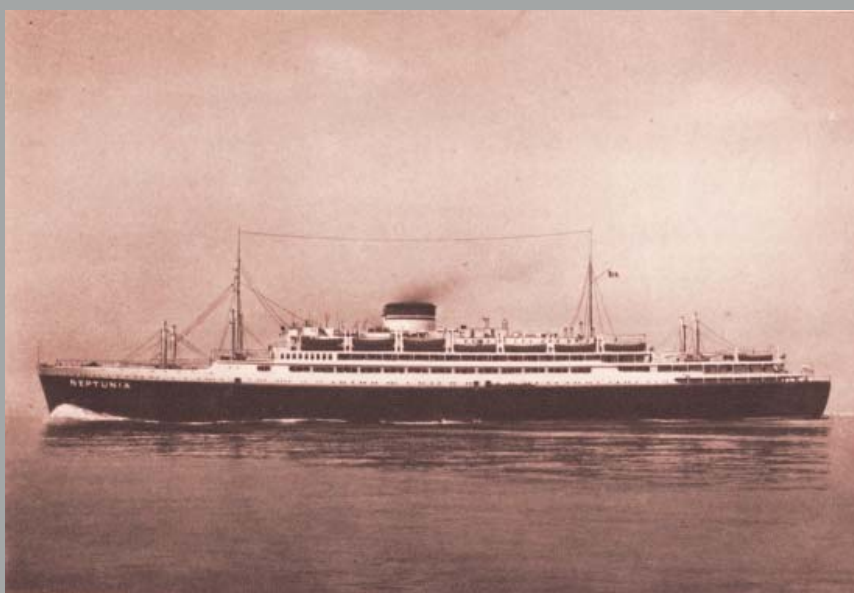


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FEDERALISM AND FUNDAMENTAL RIGHTS: SAFEGUARDING THE RIGHTS OF UNDOCUMENTED IMMIGRANTS IN THE UNITED STATES AND THE EUROPEAN UNION

RACHEL E. ROSENBLOOM¹

I.- DEVELOPMENTS IN THE UNITED STATES. II.- STATE AND LOCAL ANTI-IMMIGRANT INITIATIVES. III.- LEGAL CHALLENGES TO “ATTRITION THROUGH ENFORCEMENT” LAWS. IV.- FEDERALISM AND FUNDAMENTAL RIGHTS : LEGAL FRAMEWORKS FOR CHALLENGING ANTI-IMMIGRANT LAWS IN THE UNITED STATES AND THE EUROPEAN UNION.

ABSTRACT: In both the United States and Europe, governments have stepped up initiatives to reduce unauthorized immigration. Direct immigration control measures such as border security are just one aspect of these efforts. Another key aspect consists of indirect immigration control measures, in the form of laws that restrict the ability of undocumented immigrants to work, study, rent property, or access public services. This article reviews recent developments in the United States with respect to indirect immigration control measures and maps out some points of comparison with analogous developments within the European Union. It provides an account of the wave of state and local anti-immigrant laws that swept the United States between 2006 and 2011 and summarizes the developing U.S. jurisprudence on the constitutionality of these measures. It then offers some initial observations comparing the United States to the E.U. This comparison highlights the distinction between approaching anti-immigrant laws through the lens of federalism (or, in the terminology more common in Europe, competence) and approaching such laws as violations of fundamental rights.

Keywords: Irregular Migrants, Undocumented Immigrants, Federalism, Competence

FEDERALISMO Y DERECHOS FUNDAMENTALES: DEFENDER LOS DERECHOS DE LOS INMIGRANTES EN SITUACIÓN IRREGULAR EN ESTADOS UNIDOS Y EN LA UNIÓN EUROPEA

RESUMEN: Tanto en Estados Unidos como en Europa, se han intensificado las iniciativas para reducir la inmigración irregular. Las medidas directas de control de la inmigración, por ejemplo la seguridad fronteriza, son sólo un aspecto de estos esfuerzos. Otro aspecto clave consiste en medidas indirectas de control de la inmigración, en forma de leyes que restringen la capacidad de los migrantes irregulares para trabajar, estudiar, alquilar una propiedad, o acceder a los servicios públicos. En este artículo se analiza la evolución reciente en los Estados Unidos con respecto a las medidas indirectas de control de inmigración y se ofrecen algunos puntos de comparación con la evolución análogas dentro de la Unión Europea. El artículo describe la ola de leyes anti-inmigrantes locales del estado y que se extendió por los Estados Unidos entre 2006 y 2011 y resume la jurisprudencia EE.UU. sobre la constitucionalidad de estas medidas. A continuación, ofrece

¹ Professor of Law, Northeastern University, Boston, Massachusetts, USA. Many thanks to Professors Alejandro del Valle and Miguel Acosta at the University of Cadiz and Professor Joaquin Alcaide at the University of Seville for inviting me to present these ideas to the faculty and students at those institutions; to Professor Irene Sobrino for comments on an earlier draft of this article; and to Alyssa Telander for her excellent research assistance.

algunas observaciones iniciales que comparaban los Estados Unidos a la E.U. Esta comparación pone de relieve la distinción entre acercarse a las leyes anti-inmigrantes a través de la lente del federalismo (o, en la terminología más común en Europa, la competencia) y acercarse a esas leyes como violaciones de los derechos fundamentales.

Palabras clave: Migración Irregular, Inmigrantes Indocumentados, Federalismo, Competencia

FÉDÉRALISME ET DROITS FONDAMENTAUX : DÉFENDRE LES DROITS DES IMMIGRANTS EN SITUATION IRRÉGULIÈRE AUX ÉTATS-UNIS ET AU SEIN L'UNION EUROPÉENNE

RÉSUMÉ : Aux États-Unis comme en Europe, nombreux gouvernements ont intensifié les initiatives visant à endiguer l'immigration irrégulière. Les mesures de contrôle direct, tels que les contrôles aux frontières, ne forment que l'un des aspects de ces efforts. Un autre aspect clé sont les mesures de contrôle indirect, sous forme de lois visant à restreindre l'accès à l'emploi, à l'éducation, au logement ou aux services publics. Le présent article fait le point de l'évolution récente aux États-Unis des contrôles indirects de l'immigration, et établit les grandes lignes de comparaison avec les développements analogues au sein de l'Union Européenne.

L'article offre un compte rendu de la vague de lois, au niveau des États aussi bien qu'au niveau local, qui a balayé les États-Unis entre 2006 et 2011, et offre un résumé de la jurisprudence relative à la constitutionnalité desdites mesures. L'article offre ensuite quelques premières comparaisons entre les États-Unis et l'Union européenne. Ces comparaisons mettent en relief les différences dans la lutte contre les lois anti-immigration, entre une stratégie fédéraliste d'une part (en Europe, on parlera de compétence), et d'autre part, une stratégie visant à révéler ces lois comme contraires aux droits fondamentaux des personnes.

Mots clé : Immigration irrégulière, immigrés sans papiers, fédéralisme, compétence.

In both the United States and Europe, governments have stepped up initiatives to reduce unauthorized immigration. Direct immigration control measures such as border security are just one aspect of these efforts. Another key aspect consists of indirect immigration control measures, in the form of laws that restrict the ability of undocumented immigrants to work, study, rent property, or access public services.²

This article reviews recent developments in the United States with respect to indirect immigration control measures and maps out some points of comparison with analogous developments within the European Union (E.U.). Part I briefly reviews the evolution of U.S. immigration policy at the national level over the past three decades. Part II provides an account of the wave of state and local anti-immigrant laws that swept the United States between

² While the term “irregular migrant” is used more commonly within Europe, this article follows common U.S. practice in using the term “undocumented immigrant” to refer to noncitizens who lack authorized immigration status in the country in which they reside.

2006 and 2011. Part III summarizes the developing U.S. jurisprudence on the constitutionality of these measures. Part IV offers some initial observations comparing the United States to the E.U. This comparison highlights the distinction between approaching anti-immigrant laws through the lens of federalism (or, in the terminology more common in Europe, competence) and approaching such laws as violations of fundamental rights.

I. DEVELOPMENTS IN THE UNITED STATES

This section reviews three central issues that have shaped immigrants' rights debates at the national level within the United States over the past three decades. First, U.S. immigration policy has become increasingly focused on enforcement, marking a departure from the liberalization of the 1960s and 1970s. Secondly, the number of undocumented immigrants living in the United States has grown significantly. And finally, although the U.S. Congress has considered regularization programs numerous times over the past decade, legislators have been deeply divided on the issue and have failed to enact any proposed immigration reform legislation.

1. HEIGHTENED IMMIGRATION ENFORCEMENT

Statutory changes and spending increases have transformed the U.S. immigration enforcement system over the past three decades. Immigration policy in the United States underwent a number of progressive reforms in the 1960s through early 1980s, including the end of a racially discriminatory system of national origins quotas in 1965 and the passage of the Refugee Act in 1980.³ However, in the years since then there has been a growing emphasis on enforcement. Between 1984 and 2014, the number of people deported annually from the United States increased more than twentyfold, from fewer than nineteen thousand per year to more than four hundred thousand per

³ See MILLER, T.A., "Citizenship & Severity: Recent Immigration Reforms and the New Penology," *Georgetown Immigration Law Journal*, L.J. Vol. 17, 2003, p. 15 (noting that "immigration – seen primarily as a civil rights issue during the Civil Rights Era spanning the 1960's and 1970's – is now seen as a critical issue of national security"). See generally, AMERICAN IMMIGRATION COUNCIL, *The Growth of the U.S. Deportation Machine*, 2014, <http://www.immigrationpolicy.org/sites/default/files/docs/deportation_machine_march_2014_final.pdf>.

year.⁴ Federal spending on interior immigration enforcement has ballooned, particularly in the years since the attacks of September 11, 2001, with the result that federal government now spends more on immigration enforcement than on all other federal criminal law enforcement agencies combined.⁵

The Immigration and Nationality Act (INA), a federal law enacted in 1952, governs the admission and expulsion of noncitizens.⁶ In 1986, Congress amended the INA to include sanctions on employers who hire unauthorized workers. That legislation, the Immigration Reform and Control Act (IRCA),⁷ is generally viewed as marking the beginning of the current era of heightened enforcement. The most significant amendments to the INA during the past three decades occurred in 1996 with the passage of two sweeping laws, the Anti-Terrorism and Effective Death Penalty Act and the Illegal Immigration Reform and Immigrant Responsibility Act.⁸ Through these statutes, Congress introduced harsh new standards that subject a much broader group of immigrants to deportation, including long-term legal residents who had committed relatively minor criminal offenses.⁹ Congress

⁴ See OFFICE OF IMMIGRATION STATISTICS, DEP'T OF HOMELAND SEC., *2014 Yearbook of Immigration Statistics*, Table 39, 2016, <<https://www.dhs.gov/yearbook-immigration-statistics-2014-enforcement-actions>>.

⁵ See ROSENBLUM, M.R. & KANDEL, W.A. *Interior Immigration Enforcement: Programs Targeting Criminal Aliens*, Cong. Research Serv., 25 (2012), <<https://www.fas.org/sgp/crs/homsec/R42057.pdf>>. (documenting increase in federal funding from \$960 million in 2004 to nearly \$2.7 billion by 2013); MEISSNER, D., et. al., *Immigration Enforcement in the United States: The Rise of a Formidable Machinery*, Migration Policy Institute, 2013, p. 12 <<http://www.migrationpolicy.org/pubs/enforcementpillars.pdf>> (reporting that the U.S. government spent \$18 billion on immigration enforcement in 2013, compared to the combined \$14.4 billion it spent on the Federal Bureau of Investigation, the Drug Enforcement Agency, the Secret Service, the U.S. Marshals Service, and the Bureau of Alcohol, Tobacco, and Firearms combined).

⁶ The Immigration and Nationality Act of 1952, Pub.L. 82–414, 66 Stat. 163, codified at 8 U.S.C.A. § 101 et. seq.

⁷ Immigration Reform and Control Act of 1986, Pub.L. 99–603, 100 Stat. 3445.

⁸ See Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104–132, 110 Stat 1214; Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104–208, div. C, 110 Stat. 3009–546.

⁹ For an analysis of the deportation provisions of the 1996 immigration laws, see HUMAN RIGHTS WATCH, *Forced Apart: Families Separated and Immigrants Harmed by United States Deportation Policy*, 2007, <<https://www.hrw.org/report/2007/07/16/forced-apart/families-separated-and-immigrants-harmed-united-states-deportation>>.

also curtailed the power of immigration judges to halt deportations and to grant status to individuals on grounds such as hardship and family unity.¹⁰ In addition, the 1996 laws imposed a new one-year time limit on the filing of asylum applications, and created lengthy inadmissibility bars for those who have spent time in the United States without authorization.¹¹

Federal law does not criminalize the act of being present in the United States without authorization.¹² However, it criminalizes a number of immigration-related offenses, such as illegal entry, illegal reentry following deportation, and the use of fraudulent documents.¹³ Prosecution of such crimes has increased dramatically in recent years.¹⁴

Another significant development within U.S. immigration enforcement has been the increase in cooperation between federal immigration authorities and local police departments. A 1996 amendment to the INA authorized the federal immigration agency (then known as the Immigration and Naturalization Service (INS) and now known as the Department of Homeland Security (DHS)) to deputize local police officers to carry out some of the functions of immigration officers.¹⁵ More recently, cooperation has been achieved through the creation of systems to link data maintained by law enforcement agencies with data maintained by DHS.¹⁶

¹⁰ See *id.*

¹¹ For example, those who have been present without authorization for one year or more are barred from returning to the United States for ten years. 8 U.S.C.A. § 1182(a)(9)(B)(i)(II).

¹² “As a general rule, it is not a crime for a removable alien to remain present in the United States.” *Arizona v. United States*, 132 S. Ct. 2492, 2505 (2012).

¹³ See 8 U.S.C.A. § 1325 (illegal entry); § 1326 (illegal reentry); 18 U.S.C.A. § 1546 (document fraud).

¹⁴ See *At Nearly 100,000, Immigration Prosecutions Reach All-Time High in FY 2013*, TRAC Immigration, 2013 <<http://trac.syr.edu/immigration/reports/336/>>.

¹⁵ See 8 U.S.C.A. § 1357(g).

¹⁶ Secure Communities, a DHS program launched in 2008, established a system through which arrest data from police officers around the country is automatically sent to DHS, enabling DHS to identify and detain individuals who are deportable. This program was modified in 2014 and renamed the Priority Enforcement Program; the new program retains the system of database interoperability but establishes guidelines that are supposed to limit detentions to those who commit serious offenses. See *Secure Communities*, U.S. Immigration & Customs Enforcement, <<http://www.ice.gov/secure-communities>>.

2. UNAUTHORIZED IMMIGRATION

In 1990, there were approximately 3.5 million undocumented immigrants living in the United States.¹⁷ That number increased to approximately 12.2 million by 2007, and then leveled off at an estimated 11.3 million over the last several years.¹⁸ Nearly two-thirds of undocumented immigrant adults in the United States have been in the country for at least ten years.¹⁹ There are over five million U.S.-citizen children in the United States living with undocumented parents.²⁰

There are many factors that have contributed to the growth in the population of undocumented immigrants. The most obvious factor is an increase in unauthorized entries and visa overstay, driven in large part by violence, poverty, and political instability in many regions of the world. The increase is also attributable, however, to changes in U.S. law and policy. In previous eras, those who remained in the United States for long periods of time often transitioned to lawful status through marriage, regularization programs, and other means.²¹ However, Congress has cut off many of these paths to regularization, with the result that many people remain in an unauthorized status for decades. In addition, heightened border security may have also, ironically, played a role. Demographic research has shown that the increase in border security has led many unauthorized immigrants to remain in the United States for longer periods, ending long-standing patterns of circular labor migration, particularly among Mexican immigrants; rather than

¹⁷ PEW RESEARCH CENTER, *A Portrait of Undocumented Immigrants in the United States*, 2009, <<http://www.pewhispanic.org/2009/04/14/a-portrait-of-unauthorized-immigrants-in-the-united-states/>>.

¹⁸ PASSEL, J.S. & COHN, D., *Unauthorized Immigrant Population Stable for Half a Decade*, Pew Research Center, 2015, <<http://www.pewresearch.org/fact-tank/2015/07/22/unauthorized-immigrant-population-stable-for-half-a-decade/>>.

¹⁹ TAYLOR, P., et al., *Undocumented Immigrants: Length of Residency, Patterns of Parenthood*, Pew Hispanic Center, 2011, <<http://www.pewhispanic.org/2011/12/01/unauthorized-immigrants-length-of-residency-patterns-of-parenthood/>>.

²⁰ WARREN, R., *U.S.-Born Children of Undocumented Residents: Numbers and Characteristics in 2013*, Center for Migration Studies, <<http://cmsny.org/publications/warren-usbornchildren/>>. Children born in the United States are U.S. citizens by virtue of the Fourteenth Amendment to the U.S. Constitution, regardless of the status of their parents.

²¹ See ROSENBLUM, R., "Policing the Borders of Birthright Citizenship: Some Thoughts on the New (and Old) Restrictionism," *Washburn Law Journal*, Vol. 51, 2012, pp. 326-28.

risk apprehension through repeated border crossings, many undocumented immigrants have settled permanently in the United States.²²

3. THE FAILURE TO ENACT COMPREHENSIVE IMMIGRATION REFORM

The United States has a long history of programs to provide lawful status to unauthorized immigrants, dating back to the 1920s.²³ The most recent, and largest, legalization program occurred in 1986 with IRCA, which provided an opportunity for undocumented immigrants who had arrived before 1982 to become lawful permanent residents.²⁴ Nearly 2.7 million people obtained status through IRCA.²⁵

During the administration of President George W. Bush (2001-2008), a bipartisan group of legislators crafted various proposals for Comprehensive Immigration Reform (CIR) – termed “comprehensive” because the proposals combined a legalization program with increased border security and a guestworker program. CIR bills were debated in Congress in 2006 and 2007 but opposition from Republican lawmakers led to the defeat of these bills. A new CIR bill was introduced in Congress in 2013 under the administration of President Barack Obama, but was also defeated.

Congress has also repeatedly considered passage of the Development, Relief, and Education for Alien Minors Act (the DREAM Act). The DREAM Act would provide permanent residence and a path to citizenship to unauthorized immigrants who arrived in the United States prior to age sixteen, provided they fulfill a set of requirements including graduating from high school and pursuing either higher education or military service. The DREAM act was introduced a number of times between 2001 and 2013, both as a stand-alone bill and as part of CIR bills. However, it failed to garner enough votes for passage.

²² See DURAND, J. & DOUGLAS S. MASSEY, D.S. (eds), *Crossing the Border: Research from the Mexican Migration Project*, 2004, p. 12.

²³ See BOSWELL, R.A. “Crafting an Amnesty with Traditional Tools: Registration and Cancellation,” *Harvard Journal on Legislation*, Vol. 47, 2010, pp. 180-95.

²⁴ Immigration Reform and Control Act of 1986, Pub.L. 99–603, 100 Stat. 3445.

²⁵ CHISHTI, M. AND KAMASAKI, C., *IRCA in Retrospect: Guideposts for Today's Immigration Reform*, Migration Policy Institute, 2014, p. 6, <<http://www.migrationpolicy.org/research/irca-retrospect-immigration-reform>>.

In 2012, President Obama invoked his executive authority to initiate a program called Deferred Action for Childhood Arrivals (DACA), which provides temporary relief to many of those who would have obtained lawful status through the DREAM Act. Although a true legalization program that would provide permanent resident status and a path to citizenship must be enacted by Congress, the executive branch of government has traditionally exercised its discretion to decide whom to prioritize for deportation. Consistent with this discretion, it has for decades followed a practice of granting “deferred action” to some individuals for humanitarian or other reasons. Deferred action, somewhat like the toleration status that exists in many European countries (for example, *Duldung* status in Germany), provides an individual with temporary protection from deportation. It also provides temporary employment authorization. DACA established a system to provide renewable two-year grants of deferred action to those who entered the United States before the age of 16 and who, as of June 15, 2012, were under the age of 31 and had resided in the United States for at least five years, provided that at the time of application they are in school, have completed secondary school, or have been honorably discharged from the military.²⁶ In 2014, President Obama announced a significant expansion of this program, broadening the eligibility for DACA and creating a new program called Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA), which would provide deferred action to undocumented immigrants who have been present in the United States since 2010 and have a son or daughter who is a U.S. citizen or lawful permanent resident.²⁷

Over seven hundred thousand people have already received deferred action through DACA. These individuals do not have legal status (that is, a visa) but they do have lawful presence and employment authorization, which has led some to refer to them as “DACAmended,” a play on the term “documented.” It is estimated that with the 2014 expansion of eligibility for DACA and the creation of DAPA, the total number of people eligible

²⁶ U.S. CITIZENSHIP AND IMMIGRATION SERVICES, *Consideration of Deferred Action for Childhood Arrivals (DACA)*, <<https://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca>>.

²⁷ U.S. CITIZENSHIP AND IMMIGRATION SERVICES, *Executive Actions on Immigration*, <<https://www.uscis.gov/immigrationaction>>.

for deferred action under these programs could rise to over five million.²⁸ However, Republican elected officials have voiced fierce opposition to the plan and have accused President Obama of exceeding his power under the Constitution, and governors and attorneys general from twenty-six states sued to block the program. In February, 2015, a federal judge in Texas issued a temporary injunction that blocked the implementation of the program on the grounds that DHS had failed to follow proper administrative procedures in promulgating the regulations that govern DAPA and the expanded DACA program.²⁹ This decision was affirmed by a federal court of appeals³⁰ and by the U.S. Supreme Court.³¹ The litigation is ongoing³² and it is possible that it will end up on appeal before the Supreme Court again at a later date, but implementation of the program has been blocked at least for now. With DAPA and the expanded DACA program currently on hold, and with Congress showing no inclination to pass any sort of legalization bill, it is likely that the number of undocumented immigrants in the United States who are vulnerable to deportation will remain high for quite some time.

II. STATE AND LOCAL ANTI-IMMIGRANT INITIATIVES

With Congress divided over how to respond to the issue of unauthorized immigration, lawmakers at the state and local level have taken action on their own through passage of a variety of state laws, local ordinances, and resolutions. Some of these measures have aimed to assist undocumented immigrants (for example, by making undocumented students eligible for the reduced tuition rates enjoyed by state residents at public universities).

²⁸ MIGRATION POLICY INSTITUTE, *As Many as 3.7 Million Unauthorized Immigrants Could Get Relief from Deportation under Anticipated New Deferred Action Program*, 2014, <<http://www.migrationpolicy.org/news/mpi-many-37-million-unauthorized-immigrants-could-get-relief-deportation-under-anticipated-new>> (estimating that the 2014 changes would add 3.7 million people to the estimated 1.5 million who are already eligible for the original DACA program that was announced in 2012).

²⁹ *Texas v. U.S.*, 86 F.Supp. 3d 591, 672 (S.D. Tex. 2015).

³⁰ *Texas v. U.S.*, 809 F.3d 134 (5th Cir. 2016).

³¹ *U.S. v. Texas*, 136 S.Ct. 2271 (2016).

³² The Obama administration filed a petition on July 18, 2016 seeking rehearing by the Supreme Court. In addition, the case may end up being reviewed once again by the Court of Appeals and the Supreme Court at a later stage in the litigation.

However, most have been aimed at discouraging unauthorized immigration by placing restrictions on undocumented immigrants in areas such as housing, employment, and public services.

This section first outlines the framework of state-federal power-sharing set forth by the U.S. Constitution and Supreme Court jurisprudence. It then describes the wave of anti-immigrant legislation enacted between 2006 and 2011.

1. FEDERAL POWER OVER IMMIGRATION

Under longstanding Supreme Court precedent, subfederal units of governments – states, counties, and municipalities – lack the authority to regulate immigration directly. In 1875, the Supreme Court declared in *Chy Lung v. Freeman* that the regulation of immigration is a matter of exclusive federal control.³³ *Chy Lung* concerned a California law that authorized a state official to inspect arriving immigrants, to deny entry on various grounds, and to require immigrants deemed to be a risk of becoming a public charge to pay a sum of money intended to compensate the state if the person ended up relying on public benefits. The Supreme Court held that this law violated the Constitution. In reaching this decision, the Court reasoned that foreign governments would take offense at the law, and would bring their concerns not to California but to the federal government:

Upon whom would such a claim be made? Not upon the State of California; for, by our Constitution, she can hold no exterior relations with other nations. It would be made upon the government of the United States. If that government should get into a difficulty which would lead to war, or to suspension of intercourse, would California alone suffer, or all the Union? If we should conclude that a pecuniary indemnity was proper as a satisfaction for the injury, would California pay it, or the Federal government? If that government has forbidden the States to hold negotiations with any foreign nations, or to declare war, and has taken the whole subject of these relations upon herself, has the Constitution, which provides for this, done so foolish a thing as to leave it in the power of the States to pass laws whose enforcement renders the general government liable to just reclamations which it must answer, while it does not prohibit to the States the acts for which it is held responsible?³⁴

³³ *Chy Lung v. Freeman*, 92 U.S. 275 (1875).

³⁴ *Id.* at 279-80.

The Court concluded that “[t]he passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the States. [Congress] has the power to regulate commerce with foreign nations: the responsibility for the character of those regulations, and for the manner of their execution, belongs solely to the national government. If it be otherwise, a single State can, at her pleasure, embroil us in disastrous quarrels with other nations.”³⁵

The federal government’s powers are limited to those enumerated in the Constitution, with all other powers being reserved “to the States, respectively, or to the people.”³⁶ While the Court in *Chy Lung* did not specify which section of the U.S. Constitution gives the federal government exclusive jurisdiction over immigration to the federal government, later cases have cited Article I, which gives the federal government the power to “establish an Uniform Rule of Naturalization.”³⁷

The exclusively federal nature of the power to regulate immigration does not mean, however, that states have no role to play. The Supreme Court held in a 1976 case, *De Canas v. Bica*, that “standing alone, the fact that aliens are the subject of a state statute does not render it a regulation of immigration, which is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain.”³⁸ In cases involving indirect restrictions on immigrants, the Court held, a subfederal law will be struck down only if 1) Congress has clearly indicated its intent to preclude state or local legislation in a particular area of legislation, 2) Congress has “occupied the field” by creating a comprehensive legislative scheme that leaves no room for state legislation, or 3) a subnational law conflicts with federal law in either of two ways: if it is impossible to comply with both state and federal regulations at the same time, or if

³⁵ *Id.* at 280.

³⁶ U.S. Const., Amend. X.

³⁷ U.S. Const. Art. 1, § 8, cl. 4. See *Arizona v. United States*, 132 S. Ct. 2492, 2498 (2012) (“The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens. This authority rests, in part, on the National Government’s constitutional power to ‘establish an uniform Rule of Naturalization,’ and its inherent power as sovereign to control and conduct relations with foreign nations.”) (citations omitted).

³⁸ *De Canas v. Bica*, 424 U.S. 351, 355 (1976).

state law stands as an obstacle to the accomplishment of the purposes and objectives of Congress.³⁹ *De Canas* concerned a California law that prohibited the employment of unauthorized workers at a time when federal law had yet to impose sanctions for such acts. The Court held that because the federal government had not legislated in the area of employer sanctions, the states were free to do so, as long as the state regulation at issue did not create a conflict with federal law.⁴⁰

2. STATE AND LOCAL LAWS AIMED AT “ATTRITION THROUGH ENFORCEMENT”

The constitutional framework described above has shaped the strategies that state and local lawmakers have pursued in enacting laws aimed at discouraging unauthorized immigration. These measures have focused on areas in which the federal government and the states have overlapping authority, such as housing, education, employment, and criminal law.

The contemporary history of state and local anti-immigrant legislation can be traced back to 1994, when California voters approved a ballot initiative, Proposition 187, which prohibited unauthorized immigrants from attending public schools or accessing several types of public services, including publicly funded non-emergency medical assistance. The stated purpose of Proposition 187 was to “provide for cooperation between [the] agencies of state and local government with the federal government, and to establish a system of required notification by and between such agencies to prevent illegal aliens in the United States from receiving benefits or public services in the State of California.”⁴¹ A federal court invalidated most of the provisions of Proposition 187, holding that they constituted impermissible attempts to regulate immigration and were preempted by federal law.⁴² The court also held that Prop. 187 clearly conflicted with the 1982 Supreme Court decision *Plyler v. Doe*, which established that all children in the United States have the right to attend public elementary and secondary schools regardless of their immigration status.⁴³

³⁹ *Arizona*, 132 S.Ct. at 2501.

⁴⁰ *De Canas*, 424 U.S. at 363.

⁴¹ *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 763 (C.D. Cal. 1995), *on reconsideration in part*, 997 F. Supp. 1244 (C.D. Cal. 1997) (quoting Prop. 187).

⁴² *Id.*

⁴³ *Plyler v. Doe*, 457 U.S. 202, 230 (1982).

Although Proposition 187 never went into effect, it introduced into the political lexicon a new term: “self-deportation,” the notion that states and municipalities can take immigration policy into their own hands by making life so difficult for unauthorized migrants that they will choose to leave. In the words of Pete Wilson, then-governor of California: “If it’s clear to you that you cannot be employed, and that you and your family are ineligible for services, you will self-deport.”⁴⁴ This concept of self-deportation faded from view somewhat after Proposition 187 was invalidated, but it was revived a few years later under a new phrase – “attrition through enforcement”⁴⁵ – and gained newfound prominence between 2006 and 2011 as a wave of such measures were adopted in jurisdictions around the country. The first attempt to pass an “attrition through enforcement” law was a ballot measure that restrictionist advocates proposed in the city of San Bernardino, California, in 2006. The proposed measure would have denied city funds and business permits to businesses that employed undocumented immigrants; allowed local police to seize the vehicles that employers used to pick up day laborers who were unauthorized immigrants; prohibited unauthorized migrants from renting property; and made English the only language for conducting city business.⁴⁶ San Bernardino voters rejected the ballot measure, but it became a model for similar measures across the country.⁴⁷

A few months later, Hazleton, Pennsylvania became the first location to enact such a law. Hazleton, a town in northeastern Pennsylvania, saw its

⁴⁴ SAFIRE, W., “Self-Deportation?,” *N.Y. Times*, Nov. 21, 1994.

⁴⁵ For an early use of this phrase by anti-immigration advocates, see KRIKORIAN, M., *Downsizing Illegal Immigration: A Strategy of Attrition Through Enforcement*, Center for Immigration Studies, 2005, <<http://cis.org/ReducingIllegalImmigration-Attrition-Enforcement>>. See also KOBACH, K.W., “Attrition Through Enforcement: A Rational Approach to Illegal Immigration,” *Tulsa Journal of Comparative & International Law*, Vol. 15, 2008, p. 155 ff.

⁴⁶ O’NEIL, K., *Hazleton and Beyond: Why Communities Try to Restrict Immigration*, Migration Policy Institute, 2010, <<http://www.migrationpolicy.org/article/hazleton-and-beyond-why-communities-try-restrict-immigration>>; BUCHANAN, S. AND HOLTHOUSE, D., *Rising Anti-Immigrant Sentiments Draw Extremist Elements to Issue*, Southern Poverty Law Center (Aug. 11, 2006), <<https://www.splcenter.org/fighting-hate/intelligence-report/2006/rising-anti-immigrant-sentiments-draw-extremist-elements-issue>>.

⁴⁷ For a comprehensive list of these measures, see NAT’L. CONFERENCE OF STATE LEGISLATURES, *State Laws Related to Immigration and Immigrants*, <<http://www.ncsl.org/research/immigration/state-laws-related-to-immigration-and-immigrants.aspx>>.

mostly white population of 20,000 people grow by thirty percent between 2000 and 2007, with an influx of new residents that included many Latinos.⁴⁸ The mayor of Hazleton seized on the issue of unauthorized immigration, making inflammatory claims that immigrants were linked to crime. In 2006, Hazleton enacted the Illegal Immigration Relief Ordinance,⁴⁹ garnering national attention.

The ordinance permitted Hazleton to suspend or revoke the business licenses of employers who were found to have hired unauthorized workers, and it required certain employers (those who received government contracts and those who had a history of employing unauthorized workers) to participate in a federal employment authorization verification program that was then called the Basic Pilot Program.⁵⁰ (Later renamed E-Verify, this program allows employers to contact DHS electronically to check the validity of an individual's employment authorization documents; under federal law, this program is available to employers but use of the program is not required unless the employer is a government contractor.)⁵¹ The ordinance also required any prospective occupant of rental housing who was over the age of eighteen to seek an occupancy permit from the city government. To obtain such a permit, the occupant had to show proof of citizenship or lawful immigration status. A landlord who rented property to an occupant without such a permit would be subject to a fine of \$1000 per unauthorized occupant and an additional \$100 per day, per unauthorized occupant under the violation were remedied. Authorized occupants who permitted an unauthorized occupant to live with them were subject to the same fines.

By 2009, 42 localities across the country had enacted similar measures.⁵² Meanwhile, state legislatures also began considering anti-immigrant bills. In

⁴⁸ See CHISHTI, M. & BERGERON, C., *Hazleton Immigration Ordinance That Began With a Bang Goes Out With a Whimper*, Migration Policy Institute, 2014, <<http://www.migrationpolicy.org/article/hazleton-immigration-ordinance-began-bang-goes-out-whimper>>.

⁴⁹ HAZLETON, PA., Ordinance 2006-18 (2006).

⁵⁰ *Id.*

⁵¹ *E-Verify*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, <<https://www.uscis.gov/e-verify/about-program/history-and-milestones>>. See *infra* Part III.C.

⁵² OLIVERI, R.C., "Between A Rock and A Hard Place: Landlords, Latinos, Anti-Illegal Immigrant Ordinances, and Housing Discrimination," *Vanderbilt Law Review*, Vol. 62, 2009, p. 60. See also SOUTHERN POVERTY LAW CENTER, *When Mr. Kobach Comes to Town: Nativist*

2007, Arizona passed the Legal Arizona Workers Act, which empowered Arizona courts to suspend or revoke the business licenses of employers who knowingly or intentionally employed unauthorized workers.⁵³ Then, in 2010, Arizona made headlines around the world when it enacted SB 1070, the Support Our Law Enforcement and Safe Neighborhoods Act.⁵⁴ The law made it a state criminal offense to work or seek work without being in an authorized status. It also created criminal penalties for employing, sheltering, or transporting an unauthorized migrant, and for failure to comply with a federal law that requires all noncitizens to register with the federal government and to carry their immigration papers. It required police officers to check a person's immigration status each time they stopped someone suspected of a crime, and it authorized officers to conduct warrantless arrests whenever they had probable cause to suspect someone was undocumented.

In 2011, five additional states – Alabama, Georgia, Indiana, South Carolina and Utah – enacted similar laws.⁵⁵ The Alabama law, HB 56, arguably went furthest. It included many provisions similar to those in SB 1070. In addition, it barred undocumented immigrants from attending public colleges and universities and required that public primary and secondary schools check the status of students and report annually to the state the number of undocumented children enrolled. It also prohibited state courts from enforcing any contract to which an undocumented immigrant was a party, provided the other party had direct or constructive knowledge of the person's unauthorized status. As originally drafted, HB 56 prohibited undocumented immigrants from entering into any “business transaction” with any government entity in Alabama, which caused concern that unauthorized immigrants would be unable to obtain water, electricity, or other public

Laws & the Communities They Damage, 2011, <<https://www.splcenter.org/20110130/when-mr-kobach-comes-town-nativist-laws-and-communities-they-damage>>; CHISHTI, M. & BERGERON, C., *Hazleton Immigration Ordinance That Began With a Bang Goes Out With a Whimper*, Migration Policy Institute, 2014, <<http://www.migrationpolicy.org/article/hazleton-immigration-ordinance-began-bang-goes-out-whimper>>.

⁵³ ARIZ. REV. STAT. ANN. § 23-212.

⁵⁴ 2010 Arizona Sessions Laws, Chapter 113. S.B. 1070, 49th Leg., 2d Reg. Sess. (Az. 2010), as amended by House Bill 2162, 2010 Arizona Sessions Laws, Chapter 211.

⁵⁵ H.R. B. 56 (Ala. 2011) (enacted); H.R. B. 87 (Ga. 2011) (enacted); H.R. B. 497 (Utah 2011) (enacted); S. B. 590 (Ind. 2011) (enacted); S. B. 20 (S.C. 2011) (enacted).

utility services; this provision was later reworded to prohibit undocumented immigrants from entering into a “public records transaction” (such as an application for a driver’s license or business license).

III. LEGAL CHALLENGES TO “ATTRITION THROUGH ENFORCEMENT” LAWS

The wave of anti-immigrant laws that swept the United States between 2006 and 2011 captured a great deal of attention in the news media and gave rise to boycotts and international condemnation.⁵⁶ However, most of the provisions contained in these laws never went into effect. The federal government went to court to challenge the constitutionality of many of these laws, as did immigrants’ rights organizations such as the American Civil Liberties Union and the Mexican American Legal Defense Fund. The central question in these legal challenges has been whether the laws in question are preempted by federal law under the framework set forth by the Supreme Court in *De Canas v. Bica*, discussed above.

A key aspect of many of the new “attrition through enforcement” laws is that state and local lawmakers have framed these measures as merely being mechanisms for local enforcement of *federal* immigration policies rather than as imposing new and different restrictions at the state or local level. For example, an ordinance in Farmer’s Branch, Texas, that is quite similar to the Hazleton ordinance states that its aim is to provide “a different mechanism against the same ... conduct” criminalized by the federal government.⁵⁷ The architect of this strategy, and the drafter of many of these laws, is Kris Kobach, a former law professor and current state official in Kansas who worked in the U.S. Department of Justice during the administration of President George W. Bush. In a 2008 law review article, Kobach advanced the theory that states may impose limitations on unauthorized immigrants so long as the measures

⁵⁶ See GORDON, I. & RAJA, T., “164 Anti-Immigration Laws Passed Since 2010? A Mojo Analysis,” *Mother Jones*, Mar./Apr. 2011, <<http://www.motherjones.com/politics/2012/03/anti-immigration-law-database>>; KAIN, E., “Why Arizona’s Controversial Immigration Law Is Bad For Business,” *Forbes*, Apr. 27, 2012, <<http://www.forbes.com/sites/erikkain/2012/04/27/why-arizonas-controversial-immigration-law-is-bad-for-business/#745b7d061d64>>; LACEY, M., “Immigration Advocates Split Over Arizona Boycott,” *N.Y. Times*, Sep. 14, 2011, <<http://www.nytimes.com/2011/09/15/us/immigration-advocates-are-split-over-arizona-boycott.html>>.

⁵⁷ FARMER’S BRANCH, TEX., Ordinance 2952 (2008).

are the “mirror image” of federal law.⁵⁸ For instance, a law that creates state criminal penalties for providing transportation, housing, or other assistance to undocumented immigrants may be framed as consistent with a federal law that sets forth a range of criminal penalties for bringing a person to the United States other than at a designated port of entry; transporting an unauthorized immigrant within the United States; concealing, harboring, or shielding an unauthorized immigrant from detection; and encouraging or inducing a noncitizen to enter or reside in the United States knowing that such residence will be in violation of the law.⁵⁹

Although Kobach’s theory persuaded many lawmakers to enact anti-immigrant measures, most federal courts have rejected this theory, striking down a number of these laws even when they purport merely to provide local enforcement mechanisms for federal policies. Below is a brief summary of the current status of the relevant case law as of June, 2016. While some questions have reached the Supreme Court, others have been considered only by the lower courts. When the federal appeals courts are in disagreement, the conflict creates a “circuit split” that will not be resolved until such time as the Supreme Court takes up the issue. In the meantime, each court’s decision remains binding in the geographic area of the country over which the court has jurisdiction.

1. RESTRICTIONS ON HOUSING

The Supreme Court has not yet ruled on the validity of laws that prohibit landlords from renting housing to unauthorized migrants. Three federal appeals courts have held that such laws are preempted by federal law and are therefore unconstitutional, while one federal appeals court has upheld their validity.

The Court of Appeals for the Third Circuit, with jurisdiction over Delaware, New Jersey, and Pennsylvania, was the first to consider this matter. In 2008, it struck down the housing provision of the Hazleton ordinance on preemption grounds. The court subsequently revisited the issue in light of developing case law at the Supreme Court, but reaffirmed its earlier decision,

⁵⁸ See KOBACH, K.W., “Reinforcing the Rule of Law: What States Can and Should Do to Reduce Illegal Immigration,” *Georgetown Immigration Law Journal*, Vol. 22, 2008, p. 459 ff.

⁵⁹ 8 U.S.C. § 1324.

repeating in a 2013 decision its original conclusion that the Hazleton ordinance had impermissibly attempted to regulate immigration:

The housing provisions of Hazleton's ordinances are nothing more than a thinly veiled attempt to regulate residency under the guise of a regulation of rental housing. By barring aliens lacking lawful immigration status from rental housing in Hazleton, the housing provisions go to the core of an alien's residency. States and localities have no power to regulate residency based on immigration status.⁶⁰

The court further held that even if the ordinance did not represent an attempt to regulate immigration, the provisions would be preempted because Congress had "occupied the field" through its comprehensive laws imposing penalties for harboring unauthorized immigrants.⁶¹ Finally, the court concluded that the ordinance conflicted with federal law: "Hazleton may not unilaterally prohibit those lacking lawful status from living within its boundaries, without regard for the Executive Branch's enforcement and policy priorities. If every other state enacted similar legislation to overburden the lives of aliens, the immigration scheme would be turned on its head."⁶²

The Fifth Circuit Court of Appeals, with jurisdiction over Louisiana, Mississippi, and Texas, reached the same conclusion with regard to a similar ordinance in Farmer's Branch, Texas. The court held that the establishment of criminal offenses based on the housing of undocumented immigrants disrupted the federal immigration framework both by interfering with federal anti-harboring law and by allowing state officers to hold noncitizens in custody for possible unlawful presence without federal direction or supervision.⁶³ The Eleventh Circuit Court of Appeals, with jurisdiction over Alabama, Florida, and Georgia, also reached this conclusion with regard to Alabama's HB 56, which contained a broad anti-harboring provision that included a prohibition on offering rental accommodation to undocumented immigrants.⁶⁴

⁶⁰ *Lozano v. City of Hazleton*, 724 F.3d 297, 315 (3d Cir. 2013).

⁶¹ *Id.* at 316.

⁶² *Id.* at 318 (3d Cir. 2013) (internal quotations and citations omitted)

⁶³ *Villas at Parkside Partners v. City of Farmers Branch, Tex.*, 726 F.3d 524, 529 (5th Cir. 2013), *cert. denied*, 134 S.Ct. 1491 (2014).

⁶⁴ *United States v. Alabama*, 691 F.3d 1269, 1288 (11th Cir. 2012)

Two other federal appeals courts – the Fourth and Ninth Circuits – have reached decisions that do not directly address the question of restrictions on landlords but are otherwise in line with the Third, Fifth, and Eleventh Circuit decisions. These decisions, which are discussed below in Part III.B., interpret the federal anti-harboring statute to preempt state and local laws, holdings which strongly suggest that these courts would find landlord restrictions to be impermissible on preemption grounds.

The only federal court of appeals to have reached a different conclusion is the Eighth Circuit, which has jurisdiction over cases that arise in Arkansas, Iowa, Minnesota, North Dakota, South Dakota, Nebraska, and Missouri. In *Kellern. City of Fremont*, the court upheld the validity of an ordinance very similar to the one enacted in Hazleton and Farmer’s Branch.⁶⁵ The court concluded that “[l]aws designed to deter, or even prohibit, unlawfully present aliens from residing within a particular locality are not tantamount to immigration laws establishing who may enter or remain in the country.”⁶⁶ It then concluded that federal harboring laws were not sufficiently comprehensive to have “occupied the field,” and that the restrictions on landlords did not conflict with federal law: “As the rental provisions do not ‘remove’ any alien from the United States (or even from the City), federal immigration officials retain complete discretion to decide whether and when to pursue removal proceedings.”⁶⁷

2. RESTRICTIONS ON TRANSPORTATION OR HARBORING OF UNDOCUMENTED IMMIGRANTS

Several of these laws create state criminal offenses relating to the transportation or harboring of undocumented immigrants. For example, § 5(B) of Arizona’s SB 1070 makes it a criminal offense for a “person who is in violation of a criminal offense” to “[t]ransport or move or attempt to transport or move an alien in [Arizona], in furtherance of the illegal presence of the alien in the United States, in a means of transportation if the person knows or recklessly disregards the fact that the alien has come to, has entered or remains in the United States in violation of law”; to “[c]onceal, harbor or shield or attempt to conceal, harbor or shield an alien from detection in any place in [Arizona], including any building or any means of transportation,

⁶⁵ 719 F.3d 931, 940 (8th Cir. 2013), *cert. denied*, 34 S.Ct. 2140 (2014).

⁶⁶ *Id.* at 941.

⁶⁷ *Id.* at 944.

if the person knows or recklessly disregards the fact that the alien has come to, has entered or remains in the United States in violation of law”; or to “[e]ncourage or induce an alien to come to or reside in [Arizona] if the person knows or recklessly disregards the fact that such coming to, entering or residing in this state is or will be in violation of law.” Georgia legislators enacted a law with substantially similar wording, while Alabama and South Carolina, in enacting SB 1070-type legislation, worded their provisions more broadly, to apply to anyone who engaged in such activities whether or not the person was already “in violation of a criminal offense.”

The Fourth and Ninth Circuits, which together have jurisdiction over thirteen states, have struck down laws that impose state penalties for transportation or harboring of undocumented immigrants. In line with the decisions of the Third, Fifth, and Eleventh Circuits regarding rental housing restrictions, these decisions have concluded that laws regarding transportation or harboring laws constitute impermissible attempts by states to step into the role of regulating immigration; that such laws are preempted by the comprehensive federal legislative scheme regarding harboring; and that such laws conflict with the objectives of federal law because they interfere with the exercise of discretion regarding priorities for deportation, which is a key element of federal immigration policy.⁶⁸

As described above, the Eighth Circuit has disagreed with this reading of the federal harboring statute, concluding in *Keller v. City of Fremont* that the federal government has not occupied the field and that state and local laws sanctioning harboring are thus permissible.⁶⁹ The Eighth Circuit is the only federal appeals court to have reached this conclusion.

⁶⁸ See *Ga. Latino Alliance for Human Rights v. Governor of Ga.*, 691 F.3d 1250, 1263–65 (11th Cir.2012); *United States v. Alabama*, 691 F.3d 1269, 1285–87 (11th Cir.2012), *cert. denied*, 133 S.Ct. 2022 (2013); *United States v. South Carolina*, 906 F.Supp.2d 463, 468 (D.S.C.2012), *aff’d*, 720 F.3d 518, 2013 WL 3803464 (4th Cir. 2013); *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1023 (9th Cir. 2013), *cert denied*, 134 S.Ct. 1876 (2014). See also *Utah Coalition of La Raza v. Herbert*, 26 F. Supp. 3d 1125 (D. Utah 2014) (holding that Section 10 of H.B. 497, which makes it a crime to “harbor an alien for commercial or private gain,” was preempted by federal law).

⁶⁹ *Keller v. City of Fremont*, 719 F.3d 931 (8th Cir. 2013).

3. RESTRICTIONS ON EMPLOYMENT

There are two types of employment-related restrictions present in “attrition through enforcement” laws – those directed at employers and those directed at immigrants themselves. Laws imposing sanctions on employers have met with mixed results in the courts, while those imposing penalties on employees have been struck down.

Since the passage of IRCA in 1986, federal law has required employers to verify that prospective workers are authorized to work, and has imposed civil and criminal sanctions on employers who fail to do so. To comply with the law, employers must check the documentation of each employee who is hired, and must maintain records regarding the employee’s work authorization. In 1997, the INS launched the Basic Pilot Program, which provided a way for employers to receive rapid electronic verification of a prospective employee’s work eligibility.⁷⁰ The program, which was initially limited to employers in selected states, became effective nationwide in 2004 and became accessible to employers via the Internet. In 2007, this system was renamed E-Verify. As of 2009, federal contractors have been required to use E-Verify.⁷¹ For other employers, the system is voluntary; federal law permits employers to continue to complete the process manually instead of electronically if they so choose.

In *Chamber of Commerce of U.S. vs. Whiting*, the Supreme Court upheld the validity of an Arizona law, the Legal Arizona Workers Act of 2007, that requires employers in Arizona to participate in the E-Verify program and that provides for the suspension or revocation of the business licenses of employers that knowingly hire unauthorized workers.⁷² The Court held that federal law did not explicitly preempt the Arizona statute because IRCA, although it preempts states from imposing sanctions on employers, includes an exception broad enough to cover the Arizona law. The preemption clause in question prohibits any State or local law that imposes “civil or criminal sanctions (other than through licensing and similar laws) upon those who employ ... unauthorized aliens.”⁷³ The Supreme Court held that the Arizona

⁷⁰ U.S. CITIZENSHIP AND IMMIGRATION SERVICES, *E-Verify*, <<https://www.uscis.gov/e-verify/about-program/history-and-milestones>>.

⁷¹ *Id.*

⁷² *Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582 (2011).

⁷³ 8 U.S.C. § 1324a(h)(2).

law was a licensing law (because it punishes employers through suspension or revocation of their business license) and was thus not preempted. The Court also held that the Arizona law did not conflict with federal law because it tracked the requirements of federal law and did not impose additional requirements on employers. Even though federal law prohibits the federal government from requiring employers to participate in the E-Verify program, the Court held that Arizona was free to impose such a requirement.

Other state and local laws that attempt to impose sanctions on employers have been struck down, however. The Third Circuit Court of Appeals, which had invalidated the employer sanctions in the Hazleton ordinance prior to the Supreme Court's decision in *Chamber of Commerce v. Whiting*, reconsidered the case after the Supreme Court issued its decision, but reached the same conclusion it had before.⁷⁴ The court held that the Hazleton ordinance conflicted with IRCA because it required employers to verify the work eligibility of a much broader range of individuals than IRCA requires, covering any "agreement to perform any service or work or to provide a certain product in exchange for valuable consideration."⁷⁵

While federal law prohibits employers from hiring unauthorized workers, it does not prohibit immigrants who lack employment authorization from seeking or accepting employment. Citing this distinction, the Supreme Court in *Arizona v. U.S.*, struck down §5(C) of S.B. 1070, which made it a state misdemeanor for "an unauthorized alien to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor" in Arizona.⁷⁶ The Court found that "Congress made a deliberate choice not to impose criminal penalties on aliens who seek, or engage in, unauthorized employment" and held that § 5(C) would therefore interfere with the "careful balance" struck by Congress in IRCA.⁷⁷

4. REGISTRATION REQUIREMENTS

The Supreme Court has made clear that states may not require noncitizens to comply with any sort of registration system.

⁷⁴ *Lozano v. City of Hazleton*, 724 F.3d 297 (3d Cir. 2013), cert denied, 134 S.Ct. 1491 (2014).

⁷⁵ *Id.* at 308.

⁷⁶ ARIZ. REV. STAT. ANN. § 13-2928(C) (West Supp.2011).

⁷⁷ *Arizona v. United States*, 132 S. Ct. 2492, 2504-05 (2012).

In *Arizona v. U.S.*, the Supreme Court struck down Section 3 of Arizona's SB 1070, which created a state misdemeanor offense for "willful failure to complete or carry an alien registration document ... in violation of 8 United States Code section 1304(e) or 1306(a)." The reliance on federal law in the Arizona statute is a prime example of the "mirror image" strategy of linking state and local restrictions to federal law. Back in 1940, the Supreme Court struck down a Pennsylvania law that set up a state-run registration system for noncitizens; in that case, *Hines v. Davidowitz*, the Court held that the federal government had the exclusive power to require such registration, and that it was unconstitutional for Pennsylvania to set up its own system.⁷⁸ In contrast to the Pennsylvania law at issue in *Hines v. Davidowitz*, the Arizona law did not set up an independent registration system but rather imposed state penalties for violation of federal law. Nevertheless, the Supreme Court struck it down.

The federal law in question—which has not been enforced for many decades⁷⁹ – makes it a federal misdemeanor offense to fail to carry "any certificate of alien registration or alien registration receipt card issued . . . pursuant to subsection (d) of this section." Subsection (d), in turn, provides that "[e]very alien in the United States who has been registered and fingerprinted under the provisions of the Alien Registration Act, 1940, or under the provisions of this chapter shall be issued a certificate of alien registration or an alien registration receipt card in such form and manner and at such time as shall be prescribed under regulations issued by the Attorney General."⁸⁰ Federal law also provides that "[a]ny alien required to apply for registration and to be fingerprinted in the United States who willfully fails or refuses to make such application or to be fingerprinted, and any parent or legal guardian required to apply for the registration of any alien who willfully fails or refuses to file application for the registration of such alien."⁸¹ These provisions have their origin in a World War II-era registration program that fell out of use only a few years after it began.

⁷⁸ *Hines v. Davidowitz*, 312 U.S. 52, 74 (1941).

⁷⁹ See MORAWETZ, N. & FERNÁNDEZ-SILBER, N., "Immigration Law and the Myth of Comprehensive Registration," *U.C. Davis L. Rev.*, Vol. 48, 2014, p. 143.

⁸⁰ 8 U.S.C. § 1304(d).

⁸¹ 8 U.S.C. § 1306(a).

Rejecting the mirror image theory, the Supreme Court concluded that §3 of SB 1070 represented an impermissible encroachment on the federal power to regulate immigration. The Court held that Congress has created a comprehensive legislative scheme governing the registration of foreign nationals, and that states may not intrude upon this comprehensive scheme by imposing their own penalties relating to failure to register or to carry registration documents. “Federal law,” the Court held, “makes a single sovereign responsible for maintaining a comprehensive and unified system to keep track of aliens within the Nation’s borders.”⁸²

5. WARRANTLESS ARRESTS

In *Arizona v. U.S.*, the Supreme Court also struck down §6 of S.B. 1070, which provided that a state police officer, “without a warrant, may arrest a person if the officer has probable cause to believe ... [the person] has committed any public offense that makes [him or her] removable from the United States.”⁸³ The Court noted that §6 gave greater power to state law enforcement officers than federal law gives to federal immigration officers, who must obtain warrants before arresting noncitizens suspected of immigration violations except where the person in question “is likely to escape before a warrant can be obtained.”⁸⁴ It further noted that federal law allows state and local law enforcement officers to carry out the functions of federal immigration officers only under limited circumstances, such as when federal authorities enter into a formal agreement with a law enforcement agency and provide training and supervision to the officers.⁸⁵

The Court held that state officers may not be given the power to decide whether an alien should be detained for being removable, because the removal process is entrusted to the discretion of the Federal Government. Such a law, the Court concluded, “would allow the State to achieve its own immigration policy. The result could be unnecessary harassment of some aliens (for instance, a veteran, college student, or someone assisting with a criminal

⁸² *Arizona*, 132 S. Ct. at 2502.

⁸³ *Id.* at 2505.

⁸⁴ 8 U.S.C. § 1357(a)(2).

⁸⁵ *Arizona*, 132 S. Ct. at 2506. The federal law authorizing such collaboration is 8 U.S.C. § 1357(g).

investigation) whom federal officials determine should not be removed.”⁸⁶ Consistent with a long line of cases stretching back to *Chy Lung*, the Court reasoned that “[d]ecisions of this nature touch on foreign relations and must be made with one voice.”⁸⁷

6. “SHOW ME YOUR PAPERS” PROVISIONS

The only provision of SB 1070 that the Supreme Court declined to invalidate in *Arizona v. U.S.* was § 2(B), which requires police officers in Arizona to make a reasonable attempt to determine the immigration status of any person they detain or arrest if “reasonable suspicion exists that the person is an alien and is unlawfully present in the United States” and that any person who is arrested shall have his or her immigration status determined before being released.⁸⁸

In reaching its decision, the Court noted that there are three limits contained within § 2(B): “First, a detainee is presumed not to be an alien unlawfully present in the United States if he or she provides a valid Arizona driver’s license or similar identification. Second, officers ‘may not consider race, color or national origin ... except to the extent permitted by the United States [and] Arizona Constitution[s].’ Third, the provisions must be ‘implemented in a manner consistent with federal law regulating immigration, protecting the civil rights of all persons and respecting the privileges and immunities of United States citizens.’”⁸⁹ The Court acknowledged that “[d]etaining individuals solely to verify their immigration status would raise constitutional concerns”⁹⁰ and that “it would disrupt the federal framework to put state officers in the position of holding aliens in custody for possible unlawful presence without federal direction and supervision.”⁹¹ However, it concluded that the law could be read in such a way to avoid those problems, for example by interpreting it to require officers to “conduct a status check during the course of an authorized, lawful detention or after a detainee has been released” without the status check prolonging the detention in any

⁸⁶ *Arizona*, 132 S. Ct. at 2506.

⁸⁷ *Id.* at 2506-07.

⁸⁸ ARIZ. REV. STAT. ANN. § 11-1051(B) (West 2012).

⁸⁹ *Arizona*, 132 S. Ct. at 2507-08.

⁹⁰ *Id.* at 2509.

⁹¹ *Id.*

way. The Court concluded that because the law had not yet gone into effect, there was “a basic uncertainty about what the law means and how it will be enforced,” and that “[a]t this stage, without the benefit of a definitive interpretation from the state courts, it would be inappropriate to assume § 2(B) will be construed in a way that creates a conflict with federal law.” The Court noted, however, that its opinion did not foreclose the possibility of other challenges to the law after it went into effect.⁹²

IV. FEDERALISM AND FUNDAMENTAL RIGHTS: LEGAL FRAMEWORKS FOR CHALLENGING ANTI-IMMIGRANT LAWS IN THE UNITED STATES AND THE EUROPEAN UNION

As the above discussion makes clear, recent litigation on state and local anti-immigrant laws within the United States has turned almost exclusively on questions of federalism (i.e. competence); U.S. courts that have struck down state and local anti-immigrant laws have done so on the grounds that such laws impermissibly encroach on federal power. However, laws that single out undocumented immigrants and block access to basic services also raise questions of fundamental rights under both domestic and international law, including the right to equal protection/non-discrimination, the right to housing, the right to health, the right to education, the right to family life, and the right to dignity. This section offers a brief comparison between the United States and the European Union in order to highlight the difference between addressing such laws as matters of federalism and addressing them as violations of fundamental rights.

Federalism

From a federalism standpoint, there are certain superficial parallels to be drawn between the United States and the E.U. with regard to laws that restrict the rights of undocumented immigrants. Both the United States and the EU have policies at the federal level that are designed to discourage unauthorized immigration. In the United States these include the employer sanctions provisions of IRCA and the federal law prohibiting the harboring or transportation of unauthorized immigrants, both of which have been cited by courts as reasons to strike down subfederal laws that ostensibly have

⁹² *Id.* at 2510.

similar aims. In the EU, federal policies include the 2009 Employer Sanctions Directive,⁹³ which established an E.U. policy of prohibiting employers from hiring unauthorized workers, and the 2002 Facilitation Directive and accompanying Council Framework Decision, which established a policy of sanctioning those who assist undocumented immigrants to enter or remain in E.U. Member States.⁹⁴

In addition, in both the United States and the E.U., numerous laws restricting the rights of undocumented immigrants have been enacted at the subfederal level – by states and municipalities in the United States, and by Member States within the E.U..⁹⁵ In some cases, national laws within the E.U. look quite similar to anti-immigrant laws that have been struck down by U.S. courts. For example, landlords are prohibited from renting property to undocumented immigrants in Italy, France, Germany, Greece, Denmark, Hungary, Romania, Czech Republic, and Malta.⁹⁶ The United Kingdom

⁹³ Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals., *OJ L* 168, of 30.6.2009, pp. 24-32.

⁹⁴ Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence (Facilitation Directive); Council Framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence.

⁹⁵ Questions of federalism do sometimes arise *within* E.U. Member States with regard to such issues. However, the dynamic on display in U.S. litigation (a federal government seeking to block restrictive legislation at the state or local level) has not been very much in evidence. For an example of a federalism conflict in which a subfederal unit of government seeks to expand protections for undocumented immigrants, see, e.g. SOBRINO GUIJARRO, I., “Constitutional Bases in the Federal Conflict Over Access to Health Care of Undocumented Immigrants in Spain,” *Perspectives on Federalism*, Vol. 6, issue 2, 2014, <<http://www.on-federalism.eu/index.php/articles/183-constitutional-bases-in-the-federal-conflict-over-access-to-health-care-of-undocumented-immigrants-in-spain>>(analyzing conflict between Autonomous Communities and federal government in Spain regarding national policy restricting access to health care).

⁹⁶ See CARRERA, S. & PARKIN, J., *Protecting and Delivering Fundamental Rights of Irregular Migrants at Local and Regional Levels in the European Union*, Centre for European Policy Studies, p. 14, <<http://cor.europa.eu/en/documentation/studies/Documents/protecting-fundamental-rights-irregular-migrants.pdf>>. French law contains an exception for those who accommodate a close relative, and in Italy, landlords are punished for renting to an undocumented tenant only if they take “unfair advantage” of the tenant’s vulnerable situation. CARRERA, S., ET. AL., Fit for Purpose? The Facilitation Directive and the Criminalisation of humanitarian

(soon to exit the E.U.) imposed such restrictions through passage of the Immigration Act of 2014.⁹⁷ While public elementary and secondary education is generally accessible to undocumented immigrants within the E.U., there are several Member States that impose limits on education or require public schools to report the presence of undocumented immigrants within their student body.⁹⁸

Beyond these parallels, however, the federalism analyses diverge. The E.U. is a federation of sovereign nations, any of which may (as the recent “Brexit” vote makes clear) choose to leave the Union at any time. It does not possess anything close to the power to preempt subfederal laws that the United States federal government wields under the Supremacy Clause of the U.S. Constitution.⁹⁹ E.U. competence on migration was established with the entry into force of the Treaty of Amsterdam in 1999, and was significantly strengthened by the Treaty of Lisbon in 2009.¹⁰⁰ However, migration is an issue of shared competence and is subject to the principle of subsidiarity, under which “the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States,

assistance to irregular migrants, European Parliament, 2016, p. 31, <[http://www.europarl.europa.eu/RegData/etudes/STUD/2016/536490/IPOL_STU\(2016\)536490_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/536490/IPOL_STU(2016)536490_EN.pdf)>

⁹⁷ Home Office press release, “Right to Rent Goes Live Across England,” Feb. 1, 2016, <<https://www.gov.uk/government/news/right-to-rent-goes-live-across-england>>. The law requires landlords to check the papers of all tenants over the age of 18, and to refuse to rent to anyone who cannot provide proof of authorization to be present within the UK. Landlords who fail to do so can be fined up to three thousand pounds.

⁹⁸ See FRA-EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, *Fundamental Rights of Migrants in an Irregular Situation in the European Union*, 2011, p. 87, <http://fra.europa.eu/sites/default/files/fra_uploads/1827-FRA_2011_Migrants_in_an_irregular_situation_EN.pdf>(noting that “[i]n five countries, Bulgaria, Hungary, Latvia, Lithuania and Sweden it appears that migrant children in an irregular situation are not always entitled to free state schooling” and that the Czech Republic, Estonia, and Poland guarantee access only to primary education, while in France, undocumented children over the age of 16 can be rejected from secondary schools based on school capacity).

⁹⁹ For a comprehensive comparison of immigration federalism in the United States and the E.U., see DELANEY, E.F., “Justifying Power: Federalism, Immigration, and ‘Foreign Affairs,’” *Duke Journal of Constitutional Law and Public Policy*, Vol. 8, 2013, p. 153 ff.

¹⁰⁰ Migration falls within the Area of Freedom, Security, and Justice (AFSJ). For a full list of E.U. competencies, see *FAQ on the EU Competences and the European Commission Powers*, <<http://ec.europa.eu/citizens-initiative/public/competences/faq>>.

either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.”¹⁰¹ In keeping with this model of federalism, the E.U. policies aimed at discouraging unauthorized immigration are embodied in directives that call on – and in fact, require – Member States to take action. For example, the Facilitation Directive requires each Member State to adopt laws imposing sanctions on those who assist undocumented immigrants to “enter, or transit across, the territory of a Member State in breach of the laws of the State concerned on the entry or transit of aliens” and against “any person who, for financial gain, intentionally assists a person who is not a national of a Member State to reside within the territory of a Member State in breach of the laws of the State concerned on the residence of aliens.”¹⁰² Member States were given a deadline (Dec. 5, 2004) by which to enact such sanctions, and were directed to “communicate to the Commission the text of the main provisions of their national law which they adopt in the field covered by this Directive, together with a table showing how the provisions of this Directive correspond to the national provisions adopted.”¹⁰³

Thus, federal policies in the E.U. do not preempt subfederal lawmaking but rather are designed to promote it. In light of this important difference, the federalism arguments that have proven to be such a powerful tool for immigrant rights advocates in challenging state and local anti-immigrant legislation within the United States are unlikely to have much relevance with regard to laws enacted by E.U. Member States.¹⁰⁴

Fundamental Rights

While federalism/competence arguments are likely to be much less significant in the E.U. than in the United States, the opposite holds true for

¹⁰¹ TEU, Art. 5(3)

¹⁰² Facilitation Directive, Art. 1.

¹⁰³ Facilitation Directive, Art. 4.

¹⁰⁴ Federalism arguments may, of course, have relevance within Member States with regard to conflicts between national and subnational units of government. See, e.g. SOBRINO GUIJARRO, I., “Constitutional Bases in the Federal Conflict Over Access to Health Care of Undocumented Immigrants in Spain,” *Perspectives on Federalism*, Vol. 6, issue 2, 2014, <<http://www.on-federalism.eu/index.php/articles/183-constitutional-bases-in-the-federal-conflict-over-access-to-health-care-of-undocumented-immigrants-in-spain>>.

arguments challenging anti-immigrant laws as violations of fundamental rights.

In the United States, many commentators have argued that state and local anti-immigrant laws promote racial and ethnic discrimination in violation of the U.S. Constitution's guarantee of equal protection.¹⁰⁵ However, such arguments have been largely absent from litigation challenging the validity of such laws. During oral argument before the U.S. Supreme Court regarding Arizona's SB 1070, for example, the Solicitor General of the United States made clear that the Obama administration was not challenging the Arizona law as being racially discriminatory but was merely arguing that the law impermissibly encroached on federal power.¹⁰⁶ The administration's position reflected the view that it would be difficult to establish that the law was discriminatory on its face, and that therefore any challenge based on racial discrimination would have to rest on how the law was applied – a position that the Court itself adopted in its decision.¹⁰⁷

Critics of laws such as SB 1070 have also argued that they violate principles of non-discrimination embodied in the International Covenant on Civil and Political Rights (ICCPR) and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD),¹⁰⁸ both of which the United States has ratified, and that laws that prohibit undocumented immigrants from accessing basic necessities violate international norms of social and economic rights, such as the right to housing.¹⁰⁹ However, challenging such laws as violations of international law would be exceedingly difficult under the

¹⁰⁵ U.S. Constitution, amend. XIV, § 1, cl. 1.

¹⁰⁶ See CHACON, J.M., "The Transformation of Immigration Federalism," *21 William & Mary Bill of Rights Journal*, Vol. 21, 2012, pp. 577-78.

¹⁰⁷ *Arizona v. United States*, 132 S. Ct. 2492, 2510 (2012). A separate lawsuit has challenged racial profiling by police in Maricopa County, Arizona. See *Melendres v. Arpaio*, 784 F.3d 1254 (9th Cir. 2015), *cert. denied sub nom. Maricopa Cty., Ariz. v. Melendres*, 136 S. Ct. 799 (2016).

¹⁰⁸ See, e.g., LEWIS, H., *Human Rights Implications of Arizona v. U.S.*, <<http://www.scotusblog.com/2011/07/human-rights-implications-of-arizona-v-united-states/>>. The Inter-American Commission on Human Rights expressed its concern regarding SB 1070 and the very similar law enacted in Alabama. See INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, Press Release, "IACHR Expresses Concern over New Immigration Law in U.S. State of Alabama," <http://www.oas.org/en/iachr/media_center/PReleases/2011/063.asp>.

¹⁰⁹ See LEWIS, H. AND ROSENBLUM, R.E., "The Boston Principles: An Introduction," *Notre Dame Journal of International, Comparative, and Human Rights Law*, Vol. 1, 2011, pp. 145 ff.

legal framework that U.S. courts apply. The U.S. ratifications of the ICCPR and CERD include declarations that the treaties are not self-executing, meaning that they cannot be applied directly by U.S. courts. The prospects for litigating violations of social and economic rights is even more tenuous. As one human rights organization has put it: “The United States stands virtually alone in the world as an opponent of economic and social rights.... American administrations – regardless of the broad global consensus to the contrary – regularly take the position that economic and social rights are merely ‘aspirational,’ unenforceable and best approached as a policy matter leaving broad latitude to governments to provide or deny such rights depending on the political context of the moment. On the domestic level, the United States provides no federal constitutional guarantees for economic and social rights, and has yet to ratify the International Covenant on Economic, Social and Cultural Rights [ICESCR].”¹¹⁰

Within the E.U., in contrast, such arguments can draw on a much more robust legal framework. Every E.U. Member State is a party to the core international human rights treaties including not only the ICCPR and CERD but also the ICESCR and the Convention on the Rights of the Child (CRC). All are party as well to the European Convention on Human Rights and either the original or revised European Social Charter (ESC). And all are party to the European Charter of Fundamental Rights.

In particular, case law interpreting the ESC may hold some promise for challenging the validity of laws that aim to prevent undocumented immigrants from accessing rental housing and other essentials. The scope of the ESC is limited to “foreigners only in so far as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned.”¹¹¹ Thus, challenges to the exclusion of undocumented immigrants from ordinary government benefits programs are unlikely to succeed. However, the European Committee on Social Rights, which monitors compliance with the ESC, has interpreted its scope to reach more broadly when violations of social and economic rights are severe. For example, in *Conférence of European Churches v. Netherlands* (2014), the Committee found

¹¹⁰ CENTER FOR ECONOMIC AND SOCIAL RIGHTS, *United States*, <<http://www.cesr.org/section.php?id=26>>.

¹¹¹ European Social Charter (Revised) Appendix, §1.

that the Netherlands had violated the ESC by denying emergency shelter and assistance to undocumented immigrants, concluding that “[w]hen human dignity is at stake, the restriction of the personal scope should not be read in such a way as to deprive migrants in an irregular situation of the protection of their most basic rights enshrined in the Charter, nor to impair their fundamental rights, such as the right to life or to physical integrity or human dignity.”¹¹²

A full comparison of indirect immigration control measures in the two regions is outside the scope of this article. However, the brief comparison offered here reveals that there are significant parallels between the E.U. and the United States with regard to both federal policies aimed at discouraging unauthorized immigration and subfederal laws restricting the rights of undocumented immigrants. Due to the very different legal frameworks that govern both federalism and human rights in the two regions, case law from one jurisdiction is unlikely to be of direct use in the other. Nevertheless, further comparative scholarship on this topic would benefit scholars and immigrants’ rights advocates in both regions. As foreign policy becomes a more central aspect of E.U. governance,¹¹³ it is possible that the foreign policy

¹¹² *Conférence of European Churches (CEC) v. The Netherlands (complaint)*, Complaint No 90/2013, Council of Europe: European Committee of Social Rights, Decision on the Merits, July 1, 2014, § 66.

In *International Federation of Human Rights Leagues (FIDH) v. France*, the Committee concluded that France had violated the ESC in limiting the access of low-income undocumented immigrant children to state-funded medical assistance. The Committee held that France had not violated the ESC with regard to adult undocumented immigrants, because the legislation in question provided access to emergency medical care for all and allowed undocumented immigrants to access some forms of healthcare after being present in the country for three months. However, the Committee found that any restriction on healthcare imposed on undocumented minors was impermissible, because Article 17 of the ESC (guaranteeing the right of children to protection) is more expansive than Article 13 (right to healthcare). The Committee concluded that Article 17 was directly inspired by the CRC and that “it protects in a general manner the right of children and young persons, including unaccompanied minors, to care and assistance.” Complaint No. 14/2003, Decision on the Merits, § 36.

¹¹³ On the new rules for E.U. external action introduced by the Treaty of Lisbon, see VAN ELSUWEGE, P., “EU External Action After the Collapse of the Pillar Structure: In Search of a New Balance Between Delimitation and Consistency,” *Common Market Law Review*, Vol. 47, 2010, p. 987 ff.

rationale for federal control over immigration that has been so prominent in U.S. jurisprudence will come to be more significant within the E.U.. And U.S. scholars and advocates, who have in the past drawn on jurisprudence from the European Court of Human Rights in crafting arguments relating to the rights of noncitizens facing deportation,¹¹⁴ may gain new insights by studying developing case law in Europe regarding the economic and social rights of undocumented immigrants.

¹¹⁴ See, e.g., WISHNIE, M.J., "Immigration Law and the Proportionality Requirement," *U.C. Irvine Law Review*, Vol. 2, 2012, p. 430.

SOMMAIRE / Janvier -Décembre 2016 / N° 4

ÉTUDES

Rachel B. ROSENBLOOM

Federalism and Fundamental Rights: Safeguarding the Rights of Undocumented Immigrants in the United States and the European Union

Adil MOUSSEBIH

Le financement des partis politiques au Maroc à la lumière de la législation et de la jurisprudence constitutionnelle

NOTES

Nora SEDDIKI-EL HOUDAÏGUI

Centralité du droit dans le développement Socio-Economique

Teresa RUSSO

Some Brief Reflections Concerning the Mobility Partnership in the EU External Migration Policy

DOSSIER

Droit International Privé : Droit de Famille au Maroc et en Espagne

Mercedes MOYA ESCUDERO

Présentation

Andrés RODRÍGUEZ BENOT

Le statut personnel des marocains à l'égard de l'ordre juridique espagnol: observations générales et propositions de lege ferenda

Mercedes SOTO MOYA

Droit à la vie en famille. Un parcours difficile depuis le Maroc

Irene BLÁZQUEZ RODRÍGUEZ

La célébration du mariage avec un ressortissant étranger. Le cas des citoyens marocains

Nuria MARCHAL ESCALONA

Problèmes actuels de reconnaissance de la kafala marocaine auprès des autorités espagnoles

Ricardo RUEDA VALDIVIA

Modification en Espagne des jugements rendus au Maroc en matière d'aliments

Ángeles LARA AGUADO

Relations hispano-marocaines en matière de successions

Carmen RUIZ SUTIL

Effets «pernicieux» de la paternité légitime marocaine en Espagne : une question à résoudre

DOCUMENTATION

Lorena CALVO MARISCAL

Análisis de los Tratados, Acuerdos no Normativos y Comunicados conjuntos hispano-marroquíes, 2013-2016

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