

# CALIFORNIA DREAMIN': CAN STATE UNIVERSITIES LEGALLY HIRE NON-WORK AUTHORIZED ALIENS

GEORGE FISHMAN\*

## ABSTRACT

*A notable group of immigration law professors has assured California that it can allow its State universities to hire aliens not authorized to work under federal law, concluding that the Immigration Reform and Control Act of 1986's "prohibition on hiring undocumented persons [known as employer sanctions] does not bind state government entities". They contend that Congress cannot intrude on the States' historic police power to regulate employment without being explicit about doing so, and IRCA does not explicitly spell out that employer sanctions apply to States as employers. The professors also contend that the States' constitutional right to select their elected and non-elected leaders allows them to hire unauthorized aliens as professors, regardless of any congressional command to the contrary.*

*I conclude that the professors' first argument is incorrect because 1) Congress clearly intended employer sanctions to apply to all employers, 2) Congress had good reason for not spelling out application to the States, 3) Congress can evidence its clear and manifest purpose without the need for such a spelling out, and 4) in any case, employer sanctions are unlikely to be the sort of mandate that require any spelling out in the first place.*

*I further conclude that the professors' second argument may possibly be correct—to the extent employer sanctions were applied to State policy-making officials. However, the right of State universities to hire unauthorized aliens as professors would have to be extrapolated from Supreme Court rulings that States have the right to impose citizenship tests for positions such as public school teachers. This is a bridge too far. It is not clear that courts would agree to the obverse of the principle—that States have a right to expand eligibility to non-citizens, even to aliens unauthorized to work in the United States. And even if courts were to agree in the context of public school teachers, it is unlikely that they would equate professors with school teachers as performing a role that goes to the heart of representative government.*

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\* George Fishman is the Senior Legal Fellow at the Center for Immigration Studies. He served as a Deputy General Counsel at the U.S. Department of Homeland Security from 2018 to 2021 and as Acting Chief Counsel for U.S. Citizenship and Immigration Services from 2020 to 2021. From 1998 to 2018, he served as the Chief Counsel (or Chief Minority Counsel) for the U.S. House Judiciary Committee's subcommittee with jurisdiction over immigration, and from 1995 to 1998 as a Counsel on the subcommittee. From 1989 to 1995, he served as Legislative Counsel to U.S. Representative Henry J. Hyde. Mr. Fishman received his B.A. from the University of Illinois at Champaign-Urbana and his J.D. from the University of Michigan Law School.

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## INTRODUCTION

On October 19, 2022, Miriam Jordan reported in the *New York Times* that

[A] coalition of undocumented student leaders and some of the nation's top legal scholars is proposing that California... begin employing undocumented students at the 10 University of California campuses.

The proposal... calls for the state to defy current interpretations of a 1986 federal immigration law that prohibits U.S. employers from hiring undocumented immigrants. [A] new legal analysis... argues that the law does not apply to states.

Backed by Erwin Chemerinsky, the dean of the University of California, Berkeley, School of Law; Adam B. Cox of New York University Law School; and constitutional and immigration scholars at Cornell, Stanford and Yale, among other universities, the concept that those in the country unlawfully could be hired for state jobs could have implications for California, where the U.C. system is the third-largest employer, and for the broader population of... undocumented people who live in the United States.<sup>1</sup>

The student leaders wrote a letter to Michael Drake, the President of the University of California ("UC"), in which they "request that [he] implement the strategy set forth in this letter to permit the hiring of undocumented students for positions of employment within the University of California—even if they lack explicit authorization to be employed under federal law."<sup>2</sup> They argued that

UC has a moral and legal obligation to act *now* on behalf of our undocumented graduate and undergraduate students. Critically, hundreds of thousands of undocumented students across the nation already cannot access DACA,<sup>3</sup> because

1 Miriam Jordan, *Students, Legal Scholars Push California Universities to Hire Undocumented Students*, N.Y. TIMES, Oct. 19, 2022, <https://www.nytimes.com/2022/10/19/us/daca-dreamers-university-of-california.html>.

2 Letter from Karely Amaya Rios, Co-Chair, IDEAS (Improving Dreams Equity Access and Success) at UCLA '19–22, Co-Chair, Undocumented Student-Led Network (USLN), Master of Public Policy Candidate, University of California, Los Angeles (UCLA); Jeffrey Umaña Muñoz, Retention Director, USLN, Co-Chair, IDEAS at UCLA, Bachelor of Arts Candidate, UCLA; Carlos Alarcon, Co-Chair, USLN, Master of Public Policy Candidate, UCLA; Abraham Cruz Hernandez, Co-Chair, IDEAS at UCLA '19–22, Administrative Director, USLN, Bachelor of Arts Candidate, UCLA; Hiroshi Motomura, Susan Westerberg Prager Distinguished Professor of Law, Faculty Co-Director, Center for Immigration Law and Policy (CILP), UCLA School of Law; Ahilan Arulanantham, Professor from Practice, Faculty Co-Director, CILP, UCLA School of Law; Astghik Hairapetian, Law Fellow, CILP, UCLA School of Law; Kent Wong, Director, Labor Center, UCLA; Victor Narro, Project Director, Labor Center, UCLA, Lecturer in Law, UCLA School of Law; Chris Newman, Lecturer, Labor Studies Department, UCLA; Ju Hong, Director, Dream Resource Center, UCLA Labor Center, and Aidin Castillo Mazantini, Executive Director, UC Immigrant Legal Services Center, to Michael Drake, President, University of California, at 1 (Oct. 2022), <https://docs.google.com/document/d/1VoKC7DPCr-PO414Z-7r8CudhYFirey4DlMnRoRK8etk/edit>.

3 As the U.S. Department of Homeland Security describes the DACA program (Deferred Action for Childhood Arrivals),

they entered the U.S. after the policy's cutoff date—which requires people to have entered the United States prior to June 15, 2007, because they sought to apply after July 2021—when a court order barred the federal government from accepting new applications,<sup>4</sup> or for other reasons related to ongoing litigation over the program. As a result of these developments, many students already pursuing graduate and undergraduate studies, and the vast majority of undocumented high school graduates this year, cannot access DACA.

At [UC], students who cannot access DACA are being systematically denied opportunities afforded to their classmates. ... This unfair treatment of our undocumented students must end, and the University has legal authority to end it.<sup>5</sup>

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On June 15, 2012, then-Secretary of Homeland Security ... Janet Napolitano issued a memorandum providing new guidance for the exercise of prosecutorial discretion with respect to certain young people who came to the United States years earlier as children, who have no current lawful immigration status, and who were already generally low enforcement priorities for removal ... DHS [would] consider granting “deferred action,” on a case-by-case basis, for individuals who:

1. Came to the United States under the age of 16;
2. Continuously resided in the United States for at least 5 years preceding June 15, 2012, and were present in the United States on that date;
3. Are in school, have graduated from high school, have obtained a General Education Development (GED) certificate, or are an honorably discharged veteran of the Coast Guard or Armed Forces of the United States;
4. Have not been convicted of a felony offense, a significant misdemeanor offense, or multiple misdemeanor offenses, or otherwise do not pose a threat to national security or public safety; and
5. Were not above the age of 30 on June 15, 2012.

Individuals who request relief under this policy, meet the criteria above, and pass a background check may be granted deferred action. Deferred action is a longstanding practice by which DHS ... ha[s] exercised their discretion to forbear from or assign lower priority to removal action in certain cases for humanitarian reasons, for reasons of administrative convenience, or on the basis of other reasonable considerations involving the exercise of prosecutorial discretion.

Deferred Action for Childhood Arrivals, 87 Fed. Reg. 53153 (Aug. 30, 2022), <https://www.govinfo.gov/content/pkg/FR-2022-08-30/pdf/2022-18401.pdf>. An alien granted deferred action may apply for work authorization “if the alien establishes an economic necessity for employment.” 8 C.F.R. § 274a.12(c)(14) (2022).

4 DHS states on its website that:

On July 16, 2021, the U.S. District Court for the Southern District of Texas held that the DACA policy “is illegal.” The Court granted summary judgment on plaintiffs’ Administrative Procedure Act (APA) claims; vacated the June 15, 2012 DACA memorandum ... remanded [it] to DHS for further consideration; and issued a permanent injunction prohibiting the government’s continued administration of DACA and the reimplementation of DACA without compliance with the APA. The Court, however, temporarily stayed its order vacating the DACA memorandum and its injunction with regard to individuals who obtained DACA on or before July 16, 2021, including those with renewal requests.

DHS, Deferred Action for Childhood Arrivals (DACA): Important Information About DACA Requests, <https://www.dhs.gov/deferred-action-childhood-arrivals-daca> (last visited Apr. 11, 2023). See *Texas v. U.S. and Perez v. New Jersey*, 1:18-CV-00068 (S.D. Tex. July 16, 2021) (order granting permanent injunction), [https://www.govinfo.gov/content/pkg/USCOURTS-txsd-1\\_18-cv-00068/pdf/USCOURTS-txsd-1\\_18-cv-00068-4.pdf](https://www.govinfo.gov/content/pkg/USCOURTS-txsd-1_18-cv-00068/pdf/USCOURTS-txsd-1_18-cv-00068-4.pdf).

5 Letter from Karely Amaya Rios et al., to Michael Drake, *supra* note 2, at 1.

As Ms. Jordan reported

Ahilan Arulanantham, co-director of the Center for Immigration Law and Policy at U.C.L.A., said he began hearing last year from faculty about a worsening problem with the increase in the number of undocumented students without DACA protections—students who could not be paid to work as research assistants or in other campus jobs.

Mr. Arulanantham's team had already concluded that the federal law against hiring undocumented people did not bind states, and they began holding listening sessions with scholars across the country to vet their reasoning.<sup>6</sup>

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"This proposal has been hiding in plain sight," Mr. Arulanantham said. "For nearly 40 years, state entities thought they were bound by the federal prohibition against hiring undocumented students when, in fact, they were not."<sup>7</sup>

Who were the law professors and what exactly did they conclude? The twenty-seven professors<sup>8</sup> have indeed assured the State of California that it can, consistent

6 Jordan, *supra* note 1.

7 *Id.*

8 Sameer Ashar, Clinical Professor of Law, Associate Dean for Equity Initiatives, UC Irvine School of Law; Jennifer M. Chacón, Professor of Law, Stanford Law School; Dean Erwin Chemerinsky, Jesse H. Choper Distinguished Professor of Law, Berkeley Law; Adam B. Cox, Robert A. Kindler Professor of Law, New York University Law School; Ingrid Eagly, Professor of Law, UC, Los Angeles School of Law; Pratheepan Gulasekaram, Professor of Law, Santa Clara University School of Law; Dean Kevin Johnson, Mabie-Apallas Professor of Public Interest Law and Chicana/o Studies, UC Davis School of Law, Michael Kagan, Joyce Mack Professor of Law, University of Nevada, Las Vegas, William S. Boyd School of Law; Peter Markowitz, Professor of Law, Benjamin N. Cardozo School of Law; Shoba Sivaprasad Wadhia, Associate Dean for Diversity, Equity and Inclusion, Samuel Weiss Faculty Scholar/Clinical Professor of Law, Penn State Law; Michael Wishnie, William O. Douglas Clinical Professor of Law, Yale Law School; Stephen Yale-Loehr, Professor of Immigration Law Practice, Cornell Law School; Victor C. Romero, Maureen B. Cavanaugh Distinguished Faculty Scholar & Professor of Law, Penn State Law-University Park; Stephen Lee, Professor of Law, UC Irvine; Ming Hsu Chen, Professor of Law, Harry & Lillian Hastings Research Chair, Director of the Center on Race, Immigration, Citizenship and Equality, UC Hastings College of the Law; César Cuauhtémoc García Hernández, Gregory Williams Chair in Civil Rights and Civil Liberties, Professor of Law, Ohio State University; Angélica Cházaro, Charles I. Stone Professor of Law, University of Washington School of Law; David Baluarte, Associate Dean for Academic Affairs, Clinical Professor of Law and Director, Immigrant Rights Clinic, Washington and Lee University School of Law; Daniel Kanstroom, Professor of Law, Thomas F. Carney Distinguished Scholar, Faculty Director, Rappaport Center for Law and Public Policy, Co-director, Center for Human Rights and International Justice, Boston College Law School; M Isabel Medina, Ferris Distinguished Professor of Law, Loyola University New Orleans College of Law; Gabriel J. Chin, Edward L. Barrett Jr. Chair and Martin Luther King Jr. Professor of Law, UC Davis School of Law; Angela M. Banks, Charles J. Merriam Distinguished Professor of Law, Sandra Day O'Connor College of Law, Arizona State University; Margaret H. Taylor, Professor of Law, Wake Forest University School of Law; Stella Burch Elias, Professor of Law & Chancellor William Gardiner Hammond Fellow in Law, University of Iowa College of Law; Juliet P. Stumpf, Robert E. Jones Professor of Advocacy and Ethics, Lewis & Clark Law School; Jennifer Gordon, Professor of Law, Fordham University School of Law; Allison Brownell Tirres, Associate Professor and Associate Dean for Academic Affairs and Strategic Initiatives, DePaul University College of Law. *See* Letter from Hiroshi Motomura, Susan Westerberg Prager Distinguished Professor of Law, Faculty

with federal law, grant California State universities the ability to hire and employ aliens not authorized to work in the United States (“unauthorized aliens”). They write to “offer legal analysis of a proposal that representatives of [UC] have recently received...[that] urges [it]...to hire undocumented students for positions within UC even if they lack employment authorization under federal immigration law.”<sup>9</sup> They conclude that “[i]n our considered view, based on research and analysis of this proposal and more generally on our study of the relevant federal statutory and constitutional provisions over many years, no federal law prohibits UC from hiring undocumented students”, “IRCA’s [the Immigration Reform and Control Act of 1986<sup>10</sup>] prohibition on hiring undocumented persons does not bind state government entities,”<sup>11</sup> and they “affirm that we believe that the legal foundation for hiring undocumented students within UC... is sound.”<sup>12</sup>

The professors have written a memorandum laying out their legal reasoning.<sup>13</sup> The memo contends that “IRCA’s prohibition [on hiring unauthorized aliens] *likely* does not bind State government entities.”<sup>14</sup> As indicated by the inclusion of the qualifier likely, the professors hedge their bet in the memo in a way they do not in the letter. Similar qualifiers can also be found elsewhere in the memo, as when the professors are careful to state that “on balance, the evidence *probably favors* a finding that IRCA does not bind States”<sup>15</sup> and “IRCA is *probably* best read to not bind the States.”<sup>16</sup>

The first primary argument the professors put forth is that IRCA does not explicitly spell out that its prohibition against knowingly hiring or employing unauthorized aliens applies to States as employers, and that without such a *spelling out*, Congress cannot intrude on the States’ historic police power to regulate employment within their boundaries. The professors’ second primary argument is that since States have a constitutional right to select their elected and nonelected leaders under

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Co-Director, Center for Immigration Law and Policy, UC Los Angeles School of Law and Ahilan Arulanantham, Professor from Practice, Faculty Co-Director, Center for Immigration Law & Policy, UC Los Angeles School of Law, to whom it may concern, at 3–6 (Sept. 7, 2022), <https://docs.google.com/document/d/1TDBqeo4MUmHk2mxlwCd0tYvWYLV1xVX4m-jO4CV7-E/edit> (last visited Apr. 11, 2023).

9 *Id.* at 1.

10 Pub. L. No. 99-603, § 101(a), 100 Stat. 3360 (1986) (codified as amended at § 274A(a) of the Immigration and Nationality Act, 8 U.S.C. § 1324a(a), <https://www.congress.gov/99/statute/STATUTE-100/STATUTE-100-Pg3445.pdf>).

11 Letter from Hiroshi Motomura and Ahilan Arulanantham to whom it may concern, *supra* note 8, at 2.

12 *Id.*

13 Memorandum from Ahilan Arulanantham, Hiroshi Motomura, and Astghik Hairapetian, UCLA Center for Immigration Law and Policy, *Memo Analyzing Whether IRCA Applies to States* (Oct. 2022), <https://docs.google.com/document/d/1TDBqeo4MUmHk2mxlwCd0tYvWYLV1xVX4m-jO4CV7-E/edit> (last visited Apr. 11, 2023).

14 *Id.* at 7 (emphasis added).

15 *Id.* (emphasis added).

16 *Id.* at 8 (emphasis added).

criteria of their choosing, they consequently have a constitutional right to employ unauthorized aliens as professors at State universities, regardless of any command to the contrary by the U.S. Congress.

The stakes are high because, as Ms. Jordan reports, “[t]he class of young immigrants who grew up in the United States but are not eligible for DACA is expanding at the rate of 100,000 people each year.”<sup>17</sup> The stakes are also high because, as she also reports,

[C]ritics said it would most likely lead to legal challenges, as well as potential conflicts with the federal government. The Biden administration has tried to expand DACA protections and would be unlikely to take enforcement action, but a Republican administration could take a much stricter approach, said Josh Blackman, constitutional law professor at the South Texas College of Law Houston.

“It’s all fun and games with the Biden administration in town,” he said. “But in January 2025, if a Republican president takes office, California could be in for litigation and some ruinous fines.”<sup>18</sup>

On May 18, 2023, “[t]he [UC] regents, saying they support an equitable education for all, unanimously agreed . . . to find a pathway to enact a bold policy to hire students who lack legal status and work permits.”<sup>19</sup>

Teresa Watanabe reported in the Los Angeles Times that

The [UC] system has been under pressure to challenge a 1986 federal law barring the hiring of immigrants without legal status by asserting that it does not apply to states. . . . The regents voted to form a working group to examine that legal issue, along with practical considerations about how to roll out a policy that is already igniting controversy. But they made clear they are committed to their immigrant students and said the working group would complete its proposed plan by November.

“Absolutely, it is our intention to find a way to allow employment opportunities for all our students, regardless of their immigration status,” said Regent John A. Pérez, one of the key leaders in the effort to push a new policy forward. But he added the university needs time to work through the complex issue.

“This is too important to get wrong,” he said.

UC President Michael V. Drake and Board of Regents Chair Rich Leib also affirmed UC’s commitment to equity. “The University is committed to ensuring that all students, regardless of their immigration status, can pursue

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17 Jordan, *supra* note 1.

18 *Id.* California would also be a risk for criminal penalties, primarily for engaging in a pattern or practice of violations of employer sanctions. See *infra* sec. I.

19 Teresa Watanabe, *UC Regents Take Groundbreaking Step Toward Hiring Immigrant Students Without Legal Status*, L.A. Times, May 18, 2023, <https://www.latimes.com/california/story/2023-05-18/uc-students-legal-status-work-permits-daca>.

and attain a world-class UC education. This should include providing enriching student employment opportunities to all students," they said in a joint statement.

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UC officials have also weighed the potential for litigation against the university, public backlash and possible legal exposure to faculty and staff who would hire the students. Leib said regents need to make sure they consider the effect on all university members, including campus leaders who will need to implement any new policy.<sup>20</sup>

In this article, I will evaluate the professors' arguments. As to their first argument, I conclude that it is most likely incorrect for a number of reasons, including that Congress can evidence its *clear and manifest* purpose without the need for a spelling out if a State's policy would produce a result inconsistent with the objective of the federal statute and that IRCA's employer sanctions are unlikely to be the type of provisions that even arguably require such a spelling out.

As to the professors' second argument, it may be correct—to the extent that IRCA's employer sanctions should be applied to State elected and policy-making officials. However, whether States have a constitutional right to hire unauthorized aliens as professors at State universities is a much more tenuous (but still fascinating) claim. Such a right would have to be extrapolated from Supreme Court rulings that States have the right to impose citizenship tests for positions such as police officers and public school teachers. For college professors, this is likely a bridge too far. First, even if federal courts were to equate college professors with public school teachers, it is far from clear that they would agree that States may properly expand employment eligibility to aliens prohibited from employment under federal law—far afield from the principle that States may properly limit eligibility to U.S. citizens. Second, it is most likely that the courts would not equate professors at State universities with public school teachers, for reasons including the unique national purpose in providing youth with a basic education, the compulsory nature of attendance at elementary and secondary school, and the inherent developmental differences between children and adults.

## I. EMPLOYER SANCTIONS

The Select Commission on Immigration and Refugee Policy ("Select Commission") concluded in its final report in 1981 that

The Select Commission's determination to enforce the law is no reflection on the character or the ability of those who desperately seek to work and provide for their families. ... But if U.S. immigration policy is to serve this nation's interests, it must be enforced effectively. This nation has a responsibility to its people—citizens and resident aliens—and failure to enforce immigration law means not living up to that responsibility.<sup>21</sup>

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20 *Id.*

21 SELECT COMM'N ON IMMIGRATION AND REFUGEE POL'Y, U.S. IMMIGRATION POLICY AND THE NATIONAL

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The vast majority of undocumented / illegal aliens are attracted to this country by employment opportunities. ... As long as the possibility of employment exists, men and woman seeking economic opportunities will continue to take great risks to come to the United States, and curing illegal immigration will be extremely difficult. ... [T]he success of any campaign to curb illegal migration is dependent on the introduction of new forms of economic deterrents.<sup>22</sup>

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Without an enforcement tool to make the hiring of undocumented workers unprofitable, efforts to prevent the[ir] participation... in the labor market will continue to meet with failure. Indeed, the absence of such a law serves as an enticement for foreign workers. ... [S]ome form of employer sanctions is necessary if illegal migration is to be curtailed.<sup>23</sup>

The Select Commission was established by Congress in 1978 "to study and evaluate... existing laws, policies, and procedures governing the admission of immigrants and refugees to the United States" and to make "administrative and legislative recommendations."<sup>24</sup> Joyce Vialet, a Congressional Research Service ("CRS") Specialist in Immigration Policy, wrote a report at the request of the Senate Judiciary Committee in which she concluded that the Select Commission "was established in part in response to Congress' frustration in dealing with the seemingly intractable undocumented alien issue."<sup>25</sup> The Select Commission was chaired by Rev. Theodore Hesburgh, C.S.C., the president of the University of Notre Dame and former Chair of the U.S. Commission on Civil Rights.

In 1981, the Select Commission issued its report. The Commissioners voted 14–2 in favor of employer sanctions.<sup>26</sup> However, the Commissioners were "unable to reach a consensus as to the specific type of identification that should be required for verification"<sup>27</sup> of employment eligibility.

In 1986, the House Judiciary Committee affirmed the Select Commission's reasoning:

The principle means of... curtailing future illegal immigration... is through employer sanctions...

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INTEREST: THE FINAL REPORT AND RECOMMENDATIONS OF THE SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY WITH SUPPLEMENTAL VIEWS BY COMMISSIONERS 12 (1981), <https://babel.hathitrust.org/cgi/pt?id=uc1.31210011018916&view=1up&seq=106>.

22 *Id.* at 59.

23 *Id.* at 62.

24 Pub. L. No. 95-412, § 4(c), 92 Stat. 907 (1978), <https://www.congress.gov/95/statute/STATUTE-92/STATUTE-92-Pg907.pdf>.

25 JOYCE VIALET, CRS, LIBRARY OF CONGRESS, U.S. IMMIGRATION LAW AND POLICY 1952–1986: A REPORT PREPARED FOR THE USE OF THE SUBCOMMITTEE ON IMMIGRATION AND REFUGEE AFFAIRS, COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE, S. Print 100–100, at 89 (1988).

26 SELECT COMMISSION, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST, *supra* note 21, at 61.

27 *Id.* at 68. The Commissioners voted 9–7 in favor of employer sanctions with an existing form of identification and 8–7–1 (pass) in favor of sanctions with "some system of more secure identification." *Id.* at 61.

Employment is the magnet that attracts aliens here illegally. ... Employers will be deterred by... penalties... from hiring unauthorized aliens and this, in turn, will deter aliens from entering illegally or violating their status in search of employment.

The logic of this approach has been recognized and backed by the past four administrations, and by the Select Commission...

Now, as in the past, the Committee remains convinced that... employer sanctions is the most humane, credible and effective way to respond to the large-scale influx of undocumented aliens.<sup>28</sup>

In that year, employer sanctions were finally enacted into law as a part of IRCA. Senator Alan Simpson stated during Senate floor consideration that the legislation was “the basic work product of [the Select Commission].”<sup>29</sup> The Senate passed its version on September 19, 1985, by a vote of 69—30,<sup>30</sup> and the House passed its version on October 9, 1986, by voice vote.<sup>31</sup> A House—Senate conference committee resolved the two bodies’ differences and they agreed to the conference report in October 1986, the House by a vote of 238—173<sup>32</sup> and the Senate by a vote of 63—24.<sup>33</sup> President Reagan signed the bill into law on November 6, 1986.

IRCA created a new section 274A of the Immigration and Nationality Act (“INA”) titled Unlawful Employment of Aliens. The new section includes a subsection (a) titled Making Employment of Unauthorized Aliens Unlawful, providing in part that

(1) IN GENERAL.—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—

(A) an alien knowing the alien is an unauthorized alien (as defined in subsection (h)(3) with respect to such employment, or

(B) an individual without complying with the requirements of subsection (b) [involving an employment eligibility verification process in which an employer certifies on an “I-9” form that it has reviewed specified documents demonstrating identity and employment eligibility provided

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28 H.R. REP. NO. 99-682, pt. 1, at 46 (1986), <https://advance.lexis.com/r/documentprovider/zssyk/attachment/data?attachmentid=V1,215,38301,13703Hrp682-1From1to222,1&attachmetntype=PDF&attachmentname=OriginalSource&origination=&sequencenumber=&ishotdoc=false&docTitle=Immigration%20Control%20and%20Legalization%20Amendments%20Act%20of%201986&pdmfid=1000516>.

29 132 CONG. REC. 32410 (Oct. 16, 1986), <https://www.govinfo.gov/content/pkg/GPO-CRECB-1986-pt22/pdf/GPO-CRECB-1986-pt22-2-2.pdf>.

30 131 CONG. REC. 24318 (Sept. 19, 1985), <https://www.govinfo.gov/content/pkg/GPO-CRECB-1985-pt18/pdf/GPO-CRECB-1985-pt18-1-2.pdf>.

31 132 CONG. REC. 30102 (Oct. 9, 1986), <https://www.govinfo.gov/content/pkg/GPO-CRECB-1986-pt21/pdf/GPO-CRECB-1986-pt21-1-2.pdf>.

32 132 CONG. REC. 31646 (Oct. 15, 1986).

33 132 CONG. REC. 33245 (Oct. 17, 1986), <https://www.govinfo.gov/content/pkg/GPO-CRECB-1986-pt23/pdf/GPO-CRECB-1986-pt23-1-2.pdf>.

by a new hire and that the documents reasonably appear to be genuine and relate to the individual].

(2) CONTINUING EMPLOYMENT.—It is unlawful for a person or other entity, after hiring an alien for employment in accordance with paragraph (1), to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment.

(3) DEFENSE.—A person or entity that establishes that it has complied in good faith with the requirements of subsection (b) with respect to the hiring, recruiting, or referral for employment of an alien in the United States has established an affirmative defense that the person or entity has not violated paragraph (1)(A) with respect to such hiring, recruiting, or referral.

(4) USE OF LABOR THROUGH CONTRACT.—For purposes of this section, a person or other entity who uses a contract, subcontract, or exchange...to obtain the labor of an alien in the United States knowing that the alien is an unauthorized alien (as defined in subsection (h)(3)) with respect to performing such labor, shall be considered to have hired the alien for employment in the United States in violation of paragraph (1)(A).<sup>34</sup>

Subsection (h)(3) provided that

(3) DEFINITION OF UNAUTHORIZED ALIEN.—As used in this section, the term “unauthorized alien” means, with respect to the employment of an alien at a particular time, that the alien is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this chapter or by the Attorney General.<sup>35</sup>

As to enforcement, the new section includes subsections (e), titled Compliance, and (f), titled Criminal Penalties and Injunctions for Pattern or Practice Violations.” Subsection (e) provides in part that

(4) CEASE AND DESIST ORDER WITH CIVIL MONEY PENALTY FOR HIRING, RECRUITING, AND REFERRAL VIOLATIONS.—With respect to a violation of subsection (a)(1)(A) or (a)(2), the order under this subsection—

(A) shall require the person or entity to cease and desist from such violations and to pay a civil penalty in an amount of—

(i) not less than \$250 and not more than \$2,000 for each unauthorized alien with respect to whom a violation of either such subsection occurred,

(ii) not less than \$2,000 and not more than \$5,000 for each such alien in the case of a person or entity previously subject to one order

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34 Pub. L. No. 99-603, § 101(a), 100 Stat. 3360-61 (1986) (codified at INA § 274A(a)(1)–(4), 8 U.S.C. § 1324a(a)(1)–(4)), <https://www.congress.gov/99/statute/STATUTE-100/STATUTE-100-Pg3445.pdf>.

35 Pub. L. No. 99-603, § 101(a), 100 Stat. 3368 (1986) (codified at INA § 274A(h)(3), 8 U.S.C. § 1324a(h)(3)), <https://www.congress.gov/99/statute/STATUTE-100/STATUTE-100-Pg3445.pdf>.

under this paragraph, or

(iii) not less than \$3,000 and not more than \$10,000 for each such alien in the case of a person or entity previously subject to more than one order under this paragraph; and

(B) may require the person or entity—

(i) to comply with the requirements of subsection (b)...with respect to individuals hired (or recruited or referred for employment for a fee) during a period of up to three years, and

(ii) to take such other remedial action as is appropriate...

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(5) ENFORCEMENT OF ORDERS.—If a person or entity fails to comply with a final order issued under this subsection against the person or entity, the Attorney General shall file a suit to seek compliance with the order in any appropriate district court of the United States. In any such suit, the validity and appropriateness of the final order shall not be subject to review.<sup>36</sup>

Subsection (f) provides that

(1) CRIMINAL PENALTY.—Any person or entity which engages in a pattern or practice of violations of subsection (a)(1)(A) or (a)(2) shall be fined not more than \$3,000 for each unauthorized alien with respect to whom such a violation occurs, imprisoned for not more than six months for the entire pattern or practice, or both, notwithstanding the provisions of any other Federal law relating to fine levels.

(2) ENJOINING OF PATTERN OR PRACTICE VIOLATIONS.—Whenever the Attorney General has reasonable cause to believe that a person or entity is engaged in a pattern or practice of employment, recruitment, or referral in violation of paragraph (1)(A) or (2) of subsection (a), the Attorney General may bring a civil action in the appropriate district court of the United States requesting such relief, including a permanent or temporary injunction, restraining order, or other order against the person or entity, as the Attorney General deems necessary.<sup>37</sup>

## II. THE PROFESSORS' ARGUMENTS

### ***A. ARGUMENT #1: THE IMMIGRATION REFORM AND CONTROL ACT OF 1986'S EMPLOYER SANCTIONS DO NOT APPLY TO STATES BECAUSE THE LEGISLATION CONTAINS NO EXPLICIT CONGRESSIONAL AUTHORIZATION TO INTRUDE ON THE STATES' POLICE POWER TO REGULATE EMPLOYMENT***

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<sup>36</sup> INA § 274A(e)(4), (9); 8 U.S.C. § 1324a(e)(4), (9) (2022).

<sup>37</sup> Pub. L. No. 99-603, § 101(a), 100 Stat. 3368 (1986) (codified at INA § 274A(f), 8 U.S.C. § 1324a(f)), <https://www.congress.gov/99/statute/STATUTE-100/STATUTE-100-Pg3445.pdf>.

## 1. *The Sound of Silence*

The professors argue that

IRCA contains no language declaring that it binds States; in fact it makes no mention of States as actors with obligations. ... Thus, IRCA is best read simply not to apply to States.<sup>38</sup>

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IRCA makes it “unlawful for a person or other entity to hire... for employment in the United States” an unauthorized individual. ... A “person” is either an individual, 8 U.S.C. 1101(b)(3), or an organization defined as “an organization, corporation, company, partnership, association, trust, foundation or fund; and includes a group of persons, whether or not incorporated, permanently or temporarily associated together with joint action on any subject or subjects,” 8 U.S.C. 1101(a)(28). “Entity” is not defined as such in the statute, but a 1996 amendment to IRCA enacted in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 [“IIRIRA”] specifies that an “entity” “includes an entity in any branch of the Federal Government.” 8 U.S.C. 1324a(a)(7).<sup>39</sup> Thus, the statute mentions... various entities, including the Federal Government, as covered by its provisions, but nowhere mentions States.<sup>40</sup>

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At the same time that IIRIRA specified that the Federal Government was an “entity” without mentioning States, it added another section to the INA stating that “a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service [“INS”] information regarding the citizenship or immigration status, lawful or unlawful, of any individual.” 8 U.S.C. 1373(a). Thus, the Congress that amended IRCA to specifically bind Federal agencies knew how to specify that State entities were bound by its legislation. Its failure to do so in IRCA’s prohibition against hiring unauthorized individuals provides strong evidence that States are not included in its definition of “entity.”

The argument set forth above applies the *expressio unius est exclusio alterius* canon of statutory interpretation: “the expression of one thing is the exclusion of others[.]” ... [which] is properly applied “when the result to which its application leads is itself logical and sensible.” ... Not only do IRCA’s definitions of “person” and “entity” fail to include State governments, but they manifest a “strong contrast[.]” ... between Federal and State governments, by including only the former.<sup>41</sup>

38 Arulanantham, Motomura, and Hairapetian, *supra* note 13, at 13.

39 Pub. L. No. 104-208, § 412(d), 110 Stat. 3009-668 (1996) (codified at INA § 274A(a)(7), 8 U.S.C. § 1324a(a)(7)), <https://www.congress.gov/104/plaws/publ208/PLAW-104publ208.pdf>.

40 Arulanantham, Motomura, and Hairapetian, *supra* note 13, at 8–9 (footnotes omitted).

41 *Id.* at 9 (citations omitted).

The professors conclude that “IRCA’s failure to mention States while specifically mentioning Federal entities...suggests the statute likely does not bind State governments.”<sup>42</sup>

At first impression, the professors’ argument seems to make eminent sense. Why else would Congress specify that federal government entities are subject to employer sanctions, not say the same about State government entities, and elsewhere in the same legislation specify that federal and State government entities are subject to a separate requirement? It is easy to reach the conclusion that Congress must not have intended for entities within State governments (or local governments, for that matter) to be subject to employer sanctions. However, such a conclusion would be incorrect.

#### a. Clear and Unambiguous?

First, I will consider whether IRCA’s language—as modified by IIRIRA—that it is “unlawful for a person or other entity...to hire...for employment in the United States an alien knowing the alien is an unauthorized alien” and that an entity, otherwise undefined, “includes an entity in any branch of the Federal Government[.]” is clear and unambiguous. Of course, as the Supreme Court has admonished, “this Court has repeated with some frequency, ‘Where...the resolution of a question of federal law turns on a statute and the intention of Congress, we look first to the statutory language and then to the legislative history if the statutory language is unclear.’”<sup>43</sup>

Does the term *entity* in INA section 274A clearly and unambiguously include State governments acting as employers? The Supreme Court has stated that “[w]hen a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning” and then utilized dictionaries in order to determine such meaning.<sup>44</sup> As to entity, Merriam-Webster’s legal definition of the term is “an organization (as a business or *governmental unit*) that has a legal identity which is separate from those of its members.”<sup>45</sup> The Legal Information Institute (LII), an independently funded project of the Cornell Law School, defines the term as follows

An entity refers to a person or organization possessing separate and distinct legal rights, such as an individual, partnership, or corporation. An entity can, among other things, own property, engage in business, enter into contracts, pay taxes, sue and be sued. An entity is capable of operating legally, suing and making decisions through agents, e.g. a corporation,

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42 *Id.* at 7.

43 *Toibb v. Radloff*, 501 U.S. 157, 162 (1991) (quoting *Blum v. Stenson*, 465 U.S. 886, 896 (1984)).

44 *Smith v. United States*, 508 U.S. 223, 228 (1993).

45 Legal Definition: Entity (noun), <https://www.merriam-webster.com/dictionary/entity#legalDictionary> (emphasis added) (last visited Apr. 11, 2023).

a state,<sup>46</sup> or an association.<sup>47</sup>

It seems abundantly clear that the ordinary and natural meaning of entity can include a governmental entity, depending on context.

While entity is not defined in INA section 274A with regard to employer sanctions (except to the extent of the specified inclusion of any branch of the federal government), the manner in which the term is used elsewhere in the INA (as it existed at the time of the enactment of IIRIRA<sup>48</sup>), and in IIRIRA itself, also makes it clear that the term encompasses units and agencies of government.

As the professors point out, 8 U.S.C. section 1373, as added by IIRIRA, refers to “a Federal, State, or local government entity or official.” But, where the term *entity* is used without a specification that it refers to a governmental entity, do the INA, IRCA, and IIRIRA lend themselves to its reading as encompassing governmental units or agencies? The Supreme Court has often pointed out that the “normal rule of statutory construction [is] that ‘identical words used in different parts of the same act are intended to have the same meaning.’”<sup>49</sup> Elsewhere in the INA, the term *nongovernmental entity*<sup>50</sup> is used, implying that when the term is used without such a qualifier, it should be read to include a governmental entity (if appropriate in context). Section 274A itself, as created by IRCA, refers to an “entity which has review authority over immigration related matters,”<sup>51</sup> which could only refer to a federal agency. And the INA refers to a “law enforcement entity” (as in “duly recognized law enforcement entity”<sup>52</sup>), which could only refer to a governmental entity.

46 The LII defines a “state” as follows

A state is a political division of a body of people that occupies a territory defined by frontiers. The state is sovereign in its territory...and has the authority to enforce a system of rules over the people living inside it. That system of rules is commonly composed of a constitution, statutes, regulations, and common law.

The United States as a country is considered a sovereign state before the international community. Furthermore, the United States is divided into fifty sovereign states, as follows...

<https://www.law.cornell.edu/wex/state#:~:text=A%20state%20is%20a%20political,a%20territory%20defined%20by%20frontiers> (last visited Apr. 11, 2023). Thus, the LII would consider both the United States and each individual State as a state.

47 Entity, <https://www.law.cornell.edu/wex/entity> (emphasis added) (last visited Apr. 11, 2023).

48 I should note that subsequent to the enactment of IIRIRA, title 8 was amended to make reference to “an entity that provides dating services,” which presumably does not refer to governmental entities. *See* 8 U.S.C. § 1375a(e)(4)(B)(ii) (2022).

49 *Sorenson v. Secretary of the Treasury*, 475 U.S. 851, 860 (1986) (quoting *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932), *quoted in Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 87 (1934)). While portions of title 8 of the U.S. Code are not contained within the INA, the Supreme Court has concluded that this rule of statutory construction should also apply to different statutes that “operate together closely.” *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990).

50 INA § 214(c)(6)(F), 8 U.S.C. § 1184(c)(6)(F) (2022). The INA also makes reference to a “corporate entity.” INA § 214(c)(10), 8 U.S.C. § 1184(c)(10) (2022).

51 Pub. L. No. 99-603, § 101(a), 100 Stat. 3367 (1986) (codified at INA § 274A(e)(7), 8 U.S.C. § 1324a(e)(7) (2022)), <https://www.congress.gov/99/statute/STATUTE-100/STATUTE-100-Pg3445.pdf>.

52 INA § 210(b)(6)(B); 8 U.S.C. § 1160(b)(6)(B) (2022).

What of *expressio unius est exclusio alterius*? It is not an absolute rule, but only an interpretative aid (if that<sup>53</sup>). The Supreme Court concluded in 2002 that “the canon that expressing one item of a commonly associated group or series excludes another left unmentioned is only a guide, whose fallibility can be shown by contrary indications that adopting a particular rule or statute was probably not meant to signal any exclusion of its common relatives.”<sup>54</sup> And, a year later, the Court concluded that “[w]e do not read the enumeration of one case to exclude another unless it is fair to suppose that Congress considered the unnamed possibility and meant to say no to it.”<sup>55</sup>

In the next two subsections, I will argue that Congress’s failure to specify that States are included within the scope of entity in section 274A was “not meant to signal” their exclusion and that it is not fair to suppose that Congress meant to exclude them. But to the extent that the cannon of *expressio unius est exclusio alterius* may create doubt as to the pellucidity of the applicability of employer sanctions to States as employers, I should note that IRCA’s legislative history amply displays Congress’s intent that employer sanctions apply to all employers. The House Judiciary Committee report stated that “[t]he penalties are universally applied to all employers regardless of the number of employees...”<sup>56</sup> And the Committee’s *Summary and Explanation* of IRCA, published shortly after enactment, stated that “[a]ll employers are required to comply with the verification procedures for new hires.”<sup>57</sup> The Senate Judiciary Committee report was even more explicit:

This subsection of the new INA section 274A is intended to be broadly construed with respect to coverage. With the exception of the categories noted, all employers, recruiters, and referrers are covered: individuals, partnerships, corporations and other organizations, nonprofit and profit, private and public, who employ, recruit, or refer persons for employment in the United States.<sup>58</sup>

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53 Cass Sunstein contends that “the *expressio unius* principle . . . is a questionable one in light of the dubious reliability of inferring specific intent from silence.” Cass Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2109 n.182 (1990).

54 *United States v. Vonn*, 535 U.S. 55, 65 (2002).

55 *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168–69 (2003).

56 H.R. REP. NO. 99-682, pt. 1, at 56 (1986) (emphasis added), <https://advance.lexis.com/r/documentprovider/zssyk/attachment/data?attachmentid=V1,215,38301,13703Hrp682-1From1to222,1&attachmenttype=PDF&attachmentname=OriginalSource&origination=&sequencenumber=&ishotdoc=false&docTitle=Immigration%20Control%20and%20Legalization%20Amendments%20Act%20of%201986&pdmfid=1000516>.

57 STAFF OF H. COMM. ON THE JUDICIARY, 99TH CONG., THE “IMMIGRATION REFORM AND CONTROL ACT OF 1986” (P.L. 99-603): A SUMMARY AND EXPLANATION at 8 (Comm. Print Ser. 14 1986) (emphasis added), <https://babel.hathitrust.org/cgi/pt?id=pst.000011995135&view=1up&seq=1>.

58 S. REP. NO. 99-132, at 232 (1985) (emphasis added), <https://advance.lexis.com/r/documentprovider/zssyk/attachment/data?attachmentid=V1,215,38301,13621Srp132From1to114,1&attachmenttype=PDF&attachmentname=OriginalSource&origination=&sequencenumber=&ishotdoc=false&docTitle=Immigration%20Reform%20and%20Control%20Act%20of%201985&pdmfid=1000516>.

### b. States Were Not the Problem

The drafters of IRCA did not feel the need to specifically state the obvious, that States (when acting as employers) would be subject to employer sanctions just as would be any other employers. States at the time were simply not interested in employing unauthorized aliens. In fact, a score of them had passed laws penalizing employers for doing such. In 1980, the U.S. General Accounting Office (“GAO”) reported that

States that have enacted employer sanctions legislation include California (1971), Connecticut (1972), Delaware (1976), Florida (1977), Kansas (1973), Maine (1977), Massachusetts (1976), Montana (1977), New Hampshire (1976), Vermont (1977), and Virginia (1977). The central theme of these laws is that “no employer shall knowingly employ an alien who is not entitled to lawful residence in the United States...” California and Delaware have added the condition:... “if such employment would have an adverse effect on lawful resident workers.”...The penalties for violation range up to a maximum of \$1,000 per offense and /or confinement of 1 year per offense. ...To our knowledge, only Kansas has successfully prosecuted a case to date and imposed a fine of \$250...<sup>59</sup>

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[T]he remaining States are not planning enforcement of their ... legislation. The reasons vary: the illegal alien problem is not significant in those States; prosecution is up to the local officials; additional funds have not been allocated; and/or the States are awaiting pending Federal legislation.<sup>60</sup>

Congress was not faced with having to rein in what it believed to be rogue States seeking to hire unauthorized aliens (or otherwise thwart enforcement of federal immigration laws). As such, I would contend that Congress felt no need to divert drafting resources for that purpose. As to IIRIRA’s provision prohibiting a government entity / official from preventing a government entity / official from sending to, or receiving from, the INS information regarding the citizenship or immigration status of any individual, that provision specified State entities precisely because its goal was in part to rein in rogue State sanctuary jurisdictions. The House Judiciary Committee’s report stated that “This section is designed to prevent any State or local law, ordinance, executive order, policy, constitutional provision, or decision of any Federal or State court that prohibits or in any way restricts any communication between State and local officials and the INS.”<sup>61</sup> There was no such imperative in the context of employer sanctions to specify State

59 THE COMPTROLLER GENERAL, U.S. GENERAL ACCOUNTING OFF., PAD-80-22, REPORT TO THE CONGRESS OF THE UNITED STATES, ILLEGAL ALIENS: ESTIMATING THEIR IMPACT ON THE UNITED STATES at 45, 47 (1980), <https://www.gao.gov/assets/pad-80-22.pdf>. California had itself set in motion this State legislative gold rush. As the GAO noted, “[m]ost of the States enacted their employer sanctions legislation after the U.S. Supreme Court ruled [in *De Canas v. Bica*, 424 U.S. 351 (1976)] that California’s legislation... was constitutional.” THE COMPTROLLER GENERAL at 45.

60 *Id.* at 47.

61 H.R. REP. NO. 104-469, pt. 1, at 277 (1996), <https://www.congress.gov/104/crpt/hrpt469/CRPT-104hrpt469-pt1.pdf>.

entities, as the States were not a catalyzing agent for sanctions.

**c. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996's Clarification of the Meaning of Entity**

If IRCA was clear that the term *entity* in INA section 274A refers to governmental and nongovernmental entities alike, a conclusion that the INS quickly memorialized in implementing regulations,<sup>62</sup> why did Congress feel the need ten years later to specify that the term included any governmental entities? And why did it feel the need to specify that it included an entity in any branch of the Federal Government?

As I will explain below, the answer has to do with the mechanism to verify the identity and work eligibility of new hires, not employer sanctions per se. IIRIRA amended section 274A to specify that the federal government is included within the ambit of the term *entity* in a *belt-and-suspenders* effort to ensure that federal agencies would have to participate in IIRIRA's employment eligibility verification pilot programs. As the Supreme Court has concluded, such "redundancies are common in statutory drafting—sometimes in a congressional effort to be doubly sure",<sup>63</sup> and as the Seventh Circuit has concluded, "Congress may choose a belt-and-suspenders approach to promote its policy objectives".<sup>64</sup> Congress did not feel the need to specify in IIRIRA that State agencies were entities for purposes of section 274A because Congress in IIRIRA chose not to mandate State participation in the pilot programs. IIRIRA's failure to mention States simply does not demonstrate any congressional intent to exclude States from the employer sanctions regime.

In order to support my claim, I need to make recourse to IIRIRA's legislative history. Lamar Smith, Chairman of the House Judiciary Committee's Immigration and Claims Subcommittee and author of H.R. 2202, the House foundation for IIRIRA, explained (along with then-Subcommittee counsel, and my then-colleague, Edward Grant<sup>65</sup>), that

The enforcement centerpiece of the IRCA—sanctions against employers who hire illegal alien— failed to include any system whereby employers could reasonably verify the status of their new employees. A booming market in fraudulent documents soon developed.<sup>66</sup>

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Unfortunately, the easy availability of counterfeit documents...has made a mockery of the law. Fake documents were produced in mass quantities.

62 The INS promulgated regulations that defined an entity for purposes of section 274A as "any legal entity, including but not limited to, a corporation, partnership, joint venture, *governmental body*, agency, proprietorship, or association." Control of Employment of Aliens, 52 Fed. Reg. 16216, 16221 (May 1, 1987) (emphasis added) (codified at 8 C.F.R. § 274a.1(b)), <https://www.govinfo.gov/content/pkg/FR-1987-05-01/pdf/FR-1987-05-01.pdf>.

63 *Barton v. Barr*, 140 S. Ct. 1442, 1453 (2020).

64 *McEvoy v. IEI Barge Servs.*, 622 F.3d 671, 677 (7th Cir. 2010).

65 I worked for Chairman Smith at the time as a counsel on the House Judiciary Committee's Subcommittee on Immigration and Claims.

66 Lamar Smith & Edward Grant, *Immigration Reform: Seeking the Right Reasons*, 28 ST. MARY'S L.J. 883, 890 n.22 (1996–1997).

...As a result, even the vast majority of employers who wanted to obey the law had no reliable means of identifying illegal aliens; and...such employers actually risked being found guilty of discrimination on the basis of national origin if they asked for additional documents. At the other extreme, rogue employers could easily collude with illegal alien employees to avoid the provisions of IRCA... comfortable in the knowledge that they were presented with "genuine" documents.<sup>67</sup>

What to do? As then House Judiciary Committee Member F. James Sensenbrenner, Jr., stated during House floor consideration of H.R. 2202, "President Clinton organized a Commission headed by the late Barbara Jordan to study our immigration policies, to see if the current system is working, and to make recommendations if it is not."<sup>68</sup> In 1994, Jordan's Commission, the U.S. Commission on Immigration Reform, recommended to Congress that

A better system for verifying work authorization is central to the effective enforcement of employer sanctions.

The Commission recommends development and implementation of a simpler, more fraud-resistant system for verifying work authorization ...

In examining the options for improving verification the Commission believes that the most promising option for secure, non-discriminatory verification is a computerized registry using data provided by the Social Security Administration ... and the INS.<sup>69</sup>

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The Commission recommends that the President immediately initiate and evaluate pilot programs using the proposed computerized verification system in the five states with the highest levels of illegal immigration as well as several less affected states.<sup>70</sup>

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67 *Id.* at 923–24.

68 142 CONG. REC. H2382 (Mar. 19, 1996), <https://www.govinfo.gov/content/pkg/CREC-1996-03-19/pdf/CREC-1996-03-19-house.pdf>.

69 U.S. COMM'N ON IMMIGRATION REFORM, U.S. IMMIGRATION POLICY: RESTORING CREDIBILITY; A REPORT TO CONGRESS 12 (1994) (emphasis deleted), <https://babel.hathitrust.org/cgi/pt?id=mdp.39015032200704&view=1up&seq=26>.

70 *Id.* at 13 (emphasis deleted).

At a minimum, the President should issue an Executive Order requiring federal agencies to abide by the [employer sanctions] procedures required of other employers. Alternatively, legislation should stipulate that federal agencies follow the verification procedures required of other employers...<sup>71</sup>

Chairman Smith drafted H.R. 2202 to reflect the Commission's recommendations, stating during House floor consideration that "this legislation implements the recommendations of the Commission on Immigration Reform,"<sup>72</sup> and Mr. Sensenbrenner stated that it "contains over 80 percent of th[e Jordan Commission's] recommendations."<sup>73</sup>

IIRIRA created three employment eligibility verification pilot programs, one of which (the basic pilot program) was later rebranded as the current E-Verify system.<sup>74</sup> The House Judiciary Committee's report stated that

[T]here must be an authoritative check of the veracity of the documents provided by new employees. Such a verification mechanism will be instituted on a pilot basis, using existing databases of the SSA and the INS. Every person in America authorized to work receives a social security number. Aliens legally in this country (and many illegal aliens) have alien identification numbers issued by the INS. If a verification mechanism could compare the social security (and, for a noncitizen, alien) number provided by new employees against the existing databases, individuals presenting fictitious numbers and counterfeit documents, or who are not authorized to be employed, would be identified...

[The bill] will institute pilot projects testing this verification mechanism in at least five of the seven states with the highest estimated populations of illegal aliens.<sup>75</sup>

As Smith and Grant wrote, "IIRIRA was [in part] enacted to fulfill the promise of the IRCA and significantly weaken the job magnet...IIRIRA creates three employment eligibility verification pilot programs designed to make fraudulent documents useless. ... These pilots will give employers the tools they need to hire legal workers."<sup>76</sup>

IIRIRA, as enacted, generally made the pilot programs voluntary, but provided that

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71 *Id.* at 20 (emphasis deleted).

72 142 CONG. REC. H2380 (Mar. 19, 1996), <https://www.govinfo.gov/content/pkg/CREC-1996-03-19/pdf/CREC-1996-03-19-house.pdf>.

73 142 CONG. REC. H2382 (Mar. 19, 1996), <https://www.govinfo.gov/content/pkg/CREC-1996-03-19/pdf/CREC-1996-03-19-house.pdf>.

74 Pub. L. No. 104-208, subtitle A of title IV of division C, <https://www.congress.gov/104/plaws/publ208/PLAW-104publ208.pdf>.

75 H.R. REP. NO. 104-469, pt. 1, at 166-67 (1996), <https://www.congress.gov/104/crpt/hrpt469/CRPT-104hrpt469-pt1.pdf>.

76 Smith & Grant, *supra* note 66, at 924.

Each [Executive] Department of the Federal Government shall elect to participate in a pilot program and shall comply with the terms and conditions of such an election.<sup>77</sup>

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Each Member of Congress, each officer of Congress, and the head of each agency of the legislative branch, that conducts hiring in a State in which a pilot program is operating shall elect to participate in a pilot program, may specify which pilot program or programs ... in which the Member, officer, or agency will participate, and shall comply with the terms and conditions of such an election.<sup>78</sup>

H.R. 2202, as it had originally passed the House, used slightly different language, providing that “Each entity of the Federal Government that is subject to the requirements of section 274A of the [INA] (including the Legislative and Executive Branches of the Federal Government) shall participate in the pilot program under this section and shall comply with the terms and conditions of such an election.”<sup>79</sup>

Rep. Smith wanted to require the participation of federal agencies in the pilot programs. Since, pursuant to the text of the bill under consideration on the House floor, the federal entities that would have to participate were those “subject to the requirements of section 274A,”<sup>80</sup> he had strong motivation to ensure that the universe of federal entities subject to section 274A included all those he wanted to participate in the pilot programs. This was the reason why the House included such language. It turns out that the specification was no longer strictly necessary in the enacted legislation, since participation by federal agencies was no longer triggered by their being subject to section 274A. The specification was to become a vestigial organ, the appendix of IIRIRA.

Consistent with this analysis, the clarification of *entity* was not contained in H.R. 2202 as introduced,<sup>81</sup> nor was it contained in the bill as reported by the Judiciary Committee.<sup>82</sup> Rep. Smith at those stages had no reason to include the specification—because in both those versions of the bill, participation in the pilot programs was already *mandatory for all employers* in a State in which a pilot program was operating.<sup>83</sup> There was thus no need to create a subset of employers required

77 Pub. L. No. 104-208, § 402(e)(1)(A), 110 Stat. 3009-658 (1996), <https://www.congress.gov/104/plaws/publ208/PLAW-104publ208.pdf>.

78 Pub. L. No. 104-208, § 402(e)(1)(B), 110 Stat. 3009-659 (1996), <https://www.congress.gov/104/plaws/publ208/PLAW-104publ208.pdf>.

79 H.R. 2202, 104th Cong., § 401(e)(1) (as passed by House, Mar. 21, 1996), <https://www.congress.gov/104/bills/hr2202/BILLS-104hr2202eh.pdf>.

80 H.R. REP. NO. 104-483, at 11 (1996), <https://www.congress.gov/104/crpt/hrpt483/CRPT-104hrpt483.pdf>.

81 H.R. 2202, 104th Cong. (as introduced in the House, Aug. 4, 1995), <https://www.congress.gov/104/bills/hr2202/BILLS-104hr2202ih.pdf>.

82 H.R. 2202, 104th Cong. (as reported by H. Comm. on the Judiciary, March 4, 1996), <https://www.congress.gov/104/bills/hr2202/BILLS-104hr2202rh.pdf>.

83 “[T]he Attorney General shall undertake ... pilot projects for all employers, in at least 5 of the 7 States with the highest estimated population of unauthorized aliens ...” H.R. 2202, 104th Cong.,

to participate in the pilot programs and no need to ensure that federal agencies were contained within that subset.

However, there was a large measure of opposition by many House Republicans at the time to making participation in a pilot program mandatory, generated by the specter of *Big Brother* and opposition by business groups.<sup>84</sup> To get H.R. 2202 to the floor, Lamar Smith agreed to make the pilot programs voluntary along with a separate floor vote on an amendment to convert them back to mandatory. A deal was reached, the bill went to the floor, the Elton Gallegly amendment to make the pilots mandatory was defeated,<sup>85</sup> and IIRIRA was eventually enacted into law after a conference with the Senate and postconference negotiations with the Clinton administration.<sup>86</sup>

In any event, in preparation for the bill to go to the House floor, the House Rules Committee modified it through a self-executing amendment that made the pilot programs generally voluntary but required the participation of federal agencies and made the clarification regarding the meaning of entity.<sup>87</sup> Opaque? Sure. But because the provision was added as a self-executing amendment, there was no need for debate on the House floor.

## 2. *Preemptive Strike*

The professors argue that

“[A] clear statement principle of statutory construction...applies when Congress intends to pre-empt the historic powers of the States *or* when it legislates in traditionally sensitive areas that affect the federal balance.”<sup>88</sup>

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IRCA regulates employment, which is a traditional area of state control, as the Supreme Court decided *in an immigration case* a decade before IRCA's passage. [This] strongly suggest[s] that Congress would have had to speak clearly to bind State government entities in IRCA, notwithstanding the fact that the statute involves federal immigration regulation.<sup>89</sup>

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§ 403(e)(2)(B) (as introduced); H.R. 2202, 104th Cong., § 403(b)(3) (as reported by H. Comm. on the Judiciary). By October 1999, the pilot programs would be phased out and (in the bill as introduced) replaced with a permanent nationwide confirmation system. H.R. 2202, 104th Cong., § 403(e)(2)(A) (as introduced); H.R. 2202, 104th Cong., § 403(b)(3) (as reported by H. Comm. on the Judiciary).

84 See JAMES G. GIMPEL & JAMES R. EDWARDS, JR., *THE CONGRESSIONAL POLITICS OF IMMIGRATION REFORM* 235 (1999).

85 142 CONG. REC. H2518 (Mar. 20, 1996), <https://www.govinfo.gov/content/pkg/CREC-1996-03-20/pdf/CREC-1996-03-20-house.pdf>.

86 See GIMPEL & EDWARDS, JR., *supra* note 84, at 282–83.

87 H.R. REP. NO. 104-483, at 2 (1996), <https://www.congress.gov/104/crpt/hrpt483/CRPT-104hrpt483.pdf>.

88 Arulanantham, Motomura, and Hairapetian, *supra* note 13, at 19 (quoting *Raygor v. Regents of Univ. of Minnesota*, 534 U.S. 533, 543 (2002)) (emphasis in original) (internal citations omitted).

89 *Id.* at 18 (emphasis in original).

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[Some] may argue that even if States have power over employment generally, that power is limited in this area because “[t]he passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the States.”

However, state hiring does not concern *immigration* as such; it concerns the State’s power to employ people *already here*. In matters ancillary to the core federal power to exclude and deport, the federal courts have long recognized a role for state-level policymaking.<sup>90</sup>

**a. *Hoffman Plastic, the National Labor Relations Act and the Fair Labor Standards Act***

I find it startling that immigration law scholars would argue that “state hiring does not concern *immigration* as such; it concerns the State’s power to employ people *already here*.” They well know that control over the ability to employ unlawfully present aliens *already here* is hardly ancillary, but rather central, to Congress’s plenary power over immigration matters.<sup>91</sup> In 2002, the Supreme Court concluded in *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*<sup>92</sup> that

IRCA [is] a comprehensive scheme prohibiting the employment of illegal aliens in the United States ... IRCA “forcefully” made combating the employment of illegal aliens central to “[t]he policy of immigration law.” ... It did so by establishing an extensive “employment verification system[.]” ... designed to deny employment to aliens [not authorized to work]. ... This verification system is critical to the IRCA regime.<sup>93</sup>

As to the matters in contention in *Hoffman*, the Court explained that

[T]he [National Labor Relation] Board’s [“NLRB”] discretion to select and fashion remedies for violations of the [National Labor Relations Act] NLRA, though generally broad ... is not unlimited. ... Since the Board’s inception, we have consistently set aside awards of reinstatement or backpay to employees

90 *Id.* at 23 (quoting *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875)) (emphasis in original).

91 As the Republican and Democrat Leaders of the House Judiciary Committee jointly explained to the United States Trade Representative

Article 1, section 8, clause 4 of the Constitution provides that Congress shall have power to “establish a uniform Rule of Naturalization.” The Supreme Court has long found that this ... grants Congress plenary power over immigration policy. As the Court found in *Galvan v. Press*, 347 U.S. 522, 531 (1954), “the formulation of policies [pertaining to the entry of aliens and their right to remain here] is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government.”

Letter from F. James Sensenbrenner, Jr., Chairman, H. Comm. on the Judiciary, and John Conyers, Ranking Member, H. Comm. on the Judiciary, to Robert B. Zoelick, Ambassador, United States Trade Representative 1 (July 10, 2003), reprinted in H.R. REP. NO. 108-225, pt. 2, at 19 (2003), <https://www.congress.gov/108/crpt/hrpt225/CRPT-108hrpt225-pt2.pdf>.

92 535 U.S. 137 (2002).

93 *Id.* at 147 (emphasis added) (citations and footnote omitted).

found guilty of serious illegal conduct in connection with their employment.<sup>94</sup>

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[Even when an] employer had committed serious violations of the NLRA, the Board had no discretion to remedy those violations by awarding reinstatement with backpay to employees who themselves had committed serious criminal acts.<sup>95</sup>

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Under the IRCA regime, it is impossible for an undocumented alien to obtain employment in the United States without some party directly contravening explicit congressional policies. Either the undocumented alien tenders fraudulent identification, which subverts the cornerstone of IRCA's enforcement mechanism, or the employer knowingly hires the undocumented alien in direct contradiction of its IRCA obligations. ... We find ... that awarding backpay to illegal aliens runs counter to policies underlying IRCA. ... [T]he award lies beyond the bounds of the Board's remedial discretion.<sup>96</sup>

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We ... conclude that allowing the Board to award backpay to illegal aliens would unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in IRCA.<sup>97</sup>

The Court did point out that “[l]ack of authority to award backpay does not mean that the employer gets off scot-free. The Board here has already imposed other significant sanctions against Hoffman ...”<sup>98</sup>

*Hoffman* involved an employer that had complied with its obligations under the employment eligibility verification system mandated by IRCA and that did not know that the worker at issue was unauthorized to work. The NLRB and federal appellate courts have since extended *Hoffman*'s ruling to encompass employers who knowingly hire or continue to employ unauthorized workers.<sup>99</sup> As the U.S. District Court for the Southern District of New York concluded in *Colon v. Major Perry Street Corp.* in 2013, “this extension necessarily follows from *Hoffman*'s original logic.”<sup>100</sup>

However, post-*Hoffman*, lower federal and State courts have almost universally ruled that *Hoffman* does not prevent the federal or State governments from requiring employers to provide back pay to unauthorized aliens under the Fair Labor Standards Act (“FLSA”) and similar State laws. The court in *Colon* noted that “[d]espite employers’ repeated attempts to import the NLRA’s limitations into FLSA cases, courts have

94 *Id.* at 142–43 (citations omitted).

95 *Id.* at 143.

96 *Id.* at 148–49.

97 *Id.* at 151.

98 *Id.* at 152 (citation omitted).

99 *See* *Palma v. Nat’l Lab. Relations Bd.*, 723 F.3d 176, 180 (2d Cir. 2013).

100 987 F. Supp. 2d 451, 457 (S.D.N.Y. 2013).

consistently and overwhelmingly distinguished NLRA precedents from FLSA doctrine."<sup>101</sup> The court explained that

[The FLSA] provides, without exception, that “[a]ny employer who violates the [minimum wage or overtime] provisions... shall be liable... in the amount of... unpaid minimum wages...” ...

...FLSA provides several exceptions to [its] definition [of employee], but undocumented workers are not among the exceptions. ... [T]he Supreme Court has articulated skepticism toward finding additional exceptions by implication:

The [FLSA] declared its purposes in bold and sweeping terms. Breadth of coverage was vital to its mission. Its scope was stated in terms of substantial universality. ... Where exceptions were made, they were narrow and specific. It ... list[ed] *exemptions of specific classes of employees* ... Such specificity in stating exemptions strengthens the implication that employees not thus exempted ... remain within the Act.<sup>102</sup>

... Contemporary courts ... have continued to conclude that “FLSA’s sweeping definitions of ... ‘employee’ unambiguously encompass unauthorized aliens.”<sup>103</sup>

The court in *Colon* then emphasized that IRCA itself had not repealed FLSA’s protections for unauthorized workers, but rather “specifically authorized the appropriation of additional funds for increased FLSA enforcement on behalf of undocumented aliens. ... This provision would make little sense if Congress had intended the IRCA to repeal the FLSA’s coverage of undocumented aliens.”<sup>104</sup> The court cited the House Education and Labor Committee’s 1986 report:

[T]he committee does not intend that any provision of [IRCA] would limit the powers of State or Federal labor standards agencies... to remedy unfair practices committed against undocumented employees ... To do otherwise would be counter-productive of our intent to limit the hiring of undocumented employees and the depressing effect on working conditions caused by their employment.<sup>105</sup>

101 *Id.* at 453. The District Court for the Eastern District of New York collected such cases in *Solis v. SCA Restaurant Corp.*, 938 F. Supp. 2d 380, 400 (E.D.N.Y. 2013). Only one federal court seems to have reached the opposite conclusion. *See Renteria v. Italia Foods, Inc.*, 2003 U.S. Dist. LEXIS 14698 at 19 (N.D. Ill. 2003) (“Defendants argue that an award of back pay, front pay, or compensatory damages for a violation of the FLSA likewise would trench on the policies expressed in the IRCA. With regard to back pay and front pay, the Court agrees.”).

102 *Colon*, 987 F. Supp. 2d at 453–54 (quoting *Powell v. U.S. Cartridge Co.*, 339 U.S. 497, 516–17 (1950)) (citations omitted by *Colon*) (emphasis in *Powell*).

103 *Id.* at 454 (quoting *Lucas v. Jerusalem Café, LLC*, 721 F.3d 927, 934 (8th Cir. 2013)).

104 *Id.* (quoting *Patel v. Quality Inn S.*, 846 F.2d 700, 704 (11th Cir. 1988)) (footnote omitted).

105 *Id.* at 455 (quoting H.R. REP. NO. 99-682, pt. 2, at 8–9 (1986), <https://advance.lexis.com/r/documentprovider/zssyk/attachment/data?attachmentid=V1,215,38301,13703Hrp682-2From1to52,1&attachmenttype=PDF&attachmentname=OriginalSource&origination=&sequencenumber=&ishotdoc=false&docTitle=Immigration%20Control%20and%20Legalization%20Amendments%20Act%20of%201986&pdmfid=1000516>).

The court contrasted the broad choice of remedies available to the NLRB and the few options available under the FLSA:

The *Hoffman* Court...emphasized the availability and adequacy of alternative remedies under the NLRA... stress[ing] that “[I]ack of authority to award backpay does not mean that the employer gets off scot-free.” ... FLSA, in contrast, provides very few alternative remedies. ... [I]f backpay were not available, many first-time offenders would “get[] off scot-free” and the purpose of FLSA would not be served.<sup>106</sup>

The court quoted the Eleventh Circuit:

[N]o administrative body or court is vested with discretion to fashion an appropriate remedy under the FLSA. Instead, the Act unequivocally provides that any employer who violates its minimum wage or overtime provisions “shall be liable to the employee or employees affected in the amount of their unpaid minimum wages ...”<sup>107</sup>

The court in *Colon* concluded that “FLSA’s mandatory language leaves no discretion for courts to alter the statute’s remedial scheme based on an employee’s immigration status.”<sup>108</sup>

The court then explained that, in contrast to the NLRA, the FLSA has no equivalent “statute-specific line of cases limiting the NLRB’s remedial discretion where organizing activity dovetails with ‘serious illegal conduct.’”<sup>109</sup> It stated that

The NLRA regulates labor organizing—a field of activity in which employee dissatisfaction is collectively expressed, often through civil disobedience. The NLRA forces employers to compensate workers for engaging in disruptive activities that are often at odds with the employers’ interests; in contrast, FLSA merely forces employers to compensate workers for doing their work. ... Courts reviewing NLRB awards had to isolate protected dissidence from impermissible forms of protest ...

[T]he Supreme Court has regulated the fault line dividing the “collective power” protected by the NLRA from unlawful and unprotected forms of organizing.<sup>110</sup>

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This line of [Supreme Court] cases curtailed the NLRB’s discretion to provide remedies that would reward and promote unlawful forms of organized protest ...

The *Hoffman* Court placed its decision squarely within this line of cases.<sup>111</sup>

106 *Id.* at 459 (citations and footnotes omitted).

107 *Id.* at 458 (quoting *Lamonica v. Safe Hurricane Shutters, Inc.*, 711 F.3d 1299, 1307 (11th Cir. 2013)).

108 *Id.* at 459.

109 *Id.* (citations omitted).

110 *Id.* at 459–60 (footnote omitted).

111 *Id.* at 460 (citation omitted).

The court in *Colon* then found that “[a] third basis for distinguishing FLSA from the NLRA lies in the distinction between the retrospective backpay sought under FLSA and the post-termination backpay awarded under the NLRA.”<sup>112</sup> A magistrate judge in the Southern District of New York later concluded in *Rosas v. Alice’s Tea Cup, LLC*<sup>113</sup> that

[C]ourts distinguish between “undocumented workers seeking backpay for wages actually earned,” as in FLSA wage and hour violations, and “those seeking backpay for work not performed,” as in a termination in violation of the NLRA. ... This is because denying undocumented workers the protection of the FLSA would “permit[] abusive exploitation of workers” and “create[] an unacceptable economic incentive to hire undocumented workers by permitting employers to underpay them,” in violation of the spirit of the IRCA. ... This distinction was clear before *Hoffman* and has been reiterated since.<sup>114</sup>

Finally, the court in *Colon* found that “[s]everal courts have observed that awarding FLSA backpay to undocumented workers supports the policy goals expressed in IRCA” and that it is actually a “harmonious arrangement.”<sup>115</sup> The court quoted the Eleventh Circuit:

FLSA’s coverage of undocumented aliens goes hand in hand with the policies behind the IRCA. Congress enacted the IRCA to reduce illegal immigration by eliminating employers’ economic *incentive* to hire undocumented aliens ... The FLSA’s coverage of undocumented workers... offsets what is perhaps the most attractive feature of such workers—their willingness to work for less than the minimum wage. If the FLSA did not cover undocumented aliens, employers would have an incentive to hire them. Employers might find it economically advantageous to hire and underpay undocumented workers and run the risk of sanctions under the IRCA.<sup>116</sup>

I do question one aspect of the rationale undergirding these decisions regarding the availability of backpay for unauthorized workers under the FLSA. The court in *Colon* concluded that “[t]he *Hoffman* Court placed its decision squarely within th[e] line of cases” that “curtailed the NLRB’s discretion to provide remedies that would reward and promote unlawful forms of organized protest.”<sup>117</sup> However, the “serious criminal conduct” for the Supreme Court in *Hoffman* had nothing to do with “unlawful forms of organized protest”. Rather, it was the quotidian proffering of false documents by an unauthorized alien seeking to defeat IRCA’s verification process, a fraud that has likely been perpetrated millions of times. The Court considered this fraud serious precisely because it “subverts the cornerstone of IRCA’s enforcement mechanism.”<sup>118</sup>

112 *Id.*

113 127 F. Supp. 3d 4 (S.D.N.Y. 2015).

114 *Id.* at 9 (citations omitted).

115 987 F. Supp. 2d at 462.

116 *Id.* (quoting *Patel v. Quality Inn S.*, 846 F.2d 700, 704 (11th Cir. 1988)) (emphasis in original).

117 *Id.* at 460.

118 *Hoffman Plastic Compounds, Inc. v. Nat’l Lab. Relations Bd.*, 535 U.S. 137, 148 (2002).

What the Court in *Hoffman* understood itself to be doing was not “plac[ing] its decision squarely within th[e] line of cases” that “curtailed the NLRB’s discretion to provide remedies that would reward and promote unlawful forms of organized protest.” Rather, what it understood itself to be doing was placing its decision squarely within the line of cases that “established that where the [NLRB’s] chosen remedy trenches upon a federal statute or policy outside the Board’s competence to administer, the Board’s remedy may be required to yield.”<sup>119</sup> The Court found that was “precisely the situation today. ... IRCA ‘forcefully’ made combating the employment of illegal aliens central to ‘the policy of immigration law.’”<sup>120</sup> One of the ways in which the Court batted away the NLRB’s attempt to characterize another Supreme Court decision “as authority for awarding backpay to employees who violate federal laws”<sup>121</sup> was to note that in that case, “the challenged order did not implicate federal statutes or policies administered by other federal agencies, a ‘most delicate area’ in which the Board must be ‘particularly careful in its choice of remedy.’”<sup>122</sup>

The Supreme Court in *Hoffman* concluded that

The [NLRB] asks that we ... allow it to award backpay to an illegal alien for years of work not performed, for wages that could not lawfully have been earned, and for a job obtained in the first instance by a criminal fraud. We find, however, that awarding backpay to illegal aliens runs counter to policies underlying IRCA, policies the Board has no authority to enforce or administer.<sup>123</sup>

I should point out that two of these three factors cited by the Supreme Court—the award of backpay to an unauthorized alien for (1) wages that could not lawfully have been earned and (2) a job obtained in the first instance by a criminal fraud—apply in the FLSA context to the same extent as they do in the NLRA context. The Court went on to emphasize that

What matters here ... is that Congress has expressly made it criminally punishable for an alien to obtain employment with false documents. There is no reason to think that Congress nonetheless intended to permit backpay where but for an employer’s unfair labor practices, an alien-employee would have remained in the United States illegally, and continued to work illegally, all the while successfully evading apprehension by immigration authorities. Far from “accommodating” IRCA, the Board’s position, recognizing employer misconduct but discounting the misconduct of illegal alien employees, subverts it.<sup>124</sup>

To reiterate, the motivating issue for the *Hoffman* Court was not curtailing the NLRB’s discretion to provide remedies rewarding and promoting unlawful forms of organized protest, but rather curtailing the NLRB’s discretion to provide remedies subverting IRCA.

119 *Id.* at 147.

120 *Id.* (quoting *INS v. Nat’l Ctr. for Immigrants’ Rts., Inc.*, 502 U.S. 183, 194, 194 n.8 (1991)).

121 *Hoffman*, 535 U.S. at 145.

122 *Id.* at 146 (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 172 (1962)).

123 *Id.* at 148–49.

124 *Id.* at 149–50 (footnote omitted).

Given that lower federal courts like *Colon* have misconstrued the reasoning of the Supreme Court in *Hoffman*, it is entirely possible that should the Supreme Court ever consider the propriety of awarding backpay to unauthorized aliens as FLSA remedies, the Court would bar such awards as “subverting” IRCA, just as it did in *Hoffman*.

**b. Congress Has Brought Regulation of the Employment of Aliens Within the INA’s Framework for Regulation of Immigration**

In 2007, the District Court for the Middle District of Pennsylvania in *Lozano v. City of Hazleton*<sup>125</sup> invalidated a town ordinance that, among other things, made it unlawful for businesses to recruit, hire, or employ workers not authorized to be employed, and required employers to collect identification documents and provide them to the town in order for it to verify work authorization with the federal government. The court concluded that

IRCA is a comprehensive scheme. It leaves no room for State regulation.<sup>126</sup>

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Immigration is a national issue. The United States Congress has provided complete and thorough regulations with regard to the employment of unauthorized aliens including anti-immigration discrimination provisions.<sup>127</sup>

I certainly don’t remember many immigration law professors at the time arguing that the district court got it wrong and that the Hazleton ordinance should have been affirmed since it only dealt with an “ancillary” issue.

In 2011, the Obama administration argued to the Supreme Court in an amicus brief in *Chamber of Commerce of the United States v. Whiting*<sup>128</sup> that

Congress concluded in IRCA that the INA must prescribe measures to combat the employment of unauthorized aliens, because the availability of such employment undermines the INA’s mission of regulating entry into the United States. ... Congress therefore enacted Section [274A]. ... Congress thus has brought regulation of the employment of aliens within the INA’s framework for regulation of immigration—traditionally an area of exclusive federal, not state or local, authority.<sup>129</sup>

Similarly, in 2012, the AFL-CIO argued to the Supreme Court in an amicus brief in *Arizona v. United States*<sup>130</sup> that

125 496 F. Supp. 2d 477 (M.D. Pa. 2007).

126 *Id.* at 523.

127 *Id.*

128 563 U.S. 582 (2011).

129 Brief for the United States as Amicus Curiae Supporting Petitioners at 26, *Whiting* (No. 09-115) (emphasis added), [https://www.justice.gov/sites/default/files/crt/legacy/2010/12/28/commercebr\\_sctmerits.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2010/12/28/commercebr_sctmerits.pdf).

130 567 U.S. 387 (2012).

Together, the purpose of the IRCA and [the Immigration Act of 1990] amendments was to make regulation of the employment of aliens part and parcel of the INA's overall purpose of regulating "the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country."<sup>131</sup>

The AFL-CIO also argued that Arizona's imposition of a criminal penalty on unauthorized aliens who were employed was "directed at 'deter[ring] the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States,' ...not regulating employment relationships within the State."<sup>132</sup> A policy of allowing the UC system to hire and employ unauthorized aliens can with equal justification be said to be directed at encouraging and enabling the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States rather than regulating employment relationships within the State.

To conclude, the hiring and employment of unauthorized aliens does indeed clearly concern immigration as such. Now, it may be argued that the decisions I have cited reflect the state of precedent following the enactment of IRCA, not its prior state before Congress had "forcefully" made combating the employment of unauthorized aliens central to "[t]he policy of immigration law." But this would miss the point. The fact that Congress could, at a time of its choosing, make combating the employment of unauthorized aliens central to the policy of immigration law is made possible by Congress's constitutionally based plenary power. Combating such employment is hardly *ancillary* to the core federal immigration power, even when dormant. In its 1972 decision in *Kleindienst v. Mandel*,<sup>133</sup> the Supreme Court approvingly quoted the Court's statement in its 1895 decision in *Lem Moon Sing v. United States*<sup>134</sup> that

*The power of Congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled by our previous adjudications.*<sup>135</sup>

Of course, such *terms and conditions* include whether any alien shall be permitted to work in the United States. Aliens who are within the period of their admission or parole into the United States but who have not been granted work authorization are just as much *unauthorized aliens* under section 274A(h)(3) as are those who entered illegally or overstayed their visas.

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131 Brief of the Am. Fed'n of Lab. and Congress of Industrial Orgs. as Amicus Curiae in Support of Respondent, *Arizona* (No. 11-182), at 9 (quoting *Whiting*, 563 U.S. at 587), <https://www.nilc.org/wp-content/uploads/2016/04/US-v-AZ-SCOTUS-11-182-amicus-AFL-CIO.pdf>.

132 *Id.* (citation omitted).

133 408 U.S. 753, 766 (1972).

134 158 U.S. 538 (1895).

135 *Id.* at 547 (emphasis added). See also *De Canas v. Bica*, 424 U.S. 351, 355 (1976) (The "regulation of immigration ... is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain.").

### c. Traditionally Sensitive Area

The professors state

Where Congress “legislate[s] in [a] traditionally sensitive area[] that affect[s] the federal balance,”...courts will not presume it intended to bind States unless it uses “unmistakably clear” language indicating this intention. ... [B]ecause IRCA’s prohibition does not mention States... its language comes nowhere near what would be required to provide such a clear statement. Therefore, it is best read to not bind States.<sup>136</sup>

I in no way dispute this clarity principle when Congress legislates in a traditionally sensitive area that affects the federal balance. In fact, I would additionally point to the Supreme Court’s conclusion in *Apex Hosiery Co. v. Leader*<sup>137</sup> in 1940 that “The maintenance in our federal system of a proper distribution between state and national governments of police authority and of remedies private and public for public wrongs is of far-reaching importance. An intention to disturb the balance is not lightly to be imputed to Congress.”<sup>138</sup>

And I would point to the Supreme Court’s 1971 ruling in *United States v. Bass*<sup>139</sup> that

[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance. Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States. ... In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.<sup>140</sup>

And I would point to the Supreme Court’s clarification of this principle in its 1947 decision in *Rice v. Santa Fe Elevator Corp.*:<sup>141</sup>

[W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. Such a purpose may be evidenced in several ways... [one of which being that] the state policy may produce a result inconsistent with the objective of the federal statute.<sup>142</sup>

In 1989, the Supreme Court approvingly cited *Rice*, concluding in *Will v. Michigan Department of State Police* that “Congress should make its intention ‘clear

136 Arulanantham, Motomura, and Hairapetian, *supra* note 13, at 24 (quoting *Raygor v. Regents of the Univ. of Minn.*, 534 U.S. 533, 543 (2002) and citing *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)).

137 310 U.S. 469 (1940).

138 *Id.* at 513.

139 404 U.S. 336 (1971).

140 *Id.* at 349 (footnotes omitted).

141 331 U.S. 218 (1947).

142 *Id.* at 230.

and manifest' if it intends to pre-empt the historic powers of the States [citing *Rice*] or if it intends to impose a condition on the grant of federal moneys . . . ."<sup>143</sup> Even in *Raygor v. Regents of University of Minnesota*, highlighted by the professors, the Court approvingly cited *Will*, which approvingly cited *Rice*.<sup>144</sup>

As the Court concluded in *Rice*, one of the ways in which Congress can evidence a "clear and manifest" purpose is if "the state policy may produce a result inconsistent with the objective of the federal statute."<sup>145</sup> A State policy authorizing its entities to employ unauthorized aliens would certainly be inconsistent with IRCA's objective of, as the House Judiciary Committee put it, "deter[ing] employers from hiring undocumented aliens, and thus...cut[ting] off the magnet of employment."<sup>146</sup> And as the district court concluded in *Lozano*, "[a]llowing States or local governments to legislate with regard to the employment of unauthorized aliens would interfere with Congressional objectives."<sup>147</sup> Thus, regardless of whether IRCA's employer sanctions provisions specifically mention States, Congress's objective for employer sanctions evidences a clear and manifest desire to apply employer sanctions to the States.

The professors contend that

[In its 1976 *De Canas v. Bica*<sup>148</sup> decision], [t]he Supreme Court held... that a state law regulating the employment of *non-citizens* operated in an area of traditional state power, and therefore was not impliedly preempted by the federal government's immigration power, even though the "power to regulate immigration is unquestionably exclusively a federal power."... As the... Court explained in [*Arizona*, "a]s initially enacted, the INA did not prohibit the employment of illegal aliens, and this Court held that federal law left room for the States to regulate in this field."... While Congress later displaced such state laws when it passed IRCA, that statute obviously did not change the background rule that employment regulation is a traditional matter of state concern. ... All regulations concerning the hiring of undocumented immigrants... fall squarely within the States' traditional powers in the first instance, rather than within the federal government's power over immigration.<sup>149</sup>

But in *De Canas* itself, the Court concluded that

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143 491 U.S. 58, 65 (1989).

144 534 U.S. 533, 543–44 (2002). Just last summer, the Sixth Circuit approvingly cited *Rice* in *Adkisson v. Jacobs Eng'g Grp.*, 35 F.4th 421, 434 (6th Cir. 2022).

145 331 U.S. at 230.

146 STAFF OF H. COMM. ON THE JUDICIARY, *supra* note 57, at 6, <https://babel.hathitrust.org/cgi/pt?id=pst.000011995135&view=1up&seq=1>.

147 *Lozano v. City of Hazelton*, 496 F. Supp. 2d 477, 523–24 (M.D. Pa. 2007).

148 424 U.S. 351 (1976).

149 Arulanantham, Motomura, and Hairapetian, *supra* note 13, at 23–24 (emphasis in original) (citations and footnote omitted).

*States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State. ... California's attempt ... to prohibit the knowing employment by California employers of persons not entitled ... to work here, is certainly within the mainstream of such police power regulation. Employment of illegal aliens in times of high unemployment deprives citizens and legally admitted aliens of jobs; acceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens; and employment of illegal aliens under such conditions can diminish the effectiveness of labor unions ... In attempting to protect California's fiscal interests and lawfully resident labor force from the deleterious effects on its economy resulting from the employment of illegal aliens ... [the law] focuses directly upon these essentially local problems and is tailored to combat effectively the perceived evils.*<sup>150</sup>

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Congress' failure to enact ... general sanctions [criminalizing the knowing employment of unauthorized aliens] reinforces the inference that may be drawn from other congressional action that Congress believes this problem does not yet require uniform national rules and is appropriately addressed by the States as a local matter.<sup>151</sup>

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[Regarding two prior decisions in which the Supreme Court had struck down State statutes as preempted by Federal immigration law,] to the extent those cases were based on the predominance of federal interest in the fields of immigration and foreign affairs, *there would not appear to be a similar federal interest* in a situation in which the state law is fashioned to remedy local problems, and operates only on local employers, and only with respect to individuals whom the Federal Government has already declared cannot work in this country.<sup>152</sup>

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[W]e will not presume that Congress ... intended to oust state authority to regulate the employment relationship covered by [the law] ... in a manner consistent with pertinent federal laws. Only a demonstration that complete ouster of state power—including state power to promulgate laws not in conflict with federal laws—was “the clear and manifest purpose of Congress” would justify that conclusion. ... Respondents ... fail to point out, and an independent review does not reveal, any specific indication in either the wording or the legislative history of the INA that Congress intended to preclude *even harmonious state regulation touching on aliens in general, or the employment of illegal aliens* in particular.<sup>153</sup>

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150 424 U.S. at 356–57 (emphasis added) (citations omitted).

151 *Id.* at 360 n.9.

152 *Id.* at 363 (emphasis added).

153 *Id.* at 357–58 (emphasis added) (citations omitted).

[A]bsent congressional action, ... [the law] would not be an invalid state incursion on federal power.<sup>154</sup>

California desiring to itself employ unauthorized aliens is a quite different situation than is the California of an earlier era desiring to prohibit the employment of such aliens. The latter-day California (should it decide to ratify the decision of the UC system) would not be acting to protect the workers of California, which is what the Court in *De Canas* concluded that States possess broad authority to do under their police powers through the regulation of employment relationships. Far from it. Per the AFL-CIO, California's possible decision to allow for the employment of unauthorized workers might not even be considered a regulation of employment relationships, but rather an attempt to change immigration policy. And the latter-day California would not be seeking to prohibit the employment of those whom the federal government has already declared unable to work in the United States, but rather would be seeking the exact opposite result. One should not assume that the Court in 1976 would have been approving of a State law *authorizing* the employment of such aliens. California would neither be acting *in a manner consistent with pertinent federal laws* nor implementing a *harmonious* State regulation.

Further, in *Plyler v. Doe*,<sup>155</sup> decided six years after *De Canas* but four years prior to the enactment of IRCA, the Supreme Court explained that

The States enjoy no power with respect to the classification of aliens... This power is "committed to the political branches of the Federal Government." ... Although it is "a routine and normally legitimate part" of the business of the Federal Government to classify on the basis of alien status ... and to "take into account the character of the relationship between the alien and this country," ... only rarely are such matters relevant to legislation by a State ...

As we recognized in *De Canas* ... *States do have some authority to act with respect to illegal aliens, at least where such action mirrors federal objectives and furthers a legitimate state goal.* In *De Canas*, the State's program reflected Congress' intention to bar from employment all aliens except those possessing a grant of permission to work in this country. ... In contrast, there is no indication that the disability imposed by [the Texas law] corresponds to any identifiable congressional policy. ... More importantly, the classification reflected in [the Texas statute] does not operate harmoniously within the federal program.<sup>156</sup>

The Court in *Plyler* intentionally cast grave doubt on any State authority to act with respect to unlawfully present aliens where such action conflicts with federal objectives. California State universities' hypothetical employment of unauthorized aliens neither corresponds to any identifiable congressional policy nor operate[s] harmoniously within the federal program. In fact, it would clearly conflict with

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154 *Id.* at 356 (citation omitted).

155 457 U.S. 202 (1982).

156 *Id.* at 225-26 (emphasis added) (citations omitted).

the congressional policy undergirding IRCA “of deter[ring] aliens from entering illegally or violating their status in search of employment.”<sup>157</sup>

In addition, just because a State’s power to prohibit the knowing employment of persons not entitled to work here is *within the mainstream* of State police powers, and just because, pre-IRCA, Congress did not believe the problem of the employment of unauthorized aliens “require[d] uniform national rules,” does not mean that Congress’s eventual recognition of the need for such rules made this a sensitive area that affects the federal balance. I posit that it is not—and thus that the clear statement rule would not even apply.

First, I should note that State employment laws related to aliens have long been subject to constitutional constraints and were regularly invalidated by the Supreme Court. As the Court explained in *Ambach v. Norwick*<sup>158</sup> in 1979,

State regulation of the employment of aliens long has been subject to constitutional constraints. ... In [1886 in] *Yick Wo v. Hopkins*,<sup>159</sup> [we] struck down an ordinance which was applied to prevent aliens from running laundries, and in [1915 in] *Truax v. Raich*,<sup>160</sup> a law requiring at least 80% of the employees of certain businesses to be citizens was held to be an unconstitutional infringement of an alien’s “right to work for a living in the common occupations of the community ...”<sup>161</sup>

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[In 1948 in *Takahashi v. Fish & Game Commission*,<sup>162</sup> we] held that the “ownership” a State exercises over fish found in its territorial waters “is inadequate to justify California in excluding any or all aliens who are lawful residents of the State from making a living by fishing in the ocean off its shores while permitting all others to do so.” ... [In our 1971 decision in] *Graham v. Richardson*<sup>163</sup> ... [we] for the first time treated classifications based on alienage as “inherently suspect and subject to close judicial scrutiny.” ... Applying *Graham*, [we have] held invalid statutes that prevented aliens from entering a State’s classified civil service,<sup>164</sup> ... practicing law<sup>165</sup> ... [and] working as an engineer<sup>166</sup> ...<sup>167</sup>

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157 H.R. REP. NO. 99-682, pt. 1, *supra* note 28 at 46.

158 441 U.S. 68 (1979).

159 118 U.S. 356 (1886).

160 239 U.S. 33 (1915).

161 *Ambach*, 441 U.S. at 72 (quoting *Truax v. Raich*, 239 U.S. at 41).

162 334 U.S. 410, 421 (1948).

163 403 U.S. 365, 372 (1971).

164 The Court cited *Sugarman v. Dougall*, 413 U.S. 634 (1973).

165 The Court cited *In re Griffiths*, 413 U.S. 717 (1973).

166 The Court cited *Examining Board of Engineers, Architects & Surveyors v. Flores De Otero*, 426 U.S. 572 (1976).

167 *Ambach v. Norwick*, 441 U.S. 68, 73 (1979).

Second, that a State's power to prohibit knowing employment is within the mainstream of State police powers does not mean it would be within the mainstream for a State to actually authorize such knowing employment. And States were on notice that Congress might someday decide that the employment of unauthorized aliens, in particular, required uniform national rules.

Third, in 2014, in *Bond v. United States*,<sup>168</sup> the Supreme Court explained that

[It] is [a] well-established principle that “it is incumbent upon the federal courts to be certain of Congress’ intent before finding that federal law overrides” the “usual constitutional balance of federal and state powers.”<sup>169</sup> To quote [Supreme Court Justice Felix] Frankfurter . . . if the Federal Government would “radically readjust[ ] the balance of state and national authority, those charged with the duty of legislating [must be] reasonably explicit” about it.<sup>170</sup> Or as explained by Justice [Thurgood] Marshall, when legislation “affect[s] the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.”<sup>171</sup> . . .

We have applied this background principle when construing federal statutes that touched on several areas of traditional state responsibility. [The examples the Court gave were qualifications for state officers,<sup>172</sup> titles to real estate,<sup>173</sup> and land and water use.<sup>174</sup>] Perhaps the clearest example of traditional state authority is the punishment of local criminal activity.<sup>175</sup> Thus, “we will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction.”<sup>176</sup>

Tellingly, the Court failed to indicate that it had ever applied the principle to a federal immigration statute or that any federal immigration statute touched on an area of traditional state responsibility.

A federal statute implementing employer sanctions, and the application of such sanctions to States when acting as employers, would hardly seem to radically readjust the balance of State and national authority.

168 572 U.S. 844 (2014).

169 The Court quoted *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991).

170 The Court quoted *BFP v. Resolution Trust Corporation*, 511 U.S. 531, 544 (1994) (quoting Justice Frankfurter’s “famous essay on statutory interpretation” *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 539–40) (second alteration in original).

171 The Court quoted *United States v. Bass*, 404 U.S. 336, 349 (1971).

172 The Court cited *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991).

173 The Court cited *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994).

174 The Court cited *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, 531 U.S. 159, 174 (2001).

175 The Court cited *United States v. Morrison*, 529 U.S. 598, 618 (2000).

176 *Bond v. United States*, 572 U.S. 844, 858–59 (2014) (quoting *Bass*, 404 U.S. at 349).

### 3. *Warning -- Explicit Content*

The professors argue that

The language of statutes that *do* bind State governments provides the strongest support for the view that IRCA does not apply to States. These statutes—without exception—explicitly mention State governments.<sup>177</sup>

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[I]n 1985—the year before IRCA’s enactment—the Supreme Court held that Congress must use “unmistakably clear” language to signal its intent to abrogate State Eleventh Amendment sovereign immunity [against lawsuit in Federal court], because the ... Amendment “serves to maintain” the “constitutionally mandated balance of power between the States and the Federal Government.”<sup>178</sup>

I will now examine the statutes the professors cite.

#### a. **Title VII of the Civil Rights Act**<sup>179</sup>

The professors state that Title VII “explicitly includes States in its definition of employer” and that “in 1972, Congress amended the definition of ‘person’ to include ‘governments, governmental agencies, [and] political subdivisions,’ and also amended the definition of ‘employee’ to include ‘employees subject to the civil service laws of a State government, governmental agency or political subdivision.’”<sup>180</sup>

Title VII is inapposite because the preamendment Title VII specifically *excluded* States: “The term ‘employer’ ... does not include ... a State or political subdivision thereof. ...”<sup>181</sup> Obviously, if Congress wants to amend a statute that specifically excludes States in order to include them, prudence would call for it to specify that States shall be included. If a statute specifically excludes nonprofits, prudence would similarly call for Congress to specify that nonprofits shall be included. Of course, there was no preexisting exclusion of States in the context of IRCA.

#### b. **The Fair Labor Standards Act**<sup>182</sup>

The professors state that “Congress explicitly mentioned” certain State entities in the FLSA and that while it at first “excluded States as employers,” it was “amended

177 Arulanantham, Motomura, and Hairapetian, *supra* note 13, at 10 (emphasis in original).

178 *Id.* at 18 (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)) (internal citations omitted).

179 Pub.L.No.88-352,78Stat.241(1964),<https://www.govinfo.gov/content/pkg/STATUTE-78/pdf/STATUTE-78-Pg241.pdf>.

180 Arulanantham, Motomura, and Hairapetian, *supra* note 13, at 10 (citation omitted).

181 Pub. L. No. 88-352, § 701(b), 78 Stat. 253 (1964), <https://www.govinfo.gov/content/pkg/STATUTE-78/pdf/STATUTE-78-Pg241.pdf>.

182 Pub. L. No. 75-718, 52 Stat. 1060 (1938), <https://govtrackus.s3.amazonaws.com/legislink/pdf/stat/52/STATUTE-52-Pg1060.pdf>.

in 1966 to cover certain State hospitals and schools” and then further amended in 1974 to include “a ‘public agency’ which includes ‘the government of a State or political subdivision thereof’.”<sup>183</sup>

This is inapposite, because the preamendment FLSA specifically excluded States: “Employer includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include ... any State or political subdivision of a State ...”<sup>184</sup>

### c. The Age Discrimination in Employment Act<sup>185</sup>

The professors state that the Age Discrimination in Employment Act (“ADEA”) “explicitly covers States” and that while it first “excluded the States” from the definition of employer, it was amended to “include ‘a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State ...”<sup>186</sup>

This is inapposite because the preamendment ADEA specifically excluded States: “The term ‘employer’ ... does not include the United States, a corporation wholly owned by the Government of the United States, or a State or political subdivision thereof.”<sup>187</sup>

### d. The Rehabilitation Act<sup>188</sup>

The professors state that the Rehabilitation Act of 1973 “explicitly lists States and State entities as bound by its anti-discrimination prohibitions” and that under the Act “[p]rogram or activity’ includes ‘a department, agency, special purpose district, or other instrumentality of a State or of a local government ...”<sup>189</sup>

However, placing the Act in context, Congress was on notice during its drafting of the need to specifically state that it was stripping the States’ Eleventh Amendment sovereign immunity. In *Employees of the Department of Public Health & Welfare v. Department of Public Health & Welfare*,<sup>190</sup> decided just months before Congress passed the Rehabilitation Act, the Supreme Court concluded that

It would also be surprising in the present case to infer that Congress deprived Missouri of her constitutional immunity ... without] indicating in some way by clear language that the constitutional immunity was swept away. It

183 Arulanantham, Motomura, and Hairapetin, *supra* note 13, at 11 (citation omitted).

184 Pub. L. No. 75-718, § 3(d), 52 Stat. 1060 (1938), <https://govtrackus.s3.amazonaws.com/legislink/pdf/stat/52/STATUTE-52-Pg1060.pdf>.

185 Pub. L. No. 90-202, 81 Stat. 602 (1967), <https://www.govinfo.gov/content/pkg/STATUTE-81/pdf/STATUTE-81-Pg602.pdf>.

186 Arulanantham, Motomura, and Hairapetin, *supra* note 13, at 12 (citation omitted).

187 Pub. L. No. 90-202, § 11(b), 81 Stat. 605, <https://www.govinfo.gov/content/pkg/STATUTE-81/pdf/STATUTE-81-Pg602.pdf>.

188 Pub. L. No. 93-112, 87 Stat. 355 (1973), <https://www.congress.gov/93/statute/STATUTE-87/STATUTE-87-Pg355.pdf>.

189 Arulanantham, Motomura, and Hairapetin, *supra* note 13, at 11 (citation omitted).

190 411 U.S. 279 (1973).

is not easy to infer that Congress in legislating pursuant to the Commerce Clause ... desired silently to deprive the States of an immunity they have long enjoyed under another part of the Constitution.<sup>191</sup>

As the Court explained in *Pennhurst State School v. Halderman*<sup>192</sup> in 1984,

[A]lthough Congress has power with respect to the rights protected by the Fourteenth Amendment to abrogate the Eleventh Amendment immunity, ... we have required an unequivocal expression of congressional intent to “overturn the constitutionally guaranteed immunity of the several States.” ... Our reluctance to infer that a State's immunity from suit in the federal courts has been negated stems from recognition of the vital role of the doctrine of sovereign immunity in our federal system.<sup>193</sup>

IRCA involved neither the stripping of States of an immunity they have long enjoyed under another part of the Constitution nor a similar express command of the Supreme Court. The example of the Rehabilitation Act is inapposite.

#### e. The Individuals with Disabilities Education Act<sup>194</sup>

The professors state that the Individuals with Disabilities Education Act, which conditions federal school funding on States meeting certain requirements, “explicitly binds States.”<sup>195</sup> This is inapposite as it is another Eleventh Amendment sovereign immunity case and because it involves congressional gifts. As the Third Circuit explained in *M.A. v. State-Operated School District of the City of Newark*<sup>196</sup> in 2003,

Congress [may] bestow[] a gift or gratuity, to which the state is not otherwise entitled, with the condition that the state waive its Eleventh Amendment immunity. ... As is often the case ... the gift or gratuity at issue is federal funds disbursed by Congress pursuant to its Article I spending powers.<sup>197</sup>

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[T]hree requirements must be met before a court may determine that a state has waived its sovereign immunity by accepting a Congressional gift or gratuity [including that] Congress must state in clear and unambiguous terms that waiver of sovereign immunity is a condition of receiving the gift or gratuity ...<sup>198</sup>

191 *Id.* at 285.

192 465 U.S. 89 (1984).

193 *Id.* at 99.

194 Pub. L. No. 101-476, 104 Stat. 1103 (1990) (originally named the “Education of the Handicapped Act Amendments of 1990”), <https://www.congress.gov/101/statute/STATUTE-104/STATUTE-104-Pg1103.pdf>.

195 Arulanantham, Motomura, and Hairapetian, *supra* note 13, at 12.

196 344 F.3d 335 (3d Cir. 2003).

197 *Id.* at 345–46.

198 *Id.* at 346.

#### f. The Family and Medical Leave Act<sup>199</sup>

The professors state that the Family and Medical Leave Act “explicitly binds States” and that it “defines ‘employer’ to include ...[‘]the government of a State or political subdivision thereof; [or] any agency of ...a State, or a political subdivision of a State[’] ...”<sup>200</sup>

This is inapposite as it is yet another Eleventh Amendment sovereign immunity case.<sup>201</sup>

In conclusion, while the professors state that “[t]he language of statutes that *do* bind State governments provides the strongest support for the view that IRCA does not apply to States,” I believe this to be their weakest argument.

#### B. ARGUMENT #2: STATES HAVE A CONSTITUTIONAL RIGHT TO EMPLOY IN CERTAIN OCCUPATIONS ALIENS NOT AUTORIZED TO WORK UNDER FEDERAL LAW

The professors’ second primary argument is their strongest and the most intriguing. They argue that—even assuming for the sake of argument that IRCA’s employer sanctions apply to the States—the States may very well have a constitutional right as States to hire and employ unauthorized aliens as professors at State universities. The professors write that

If IRCA bound State government entities, it would at the very least alter the Federal-State balance by intruding into an area of traditional State authority: the States’ power to dictate the qualifications of their own officials. A State has the “broad power to define its political community” ...[and the right] to determine the qualifications for State positions “rest[s] firmly within a State’s constitutional prerogatives [citing the 1973 Supreme Court decision in *Sugarman v. Dougall*<sup>202</sup>].” The Supreme Court has long recognized this power as foundational to the structure of the nation’s federalist system. “It is obviously essential to the independence of the States, and to their peace and tranquility, that their power to prescribe the qualifications of their own officers ... should be exclusive, and free from external interference, except so far as plainly provided by the Constitution of the United States.” Because “each State has the power to prescribe the qualifications of its officers ... [and] it is a power reserved to the States under the Tenth

199 Pub. L. No. 103-3, 107 Stat. 6 (1993), <https://www.congress.gov/103/statute/STATUTE-107/STATUTE-107-Pg6.pdf>.

200 Arulanantham, Motomura, and Hairapetian, *supra* note 13, at 13 (citation omitted).

201 In 2003, the Supreme Court concluded in *Nevada Department of Human Resources v. Hibbs* that in enacting the FMLA, Congress relied on two of the powers vested in it by the Constitution: its Article I commerce power and its power under § 5 of the Fourteenth Amendment to enforce that Amendment’s guarantees. Congress may not abrogate the States’ sovereign immunity pursuant to its Article I power over commerce...Congress may, however, abrogate States’ sovereign immunity through a valid exercise of its § 5 power...

538 U.S. 721, 727–27 (2003).

202 413 U.S. 634, 648 (1973).

Amendment," application of IRCA's prohibition to at least some State employment decisions could well be unconstitutional.<sup>203</sup>

1. *Sugarman v. Dougall*

In *Sugarman*, the Supreme Court ruled unconstitutional a New York law generally providing that "no person shall be eligible for appointment for any position in the competitive class unless he is a citizen of the United States."<sup>204</sup> New York State's competitive class apparently "reache[d] various positions in nearly the full range of work tasks ... all the way from the menial to the policy making."<sup>205</sup> The Court noted its precedent declaring aliens as a class to be "a prime example of a 'discrete and insular' minority" ... and classifications based on alienage 'subject to close judicial scrutiny' []." <sup>206</sup> While the Court "recognize[d] 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[']" and a "State's broad power to define its political community," "in seeking to achieve this substantial purpose, with discrimination against aliens, the means the State employs must be precisely drawn in light of the acknowledged purpose."<sup>207</sup>

The Court concluded that

[New York's law is] neither narrowly confined nor precise in its application. Its imposed ineligibility may apply to the "sanitation man, class B," ... to the typist, and to the office worker, as well as to the person who directly participates in the formulation and execution of important state policy. The citizenship restriction sweeps indiscriminately. ... [In contrast, sections of New York law] relating generally to persons holding elective and high appointive offices, contain no citizenship restrictions.<sup>208</sup>

The Court ruled "that the statute does not withstand close judicial scrutiny"<sup>209</sup> and "violate[d] the Fourteenth Amendment's equal protection guarantee."<sup>210</sup> Importantly, however, the Court clarified that

[W]e do not hold that, on the basis of an individualized determination, an alien may not be refused, or discharged from, public employment... on the basis of noncitizenship, if... rest[ing] on legitimate state interests that relate to qualifications for a particular position or to the characteristics of the employee. We hold only that a flat ban on the employment of aliens

203 Arulanantham, Motomura, and Hairapetian, *supra* note 13, at 19 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 462–63 (1991)) (citations omitted).

204 413 U.S. at 635.

205 *Id.* at 640.

206 *Id.* at 642 (quoting *Graham v. Richardson*, 403 U.S. 365, 372 (1971)) (citation omitted).

207 *Id.* at 642–43 (quoting *Dunn v. Blumstein*, 405 U.S. 330, 344 (1972)).

208 *Id.* at 643 (citations omitted).

209 *Id.*

210 *Id.* at 646 (footnote omitted).

in positions that have little, if any, relation to a State's legitimate interest, cannot withstand scrutiny under the Fourteenth Amendment.

Neither do we hold that a State may not, in an appropriately defined class of positions, require citizenship as a qualification for office. Just as "the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections,"<sup>211</sup>... "each State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen."<sup>212</sup> Such power inheres in the State by virtue of its obligation, already noted above, "to preserve the basic conception of a political community."<sup>213</sup>... *And this power and responsibility of the State applies, not only to the qualifications of voters, but also to persons holding state elective or important nonelective executive, legislative, and judicial positions, for officers who participate directly in the formulation, execution, or review of broad public policy perform functions that go to the heart of representative government. There... is "where citizenship bears some rational relationship to the special demands of the particular position."*<sup>214</sup>

[S]uch state action, particularly with respect to voter qualifications, is not wholly immune from scrutiny under the Equal Protection Clause. ... But our scrutiny will not be so demanding where we deal with matters resting firmly within a State's constitutional prerogatives. ... *This is no more than a recognition of a State's historical power to exclude aliens from participation in its democratic political institutions... and a recognition of a State's constitutional responsibility for the establishment and operation of its own government, as well as the qualifications of an appropriately designated class of public office holders. ... This Court has never held that aliens have a constitutional right to vote or to hold high public office under the Equal Protection Clause. Indeed, implicit in many of this Court's voting rights decisions is the notion that citizenship is a permissible criterion for limiting such rights. ... A restriction on the employment of noncitizens, narrowly confined, could have particular relevance to this important state responsibility, for alienage itself is a factor that reasonably could be employed in defining "political community."*<sup>215</sup>

Could it be the case that IRCA is unconstitutional to the degree that it prohibits States from allowing unauthorized aliens to be State "officers"? And even if the answer is yes, would college professors (and possibly teaching assistants) at State universities be considered such State officers?

I should first note that *Sugarman* is an Equal Protection Clause case. The Fourteenth Amendment provides that "[no] State shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the

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211 The Court quoted *Oregon v. Mitchell*, 400 U.S. 112, 124-25 (1970) (opinion of Black, J.) (footnote and citations omitted).

212 The Court quoted *Boyd v. Thayer*, 143 U.S. 135, 161 (1892).

213 The Court quoted *Dunn v. Blumstein*, 405 U.S. 330, 344 (1972).

214 The Court quoted the district court's decision below, *Dougall v. Sugarman*, 339 F. Supp. 906, 911 (S.D.N.Y. 1971) (Lumbard, concurring).

215 *Sugarman*, 413 U.S. at 646-49 (emphasis added) (citations omitted).

equal protection of the laws."<sup>216</sup> So are the post-*Sugarman* cases I will consider below. However, this article is not analyzing the States' right to employ unauthorized aliens as college professors through the lens of rights possessed by such aliens under the Equal Protection Clause. Rather, it is addressing whether States have the right, pursuant to the constitutional balance of power between States and the federal government, not to comply with a federal law *requiring* them to so deny employment. However, the Fourteenth Amendment cases will certainly be instructive in the analysis.

The Supreme Court has ruled that all persons residing within a State, including aliens unlawfully present within the United States, are protected by the Equal Protection Clause. In 1982, the Court ruled in *Plyler* that

[Texas] argue[s] at the outset that undocumented aliens, because of their immigration status, are not "persons within the jurisdiction" of the State of Texas, and that they therefore have no right to the equal protection of Texas law. We reject this argument. ... Aliens, even aliens whose presence in this country is unlawful, have long been recognized as "persons" guaranteed due process of law by the Fifth and Fourteenth Amendments.<sup>217</sup>

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To permit a State to employ the phrase "within its jurisdiction" in order to identify subclasses of persons whom it would define as beyond its jurisdiction, thereby relieving itself of the obligation to assure that its laws are designed and applied equally to those persons, would undermine the principal purpose for which the Equal Protection Clause was incorporated in the Fourteenth Amendment... [which was] to work nothing less than the abolition of all caste-based and invidious class-based legislation.<sup>218</sup>

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[T]he protection of the Fourteenth Amendment extends to anyone, citizen or stranger, who is subject to the laws of a State, and reaches into every corner of a State's territory. That a person's initial entry into ... the United States, was unlawful, and that he may for that reason be expelled, cannot negate the simple fact of his presence within the State's territorial perimeter. ... [U]ntil he leaves the jurisdiction—either voluntarily, or involuntarily...—he is entitled to the equal protection of the laws that a State may choose to establish.<sup>219</sup>

As to the standard of review, the Court explained that "[i]n applying the Equal Protection Clause to most forms of state action, we... seek only the assurance that the classification at issue bears some fair relationship to a legitimate public purpose [the "rational relation" test]."<sup>220</sup> Generally, "[u]ndocumented aliens cannot be treated as a suspect class [requiring the highest standard of review of "strict

216 U.S. Const. amend XIV, § 1 (emphasis added).

217 *Plyler v. Doe*, 457 U.S. 202, 210 (1982) (citing *Shaughnessy v. Mezei*, 345 U.S. 206, 212 (1953), *Wong Wing v. United States*, 163 U.S. 228, 238 (1896), and *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886)).

218 *Plyler*, 457 U.S. at 213.

219 *Id.* at 215.

220 *Id.* at 216.

scrutiny"] because their presence in this country in violation of federal law is not a "constitutional irrelevancy."<sup>221</sup>

Returning to the question at hand, are IRCA's employer sanctions unconstitutional to the degree that they prohibit States from allowing unauthorized aliens to be State *officers*? The answer is very possibly yes. However, the answer is also very possibly no. As the professors acknowledge,

[Some] may argue that *Sugarman* and the cases following it give States some discretion to *exclude* certain people from the "political community" and thus public office, but not to *include* people excluded under federal law ... *Ambach* [states that] "It is because of th[e] special significance of citizenship that governmental entities, when exercising the functions of government, have wider latitude in *limiting* the participation of noncitizens." ...<sup>222</sup>

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Ultimately, the fact that the Court's prior cases on this issue concern limitations on the political community makes it impossible to know whether a future decision might draw such a distinction.<sup>223</sup>

In *Ambach*, the Supreme Court ruled that

The rule for governmental functions, which is an exception to the general standard applicable to classifications based on alienage, rests on important principles inherent in the Constitution. The distinction between citizens and aliens, though ordinarily irrelevant to private activity, is fundamental to the definition and government of a State. The Constitution itself refers to the distinction no less than 11 times. ... [T]he status of citizenship was meant to have significance in the structure of our government. ... *It is because of this special significance of citizenship that governmental entities, when exercising the functions of government, have wider latitude in limiting the*

221 *Id.* at 223. The Court in *Plyler* decided to apply an intermediate standard of review because of the case's "special constitutional sensitivity." *Id.* at 226. The Court stated that

Persuasive arguments support the view that a State may withhold its beneficence from those whose very presence within the United States is the product of their own unlawful conduct. These arguments do not apply with the same force to classifications imposing disabilities on the minor *children* of such illegal entrants.

*Id.* at 219 (emphasis in original). But as the Court later explained in *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450 (1988),

*Th[e] standard of review [used in Plyler]...less demanding than "strict scrutiny" but more demanding than the standard rational relation test, has generally been applied only in cases that involved discriminatory classifications based on sex or illegitimacy. In Plyler, which did not fit this pattern, the State of Texas had denied to the children of illegal aliens the free public education that it made available to other residents. Applying a heightened level of equal protection scrutiny, the Court concluded that the State had failed to show that its classification advanced a substantial state interest. ... We have not extended this holding beyond the "unique circumstances," ... that provoked [Plyler's] "unique confluence of theories and rationales[.]"*

*Kadrmas*, 487 U.S. at 459 (citations omitted).

222 Arulanantham, Motomura, and Hairapetian, *supra* note 13, at 21 (citations omitted) (emphasis added by memo).

223 *Id.* at 22.

*participation of noncitizens.*<sup>224</sup>

And as the Supreme Court concluded in *Foley v. Connelie* in 1978, “[t]he essence of our holdings to date is that ... the right to govern is reserved to citizens”<sup>225</sup>—not reserved to citizens and those noncitizens of a State’s choosing, but to citizens.

Thus, while it is certainly *impossible to know* whether the Supreme Court in the future will find IRCA’s employer sanctions unconstitutional to the degree that they prohibit States from allowing unauthorized aliens to be State “officers”, there is a very strong possibility that the Court will not, considering its prior focus on the right of States to *limit* the participation of noncitizens based upon the distinction between citizens and aliens being fundamental to the definition and governance of a State.

## 2. *Public School Teachers versus University Professors*

Assuming for the sake of argument that IRCA’s employer sanctions would be unconstitutional if applied to State “officers,” would the Supreme Court consider college professors at State universities to be such officers? Are they *persons holding State elective or important nonelective executive, legislative, and judicial positions*? As the professors state, “[o]pponents of [our] view may argue that States’ power to dictate their employees’ qualifications is reserved only for the “most important government officials.”<sup>226</sup>

The professors’ response is that “[u]nder *Sugarman* and its progeny, the Court has defined the category of ‘important government officials’ quite broadly, to include police officers and public school teachers.”<sup>227</sup> As to police officers, in 1978 the Supreme Court ruled in *Foley* that

To effectuate th[e] result [that the right to govern is reserved to citizens], we must necessarily examine each position in question to determine whether it involves discretionary decision making, or execution of policy, which substantially affects members of the political community.<sup>228</sup>

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The police function fulfills a most fundamental obligation of government to its constituency. Police officers in the ranks do not formulate policy, *per se*, but they are clothed with authority to exercise an almost infinite variety of discretionary powers. ... [which] affects members of the public significantly and often in the most sensitive areas of daily life. ... An arrest ... is a serious matter for any person even when no prosecution follows or when an acquittal is obtained. Most arrests are without prior judicial authority, as when an officer observes a criminal act in progress or

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224 *Ambach v. Norwick*, 441 U.S. 68, 75 (1979) (emphasis added) (citations and footnotes omitted).

225 435 U.S. 291, 297 (1978) (emphasis added).

226 Arulanantham, Motomura, and Hairapetian, *supra* note 13, at 19 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 463 (1991)) (citation omitted).

227 *Id.* at 20 (citations omitted).

228 *Foley*, 435 U.S. at 296 (footnote omitted).

suspects that felonious activity is afoot. ...

Clearly the exercise of police authority calls for a very high degree of judgment and discretion, the abuse or misuse of which can have serious impact on individuals. ... A policeman... is not to be equated with a private person engaged in routine public employment or other "common occupations of the community". ...

[I]t would be ... anomalous to conclude that citizens may be subjected to the broad discretionary powers of noncitizen police officers. ... Police officers very clearly fall within the category of "important nonelective ... officers who participate directly in the ... *execution* ... of broad public policy." ... [C]itizenship bears a rational relationship to the special demands of the particular position. A State may, therefore, consonant with the Constitution, confine the performance of this important public responsibility to citizens of the United States.<sup>229</sup>

So, it is within the realm of possibility that the Court would find that States have a constitutional right to hire unauthorized aliens as police officers. However, again, as the professors acknowledge, just because the Court found that States have the right to impose a citizenship requirement on police officers does not necessarily mean that the Court would also find that States have the right to hire noncitizens as officers (should federal law ever bar noncitizen eligibility), or even the right to hire as officers aliens already barred by federal law from employment.

As the Court stated, "the right to govern is reserved to citizens" and "it would be ... anomalous to conclude that citizens may be subjected to the broad discretionary powers of noncitizen police officers." Furthermore, "citizenship bears a rational relationship to the special demands of the particular position." And, as the Court stated in 1982 in *Toll v. Moreno*, "Our cases do recognize ... that a State, in the course of defining its political community, may, in appropriate circumstances, limit the participation of noncitizens in the States' political and governmental functions."<sup>230</sup> The cases do not recognize that States can *expand* the participation of noncitizens in their political and governmental functions in contravention of federal law.

In any event, what about public school teachers? The Court concluded in *Ambach* that

[New York] forbids certification as a public school teacher of any person who is not a citizen ... unless that person has manifested an intention to apply for citizenship [with exemptions possible].<sup>231</sup>

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[S]ome state functions are so bound up with the operation of the State as a governmental entity as to permit the exclusion from those functions of

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229 *Id.* at 297–300 (quoting *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973)) (emphasis in original) (footnotes and citation omitted).

230 458 U.S. 1, 12 n.17 (1982) (citing *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982), *Ambach v. Norwick*, 441 U.S. 68, 72, 75 (1979), *Foley*, 435 U.S. at 295–96, and *Sugarman*, 413 U.S. at 646–49)).

231 441 U.S. at 69–70 (footnote and citation omitted).

all persons who have not become part of the process of self-government. In *Sugarman*, we recognized that a State could, “in an appropriately defined class of positions, require citizenship as a qualification for office.”<sup>232</sup>

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*In determining whether, for purposes of equal protection analysis, teaching in public schools constitutes a governmental function, we look to the role of public education and to the degree of responsibility and discretion teachers possess in fulfilling that role. ... Each of these considerations supports the conclusion that public school teachers may be regarded as performing a task “that [goes] to the heart of representative government.”*<sup>233</sup>

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Public education ... “fulfills a most fundamental obligation of government to its constituency.”<sup>234</sup> The importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests, long has been recognized by our decisions:

“Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.” [quoting the Court’s decision in *Brown v. Board of Education*.<sup>235</sup>]

... Other authorities have perceived public schools as an “assimilative force” by which diverse and conflicting elements in our society are brought together on a broad but common ground. ... These perceptions of the public schools as inculcating fundamental values necessary to the maintenance of a democratic political system have been confirmed by the observations of social scientists.

Within the public school system, teachers play a critical part in developing students’ attitude toward government and understanding of the role of citizens in our society. ... [T]eachers are in direct, day-to-day contact with students. ... They are responsible for presenting and explaining the subject matter in a way that is both comprehensible and inspiring. ... [and] serve[] as a role model for ... students, exerting a subtle but important influence over their perceptions and values. ... [A] teacher has an opportunity to influence the attitudes of students toward government, the political process, and a citizen's

232 *Id.* at 73–74.

233 The Court quoted *Sugarman*, 413 U.S. at 647 (footnote and citation omitted).

234 The Court quoted *Foley*, 435 U.S. at 297.

235 347 U.S. 483, 493 (1954).

social responsibilities. This influence is crucial to the continued good health of a democracy.

...[W]e think it clear that public school teachers come well within the “governmental function” principle recognized in *Sugarman* and *Foley*. Accordingly, the Constitution requires only that a citizenship requirement applicable to teaching in the public schools bear a rational relationship to a legitimate state interest.<sup>236</sup>

At first blush, it might be presumed that the Court would analyze the right of a State to hire professors at State universities in the same manner as it would a State’s right to hire public school teachers. However, the analysis of the Supreme Court (as well as federal appellate courts) in other cases points to the opposite conclusion. Below I consider federal courts’ views of the fundamental roles of primary/secondary education compared to their views of the role of higher education. I also consider their views of the attributes of minor children attending school as compared to adults attending college.

I should first point out that in *Ambach* itself, Justice Blackmun wrote in dissent that “[w]e are concerned here with elementary and secondary education in the public schools of New York State. We are not concerned with teaching at the college or graduate levels.”<sup>237</sup>

#### a. Public Education = Basic Education

In *Ambach*, the majority cited a number of cases in addition to *Brown* for the proposition that “[t]he importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests,” and none of them involve higher education.<sup>238</sup>

Additionally, the Supreme Court has continually focused on the importance of *basic education* for *young minds*. In 1952, it found in *Adler v. Board of Education*<sup>239</sup> that

A teacher ... in a schoolroom ... shapes the attitude of *young minds* towards the society in which they live. In this, the state has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted.<sup>240</sup>

In 1972, the Court concluded in *Wisconsin v. Yoder* that “There is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of *basic education*

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236 *Ambach*, 441 U.S. at 75–80 (emphasis added) (citations and footnotes omitted).

237 *Id.* at 84 (Blackmun, J., dissenting).

238 *Id.* at 76–77.

239 342 U.S. 485 (1952).

240 *Id.* at 493 (emphasis added).

[citing its 1925 decision in *Pierce v. Society of Sisters*<sup>241</sup>]. Providing public schools ranks at the very apex of the function of a State."<sup>242</sup> In 1982, the Court concluded in *Plyler* that "[b]y denying these [unlawfully present alien] children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation."<sup>243</sup> The *Plyler* Court went on to explain that

The inability to read and write will handicap the individual deprived of a basic education each and every day of his life. The inestimable toll of that deprivation on the social, economic, intellectual, and psychological well-being of the individual, and the obstacle it poses to individual achievement, make it most difficult to reconcile the cost or the principle of a status-based denial of basic education with the framework of equality embodied in the Equal Protection Clause.<sup>244</sup>

It seems clear that the Supreme Court is referring to public primary and secondary education when referring to public education—and not to public higher education.

#### b. Moral Development of Youth

In *Plyler*, the Court further explained that

We have recognized "the public schools as a most vital civic institution for the preservation of a democratic system of government,"<sup>245</sup> and as the primary vehicle for transmitting "the values on which our society rests."<sup>246</sup> "[As] ... pointed out early in our history, ... some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence."<sup>247</sup>

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The public schools are an important socializing institution, imparting those shared values through which social order and stability are maintained.<sup>248</sup>

Four years later, in 1986, the Court stated in *Bethel School District v. Fraser*<sup>249</sup> that

The role and purpose of the American public school system were well described

241 268 U.S. 510, 534 (1925).

242 406 U.S. 205, 213 (1972) (emphasis added).

243 *Plyler v. Doe*, 457 U.S. 202, 223–24 (1982) (emphasis added).

244 *Id.* at 222 (emphasis added) (footnote omitted).

245 The Court quoted *Abington School District v. Schempp*, 374 U.S. 203, 230 (1963) (Brennan, J., concurring).

246 The Court quoted *Ambach v. Norwick*, 441 U.S. 68, 72, 76 (1979).

247 *Plyler*, 457 U.S. at 221. The Court quoted *Yoder*, 406 U.S. at 221.

248 *Plyler*, 457 U.S. at 222 n.20.

249 478 U.S. 675 (1986).

by two historians, who stated: “[Public] education must prepare pupils for citizenship in the Republic. ... It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation.”<sup>250</sup>

And as the District Court for the District of Massachusetts concluded in *Parker v. Hurley*<sup>251</sup> in 2007,

The reason for the constitutional concern regarding *young school children* for Establishment Clause purposes does not apply to plaintiffs' substantive due process and Free Exercise Clause claims in this case. The Establishment Clause prohibits government conduct that has the effect of endorsing religion. ... However, the very purpose of schools is the “preparation of individuals for participation as citizens’ [and, therefore,] local education officials may attempt ‘to promote civic virtues’ ‘that awake[n] the child to cultural values.’”<sup>252</sup> Schools are expected to transmit civic values.<sup>253</sup> ... In essence, the Supreme Court has made clear that while the state may not expressly or indirectly endorse a particular religion or suggest that religious beliefs are officially preferred over other beliefs, the state is expected to teach civic values as part of its preparation of students for citizenship.<sup>254</sup>

Federal courts have not described the purpose of higher education in this fashion, as preparing students to be U.S. citizens and imparting shared values. In fact, as I will discuss below, they have ascribed a wholly different role to higher education.

### c. The Distinct Role of Higher Education

In 2008, the Third Circuit concluded in *DeJohn v. Temple University*,<sup>255</sup> that

[T]here is a difference between the extent that a school may regulate student speech in a public university setting as opposed to that of a public elementary or high school.<sup>256</sup>

... Certain speech ... which *cannot* be prohibited to adults *may* be prohibited to public elementary and high school students.<sup>257</sup>

... [A]dministrators are granted *less leeway* in regulating student speech than are public elementary or high school administrators.<sup>258</sup>

250 *Id.* at 681 (citation omitted).

251 474 F. Supp. 2d 261 (D. Mass. 2007).

252 The court quoted *Board of Education v. Pico*, 457 U.S. 853, 876 (1982) (Blackmun, J., concurring).

253 The court cited *Plyler*, 457 U.S. at 221 and *Ambach v. Norwick*, 441 U.S. 68, 72, 76 (1979).

254 *Parker*, 474 F. Supp. 2d at 271–72 (emphasis added).

255 537 F.3d 301 (3d Cir. 2008).

256 *Id.* at 315.

257 *Id.* (emphasis in original) (citation omitted).

258 *Id.* at 316 (emphasis in original).

The court explained that

[O]n public university campuses throughout this country... free speech is of critical importance because it is the lifeblood of academic freedom. As the Supreme Court... explained, "the precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, 'the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.'"<sup>259</sup>

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It is well recognized that "[t]he college classroom with its surrounding environs is peculiarly the 'marketplace of ideas[.]'"<sup>260</sup>

And in 2010, the Third Circuit in *McCauley v. University of the Virgin Islands*<sup>261</sup> explained that "[d]iscussion by adult students in a college classroom should not be restricted,"<sup>262</sup> "based solely on rationales propounded specifically for the restriction of speech in public elementary and high schools..."<sup>263</sup> The Third Circuit reiterated its *DeJohn* ruling: "Public universities have significantly less leeway in regulating student speech than public elementary or high schools."<sup>264</sup> It explained that

We reach this conclusion in light of [1] the differing pedagogical goals of each institution, [2] the *in loco parentis* role of public elementary and high school administrators, [3] the special needs of school discipline in public elementary and high schools, [4] the maturity of the students, and, finally, [5] the fact that many university students reside on campus and thus are subject to university rules at almost all times.<sup>265</sup>

*i. The Distinct Role: Pedagogical Differences*

As to the differing pedagogical goals of each institution, the Third Circuit in *McCauley* explained that

[T]he pedagogical missions of public universities and public elementary and high schools are undeniably different. ... [T]he former encourages inquiry and challenging a priori assumptions whereas the latter prioritizes the inculcation of societal values. Public universities encourage teachers and students to launch new inquiries into our understanding of the world. ... The university atmosphere of speculation, experiment, and creation is essential to the quality of higher

259 *Id.* at 314 (quoting *Healy v. James*, 408 U.S. 169, 180 (1972)) (citation omitted). See generally Henry J. Hyde & George Fishman, *The Collegiate Speech Protection Act of 1991: A Response to the New Intolerance in the Academy*, 37 Wayne L. Rev. 1469 (1991).

260 *Id.* 315 (quoting *Healy*, 408 U.S. at 180).

261 618 F.3d 232 (3d Cir. 2010).

262 *Id.* at 242 (quoting *DeJohn*, 537 F.3d at 315).

263 *Id.* (citing *DeJohn*, 537 F.3d at 315) (citation omitted).

264 *Id.* at 247.

265 *Id.* at 242–43.

education. Our public universities require great latitude in expression and inquiry to flourish. ...*Free speech "is the lifeblood of academic freedom."*<sup>266</sup> ...Public elementary and high schools, on the other hand, are tasked with inculcating a "child [with] cultural values, [to] prepar[e] him for later professional training, and [to] help[] him to adjust normally to his environment."<sup>267</sup> ... "The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order."<sup>268</sup> As a result, "teachers—and indeed the older students—[must] demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class."<sup>269</sup> ...School attendance exposes students to "role models" who are to provide "essential lessons of civil, mature conduct."<sup>270</sup> ...*Public elementary and high school education is as much about learning how to be a good citizen as it is about multiplication tables and United States history.*<sup>271</sup>

ii. *The Distinct Role: In Loco Parentis*

As to the *in loco parentis* role of public elementary and high school administrators, the court in *McCauley* explained that

"[P]ublic elementary and high school administrators," unlike their counterparts at public universities, "have the unique responsibility to act *in loco parentis*."<sup>272</sup> ... "[B]road authority to control the conduct of [public elementary and high school] students granted to school officials permits a good deal of latitude in determining which policies will best serve educational and disciplinary goals."<sup>273</sup>

*Public university administrators, officials, and professors do not hold the same power over students.*<sup>274</sup>

The court explained that this has not always been so, but rather is a modern development. It concluded that "[t]he idea that public universities exercise strict control over students via an *in loco parentis* relationship has decayed to the point of irrelevance."<sup>275</sup>

266 The court quoted *DeJohn*, 537 F.3d at 314 (emphasis added).

267 The court quoted *Brown v. Board of Education*, 347 U.S. 483, 493 (1954) (emphasis added) (citation omitted).

268 The court quoted *Bethel School District v. Fraser*, 478 U.S. 675, 683 (1986).

269 *Id.*

270 *Id.*

271 *McCauley*, 618 F.3d at 243 (emphasis added) (citations omitted).

272 The court quoted *DeJohn v. Temple University*, 537 F.3d 301, 315 (3d Cir. 2008).

273 The court quoted *Sypniewski v. Warren Hills Regional Board of Education*, 307 F.3d 243, 260 (2002).

274 *McCauley*, 618 F.3d at 243–44 (emphasis added) (citations omitted).

275 *Id.* at 245 (citations omitted). The court then provided some historical context:

Trustees, administrators, and faculties have been required to yield to the expanding rights and privileges of their students. ...[R]ights formerly possessed by college administrations

iii. *The Distinct Role: School Discipline*

As to the special needs of school discipline in public elementary and high schools, the Supreme Court concluded *Vernonia School District v. Acton*<sup>276</sup> in 1995 that

In [N.J. v.] T. L. O. . . . [we] did not deny, but indeed emphasized, that *the nature of [public schools'] power [over students] is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults. "[A] proper educational environment requires close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult."*<sup>277</sup> . . . [W]e have acknowledged that for many purposes "school authorities act in loco parentis,"<sup>278</sup> with the power and indeed the duty to "inculcate the habits and manners of civility,"<sup>279</sup> . . . Thus, while children assuredly do not "shed their constitutional rights. . . at the schoolhouse gate,"<sup>280</sup> *the nature of those rights is what is appropriate for children in school. . . .*

*Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are different in public schools than elsewhere; the "reasonableness" inquiry cannot disregard the schools' custodial and tutelary responsibility for children.*<sup>281</sup>

The Third Circuit in *McCauley* explained that

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have been transferred to students. College students today are no longer minors; they are now regarded as adults in almost every phase of community life. . . . [E]ighteen year old students are now identified with an expansive bundle of individual and social interests and possess discrete rights not held by college students from decades past. There was a time when college administrators and faculties assumed a role In loco parentis. . . . The campus revolutions of the late sixties and early seventies were a direct attack by the students on rigid controls by the colleges and were an all-pervasive affirmative demand for more student rights. In general, the students succeeded, peaceably and otherwise, in acquiring a new status at colleges throughout the country. These movements, taking place almost simultaneously with legislation and case law lowering the age of majority, produced fundamental changes in our society. A dramatic reapportionment of responsibilities and social interests of general security took place. Regulation by the college of student life on and off campus has become limited. Adult students now demand and receive expanded rights of privacy in their college life including, for example, liberal, if not unlimited, partial visiting hours. College administrators no longer control the broad arena of general morals. At one time, exercising their rights and duties In loco parentis, colleges were able to impose strict regulations. But today students vigorously claim the right to define and regulate their own lives.

*Id.* at 244–45 (quoting *Bradshaw v. Rawlings*, 612 F.2d 135, 138–40 (3d Cir. 1979)) (footnotes omitted).

276 515 U.S. 646 (1995).

277 The Court quoted *N.J. v. T. L. O.*, 469 U.S. 325, 339 (1985) (emphasis added).

278 The Court quoted *Bethel School District v. Fraser*, 478 U.S. 675, 684 (1986)..

279 The Court quoted *Bethel*, 478 U.S. at 681 (internal quotation marks omitted by *Vernonia*).

280 The Court quoted *Tinker v. Des Moines Independent School District*, 393 U.S. 503, 506 (1969) (emphasis added).

281 *Veronica*, 515 U.S. at 655–56 (emphasis added) (citations omitted).

Closely related to the *in loco parentis* issue is...that public elementary and high schools must be empowered to address the “special needs of school discipline” unique to those environs.<sup>282</sup> In [N.J. v.] T.L.O., the Supreme Court, in discussing the scope of a public high school student’s Fourth Amendment rights, stated that teachers and administrators in public high schools have a substantial interest in “maintaining discipline in the classroom and on school grounds”: “Maintaining order in the classroom has never been easy, but in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems.”<sup>283</sup> ...“Compulsory attendance laws automatically inhibit the liberty interest afforded public school students, as the law compels students to attend school in the first place [and o]nce under the control of the school, students’ movement and location are subject to the ordering and direction of teachers and administrators.”<sup>284</sup> Unlike the strictly controlled, smaller environments of public elementary and high schools, where a student’s course schedule, class times, lunch time, and curriculum are determined by school administrators, *public universities operate in a manner that gives students great latitude*: for example, university students routinely (and unwisely) skip class; they are often entrusted to responsibly use laptops in the classroom; they bring snacks and drinks into class; and they choose their own classes. In short, *public university students are given opportunities to acquit themselves as adults. Those same opportunities are not afforded to public elementary and high school students.*<sup>285</sup>

*iv. The Distinct Role: Emotional Maturity*

As to the maturity of elementary and secondary school students as compared to those in higher education, the court in *McCauley* explained that

*[P]ublic elementary and high school administrators “must be able to take into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics, which might range from the existence of Santa Claus in an elementary school setting to the particulars of teenage sexual activity in a high school setting.”*<sup>286</sup> ...*Considerations of maturity are not nearly as important for university students, most of whom are already over the age of 18 and entrusted with a panoply of rights and responsibilities as legal adults. ...“University students are...young adults [and] are less impressionable*

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282 The court quoted *DeJohn v. Temple University*, 537 F.3d 301, 315–16 (3d Cir. 2008).

283 The court quoted *T.L.O.*, 469 U.S. at 339.

284 The court quoted *Shuman v. Penn Manor School District*, 422 F.3d 141, 149 (3d Cir. 2005) (emphasis added) (internal citations and quotation marks omitted).

285 *McCauley v. University of the Virgin Is.*, 618 F.3d 232, 245–46 (3d Cir. 2010). (emphasis added) (citations omitted).

286 The court quoted *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 272 (1988) (emphasis added). The court also quoted *Bethel School District v. Fraser*, 478 U.S. 675, 683 (1986) (“The speech [at issue] could well be seriously damaging to its less mature audience.”) and *Lee v. Weisman*, 505 U.S. 577, 592 (1992) (“[T]here are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools.”).

*than younger students[.]*<sup>287</sup>

In 1987, the Supreme Court found in *Edwards v. Aguillard* that “Students in [elementary and secondary schools] are impressionable and their attendance is involuntary. . . . The State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure.”<sup>288</sup>

Finally, in 2006, the Ninth Circuit in *Harper v. Poway Unified School District*<sup>289</sup> explained that its decision to affirm a district court's denial of a preliminary injunction sought by a high school student who sued school officials over their decision to keep him out of class for wearing a T-shirt with a religious message that condemned homosexuality “is based not only on the type and degree of injury the speech involved causes to impressionable young people, but on the locale in which it takes place. . . . [S]tudent rights must be construed ‘in light of the special characteristics of the school environment’”[.].<sup>290</sup>

The Ninth Circuit then emphasized that

[The precedent we are setting] is *limited to conduct that occurs in public high schools (and in elementary schools). As young students acquire more strength and maturity, and specifically as they reach college age, they become adequately equipped emotionally and intellectually to deal with the type of verbal assaults that may be prohibited during their earlier years. Accordingly, we do not condone the use in public colleges or other public institutions of higher learning of restrictions similar to those permitted here.*<sup>291</sup>

*v. The Distinct Role: Compulsory Attendance*

In *Abington School District v. Schempp*,<sup>292</sup> Justice Brennan wrote in a concurring opinion that

In *Hamilton v. Regents of the University of California*<sup>293</sup> . . . the question was that of the power of a State to compel students at the State University to participate in military training instruction against their religious convictions.

287 618 F.3d at 246 (emphasis added) (citations and footnote omitted). The court quoted *Widmar v. Vincent*, 454 U.S. 263, 274 n.14 (1981). In *Bethel*, the Supreme Court explained that

This Court's First Amendment jurisprudence has acknowledged limitations on the otherwise absolute interest of the speaker in reaching an unlimited audience where the speech is sexually explicit and the audience may include children. . . . *These cases recognize the obvious concern on the part of parents, and school authorities acting in loco parentis, to protect children—especially in a captive audience—from exposure to sexually explicit, indecent, or lewd speech.*

478 U.S. at 684 (emphasis added) (citations omitted).

288 482 U.S. 578, 584 (1987) (citations and footnote omitted).

289 445 F.3d 1166 (9th Cir. 2006), *vacated and remanded on other grounds*, 549 U.S. 1262 (2007).

290 *Id.* at 1183 (quoting *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

291 *Id.* (emphasis added).

292 374 U.S. 203 (1963).

293 293 U.S. 245 (1934).

The validity of the statute was sustained against claims based upon the First Amendment. But the decision rested on a very narrow principle: since there was neither a constitutional right nor a legal obligation to attend the State University, the obligation to participate in military training courses, reflecting a legitimate state interest, might properly be imposed upon those who chose to attend. ...

...[I]f *Hamilton* retains any vitality with respect to higher education, we recognized its inapplicability to cognate questions in the public primary and secondary schools when we held in *West Virginia Board of Education v. Barnette*<sup>294</sup> ... that a State had no power to expel from public schools students who refused on religious grounds to comply with a daily flag salute requirement. ... The key to the holding that such a requirement abridged rights of free exercise lay in the fact that attendance at school was not voluntary but compulsory. The Court [in *Barnette*] said:

... "In the present case attendance is not optional."<sup>295</sup>

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The different results of those cases are attributable only in part to a difference in the strength of the particular state interests which the respective statutes were designed to serve. Far more significant is the fact that *Hamilton* dealt with the voluntary attendance at college of young adults, while *Barnette* involved the compelled attendance of young children at elementary and secondary schools. *This distinction warrants a difference in constitutional results.*<sup>296</sup>

In *Edwards*, the Supreme Court approvingly quoted Justice Brennan's conclusion: "Students in [elementary and secondary schools] are impressionable and their attendance is involuntary."<sup>297</sup> *The State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure.*<sup>298</sup> And in the related footnote, the Court quoted from Justice Brennan's concurrence: "The potential for undue influence is far less significant with regard to college students who voluntarily enroll in courses. *This distinction warrants a difference in constitutional results.*"<sup>299</sup>

#### *vi. The Distinct Role: On-Campus Residence*

The Third Circuit in *McCauley* concluded that

[U]niversity students, unlike public elementary and high school students,

294 319 U.S. 624 (1943).

295 *Schempp*, 374 U.S. at 250–52 (Brennan, J., concurring) (quoting *Barnette*, 319 U.S. at 631–32) (citations omitted).

296 *Id.* at 252–53 (Brennan, J., concurring) (emphasis added) (footnote omitted).

297 482 U.S. 578, 584 (1987) (citing a number of cases including Justice Brennan's concurrence in *Schempp*).

298 *Id.* (citing a number of cases including Justice Brennan's concurrence in *Schempp*) (emphasis added) (citations and footnote omitted).

299 *Id.* at n.5 (quoting *Schempp*, 374 U.S. at 253 (Brennan, J., concurring)).

often reside in dormitories on campus, so they remain subject to university rules at almost all hours of the day. The concept of the “schoolhouse gate,” and the idea that students may lose some aspects of their First Amendment right to freedom of speech while in school, does not translate well to an environment where the student is constantly within the confines of the schoolhouse.<sup>300</sup>

In summation, the factors that led the Supreme Court in *Ambach* to conclude that public school teachers perform a task “that [goes] to the heart of representative government”—most decisively that they have the responsibility of preparing children for future participation as citizens in self-government and the responsibility to preserve the values on which our society rests—are factors that federal courts have found to be largely absent with regard to professors and administrators in the dramatically different context of higher education. It may be doubted that the citizenship or immigration status of a professor will materially impact the encouragement of free inquiry and the challenging of ingrained assumptions. Additionally, among other factors, the adults attending college have a higher level of emotional maturity and are attending school on a voluntary basis. Thus, it may be doubted that the Supreme Court would find that States have a right to impose a citizenship requirement on State university professors. However, as discussed, even if the Court did find States to have this right, this does not necessarily mean that the Court would also find them to have the right to hire noncitizen professors (should federal law bar noncitizen eligibility), or even the right to hire unauthorized alien professors.

### III. CONCLUSION

If the Regents of the University of California do authorize the UC system to employ aliens not authorized to work under federal law, and the federal government challenges the decision, (1) IRCA’s employer sanctions regime will likely be found to apply to UC; and (2) UC will likely not be found to have a constitutional right to hire unauthorized aliens as professors. Unless the California State government officially authorizes such action, however, the UC system would not even have available the police power or constitutional defenses put forward by the professors, and could only rely on the argument that IRCA’s employer sanctions do not apply to any State entity acting as an employer because of Congress’s failure to spell out their application to States. I would thus presume that the UC system would implore the California legislature to pass, and the governor to sign, legislation providing official authorization. In any event, if California or any other State desires to allow its State universities to employ unauthorized aliens, I would suggest it should seek a statutory exemption from Congress.

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300 *McCauley v. Univ. of the Virgin Is.*, 618 F.3d 232, 247 (3d Cir. 2010) (citation omitted).