NOTES

E-VERIFY: LONG-AWAITED 'MAGIC BULLET'[1] OR WEAK ATTEMPT TO SUBSTITUTE TECHNOLOGY FOR COMPREHENSIVE REFORM?

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INTRODUCTION

The subject of immigration reform was notably absent from the 2008 presidential campaign. Neither John McCain nor Barack Obama, who incidentally take similar positions on immigration,[2] made immigration a focal point, or even a supporting feature, of their respective platforms. Notwithstanding the lack of attention given to what many term "immigration reform,"[3] it continues to be a hot button issue that is sure to undergo change in the coming years.[4]

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1. *See* BASIC PILOT/E-VERIFY: NOT A MAGIC BULLET 1 (Nat'l Immigration Law Ctr. ed., Jan. 4, 2008) ("E-Verify often is portrayed as the magic bullet that would curb the hiring of unauthorized workers . . . .").

2. Both McCain and Obama, for example, supported legislation that would create a road to legalization for unauthorized workers in this country. *See* Michael Luo, *McCain Says Immigration Reform Should Be Top Priority*, N.Y. TIMES, May 22, 2008, http://thecaucus.blogs.nytimes.com/2008/05/22/mccain-says-immigration-reform-should-be-top-priority/?scp=1&sq=See%20Michael%20Luo,%20McCain%20Says%20Immigration%20Reform%20Should%20be%20Top%20Priority,%20N.Y.%20Times,%20May%2022,%202008&st=cse (last visited Mar. 26, 2010). On the other hand, there is also bi-partisan support for greater enforcement. Julia Preston, *Immigration Cools as Campaign Issue*, N.Y. TIMES, Oct. 29, 2008, at A20.

3. *See, e.g.*, Luo, *supra* note 2.

4. This is especially true in light of the recent recession and a national unemployment rate hovering around ten percent. U.S. Dep't of Labor, Bureau of Labor Statistics, *Economy at a Glance: United States Monthly Data*, http://www.bls.gov/eag/eag.us.htm (last visited Mar. 26, 2010). On April 23, 2010 Arizona Governor Jan Brewer signed a new immigration bill authorizing state law enforcement to request documentation from any person whom they "reason[ably] susp[ect]" to be in the country illegally and arrest whomever is unable to present suitable identification or immigration documents upon request. 2010 Ariz. Sess. Laws 113; Randal C. Archibold, *Arizona Enacts Stringent Law On*

Three years prior to the 2008 election, President George W. Bush stated, "[w]e should not be content with laws that punish hard-working people who want only to provide for their families and deny businesses willing workers and invite chaos at our border."[5] Although undocumented workers accounted for just 5 percent of the U.S. workforce that year, they comprised a much higher proportion of workers in industries that rely heavily on immigrant labor.[6]

According to a 2005 current population survey, unauthorized immigrants made up 24 percent of agricultural workers, 17 percent of the cleaning industry, 14 percent of the construction industry, and 12 percent of the food preparation industry in the United States.[7] As these statistics show, many industries are dependent on immigrant labor for their survival. However, in a post-9/11 world, the U.S. government must also be able to account for the individuals within its borders. As of January 1, 2007, an estimated 11.8 million unauthorized immigrants were residing in the United States compared to 8.5 million in 2000.[8] Further, the residencies of unauthorized immigrants have become more dispersed.[9] While California's historically disproportionate share of the unauthorized immigrant population declined over the seven-year period, Georgia, Arizona, Texas, and Washington experienced the greatest increases.[10]

In response to the continued growth of the unauthorized immigrant population in the United States, interior and worksite enforcement have become a key component of U.S. immigration policy, "reclassifying immigration law as a domestic issue, rather than as pure foreign policy."[11] One of the products of this policy shift

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Immigration, N.Y. TIMES, Apr. 23, 2010, at A1. The new law, whose goal is "to discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States" has sparked debate on capital hill and led to nationwide protests, renewing the prospect of national reform in the near future. 2010 Ariz. Sess. Laws 113; *see also* Julie Pace, *Immigration At Forefront of Obama-Calderon Meeting*, WASH. POST, May 18, 2010.

5. President George W. Bush, State of the Union Address (Feb. 2, 2005).

6. JEFFREY S. PASSEL, THE PEW HISPANIC CTR., THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S.: ESTIMATES BASED ON THE MARCH 2005 CURRENT POPULATION SURVEY 13-14 (2006), http://pewhispanic.org/files/reports/ 61.pdf.

7. *Id.* at 11.

8. MICHAEL HOEFER, NANCY RYTINA & BRYAN C. BAKER, DEP'T OF HOMELAND SEC., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2007, at 1 (2008), http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2007.pdf.

9. *Id.* at 4.

10. *Id.*

11. Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power Over*

is E-Verify.[12]

This Note considers the possible expansion of E-Verify, an electronic online employment verification database developed by the Department of Homeland Security (DHS) in conjunction with the Social Security Administration (SSA), to regulate and prevent the employment of unauthorized workers. Participation in E-Verify is currently voluntary for most employers; however, federal contractors are now required to use the system[13] and some states have passed legislation mandating its use.[14] This trend raises several constitutional and practical concerns relating to employers' and states' roles in controlling illegal immigration within our borders. In particular, the accuracy of the system's data, along with the role of individual employers as program administrators, raise due process and civil rights concerns in light of unacceptably high error rates and employer misuse.

This Note argues that E-Verify should not be nationalized at this time. Although mandatory nationalization would help standardize the law across the fifty states, more robust procedural safeguards and a program that legally integrates working immigrants and their families are needed. More rigorous enforcement of labor laws would provide a meaningful and efficient alternative to a large-scale database that would overburden existing agencies, encourage identity theft, and promote an underground economy where exploitation and criminality could thrive.

Part I provides a historical account of the United States' past and present approaches toward immigration, beginning with the passage of the Immigration Reform and Control Act of 1986 (IRCA).[15] It discusses the successes and failures that have generated the latest shift from border to interior enforcement. Part II introduces the notion of "immigration federalism" and examines the competing arguments for and against state and local enforcement efforts. Specifically, it discusses the advantages and disadvantages of nationalizing E-Verify and looks at the various ways in which states have already integrated or rejected E-Verify as a part of their policies toward the employment of unauthorized workers. Due to the limited scope of this Note, however, Part II does not make a normative

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Immigration, 86 N.C. L. REV. 1557, 1583 (2008).

12. *See* BASIC PILOT/E-VERIFY: NOT A MAGIC BULLET, *supra* note 1, at 1.

13. *See* Exec. Order No. 13,465, 73 Fed. Reg. 33,285 (June 11, 2008).

14. *E.g.*, Legal Arizona Workers Act, ARIZ. REV. STAT. ANN. §§ 23-211 to 23-214. (2009).

15. Immigration Reform and Control Act of 1986, Pub. L. 99-603, 100 Stat. 3359 (1986) (codified as amended at 8 U.S.C. § 1101 *et seq.* (2006)) [hereinafter IRCA].

argument for or against a federalist model.[16] Part III contends that while a uniform national verification system would better facilitate compliance for multi-state employers, the program costs, combined with the threat of discriminatory practices and due process violations, outweigh potential benefits. Finally, Part IV proposes that greater enforcement of labor laws would provide a more cost-effective alternative to E-Verify, better preserve the due process rights of immigrant workers, and limit the occurrence of identity theft.

I. BACKGROUND OF UNITED STATES IMMIGRATION POLICY: THEN AND NOW

The Immigration Reform and Control Act of 1986 (IRCA) ushered in a new era of comprehensive immigration reform.[17] With employer sanctions as its centerpiece,[18] IRCA prohibits employers from knowingly hiring or continuing to employ an illegal worker,[19] which the Act defines as a person not "lawfully admitted for permanent residence" or "authorized to be so employed by [IRCA] or by the Attorney General."[20]

Resembling state employment law more than anything akin to foreign policy,[21] IRCA aims to deter illegal immigration by reducing the greatest "pull factor" for unauthorized migrant workers: employment.[22] Coupled with enhanced border control and an extensive legalization program for undocumented workers already here, the legislation represented a bipartisan compromise that

16. See Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57 (2007), for a discussion of how states might help achieve the goals of federal immigration policy.

17. *See, e.g.*, Stumpf, *supra* note 11, at 1583.

18. Employers of illegal workers could face civil fines and criminal prosecution. 8 U.S.C. §§ 1324a(e)(4)(A), (f)(1) (2006). Employees who use fraudulent documents are also subject to criminal prosecution and civil fines. 8 U.S.C. § 1324.

19. 8 U.S.C. §§ 1324a(a)(1)-(2). "The term knowing includes not only actual knowledge but also knowledge which may fairly be inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition." 8 C.F.R. § 274a.1(*l*)(1) (2009).

20. 8 U.S.C. § 1324a(h)(3).

21. Stumpf, *supra* note 11, at 1583-84.

22. Jeffrey J. Ehrenpreis, *Controlling Our Borders Through Enhanced Employer Sanctions*, 79 S. CAL. L. REV. 1203, 1205-06 (2006) (arguing that by increasing civil and criminal sanctions against employers who knowingly hire unauthorized workers, employers will stop hiring them and fewer illegal immigrants will enter or remain in the United States as a result); *see also* H.R. REP. NO. 99-682, pt. 1, at 56 (1986) ("[T]he [Judiciary] Committee is convinced that as long as job opportunities are available to undocumented aliens, the intense pressure . . . to [illegally] obtain employment will continue.").

successfully balanced the seemingly conflicting goals of immigration reform: preventing unauthorized migration and providing a path to citizenship for those already in the country.[23]

Specifically, the Act mandates use of a paper-based employment verification system, commonly known as the I-9 system, to ensure compliance with the Act.[24] It requires employees to demonstrate that they are either U.S. citizens, permanent residents, or otherwise authorized to work in the United States by providing one of the specified documents under the Act.[25] IRCA then requires employers to verify, under penalty of perjury, that they have reviewed the documentation presented to them and that such documentation "reasonably appears on its face to be genuine."[26] Employers must keep the I-9 Form on file for three years after the date of hire or one year after the employee's last day of work, whichever is later.[27] Employers are also prohibited from discriminating on the basis of national origin or citizenship status.[28]

Since its passage, IRCA has been unable to achieve its stated goal of deterring illegal immigration. Numerous critiques of IRCA have been published, citing document fraud, non-compliance by employers, lack of interior enforcement, and the countervailing interests of certain domestic industries that depend on and benefit from the cheap labor as weaknesses of the Act.[29] Notwithstanding

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23. BETSY COOPER & KEVIN O'NEIL, MIGRATION POL'Y INST., LESSONS FROM THE IMMIGRATION REFORM AND CONTROL ACT OF 1986 1-4 (2005).

24. 8 U.S.C. §§ 1324a(b)(1)-(2).

25. *Id.*

26. *Id.*; *see also Employment Verification: Challenges Exist in Implementing a Mandatory Electronic Verification System: Testimony Before the Subcomm. on Social Security, Comm. on Ways and Means*, 110th Cong. 4 (2007) [hereinafter *Stana*] (statement of Richard M. Stana, Director Homeland Security and Justice Issues). Under IRCA, employees could initially choose from twenty-nine documents to identify themselves to their employer. In 1997, the INS reduced the number of acceptable documents to twenty-seven. *Id.* at 5. "Eight of these documents establish both identity and employment eligibility (*e.g.*, U.S. Passport or permanent resident card); [twelve] documents establish identity only (*e.g.*, driver's license); and [seven] documents establish employment eligibility only (*e.g.*, Social Security card)." *Id.* at 5 n.7.; *see also* 8 U.S.C. § 1324a(b)(1)(A)(ii) ("A person or entity has complied with the requirement of this paragraph with respect to examination of a document if the document reasonably appears on its face to be genuine.").

27. 8 C.F.R. § 274a.2(c)(2) (2009). The hiring of contractors and "casual domestic" workers exempts employers of their I-9 obligation. 8 C.F.R. § 274a.1(f).

28. 8 U.S.C. § 1324b(a); Unfair Immigration-Related Employment Practices, 52 Fed. Reg. 37,402 (Oct. 6, 1987) (codified at 28 C.F.R. pt. 44).

29. *See generally* Ehrenpreis, *supra* note 22, at 1206 (arguing that enforcement should focus on the employers who hire illegal immigrants); Schuck, *supra* note 16, at 59 (arguing that states should play a greater role in immigration enforcement); Richard A. Johnson, Note, *Twenty Years of the IRCA: The Urgent Need For An*

IRCA's limited success, however, the legislation represents a marked shift from border to interior enforcement.[30]

A. Electronic Verification Systems Developed to Resolve Document Fraud Under IRCA's Paper-Based Verification System

In 1991, pursuant to the authority granted the executive branch in the Immigration and Nationality Act,[31] President Bush issued Executive Order 12781,[32] delegating to the Attorney General the authority to "undertake demonstration projects" relating to an employment verification system.[33] In March 1992, the former Immigration and Naturalization Service (INS) created a Telephone Verification Service, by which employers could contact the INS directly to confirm the legal status of new employees.[34] In 1996, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) authorized multiple electronic verification systems.[35] One such pilot program, initially called the Employment Eligibility Verification Program or Basic Pilot Program (now known as E-Verify), was instituted that year and is currently the only system in use.[36]

E-Verify is a web-based system designed to electronically cross-check the documentation provided by a new hire with the Social Security Administration (SSA) and U.S. Citizenship and Immigration Services (USCIS), a bureau within the Department of Homeland Security (DHS).[37] Participation in the program is voluntary and free of charge.[38] Although use of the electronic system does not relieve

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Updated Legislative Response to the Current Undocumented Immigrant Situation In the United States, 21 GEO. IMMIGR. L.J. 239, 251-54 (2007) (criticizing the IRCA for its poor job of staunching the flow of illegal immigrants into the United States).

30. DOUGLAS S. MASSEY, CTR. FOR TRADE & POL'Y STUD., BACKFIRE AT THE BORDER: WHY ENFORCEMENT WITHOUT LEGALIZATION CANNOT STOP ILLEGAL IMMIGRATION 5 (2005) (noting that the budget for border control rose from $151 million under IRCA to $1.6 billion in 2002).

31. 8 U.S.C. §§ 1324a(d)(2), (4).

32. Exec. Order No. 12,781, 56 Fed. Reg. 59, 203 (Nov. 22, 1991).

33. *Id.*

34. THE HISTORY OF BASIC PILOT/E-VERIFY 1 (Nat'l Immigration Law Ctr. ed., Oct. 2008), http://www.nilc.org/immsemplymnt/ircaempverif/e-verify-history-2008-10-17.pdf.

35. Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996) (codified as amended at 8 U.S.C. § 1324a).

36. THE HISTORY OF BASIC PILOT/E-VERIFY, *supra* note 34.

37. *Id.*

38. U.S. Citizen and Immigration Services, Statement for the Record: E-Verify,

employers from manually completing I-9 forms as well, participation in the program entitles employers to a "'rebuttable presumption' of non-liability."[39]

After an employer submits a verification request for a new employee, E-Verify issues either a confirmation or tentative non-confirmation ("TNC") of work eligibility status within seconds.[40] If a tentative non-confirmation is issued, the employer must notify the affected employee, who has eight business days to challenge the finding by personally visiting a SSA office.[41] During this time, the employer is forbidden from taking any adverse action against the employee.[42] If an employee does not challenge, or unsuccessfully challenges, her work authorization status, the employer will receive a final non-confirmation notice from E-Verify and must terminate the employee or inform the Department of Homeland Security that it will continue to employ that person.[43]

B. Recent Successes Attributed to Interior Enforcement.

Border enforcement, the alternative means to stem illegal immigration, has been ineffective and costly. Conversely, increased emphasis on workplace or "interior" enforcement has been credited for reducing the influx of illegal immigrants in recent years.[44] A report issued in October 2008 by the Pew Hispanic Center found that between 2005 and 2008, the number of permanent immigrant residents in the U.S. surpassed the number of undocumented immigrants.[45] The "inflow" of unauthorized migrants also fell from 800,000 per year between 2000 and 2004 to 500,000 per year from

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http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=bca6fa693660a110VgnVCM1000004718190aRCRD&vgnextchannel=75bce2e261405110VgnVCM1000004718190aRCRD (last visited Mar. 26, 2010) [hereinafter Statement]. Although E-Verify is touted as a "free" service for employers, such statements ignore the administrative costs associated with the system, including the need for internet access, training costs, and time spent communicating with federal agencies and conducting the verification checks. *Id.*

39. Ariz. Contractors Ass'n v. Candelaria, 534 F. Supp. 2d 1036, 1054 (D. Ariz. 2008).

40. Statement, *supra* note 38.

41. *Id.*

42. *Id.*

43. *Id.*

44. Amber McKinney, *Immigration: Increased Worksite Enforcement, E-Verify Slowing Illegal Immigration, Chertoff Says*, DAILY LAB. REP. (No. 207), Oct. 27, 2008, at A-12.

45. JEFFREY S. PASSEL & D'VERA COHN, PEW HISPANIC CTR., TRENDS IN UNAUTHORIZED IMMIGRATION: UNDOCUMENTED INFLOW NOW TRAILS LEGAL INFLOW 2 (2008), http://pewhispanic.org/files/reports/94.pdf.

2005 to 2008.[46] In October 2008, DHS Secretary Michael Chertoff praised the DHS for "put[ting] our country on a path moving in the right direction with respect to illegal migration," through enhanced workplace enforcement and the greater use of E-Verify.[47] This shift toward interior enforcement has meant that states and localities are taking on a greater role, especially when it comes to workplace enforcement. As such, opponents of state and local immigration regulations have raised questions as to whether such legislation is constitutionally permitted or preempted by federal law.[48]

II. IMMIGRATION FEDERALISM AND AN OVERVIEW OF STATE IMMIGRATION LEGISLATION

State and local governments already play a critical role in apprehending immigrants who have committed crimes in this country, no doubt a major priority within the larger arena of immigration enforcement.[49] However, immigration regulation now intersects with employment law, welfare, and criminal law.[50] What was once exclusively a federal matter is now regulated by a decidedly federalist model. In 2007 alone, state immigration legislation tripled across the fifty states with 1562 bills introduced and 240 laws enacted just that year.[51] As of November 30, 2008 at least 1305 pieces of legislation had been introduced, and 206 state laws or resolutions had been enacted across forty-one states.[52] Nineteen employment-related immigration laws were passed in thirteen states that year[53] and seventeen state legislatures, most notably Arizona, "introduced legislation that would mandate the use of E-Verify for at least some employers."[54]

Many of these laws and regulations mirror the language of IRCA and I-9 rules, with added local and state penalties for essentially

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46. *Id.*

47. McKinney, *supra* note 44, at A-12.

48. *See* Karla Mari McKanders, *The Constitutionality of State and Local Laws Targeting Immigrants*, 31 U. ARK. LITTLE ROCK L. REV. 579, 580-81 (2009).

49. *See* Schuck, *supra* note 16, at 72 (explaining (1) that local and state law enforcement generally determine which immigrants are criminals, and (2) the INS has a limited budget to conduct law enforcement across the fifty states).

50. Stumpf, *supra* note 11, at 1565.

51. NAT'L CONFERENCE OF STATE LEGISLATURES, STATE LAWS RELATED TO IMMIGRANTS AND IMMIGRATION IN 2008, at 1 (Rev'd Jan. 27, 2009), http://www.ncsl.org/print//immig/State%20Immigration%20Report%20December%2018%202008.pdf. [hereinafter CONFERENCE]

52. *Id.* at 1, 3.

53. *Id.* at 5.

54. Gary Endelman, *The "Perils of Preemption": Immigration and the Federalist Paradox*, BENDER'S IMMIGR. BULL., Oct. 15, 2008, at 12.

federal violations.[55] However, other states have created and imposed harsher penalties than those under federal law.[56] Finally, several states have mandated that their employers use E-Verify while others have specifically forbid them from doing so.[57]

The most often discussed state legislation is the Legal Arizona Workers Act (LAWA),[58] which requires all employers to use E-Verify and issues sanctions against employers who knowingly or intentionally hire unauthorized workers.[59] Other states have followed suit. The Mississippi Employment Protection Act[60] and South Carolina Illegal Immigration Reform Act[61] not only require employers to use E-Verify to confirm the legal status of their employees,[62] but also create a private cause of action for discharged workers who can show that the employer knowingly employed unauthorized workers at the time of discharge.[63] Similarly, in 2006, the city of Hazelton, Pennsylvania passed the Illegal Immigration Relief Act,[64] requiring city contractors to use E-Verify and imposing sanctions on businesses found to be employing unauthorized workers.[65]

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55. *Id.* Arizona, Florida, Louisiana, Mississippi, Nevada, New Hampshire, Oregon, South Carolina, Tennessee, Virginia, and West Virginia impose state sanctions on employers who hire unauthorized workers. *Id.* at 4-7.

56. Arizona, Mississippi, and South Carolina are among the states that have empowered their own officials to police the employment of unauthorized workers. *Id.* at 4.

57. *Id.* at 4-7. See Ann Morse, National Conference of State Legislatures, *E-Verify: Frequently Asked Questions*, Feb. 4, 2010, http://www.ncsl.org/?tabid=13127#states_ address for more updated information on state laws that address E-Verify.

58. ARIZ. REV. STAT. §§ 23-211 to 23-214 (2008).

59. The Legal Arizona Workers Act was signed into law on July 2, 2007 by former Arizona Governor Janet Napolitano, now United States Secretary of Homeland Security. *See* Editorial, *Blazing Arizona*, N.Y. TIMES, Dec. 18, 2007, at A34. First time violators are subject to a three-year probationary period and may have their business license revoked for up to ten business days. ARIZ. REV. STAT. § 23-212(F)(1). If an employer violates the act during his probationary period, his business license will be permanently revoked. *Id.* at § 23-212(F)(2).

60. MISS. CODE ANN. §§ 71-11-1 to -3 (2009).

61. S.C. CODE ANN. §§ 8-14-10, -20 (2008).

62. The law is being "phased in" such that employers with 250 or more employees must begin using E-Verify by July 1, 2008, employers with 100-250 employees must begin by July 1, 2009, those with 30-100 employees by July 1, 2010, and all other employers by July 1, 2011. MISS. CODE. ANN. § 71-11-3.

63. Employers who use E-Verify are provided a safe harbor from discrimination suits. *Id.* § 71-11-4(b)(iii).

64. *See* Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 484 (M.D. Pa. 2007).

65. Hazleton, Pa., Illegal Immig. Relief Act, Ordinance 2006-18 (Sept. 21, 2006), *invalidated by Lozano*, 496 F. Supp. 2d at 477. The following summer, the law was invalidated by the U.S. District Court for the Middle District of Pennsylvania which

Meanwhile, the state of Illinois amended its Right to Privacy in the Workplace Act[66] to prohibit employers from using E-Verify until the SSA and DHS "are able to make a determination on 99% of the tentative non-confirmation notices issued to employers within 3 days, unless otherwise required by federal law."[67] In September 2007, the United States Department of Justice filed a complaint against the state of Illinois alleging that the amendment conflicted with and was thereby preempted by the federal law.[68] On March 11, 2009, the United States District Court for the Central District of Illinois granted summary judgment in favor of the United States, finding that the Illinois Act frustrated Congress' purpose of allowing any employer to participate in the program, and that Congress alone could establish accuracy standards for its own database.[69]

A. E-Verify Challenged on Federal Preemption Grounds

Historically, Congress has enjoyed an implied power to regulate immigration.[70] The leading case on the preemption of state immigration regulations is *De Canas v. Bica*.[71] In *De Canas*, migrant farm workers challenged the validity of a California statute that imposed criminal penalties on employers who knowingly hired unauthorized workers.[72] The Court ruled that notwithstanding the federal government's plenary power over immigration, states may pass laws that indirectly impact immigration unless Congress has

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found that the municipal act was preempted by federal law. *Lozano*, 496 F. Supp. 2d at 477.

66. Right to Privacy in the Workplace Act, 820 ILL. COMP. STAT. 55/12 (2008), *invalidated by* United States v. Illinois, No. 07-3261, 2009 U.S. Dist. LEXIS 19533 (C.D. Ill. Mar. 11, 2009).

67. *Id.*

68. Complaint, *Illinois*, 2009 U.S. Dist. LEXIS 19533 (C.D. Ill. Sep. 25, 2009); *see also* Endelman, *supra* note 54, at 10. The relevant federal law in this case is § 1324(a)(d)(4) of the Immigration and Nationality Act which authorized the executive branch to permit "demonstration projects." 8 U.S.C. § 1324(a) (2006). Although the Illinois law made an exception for employers who are required by federal law to use E-Verify, it did not permit employers to voluntarily participate. 820 ILL. COMP. STAT. 55/12.

69. *Illinois*, 2009 U.S. Dist. LEXIS 19533, at 6-7.

70. The power to exclude foreigners was confirmed by the Supreme Court in *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 597 (1889), in which Chinese laborers were denied entry pursuant to "'[a]n act to execute certain treaty stipulations relating to Chinese,'" notwithstanding existing treaties between China and the United States allowing entry. *See also* Fong Yue Ting v. United States, 149 U.S. 698, 713 (1893) (deferring to congressional acts with regard to the exclusion of foreigners).

71. 424 U.S. 351 (1976).

72. *Id.* at 352-53.

"unmistakably so ordained" that they not do so.[73] In other words, a state statute that affects immigrants directly, but only tangentially impacts immigration itself does not constitute a "regulation of immigration."[74]

Practically speaking, *De Canas* holds that a state law that affects the *employment* of unauthorized workers is not a regulation of immigration *per se*, and therefore is not automatically preempted by federal law.[75] Citing "[c]hild labor laws, minimum and other wage laws, laws affecting occupational health and safety, and workmen's compensation laws," the Court held that employment laws have traditionally fallen under the broad police powers of a state.[76] The Court also recognized the state's interest in preserving the job market for California residents, who faced an influx of immigrant labor from neighboring Mexico.[77] Lastly, despite calling the INA a "comprehensive [legislative] scheme,"[78] the Court noted that "such [preemptive] intent [cannot] be derived from the scope and detail of the INA."[79]

Opponents of state and local immigration regulations urge that, unlike the Immigration and Nationality Act (INA),[80] IRCA created a comprehensive regulatory scheme that specifically targets the employment of unauthorized workers.[81] With a greater focus on interior enforcement, they argue that IRCA leaves no room for states to police unlawful employment, let alone impose additional sanctions on employers.[82] Predictably, *De Canas* has been used by both sides of the debate to support competing interpretations of IRCA.[83]

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73. *See id.* at 356. The Court explained that, "the fact that aliens are the subject of a state statute does not render it a regulation of immigration." *Id.* at 355. Rather, the Court considered such regulations to fall under a state's police power, one of which is to regulate employment. *Id.* at 356-57. In the case of California, the State was justified in wanting to protect their residents' livelihood by preserving jobs and wages for legal California residents in the face of unauthorized migration from Mexico. *But cf.* Pennsylvania v. Nelson, 350 U.S. 497 (1956) (holding that a state statute was preempted when the field was pervasively regulated by Congress); Hines v. Davidowitz, 312 U.S. 52 (1941) (holding that a state statute was preempted when Congress had already put in place a comprehensive scheme).

74. *De Canas*, 424 U.S. at 355-56.

75. *See id.* at 355-57.

76. *Id.* at 356.

77. *Id.* at 356-57.

78. *Id.* at 354.

79. *Id.* at 359.

80. 8 U.S.C. §§ 1101-1189 (2006).

81. *See* Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 147 (2002); *see also* Lozano v. City of Hazelton, 496 F. Supp. 2d 477, 523 (M.D. Pa. 2007).

82. *Lozano*, 496 F. Supp. 2d at 523.

83. *Compare* Chicanos Por La Causa, Inc. v. Napolitano, 544 F.3d 976, 983-84 (9th

B. Federal Preemption Doctrine Unlikely to Prevent States from Expanding Use of E-Verify

The Supremacy Clause of the United States Constitution provides that if there is a conflict between state and federal law, the state law is preempted by federal law.[84] Preemption can be either express or implied; however, the ultimate touchstone is congressional intent.[85]

Express preemption occurs when the plain language of a federal law precludes the coexistence of state law.[86] IRCA's preemption clause reads, "[t]he provisions of this section preempt any State or local law imposing civil or criminal sanctions (*other than through licensing and similar laws*) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens."[87] The clause clearly proscribes the imposition of state sanctions on employers who hire undocumented workers. However, the question remains as to what constitutes state "licensing and similar laws."[88] The case law on this question is mixed.

Proponents of local regulation insist that IRCA was not intended to prevent states from revoking state business licenses of employers who violated the Act or from licensing "fitness to do business laws" in certain industries.[89] In January 2007, a Missouri district court upheld a municipal statute which permits citizens and other businesses to submit complaints about employers suspected of hiring unauthorized workers and requires violators to utilize E-Verify.[90]

Cir. 2008) (reaffirming *De Canas* and distinguishing the assertion in *Hoffman* that "IRCA made the employment of unauthorized workers 'central to [t]he policy of immigration law'" from the present challenge because *Hoffman* did not involve a challenge to a state law or preemption) (internal quotations omitted), *with Lozano*, 496 F. Supp. 2d at 524 (distinguishing *De Canas* on the basis that reducing unauthorized employment was a central goal of IRCA).

84. *See* U.S. CONST. art. VI; Gade v. Nat'l Solid Waste Mgmt. Ass'n, 505 U.S. 88, 98 (1992) (explaining that the constitutional preemption doctrine is derived from the supremacy clause).

85. *Gade*, 505 U.S. at 98.

86. *See* Jones v. Rath Packing, 430 U.S. 519, 525 (1977) ("[Express preemption] is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.").

87. 8 U.S.C. § 1324a(h)(2) (2006) (emphasis added).

88. *See, e.g.*, *Chicanos Por La Causa*, 544 F.3d at 980.

89. *Id.* at 984 (quoting H.R. REP. No. 99-682, pt. 1, at 58 (1986)).

90. Gray v. City of Valley Park, No. 4:07CV00881 ERW, 2008 WL 294294, at *26 (E.D. Mo. Jan. 31, 2008). Businesses subject to such complaints must turn over

The Court viewed the law as a business licensure ordinance, not a regulation of immigration as defined by *De Canas*.[91]

In *Arizona Contractors Association v. Candelaria*,[92] Arizona employers challenged the Legal Arizona Workers Act,[93] which prohibits the employment of unauthorized workers, mandates that all employers use E-Verify to certify the legal status of their employees, and imposes harsh penalties on employers who violate the Act.[94] The Arizona District Court, rather than interpreting IRCA's preemption clause as a limitation on how and whether states could act, construed the clause as expressly permitting states to enact business licensing laws.[95] The court also concluded that the state mandate, requiring that employers use E-Verify, did not conflict with federal objectives.[96]

Earlier Supreme Court decisions point out that "the mere existence of a federal regulatory or enforcement scheme . . . does not by itself imply pre-emption of state remedies."[97] In fact, courts are generally reluctant to infer federal preemption in the absence of "an explicit statutory directive, . . . unmistakable implication from legislative history, or . . . a clear incompatibility between state-court jurisdiction and federal interests."[98] Preemption is far from certain even when state penalties are harsher than those imposed under federal law.[99]

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documentation provided by employers to the City, who in turn verifies employees' legal status with the Department of Homeland Security. *Id.* at *9-10.

91. *Id.* at *25.

92. Ariz. Contractors Ass'n v. Candelaria, 534 F. Supp. 2d 1036 (D. Ariz. 2008), *aff'd sub nom. Chicanos Por La Causa, Inc.*, 544 F.3d at 980 (upholding the district court's decision, but noting that Petitioners' challenge was "brought against a blank factual background of enforcement," suggesting that when sanctions are actually imposed, a renewed challenge could yield a different result).

93. ARIZ. REV. STAT. ANN. §§ 23-211 to -214 (2009).

94. *See id.*

95. *Ariz. Contractors Ass'n*, 534 F. Supp. 2d at 1046.

96. *Id.* at 1053-55.

97. English v. Gen. Elec. Co., 496 U.S. 72, 87 (1990).

98. Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 478 (1981). "Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law." Maryland v. Louisiana, 451 U.S. 725, 746 (1981); *see also* Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963) ("[F]ederal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons – either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.").

99. California v. ARC Am. Corp., 490 U.S. 93, 105 (1989) ("Ordinarily state causes of action are not pre-empted solely because they impose liability over and above that authorized by federal law.").

However, not all judges have interpreted IRCA in this light. Some courts have decided that laws regulating immigrant employment are effectively a regulation of immigration under IRCA.[100] In *Lozano*,[101] the plaintiffs urged that the city's immigration scheme, which suspended business permits of employers who employed unauthorized workers and created a private cause of action for discharged employees was preempted by the express language of IRCA.[102] The city claimed that the business permit suspension was not a civil or criminal penalty, but rather a licensing similar law that followed IRCA with "exacting precision."[103] The court found this distinction dubious, calling a business suspension the "ultimate sanction," and labeling the cause of action for discharged employees nothing even resembling a "licensing" law.[104] The court further observed that state licensing laws were envisioned to punish federal violations of IRCA only, not local immigration laws.[105] While some district court decisions have found preemption where states create their own versions of federal immigration laws, it is unlikely that the Supreme Court will invalidate state laws that essentially mirror the goals of IRCA.[106]

Proceeding under the assumption that state laws mandating employer use of E-Verify are not preempted by IRCA, two central questions begin to emerge. First, is E-Verify really necessary, and if so, should Congress nationalize E-Verify, taking into account financial, political, and constitutional concerns? And second, if E-

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100. *See* Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 521-33 (M.D. Pa. 2007).

101. *Id.*

102. *Id.* at 519.

103. *Id.*

104. *Id.* at 519-20.

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

Id. at 519-20 (quoting H.R. REP. No. 99-682, pt. 1, at 5662 (1986)).

106. The DHS is actively marketing E-Verify to employers via radio advertisements on National Public Radio (NPR). Alicia C. Shepard, *Should NPR Run Funding Credits from the Department of Homeland Security?*, NPR, Nov. 25, 2008, http://www.npr.org/ombudsman/2008/11/should_npr_run_funding_credits.html; *see also* Basic Pilot Program Extension and Expansion Act of 2003, Pub. L. 108-156, 117 Stat. 1944.

Verify is not necessary, do alternative means to curb unauthorized employment by reducing employers' incentive to hire undocumented workers exist?

III. PROGRAM COSTS AND NEGATIVE EXTERNALITIES OUTWEIGH THE PURPORTED BENEFITS OF AN ELECTRONIC VERIFICATION SYSTEM

A. Existing Demand for Immigrant Labor Does Not Favor E-Verify's Immediate Expansion

Many people believe that undocumented workers take jobs away from native workers.[107] However, empirical evidence does not show a causal relationship between immigrant labor and negative employment outcomes for native workers.[108] First, immigrants not only supply labor, but also demand goods and services, thereby further expanding the demand for skilled and unskilled labor alike.[109] Second, native and immigrant workers often do not compete for the same jobs.[110] In fact, some economists suggest that immigrant and native labor complement each other to such a degree that increased immigrant migration could actually benefit native workers.[111] Even studies that have looked at the impact of immigrant migration on less educated blacks and latinos (thought to be the closest substitutes for immigrants in the workplace) have found negligible effects on the native earnings of those groups.[112]

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107. *See generally* George J. Borjas, *The Economics of Immigration*, 32 J. ECON. LIT. 1667 (1994) [hereinafter Borjas, *Economics*]; Rachel M. Friedberg & Jennifer Hunt, *The Impact of Immigrants on Host Country Wages, Employment and Growth*, 9 J. ECON. PERSPECTIVE 23 (1995).

108. *See* Borjas, *Economics*, *supra* note 107, at 1697-98; Friedberg & Hunt, *supra* note 107, at 42; Giovanni Peri, *The Effect of Immigration of Productivity: Evidence from U.S. States* 20 (Nat'l Bureau of Econ. Research, Working Paper No. 15507, 2009).

109. *See* Howard F. Chang, *The Economic Impact of International Labor Migration: Recent Estimates and Policy Implications*, 16 TEMP. POL. & CIV. RTS. L. REV. 321, 328 (2007); *see also* COAL. FOR IMMIGRANT & REFUGEE RIGHTS, FACT SHEET: ECONOMIC CONTRIBUTIONS OF IMMIGRANTS 2, http://www.icirr.org/en/print/1221 (last visited Mar. 26, 2010).

110. Chang, *supra* note 109, at 328; *see* PASSEL, *supra* note 6, at 13-14.

111. Chang, *supra* note 109, at 328.

112. George J. Borjas, *Immigrants, Minorities, and Labor Market Competition*, 40 INDUST. & LAB. REL. REV. 382, 385-88 (1987); *see also* Borjas, *Economics*, *supra* note 107, at 1667-1717; Roberto Pedace, *Immigration, Labor Market Mobility, and the Earnings of Native-Born Workers: An Occupational Segmentation Approach*, 65 AM. J. ECON. & SOC'Y 313, 315-16, 331-40 (2006). Although some studies have found that undocumented workers marginally depress wages for native low-wage workers, policy solutions exist for correcting this differential. One non-profit public research institution suggests that "tax reductions, subsidies, wage supports, training, job

In addition to displacing native workers, states and localities argue that undocumented populations are a drain on state and local resources.[113] Specifically, some studies suggest that tax evasion among undocumented immigrants combined with the increased cost of law enforcement,[114] emergency medical care, welfare, public education and other state expenditures created by their presence deplete state funds at the expense of legal residents.[115] In *De Canas*, the Supreme Court upheld a state law proscribing employment of unauthorized workers on the basis that the state law was narrowly tailored to "protect California's fiscal interests and lawfully resident labor force from the deleterious effects on its economy resulting from the employment of illegal aliens."[116]

However, competing research shows that even if undocumented workers disproportionately depend on state and local public services, unauthorized immigrants contribute more in taxes over their lifetime than they receive in benefits.[117] Under the current I-9 system, when undocumented workers present fake IDs to their employers, they are still paid on the books with payroll tax deductions.[118] Remarkably, tax-paying undocumented workers, who are not entitled to benefits

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placement, the earned income tax credit, and relocation programs" can be utilized to offset the economic impact undocumented workers have on native workers in similar industries. GREG ANRIG & TOVA ANDREA WANG, THE CENTURY FOUND., IMMIGRATION, JOBS, AND THE AMERICAN ECONOMY 7 (2004), http://www.tcf.org/Publications/EconomicsInequality/immigrationgatw.pdf.

113. *See* Katie E. Chachere, *Keeping America Competitive: A Multilateral Approach to Illegal Immigration Reform*, 49 S. TEX. L. REV. 659, 673 (2008).

114. Immigrants' rights groups argue that local and state immigration enforcement weakens relationships between local police and immigrant communities, deflects resources from everyday crime-fighting, and heightens the potential for civil rights and due process violations as a result of racial-profiling. HANNAH GLADSTEIN ET AL., MIGRATION POL'Y INST., BLURRING THE LINES: A PROFILE OF STATE AND LOCAL POLICE ENFORCEMENT OF IMMIGRATION LAW USING THE NATIONAL CRIME INFORMATION CENTER DATABASE, 2002-2004, at 5 (2005), http://www.migrationpolicy.org/pubs/MPI_report_Blurring_the_Lines_120805.

115. *See* Kris W. Kobach, *Reinforcing the Rule of Law: What States Can and Should Do to Reduce Illegal Immigration*, 22 GEO. IMMIGR. L.J. 459, 459-62 (2008). Undocumented immigrants are precluded, however, from receiving need-based public assistance as a result of The Welfare Reform Bill of 1996. Also, they cannot escape paying sales, property, consumption and social security taxes. Chachere, *supra* note 113, at 674.

116. De Canas v. Bica, 424 U.S. 351, 357 (1976); *see also* Schuck, *supra* note 16, at 79-80 ("[T]he concentration of the undocumented in a small number of states . . . means that the adverse political and fiscal effects of these concentrations are disproportionate in these states.").

117. Chachere, *supra* note 113, at 673-74.

118. *See* Eduardo Porter, *Illegal Immigrants are Bolstering Social Security With Billions*, N.Y. TIMES, Apr. 5, 2005, at C7.

under the current system, are subsidizing the SSA with as much as 7 billion dollars a year.[119] It is estimated the undocumented workers from Mexico alone contribute between 154 and 220 billion dollars to the national GDP.[120]

In sum, it is unclear whether the current rate of immigration, including unauthorized immigration, is necessarily harmful. The American Bar Association (ABA) suggests that too few visas are reserved for low-skilled workers, as compared to skilled workers and professionals.[121] Given the high number of undocumented workers finding employment in the United States at present, the ABA recommends that the legal avenues for low-skilled immigrant labor be closer aligned with economic realities.[122] Others have gone so far as to suggest that the "optimal level of illegal immigration may even exceed today's estimated level of approximately 11-12 million undocumented residents, with 250,000 more added each year to the more or less permanent population."[123]

The National Conference of State Legislatures reports that, "[s]everal states commissioned studies to investigate the economic and fiscal impacts of immigration" in 2008.[124] Although this Note argues that E-Verify should not undergo national expansion at this time, state legislatures should consider the demand for immigrant labor, impact on state resources, and the impact on local employers[125] before requiring E-Verify. Though it is essential to our national security that we are able to account for all individuals within our borders, until Congress more closely examines the impact of immigrant labor on native workers and considers implementing a legalization program in support of those findings, it would seem unfair to nationalize E-Verify when states and regions have different needs.[126]

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119. *Id.*

120. *See* RAUL HIROJOSA OJEDA ET AL., N. AM. INTEGRATION & DEV. CTR., COMPREHENSIVE MIGRATION POLICY REFORM IN NORTH AMERICA: THE KEY TO SUSTAINABLE AND EQUITABLE ECONOMIC INTEGRATION (Aug. 2001), http://www.naid.ucla.edu/Papers/working%20Papers/01-2001.pdf.

121. Fewer than 5,000 visas are issued to workers who lack two years of training. RICHARD PENA, AMERICAN BAR ASSOCIATION COMMISSION ON IMMIGRATION: REPORT TO THE HOUSE OF DELEGATES 5 (2006), http://www.abanet.org/publicserv/immigration/107b_comprehensive_immig_reform.pdf.

122. *Id.*

123. Schuck, *supra* note 16, at 72 (quoting Peter H. Schuck, *Law and the Study of Mogration, in* MIGRATION THEORY: TALKING ACROSS DISCIPLINES 249 (Caroline Brettel & James Hollifield eds., 2d ed. 2007)).

124. CONFERENCE, *supra* note 51, at 1.

125. *See supra* text accompanying notes 117-18.

126. *See supra* Part III.(A). Furthermore, mass deportation is not an option. In

B. E-Verify Faces Tough Opposition from Business and Immigrant Rights Groups

On June 6, 2008, President Bush issued Executive Order 13465 requiring that all federal contractors utilize E-Verify to validate the legal status of their workforce.[127] The policy rationale behind the order was to "promote economy and efficiency in Federal Government procurement"[128] by hiring contractors with a "stable" and "dependable" workforce, which is less likely to be affected by immigration enforcement actions mid–project.[129] Illustrating the fierce opposition from business lobbies, the effective date of the order was postponed for the second time from January 15 to May 21, 2009, so that the Obama Administration could independently review the order.[130]

The postponement was prompted by a federal suit, in which the U.S. Chamber of Commerce and four other business associations argued that the executive order violates a statutory provision in the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA),[131] which states that "the Secretary of Homeland Security may not require any person or other entity to participate in a pilot program" originating under the law.[132] The U.S. Chamber of Commerce also argued that E-Verify imposes an unfair economic and legal burden on contractors to comply with the mandate and questioned the significant onus placed on the federal government to operate such a system.[133] While the scope of the President's order

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2006, the ABA declared that it would be "unrealistic to expect and impractical to require," that the government deport all eleven million unauthorized immigrants presently residing in the United States, especially those who arrived when they were minors. PENA, *supra* note 121, at 8. Douglas Massey, professor of sociology and public affairs at Princeton University, has described the current immigration enforcement regime as, "at odds with the reality of the North American economy and labor market." MASSEY, *supra* note 30, at 12.

127. The actual order makes no explicit reference to E-Verify but states that "an electronic employment eligibility verification system designated by the Secretary of Homeland Security" be used. Exec. Order No. 13,465, 73 Fed. Reg. 33,285 (Jun. 11, 2008).

128. *Id.*

129. *Id.*

130. Spencer S. Hsu, *System to Verify Worker Legality is Delayed Again*, WASH. POST, Jan. 30, 2009, at A07.

131. CCH Aspen Publishers Technical Answer Group, *E-Verify Federal Contractor Rule Now on Hold Until May 21, 2009* (Feb. 2, 2009), http://hr.cch.com/news/employment/020209a.asp.

132. Complaint at ¶ 5, Chamber of Commerce v. Chertoff, No. 8:08-cv-03444-AW (D. Md. Dec. 23, 2008).

133. *E-Verify Faces Court Challenge: U.S. Chamber Leads Business Groups in*

was restricted in response to intense lobbying by business groups,[134] the mandate became effective on September 8, 2009.[135]

C. *Nationalizing E-Verify Would Come at Substantial Cost*

Although E-Verify offers a promising solution to document fraud and illegal immigration overall, potential costs outweigh its benefits. The greatest fiscal cost of nationalization would be the heavy onus its institution would place on the SSA, already overburdened with an impressive backlog of disability claims and appeals.[136] The DHS estimates that requiring all employers to use E-Verify "could cost it $70 million annually for program management and $300 million to $400 million annually for compliance activities and staff."[137] Critics have also argued that as much as $40 billion dollars could be lost to a combination of program costs, employer compliance costs, and lost tax revenue when "[tax-paying] workers are driven off the books."[138]

Prospective employer compliance costs are especially troublesome for small businesses. Public announcements that describe E-Verify as "free of charge"[139] ignore the expenses associated with procuring and maintaining a computer, financing internet access, and allocating time and labor for data entry and potential correspondence with the SSA and DHS. The U.S. Chamber of Commerce estimates that E-Verify would triple the cost to employers to the cumulative sum of $188 million dollars.[140]

D. *E-Verify's Unsatisfactory Accuracy Rate and Potential for Employer Abuse Threaten Due Process Rights of All*

Lawsuit, U.S. CHAMBER MAG., Feb. 2009, http://www.uschambermagazine.com/content/0902_6a.htm (last visited Mar. 26, 2010) [hereinafter *E-Verify Faces Court Challenge*].

134. Spencer S. Hsu, *New Immigration Regulation Eased After Firms Complain; Homeland Security Measure Requires Checks of New Hires*, WASH. POST, Nov. 15, 2008, at A02. The revised order will now apply to government contractors who do more than $100,000 in government work, as opposed to the initial figure of $3,000. *Id.* Additionally, government contractors are only responsible for verifying the status of workers assigned to a given project, as opposed to all of their employees. *Id.*

135. USCIS, Frequently Asked Questions: Federal Contractors and E-Verify, http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=cb2a535e0869d110VgnVCM1000004718190aRCRD&vgnextchannel=534bbd181e09d110VgnVCM1000004718190aRCRD (last visited Mar. 26, 2010); *see also* Federal Acquisition Regulations System, 48 C.F.R. § 1.108(d) (2009).

136. Editorial, *What Social Security Isn't Meant to Do*, N.Y. TIMES, May 12, 2008, at A18.

137. Stana, *supra* note 26, at 1.

138. *Id.*

139. Kobach, *supra* note 115, at 471.

140. *E-Verify Faces Court Challenge*, *supra* note 133.

Employees

As early as 1836, James Madison warned that "[presuming] aliens are not parties to the Constitution, it does not follow that the Constitution has vested in Congress an absolute power over them."[141] The Fifth Amendment protections "are universal in their application, [and extend] to all persons within the territorial jurisdiction" of the United States.[142] In the field of immigration law, the Supreme Court has acknowledged a difference between substantive congressional policy choices and the administrative methods used to effectuate those policies.[143] In *Yamataya v. Fisher*,[144] the Court warned that, "administrative officers, when executing the provisions of a statute involving the liberty of persons, may [never] disregard the fundamental principles that inhere in 'due process of law.'"[145]

In *Mathews v. Eldridge*,[146] the Supreme Court articulated a three-part test to determine whether a particular administrative procedure sufficiently accords due process: (1) the importance of the private interest and extent to which the government action threatens that interest; (2) the risk that a private interest will be deprived through procedural error and the corresponding ability to safeguard against unconstitutional takings; and (3) the public's interest in the policy and the government's interest in efficiency.[147] Certainly, authorized foreign-born workers have a strong interest in the accuracy of their lawful immigration status and consequential right to work.[148] As for the second factor, the ABA has recognized that

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141. JAMES MADISON, MADISON'S REPORT ON THE VIRGINIA RESOLUTIONS, 4 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 556 (Jonathan Elliot, 2d ed. rev., Philadelphia, J.B. Lippincott Co. 1891).

142. Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886); *see also* Yamataya v. Fisher, 189 U.S. 86, 99-101 (1903) (discussing what due process rights an alien has under the Fifth Amendment); Kamara v. AG of the U.S., 420 F.3d 202, 216 (3d Cir. 2005) (quoting Zadvydas v. Davis, 533 U.S. 678, 693 (2001)) (due process is accorded "to all 'persons within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent'").

143. See PENA, *supra* note 121, at 2-3.

144. *Yamataya*, 189 U.S. at 86.

145. *Id.* at 100.

146. Mathews v. Eldridge, 424 U.S. 319 (1976).

147. *Id.* at 335.

148. In *Lozano*, the court held that the employer plaintiffs retained "Fourteenth Amendment property and liberty interests in running their businesses" and that the individual employees held a corresponding Fourteenth Amendment right to gainful employment. Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 533 (M.D. Pa. 2007). The district court specifically rejected defendants' claim that because employers are prohibited by law from hiring unauthorized workers, "no protected interests are at

"the government often overestimates its interest in minimizing procedural protections."[149] Thirdly, improved maintenance of electronic immigration records could produce considerable improvements in accuracy.

To be sure, some procedural safeguards are already in place. Before enrolling in E-Verify, employers must sign a Memorandum of Understanding (MOU), which sets forth the terms and conditions of use.[150] The MOU also outlines the rights employees retain while awaiting a response from the DHS as to their work authorization status.[151] Employers and additional users are then required to take an online tutorial and pass a "Mastery Test" before using the system.[152] In addition to the MOU and mastery test, Section 102 of IRCA outlaws discriminatory hiring, discharge, and wage practices "against 'foreign looking' or 'foreign sounding' persons."[153] Specifically, Section 102 provides for an independent "'Special Counsel for Immigration-Related Unfair Employment Practices' within the Department of Justice" to investigate unfair immigration-related employment practices.[154] Unfortunately, these protections have not proven to be foolproof.

The accuracy of E-Verify's system data was questioned in a 2007 independent evaluation, commissioned by the DHS, of the "Web Basic Pilot" or E-Verify Program.[155] Primarily, the report concluded that the database was "not sufficiently up to date" to meet the accuracy requirements set forth in IRCA.[156] The Office of the Inspector General estimates that of the 46.5 million non-citizen social

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stake," recognizing that the Pennsylvania statute would impact both authorized and unauthorized workers alike. *Id.* at 533-34; *see also* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 543 (1985).

149. PENA, *supra* note 121, at 4.

150. USCIS, THE E-VERIFY PROGRAM FOR EMPLOYMENT VERIFICATION MEMORANDUM OF UNDERSTANDING 1 (Oct. 29, 2008), http://www.uscis.gov/files/nativedocuments/MOU.pdf.

151. *Id.* at 5.

152. WESTAT, FINDINGS OF THE WEB BASIC PILOT EVALUATION xvii (Sept. 2007), http://www.uscis.gov/files/article/WebBasicPilotRprtSept2007.pdf [hereinafter WESTAT]. Automatic edit checks were recently added to reduce the number of manual input errors by employers. *Id.* at 58.

153. Unfair Immigration-Related Employment Practices, 28 C.F.R. pt. 44 (1987).

154. *Id.*

155. *See* WESTAT, *supra* note 152, at 56-59.

156. *Id.* at xxi. Section 404g of IRCA commands that, "[th]e Commissioners of Social Security and the Immigration and Naturalization Service shall update their information in a manner that promotes the maximum accuracy and shall provide a process for the prompt correction of erroneous information, including instances in which it is brought to their attention in the secondary verification process described in subsection (c)." 8 U.S.C. § 1324a (2006).

security records, about 3.3 million records report an outdated citizenship status.[157] Furthermore, because the SSA database does not contain records of alien numbers and the DHS database does not contain the social security numbers of work-authorized migrants, secondary verifications can be necessary, further burdening the responsible agencies.[158]

Authorized foreign-born workers are the most at risk during the verification process, resulting in discrimination against foreign-born employees.[159] It is undisputed that the tentative non-confirmation rate[160] for foreign-born citizens is higher than for native-born citizens. Foreign-born workers are thirty times more likely than native-born workers to incorrectly receive a TNC[161] and as many as 10 percent of authorized foreign-born workers receive TNCs.[162] Finally, 285,000 of the TNCs issued between June 2004 and March 2007 (representing 7 percent of total inquiries)[163] became final non-confirmations when not properly contested.[164]

The tentative non-confirmation result is especially troubling, as it essentially falls on the employee to promptly challenge the finding before she is permanently discharged.[165] Although it is the employer's responsibility to inform her employees of a TNC, and to provide them with printed notice of the TNC and referral letter, notice is not always given. Furthermore, such documents are not easily understood by non-native speakers.[166] Especially due to the narrow eight-day window in which the affected employee must

157. OFFICE OF THE INSPECTOR GEN., SOC. SEC. ADMIN., A-08-06-26100, CONG. RESPONSE REPORT: ACCURACY OF THE SOC. SEC. ADMIN.'S NUMIDENT FILE 12 (2006).

158. Micah Bump, *Immigration, Technology, and the Worksite: The Challenges of Electronic Employment Verification*, 22 GEO. IMMIGR. L.J. 391, 394-95 (2008).

159. *See* WESTAT, *supra* note 152, at xxii-xxiii, xxv.

160. Reasons for a TNC include (1) the employee is not authorized to work; (2) the employee has not updated his or her records with the SSA; or (3) the employer has made an electronic input error. *Electronic Employment Verification Systems: Needed Safeguards to Protect Privacy and Prevent Misuse Before the Subcomm. on Immigr., Citizenship, Refugees, Border Security of the H. Comm. on the Judiciary*, 110th CONG. 49 (2008) [hereinafter *Hearings*] (prepared statement of Jonathan Scharfen); *see also* Bump, *supra* note 158, at 394.

161. Bump, *supra* note 158, at 394; *see also* WESTAT, *supra* note 152, at 98.

162. Bump, *supra* note 158, at 394; *see* WESTAT, *supra* note 152, at 57.

163. WESTAT, *supra* note 152, at 88.

164. *Id.*

165. It is the employer's responsibility to inform the employee of a tentative non-confirmation and inform him of his options. *See* Statement, *supra* note 38. *But see* Stephen A. Brown, Comment, *Illegal Immigrants in the Workplace: Why Electronic Verification Benefits Employers*, 8 N.C. J.L. & TECH. 349, 384-85 (2007) (applauding the shift of responsibility from employers to employees to verify work status).

166. *See* WESTAT, *supra* note 152, at 77.

contest her work status,[167] it is essential that foreign-born workers understand their rights and legal options.

If an employee is aware of how to challenge a TNC, she must visit her nearest SSA office to contest the result, notwithstanding the potential difficulty of finding transportation or childcare.[168] The United States Citizen and Immigration Services (USCIS) estimates that less than 1 percent of employees challenge tentative non-confirmations.[169] Furthermore, even if an employee visits her local SSA or USCIS office to contest a no-match status, the corrected status is not always reflected in the database for the employer to confirm.[170]

In addition to database errors and an appeal process that needlessly burdens employees, the employer's role as program administrator raises both equal protection and privacy concerns.[171] The potential for employer misuse raises both equal protection and privacy concerns.[172] As of 2007, "the rate of employer noncompliance [was] still substantial."[173] Reported abuses included allowing untrained employees to circumvent the mastery test by logging on as an authorized employee, screening applicants before hire (a practice prohibited to prevent discrimination against foreign looking or sounding applicants), failing to notify an employee about a TNC, and taking adverse action against employees while they contest their TNC.[174] Such administrative shortcuts, coupled with the brief window available for contesting a TNC, threaten the due process rights of all employees.[175]

E. E-Verify Raises Significant Identity Theft Concerns

Ironically, although E-Verify has been hailed as an answer to document fraud, easily achieved under the paper-based I-9 system, E-Verify could very well increase *identity theft* due to the system's

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167. *See* Statement, *supra* note 38.

168. Recently, the DHS has permitted naturalized citizens who receive a TNC to contest their status over the phone with the USCIS. All others are still required to visit their nearest SSA office to contest a TNC. *Id.*

169. *Hearings*, *supra* note 160, at 47; *see also* Bump, *supra* note 158, at 400 (reporting that between 1 and 2 percent of the 8 percent of workers "who do not receive immediate confirmation" challenge their status with the SSA).

170. WESTAT, *supra* note 152, at 67.

171. *See id.* at 17.

172. *See id.*

173. *Id.* at xxii.

174. *See id.* at xxiii. Employers have expressed specific frustration with the wasted expenditure of training a new employee only to find out (after the ten-day contestation period) that the employee is ineligible to work. *Id.* at 67-68.

175. *Id.*

exclusive reliance on social security numbers. Though a national identification system like E-Verify might discourage employers from hiring undocumented workers, it could also create a perverse incentive for unauthorized migrants to obtain and/or falsify cards with stolen information in order to gain confirmation. Further, allowing employers and their employees to act as program administrators increases the potential for employer misuse and sale of employee information data.

In the mid-1990s, when "fool-proof" IDs were issued by state motor vehicle agencies, state agency employees began selling "real" IDs to illegal immigrants and criminals in order to circumvent the system.[176] Additionally, counterfeit birth certificates have been used to obtain ostensibly valid social security cards.[177] Nor is it unheard of for social security employees to fabricate and register entirely new numbers to illegal immigrants.[178] Identity theft is one of the fastest-growing crimes in the United States today.[179] The SSA Office of the Inspector General reported a five-fold increase in complaints of social security number misuse between 1998 and 2001, 81 percent of which related to identity theft.[180] As the system currently stands, there is no mechanism that can identify fraudulent social security numbers or other stolen data.[181] Although the USCIS is currently experimenting with an enhanced system that would use photographs to cut down on identity theft and achieve more accurate results,[182] the database poses too great a privacy risk to implement at this time.[183]

IV. GREATER ENFORCEMENT OF LABOR LAWS IS A SUPERIOR ALTERNATIVE TO AN ELECTRONIC VERIFICATION SYSTEM

Not only would E-Verify's expansion be costly and error-prone, but the program places the overwhelming burden and risk on employees, not the employers who often knowingly employ them.

176. Claire Wolfe, *National ID: Our Line in the Sand, in* NATIONAL IDENTIFICATION SYSTEMS: ESSAYS IN OPPOSITION 184, 188 (Carl Watner & Wendy McElroy eds., 2004).

177. Bump, *supra* note 158, at 397.

178. Wolfe, *supra* note 176, at 188.

179. *See* SYNOVATE, FEDERAL TRADE COMMISSION – 2006 IDENTITY THEFT SURVEY REPORT 10-21 (2007); U.S. GEN. ACCOUNTING OFFICE, GAO–02–363, IDENTITY THEFT: PREVALENCE AND COST APPEAR TO BE GROWING 5 (2002).

180. U.S. GEN. ACCOUNTING OFFICE, *supra* note 179, at 5. Although a share of this increase was attributed to increased staffing of the SSA Fraud Hotline, the increase was also attributed to an elevated incidence of identity theft. *Id.*

181. *Id.* at 4.

182. *See* WESTAT, *supra* note 152, at 16-18.

183. *Id.* at xxvi.

Currently, employers who voluntarily use E-Verify are entitled to a rebuttable presumption of non-liability.[184] In this way, the employer sanctions envisioned by IRCA will be no better realized through the use of an expensive online verification system than under the I-9 paper system. The risk still lies with the workers, many of whom are not only needed by local economies and contribute to the federal government as taxpayers, but also endure reprehensible working conditions for little pay in order to support their families.[185] The exorbitant cost of maintaining a database would be better spent enforcing immigrant workers' rights.

A. Undocumented Workers Are Most Susceptible to Threats and Exploitation by Their Employers

Undocumented workers are frequently victims of substandard working conditions, paid less than the minimum wage, denied overtime pay, and retaliated against for protesting these very violations.[186] With limited English language skills, low education levels, and the constant fear of deportation, undocumented immigrants are often willing to work long hours for little pay.[187] They are also less likely to report such labor law violations, fearing that their employer will either retaliate against them or, worse, report them to the INS.[188] For this reason, many employers believe they can violate undocumented workers' rights without consequence. Current immigration policy reinforces this belief by precluding the National Labor Relations Board from awarding backpay even if a violation is found.[189]

For all these reasons, employers have a clear incentive to hire

184. Ariz. Contractors Ass'n v. Candelaria, 534 F. Supp. 2d 1036, 1054 (D. Ariz. 2008).

185. *See id.* at 1049.

186. *See generally* Rebecca Smith & Catherine Ruckelshaus, *Solutions, Not Scapegoats: Abating Sweatshop Conditions for All Low-Wage Workers as a Centerpiece of Immigration Reform*, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 555 (2006).

187. *See* Lora Jo Foo, *The Vulnerable and Exploitable Immigrant Workforce and the Need for Strengthening Worker Protective Legislation*, 103 YALE L.J. 2179, 2182-84 (1994).

188. *See* Rivera v. NIBCO, Inc., 364 F.3d 1057, 1064-65 (9th Cir. 2004); Walter A. Ewing, *From Denial to Acceptance: Effectively Regulating Immigration in the United States*, 16 STAN. L. & POL'Y REV. 445, 459 (2005). I would suspect that employers are more likely to retaliate against complaining employees before reporting them to the INS in order to defend themselves against criminal penalties or fines.

189. *See* Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002) (holding that although the employer had committed an unfair labor practice when it retaliated against an employee for labor organizing, the NLRB was precluded from awarding backpay because to do so would conflict with federal immigration policy, as expressed in IRCA).

undocumented workers. E-Verify would likely diminish the unauthorized employment of these workers. Employers would no longer be shielded from sanctions by claiming a good-faith belief that their employees' documentation "appears genuine."[190] The verification process would be out of their hands. However, a likely consequence of nationalizing E-Verify, apart from promoting identity fraud, would be to drive undocumented workers off the books in order to avoid detection.[191] Defiant employers would try to circumvent the system, as they have since IRCA's passage. In 1993, an eighteen-month survey conducted by state labor agencies in California found that as many as 13 percent of employers were evading employment taxes by paying workers off the books, resulting in an annual loss of 3 billion dollars in state income taxes alone.[192] In addition to lost tax revenue, underground economies would create conditions where employers could chronically violate labor laws without detection.[193]

The stated purpose of E-Verify is to reduce the incentive for employers to hire undocumented workers by strengthening enforcement of illegal hiring practices and removing the so-called pull-factor for unauthorized workers–employment.[194] However, another way to discourage employers from hiring unauthorized workers is to more rigorously investigate and prosecute unfair labor practices. This strategy would eliminate the incentive to purposely employ unauthorized workers, namely substandard wages and working conditions, while shifting a portion of the risk back onto employers.

B. Legislative History of IRCA Lends Support to Enhancing Workplace Protections

Foreseeing the potential conflict between the goals of IRCA and the National Labor Relations Board, Congress specifically stated that undocumented workers would retain labor protections under the law.[195] To deny such protections, it reasoned, would not only violate

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190. *See* 8 U.S.C. § 1324a(b)(1)(A)(ii) (2006).

191. As mentioned previously, unauthorized workers under IRCA frequently pay taxes on their income despite the fact they are denied many public benefits by law. *See supra* text accompanying notes 119-20.

192. *See* Foo, *supra* note 187, at 2180.

193. *Id.*

194. U.S. Citizenship and Immigration Services, Why E-Verify?, http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=e94888e60a405110VghVCM1000004718190aRCRD&vgnextchannel=e94888e6a405110VgnVCM1000004718190aRCRD (last visited Mar. 26, 2010).

195. *See* H.R. REP. NO. 99-682, pt. 2, at 8-9 (stating that to "limit the powers of State or Federal labor standards agencies . . . would be counterproductive" to the goals of IRCA). IRCA also authorizes funds for the U.S. Department of Labor's (DOL) Wage

the basic due process rights of undocumented workers,[196] but would also permit employers to maintain unacceptably low wages and working conditions.[197]

The National Labor Relations Act[198] (NLRA) protects all employees' right to organize labor unions, pursue collective bargaining, and engage in other concerted activity, such as strikes, to improve working conditions and strengthen their bargaining position.[199] The Fair Labor Standards Act[200] (FLSA) seeks to "[maintain] the minimum standard of living necessary for health, efficiency, and general well-being of workers," with help from the Department of Labor's Wage and Hour Division.[201] Although the legislative history of IRCA suggests that these laws were intended to protect undocumented workers, the law has taken a turn since IRCA's 1986 enactment. In *Hoffman Plastic Compounds, Inc. v. NLRB,*[202] the Supreme Court held that undocumented workers could not collect backpay under the NLRA when they engaged in protected activity under the Act.[203]

Although the Court's ruling in *Hoffman* precludes awarding backpay to undocumented workers,[204] Justice Breyer's dissent is helpful in understanding how the purposes of labor law intersect with and strengthen immigration law.[205] Rejecting the majority's view that awarding backpay would contradict the federal objectives as set forth in IRCA, Justice Breyer urged that not only was backpay not inconsistent with the purposes of IRCA, they were necessary to

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and Hour Division to enforce minimum wage and overtime laws for undocumented workers. Pub. L. No. 99-603, 111(d), 100 Stat. 3359, cited in Brief for American Civil Liberties Union (ACLU) et al. as Amicus Curiae Supporting Respondent at 11, Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002) (No. 00-1595), 2001 WL 1631648 [hereinafter Brief for ACLU].

196. *See* H.R. REP. NO. 99-682, pt. 1, at 49.

197. *Id.*

198. National Labor Relations Act, 29 U.S.C. §§ 151-169 (2006).

199. *Id.* "Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees." *Id.* at § 151.

200. Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (2006).

201. *Id.* at § 202.

202. Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002).

203. *Id.* at 140.

204. *Id.*

205. *See id.* at 153 (Breyer, J., dissenting).

prevent employers from violating the law.[206] In general, Justice Breyer did not believe that enhanced workplace protections would encourage illegal immigrants to migrate to the United States.[207] To the contrary, Justice Breyer predicted that withholding backpay for labor law violations against undocumented workers would likely entice employers to hire those workers.[208]

Justice Breyer's assertion that enforcing labor violations against undocumented workers would further U.S. immigration policy, and not detract from it, is supported by IRCA's original purpose.[209] IRCA's sanctions were directed at employers "who have hired illegal aliens specifically so that they can exploit them."[210] E-Verify would do little to accomplish this goal.

Tax dollars that could be applied to a large-scale expansion of E-Verify would be better spent eliminating the substandard working conditions that effectively bifurcate the market between native and immigrant workers. Unfortunately, the Occupational Safety and Health Administration (OSHA), charged with preventing work-related injuries, illnesses and deaths,[211] is underfunded and understaffed.[212] Furthermore, OSHA has devoted more resources to "voluntary and educational efforts" over civil and criminal enforcement in recent years.[213] The budgets of OSHA and the DOL's Wage and Hour Division should be increased to strengthen enforcement efforts on the ground. Employer penalties should also be enhanced in order to achieve meaningful deterrence.

CONCLUSION

E-Verify should not be nationalized at this time. Rather, enhanced workplace protections for low-wage workers are a superior alternative to an expensive and potentially unwieldy system that would threaten the privacy interests of all employees, unfairly

206. *Id.*

207. *Id.* at 155-56 (citing A.P.R.A. Fuel Oil Buyers Group, Inc., 320 N.L.R.B. 408, 411-12 (1995)) ("Coverage of undocumented workers by the NLRA . . . helps to ensure reasonable working conditions by decreasing competition from aliens willing to accept substandard wages and employment conditions.").

208. *Id.*

209. *Id.* at 153-57.

210. *See* Brief for ACLU, *supra* note 195, at 11.

211. Occupational Safety and Health Administration (OSHA), The New OSHA – Reinventing Safety and Health, http://www.osha.gov/doc/outreachtraining/htmlfiles/newosha.html (last visited Mar. 26, 2010).

212. *See* Smith & Ruckelshaus, *supra* note 186, at 564; *see also* Annette Bernhardt & Siobhan McGrath, *Trends in Wage and Hour Enforcement by the U.S. Department of Labor, 1975-2004*, ECON. POL'Y BRIEF NO. 3, Sept. 2005.

213. Smith & Ruckelshaus, *supra* note 186, at 564.

discriminate against foreign-born citizens, and ignore the exploitative conditions faced by many immigrant workers. Undocumented workers occupy a significant sector of our economy and deserve protection under the law.[214]

More meaningful enforcement of workers' rights would also eliminate the preference many employers have for undocumented workers, thereby protecting low-wage native workers, law-abiding employers, and undocumented workers alike. Undocumented workers would receive protection from exploitative practices and unsafe working conditions, states would have the opportunity to crack down on underground labor markets, native workers would no longer have to compete with undocumented workers on account of lower labor costs, and employers would be protected against unfair competition.[215]

In order for this proposal to gain the attention and consideration it deserves, immigration policies should be less focused on what draws illegal immigrants to American employers, and more interested in the preference many employers share for undocumented workers. To use Justice Breyer's analogy in *Hoffman*, only when labor conditions are improved for all workers will the "magnetic force" attracting illegal immigrants to American jobs that exploit them begin to subside.[216]

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214. *See supra* text accompanying notes 6-7.

215. *See* Ewing, *supra* note 188, at 459-60.

216. Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 155 (2002) (Breyer, J., dissenting) (quoting H.R. REP. NO. 99-682 pt. 1, p.45 (1986)). The economic conditions outside of the United States, especially neighboring Mexico, that drive immigrants (unauthorized or otherwise) to the United States will continue to exist no matter what immigration policy the United States adopts. *See* R. Paul Faxon, *Employer Sanctions for Hiring Illegal Aliens: A Simplistic Solution to a Complex Problem*, 6 NW. J. INT'L. L. & BUS. 203, 204-05 (1984). Therefore, whatever immigration reform strategy is ultimately pursued, it must take into account the many low-wage workers and their families already here. *See* PENA, *supra* note 121, at 5-6.

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