The Unconstitutionality of Mississippi’s Employment Protection Act and a Framework for Assessing Similar State Immigration Employment Laws

Nicholas Neidzwski*

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* J.D., Washington and Lee University School of Law, 2010; B.M., Music Business, New York University, 2007. I would like to thank Professor Michelle Drumbl for her incredible guidance in writing my note.
"MILTON, Fla. Three months after the local police inspected more than a dozen businesses searching for illegal immigrants using stolen Social Security numbers, this community in the Florida Panhandle has become more law-abiding, emptier and whiter. Many of the Hispanic immigrants who came in 2004 to help rebuild after Hurricane Ivan have either fled or gone into hiding. Churches with services in Spanish are half-empty. Businesses are struggling to find workers. And for Hispanic citizens with roots here—the foremen and entrepreneurs who received visits from the police—the losses are especially profound."

I. Introduction

Florida is just one state out of many that is enacting stronger and harsher laws aimed at preventing illegal alien employment. A new law in Mississippi makes it a felony for an illegal alien to hold a job. A law in Oklahoma also makes it a felony to shelter or transport illegal aliens. In 2008, a staggering 1,305 or more pieces of state legislation related to immigration issues had been introduced. In 2007, an astounding 1,562 bills


2. See id. ("State lawmakers, in response to Congressional inaction on immigration law, are giving local authorities a wider berth. In 2007, 1,562 bills related to illegal immigration were introduced nationwide and 240 were enacted in 46 states, triple the number that passed in 2006, according to the National Conference of State Legislatures."). Of these bills, the majority do not relate to employment issues, but a substantial percentage do.

3. See Mississippi Employment Protection Act, MISS. CODE ANN. § 71-11-3(8)(c)(i) (2008) ("It shall be a felony for any person to accept or perform employment for compensation knowing or in reckless disregard that the person is an unauthorized alien with respect to employment during the period which the unauthorized employment occurred.").

4. See Oklahoma Taxpayer and Citizen Protection Act, OKLA. STAT. ANN. Tit. 21, § 446(2007) (making it a felony to knowingly "transport, move . . . conceal, harbor or shelter" any illegal immigrant).

5. See DIRK HEGEN, NAT’L CONFERENCE OF STATE LEGISLATURES, STATE LAWS
related to immigration were introduced, and 240 laws were enacted.\textsuperscript{5} The top three areas of these pieces of immigration related legislation in 2007 and 2008 were identification/driver’s licenses, employment, and law enforcement.\textsuperscript{7} Preventing illegal alien employment thus is at the forefront of many states’ immigration issues, and will likely remain so in the future.

\section*{A. Legislative Standard}

Immigration analysts point to the alleged lack of Congressional action on illegal aliens as a reason for many states’ passing so many immigration related bills.\textsuperscript{8} But what standard, if any, has Congress provided relating to the employment of illegal alien workers, and to illegal aliens in general? The Immigration Reform and Control Act of 1986 (IRCA) mandates sanctions for knowingly hiring illegal aliens.\textsuperscript{9} The IRCA "forcefully made combating the employment of illegal aliens central to the policy of immigration law."\textsuperscript{10} The IRCA prohibits the employment of aliens who are not lawfully present in the United States, and not lawfully authorized to work in the United States.\textsuperscript{11} In order to prevent the employment of unauthorized workers, the IRCA requires employers to verify the identity and eligibility for work of all new hires.\textsuperscript{12} This verification is accomplished

\begin{itemize}
\item See id. at 1 ("The 2008 level of activity is comparable to last year, when 1,562 bills were introduced and 240 laws were enacted.").
\item See id. ("As in recent years, the top three areas of interest are identification/driver’s licenses, employment and law enforcement.").
\item See Cave, supra note 1 (quoting Jessica Vaughan, a senior policy analyst at the Center for Immigration Studies, who describes the recent increase in state illegal immigration laws due to Congressional inaction).
\item See Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324a(a)(1) (1986) ("It is unlawful for a person or other entity to hire, or to recruit or refer for fee, for employment in the United States an alien knowing the alien is an unauthorized alien . . . with respect to such employment . . . "). The Act further imposed sanctions for any violations under section (a)(1). Id. § 1324a(a)(4) ("With respect to a violation of subsection (a)(1)(A) or (a)(2) of this section, the order under this subsection shall require the person or entity to cease and desist from such violations and to pay a civil penalty in an amount of . . . ").
\item See Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 518 (M.D. Pa. 2007) (describing the effect the IRCA had on Immigration Law in general).
\item See generally Immigration Reform and Control Act of 1986, supra note 9.
\item Id.
\end{itemize}
with the employer’s review of specified documents. Under the IRCA, if an employer knows that an employee’s status is unauthorized, the employer must discharge the employee. If the employer fails to do so, the employer will be subject to both civil fines and criminal prosecution.

Other notable immigration related acts include the Immigration Act of 1990, which increased legal immigration ceilings and tripled the number of visas for priority workers and professionals with U.S. job offers. The 1996 Illegal Immigration Act made immigrants eligible for deportation proceedings for minor offenses such as shoplifting, instead of only for offenses that carried a potential sentence of five years or more in jail. The Enhanced Border Security and Visa Entry Form Act, passed in 2002, provided for more Border Patrol agents, required that schools report foreign students attending classes, and stipulated that foreign nationals in the United States will be required to carry IDs with biometric technology. Finally, in 2005, Congress passed the Real ID Act requiring the use of IDs meeting certain security specifications to enter government buildings, board planes, and open bank accounts.

B. Overview

It is evident in analyzing these major immigration statutes that Congress has acted in many ways relating to immigration in whole, but had provided only a general standard, enunciated in IRCA as pertaining to hiring illegal aliens: "It is unlawful for a person or other entity to hire, or to recruit or refer for fee, for employment in the United States an alien knowing the alien is an unauthorized alien." The first main question this

13. Id.
14. Id.
15. Id.
20. See Immigration Reform and Control Act, supra note 9, at § 1324a(a)(1) ("It is unlawful for a person or other entity to hire, or to recruit or refer for fee, for employment in the United States an alien knowing the alien is an unauthorized alien . . . with respect to such employment . . . ").
Note will address in Section II is how to assess the constitutionality of recent and controversial state immigration employment laws, such as that enacted in Mississippi. After this assessment is made, this Note will apply the constitutional analysis formulated in Section II to the Mississippi Employment Protection Act\textsuperscript{21} in Section III. The legislative standard enunciated in ActIRA does little to guide us in assessing the constitutionality of recent state immigration employment bills, and therefore the analysis will predominantly rely on the relevant case law governing immigrant and illegal alien employment.

The next portion of this Note (Section IV) will attempt to provide insight on whether these new state laws pertaining to illegal alien employment have, or will likely, help the state’s economy regardless of the laws’ constitutionality. This section of the Note will analyze several economic reports on the effect illegal aliens have on the economy, and will draw conclusions based on these reports whether state laws seeking to curb illegal alien employment aid the state’s economy.

\section*{C. Immigration Law Terminology}

The terminology related to immigration law can be confusing due to the media’s common misuse of standard immigration terms. For example, what is the difference between an alien and an immigrant? Furthermore, what is the difference between an illegal alien and a non-immigrant? Understanding these distinctions and other immigration law-related terminology is a necessary starting point and will greatly help in understanding the relevant legislative standard and case law governing an illegal alien’s right to employment. The media’s contortion of common immigration law-related terms also makes it important to gain a real understanding of the terminology.

The United States Internal Revenue Service provides the following immigration terms and definitions involving aliens:

1. Alien: An individual who is not a U.S. citizen or U.S. national.

2. Immigrant: An alien who has been granted the right by the United States Citizenship and Immigration Services (hereinafter referred to as the "USCIS") to reside permanently in the United States and to work without restrictions in the United States.

\footnote{Mississippi Employment Protection Act, \textit{supra} note 3.}
3. Nonimmigrant: An alien who has been granted the right by the USCIS to reside temporarily in the United States.

4. Illegal Alien: Also known as an "Undocumented Alien," is an alien who has entered the United States illegally and is deportable if apprehended or an alien who entered the United States legally but who has fallen "out of status" and is deportable.²²

As seen in the definitions listed above, the United States government did not use the phrase "illegal immigrant" in any context. Courts and most state legislatures generally do not use the phrase "illegal immigrant," and instead either use the term "undocumented alien" or "illegal alien" when referring to a person who has entered the United States illegally.²³ Please note that if any study, court decision, or state or federal law uses the terms "illegal immigrant" or "unauthorized immigrant," the source is referring to illegal aliens. This Note focuses on state legislation designed to severally punish the employment of illegal aliens. But, as will be seen in the case law discussion below, a majority of the case law governing an alien’s right to employment concerned only aliens ("An individual who is not a U.S. citizen or U.S. national"²⁴), not illegal aliens. This case law will be nonetheless imperative to the focus of this Note because of its relevance in assessing how recent laws affecting illegal aliens will be constitutionally scrutinized.

II. Case Law

A majority of case law governing an illegal alien’s right to employment concerns only aliens. While these cases do not factually involve illegal aliens, it is necessary to analyze these cases because the legal rationales the courts use in upholding or rejecting state laws governing aliens and their general rights to different types of employment may be applied to state laws seeking to halt or greatly impede an illegal alien’s right to employment. The cases analyzed in subsection A comprise the foundation of case law governing an alien’s right to employment. The cases analyzed in subsection B include modern case law governing an illegal aliens’ right to employment.

²² Id.
²³ See Kris Kobach, Immigration Nullification: In-state Tuition and Lawmakers Who Disregard the Law, 10 N.Y.U. J. INT’L L. & POL. 473, 474–75 n.5 (explaining the usage of different terms to describe "illegal alien" in immigration law today).
²⁴ Id.
A. Foundational Cases

The cases described below all concern state employment restrictions placed on aliens, not illegal aliens. As will be evident below, state statutes that discriminate based on alienage are subject to "strict judicial scrutiny," meaning that the state statute must be narrowly tailored and necessary to promote a compelling or overriding governmental interest. Courts, however, have never held that state laws based on illegal alienage are subject to strict judicial scrutiny. If recent state legislation that seeks to impose harsh penalties on businesses employing illegal aliens, such as Mississippi’s Employment Protection Act, is subject to strict judicial scrutiny, it will be a very difficult burden for Mississippi to meet. The difficulty of a state satisfying strict judicial scrutiny with respect to laws designed to curb the employment rights of aliens is evidenced in the cases described below.

Graham v. Richardson was the first case establishing that state classifications based on alienage were subject to strict judicial scrutiny. As noted above, in order for a state to meet this standard, the statute must be narrowly tailored and necessary to promote a compelling or overriding governmental interest. Graham concerned an Arizona statute that denied welfare benefits to resident aliens unless they met a fifteen-year residency requirement, and a Pennsylvania statute that denied welfare benefits to resident aliens. The only justification Arizona and Pennsylvania put forth for their respective statutes was that each state had a "special public interest" in favoring [their] own citizens over aliens in the distribution of limited resources such as welfare benefits. In striking down both statutes, the Court equated resident aliens to "persons" protected under the

25. Johnson v. California, 543 U.S. 499, 505 (2005) ("Under strict scrutiny, the government has the burden of proving that racial classifications ‘are narrowly tailored measures that further compelling governmental interests.’" (citing Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995))).

26. See Graham v. Richardson, 403 U.S. 365, 371–72 (1971) ("But the Court’s decisions have established that classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a ‘discrete and insular’ minority for whom such heightened judicial solicitude is appropriate." (citations omitted)).

27. See supra note 25 and accompanying text.

28. See Graham, 403 U.S. at 367 (describing the Arizona statute at issue in this case).

29. See id. at 368 (describing the Pennsylvania statute at issue in this case).

30. Id. at 372.
Equal Protection Clause of the Fourteenth Amendment.\textsuperscript{31} While the Court admitted that "a state ha[d] a valid interest in preserving the fiscal integrity of its programs,"\textsuperscript{32} the Court rejected that a state may accomplish this purpose by "invidious distinctions between classes of its citizens."\textsuperscript{33} Finally, the Court rejected the argument advanced by Arizona and Pennsylvania that since no fundamental right was involved in the case, strict judicial scrutiny should not apply. The Court instead concluded that since alienage was a suspect class, a fundamental right need was not necessary for strict scrutiny to apply.\textsuperscript{34}

The Supreme Court in In re Griffiths declared invalid a Connecticut statute that excluded aliens from the practice of law.\textsuperscript{35} Connecticut defended the statute’s requirement that applicants for admission to the bar be citizens of the United States on the ground that lawyers possessed a "special role" within the state, and therefore excluding non-citizens from this position was permissible.\textsuperscript{36} The State elaborated that in Connecticut, "the maxim that a lawyer [was] an ‘officer of the court’ [was] given concrete meaning by a statute which makes every lawyer a ‘commissioner of the Superior Court.’"\textsuperscript{37} Connecticut argued that a lawyer in the state had powers that should only be conferred to a citizen, such as "authority to ‚sign writs and subpoenas, take recognizances, administer oaths and take depositions and acknowledgements of deeds."\textsuperscript{38} The Court, however, found these arguments advanced by Connecticut unconvincing: "It in no way denigrates a lawyer’s high responsibilities to observe that the powers ‘to sign writs and subpoenas, take recognizances, (and) administer oaths’

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\textsuperscript{31} See id. at 371 ("It has long been settled, and it is not disputed here, that the term ‘person’ in this context encompasses lawfully admitted resident aliens as well as citizens of the United States and entitles both citizens and aliens to the equal protection of the laws of the State in which they reside.").

\textsuperscript{32} Id. at 374.

\textsuperscript{33} Id. at 375.

\textsuperscript{34} See id. at 376 ("The classifications involved in the instant cases, on the other hand, are inherently suspect and are therefore subject to strict judicial scrutiny whether or not a fundamental right is impaired.").

\textsuperscript{35} See In re Griffiths, 413 U.S. 717, 729 (1973) ("We hold that subsection 8(1) violates the Equal Protection Clause.").

\textsuperscript{36} See id. at 723 (describing the Committee’s defense for Rule 8(1)’s citizenship requirement).

\textsuperscript{37} Id.

\textsuperscript{38} Id.
hardly involve matters of state policy or acts of such unique responsibility as to entrust them only to citizens."

The Court in *Sugarman v. Dougall* carved out a limited exception that in some circumstances, states could bar resident aliens from state or public employment. The test articulated in *Sugarman* for whether aliens could be banned from a particular state position was substantially similar to basic constitutional strict scrutiny, and looked to "the substantiality of the State’s interest in enforcing the statute in question, and to the narrowness of the limits within which the discrimination is confined." The Court recognized a state interest in limiting participation in its government to those who were "within ‘the basic conception of a political community.’" The Court applied this standard to a New York statute at issue in the case, which denied all aliens the right to hold positions in New York’s classified competitive civil service, and held the law unconstitutional for violating the Fourteenth Amendment’s Equal Protection clause.

Adopting a similar test as articulated in *Sugarman*, the Supreme Court in *Cabell v. Chavez-Salido* concluded that a California statute, which limited the position of a California probation officer to citizens, was not unconstitutional. The Court related the position of the probation officer to state sovereignty, concluding that the probation officer "acts as an extension of the judiciary’s authority to set the conditions under which particular individuals will lead their lives and of the executive’s authority to coerce obedience to those conditions." The Court used a dual perspective to conclude that California’s citizenship requirement was an "appropriate limitation," stating that from the perspective of the probationer, "his

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39. *Id.* at 724.
40. See *Sugarman v. Dougall*, 413 U.S. 634, 642 (1973) ("We recognize a State’s interest in establishing its own form of government, and in limiting participation in that government to those who are within ‘the basic conception of a political community.’").
41. *Id.* at 642.
42. *Id.*
43. See *id.* at 646 (concluding that the New York statute at issue violates the Equal Protection Clause).
44. See *id.* at 642 (describing the Court’s test for whether aliens could be banned from a particular state position).
45. See *Cabell v. Chavez-Salido*, 454 U.S. 432, 445 (1982) ("Looking at the functions of California probation officers, we conclude that they, like the state troopers involved in *Foley*, sufficiently partake of the sovereign’s power to exercise coercive force over the individual that they may be limited to citizens.").
46. *Id.* at 447.
47. *Id.* at 744.
probation officer may personify the State’s sovereign powers; from the perspective of the larger community, the probation officer may symbolize the political community’s control over, and thus responsibility for, those who have been found to have violated the norms of social order.\footnote{Id.}

The court in \textit{Jii v. Rhodes} held that an Ohio statute requiring applicants for appointment to the office of notary public to be citizens of the United States violated the Equal Protection clause of the Fourteenth Amendment, in absence of a showing that citizenship bore any relationship to the special demands of the particular position of notaries public.\footnote{See Jii v. Rhodes, 577 F. Supp. 1128, 1135 (S.D. Ohio 1983) which states: In this case, the state has utterly failed to demonstrate that citizenship bears any relationship to the special demands of the particular position of notaries public. Rather the defendants, without further explanation, simply state that the citizenship requirement is needed because notaries perform sovereign functions. Absent some further explanation, the Court is unconvinced that the citizenship requirement for Ohio’s notaries public is any way related to the achievement of some valid state objective. The Court, therefore, concludes that the citizenship requirement for notaries public found in R.C. 147.02 violates the Equal Protection Clause of the Fourteenth Amendment.} Ohio in this case argued that the statute falls under the "\textit{Sugarman-Cabell ‘government function’ exception}"\footnote{Id. at 1133.} because "notaries public exercise ‘government functions’ which were intimately related to the state’s sovereignty."\footnote{Id.} The court, writing on the assumption that the statute was sufficiently narrowly tailored to satisfy the first prong of strict scrutiny judicial analysis,\footnote{See Sugarman v. Dougall, 413 U.S. 634, 642 (1973), for a discussion on the two prongs needed to satisfy strict judicial scrutiny; a statute must be narrowly tailored (first prong) and necessary to promote a compelling or overriding governmental interest (second prong).} still found the Ohio statute unconstitutional because the court viewed notary publics closer in "quality and character to the functions of an attorney,"\footnote{Jii, 577 F. Supp at 1134.} which in \textit{In re Griffiths} the Court held should be an available position to resident aliens,\footnote{See In re Griffiths, 413 U.S. 717, 729 (1973) ("We hold that section 8(1) violates the Equal Protection Clause.").} rather than to the functions of police or probation officers.\footnote{See Cabell v. Chavez-Salido, 454 U.S. 432, 445 (1982) (concluding that the "functions of California probation officers" sufficiently "partake of the sovereign’s power to exercise coercive force over the individual that they may be limited to citizens").} The court concluded that states may be justified in
restricting aliens’ access to certain offices, but maintained the *Sugarman* standard that the position denied to aliens must require the "performance of some functions regulation of which is necessary to preserve the basic conception of a political community." The five foundational cases analyzed above set a high standard for states to overcome when enacting laws that discriminate against aliens with respect to employment opportunities. As established in *Graham*, state classifications based on alienage are subject to strict judicial scrutiny. The Court in *Sugarman* interpreted this test as examining "the substantiability of the state’s interest in enforcing the statute in question, and to the narrowness of the limits within which the discrimination is defined." The only accepted state interest recognized by later courts and in *Sugarman* for enacting a law that discriminates resident aliens from public employment jobs is if the position at issue is within "the basic conception of a political community." In *Cabell v. Chavez-Salido*, the Court held that the state purpose in enacting a law that discriminated against non-citizens could be compelling if the employment position at issue has a direct effect on the functioning of government. Statutes, however, that discriminated against aliens based on other factors were declared constitutionally void, as seen in *In re Griffiths* and *Jii v. Rhodes*. It is thus very difficult for a state to constitutionally discriminate against aliens for employment purposes.

As will be seen in Section B below, however, the Supreme Court has not held that *undocumented* or *illegal* aliens are a suspect classification. Thus, a state statute that denies benefits or imposes burdens on illegal aliens

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56. *See Jii v. Rhodes*, 577 F. Supp. 1128, 1134 (S.D. Ohio 1983) (concluding that a state may have justification for restricting aliens’ access to certain offices only if the position meets the standard enunciated in *Cabell*).  
57. *See Sugarman v. Dougall*, 413 U.S. 634, 642 (1973) ("We recognize a State’s interest in establishing its own form of government, and in limiting participation in that government to those who are within ‘the basic conception of a political community.’").  
58. *See Graham v. Richardson*, 403 U.S. 365, 371–72 (1971) ("But the Court’s decisions have established that classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a ‘discrete and insular’ minority for whom such heightened judicial solicitude is appropriate." (citations omitted)).  
59. *Sugarman*, 413 U.S. at 642–43 (applying the strict scrutiny test to the statute at issue).  
60. *Id.* at 642.  
61. *See Cabell v. Chavez-Salido*, 454 U.S. 432, 445 (1982) ("Looking at the functions of California probation officers, we conclude that they, like the state troopers involved in *Foley*, sufficiently partake of the sovereign’s power to exercise coercive force over the individual that they may be limited to citizens.").
might be analyzed under the rational basis test\(^{62}\) or under some type of intermediate scrutiny,\(^{63}\) as opposed to strict scrutiny as used in the cases above regarding aliens. The constitutional test regarding the assessment of a statute that discriminates based on illegal aliens remains to be seen.

**B. Modern Case Law governing Constitutional Rights of Illegal Aliens**

The three cases described below display the common constitutional methods of attacking a statute that seeks to place restrictions on illegal aliens. All three cases show that courts are still unwilling to determine that state classifications based on illegal alienage are subject to strict judicial scrutiny, or a mere rational basis or intermediate scrutiny test. The cases, however, do provide insight into how state statutes designed to place severe restrictions on illegal aliens are commonly attacked, and act as a guide as to what arguments will likely work the best in the future.

**1. Plyler v. Doe**

The Court in *Plyler v. Doe* considered whether "Texas may deny to undocumented school-age children the free public education that it provides to children who are citizens of the United States or legally admitted aliens."\(^{64}\) The plaintiffs argued that Texas violated the Equal Protection Clause of the Fourteenth Amendment in trying to deny to undocumented children the right to free public education.\(^{65}\) Texas, however, argued that the Equal Protection Clause should not apply, stating that "the Equal Protection Clause directs a State to afford its protection only to persons

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\(^{62}\) Under the rational basis test, the law (or other government action) will be upheld if it is rationally related to any conceivable legitimate end of government. *See* Lawrence v. Texas, 539 U.S. 558, 579 (2003) (O’Connor, J., concurring) ("Under our rational basis standard of review, ‘legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.’" (quoting Cleburne v. Cleburne Living Center, 457 U.S. 202, 440 (1982))).

\(^{63}\) Under intermediate scrutiny, the law (or other government action) will be upheld only if it involves important government interests that are furthered by substantially related means. *See* U.S. v. Virginia, 518 U.S. 515, 570-571 (1996) (Scalia, J., dissenting) ("We have denominated this standard ‘intermediate scrutiny’ and under it have inquired whether the statutory classification is ‘substantially related to an important governmental objective.’" (quoting Clark v. Jeter, 486 U.S. 456, 461 (1988))).


\(^{65}\) *Id.* at 206.
within its jurisdiction while the Due Process Clauses of the Fifth and Fourteenth Amendments contain no such assertedly limiting phrase. The Court rejected Texas’s argument, holding that both the Due Process Clauses and Equal Protection Clause protect an identical class of persons. In rejecting Texas’s argument, the Court relied on Yick Wo v. Hopkins, quoting that the

Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: ‘Nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.’ These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the protection of the laws is a pledge of the protection of equal laws.

The Court concluded that the Texas statute seeking to exclude illegal alien children from the benefits of public education violated the Equal Protection Clause of the Fourteenth Amendment because Texas failed to show that the statute furthered any substantial state interest. In reaching this conclusion, the Court employed a type of intermediate judicial scrutiny, only upholding the statute if it involved important government interests that were furthered by substantially related means. Applying intermediate judicial scrutiny to these illegal alien children, however, is not a holding of the case, and the type of judicial scrutiny that will be applied to illegal aliens in the future still remains to be seen.

66. Id. at 211.
67. See id. ("We have never suggested that the class of persons who might avail themselves of the equal protection guarantee is less than coextensive with that entitled to due process.").
68. See Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (stating that the Fourteenth Amendment is not confined to the protection of only United States citizens).
69. See Plyer, 457 U.S. at 212 (quoting Yick Wo, 118 U.S. at 369, on the breadth of the Fourteenth Amendment).
70. See id. at 230 ("If the State is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest. No such showing was made here.").
71. See id. at 217–18 ("[W]e have recognized that certain forms of legislative classification, while not facially invidious, nonetheless give rise to recurring constitutional difficulties; in these limited circumstances we have sought the assurance that the classification reflects a reasoned judgment consistent with the ideal of equal protection by inquiring whether it may fairly be viewed as furthering a substantial interest of the State.").
2. Lozano v. City of Hazleton

A case that shed some light on how courts may respond when confronted with a statute that discriminates through employment restrictions against illegal aliens, as well as aliens, is *Lozano v. City of Hazleton*.\(^\text{72}\) The two statutes at issue in this case were both enacted by the city of Hazleton on August 15, 2006 and on September 21, 2006 and were titled respectively the "Tenant Registration Ordinance" (RO), and the "Illegal Immigration Relief Act Ordinance" (IIRA).\(^\text{73}\) The RO required apartment dwellers in Hazleton to prove through obtaining an occupancy permit that they were citizens or lawful residents,\(^\text{74}\) while the IIRA "prohibits the employment and harboring of undocumented aliens in the City of Hazleton."\(^\text{75}\) The IIRA sought to address specifically the issue of illegal aliens, defining an "illegal alien" as an "alien who is not lawfully present in the United States."\(^\text{76}\) The plaintiffs advanced three major arguments against both of the statutes: that the IIRA and RO violate (1) the Supremacy Clause, (2) the Due Process Clause and (3) the Equal Protection Clause of the United States Constitution.\(^\text{77}\) These three causes of action are brought by plaintiffs pursuant to 42 U.S.C. § 1983,\(^\text{78}\) which in part provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress.\(^\text{79}\)

The court listed two criteria that must be met to establish a claim under 42 U.S.C. § 1983 (section 1983): "First the conduct complained of must


\(^{73}\) *See id.* at 484—85 (describing the statutes at issue in this case).

\(^{74}\) *Id.* at 484.

\(^{75}\) *Id.*

\(^{76}\) *Id.* at 485.

\(^{77}\) *See id.* ("The second amended complaint seeks a declaratory judgment that IIRA and RO violate the Supremacy Clause, the Due Process Clause and the Equal Protection Clause of the Constitution of the United States.").


have been committed by a person acting under color of state law. Second, the conduct must deprive the complainant of rights secured under the Constitution or federal law.\footnote{Id. (citing Sameric Corp. of Del., Inc. v. City of Philadelphia, 142 F.3d 582, 590 (3d Cir. 1998)).} The court concluded that no issue existed whether the defendant, the City of Hazleton, acted under the color of state law in enacting the ordinances at issue.\footnote{See Lozano, 496 F. Supp. 2d at 517 ("In the instant case, no question exists as to whether the defendant acted under the color of state law in enacting the ordinances at issue.").} The court then addressed the four major constitutional arguments advanced by the plaintiffs separately.\footnote{See id. at 517–45 (outlining the four constitutional arguments as federal preemption, procedural due process, equal protection, and privacy rights).} This Note will only analyze the constitutional arguments considered with respect to the IIRA, not the RO.

The Supremacy Clause of the United States Constitution provides that federal law is the supreme law of the land.\footnote{U.S. Const. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.").} Therefore, the Supremacy Clause of the United States Constitution "invalidates state laws that ‘interfere with or are contrary to’ federal law."\footnote{Lozano, 496 F. Supp. 2d at 518 (describing the Supremacy Clause and its effect on state law).} The plaintiffs argue that IRCA\footnote{See IRCA, supra note 9, § 1324(a)(1) ("It is unlawful for a person or other entity to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien . . . with respect to such employment."). The Act further imposed sanctions for any violations under section (a)(1). Id. ("With respect to a violation of subsection (a)(1)(A) or (a)(2), the order under this subsection shall require the person or entity to cease and desist from such violations and to pay a civil penalty in an amount of . . .").} contains a preemption clause that pre-empts the employer portions of the IIRA.\footnote{See Lozano, 496 F. Supp. 2d at 518 ("Plaintiffs assert that the federal Immigration Reform and Control Act of 1986, . . . which deals with the employment of unauthorized aliens, contains an express preemption clause that pre-empts the employer portions of the IIRA.").} The court agreed with the plaintiff’s interpretation of the IRCA by looking to the text of the IRCA preemption clause: "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."\footnote{8 U.S.C. § 1324(a)(h)(2).} The court rejected the city of Hazleton’s
interpretation of the provision that a "state or local municipality properly
can impose any rule they choose on employers with regard to hiring illegal
aliens as long as the sanction imposed is to force the employer out of
business by suspending its business permit." The court found this
interpretation, "at odds with the plain language of the express preemption
provision."  

The only two exceptions the court recognized with respect to the
IRCA preemption provision concerned (1) "[S]tate or local laws dealing
with 'suspension, revocation or refusal to reissue a license' to an entity
found to have violated the sanction provisions of the IRCA" and (2)
"fitness to do business laws such as state farm labor contractor laws or
forestry laws." The court found neither exception applicable to the IIRA
because as to the first exception, "Hazleton suspends the business permit of
those who violate its Ordinance, not those who violate IRCA", and in
regard to the second exception, "[f]itness to do business laws generally
deal with a person’s character as it relates to his or her ability to be engaged
in a certain business activity", which is not at issue in the IIRA. Finding
that neither of the two above described exceptions were applicable to the
IIRA, the court found that the IIRA’s employment provisions violated the
Supremacy Clause of the United States Constitution.  

The court also found that the IIRA violated the due process rights of
both the employers and employees affected by the statute. The Due
Process Clause of the Fourteenth Amendment provides that no state shall
"deprive any person of life, liberty, or property, without due process of
law." Describing notice as the "cornerstone of due process," the Court
concluded that the IIRA "fails to require that anyone provide notice to an
employee when a complaint is filed or at any time during the

88.  Lozano, 496 F. Supp. 2d at 519 (describing Hazleton’s interpretation of the IRCA).
89.  Id.
90.  Id. at 520.
91.  Id. (quotations omitted).
92.  Id.
93.  Id. ("Hazleton’s ordinances are not fitness to do business laws such as state farm
        labor contractor laws or forestry laws.").
94.  See id. at 521 ("[W]e find that IRCA’s express preemption provision applies to
        IIRA’s employment provisions. Thus, the Ordinance’s employment provisions violate the
        Supremacy Clause of the United States Constitution.").
95.  See id. at 537 ("For the above reasons, we find that IIRA violates the due process
        rights of both the employers and employees and is thus unconstitutional.").
96.  U.S. Const. amend. XIV, § 1.
proceedings." 97  Suggesting a possible outcome to this situation, the court noted that an employer could "merely fire the employee and avoid the hassle of determining the employee’s immigration status." 98  Nothing in the IIRA protected the employee from this hypothetical situation. 99

The third major argument the plaintiffs advanced in Lozano against the IIRA was that the IIRA violated their equal protection rights. 100  The Fourteenth Amendment of the United States Constitution provides that a state may not "deny to any person within its jurisdiction the equal protection of the laws." 101  This constitutional argument, unlike the previous two (Supremacy and Due Process), is not accepted by the Court because the plaintiffs could not show that the "relevant decision-maker [City of Hazleton] adopted the policy at issue ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group." 102  The Court used the "because of," "in spite of" test because the IIRA is facially neutral, and therefore a traditional rational basis or strict scrutiny test does not apply. 103  The Court thereby never addressed whether illegal aliens were a suspect class, and therefore entitled to strict scrutiny analysis for any statute discriminating against them, or were not a suspect class and thereby only entitled to a rational basis or intermediate scrutiny test. As noted at the end of Section A, illegal aliens have still not been held as a suspect class by any court.

97.  Lozano, 496 F. Supp. 2d at 536 (describing why the IIRA violates the fundamental notice principle of due process).
98.  Id.
99.  See id. ("Nothing in IIRA provides protection to the employee from such action.").
100. See id. at 538 (claiming that the IIRA violates plaintiff’s Equal Protection rights by "allowing the City to consider race, ethnicity, or national origin in determining whether a complaint under the Ordinance is ‘valid’").
102. Lozano, 496 F. Supp. 2d at 540.
103. See id. at 540, which describes how this approach requires a slightly different analysis. The equal protection ‘clause prohibits states from intentionally discriminating between individuals on the basis of race. To prove intentional discrimination by a facially neutral policy, a plaintiff must show that the relevant decision-maker (e.g., a state legislature) adopted the policy at issue “because of,” not merely “in spite of” its adverse effects upon an identifiable group."
3. Gray v. City of Valley Park

The Eighth Circuit in Gray v. City of Valley Park\textsuperscript{104} held constitutional an ordinance substantially similar to the statute at issue in Lozano, declaring that the Supremacy Clause does not bar the ordinance because it was not pre-empted by the IRCA.\textsuperscript{105} The ordinance at issue in Gray made it unlawful for any business within the City of Valley Park, MO, to "recruit, hire for employment, or continue to employ, or to permit, dispatch, or instruct any person who is an unlawful worker to perform work in whole or part within the City."\textsuperscript{106} The ordinance penalized any business that violated this section and failed to correct the violation within three business days after notification of the violation by suspension of the entity's business license.\textsuperscript{107}

Similar to the court in Lozano, the court in Gray considered whether the IRCA preemption clause pre-empts the city ordinance at issue.\textsuperscript{108} The IRCA preemption clause states that "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."\textsuperscript{109} The major difference between the court in Lozano and Gray lies in each Court's reading of the two exceptions ("other than through licensing and similar laws") in the IRCA’s preemption clause. The court in Lozano found neither exception applicable to the IIRA because as to the first exception, Hazleton suspends the business permit of those who violates its Ordinance, \textit{not those who violate IRCA},\textsuperscript{110} and as to the second exception, fitness to do business laws generally deal with a person’s character as it relates to his or her ability to be engaged in a certain business activity, which is not at issue in

\textsuperscript{105} See id. (describing the Immigration Reform and Control Act’s preemption clause and why the statute at issue falls under its licensing exception).
\textsuperscript{106} Id. at 28.
\textsuperscript{107} Id.
\textsuperscript{108} See id. at 27 ("The first argument between the Parties relates to express preemption; specifically, does the federal statute expressly preempt the state law in question?"). The “federal statute” the Court is referring to is the Immigration Reform and Control Act of 1986.
\textsuperscript{109} 8 U.S.C. § 1324(a)(h)(2) (emphasis added).
\textsuperscript{110} See Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 520 (M.D. Pa. 2007) ("In the instant case, Hazleton suspends the business permit of those who violate its Ordinance, not those who violate IRCA.").
the IIRA. The court in Gray, however, found that the licensing exception of the IRCA did apply to the Valley Park ordinance because on its face the ordinance at issue was a licensing law. Most importantly, the court in Gray did not read the licensing exception of the IRCA preemption clause to require that the IRCA must be violated in order for the exception to apply. The court in Lozano, however, found that the licensing exception was not applicable for this very reason; that Hazleton suspended the business permit of those who violated the Hazleton Ordinance, not those who violated the IRCA. Thus it is in this minor difference in reading the exceptions to the preemption clause in the IRCA that both courts reached opposing results.

While the court in Gray noted that the Lozano decision runs completely contrary to their position, the court nonetheless held that the IRCA preemption clause exception applied, and therefore the Supremacy Clause of the Constitution did not bar the Valley Park statute. The courts in Gray and Lozano created a clear split in analyzing statutes seeking to halt employment of illegal aliens, but both decisions revealed that the Equal Protection and Due Process clauses of the U.S. Constitution are not the only potential means to strike down such a statute. The Supremacy Clause is at the forefront of the debate in both decisions, and will likely be so in the future because of the potentially ambiguous text of the IRCA’s

111. See id. ("Hazleton’s ordinances are not fitness to do business laws such as state farm labor contractor laws or forestry laws.” (quotations omitted)).


113. See id. ("There is no requirement in the statute that a finding be made by the federal government that a person has employed, recruited or referred for a fee for employment, unauthorized aliens, only that those are the individuals who are subject to penalty.”).

114. See Lozano, 496 F. Supp. 2d at 520 ("In the instant case, Hazleton suspends the business permit of those who violate its Ordinance, not those who violate IRCA.”).

115. See Gray, 2008 U.S. Dist. LEXIS 7238 at 32 n.13 ("Throughout their briefing, Plaintiffs rely heavily upon the recent Pennsylvania decision, in which a substantially similar local ordinance was found to be preempted by federal law. The Court respectfully notes that the Pennsylvania decision is not binding, and therefore, the Court will conduct its own thorough analysis of the issues presented.” (citations omitted)).

116. U.S. Const. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.").

117. See Gray, 2008 U.S. Dist. LEXIS 7238 at 37 ("The plain meaning of the statute clearly provides for state and local governments to pass licensing laws which touch on the subject of illegal immigration. The statute at issue is such a licensing law, and therefore is not expressly preempted by the federal law.”).
preemption clause. If the IRCA’s preemption clause is read broadly as displayed in \textit{Lozano}, many recent state statutes designed to halt the employment of illegal aliens will likely be held pre-empted by the IRCA, thereby violating the Supremacy Clause of the Constitution. If, however, the preemption clause is read narrowly as seen in \textit{Gray}, the recent state statutes will likely not be held as violating the Supremacy Clause.

\textbf{C. Constitutional Framework for Assessing State Immigration Employment Statutes}

The case law described above in Section A and in Section B have several common themes prevalent throughout all of the cases that will help in assessing recent state immigration employment legislation. The five foundational cases described in Section A involve state employment restrictions placed on aliens, all of which were subject to strict judicial scrutiny. These cases display how difficult it is for a state to meet this standard; notably only in \textit{Cabell v. Chavez-Salido} did the Court uphold a state’s statute that discriminated against aliens.\textsuperscript{119} The test articulated in \textit{Cabell} established a high burden for a state to show a compelling interest, and looked to see if the statute regulated an employment position (probation officers in the \textit{Cabell} case) which sufficiently partook of the "sovereign’s power to exercise coercive force over the individual that they may be limited to citizens."\textsuperscript{120} Thus, if any of the recent state legislation imposes restrictions on illegal aliens, as well as aliens, the statute will likely be scrutinized with strict judicial scrutiny, and the burden on the state to prove a compelling interest will be highly difficult to meet.

Even if the recent state immigration employment legislation only involves illegal aliens, Equal Protection and Due Process challenges can be made, as evidenced in \textit{Lozano v. City of Hazleton}.\textsuperscript{121} Although strict judicial scrutiny will likely not be applied, the State will still likely have to meet the standards of either a rational basis or intermediate scrutiny test. The Court in \textit{Plyer v. Doe} rejected the argument advanced by Texas that

\textsuperscript{118} 8 U.S.C. § 1324(a)(h)(2).

\textsuperscript{119} See \textit{Cabell v. Chavez-Salido} 454 U.S. 432, 445 (1982) ("Looking at the functions of California probation officers, we conclude that they, like the state troopers involved in \textit{Foley}, sufficiently partake of the sovereign’s power to exercise coercive force over the individual that they may be limited to citizens.").

\textsuperscript{120} \textit{Id.}

\textsuperscript{121} \textit{Lozano v. City of Hazleton}, 496 F. Supp. 2d 477 (M.D. Pa. 2007).
illegal aliens residing within the territory of the United States were not covered by the Equal Protection Clause,\textsuperscript{122} holding that illegal aliens in the United States were "persons" within the context of the Fourteenth Amendment.\textsuperscript{123} Even though \textit{Plyer v. Doe} did not concern employment rights of illegal aliens (the case instead speaks to the right to public education of illegal alien children), it established that illegal aliens residing in the United States are entitled to the protection of the Equal Protection clause. Therefore, any recent State immigration employment related legislation can be attacked on both Equal Protection and Due Process grounds regardless if the statute pertains to only illegal aliens, or aliens in general.

Both \textit{Gray v. City of Valley Park} and \textit{Lozano v. City of Hazleton} illustrate how the relation between the IRCA\textsuperscript{124} and the Supremacy Clause\textsuperscript{125} is a major issue in cases involving state statutes designed to halt the employment of illegal aliens. The relation between the Supremacy Clause and the IRCA lies in the IRCA’s preemption clause: "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."\textsuperscript{126} Thus, depending on how a particular jurisdiction reads this clause, recent state legislation seeking to punish businesses that hire illegal aliens may be pre-empted by the IRCA’s preemption clause. As seen in both \textit{Lozano} and \textit{Gray}, no consensus across jurisdictions has been reached on this preemption issue. In Section III below, the constitutional framework described above will be applied to Mississippi’s Employment Protection Act, which makes it a felony to knowingly employ illegal aliens.\textsuperscript{127}

\textsuperscript{122} See U.S. Const. amend. XIV § 1 ("No state shall … deny to any person within its jurisdiction the equal protection of the laws.").

\textsuperscript{123} See \textit{Plyer v. Doe}, 457 U.S. 202, 211 (1982) (describing why illegal aliens residing within the territory of the United States are entitled to the protections afforded by the Equal Protection Clause of the Fourteenth Amendment).

\textsuperscript{124} Immigration Reform and Control Act, \textit{supra} note 9.

\textsuperscript{125} U.S. Const. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.").

\textsuperscript{126} 8 U.S.C. § 1324(a)(h)(2).

\textsuperscript{127} See Mississippi Employment Protection Act, \textit{supra} note 3 ("It shall be a felony for any person to accept or perform employment for compensation knowing or in reckless disregard that the person is an unauthorized alien with respect to employment during the period in which the unauthorized employment occurred.").
III. Analyzing the Constitutionality of the Mississippi Employment Protection Act

A. Standing

In challenging the constitutionality of the Mississippi Employment Protection Act (the Mississippi Act or Act), a group of potential plaintiffs must first prove standing pursuant to 42 U.S.C § 1983, which in part provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The court in Lozano v. City of Hazleton established that two main criteria must be met to establish a claim under 42 U.S.C. § 1983: "First, the conduct complained of must have been committed by a person acting under color of state law. Second, the conduct must deprive the complainant of rights secured under the Constitution or federal law." A constitutional challenge of the Mississippi Act can come either from an employer, who has been found in violation of the Act’s provisions, or an illegal alien(s) that worked for an employer found in violation of the Act. Either of these plaintiffs would satisfy both prongs of 42 U.S.C. § 1983 because in either case, the State agency or group of persons finding the violation and enforcing the punishment would be acting under the color of state law, and the State’s conduct would deprive either the employer or illegal alien(s) of rights secured under the Constitution or federal law. Whether the deprivation of these rights is nonetheless constitutional will be the issue of the case.

129. Id.
B. Equal Protection and Due Process

The Mississippi Act pertains only to the employment of illegal or unauthorized aliens,\(^{131}\) therefore strict judicial scrutiny will unlikely be applied in any constitutional challenge on due process or equal protection grounds. A court instead will likely apply either a rational basis or intermediate scrutiny test with respect to any due process or equal protection challenge. The Mississippi Act provides that:

\[
\ldots \text{when illegal immigrants have been sheltered and harbored in this state and encouraged to reside in this state through the benefit of work without verifying immigration status, these practices impede and obstruct the enforcement of federal immigration law, undermine the security of our borders, and impermissibly restrict the privileges and immunities of the citizens of Mississippi.}^{132}\]

It is for these reasons that Mississippi declared that is a "compelling public interest of this state to discourage illegal immigration."\(^{133}\) In equating the alleged problems with illegal aliens listed above as a "compelling public interest," Mississippi seems to anticipate any challenge based on equal protection or due process grounds. A state must only show a "compelling interest" if strict judicial scrutiny\(^{134}\) is applied. If, however, only a rational basis\(^{135}\) or intermediate scrutiny\(^{136}\) test is applied, a state must only show a legitimate or important interest. If a compelling interest is shown, all three tests (rational basis, intermediate scrutiny, and strict scrutiny) will be satisfied.

The Fourteenth Amendment of the United States Constitution provides that a State may not "deny to any person within its jurisdiction the equal protection of the laws."\(^{137}\) A challenge brought pursuant to the Equal Protection Clause will probably fail for two primary reasons: strict scrutiny

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131. See Mississippi Employment Protection Act, supra note 3, § 4(a) ("Employers in the State of Mississippi shall only hire employees who are legal citizens of the United States of America or are legal aliens.").
132. See id. § 71-11-1.
133. Id. (emphasis added).
134. To satisfy strict judicial scrutiny, a statute must be narrowly tailored (first prong) and necessary to promote a compelling or overriding governmental interest (second prong).
135. Under the rational basis test, the law (or other government action) will be upheld if it is rationally related to any conceivable legitimate end of government.
136. Under intermediate scrutiny, the law (or other government action) will be upheld only if it involves important government interests that are furthered by substantially related means.
137. U.S. Const. amend. XIV, § 1.
will likely not be applied and any group of plaintiffs challenging the Act will not be able to show that Mississippi adopted the Act "because of," not merely "in spite of," its adverse effects upon an identifiable group. The Mississippi Act does not contain any language that indicates that the State adopted the Act because of its potential adverse affect on illegal aliens. After analyzing the case law in Section B concerning employment restrictions placed on illegal aliens, it is evident that courts have not struck down such statutes on equal protection grounds. Due to this fact and the reasons stated above, the Mississippi Act will likely not be struck down based on the Equal Protection Clause.

The Due Process Clause of the Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." The Mississippi Act will likely survive any procedural due process challenge because the Act allows any employer or other person penalized under the statute the right to appeal: "Any person or entity penalized under this section shall have the right to appeal to the appropriate entity bringing charges or to the circuit court of competent jurisdiction.

The Court in Lozano v. City of Hazleton struck down one of the statutes at issue in the case partly because it violated the Due Process Clause of the Fourteenth Amendment for failure to provide notice. The Mississippi

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138. Strict scrutiny will likely not be applied because no court has ever held illegal aliens as a suspect class. Therefore, Mississippi will only have to meet a lower standard of either intermediate scrutiny or the rational basis test.

139. See Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 540 (M.D. Pa. 2007) ("The equal protection clause prohibits states from intentionally discriminating between individuals on the basis of race. To prove intentional discrimination by a facially neutral policy, a plaintiff must show that the relevant decision-maker . . . adopted the policy at issue 'because of,' not merely 'in spite of' its adverse effects upon an identifiable group.").

140. See generally Mississippi Employment Protection Act, supra note 3.

141. See Plyler v. Doe, 457 U.S. 202, 217 (1982) (using intermediate scrutiny to invalidate a Texas statute that sought to exclude illegal alien children from public education because the state did not show the statute furthered a substantial state interest); Lozano, 496 F. Supp. 2d at 540 (rejecting an Equal Protection Clause argument that a local employment statute was unconstitutional by employing a "because of," "in spite of" test because the statute was facially neutral); Gray v. City of Valley Park, 2008 U.S. Dist. LEXIS 7238, 37 (8th Cir. 2008) (holding the Immigration Reform and Control Act’s preemption clause exception applies and the Supremacy Clause does not bar the local employment statute).

142. U.S. Const. amend. XIV, § 1.

143. See Mississippi Employment Protection Act, supra note 3 (describing the opportunity to appeal when found in violation of the Act).

144. See Lozano 496 F. Supp. 2d at 536 (describing notice as the "cornerstone of due process," the Court concludes that the IIRA "fails to require that anyone provide notice to an employee when a complaint is filed or at any time during the proceedings").
Act, however, provides such notice in giving a person or entity penalized by the Act the opportunity to appeal the decision.145 Any challenge based on substantive due process will also fail because strict judicial scrutiny will not apply, thereby making Mississippi’s burden in showing that the statute furthers some state interest substantially less.

C. Supremacy Clause

The Mississippi Act should be held constitutionally void because of the Supremacy Clause of the United States Constitution and IRCA. The Supremacy Clause provides that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof, and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."146 A state statute or government regulation will be held in violation of the Supremacy Clause if it is pre-empted by a U.S. federal law or the U.S. Constitution. The Mississippi Act is pre-empted by the IRCA’s preemption clause because it fails to fall within either of the two exceptions provided in the clause: "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."147

Two provisions in the Mississippi Act will be at issue in any Supremacy Clause challenge. In the first provision that potentially violates the Supremacy Clause, the Mississippi Act provides that:

Any employer violating the provisions of this section shall be subject to the cancellation of any state or public contract, resulting in ineligibility for any state or public contract for up to three (3) years, the loss of any license, permit, certificate or other document granted to the employer by any agency, department or government entity in the State of Mississippi for the right to do business in Mississippi for up to one year, or both.148

Mississippi will likely try to argue with respect to this provision that it falls under the "licensing" exception of the IRCA’s preemption clause. This argument may be accepted depending on how broadly the relevant jurisdiction reads the IRCA clause. The court in Lozano, for example, held

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145. Mississippi Employment Protection Act, supra note 3, § (7)(e)(i).
146. U.S. Const. art. VI, cl. 2.
148. Mississippi Employment Protection Act, supra note 3 (emphasis added).
that the IRCA’s preemption clause licensing exception only applies if the statute at issue revokes the license of a business due to a violation of the IRCA, not the statute at issue.\textsuperscript{149} However, the court in Gray v. City of Valley Park ruled that the licensing exception did apply to a statute substantially similar to the one at issue in Lozano because the ordinance revoked business licenses for violations of the ordinance, not the IRCA.\textsuperscript{150} Therefore, it will depend on the jurisdiction if the provision of the Mississippi Act stated above will be held in violation of the IRCA’s preemption clause, and thereby in violation of the Supremacy Clause of the Constitution.

The reason why, however, the Mississippi Act should be held constitutionally void, regardless of jurisdiction, is that the second provision at issue under a Supremacy Clause challenge. This provision of the Act in part states:

It shall be a \textit{felony} for any person to accept or perform employment for compensation knowing or in reckless disregard that the person is an unauthorized alien with respect to employment during the period which the unauthorized employment occurred. Upon conviction, a violator shall be subject to imprisonment in the custody of the Department of Corrections for not less than one (1) year nor more than five (5) years, a fine of not less than One Thousand Dollars ($1,000.00) nor more than Ten Thousand Dollars ($10,000.00), or both.\textsuperscript{151}

This clause (hereinafter referred to the "felony and fine provision") acts as a clear violation of the IRCA’s preemption clause\textsuperscript{152} and does not fit into either the "licensing" or "similar laws" exception. The above provision in the Mississippi Act cannot in any way be read to reasonably relate to the licensing or similar law exception, as it imposes imprisonment and fines for violators of the Mississippi Act.\textsuperscript{153} Therefore, even if a jurisdiction adopts

\begin{itemize}
\item \textsuperscript{149} See Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 520 (M.D. Pa. 2007) ("In the instant case, Hazleton suspends the business permit of those who violate its Ordinance, not those who violate IRCA.").
\item \textsuperscript{150} See Gray v. City of Valley Park, No. 07-0088, 2008 U.S. Dist. LEXIS 7238 (E.D. Mo. Jan. 31, 2008) ("The plain meaning of the statute clearly provides for state and local governments to pass licensing laws which touch on the subject of illegal immigration. The statute at issue is such a licensing law, and therefore is not expressly preempted by the federal law.").
\item \textsuperscript{151} Mississippi Employment Protection Act, \textit{supra} note 3 (emphasis added).
\item \textsuperscript{152} 8 U.S.C. § 1324(a)(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, recruit or refer for a fee for employment, unauthorized aliens.").
\item \textsuperscript{153} Mississippi Employment Protection Act, \textit{supra} note 3
\end{itemize}
the view, similar to the one held in *Gray v. City of Valley Park*, that the IRCA need not be violated for the licensing exception to apply, a court can still in no reasonable way hold that the felony and fine provision stated above falls within one of the two exceptions contained within the IRCA preemption clause. The felony and fine provision stated above goes far beyond the bounds of the Valley Park ordinance held constitutional in *Gray v. City of Valley Park*, and any jurisdiction should find this provision, if not the entire Mississippi Act, constitutionally repugnant.

The Mississippi Legislature in the Act attempts to anticipate any preemption claim by providing that "[t]his section shall not be construed as an attempt to pre-empt federal law," immediately before the felony and fine provision. This statement, however, should not be given weight by a court because the felony and fine provision is a clear violation of the IRCA’s preemption clause. Thus, the entire Act or the felony and fine provision should fail under constitutional scrutiny based upon the Supremacy Clause of the Constitution. Even though a court will likely not find any equal protection or due process violation, cases such as *Lozano* and *Gray* have shown how pivotal the Supremacy Clause and the IRCA can be in deciding the constitutionality of a state statute designed to place restrictions on the employment of illegal aliens. The Supremacy Clause and the IRCA will be the best mode to attack similar statutes in the future.

**IV. The Effect of Illegal Aliens on the United States Economy**

Regardless of the constitutionality of recent State legislation designed to halt the employment of illegal aliens, will this legislation likely help the State’s and the country’s economy? The answer to this question will not be clear at the end of this section, but the lack of a clear answer does not mean that the recent State legislation is justified. To the contrary, the lack of a dispositive answer to the question creates doubt in the rationales behind

154. *See* *Gray*, 2008 U.S. Dist. LEXIS 7238 at 37 ("The plain meaning of the statute clearly provides for state and local governments to pass licensing laws which touch on the subject of illegal immigration. The statute at issue is such a licensing law, and therefore is not expressly preempted by the federal law.").

155. *Id.*

156. *Mississippi Employment Protection Act, supra* note 3.

157. *See* 8 U.S.C. § 1324(a)(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.").
state statutes such as the Mississippi Act, and serves to question whether states such as Mississippi acted both too quickly and harshly in enacting these laws. This section will focus on contrasting studies analyzing the effect of illegal aliens on the U.S. economy.

A. "The High Cost of Cheap Labor"

The "High Cost of Cheap Labor: Illegal Immigration and the Federal Budget" is a study released by the Center of Immigration Studies\(^\text{159}\) (CIS) in August of 2004. Claiming that the study was "one of the first to estimate the total impact of illegal immigration on the federal budget,"\(^\text{160}\) the CIS used Census Bureau data to support several major conclusions.\(^\text{161}\) Most significantly, the study asserted that "[h]ouseholds headed by illegal aliens imposed more than $26.3 billion in costs on the federal government in 2002 and paid only $16 billion in taxes, creating a net fiscal deficit of almost $10.4 billion, or $2,700 per illegal household."\(^\text{162}\) Among the largest costs of illegal aliens cited were "Medicaid ($2.5 billion); treatment for the uninsured ($2.2 billion); food assistance programs such as food stamps, WIC, and free school lunches ($1.9 billion); the federal prison and court systems ($1.6 billion); and federal aid to schools ($1.4 billion)."\(^\text{163}\) The study additionally estimates that if amnesty is granted for all illegal aliens, the net fiscal deficit would grow to nearly $29 billion.\(^\text{164}\) Concluding that the fiscal impact of illegal aliens at the federal level is almost certain to "create a large fiscal deficit at the state and local levels,"\(^\text{165}\) this study casts illegal aliens as a drain to the federal budget. The methodology employed in this and other studies, however, were later questioned in the report analyzed below.


\(^{159}\) Id. at 2 ("The Center for Immigration Studies, founded in 1985, is a non-profit, non-partisan research organization in Washington, D.C., that examines and critiques the impact of immigration on the United States.").

\(^{160}\) Id. at 3.

\(^{161}\) Id.

\(^{162}\) Id. (emphasis added).

\(^{163}\) Id.

\(^{164}\) Id.

\(^{165}\) Id. at 38.
B. "The Impact of Unauthorized Immigrants on the Budgets of State and Local Governments"\textsuperscript{166}

The Congressional Budget Office (CBO) in December of 2007 issued a report entitled "The Impact of Unauthorized Immigrants on the Budgets of State and Local Governments."\textsuperscript{167} This report questions the methodology employed in previous studies finding that illegal aliens create a net fiscal deficit in the federal budget.\textsuperscript{168} The report further asserts that any impact illegal aliens have on the federal economy should not be used to conclude that illegal aliens have a similar impact at state or local levels.\textsuperscript{169} The reason for this is because of "the type of services provided at each level of government and the rules governing those programs."\textsuperscript{170} For example, illegal aliens are prohibited from receiving Social Security benefits from the federal government, but state and local governments provide certain services to individuals, regardless of their immigration status or ability to pay.\textsuperscript{171}

The CBO study relies on "29 reports published over the past 15 years that attempted to evaluate the impact of unauthorized immigrants on the budgets of state and local governments."\textsuperscript{172} After analyzing these sources, the CBO provides several general conclusions that are common findings in all or most of the 29 reports. One conclusion the CBO states is that "[t]he amount that state and local governments spend on services for unauthorized immigrants represents a small percentage of the total amount spent by those governments to provide such services to residents in their jurisdictions."\textsuperscript{173} Additionally, most of the estimates examined by the CBO provided that

\begin{itemize}
  \item \textsuperscript{166} The Congress of the United States Congressional Budget Office, The Impact of Unauthorized Immigrants on the Budgets of State and Local Governments (2007), http://www.cbo.gov/ftpdocs/87xx/doc8711/12-6-Immigration.pdf.
  \item \textsuperscript{167} Id.
  \item \textsuperscript{168} Id. at 1 ("It is important to note . . . that currently available estimates have significant limitations; therefore, using them to determine an aggregate effect across all states would be difficult and prone to considerable error.").
  \item \textsuperscript{169} Id. ("The impact of unauthorized immigrants on the federal budget differs from that population’s effect on state and local budgets primarily because of the types of services provided at each level of government and the rules governing those programs.").
  \item \textsuperscript{170} Id.
  \item \textsuperscript{171} Id. (describing why any impact illegal aliens have on the federal economy cannot be translated to state and local levels).
  \item \textsuperscript{172} Id. at 2 (discussing how the CBO study was prepared and what methods were used).
  \item \textsuperscript{173} Id. at 3 (concluding that state and local governments spend a small percentage on services for illegal aliens).
\end{itemize}
illegal aliens "accounted for less than 5 percent of total state and local spending for those services."

The CBO, however, also concludes that "[t]he tax revenues that unauthorized immigrants generate for state and local governments do not offset the total cost of services provided to those immigrants." Any precise estimate, though, on the amount of the deficit is difficult to obtain.

Thus, in analyzing these past 29 studies, the CBO creates substantial doubt as to the accuracy in any report analyzing the alleged deficit illegal aliens create on state and local levels. Even though the CBO concludes that most of the previous studies found that the tax revenues, which illegal aliens generate for state and local governments, do not offset the total cost of the services provided to those same people, the CBO also asserts that any precise estimate is difficult to maintain. The report further establishes that any drain illegal aliens create on state or local programs accounts for a very small percentage of the total amount spent on those programs. Finally, the report outwardly questions the methodology of reports analyzing the effect of illegal aliens on the federal budget.

C. A Case Study

Angel Martinez is an illegal alien currently residing in the United States. Illegally crossing the Mexican border into the U.S. in 1999, Mr. Martinez has since "done backbreaking work, harvesting asparagus, pruning grapevines and picking the ripe fruit. More recently, he has also washed trucks, often working as much as 70 hours a week, earning $8.50 to $12.75 an hour." In 2004, Mr. Martinez paid roughly $2,000 toward Social Security and $450 for Medicare, but different than most other
Americans, Mr. Martinez will not be entitled to the benefits.\textsuperscript{181} Mr. Martinez is not the only illegal alien paying out money to programs such as Social Security and Medicare without being able to receive any of the benefits in the future. He "belongs to a big club."\textsuperscript{182} This club is so big that the estimated seven million or so illegal alien workers in the United States are providing "the system with a subsidy of as much as $7 billion a year."\textsuperscript{183} While it has been evident that illegal aliens pay a variety of taxes, their contribution to Social Security is overwhelming, growing to 10 percent of the federal surplus in 2004.\textsuperscript{184} Marcelo Suarez-Oroco, co-director of immigration studies at New York University, stated that illegal aliens could provide "the fastest way to shore up the long-term finances of Social Security."\textsuperscript{185}

While Mr. Martinez in no way proves that illegal aliens as a group give more through taxes to the government than they receive back in federal programs, his story showcases how the United States benefits substantially from him and others alike in certain ways. It is impossible to know precisely how many other illegal aliens pay their taxes like Mr. Martinez, but "according to specialists, most of them do."\textsuperscript{186} Mr. Martinez’s story and the larger positive effect illegal aliens have on programs such as Social Security instill doubt in the rationales used behind state laws seeking to completely halt the employment of illegal aliens. Does Mr. Martinez and millions of others like him act as a "compelling," or even legitimate interest in denying them the opportunity to work?\textsuperscript{187}

\textbf{V. Conclusion}

Illegal aliens residing in the United States have not and likely will not receive the same protections afforded to all other aliens. Illegal aliens do,

\textsuperscript{181} See id. (describing how much Mr. Martinez has paid to Social Security and Medicare without the potential of receiving the future benefits from doing so).

\textsuperscript{182} Id.

\textsuperscript{183} Id. (emphasis added).

\textsuperscript{184} See id. ("The extent of their contributions to Social Security is striking: the money added up to about 10 percent of last year’s surplus—the difference between what the system currently receives in payroll taxes and what it doles out in pension benefits.").

\textsuperscript{185} Id.

\textsuperscript{186} Id.

\textsuperscript{187} See Mississippi Employment Protection Act, supra note 3 ("The Legislature declares that it is a compelling public interest of this state to discourage illegal immigration.").
however, have means to challenge recent state immigration employment laws, especially those that impose harsh penalties on employers who knowingly hire illegal aliens. The Mississippi Act serves as a prime example of a state statute that goes far beyond the licensing exception in IRCA preemption clause by making it a felony for an employer to hire an illegal alien. This Act should be pre-empted by the IRCA and held constitutionally repugnant due to the Supremacy Clause of the Constitution. Illegal aliens may also have means to challenge state statutes based on the Equal Protection or Due Process grounds if the statute will not further either a legitimate or important government interest. Although courts have generally not looked favorably upon such equal protection and due process claims concerning illegal aliens, this outlook may change due to the lack of clarity over whether illegal aliens really do have a negative effect on the economy (federal or state). The illegal alien issue in the United States will not be solved by state legislatures such as Mississippi. Such state action only serves to perpetuate stereotypes, deprive businesses, and reduce seven million Americans to a cost/benefit analysis. Until more clarity can be reached on the effect illegal aliens have on the U.S. economy, states should not enact laws with harsher punishments than the federal standard established in the IRCA in 1986.