reasoned that lawfully-present aliens, such as those from Visa exchange countries, may not always have their documentation readily available, and therefore they could be "subjected to arrest and detention, in addition to the burden of possible inquisitorial practices and police surveillance."[243] Such fears are speculative. The Court even points out that "many law enforcement officers already have the discretion to verify immigration status if they have rea-

238. United States v. Arizona, 703 F. Supp. 2d 980, 995 (D. Ariz. 2010).

239. Myers Wood, *supra* note 232.

240. 703 F. Supp. 2d at 995 (quoting Buckman Co. v. Plaintiffs' Legal Comm., 531 U.S. 341, 351 (2001)).

241. Myers Wood, *supra* note 232.

242. *See supra* Part III.C.1.

243. United States v. Arizona, 703 F. Supp. 2d 980, 997 (D. Ariz. 2010) (quoting Hines v. Davidowitz, 312 U.S. 52, 74 (1941).

sonable suspicion" that a person is in the country illegally.[244] However, the Court fails to explain how making mandatory status checks will *increase* the "burden" on legally-present aliens when such checks still must be based upon reasonable suspicion.

Regarding Section 3 of S.B. 1070, the alien registration requirement, the Court found that the law was impliedly preempted by the federal registration scheme. As noted earlier, the Court relied on *Hines*, a seventy-year old decision that struck down a state alien registration requirement finding preemption by federal law. The Court's reliance on *Hines* in misplaced, as the state statute at issue in the case added extensive registration requirements on top of those required by the current federal statutes, and it was decided more than 30 years before *DeCanas*.[245] Unlike the state statute in *Hines*, Section 3 adds nothing to the federal alien registration requirements. Section 3 expressly incorporates the federal scheme. The Court recognized this, but it still found Section 3 likely preempted because it "alters the penalties established . . . under the federal registration scheme."[246]

How can Section 3 "stand as an obstacle to the uniform, federal registration scheme," when under both Section 3 and the federal statutes, a failure to complete or carry alien registration documents, is a misdemeanor offense? This type of "complementing" of federal law by the states was not the concern of *Hines*.[247] S.B. 1070 does not conflict with federal law; instead it promotes the federal government's objectives.[248]

---

244. *Id.*

245. *See* Hines v. Davidowitz, 312 U.S. 52, 59–60 (1941). *Hines* involved the validity of a Pennsylvania law passed in 1939. "The Act . . . require[d] every alien 18 years or over, with certain exceptions, to register once each year; provide such information as is required by the statute, plus any 'other information and details' that the [state] may direct; pay $1 as an annual registration fee; receive an [Pennsylvania] alien identification card and carry it at all times; show the card whenever it may be demanded by any police officer or any agent of the [state], and exhibit the card as a condition precedent to registering a motor vehicle in his name or obtaining a license to operate one, *id.*

246. *Id.* at 999.

247. The *Hines* court never mentioned the penalty portion of the state law in question to supports its finding that the law was preempted. Its decision centered on the several additional registration requirements that the state law imposed on aliens, such as having to register once a year with the state. *See* Hines v. Davidowitz, 312 U.S. 52, 59–69 (1941).

248. The Ninth Circuit Court of Appeals upheld Judge Bolton's decision on Section 2(B) & 3 of S.B. 1070, adopting her arguments in large part, in United States v. Arizona, 641 F.3d 339 (9th Cir. 2011). Thus, Arizona has asked the Supreme Court to review the Ninth Circuit's ruling. *See* Press Release, Arizona Attorney General, State Files Petition Requesting the High Court Overturn Ninth Circuit Ruling (August 10, 2011) (on file with the author).

IV. THE RIGHT IMMIGRATION SOLUTION: "MAKE HASTE SLOWLY"

Figures released by the Pew Hispanic Research Center indicate that the recent declines in the illegal immigrant population have ceased.[249] The organization estimates that 11.2 million illegal immigrants now reside in the United States.[250] This is significant because it is "virtually unchanged from a year earlier."[251] In the previous two years, the number had declined from Pew's 2007 estimate of 12 million illegal aliens living in the United States.[252] These statistics indicate that the immigration policies adopted now could either secure a further decline in the illegal immigration population or facilitate a return to its increase.

In order to secure long-lasting reductions in the illegal immigrant population, the Obama administration must abandon its exclusively federal and selective enforcement strategy,[253] and abandon its pursuit of comprehensive immigration reform. New top-to-bottom legislation from Washington, D.C. is not the answer. The right illegal immigration solution is to "make haste slowly." Greater federal enforcement of current immigration law, unfettered state and federal cooperation, and concurrent enforcement of state immigration laws will discourage new illegal entrants and increase self-deportation.

A. *The Fantasy of Comprehensive Immigration Reform*

Pursuing comprehensive reform is an attractive policy goal for politicians eager to secure their legacy with sweeping legislative change. However, history indicates that top-to-bottom change is elusive; moreover, even if comprehensive reform is achieved, the end result may not bring about the change intended. Yet, President Obama is committed to address every aspect of illegal immigration in one single bill.[254]

The debate surrounding comprehensive immigration reform has revolved around the following solutions to curtail illegal immigration: large-scale deportations of undocumented aliens; expansion of U.S.-Mexican border security and enforcement; extensive guest-worker programs; and amnesty for those aliens already living in the United

249. Jeffrey S. Passel & D'Vera Cohn, *Unauthorized Immigrant Population: National and State Trends, 2010*, PEW HISPANIC CENTER (Feb. 1, 2011), *available at* http://pewhispanic.org/files/reports/133.pdf; *see* Michael Hoefer, et al., *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2010*, DEP'T OF HOMELAND SEC. (Feb. 2011), http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2010.pdf (DHS statistics also indicate the decline has ended. "The number of unauthorized immigrants living in the United States in January 2010 was 10.8 million—the same as in January 2009.").

250. *Id.* at 1.

251. *Id.*

252. *Id.*

253. *See supra* Part I.E.

254. *See* Southall, *supra* note 14.

States.[255] In 2007, President Bush forcefully pushed for sweeping immigration reform, leading to a national debate on federal immigration policy.[256] But the "cornerstone of the [President's] domestic agenda" ultimately failed when the Senate could not agree on key portions of the bill.[257] Like most comprehensive measures, "the bill suffered, [because] it attempt[ed] to please too many constituents."[258] Entrenched special interests on both sides of the issue could not be appeased:

> Pro-immigration interests that previously aligned, such as the high-tech lobby and ethnic groups, were divided over the new points system [of the guest worker initiative]. Although the program's emphasis on skills seemed to benefit high-tech business, new hiring regulations and the removal of current allowances for employers to sponsor specific workers displeased the lobby. The bill's guest-worker provisions threatened to divide labor unions on the Left, and the legalization, guest-worker, and family reunification provisions divided ethnic lobbies, particularity certain non-Hispanic advocates who would not benefit from changes. On the Right, the bill was criticized for undermining border security and doing nothing to stem the overall number of immigrants . . . .Nor did legalization enjoy popularity as a plan for dealing with the resident unauthorized population.[259]

President Bush's failed attempt to overhaul immigration law should give President Obama pause, so should his experience in achieving comprehensive health care reform. Although the President was successful in getting his 983 billion dollar 1,200-page bill through Congress by use of the "nuclear option,"[260] the massive overhaul of America's health care system did not come without consequences.[261] Debate over the bill took nearly a year, and bitterly divided the country.[262] Some political commentators believe Obama's do-or-die push for health reform, instead of job growth, contributed to the "shellacking" the Democrats received in the November 2010 elections.[263] The shear size of the bill and the

---

255. *See* NEWTON, *supra* note 20, at 171.

256. *See* Pear & Hulse, *supra* note 2.

257. *Id.* (the measure failed to pass by 16 votes).

258. NEWTON, *supra* note 20, at 179.

259. *Id.*

260. For an explanation of the "nuclear option" tactic see Trish Turner, *Top Senate Democrat Outlines 'Nuclear Option' Strategy for Health Care*, FOXNEWS (Jan. 19, 2010), http://www.foxnews.com/politics/2010/01/19/senate-democrat-outlines-nuclear-option-strategy-health-care/.

261. *See* Huma Khan, *Obama Signs Historic Health Care Bill: 'It is the Law of the Land'*, ABCNEWS (Mar. 23, 2010), http://abcnews.go.com/WN/HealthCare/obama-signs-health-care-bill-law/story?id=10178597.

262. *See id.*

263. *After 'Shellacking,' Obama Laments Disconnect With Voters*, MSNBC (Nov. 3, 2010), http://www.msnbc.msn.com/id/39987154/ns/politics-decision_2010/.

impossibility to know all of its implications when it was passed,[264] has led the Obama administration to grant over 1,000 "healthcare-reform waivers to unions, corporations, and nonprofits in order to stave off massive policy cancellations and rate hikes."[265] Finally, in pursuit of top-to-bottom health care change, the Obama administration and Democrats may have overreached. A Federal Judge in Florida recently ruled that the health care law's individual mandate to buy health insurance was outside of Congress' power under the commerce clause, and finding the bill non-severable, he declared it unconstitutional in its entirety.[266]

Comprehensive reform whether passed by Congress or not, has a polarizing effect on political discourse, and inevitably leads to unintended consequences. Victor Davis Hanson described it this way: "Comprehensive reform . . . often involves new laws, more money and additional bureaucrats. Yet almost every problem facing America arises from too much federal spending and borrowing—not too little government."[267] A far better approach to immigration reform is the attrition through enforcement model.

B. *The Right Solution*[268]

The attrition through enforcement model "relies on tried and true immigration law enforcement techniques that discourage illegal settlement and increase the probability that illegal aliens will return on their own accord."[269] Its foundation is the notion that humans respond to incentives and deterrents. Enforcing current federal immigration laws with increased federal and state cooperation, and utilizing enforcement schemes at the state level will sufficiently "increase . . . the 'heat' on illegal aliens . . . enough to dramatically reduce the scale of the [illegal

264. Even the Democrats seemed to acknowledge this fact, as Nancy Pelosi infamously insisted, "But we have to pass the bill so that you can find out what is in it, away from the fog of the controversy." David Freddoso, *Pelosi on health care: 'We have to pass the bill so you can find out what is in it. . .'*, WASH. EXAMINER (Mar. 9, 2010), http://washingtonexaminer.com/blogs/beltway-confidential/pelosi-health-care-039we-have-pass-bill-so-you-can-find-out-what-it039.

265. Jason Millman, *Number of Healthcare Reform Law Waivers Climbs Above 1,000*, THE HILL (Mar. 6, 2011), http://thehill.com/blogs/healthwatch/health-reform-implementation/147715-number-of-healthcare-reform-law-waivers-climbs-above-1000.

266. *See* Order Granting Summary Judgment, Florida v. U.S. Dep't of Health & Human Servs., (No. 3:10-cv-91-RV/EMT) (2011) *available at* http://myfloridalegal.com/webfiles.nsf/WF/JDAS8DMNTD/$file/VinsonRuling1312011.pdf.

267. Hanson, *supra* note 15.

268. For a detailed discussion of the attrition through enforcement model, see Jessica M. Vaughan, *Attrition Through Enforcement: A Cost-Effective Strategy to Shrink the Illegal Population*, CENTER FOR IMMIGR. STUD. (Apr. 2006), *available at* http://www.cis.org/articles/2006/back406.pdf.

269. Vaughn, *supra* note 268, at 14.

immigration.]"[270] By devoting resources to enforce the existing structure of federal immigration laws, coupled with state level enforcement, illegal immigration can be reduced, over time, without sweeping comprehensive reform.

1. A Uniform Federal Policy of Vigorous Enforcement of Immigration Laws

As discussed in Part I of this article, the Obama administration's current federal immigration policy is conflicted. On the one hand it encourages greater use of E-Verify and increases deportations of unauthorized aliens; but on the other it is attempting to quash state immigration laws, curtail state and federal cooperation, and limit federal immigration enforcement to only high priority "dangerous aliens."[271] The Obama administration, to be successful, must adopt an across-the-board policy of vigorous enforcement of current immigration laws.

First, the administration must continue to foster the growth of E-Verify. Although the system is far from perfect,[272] its paper alternative, the I-9 system, is equally susceptible to fraud. When one considers the technological advances that can be made with an electronic system versus a paper system, E-Verify's value is obvious.[273] Second, the administration must drop its "prioritized" enforcement model. This new selective enforcement policy has no support in federal immigration statutes, and it frustrates Congress' original intent. By focusing only on "criminal aliens," who would likely be detected by law enforcement anyway, and allowing illegal aliens to go free that don't meet the new "priority" scheme, the federal government has rendered programs like 287(g) ineffective and redundant.

Instead of stifling enforcement at the state and local level, the Obama administration should embrace an approach based on concurrent enforcement. The 287(g) program (as originally passed) and other federal statutes that mandate open communication between LLEAs and the federal immigration authorities make clear that Congress intended the

---

270. *Id.*

271. *See supra* Part I.E.

272. Westat, Findings of the E-Verify Program Evaluation, USCIS (Dec. 2009), *available at* http://www.uscis.gov/USCIS/E-Verify/E-Verify/Final%20E-Verify%20Report%20 12-16-09_2.pdf. This DHS sponsored reports suggests that E-Verify's error rate for unauthorized workers is 54 percent. *Id.* The primary reason for the large "inaccuracy rate for unauthorized workers," according to the report, is that "E-Verify, as currently formulated, does not detect most identity fraud cases for workers who use information about real employment-authorized persons. *Id.*

273. *See, e.g.*, Lora L. Ries, *B-Verify: Transforming E-Verify into A Biometric Employment Verification System*, 3 Alb. Gov't L. Rev. 271 (2010).

states to play a role in immigration enforcement.[274] In its case against Arizona over S.B. 1070, the federal government repeatedly asserted that its resources were lacking.[275] Yet, the federal government continues to insist on shouldering "the entire responsibility to address illegal immigration."[276] A cooperative approach, with increased enforcement at the local and state level (under programs like 287(g)), can help relieve the burden on the federal government.

2. State Immigration Laws Help to Further Deter Illegal Immigration

Federal law does not preempt state immigration laws that mandate employers to use E-Verify or laws that create state level offenses for violations of federal law.[277] These statutes allow states to play an active role in managing their immigrant populations within their traditional police powers.

State immigration laws do not frustrate or conflict with federal enforcement. Instead they complement and enhance the federal scheme. A state law, which requires LLEAs to inform ICE about the presence of an illegal alien, simply does not interfere with federal priorities. Such a law may interfere with an Executive branch that seeks to avoid learning about the presence of illegal aliens, but in terms of federal preemption, that fact is irrelevant. Simply put, the Executive branch cannot preempt state laws, only Congress can.[278] And under the cooperative scheme Congress envisioned, state immigration laws that seek to reduce illegal immigration, within the federal government's framework, are encouraged, not unconstitutional.

Conclusion

Greater non-selective enforcement at the federal level, paired with concurrent enforcement of state immigration laws, will make coming and staying in the U.S. an irrational choice for illegal immigrants. Enhanced enforcement is already working in Arizona, where LAWA is in effect and the threat of greater enforcement under S.B. 1070 looms. Between 2008 and 2009, after LAWA took effect, an estimated 100,000

274. *See supra* Part I.B.2.

275. *See* Complaint, *supra* note 213.

276. Myers Wood, *supra* note 232.

277. *See supra* Part III.

278. There is one exception to this rule. *See* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 413 (2003) (stating that an exercise of state power that concerns "foreign relations must yield to the National Government's policy, given the concern for uniformity in this country's dealings with foreign nations that animated the Constitution's allocation of the foreign relations power to the National Government in the first place.") (internal quotations omitted").

illegal immigrants voluntarily left Arizona.[279] This represented an 18 percent drop in Arizona's illegal alien population, compared to a 7 percent drop for the country as whole during the same timeframe.[280] Weeks before S.B. 1070 was to take effect, a similar "exodus" of illegal immigrants occurred.[281]

Arizona's successes suggest that the attrition through enforcement model is effective. It may not be as visible as border fences or as politically attractive as comprehensive immigration reform—but it works.

279. Alan Gomez, *Hispanics Flee Arizona Ahead of Immigration Law*, USA TODAY (Jun. 9, 2010), http://www.usatoday.com/news/nation/2010-06-08-immigration_N.htm.

280. *See* Camarota, *supra* note 33.

281. *See* Gomez, *supra* note 279.