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E-VERIFY: AN EXCEPTIONALIST SYSTEM EMBEDDED IN THE IMMIGRATION REFORM BATTLE BETWEEN FEDERAL AND STATE GOVERNMENTS

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Abstract: The immigration debate has proven to be fertile ground for promoting exceptionalist practices, where certain groups of people are isolated from the rest of the population and regarded as a subclass. The federal electronic employment verification system, E-Verify, is a prime example of such a practice. Passed under the Procurement Act, the goal of E-Verify was to promote efficiency and economy in government procurement. Unfortunately, the system falls far short of these goals because of problems inherent in the electronic database and increased state involvement over immigration reform. E-Verify is often criticized as unreliable because it relies on inaccurate databases, imposes an undue financial burden on employers, and leaves immigrant workers vulnerable to subjective determinations about their legal status. While Congress works on resolving these issues, the legal landscape is nevertheless changing as states enact and enforce their own immigration laws, including those that mandate the use of E-Verify. State entry into the immigration arena not only expands the reach of the system's problems, but it also threatens to legitimize the exclusion of immigrants, documented or undocumented. This Comment describes how the implementation of E-Verify has frustrated the goals of efficiency and economy, and argues that Congress should establish definitive boundaries between state and federal immigration reform to restore the political imbalance.

Introduction

On February 11, 2009, Julian Mora was taking his regular route to work when, without provocation, a vehicle from the Maricopa County Sherriff's Office (MCSO) pulled up behind him while another cut in front of him.[1] After forcing him to stop abruptly, MCSO deputies ques-

* Staff Writer, Boston College Third World Law Journal (2009–2010).

[1] Brief for Plaintiffs Julio and Julian Mora at 6, Mora v. Arpaio, No. 209 Civ. 01719 (D. Ariz. Aug. 19, 2009), 2009 WL 3488718; Press Release, ACLU, ACLU Sues Maricopa County

tioned Mora about his destination but failed to proffer any explanation for the stop.[2] Cooperating with the deputies, Mora informed them that he was going to work at Handyman Maintenance, Inc. (HMI) and provided a valid Arizona driver's license.[3] MCSO deputies ordered Mora and his nineteen-year-old son, Julio, out of their vehicle.[4] Without suspicion of any criminal activity, the deputies proceeded to frisk and handcuff them.[5] Julio asked for an explanation but was given no answers.[6] Although there was no reason to believe that the Moras were in the country illegally, MCSO deputies transported them to the HMI worksite, where MCSO was conducting a raid.[7]

At the worksite, MCSO personnel, allegedly carrying semiautomatic rifles, had already detained all HMI employees for interrogation.[8] Detainees were never informed of their constitutional right to legal advice; on the contrary, they were forbidden from using their cell phone.[9]

The ordeal was especially degrading for Julian who, as a diabetic, had difficulty controlling his bladder.[10] The deputies, however, denied his repeated requests to use the restroom.[11] It was not until Mora told the deputies that he would have to relieve himself in front of everyone that they escorted him to the parking lot, where he urinated behind a

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Sherriff's Office for Illegal Arrest and Detention of US Citizen and Legal Resident (Aug. 19, 2009) (on file with ACLU).

[2] Brief for Plaintiffs, *supra* note 1, at 6.

[3] *Id.*

[4] *Id.*

[5] *Id.* at 7.

[6] *Id.*

[7] Press Release, ACLU, *supra* note 1.

[8] Brief for Plaintiffs, *supra* note 1, at 7. Allegedly, Maricopa County Sheriff Joe Arpaio routinely relies on Arizona's draconian employer sanction laws to raid businesses and question all employees for purported violations related to their immigration status. *See* Paul Giblin, *Arizona Sheriff Conducts Immigration Raid at City Hall, Angering Officials*, N.Y. Times, Oct. 18, 2008, at A10 (indicating that "60 heavily armed sheriff's deputies" raided City Hall in Mesa, Arizona, at 2 a.m. and arrested three people whom they "suspected [of being] illegal immigrants working as janitors"); *see also* Megan Boehnke & JJ Hensley, *Sheriff's Office Raids Gold Canyon Candle Company*, Ariz. Republic, Sept. 10, 2008, http://www.azcentral.com/community/chandler/articles/2008/09/10/20080910chandlerraid0910-ON.html (noting that "[d]eputies held 300 employees for about six hours . . . refusing to let anyone in or out," resulting in "65 arrests"); Jackee Coe & JJ Hensley, *Sheriff's Deputies Raid Mesa Landscaping Business*, Ariz. Republic, Aug. 27, 2008, http://www.azcentral.com/news/articles/2008/08/27/20080827immig-landscaping0827-ON.html (reporting that deputies handcuffed workers (including U.S. citizens) until they could check for immigration documents).

[9] Brief for Plaintiffs, *supra* note 1, at 7.

[10] Press Release, ACLU, *supra* note 1.

[11] *Id.*

car.[12] Shortly thereafter, when Julio asked to use the bathroom, a deputy took him to a proper facility but refused to un-cuff his hands.[13] Watching the young man struggle with his hands tied together, the deputy mocked him, saying, "[w]hat's the matter, you can't find it?"[14] When he returned from the restroom, Julio asked another deputy if he could leave because he was not an HMI employee.[15] He was told he could leave only after he got to the front of the line and verified his immigration status, nearly three hours later.[16]

Workplace raids and detentions, such as the one described above at the HMI worksite, provide a contemporary example of how various cities and towns across the country are increasingly structuring society "along the lines of 'the exception'" to deal with the immigration crisis.[17] In her book *The Law into Their Own Hands: Immigration and the Politics of Exceptionalism*, Roxanne L. Doty defines exceptionalism as a phenomenon in which certain individuals or groups are "segmented from the general population and denied the rights and protections accorded to the rest of the population."[18] At its core, exceptionalism creates a group of "others," considered to be "potential enemies."[19]

Doty examines the "attrition through enforcement" strategy embraced by several states to prevent undocumented migrants from "embed[ding] themselves" in their communities and eventually forcing

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[12] Brief for Plaintiffs, *supra* note 1, at 8.

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.* at 9. On August 19, 2009, the American Civil Liberties Union and the ACLU of Arizona filed a lawsuit challenging the illegal arrest and detention of the Moras by MSCO deputies. *See* Press Release, ACLU, *supra* note 1. Because these arbitrary detentions prevent law-abiding citizens and legal residents from going about their business without government interference, the complaint alleges that MSCO deputies violated the Fourth and Fourteenth Amendments of the United States Constitution. *See* Brief for Plaintiffs, *supra* note 1, at 7; Press Release, ACLU, *supra* note 1.

[17] *See* Roxanne Lynn Doty, The Law into Their Own Hands: Immigration and the Politics of Exceptionalism 83, 94 (2009) (noting that although the U.S. Bureau of Immigration and Customs Enforcement (ICE) directed its "Operation Return to Sender" raids at criminals, they resulted in numerous "collateral catches" of undocumented migrants who were not intended targets). Headlines about such raids have become commonplace. *See* Nina Bernstein, *Immigrants Go from Farms to Jails, and a Climate of Fear Settles In*, N.Y. Times, Dec. 24, 2006, at 21; Judy Keen, *Effects of Raid Still Felt in Iowa Town*, USA Today, Feb. 12, 2007, at 3A; Sylvia Moreno, *Immigration Raid Leaves Texas Town a Skeleton*, Wash. Post, Feb. 9, 2007, at A2; Julia Preston, *Immigrants' Families Figuring Out What to Do After Federal Raids*, N.Y. Times, Dec. 16, 2006, at A13.

[18] Doty, *supra* note 17, at 84.

[19] *See id.*

them to either leave the country or relocate to another city.[20] The voluntary federal electronic verification program (E-Verify) provides a contemporary example of this practice.[21] E-Verify is an Internet-based database operated by the Department of Homeland Security (DHS) in partnership with the Social Security Administration (SSA), which allows employers to electronically verify an employee's work eligibility.[22]

The principal grant of legislative authority on which President George W. Bush relied in expanding the scope of E-Verify was the Federal Property and Administrative Services Act of 1949 ("Procurement Act").[23] The Procurement Act's express purpose is to provide an "economical and efficient system" of government procurement.[24] Accordingly, the President may "prescribe policies and directives that [he or she] considers necessary," as long as these directives are "consistent with" the Procurement Act's provisions.[25] Despite its vagueness, the Procurement Act does not give the President unlimited authority to make decisions that he believes will result in savings to the government.[26] Instead, it qualifies Presidential directives with the goals of "economy" and "efficiency."[27]

The terms "economy" and "efficiency," however, are not narrowly construed.[28] In addition to price, they include factors such as the quality of goods or services, their suitability for government purposes, and

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[20] *See* Doty, *supra* note 17, at 83, 85 (arguing that the proliferation of border vigilante groups and the subsequent expansion of their mission beyond "the physical patrolling of the US-Mexico border, has been a major factor in the unprecedented grassroots movement against undocumented migrants").

[21] *See id.*; U.S. Citizenship & Immigration Servs., E-Verify Supplemental Guide for Federal Contractors 18 (2009), *available at* http://www.uscis.gov (follow "E-Verify Homepage" hyperlink; then follow "Information for Federal Contractors" hyperlink; then follow "E-Verify Supplemental Guidance for Federal Contractors" hyperlink).

[22] *See* U.S. Citizenship & Immigration Servs., *supra* note 21.

[23] *See* 40 U.S.C. § 101 (2006); Federal Acquisition Regulations for Employment Eligibility Verification, 73 Fed. Reg. 67,651 (Nov. 14, 2008) (to be codified at 48 C.F.R. pts. 2, 22, 52).

[24] 40 U.S.C. § 101.

[25] *Id.* § 121(a).

[26] *See* Am. Fed'n of Labor & Cong. of Indus. Orgs. v. Kahn, 618 F.2d 784, 793 (D.C. Cir. 1979) ("[The Court's] decision does not write a blank check for the President to fill in at his will. The procurement power must be exercised consistently with the structure and purposes of the statute that delegates that power.") (citation omitted).

[27] *See* 40 U.S.C. § 101; Liberty Mut. Ins. Co. v. Friedman, 639 F.2d 164, 170 (4th Cir. 1981) (requiring a "reasonably close nexus" between the Executive Order and the Procurement Act's policy goals of "ensuring efficiency and economy in government procurement").

[28] *See Kahn*, 618 F.2d at 789.

their availability in the market.[29] The broad nature of this power allows the President to implement any social or economic goal he sees fit, provided that there is some conceivable connection, no matter how attenuated, to the goals of the Procurement Act.[30] Courts therefore routinely defer to the President's findings insofar as his directives promote "efficiency" and "economy."[31]

The issue of whether a presidential directive, like E-Verify, is effective in meeting its objective is beyond judicial scrutiny.[32] Nevertheless, the fact remains that the system is broken.[33] Congress's recent decision to reauthorize E-Verify as a voluntary program, rather than a mandatory one, demonstrates its own reservations.[34] Because the system relies on flawed databases, mandatory participation will cripple American businesses and workers by driving "workers from tax-paying, aboveboard work into the underground, black market, cash economy."[35]

While Congress debates federal immigration reform and the role of E-Verify, the legal landscape at both the state and local levels is changing.[36] With no clear pathway to reform in sight, local communities have begun to enact their own immigration-related ordinances.[37] Although these ordinances propose solutions to the immigration crisis, they undermine the democratic fabric of our society because they "attribute worth to human beings" on the basis of having or not having certain documents.[38] By denying immigrants access to jobs, identification, housing, and education, state and local governments "fan the flames" of xenophobic sentiments.[39] These laws not only promote defensive hiring practices, but they also incite state and local police offi-

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[29] *Id.*

[30] *See id.* at 805–06 (MacKinnon, J., dissenting).

[31] *See id.* at 789 (upholding President Carter's Executive Order requiring contractors to use certain wage-and-price standards); *see also* City of Albuquerque v. U.S. Dep't of Interior, 379 F.3d 901, 914 (10th Cir. 2004) (noting that the Procurement Act is a "broad delegation of authority" and upholding the Executive Order at issue).

[32] *See Kahn*, 618 F.2d at 807 (MacKinnon, J., dissenting).

[33] *See* Press Release, Nat'l Immigration Forum, Congress Passes DHS Appropriations Devoid of Wedge Issue Immigration Amendments (Oct. 21, 2009) (on file with author).

[34] *Id.*

[35] *Id.*

[36] *See* Julia Preston, *Surge in Immigration Laws Around U.S.*, N.Y. Times, Aug. 6, 2007, at A2 (noting that in 2006 there were eighty-four laws passed regarding immigration issues).

[37] *See* Emily Bazar, *Illegal Immigrants Moving Out*, USA Today, Sept. 27, 2007, at 3A.

[38] *See* Doty, *supra* note 17, at 84.

[39] *See id.* at 85, 90–91.

cers to improperly prosecute immigrants, affecting legally documented migrants like the Moras.[40]

This Comment, through an examination of E-Verify, argues that Congress, and not the states, should enforce existing immigration laws and enact laws that clearly circumscribe when state and local governments can assist the federal government. Part I provides a brief overview of the E-Verify program. Part II explains how the E-Verify program frustrates the Procurement Act's goals of ensuring efficiency and economy. Part III discusses how states are transforming the legal landscape by enacting and enforcing their own immigration laws, including those governing the use of E-Verify. Because these laws expand the use of E-Verify, they compound the systemic problems inherent in the federal program and further frustrate the goals of the Procurement Act. Finally, Part IV proposes that Congress should assert greater control in the immigration arena to resolve the inefficiencies brought about through the implementation of E-Verify.

I. What Is E-Verify?

A. *The Origins of E-Verify*

The Immigration Reform and Control Act (IRCA) of 1986 imposes employment-related restrictions on immigrants by requiring employers to inspect and verify the authenticity of certain documents provided by prospective employees.[41] After reviewing these documents, employers must attest to an employee's eligibility by completing a Form I-9.[42] With at least twenty-six documents available to demonstrate eligi-

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[40] *See* Karla M. McKanders, *The Constitutionality of State and Local Laws Targeting Immigrants*, 31 U. Ark. Little Rock L. Rev. 579, 589 (2009); *see also* Press Release, ACLU, Over 500 Organizations Demand White House End Flawed State and Local Immigration Enforcement Program (Aug. 27, 2009) (on file with ACLU) ("Since its inception the 287(g) program has drawn sharp criticism . . . because it has led to illegal racial profiling and civil rights abuses, including the unlawful detention and deportation of U.S. citizens and permanent residents, while diverting scarce resources from traditional local law enforcement functions and distorting immigration enforcement policies.").

[41] *See* Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324a(a)(1), (b)(1) (2006); Hoffman Plastic Compounds, Inc. v. N.L.R.B., 535 U.S. 137, 148–49 (2002) (holding that the IRCA foreclosed an employer from awarding backpay to an undocumented migrant who was not legally authorized to work in the United States); Ann Marie O'Donovan, *Immigrant Workers and Workers' Compensation After* Hoffman Plastic Compounds, Inc. v. N.L.R.B., 30 N.Y.U. Rev. L. & Soc. Change 299, 300 (2006).

[42] *See* 8 U.S.C. § 1324a(b)(1)(A); 8 C.F.R. § 274a.2(a)(2) (2008). There is no requirement that an employer file the Form I–9 with a federal agency; the employer must, however, retain it for inspection by federal officials. *See* 8 C.F.R. § 274a.2(b)(2); U.S. Citizen-

bility, many of which are prone to fraud and forgery, it was difficult for employers to differentiate between the documented and undocumented immigrant.[43] Consequently, the IRCA did not adequately fulfill its goals of increasing job security for U.S. citizens and curbing unauthorized employment.[44]

In response to a growing population of undocumented migrants, Congress passed the Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA) in 1996.[45] Under the IIRIRA, the federal government rolled out the Basic Pilot/Employment Eligibility Verification Program, allowing employers to confirm a new hire's eligibility via an electronic verification system.[46] This supplement to the paper based I-9 system was initially only available in the five states with the largest undocumented populations: California, Florida, Illinois, New York, and Texas.[47] By 2003, all fifty states were participating in the pilot program.[48]

In 2007, the Bush administration enhanced the internal enforcement of immigration laws.[49] This effort rebranded the Basic Pilot/Employment Eligibility Verification Program as the E-Verify Program.[50] Under this program, the employer enters an employee's social security number, date of birth, and citizenship status into the E-Verify website.[51] The system then verifies this information against the information contained in the SSA and U.S. Citizenship and Immigration

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ship & Immigration Servs., *Form I–9, Employment Eligibility Verification*, *available at* http://www.uscis.gov/files/form/i-9.pdf.

[43] *See The Human Resource Initiative for a Legal Workforce: Hearing Before the Subcomm. on Social Security of the H. Comm. on Ways & Means*, 110th Cong. 63 (2007) (statement of Susan R. Meisinger, Pres. and CEO of the Society for Human Resource Management) [hereinafter *Legal Workforce Hearing*]; U.S. Citizenship & Immigration Servs., *supra* note 42.

[44] *See Electronic Verification of Employee Eligibility: Hearing Before the Subcomm. on Government Management, Organization and Procurement of the Comm. on H. Oversight and Government Reform*, 111th Cong. (2009) (statement of Jean Baker McNeill, Policy Analyst, The Heritage Foundation) [hereinafter *Employee Eligibility Hearing*] (noting that the failure of the IRCA was due, at least in part, to the ease with which immigrants could obtain forged documents to show that they were employment eligible); *see also* Maria Trevino, *Assimilation Key to Immigration Reform*, USA Today, Feb. 9, 2007, at 15A (noting that the failure to enforce vigorously employer sanctions was among the reasons the IRCA was unsuccessful).

[45] Illegal Immigration Reform and Immigration Responsibility Act, 8 U.S.C. § 1324a (1996); Lindsay L. Chichester & Gregory P. Adams, *The State of E-Verify: What Every Employer Should Know*, Fed. Law., Jul. 2009, at 50, 50.

[46] Chichester & Adams, *supra* note 45, at 50.

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *Id.* at 51.

[51] Federal Acquisition Regulations for Employment Eligibility Verification, 73 Fed. Reg. 33,376 (proposed June 12, 2008) (to be codified at 48 C.F.R. pt. 2, 12, 22, and 52).

Services (USCIS) databases.[52] Additionally, the government pledged to expand both civil and criminal investigations of employers who hire unauthorized workers.[53] In particular, it sought to increase civil fines by approximately twenty-five percent and bolster the enforcement efforts of U.S. Immigration and Customs Enforcement.[54]

The Administration also launched a rulemaking process to mandate that all contractors and subcontractors doing business with the federal government use E-Verify not only for new hires but also for existing employees.[55] In fact, on June 6, 2008, President Bush signed Executive Order 13,465 which instructs:

> Executive departments and agencies that enter into contracts shall require, as a condition of each contract, that the contractor agree to use an electronic employment eligibility verification system designated by the Secretary of Homeland Security to verify the employment eligibility of: (i) all persons hired during the contract term by the contractor to perform employment duties within the United States; and (ii) all persons assigned by the contractor to perform work within the United States on the Federal contract.[56]

B. *A Change in the Scope of E-Verify*

The SSA indicated that approximately 137,000 employers were participating in the E-Verify program as of July 11, 2009.[57] Participation in the program is likely to grow as federal and state governments adopt

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[52] *Id.* If the SSA database cannot verify an employee's citizenship status, the query will then run through the USCIS database, which maintains employment eligibility information for immigrant workers. *Id.*

[53] *See* Press Release, Dep't Homeland Sec., Fact Sheet: Improving Border Security and Immigration Within Existing Law (Aug. 10, 2007) (on file with author).

[54] *See id.* (noting that as of July 31, 2007, ICE had made 742 criminal arrests in connection with its investigations of employers who hire undocumented migrants).

[55] *See id.* (indicating that with more than 200,000 companies doing business with the federal government, it "ought to lead by example. . . . and make it more difficult for illegal immigrants to obtain jobs").

[56] Exec. Order No. 13,465, 73 Fed. Reg. 33,285–86 (June 11, 2008) (*amending* Exec. Order No. 12,989). The Bush Administration passed the regulation on November 14, 2008. *See* Final Employment Eligibility Verification Rule, 73 Fed. Reg. 67,651 (Nov. 14, 2008) (to be codified at 48 C.F.R. pt. 2, 22, and 52). The regulation went into effect on September 8, 2009. *See* Press Release, Dep't Homeland Sec., Secretary Napolitano Strengthens Employment Verification with Administration's Commitment to E-Verify (July 8, 2009) (on file with author).

[57] *See Employee Eligibility Hearing*, *supra* note 44 (statement of David A. Rust, Deputy Comm'r, Soc. Sec. Admin.).

procurement policies of only soliciting contractors that agree to use E-Verify.[58]

State laws have taken on a variety of iterations of the federal law.[59] Some states, like Missouri and Nebraska, require participation by state governments and agencies only.[60] But others—including Arizona, Georgia, Mississippi, and South Carolina—have gone a step further by making the verification system mandatory for private businesses as well.[61] The impact of E-Verify is even noticeable at the local government level.[62] In 2007, Mission Viejo, California passed a law obligating the city and city contractors to verify work eligibility via E-Verify.[63]

This cornucopia of local ordinances and state laws has imposed a new dimension in addition to the federal program.[64] Because it shifts the focus from the undocumented migrant to the unscrupulous employer, the effects of the once voluntary program are not confined to

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[58] *See* Chichester & Adams, *supra* note 45, at 53; Press Release, Dep't Homeland Sec., *supra* note 53.

[59] *See* Nat'l Assoc. of Gov't Contractors, E-Verify Legislation Guide, http://www.formi9nagc.com/E-Verify_Summary.html (last visited Mar. 13, 2010).

[60] *See* Mo. Rev. Stat. § 285.530(3) (2009) ("All public employers shall enroll and actively participate in a federal work authorization program."); Neb. Rev. Stat. § 4-114(2) (2009) ("Every public employer and public contractor shall register with and use a federal immigration verification system to determine the work eligibility status of new employees physically performing services within the State of Nebraska.").

[61] *See* Ariz. Rev. Stat. Ann. § 23-212(A) (2009); Ga. Code Ann. § 13-10-91 (2009) ("No public employer shall enter into a contract . . . for the physical performance of services within this state unless the contractor registers and participates in the federal work authorization program to verify information of all newly hired employees or subcontractors."); Miss. Code Ann. § 71-11-3 (2008) ("Every employer shall register with and utilize the status verification system to verify the federal employment authorization status of all newly hired employees."); S.C. Code Ann. § 41-8-20(B) (2008) (providing that "all private employers . . . must: (1) register and participate in the E-Verify federal work authorization program, or its successor, to verify information of all new employees").

[62] Chichester & Adams, *supra* note 45, at 53.

[63] *See* Mission Viejo, Cal., Code of Ordinances tit. 2, ch. 2.80, § 2.80.030 (2007). The ordinance requires:

> As a condition for the award or renewal of any City contract . . . to a Business Entity or Contractor after July 1, 2007 for which the reasonable value of employment, labor, or personal services shall exceed $15,000, the Business Entity or Contractor shall enroll in the Basic Pilot Program and thereafter shall provide the City documentation affirming its enrollment and participation in the Basic Pilot Program. The Business Entity or Contractor shall be required to continue its participation in the Basic Pilot Program throughout the course of its business relationship with the City.

Id.

[64] *See* Chichester & Adams, *supra* note 45, at 50.

those without proper documentation.[65] As these ordinances become commonplace, local residents begin to view immigrants as enemies, eventually leading to the dissolution of entire migrant communities.[66] Essentially, the current state of E-Verify is reconfiguring immigration policy around the state of exception.[67]

II. The Problems with E-Verify

In a recent federal court decision, *Chamber of Commerce v. Napolitano*, a Federal District of Maryland Court upheld the validity of Executive Order 13,465, which mandated that federal contractors use the E-Verify system.[68] The court explained that the President has broad discretion to regulate government contracting under the Procurement Act as long as the directive provides "an economical and efficient system" of government procurement.[69]

Although Executive Order 13,465 is valid, the E-Verify system is a "half–hearted and flawed" approach to immigration reform.[70] Critics frequently note that the system is unreliable and unduly burdensome because it relies on inaccurate databases, imposes a financial burden on employers without reducing potential liability, and invites invidious discrimination.[71] Thus, even if the Procurement Act purportedly provides

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[65] *See* Doty, *supra* note 17, at 99 (noting that the anti-immigrant ordinance introduced in Hazelton, Pennsylvania forced local store owners to close their businesses because their client base consisted mostly of recent immigrants); Nat'l Assoc. of Gov't Contractors, *supra* note 59.

[66] *See* Doty, *supra* note 17, at 99.

[67] *See id.*

[68] *See* Chamber of Commerce v. Napolitano, 648 F. Supp. 2d 726, 737–38 (D. Md. 2009); Exec. Order No. 13,465 § 3, 73 Fed. Reg. 33,285–86 (June 11, 2008) (amending Exec. Order No. 12,989 § 5). On June 9, 2008, the Secretary of Homeland Security, acting pursuant to Executive Order 13,465, designated E-Verify as the "electronic employment eligibility verification system to be used by Federal contractors." *See* Designation of the Electronic Employment Eligibility Verification System Under Exec. Order No. 12,989, 73 Fed. Reg. 33,837 (June 13, 2008).

[69] *See* 40 U.S.C. § 101 (2006); *Napolitano*, 648 F. Supp. 2d at 737–38. To support a finding for a reasonably close nexus, the *Napolitano* court required nothing more than the President's reasonable and rational explanation of how an Executive Order promotes efficiency and economy. *See Napolitano*, 648 F. Supp. 2d at 738.

[70] *See Employment Verification System: Hearing Before the Subcomm. on Immigration, Refugees and Border Security of the S. Comm. on the Judiciary*, 110th Cong. (2009) (statement of Sen. Charles E. Schumer, Chairman, Subcomm. on Immigration, Refugees and Border Security) [hereinafter *Employment Verification Hearing*].

[71] *See id.*

the basis for the Executive Order, the practical implementation of the E-Verify system undermines the policy goals of efficiency and economy.[72]

A. *Lack of Accurate and Reliable Databases*

A major problem with E-Verify is that it relies on the flawed databases of the SSA.[73] In 2008, Intel Corporation reported that the system erroneously identified twelve percent of its new hires as employment ineligible.[74] As a result of its own investigation, the SSA estimated nearly 17.8 million discrepancies in its database.[75] With such a large margin of error, nearly 2.5 million legal residents are at risk of losing their jobs as a result of being misidentified as an unauthorized worker.[76]

Supporters of the system note that approximately 96.9% of queries confirm that the employee has authorization to work.[77] The remaining 3.1% of all queries resulted in a Tentative Nonconfirmation (TNC), indicating that the employee's information does not correspond with the information in the SSA or Department of Homeland Security (DHS) databases.[78] If the query results in a TNC, the employer must notify the employee and initiate a referral to the SSA so that the employee can resolve the discrepancy.[79] Nevertheless, from the time the employer refers the employee to the SSA, the employee has only eight business days to settle the nonconfirmation.[80]

The USCIS reported that successful resolution results in only 0.3% of all TNC cases.[81] Of the remaining 2.8% of TNCs, final nonconfirmation for an eligible employee often results when the employee did not follow proper procedures to contest or, alternatively, was not aware of

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[72] *See* 40 U.S.C. § 101; *Chamber of Commerce v. Napolitano*, 648 F. Supp. 2d at 737–38; *Employment Verification Hearing*, *supra* note 70 (statement of Sen. Charles E. Schumer, Chairman, Subcomm. on Immigration, Refugees and Border Security).

[73] Chichester & Adams, *supra* note 45, at 51.

[74] *See Employment Verification Hearing*, *supra* note 70 (statement of Sen. Russ Feingold).

[75] Office of the Inspector Gen., Soc. Sec. Admin., No. A-08-06-216100, Congressional Response Report: Accuracy of the Social Security Administration's Numident File 2 (2006).

[76] Jaime Contreras, *How About E-Trust?*, Wash. Times, Sept. 25, 2009, at A20.

[77] *See Employment Verification Hearing*, *supra* note 70 (statement of Michael Aytes, Acting Deputy Director of U.S. Citizenship and Immigration Services) (noting that statistics from October through December 2008 provide the basis for the 96.9% figure).

[78] *See id.*

[79] Chichester & Adams, *supra* note 45, at 51.

[80] *See id.*

[81] *Employment Verification Hearing*, *supra* note 70 (statement of Michael Aytes, Acting Deputy Director of U.S. Citizenship and Immigration Services).

either the TNC or the opportunity to contest because his employer failed to initiate a SSA referral.[82] In a country with an eligible working population (defined as individuals between the ages of eighteen and sixty–five) of approximately 190 million, a margin of error of even one percent is troublesome.[83] The difficult question, and one that currently remains unanswered, is what recourse is available to legal residents who are subject to final nonconfirmation under the E-Verify system?[84]

B. *Unreasonable and Disproportionate Costs for Employers*

Although E-Verify is a "free, Internet-based system," participation in the program is hardly without its costs.[85] In fact, the Final Employment Eligibility Verification Rule (Final Rule) estimated that employers' startup costs for compliance with the requirement would total $188 million in fiscal year 2009 alone.[86]

To comply with Final Rule, an employer must enter into an E-Verify Memorandum of Understanding (MOU) with DHS and SSA.[87] The MOU stipulates that the employer must periodically allow DHS and SSA "to review Forms I-9 and other employment records and to interview the employer and its employees regarding the [e]mployer's

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[82] *See id.* An independent examination of the E-Verify program disclosed that many recently naturalized citizens are subject to misidentification. *See id.* Although the USCIS notes that it instituted an automated check with its naturalization data to reduce such mismatches, these "enhancements" only affect a small percentage of TNCs, and they do not prevent the initial TNC. *See id.*

[83] *Employment Verification Hearing*, *supra* note 70 (statement of Michael Aytes, Acting Deputy Director of U.S. Citizenship and Immigration Services); U.S. Census Bureau, *The Resident Population by Age and Sex*, 2009, http://www.census.gov/compendia/statab (follow "Population" hyperlink; then follow "Resident Population by Age and Sex PDF" hyperlink).

[84] Interview with Francis Chin, Partner, Chin & Curtis LLP, in Boston, Mass. (Oct. 15, 2009).

[85] *See* Final Employment Eligibility Verification Rule, 73 Fed. Reg. 67,702 (Nov. 14, 2008) (to be codified at 48 C.F.R. pt. 2, 22, and 52); U.S. Citizenship & Immigration Servs., *supra* note 21, at 4.

[86] *See* Final Employment Eligibility Verification Rule, 73 Fed. Reg. at 67,702. Notably, the $188 million figure exceeds the cost initially anticipated in the proposed rule by approximately $127 million. *Compare* Final Employment Eligibility Verification Rule, 73 Fed. Reg. at 67,702, *with* Federal Acquisition Regulations for Employment Eligibility Verification, 73 Fed. Reg. 33,376 (proposed June 12, 2008) (to be codified at 48 C.F.R. pt. 2, 12, 22, and 52) (approximating total startup and training costs to be $62 million for fiscal year 2009).

[87] *See* Final Employment Eligibility Verification Rule, 73 Fed. Reg. at 67,651 (noting that the terms of the MOU, as established by the USCIS, are non-negotiable and that any violation of these terms may lead to termination of the employer's participation in E-Verify).

use of E-Verify."[88] By signing the MOU *before* enrolling in the E-Verify Program, the employer consents to the release of records that may be beyond the scope of immigration matters.[89]

Even those employers who scrupulously follow verification procedures face the possibility of a DHS audit or raid.[90] The Immigration and Customs Enforcement (ICE) raids of six Swift & Co. processing plants in December 2006 provide a compelling example of potential liability.[91] Resulting in arrests of 1282 legal and illegal immigrants, the raid not only disrupted the workforce but also cost the company more than $50 million.[92] In a testimony before the House Judiciary Committee in April 2007, Jack Shadley, Senior Vice President of Swift & Co., noted that the company had been participating in E-Verify since 1997.[93] Yet, many ineligible employees slipped through cracks, not through any wrongdoing by the company but because of the system's inability to identify fraudulent documents.[94] Cases like this raise doubts as to whether the "rebuttable presumption," that an E-Verify participant did not knowingly hire an ineligible employee, affords any meaningful protection.[95]

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[88] U.S. Citizenship & Immigration Servs., The E-Verify Program for Employment Verification Memorandum of Understanding (MOU) (2008), *avaliable at* http://www.uscis.gov/files/nativedocuments/MOU.pdf.

[89] *See id.*; Interview with Francis Chin, *supra* note 84.

[90] *Ensuring a Legal Workforce: What Changes Should Be Made to Our Current Employment Verification System?: Hearing Before the Subcomm. on Immigration, Refugees and Border Security of the Comm. on S. Judiciary*, 110th Cong. (statement of Lynden Melmed, former Chief Counsel of USCIS) [hereinafter *Current Employment Verification Hearing*].

[91] *See id.*

[92] *See* Preston, *supra* note 17; Henry C. Jackson, *Raids Could Force Meatpackers to Raise Worker Pay*, Chi. Trib., Dec. 5, 2008, http://archives.chicagotribune.com/2008/dec/05 (follow "Raids could force meatpakers to raise worker pay" hyperlink).

[93] *See Current Employment Verification Hearing*, *supra* note 90 (statement of Lynden Melmed, former Chief Counsel of USCIS) (quoting Mr. Shadley's prior testimony that "[i]t is particularly galling to us that an employer who played by all the rules and used the only available government tool to screen employee eligibility would be subject[] to adversarial treatment by our government").

[94] *See Legal Workforce Hearing*, *supra* note 43 (statement of Susan R. Meisinger, President and CEO of the Society for Human Resource Management); Valerie Richardson, *Meatpackers' Union Sues Over Illegal Alien Raids*, Wash. Times, Sept. 15, 2007, at A2 (noting that, of the workers arrested, 274 faced criminal charges for identity theft).

[95] *See* Final Employment Eligibility Verification Rule, 73 Fed. Reg. 67,652 (Nov. 14, 2008) (to be codified at 48 C.F.R. pt. 2, 22, and 52) (noting that where E-Verify confirms the identity of an employee, there is a rebuttable presumption in favor of the employer that it did not knowingly hire an unauthorized worker); Jackson, *supra* note 92.

The conjunctive imposition of periodic visits and unfettered access to records will increase employers' exposure to fines and penalties.[96] Civil penalties range from $375 to $16,000 for every ineligible employee hired and from $110 to $1100 for Form I-9 errors and omissions.[97] Finally, failure to comply with the MOU may result in contract termination or suspension.[98]

One way that employers internalize the risk of such fines and sanctions is by reducing wages.[99] Generally, undocumented workers are paid ten to fifty-five percent less than their documented colleagues.[100] This wage penalty has a direct impact on documented and native-born immigrants because employers are unsure of the employee's work status.[101]

C. *Disparate Impact on Employees, Documented or Otherwise*

Increasingly, employers must walk a tightrope as a result of enforcement activities.[102] The decision of American Apparel Inc. to reduce its workforce by more than a quarter amid an investigation by immigration officials illustrates how employers are likely to react to such increased pressure.[103]

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[96] *See* Chichester & Adams, *supra* note 45, at 52. In fact, on July 1, 2009, ICE announced a national audit initiative resulting in the investigation of 652 employers across the country. *See* Press Release, U.S. Immigration & Customs Enforcement, 652 Businesses Nationwide Being Served with Audit Notices Today (July 1, 2009) (on file with author).

[97] Michael D. Patrick, *The Immigration Compliance Puzzle—New Pieces Abound*, N.Y. L. J., July 27, 2009, at 3.

[98] *See* Final Employment Eligibility Verification Rule, 73 Fed. Reg. at 67,704 ("If DHS or SSA terminates a contractor's MOU, the terminating agency must refer the contractor to a suspension or debarment official for possible suspension or debarment action."). The Federal Acquisition Regulation (FAR) also provides:"Contractors debarred, suspended, or proposed for debarment are excluded from receiving contracts, and agencies shall not solicit offers from, award contracts to, or consent to subcontracts with these contractors, unless the agency head determines that there is a compelling reason for such action." 48 C.F.R. § 9.405(a) (2008).

[99] *See Comprehensive Immigration Reform in 2009, Can We Do It and How?: Hearing Before the Subcomm. on Immigration, Refugees and Border Security of the S. Comm. on the Judiciary*, 110th Cong. (2009) (statement of Doris Meissner, Senior Fellow, Migration Policy Institute).

[100] *Id.*

[101] *Id.*

[102] *See* Cam Simpson, *Obama Hones Immigration Policy*, WALL ST. J., July 21, 2009, at A6.

[103] *See* Miriam Jordan, *American Apparel Sets Layoffs Tied to Probe*, WALL ST. J., Sept. 4, 2009, at B3 (indicating that American Apparel terminated 1500 of its 5600 employees after receiving notification from ICE that approximately 1600 employees were not employment eligible).

Enforcement efforts promote defensive hiring practices.[104] These practices typically result in the refusal to hire immigrants, documented or otherwise, because employers fear that they might mistakenly hire an undocumented immigrant and be subject to sanctions.[105] In the case of E-Verify, the potential for such abuse arises where employers use the system to pre-screen new hires.[106] Specifically, an employer may rely on query results—namely a TNC—to make hiring decisions.[107] Because those who receive TNCs are disproportionately foreign-born, the disparate impact is especially striking.[108]

By stripping them of the opportunity to work, laws mandating the use of E-Verify deprive immigrants of the benefits of citizenship that facilitate belonging.[109] Because immigrant workers buy goods from locally-owned stores, eat in local restaurants, and start new businesses, they generate approximately $700 billion in economic activity each year.[110] Consequently, wrongly forcing them out of work will not only promote exceptionalism but will also disrupt the economy.[111]

III. The Adoption of E-Verify as an Exercise of State Sovereignty

Traditionally, the focus of immigration law has been on issues of foreign affairs and national security.[112] Recently, however, this focus shifted into the domestic sphere as states enter the immigration arena.[113] State legislatures across the country continue to introduce, pass, or con-

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[104] *See* Anna Gorman, *L.A. Employers Face Immigration Audits; Federal Agency Targets Hiring Practices in a Nationwide Inquiry*, L.A. Times, July 2, 2009, at 1.

[105] *See* McKanders, *supra* note 40, at 589.

[106] *See* Inst. for Survey Research & Westat, Immigration and Nationalization Services Basic Pilot Evaluation Summary Report for U.S. Department of Justice 29–30 (2002), *available at* http://www.uscis.gov (follow "Resources" hyperlink; then follow "Reports and Studies" hyperlink; then follow "Basic Pilot Evaluation Summary Report (January 29, 2002)" hyperlink); McKanders, *supra* note 40, at 589.

[107] *See* Inst. for Survey Research & Westat, *supra* note 106; McKanders, *supra* note 40, at 589.

[108] *See* Inst. for Survey Research & Westat, *supra* note 106; McKanders, *supra* note 40, at 589.

[109] *See* Jennifer Gordon & R.A. Lenhardt, *Rethinking Work and Citizenship*, 55 UCLA L. Rev. 1161, 1191 (2008) (arguing that work provides a form of belonging because it "builds relationships across lines of race, promotes a sense of 'interdependence and common fate'").

[110] Contreras, *supra* note 76.

[111] *See* Doty, *supra* note 17, at 94.

[112] *See id.* at 41, 43.

[113] *See id.* at 86.

sider immigrant-related ordinances.[114] In the first half of 2009, state legislators in all fifty states introduced more than 1400 immigration related bills, surpassing last year's totals.[115]

Among other contributing factors, two significant reasons form the foundation of this phenomenon.[116] First, although the IRCA expressly forbids states from regulating unauthorized employment, it carves out an exception to preemption when a state regulates "licensing and similar laws."[117] Second, the federal government encouraged state assistance in the enforcement of immigration laws after September 11, 2001.[118] Pursuant to agreements with ICE, the federal government delegated its immigration authority to state law enforcement officials, allowing them to investigate, arrest, and detain suspected violators.[119]

The advent of E-Verify has contributed to this distracting patchwork of state laws, exacerbating the politics of exceptionalism.[120] Several states have sought to enact and enforce immigration laws under the guise of state police powers to protect the safety and welfare of their constituents.[121] For instance, Janet Napolitano (former Arizona governor and current Secretary of Homeland Security) signed the Legal Arizona Workers Act because it was "abundantly clear that Congress finds itself incapable of coping with the comprehensive immigration reform

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[114] *See* Nat'l Conference of State Legislatures, Immigrant Policy Project: State Laws Related to Immigrants and Immigration January 1–June 30, 2009, at 1 (2009), *available at* http://www.ncsl.org/documents/immig/ImmigrationReport2009.pdf.

[115] *Id.* In 2008, state legislatures considered approximately 1305 bills related to immigration, of which 206 were enacted and 3 were vetoed. *Id.*

[116] *See* 8 U.S.C. § 1324a(h)(2) (2006); Memorandum from Jay S. Bybee, Assistant Attorney Gen., Office of Legal Counsel, to John Ashcroft, Attorney Gen. (Apr. 2, 2002) (on file with ACLU) (providing that states have inherent authority to enforce immigration laws).

[117] *See* 8 U.S.C. § 1324a(h)(2) ("The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit, or refer for a fee for employment, unauthorized aliens.").

[118] *See* McKanders, *supra* note 40, at 584; Memorandum from Jay S. Bybee, *supra* note 116.

[119] *See* 8 U.S.C. § 1357(g)(1) (providing authority for the Attorney General to deputize state and local law enforcement officers to enforce immigration law after training them under the supervision of federal authorities); McKanders, *supra* note 40, at 584.

[120] *See* Doty, *supra* note 17, at 86; Nat'l Assoc. of Gov't Contractors, *supra* note 59.

[121] *See* Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power over Immigration*, 86 N.C. L. Rev. 1557, 1589 (2008) (noting that violations of immigration-related laws, such as by "claiming U.S. citizenship to obtain . . . employment," now warrant criminal sanction).

our country needs."[122] This is a classic example of a state exercising its sovereignty by legitimizing the exclusion of non-citizens.[123] In so doing, the state endorses a bifurcated society structured around the notion of an "us" versus "them."[124]

A. *Arizona: A Microcosm of State Enactment and Enforcement*

The Legal Arizona Workers Act, enacted in 2007, requires all employers to use E-Verify to determine employment eligibility.[125] The Act imposes a series of sanctions for violations ranging from the filing of quarterly reports of all new hires during a three-year probationary period to the suspension and revocation of the employer's business license.[126]

Under the IRCA's preemption provision, each state retains the right to regulate licensing laws.[127] The Ninth Circuit, in *Chicanos Por La Causa, Inc. v. Napolitano*, upheld the constitutionality of the Act for precisely this reason.[128] Relying on the IRCA provision, the court noted that the Arizona law does not attempt to define employment eligibility; rather, the federal immigration law standards provide the basis for the Act's adoption.[129] Additionally, the court found that even though participation in E-Verify is voluntary at the federal level, the mandatory nature of the Arizona statute does not raise conflict preemption concerns because Congress did not intend to prevent the states from making it mandatory.[130] Consequently, the court held that regulating em-

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[122] *See* ARIZ. REV. STAT. ANN. § 23-212 (2009); Letter from Janet Napolitano, Former Governor of Ariz., to Jim Weiers, Former Speaker of the House of Representatives (July 2, 2007) (on file with author).

[123] *See* ARIZ. REV. STAT. ANN. § 23-212; DOTY, *supra* note 17, at 11.

[124] *See* ARIZ. REV. STAT. ANN. § 23-212; DOTY, *supra* note 17, at 11.

[125] *See* ARIZ. REV. STAT. ANN. § 23-212(A)–(J); McKanders, *supra* note 40, at 92.

[126] ARIZ. REV. STAT. ANN. § 23-212(F) (distinguishing between knowingly and intentionally employing undocumented immigrants for purposes of determining the applicable punishment). For instance, a court *may* suspend an employer's business license for up to ten days if the employer is a first-time offender who "knowingly" hired an undocumented immigrant. *See* ARIZ. REV. STAT. ANN. § 23-212(F)(1)(d). If, however, an employer "intentionally" hired an undocumented immigrant, the employer's business permit will be suspended for a minimum of ten days. *See* ARIZ. REV. STAT. ANN. § 23-212(F)(1)(c). Both knowing and intentional violators must terminate all undocumented workers and "file an affidavit within three business days" asserting that the "employer has terminated the employment of all unauthorized aliens in this state and that the employer will not intentionally or knowingly employ an unauthorized alien in this state." *See* ARIZ. REV. STAT. ANN. § 23-212(F)(1)(a), (c).

[127] 8 U.S.C. § 1324a(h)(2) (2006).

[128] *See* Chicanos Por La Causa, Inc. v. Napolitano, 558 F.3d 856, 866 (9th Cir. 2009).

[129] *Id.*

[130] *Id.* at 867.

ployment of undocumented workers is "within the mainstream" of the state's police powers.[131]

Chicanos Por La Causa highlights the current transformation of immigration law away from border control matters and toward enforcement of employment law issues.[132] Requiring cooperation with local police, it operates against the silent backdrop of national security concerns.[133] As a result, enforcing immigration laws has become implicit in the role of local law enforcement officials.[134]

A decentralized approach to enforcement of immigration laws by local police creates confusion between state and federal enforcement.[135] As highlighted in the case of the Moras, the sheriff of Maricopa County in Arizona, Joe Arpaio, has taken such a tough approach in enforcing immigration laws that federal officials are currently investigating his tactics.[136] His campaign of terror includes parading chain-ganged prisoners through downtown Phoenix in pink underwear and detaining them in army tents from the Korean War.[137] Known for targeting anyone who merely looks Hispanic, his abusive practices are not confined to undocumented migrants.[138] In fact, the improper arrest and detention of Julio (a U.S. citizen) and Julian Mora (a legal resident) resulted from a workplace raid conducted by Arpaio.[139] Notwithstanding the fact that the Department of Homeland Security stripped Arpaio's deputies of their authority to enforce immigration laws, he remains defiant.[140] His

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[131] *Id.* at 864 (quoting De Canas v. Bica, 424 U.S. 351, 365 (1976)); *see also De Canas*, 424 U.S. at 356 (discussing each state's "broad authority under their police powers to regulate . . . employment relationship[s] to protect workers within the [s]tate.").

[132] *See Chicanos Por La Causa*, 558 F.3d at 864; Stumpf, *supra* note 121, at 1583.

[133] *See* Ariz. Rev. Stat. Ann. § 23-212 (2009); John Ashcroft, Attorney Gen., Announcement of the National Security Entry-Exit Registration System (June 6, 2002) (transcript available at http://www.justice.gov/archive/ag/speeches.html (follow "2002 Speeches" hyperlink; then follow "Attorney General Ashcroft announces Implementation of National Security Entry Exit Registration System (11-07-02)" hyperlink)) (referring to the Office of Legal Counsel opinion that state and local law enforcement officials can enforce both civil and criminal immigration laws).

[134] *See* Ashcroft, *supra* note 133.

[135] *See* Rachel E. Morse, Book Review, *Following* Lozano v. Hazelton*: Keeping States and Cities Out of the Immigration Business*, 28 B.C. Third World L.J. 513, 531 n.145 (2008) (reviewing Phillipe Legrain, Immigrants: Your Country Needs Them (2007)) (noting that the delegation of immigration enforcement duties to local police officers creates a conflict of interest between the local police officer's role to "serve the community" and his or her obligation to patrol for illegal immigrants).

[136] *See Still Going After Them*, Economist, Oct. 24, 2009, at 38.

[137] *See id.*

[138] *See id.*

[139] *See* Press Release, ACLU, *supra* note 1.

[140] *Still Going After Them*, *supra* note 136.

express goal is to "catch them coming through."[141] To that end, he will continue to arrest suspected immigrants "for cracked windshields, loose tailpipes, or whatever," and then verify their citizenship status under state laws.[142]

B. *The Enactment and Enforcement of Unilateral State Immigration Laws Mandating the Use of E-Verify Undermines Efficiency*

The complex web of city, county, and state laws governing employment verification standards undermines efficient immigration enforcement.[143] Local enforcement of laws mandating the use of E-Verify necessarily leads to a diversion of a state's already limited resources.[144] A recent study, comparing the immigration policies of the United States with that of other countries, revealed that laws enforcing closed-door policies invariably lead to stagnation.[145] In the case of E-Verify, fragmented state policies interfere with the federal government's ability to implement comprehensive immigration reform.[146]

The fact that E-Verify disproportionately misidentifies those who are foreign-born could lead to the development of a subclass of immigrants.[147] In *Plyer v. Doe*, the Supreme Court contemplated the development of this subclass.[148] While the *Plyer* Court dealt with the status of immigrant children, its rationale can arguably be applied to the immigrant community at large.[149] While some undocumented immigrants may leave the country altogether, many will remain indefinitely.[150]

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[141] *See id.*

[142] *See id.*

[143] *See* Morse, *supra* note 135, at 528.

[144] *See* Brief for the Plaintiffs at 39–40, Ariz. Contractors Ass'n v. Candelaria, 534 F. Supp. 2d 1036 (D. Ariz. 2008) (No. 207 Civ. 02496) (noting that the Arizona statute diverts resources away from the federal anti-terrorism program by requiring the federal government to respond to inquiries from Arizona County attorneys about the status of Arizona workers because Arizona deems it to be a more compelling use of federal money than tracking Al Queda operatives); Nchimunya D. Ndulo, Note, *State Employer Sanctions Laws and the Federal Preemption Doctrine: The Legal Arizona Workers Act Revisited*, 18 Cornell J.L. & Pub. Pol'y 849, 878 (2009).

[145] *See* Morse, *supra* note 135, at 514.

[146] *See id.* at 528.

[147] *See* Inst. for Survey Research & Westat, *supra* note 106, at 29; Ndulo, *supra* note 144, at 878.

[148] *See* Plyer v. Doe, 457 U.S. 202, 230 (1982) (holding unconstitutional a Texas statute that excluded illegal immigrant children from enrolling in public schools).

[149] *See* Ndulo, *supra* note 144, at 878–79.

[150] *See Plyer*, 457 U.S. at 230; Alberto Dávila et al., *The Short-Term and Long-Term Deterrence Effects of INS Border and Interior Enforcement on Undocumented Immigration*, 49 J. Econ.

Those that remain will then flood states with seemingly pro-immigrant laws, raising the potential for political turmoil in that state.[151] The end result is that certain localities will have a concentrated population of undocumented immigrants, who would otherwise be spread across the country.[152] The advent of a subordinated class of immigrants would only "add[] to the problems and costs of unemployment, welfare, and crime."[153] Consequently, the long-term costs outweigh the perceived short-term benefits of enacting and enforcing stringent immigration laws.[154]

IV. The Role of Congress

The proliferation of local immigration laws highlights the need for congressional overhaul of federal immigration system so that "local communities do not take matters into their own hands."[155] To realign immigration reform with the goals of efficiency and economy, Congress should establish clear boundaries over which level of government should regulate immigration.[156]

A. *Immigration Federalism*

There are three models that balance the level of state and federal regulation of immigration: a) federal exclusivity; b) state and local co-operation; and c) state and local regulation.[157] The federal exclusivity model precludes states from enacting their own immigration laws.[158] On the opposite end of the scale is the state and local regulatory scheme, which encourages enactment and enforcement of immigration laws under states' inherent police power to protect the general welfare

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Behav. & Org. 459, 462 (2002) (noting that "increases in INS enforcement resources do not appear to be a significant long-term deterrent" to undocumented immigration).

[151] *See* McKanders, *supra* note 40, at 590; Mark K. Matthews, *Immigration Bedevils State Lawmakers*, Stateline.org, Sept. 2, 2005, http://www.archives.stateline.org (follow "Stories from 2005" hyperlink; then follow "Immigration Bedevils State Lawmakers" hyperlink) (describing the relocation of immigrants in cities across the country).

[152] *See* Morse, *supra* note 135, at 527.

[153] *See Plyer*, 457 U.S. at 230.

[154] *See* Ndulo, *supra* note 144, at 879.

[155] Michael Doyle, *Supreme Court Seeks White House Views on Hiring Illegals*, McClatchy, Nov. 2, 2009, http://www.mcclatchydc.com/homepage/story/78204.html (quoting then-candidate Barack Obama during the 2008 presidential campaign).

[156] *See id.*

[157] *See* McKanders, *supra* note 40, at 593.

[158] *Id.*

of their people.[159] Meanwhile, the cooperative model lies somewhere in between these extremes.[160] Under this model, the federal government has the exclusive power to enact and enforce immigration policies; but, it may seek state and local assistance as needed.[161]

The federal exclusivity model reinforces the notion that the power to regulate immigration lies exclusively with Congress.[162] Although it is not expressly stated in the Constitution, scholars agree that the immigration power is a derivative of the Naturalization Clause, the Foreign Affairs Clauses, and the Commerce Clause.[163] When considered in conjunction with the Supremacy Clause, which states that the federal law is the "Supreme Law of the Land," it seems that Congress has the upper hand in the immigration arena.[164]

The line between federal and state authority, however, is blurred when the federal government remains silent and states rely on their Tenth Amendment police powers to pass laws aimed at immigrants.[165] States' exercise of the Tenth Amendment police powers is especially troublesome where, as in the case of E-Verify, local immigration laws are enacted with the pretense of protecting the safety and welfare of those communities.[166] Instead, the true purpose of such laws is to encourage immigrants to relocate or self-deport.[167]

Congress should embrace the cooperative model and enact laws that clearly circumscribe the role of state and local governments with respect to immigration.[168] When federal statutes "explicitly command[] that state law be displaced," there is no doubt that states are kept out of the immigration arena.[169] Enforcement of federal immigration laws would nevertheless be permissible when the federal government requests it.[170] Under no circumstances, then, would states be able to enact

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[159] *Id.*

[160] *Id.* at 599.

[161] *See id.*

[162] *See* De Canas v. Bica, 424 U.S. 351, 354 (1976) ("Power to regulate immigration is unquestionably exclusively a federal power."); McKanders, *supra* note 40, at 599.

[163] *See* Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373, 1381 (2006).

[164] *See* U.S. CONST. art. VI, cl. 2; Pham, *supra* note 163, at 1381.

[165] U.S. CONST. amend. X (providing that "powers not delegated to the United States by the Constitution . . . are reserved to the States"); McKanders, *supra* note 40, at 599.

[166] McKanders, *supra* note 40, at 598.

[167] *See id.*

[168] *See id.* at 599.

[169] *See* Lozano v. City of Hazelton, 496 F. Supp. 2d 477, 518 (M.D. Pa. 2007).

[170] *See* McKanders, *supra* note 40, at 599.

laws, like the Legal Arizona Workers Act, mandating the use of E-Verify to target immigrants.[171]

Conclusion

Passed under the Procurement Act, the goal of E-Verify was to promote efficiency and economy. At both the federal and state levels, however, E-Verify leaves workers vulnerable to subjective determinations about their legal status and therefore, promotes exceptionalism. The complex web woven by state immigration laws, including a mandate to use E-Verify, has only compounded the reach of the system's problems—inaccurate databases, disproportionate costs on employers, and disparate impact on immigrants. Moreover, the proliferation of these laws has also empowered local law enforcement officials to use draconian tactics, such as workplace raids, to weed out undocumented workers. Because these measures often unfairly target legal workers and disrupt workplace dynamics, they undermine the Procurement Act's goals of efficiency and economy.

To realign E-Verify with the goals of the Procurement Act, Congress must overhaul the federal immigration system by establishing definitive boundaries between state and federal regulation of immigration. One way to do this is to adopt a cooperative immigration model, which limits state involvement in the immigration arena. Under this model, states would have no authority to enact their own immigration laws. In fact, the only avenue by which states could enter the immigration arena is through the enforcement of federal laws. Notably, under the cooperative model, even those activities would be contingent on a federal call for assistance.

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[171] *See id.*