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Jill Keblawi

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COMMENTS

IMMIGRATION ARRESTS BY LOCAL POLICE: INHERENT AUTHORITY OR INHERENTLY PREEMPTED?

Jill Keblawi[†]

As a result of the terrorist attacks on September 11, 2001, President George W. Bush's Administration has used immigration policy as its primary weapon in terrorist prevention.¹ Because there are only two thousand federal immigration agents and an estimated eight million undocumented immigrants, this Administration has encouraged the nation's 650,000 local law enforcement officers to aid in immigration arrests.² In line with the Bush Administration's goal of ensuring national security through tightening immigration laws, Attorney General John Ashcroft announced on June 6, 2002, that state and local police have the "inherent authority" to enforce civil and criminal violations of immigration law, but that such authority should apply only to the

[†] J.D. Candidate, May 2005. The Catholic University of America, Columbus School of Law. I would like to thank Professor Carlos Ortiz Miranda for his guidance and instruction throughout the writing process.

1. The *Immigration and Naturalization Service's (INS) Interior Enforcement Strategy: Hearing Before the Subcomm. on Immigration Border Security, and Claims of the House Comm. on the Judiciary*, 107th Cong. 9 (2002) [hereinafter *Hearing*] (statement of Joseph R. Greene, Assistant Commissioner for Investigations, U.S. Immigration and Naturalization Service) ("The terrorist attacks on September 11, 2001 prompted a refocus of the INS' strategic approach to its law enforcement responsibilities.").

2. *Id.* John Ashcroft, United States Attorney General, Prepared Remarks on the National Security Entry-Exit Registration System (June 6, 2002), at <http://www.usdoj.gov/ag/speeches/2002/060502agpreparedremarks.htm> (last visited March 30, 2004) [hereinafter *Ashcroft Remarks*]. This Comment will use the phrase "undocumented immigrant" instead of "illegal alien" where possible. See Ruben J. Garcia, *Critical Race Theory and Proposition 187: The Racial Politics of Immigration Law*, 17 CHICANO-LATINO L. REV. 118, 118 n.1 (1995). As Garcia stated:

"Alien" is a legal term that defines all noncitizens of the United States. 8 U.S.C. § 1101(a)(3). Although the term "illegal aliens" is often used to refer to those who enter the United States without immigration documents, it further demonizes undocumented immigrants as lawbreakers and outsiders. In opposition to this rhetoric, I will throughout this Comment use the term "undocumented immigrants," unless the term "alien" is more descriptive as a legal category.

Id.

“narrow anti-terrorism mission.”³ This new “inherent authority” interpretation, contained in a legal opinion written by the Department of Justice Office of Legal Counsel (OLC), has not been released.⁴ The “inherent authority” stance not only contradicts previous OLC opinions, but also contradicts decades of traditional interpretations of the immigration power.⁵ Further, if a state chooses to accept Ashcroft’s invitation, it may face a great deal of civil rights litigation, and may undermine both public safety and anti-terrorism investigations.⁶

This Comment first explores the source of the federal power to regulate immigration. Then, this Comment discusses state immigration laws that the Supreme Court has struck down for infringing on the federal power and violating the Equal Protection Clause. This Comment also examines state laws that the Supreme Court has upheld on the grounds that they focused on inherently local problems, rather than federal immigration regulation. Next, this Comment discusses the legality of state immigration enforcement in light of the federal preemption doctrine and congressional intent. In doing so, this Comment analyzes the disparity between the Ninth and Tenth Circuits on the issue of local enforcement of civil violations of immigration law. This Comment then argues that the Ninth Circuit properly analyzed the issue, in light of the origins of the federal immigration power, the Court’s review of state immigration laws, and through examination of federal immigration policies. This Comment also argues that official actions and statements from the Executive Branch have demonstrated that the “inherent authority” stance lacks a firm legal basis. Finally, this Comment concludes that the Bush Administration’s “inherent authority” opinion is inconsistent with reliable prior law. This Comment further concludes that this Administration’s “inherent authority” doctrine contravenes public policy because it subjects states to civil rights litigation and ineffectively combats terrorism.

3. Ashcroft Remarks, *supra* note 2. The Attorney General stated that “arresting aliens who have violated . . . civil provisions [of the Immigration and Nationality Act] that render an alien deportable, and who are listed on the NCIC—is within the inherent authority of the states.” *Id.*

4. *DOJ Legal Opinion Would Broaden Use of State, Local Personnel in Immigration Enforcement*, 79 INTERPRETER RELEASES 509, 519 (Apr. 8, 2002). In fact, several advocacy groups have sued the Department of Justice under the Freedom of Information Act to obtain a copy of the opinion. MUZAFFAR A. CHISHTI ET AL., *MIGRATION POL’Y INST., AMERICA’S CHALLENGE: DOMESTIC SECURITY, CIVIL LIBERTIES, AND NATIONAL UNITY AFTER SEPTEMBER 11 83* (2003).

5. See *infra* Part I.A-C.

6. See *infra* Part III.A-B.

I. AN EXAMINATION OF THE FEDERAL IMMIGRATION POWER AND STATES' AUTHORITY TO ENFORCE IMMIGRATION LAW

A. The Federal Government Has Exclusive Power To Regulate Immigration

Although the Constitution does not specifically enumerate the power to regulate immigration, in *Toll v. Moreno*,⁷ the Supreme Court stated that the power stemmed from “various sources” in the Constitution and authority outside the Constitution’s text,⁸ including the Naturalization Clause,⁹ the Foreign Commerce Clause,¹⁰ and the federal government’s broad authority over foreign affairs.¹¹ While the Court has never determined the precise source of the immigration power, it emphatically stated, “‘over no conceivable subject is the legislative power of Congress more complete than it is over’ the admission of aliens.”¹² Each possible source of power named in *Moreno* confirmed that any origin of the immigration power rested exclusively with the federal government.¹³

7. *Toll v. Moreno*, 458 U.S. 1 (1982).

8. *Id.* at 10 (stating that the “[f]ederal authority to regulate the status of aliens derives from various sources”). The Court further stated, “Our cases have long recognized the preeminent role of the Federal Government with respect to the regulation of aliens within our borders.” *Id.*

9. *Id.* See U.S. CONST. art. I, § 8, cl. 4. The Naturalization Clause states that “[t]he Congress shall have Power . . . [t]o establish an [sic] uniform Rule of Naturalization.” *Id.*

10. See U.S. CONST. art. I, § 8, cl. 3. The Foreign Commerce Clause states that “[t]he Congress shall have power . . . [t]o regulate Commerce with foreign Nations.” *Id.*

11. *Moreno*, 458 U.S. at 10. See U.S. CONST. art. I, § 8, cl. 11 (stating that “[t]he Congress shall have Power . . . [t]o declare War”); see *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 318 (1936) (including the regulation of aliens as one of the powers inherent in a sovereign nation); *Chae Chan Ping v. United States*, 130 U.S. 581, 603-06 (1889) (justifying the exclusion of Chinese immigrants as part of a nation’s inherent sovereignty).

12. *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (quoting *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909)); see *id.* (applying deferential scrutiny to uphold Congress’s provision that used a gender-based classification).

13. *Moreno*, 458 U.S. at 10. Because the act of naturalization is only one aspect of immigration, and fairly straightforward, it will not be discussed in the main text of this article. See U.S. CONST. art. I, § 8, cl. 4. The Constitution does not expressly forbid states from regulating naturalization. Cf. U.S. CONST. art. I, § 10 (expressly forbidding state action in other areas, such as treaty-making); see also *Chirac v. Chirac’s Lessee*, 15 U.S. (2 Wheat.) 259, 269-70 (1817) (suggesting as early as 1817 that states cannot interfere with this federal power and invalidating a Maryland law that required French citizens to naturalize in order to become property owners in that state). Chief Justice Marshall stated “[t]hat the power of naturalization is exclusively in [C]ongress does not seem to be, and certainly ought not to be, controverted.” 15 U.S. (2 Wheat.) at 269; see also *United States v. Wong Kim Ark.*, 169 U.S. 649, 701 (1898) (“The power, granted to Congress by the Constitution, ‘to establish an [sic] uniform rule of naturalization,’ was long ago adjudged by this court to be vested exclusively in Congress.”); *Boyd v. Nebraska ex rel. Thayer*, 143 U.S. 135, 160 (1892) (“The Constitution has conferred on Congress the right to establish

The Foreign Commerce Clause was the first source used to rationalize the exclusive federal power over the entire immigration field.¹⁴ In the *Head Money Cases*,¹⁵ the Court upheld a federal statute that imposed a tax on owners of vessels that transported foreign passengers into the United States.¹⁶ The Court held that the transportation of foreign passengers was a “part of . . . commerce with foreign nations.”¹⁷ Thus, the *Head Money Cases* became the first Supreme Court decision to hold that a federal statute regulating immigration was constitutionally valid under the power to regulate foreign commerce.¹⁸ The Foreign

an [sic] uniform rule of naturalization, and this right is evidently exclusive, and has always been held by this court to be so.”)

14. See U.S. CONST. art. I, § 8, cl. 3. (empowering Congress to “regulate Commerce with foreign Nations”); *The Head Money Cases*, 112 U.S. 580, 600 (1884) (“Congress [has] the power to pass a law regulating immigration as a part of commerce of this country with foreign nations . . .”).

15. 112 U.S. 580 (1884).

16. *Id.* at 586, 600. The tax was intended to provide for arriving immigrants and to “defray the expense of regulating immigration.” *Id.* at 590. The owners of the vessels brought the suit, claiming the tax was invalid as applied to children. *Id.* at 589.

17. *Id.* at 592, 600. In 1824, Justice Marshall defined commerce to include the transportation of passengers. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 215 (1824) (“[N]o clear distinction is perceived between the power to regulate vessels employed in transporting men for hire, and property for hire [for the purposes of Congress’s power to regulate commerce].”). See also *Fong Yue Ting v. United States*, 149 U.S. 698, 712 (1893) (noting that “[t]he Constitution has granted to Congress the power to regulate commerce with foreign nations, including . . . the bringing of persons into the ports of the United States”). The *Head Money* Court relied on two prior decisions in which the Court struck down state taxes on incoming vessels because the laws encroached on the federal power to regulate foreign commerce. 112 U.S. at 591-593 (citing and discussing *The Passenger Cases*, 48 U.S. 282, 409 (1849) and *Henderson v. Mayor of New York*, 92 U.S. 259 (1875)). See also *The Passenger Cases*, 48 U.S. at 408 (“The act of New York which imposes a tax on passengers of a ship from a foreign port, in the manner provided, is a regulation of foreign commerce, which is exclusively vested in Congress; and the act is therefore void.”).

18. *The Head Money Cases*, 112 U.S. at 600. In deciding the *Passenger Cases*, the Court only achieved a plurality opinion as to the rationale that the localities were impermissibly regulating foreign commerce. *Id.* at 592. Then, in *Henderson v. Mayor of New York*, the Court decided the same issue as in the *Passenger Cases* but stated: “A law or a rule . . . which prescribes terms or conditions on which alone the vessel can discharge its passengers, is a regulation of commerce; and, in case of vessels and passengers coming from foreign ports, in a regulation of commerce with foreign nations.” *Henderson*, 92 U.S. 259, 271 (1875). The *Head Money Cases* were different because instead of invalidating a state law for infringing upon a federal power, the Court upheld a federal law as within that power. *The Head Money Cases*, 112 U.S. at 600. The *Head Money* Court stated:

It cannot be said that [the *Passenger Cases* and *Henderson v. Mayor of New York*] do not govern the present, though there was not then before us any act of Congress whose validity was in question, for the decisions rest upon the ground that the State statutes were void only because Congress, and not the States, was authorized by the Constitution to pass them.

Id.

Commerce Clause, and therefore the immigration power stemming from it, has been deemed an exclusive power of the federal government.¹⁹

Case law has distinguished two sources of power from the government's general authority over foreign affairs, named in *Moreno*:²⁰ 1) the extra-constitutional concept of inherent sovereignty;²¹ and 2) the textual authority to declare war.²² Five years after its foreign commerce jurisprudence, the Court emphasized that the power to exclude foreigners was inherent in a sovereign nation and not specifically enumerated in the Constitution.²³ In the *Chinese Exclusion Case*,²⁴ the Court upheld a federal statute that prohibited Chinese laborers from entering the United States.²⁵ The Court claimed the power to exclude

19. *Buttfield v. Stranahan*, 192 U.S. 470, 492 (1904). Although the Interstate Commerce power leaves room for state involvement, the Foreign Commerce power is plenary. The *Buttfield* Court stated:

Whatever difference of opinion, if any, may have existed or does exist concerning the limitations of the power, resulting from other provisions of the Constitution, so far as interstate commerce is concerned, it is not to be doubted that from the beginning Congress has exercised a plenary power in respect to the exclusion of merchandise brought from foreign countries.

Id. The Supreme Court stressed the necessity for consistency in dealings with other nations and that standardized relations would not be possible if each state acted individually. *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 448 (1979). Justice Blackmun concluded that “there is evidence that the Founders intended the scope of the foreign commerce power to be greater” than that of the Interstate Commerce Clause, and “[c]ases of this Court, stressing the need for uniformity in treating [] other nations, echo this distinction.” *Id.* The Court emphasized this point by stating that the federal government “must speak with one voice” when regulating commerce with foreign entities. *Id.* at 449. This “one voice” requirement for foreign commerce regulations indicates the significant extent to which the federal power over immigration is exclusive. Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493, 547 (2001) (stating that “[t]he Supreme Court’s ‘one voice’ Foreign Commerce Clause jurisprudence is essentially a jurisprudence of preemption [of state action]”).

20. *Toll v. Moreno*, 458 U.S. 1, 10 (1982).

21. *United States v. Curtiss-Wright Exp. Corp.*, 29 U.S. 304, 316 (1936) (discussing the extra-constitutional powers inherent in a sovereign nation).

22. *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952) (stating that the federal government’s “policy toward aliens is vitally and intricately interwoven with . . . the war power”).

23. *The Chinese Exclusion Case*, 130 U.S. 581, 604 (1889).

24. 130 U.S. 581 (1889).

25. *Id.* at 589, 609. A Chinese laborer, who had been allowed to enter the United States before this law was enacted, challenged its validity after he was detained for trying to re-enter the country. *Id.* at 582.

aliens as an “incident of sovereignty,”²⁶ and said that a nation’s ability to exclude aliens in any manner would diminish its sovereignty.²⁷

This concept was expanded in *United States v. Curtiss-Wright Export Corp.*,²⁸ in which Justice Sutherland argued that the statement that the federal government can exercise no powers except those specifically enumerated in the Constitution holds true only for internal affairs.²⁹ Sutherland reasoned that while the Constitution’s enumerated powers were “carved from the mass of state powers,” the states “never possessed international powers.”³⁰ Instead, the federal government’s unenumerated sovereignty over the realm of foreign affairs passed from Great Britain to the colonies, not individually, but as a whole.³¹ The *Curtiss-Wright* Court specifically included the domain of immigration law as one of those inherent powers when it stated that the “power to expel undesirable aliens” was an inherently federal power.³² The Court further noted that any powers stemming from the inherent sovereignty of a nation unmistakably rest exclusively with the federal government.³³

More recent cases have returned to the Constitution’s text to find support for the federal government’s broad authority over foreign affairs and immigration regulation.³⁴ The first case to use Congress’ War Power

26. *Id.* at 609.

27. *Id.* at 603-04. *See also* *Fong Yue Ting v. United States*, 149 U.S. 698, 707-08 (1893) (finding support for the inherent sovereignty position in the writings of international law commentators).

28. 299 U.S. 304 (1936).

29. *Id.* at 315-16.

30. *Id.* at 316.

31. *Id.* Justice Sutherland stated, “As a result of the separation from Great Britain by the colonies acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America.” *Id.*

32. *Id.* at 318 (citing *Fong Yue Ting v. United States*, 149 U.S. 698, 705 (1893)).

33. *Id.* at 316; *The Chinese Exclusion Case*, 130 U.S. 581, 609 (1889) (stating that the power of the United States to exclude aliens “cannot be granted away or restrained on behalf of any one [sic]”).

34. *Toll v. Moreno*, 458 U.S. 1, 10 (1982) (finding that federal authority to regulate immigration derives from U.S. CONST. art I, § 8, cl. 4); *Mathews v. Diaz*, 426 U.S. 67, 81 n.17 (1976) (declaring that immigration policies are “intricately woven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government”); *see also* *Wishnie*, *supra* note 19, at 537-45 (discussing all the Constitution’s Foreign Affairs Clauses in relation to the federal power to regulate immigration). In his article, *Wishnie* stated:

The Supreme Court often has spoken in sweeping terms of the federal government’s exclusive control of foreign affairs. Historical materials too support this view. To the extent that the power to regulate immigration arises from the foreign affairs powers, therefore, the immigration power would seem similarly to be reserved to the federal government.

to justify the deportation of non-citizens did so in “apprehension” of Communism.³⁵ In *Harisiades v. Shaughnessy*,³⁶ the Court upheld the government’s authority to expel non-citizens because of their membership in the Communist party.³⁷ The Court reasoned that the power to deport these non-citizens stemmed from the War Power because if the United States was at war with a non-citizen’s nation, or had “apprehension of foreign . . . dangers short of war,” Congress would have the authority to expel this person.³⁸ Two decades later, the Court used the War Power to justify the creation of immigration laws, regardless of the existence of war or poor relations with other nations.³⁹

Id. at 537-38 (internal footnotes omitted). Because no over-arching general constitutional grant of a foreign affairs power exists, Wishnie discusses several powers, each of which constitute foreign affairs powers. *Id.* at 539. Wishnie asserts that:

The text empowers Congress to declare war and to define and punish offenses against the law of nations and the Senate to advise and consent on the appointment of ambassadors; the President is designated as Commander-in-Chief of the armed forces and is authorized to make treaties, with the advice and consent of the Senate, and to send and receive ambassadors.

Id. Wishnie further asserts that the Constitution itself forbids the states from engaging in foreign affairs activities, stating:

For example, Article I, Section 10 provides that “[n]o State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal.” On the other hand, the same section’s third clause contains a series of *conditional* prohibitions: “No State shall, *without the Consent of Congress* . . . keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.”

Id. at 540.

35. *Harisiades v. Shaughnessy*, 342 U.S. 580, 581, 587 (1952). See U.S. CONST. art. I, § 8, cl. 11.

36. 342 U.S. 580 (1952).

37. *Id.* at 581, 596.

38. *Id.* at 587. The Court stated:

War, of course, is the most usual occasion for extensive resort to the power. Though the resident alien may be personally loyal to the United States, if his nation becomes our enemy his allegiance prevails over his personal preference and makes him also our enemy But it does not require war to bring the power of deportation into existence or to authorize its exercise. Congressional apprehension of foreign or internal dangers short of war may lead to its use. So long as the alien elects to continue the ambiguity of his allegiance his domicile here is held by a precarious tenure. That aliens remain vulnerable to expulsion after long residence is a practice that bristles with severities. But it is a weapon of defense and reprisal confirmed by international law as a power inherent in every sovereign state. Such is the traditional power of the Nation over the alien and we leave the law on the subject as we find it.

Id. at 587-88.

39. *Mathews v. Diaz*, 426 U.S. 67, 69, 81 (1976) (upholding a statute that conditioned non-citizens’ eligibility for participation in a medical program on the length of their residency).

In *Mathews v. Diaz*,⁴⁰ the Court reasoned that Congress' decisions relating to non-immigrants, even if they related to inherently internal affairs, "may [still] implicate our relations with foreign powers."⁴¹ In sum, the Supreme Court has held that each power used to justify the immigration power is exclusively federal, and it has used this rationale to establish the plenary nature of the immigration power.⁴²

B. States May Make Laws Within Their Police Powers That Have An Incidental Effect On Undocumented Immigrants

The Supreme Court consistently has struck down state laws that attempt to regulate immigration on two grounds: violation of the Equal Protection Clause and federal preemption.⁴³ The Supreme Court has utilized the first ground to invalidate state laws because they unconstitutionally discriminate against non-citizens.⁴⁴ Although *Yick Wo v. Hopkins*⁴⁵ was the first case to hold that equal protection applied to non-citizens, the principle issue in *Yick Wo* was discrimination based on

40. 426 U.S. 67 (1976).

41. *Id.* at 81.

42. *See supra* note 13 (discussing cases in which the Court held that Congress has exclusive authority over the Naturalization Power); *Harisiades*, 342 U.S. at 587-88 (holding that the authority to expel non-citizens is justified under the congressional war power and is "inherent in every sovereign state"); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 316 (1936) (holding that under the extra-constitutional theory of "inherent sovereignty," the immigration power is exclusively federal); *The Chinese Exclusion Case*, 130 U.S. 581, 609 (1889); *The Head Money Cases*, 112 U.S. 580, 591 (1884) (holding that because the Foreign Commerce Clause is a plenary power, Congress has the exclusive power to regulate the admission of foreign passengers into the country); *see also* *Wishnie*, *supra* note 19, at 533 ("[E]ach constituent element of the immigration power is an exclusively federal power. That the sources of the immigration power are exclusively federal . . . strongly indicates that the immigration power is itself an exclusively federal . . . power.").

43. *See, e.g.*, *Graham v. Richardson*, 403 U.S. 365, 371, 372, 377-80 (1971) (striking down a state law denying unemployment benefits to non-citizens on the grounds of federal preemption and also on Fourteenth Amendment equal protection grounds). Even before the federal immigration power was utilized by Congress, the Court struck down state laws that encroached upon the immigration field. *See Henderson v. Mayor of New York*, 92 U.S. 259, 271 (1875); *The Passenger Cases*, 48 U.S. 282, 409 (1849).

44. *See Graham*, 403 U.S. at 382-83 (refusing to uphold a state law that violated the Equal Protection Clause by discriminating against aliens); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 419-22 (1948) (striking down a state law that unlawfully discriminated against aliens, in violation of the Equal Protection Clause); *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886) (invalidating a California law for violating the Equal Protection Clause).

45. 118 U.S. 356 (1886). In *Yick Wo*, the Court struck down a California statute that discriminated against Chinese immigrants in the laundry business. *Id.* at 374.

race rather than on immigration status.⁴⁶ The Supreme Court did not use the Equal Protection Clause to invalidate a state law that discriminated based on immigration status until *Takahashi v. Fish and Game Commission*.⁴⁷ The *Takahashi* Court struck down a statute that denied fishing licenses to non-citizens, reasoning that lawful admittance into the country entitles an alien to equal protection under state laws.⁴⁸

In 1971, in *Graham v. Richardson*,⁴⁹ the Court fashioned a standard of review for state laws that discriminate against non-citizens: “classifications based on alienage . . . are inherently suspect and subject to close judicial scrutiny.”⁵⁰ The Court classified non-citizens as a “discrete and insular minority” to whom strict scrutiny review must apply.⁵¹ Thus, while the judiciary defers significantly to Congress’ power to enact federal immigration laws,⁵² state laws that discriminate warrant

46. *Id.* at 374; see also Wishnie, *supra* note 19, at 504. Wishnie writes: “[a]lthough *Yick Wo* settled the applicability of the Fourteenth Amendment to all ‘persons,’ regardless of immigration status, it did so in the context of a claim of race and nationality discrimination.” *Id.*

47. 334 U.S. 410 (1948).

48. *Id.* at 420. The Court stated, “The Fourteenth Amendment and the laws adopted under its authority thus embody a general policy that all persons lawfully in this country shall abide ‘in any state’ on an equality of legal privileges with all citizens under non-discriminatory laws.” *Id.* The Court explained that the federal government may classify non-citizens based on race, but that states have no powers to regulate the condition of a non-citizen’s conduct once the federal government has admitted him into the country. *Id.* at 418-19. The Court stated further that the states may not impose “discriminatory burdens” on non-citizens, including restricting their right to earn a living, once they lawfully have entered under the federal government’s standards. *Id.* at 419.

49. 403 U.S. 365, 382-83 (1971) (invalidating the state’s conditioning of welfare benefits on a person’s immigration status). The *Graham* Court struck down the state law on the alternate grounds of federal preemption. *Id.* at 382-83.

50. *Id.* at 372. The Court stated, “[w]e conclude that a State’s desire to preserve limited welfare benefits for its own citizens is inadequate to justify” the state’s discrimination against aliens. *Id.* at 374. Citing *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969), the *Graham* Court asserted:

“[A] State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens The saving of welfare costs cannot justify an otherwise invidious classification.

Id. at 374-375.

51. *Id.* at 372 (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938)).

52. *Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952) (“[Policies towards aliens] are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.”); see also *Mathews v. Diaz*, 426 U.S. 67, 85 (1976) (explaining that state classification of non-citizens for the purposes of denying welfare benefits cannot be justified, although a comparable federal classification is legitimate). The *Mathews* Court reasoned that because federal classifications concerned immigration

strict scrutiny review.⁵³

The Court has used the federal preemption doctrine as an alternative means of invalidating state legislation that impacts non-citizens.⁵⁴ Although the Court consistently has invalidated state laws that encroach upon the federal immigration power since the 1800s, the Court did not expressly address the issue of federal preemption until the late twentieth century.⁵⁵ The question of whether federal immigration law preempts states from legislating in the same area turns on the field of law that the state attempts to regulate.⁵⁶ The first preemption cases struck down state laws because they encroached on immigration regulations by burdening the non-citizens more than the federal laws did, in subjecting them to further registration requirements or denying them benefits.⁵⁷ But the Court has upheld state legislation if it concerns an inherently local problem and does not contradict federal immigration policy.⁵⁸

In *De Canas v. Bica*,⁵⁹ the Supreme Court cited the state police powers to uphold a California state law that penalized employers who hired

policy, and therefore foreign relations, the standard of review to be applied was minimal—it would be upheld unless “wholly irrational.” *Id.* at 83, 85-87.

53. *But see* *Cabell v. Chavez-Salido*, 454 U.S. 432, 433, 439 (1982) (stating “We have concluded that strict scrutiny is out of place when the restriction primarily serves a political function,” and noting that one exception to the strict scrutiny standard is that it is rational for the state to prohibit non-citizens from serving as deputy probation officers); *Ambach v. Norwick*, 441 U.S. 68, 80-81 (1979) (noting that a state prohibition against non-citizens becoming public school teachers survives the rational basis review); *Foley v. Connelie*, 435 U.S. 291, 293, 300 (1978) (noting it is rational for the state to prohibit non-citizens from becoming state troopers).

54. U.S. CONST. art. VI, cl. 2. Article VI of the Constitution states, “[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land.” *Id.*

55. *See supra* Part I.A (discussing the early invalidation of state immigration laws); *Toll v. Moreno*, 458 U.S. 1, 10 (1982); *Graham v. Richardson*, 403 U.S. 365, 378-80 (1971).

56. *Compare* *De Canas v. Bica*, 424 U.S. 351, 357 (1976) (upholding a state law because it concerns an inherently local problem of employment), *with* *Graham v. Richardson*, 403 U.S. 365, 377-80 (1971) (striking down a state law because it concerned denying welfare benefits to non-citizens), *and* *Hines v. Davidowitz*, 312 U.S. 52, 68 (1941) (striking down a state alien registration act).

57. *See, e.g.,* *Davidowitz*, 312 U.S. at 66-68 (invalidating a Pennsylvania law that set up a registration system for non-citizens in that state); *Richardson*, 403 U.S. at 377-80 (striking down a state welfare law on federal preemption grounds); *see also* Allison B. Feld, *Section 434 of the Welfare Act: Does the Federal Immigration Power Collide with the Tenth Amendment?*, 63 BROOK. L. REV. 551, 561 (1997) (“The common thread running through these cases is the Court’s finding that the states’ acts intruded upon the broad federal immigration power by imposing burdens on aliens beyond those imposed by the federal government.”).

58. *See De Canas*, 424 U.S. at 357.

59. *Id.*

illegal immigrants.⁶⁰ In asserting that not all state laws affecting non-citizens function as attempts to regulate immigration,⁶¹ the Court established a three-prong test to determine the constitutionality of such state legislation.⁶² First, a state law may not regulate immigration.⁶³ The Court found that the California statute aimed to strengthen the state's economic policy, rather than regulate immigration.⁶⁴ Second, if the statute did not regulate immigration, the Court may still invalidate it if Congress explicitly stated its intent to occupy the field in such a way that "complete[ly] oust[ed]" state power.⁶⁵ The Court found no relevant congressional statute that explicitly stated such an intent regarding employment.⁶⁶ Third, the state law cannot serve as an "obstacle" to the federal immigration policies; the Court did not apply this prong of the test, but remanded it to the lower court.⁶⁷ The Court ultimately upheld the law because California's police powers were aimed principally at

60. *Id.* at 356-57. The California law provides that "(n)o employer shall knowingly employ an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers." *Id.* at 352 (citing CAL. LAB. CODE § 2805(a)(1971)).

61. *Id.* at 355 ("The Court has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus per se pre-empted by this constitutional power, whether latent or exercised.").

62. *See id.* at 354-57, 363.

63. *Id.* at 354. *De Canas* defined a regulation of immigration as "essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." *Id.* at 355.

64. *Id.* at 355. The Court stated that:

In this case, California has sought to strengthen its economy by adopting federal standards in imposing criminal sanctions against state employers who knowingly employ aliens who have no federal right to employment within the country; even if such local regulation has some purely speculative and indirect impact on immigration, it does not thereby become a constitutionally proscribed regulation of immigration that Congress itself would be powerless to authorize or approve.

Id. at 355-56.

65. *Id.* at 356, 357. The Court explained that evidence of a "complete ouster" can be demonstrated by the text of a statute or in its legislative history. *Id.* at 357-58.

66. *Id.* at 358. The Court found no statute or legislative history of the INA that supported the Respondents' claim. *Id.* Further, the Court found that it could not infer Congress's intent, stating:

Nor can such intent be derived from the scope and detail of the INA. The central concern of the INA is with the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country. The comprehensiveness of the INA scheme for regulation of immigration and naturalization, without more, cannot be said to draw in the employment of illegal aliens as "plainly within . . . [that] central aim of federal regulation."

Id. at 359.

67. *Id.* at 363, 364-65

preserving the local labor market for legally present immigrants and citizens, and because the law was ancillary to the field of immigration.⁶⁸

In the *De Canas* Court's discussion of police powers, it conceded some limited immigration powers to the states.⁶⁹ Less than a decade later, however, the Court reasserted the plenary power of the federal government.⁷⁰ In *Plyler v. Doe*,⁷¹ the Supreme Court limited the authority of the states to make legislation impacting undocumented immigrants when it struck down a Texas statute that encouraged public schools to deny education to undocumented immigrant children.⁷² The Court held that Texas's use of its police powers to preserve resources for its legal citizens was insufficient to justify discriminating against undocumented children; the use of police powers for this purpose did not correspond to any federal immigration policy.⁷³ Even though *Plyler*

68. *Id.* at 355-56, 363. The Court characterized the police power as one in which the "state law is fashioned to remedy local problems." *Id.* at 363. The Court rationalized that the California law was policing local employers; the law did not impair the federal interest in foreign affairs because it concerned individuals whom the federal government had already declared cannot work in this country. *Id.* at 355-56. Finally, the Court stated that, "States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State." *Id.* at 356.

69. *Id.* at 358-59. See also Bert C. Buzan & George M. Dery III, *California's Resurrection of the Poor Laws: Proposition 187, Preemption, and the Peeling Back of the Hollow Onion of Immigration Law*, 10 GEO. IMMIGR. L.J. 141, 156 (1996). Buzan and Dery state:

Thus, in *De Canas*, the Court rather generously read their newly created three-pronged test in favor of the states. California was seen as merely exercising its broadly defined police powers to handle an essentially local problem. Conversely, Congress was viewed as leaving an area of law dealing with alienage to the states, despite its enactment of a detailed and comprehensive statutory scheme.

Id.

70. See *Toll v. Moreno*, 458 U.S. 1, 17 (1982) (restricting the states' police powers in holding that a state university that imposed discriminatory tuition charges based on immigration status violated the Supremacy Clause); *Plyler v. Doe*, 457 U.S. 202 (1982). In *Moreno*, the State of Maryland attempted to assert that it merely was mirroring the federal government's policies. *Moreno*, 458 U.S. at 10-11. The Court stated, "[i]n seeking to defend the statute, the State argued that it had 'simply followed the Federal Government's lead' in classifying certain persons as 'ineligible for citizenship'." *Id.* The *Moreno* Court rejected outright this argument, explaining the distinct roles of the federal and state governments in the immigration field. *Id.* at 11.

71. 457 U.S. 202 (1982).

72. *Id.* at 230. This case was primarily decided on equal protection grounds. See *id.* at 210-17.

73. *Id.* at 226; see also Karl Manheim, *State Immigration Laws and Federal Supremacy*, 22 HASTINGS CONST. L.Q. 939, 989-92 (1995) (including an analysis of what constitutes legitimate state interests). State police powers are "assert[ed] as a valid independent state interest" for the purposes of judicial review of state action in the immigration realm. *Id.* at 989. Manheim, however, finds that the only legitimate state

acknowledged the *De Canas* Court's concession of federal power,⁷⁴ it indicated that the Court was moving away from the requirement of explicit congressional intent in order to find a preemption of state law.⁷⁵

C. Federal Policy Allows States a Limited Concurrent Power To Make Immigration Arrests

In some statutes, Congress has manifested its clear intent by expressly delegating authority to the states to enforce immigration law.⁷⁶ In instances where the immigration violation stems from the non-citizen's criminal behavior, and not merely the non-citizen's unlawful presence, Congress has delegated authority to local police to make arrests.⁷⁷ In particular, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) allows states to arrest non-citizens who have committed the

interest the Court has upheld is that asserted in *De Canas*, the "adverse impact on the domestic labor force." *Id.* at 990. One state law was struck down because the Court found the proffered state interest to be illusory; the *Tayyari* Court struck down a law that attempted to bar Iranian students from state universities at the time of the Hostage Crisis in Iran for concern of physical safety. *Tayyari v. New Mexico State Univ.*, 495 F. Supp. 1365, 1367 (D.M. 1980); *Manheim, supra* at 989. The *Tayyari* Court found that the "true purpose" of the state's law was to "make a political statement" about Iranian students. *Tayyari*, 495 F. Supp. at 1376; *Mahheim, supra* at 989-90. The *Plyler* Court rejected the claim that a legitimate interest of Texas was improving the educational environment for lawful residents by excluding undocumented children from school. *Plyler*, 457 U.S. at 226; *Mahheim, supra* at 990.

74. *Plyler*, 457 U.S. at 225 (noting that "the 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"). The Court manifested its desire to restrict the *De Canas* decision to the scope of Congress's intention to bar employment to undocumented immigrants. *Id.*; see also *Buzan & Dery, supra* note 69, at 156.

75. *Plyler*, 457 U.S. at 224-25. The Court found that even though Congress did not expressly preempt the field of withholding education from undocumented children, it would consider the state law invalid on preemption grounds precisely because Congress was silent on the discrimination against undocumented children. *Id.* at 226. The *Plyler* Court stated, "[W]e perceive no national policy that supports the State in denying these children an elementary education." *Id.* at 226.

76. See, e.g., Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. 104-132, § 439, 110 Stat. 1276 (codified as amended at 8 U.S.C. § 1252c (2000)); 8 U.S.C. § 1324 (2000); Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), 8 U.S.C. 1357 (2000); Immigration and Nationality Act (INA), 8 U.S.C. § 1103(a)(10) (Supp. 2003).

77. See, e.g., AEDPA § 439, 8 U.S.C. § 1252c. State enforcement of non-citizen's criminal behavior falls within the realm of a state's police powers. Cf. *Miller v. United States*, 357 U.S. 301, 305 (1958). The *Miller* Court supports the proposition that a state police officer is authorized to arrest a person in violation of a federal criminal law. *Id.*; see also *Linda Reyna Yañez & Alfonso Soto, Local Police Involvement in the Enforcement of Immigration Law*, 1 HISP. L.J. 9, 38 (1994) (noting that "under the state police power, law enforcement agents can make arrests for criminal acts").

federal immigration crime of illegal re-entry and have been previously deported as a felon, but not those who are merely illegally present.⁷⁸

Congress also has delegated arrest authority in a statute that establishes a number of criminal penalties for immigration offenses.⁷⁹ The statute states:

No officer or person shall have authority to make any arrests for a violation of any provision of this section except officers and employees of the Service designated by the Attorney General, either individually or as a member of a class, *and all other officers whose duty it is to enforce criminal laws.*⁸⁰

The authorization, limited to this section of the Act, serves as an express delegation of authority to local police.⁸¹

Other congressional legislation delegates arrest authority in limited situations.⁸² The Attorney General can enter into a written agreement, called a Memorandum of Understanding (MOU), with an individual state to deputize and train state officials in federal immigration law.⁸³ The agreement must certify that the deputized officers received “adequate training” in the enforcement of federal immigration laws.⁸⁴ The Attorney General can also delegate arrest authority to local police in the event of an immigration emergency, termed a “mass influx” of undocumented immigrants.⁸⁵

78. AEDPA § 439. The law provides that “State and local law enforcement officials are authorized to arrest and detain an individual who—(1) is an alien illegally present in the United States; and (2) has previously been convicted of a felony in the United States.” *Id.*

79. 8 U.S.C. § 1324 (citing the immigration offense of “[b]ringing in and harboring certain aliens”).

80. § 1324(c) (emphasis added).

81. *See* Estate of Bell v. Comm’r, 928 F.2d 901, 904 (9th Cir. 1991) (“Congress is presumed to act intentionally and purposely when it includes language in one section but omits it in another.”); 73 AM. JUR. 2D. Statutes § 129 (2003) (explaining the canon of statutory interpretation *expressio unius est exclusio alterius*, which means that the express “mention of one thing in a statute” implies the exclusion of another); CHISHTI, *supra* note 4, at 81 (explaining that “there is no similar express general grant of authority to make arrests for civil violations, and some criminal provisions do not specifically authorize state or local enforcement”).

82. *See, e.g.*, Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), 8 U.S.C. § 1357 (2000); Immigration and Nationality Act (INA), 8 U.S.C. § 1103(a)(10) (Supp. 2003).

83. 8 U.S.C. § 1357(g) (“[T]he Attorney General may enter into a written agreement with a State . . . [allowing an officer of the State who is qualified] to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States.”).

84. § 1357(g)(2). Further, these local police “shall be subject to the direction and supervision of the Attorney General.” § 1357(g)(3).

85. 8 U.S.C. § 1103(a)(10). This provision states:

When Congress has not manifested its intent to preempt state immigration enforcement—and the Court is unable or unwilling to infer it—the Court has held that states can enforce immigration law when a violation falls within their police powers, or when combating an inherently local problem.⁸⁶ In accordance with the states' police powers, law enforcement officers can make arrests for criminal acts.⁸⁷ Because states can also enforce federal laws, it follows that states, with some limitations, can enforce criminal immigration laws.⁸⁸ The federal courts of appeal maintain this position.⁸⁹

Although states have the authority to make criminal immigration arrests, *Gonzales v. City of Peoria*⁹⁰ enumerates limitations on this

In the event that the Attorney General determines that an actual or imminent mass influx of aliens arriving off the coast of the United States, or near a land border, presents urgent circumstances requiring an immediate Federal response, the Attorney General may authorize any State or local law enforcement officer, with the consent of the head of the department, agency, or establishment under whose jurisdiction the individual is serving, to perform or exercise any of the powers, privileges, or duties conferred or imposed by this chapter or regulations issued thereunder upon officers or employees of the Service.

Id. This authority was used only in August 1994, when 30,000 Cuban and Haitian refugees fled to Florida's shores. Assistance by State and Local Police in Apprehending Illegal Aliens, 20 Op. Off. Legal Counsel 26 (1996) [hereinafter OLC Opinion].

86. See, e.g., *Plyler v. Doe*, 457 U.S. 202, 226 (1982); *De Canas v. Bica*, 424 U.S. 351, 356 (1976); see also *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) ("So we 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.").

87. See *Miller v. United States*, 357 U.S. 301, 305 (1958). The *Miller* Court stated that in the "circumstance of an arrest for violation of federal law by state peace officers, that the lawfulness of the arrest . . . is to be determined by reference to state law." *Id.* In other words, federal law does not prohibit state police officers from arresting violators of federal criminal laws; the only limitation is state law. See *id.* State enforcement of non-citizen's criminal behavior falls within the realm of a state's police powers. Yañez, *supra* note 77, at 38 (noting that "under the state police power, law enforcement agents can make arrests for criminal acts").

88. See *Gonzales v. City of Peoria*, 722 F.2d 468, 474 (9th Cir. 1983) (citing *Ker v. California*, 374 U.S. 23 (1963); *Miller v. United States*, 357 U.S. 301 (1958); *United States v. DiRe*, 332 U.S. 581 (1948)).

89. See, e.g., *United States v. Vasquez-Alvarez*, 176 F.3d 1294, 1295 (10th Cir. 1999); *Gonzales*, 722 F.2d at 474. But see *Manheim*, *supra* note 73, at 980. *Manheim* asks:

Is there anything about federal immigration laws that counsel a different result? For one thing, criminal enforcement is direct regulation; its sole object is to implement immigration statutes. Unlike narcotics trafficking, for instance, immigration is not an area where state and federal governments have concurrent interests and power.

Id. Two federal district courts, in Arkansas and Washington, disagree with this proposition as they have permanently enjoined local enforcement of immigration laws with consent decrees. *Id.* at 979 n.279.

90. 722 F.2d 468 (9th Cir. 1983).

power.⁹¹ One of these limitations distinguishes between the civil and criminal aspects of immigration law, which determines the arrest authority of local police.⁹² This limitation exists out of concern that local police may not understand the difference between criminal and civil violations of immigration law.⁹³ In *Gonzales*, the confusion among the police of the City of Peoria centered on the term “illegal alien,” which appeared in their department policies; the term “obscure[d] the distinction between civil and criminal violations.”⁹⁴ The Peoria police interpreted it to mean both “an alien who has illegally entered the country, which is a criminal violation under section 1325” and also “an alien who is illegally present in the United States, which is only a civil violation.”⁹⁵ An illegally present alien has not committed a crime, but merely has violated a technical provision of the Immigration and Nationality Act (INA).⁹⁶ The *Gonzales* court gave examples of technical

91. *Id.* at 475-77.

92. *Id.* at 476. The second limitation on state enforcement of immigration law is the Fourth Amendment’s requirement of probable cause. *See id.* at 475-77. The probable cause must be based on a belief that the person has violated a criminal provision of the INA. *Id.* at 476-77. Probable cause cannot be based on ethnic appearance, lack of documentation or an admission of illegal presence. *See id.* at 476-77; *United States v. Brignoni-Ponce*, 422 U.S. 873, 885-87 (1975) (deciding that the apparent Mexican ancestry of a car’s occupants did not constitute reasonable grounds for police officers to conclude the occupants were aliens). State law serves as the third limitation. *See Gonzales*, 722 F.2d at 475. States cannot make immigration arrests without state law granting local police the “affirmative authority to make arrests under [federal] statutes.” *Id.* at 475; *see also Vazquez-Alvarez*, 176 F.3d at 1296 (noting expressly the condition of state law allowing immigration arrests); Sylvia R. Lazos Vargas, *Missouri, the “War on Terrorism,” and Immigrants: Legal Challenges Post 9/11*, 67 MO. L. REV. 775, 792-94 (2002) (analyzing Missouri state law to determine whether state police can make immigration arrests); OLC Opinion, *supra* note 85 (analyzing California state law to determine whether local police can enforce immigration law).

93. *Gonzales*, 722 F.2d at 476 (“Many of the problems . . . have derived from a failure to distinguish between civil and criminal violations of the Act.”); *see also* Manheim, *supra* note 73, at 975 (“State enforcement of federal immigration laws also presupposes that local officials are competent to determine immigration status.”); *see also* Lynn Tramonte, *Justice Department Seeks New Role for State and Local Police*, 23 REFUGEE REP. 6, (2002), available at http://www.refugees.org/word/articles/RR_August_2002_lead.cfm (citing examples of civil immigration violations and criminal immigration violations). Civil violations include “staying in the United States longer than the time period indicated on one’s visa, or living in the United States without the proper documentation,” while criminal violations “include document fraud, marriage fraud, and illegal entry after deportation.” *Id.* Civil immigration violators “are put into special administrative law proceedings outside of the criminal justice system.” *Id.* Criminal violators, on the other hand are put into criminal proceedings and are subject to incarceration. *Id.*

94. *Gonzales*, 722 F.2d at 476.

95. *Id.*

96. *Id.*; *see, e.g.*, 8 U.S.C. § 1202(g)(1). This provision states that the visa of an alien admitted to the country on a non-immigrant visa “shall be void beginning after the

civil violations, including “expiration of a visitor’s visa, change of student status, or acquisition of prohibited employment.”⁹⁷ *Gonzales* mandated that state officers must understand the distinction between criminal and civil violations in order to enforce even criminal provisions of the INA.⁹⁸ Thus, although the courts have held that the enforcement of INA criminal violations fall well within a state’s police powers, a police officer must first distinguish a criminal violation from a civil one.⁹⁹

Two circuits disagree as to whether this rationale extends to allow local police enforcement of the civil provisions of the INA.¹⁰⁰ Currently, federal immigration law does not give local police clear authority to make civil immigration arrests.¹⁰¹ However, U.S. Congressman Charles Norwood of Georgia has proposed a bill, the Clear Law Enforcement for Criminal Aliens Act (CLEAR Act), that would make explicit Congress’s intent to authorize local police to enforce *civil* immigration law.¹⁰² The CLEAR Act would not only encourage police to make such arrests, but would also require states to enact statutes that expressly authorize such arrests.¹⁰³ No current statute manifests congressional intent as clearly as

conclusion of such period of stay.” *Id.* The violation of such a provision would not render this alien criminally liable. *See Gonzales*, 722 F.2d at 476.

97. *Gonzales*, 722 F.2d at 476.

98. *Id.* at 477. The court stated that, “[i]n implementing the arrest authority granted by state law, local police must be able to distinguish between criminal and civil violations and the evidence pertinent to each.” *Id.* The court recommended that “this may require refinements of both the written policies and officer training programs.” *Id.*

99. *E.g., id.*

100. The Ninth Circuit has held that the rationale does not extend that far and that local police are only authorized to enforce criminal violations. *Id.* at 476. The Tenth Circuit has, however, extended the rationale to the civil provisions. *See United States v. Vasquez-Alvarez*, 176 F.3d 1294, 1300 (10th Cir. 1999); *United States v. Salinas-Calderon*, 728 F.2d 1298, 1302 (10th Cir. 1984). Other circuits have remained silent on this issue.

101. *See e.g.* Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. 104-132, § 439, 110 Stat. 1276 (codified as amended at 8 U.S.C. § 1252c (2000)); 8 U.S.C. § 1324 (2000) (granting local police the authority to arrest only criminal aliens who are illegally present); Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), 8 U.S.C. § 1357 (2000) (delegating arrest authority for immigration offenses carrying criminal penalties); Immigration and Nationality Act, 8 U.S.C. § 1103(a)(10) (Supp. 2003) (permitting local police to arrest civil and criminal immigration violators, but only during an immigration emergency).

102. Clear Law Enforcement for Criminal Alien Removal (CLEAR) Act of 2003, H.R. 2671, 108th Cong. § 101 (2003). Section 101 of the CLEAR Act states, “law enforcement personnel of a State or a political subdivision of a State are fully authorized to investigate, apprehend, detain, or remove aliens in the United States . . . in the enforcement of the immigration laws of the United States.” *Id.*

103. H.R. 2671 § 102. Section 102 states that any state “that fails to have in effect a statute that expressly authorizes law enforcement” to enforce immigration laws, “shall not receive any of the funds that would otherwise be allocated to the State under section 241(i) of the Immigration and Nationality Act (8 U.S.C. 1231(i)).” *Id.*

this proposed bill.¹⁰⁴ Thus, the courts have based their analysis of the enforcement issue on the principles of field preemption, which allows local police to validly enforce federal statutes so long as enforcement would “not impair federal regulatory interests.”¹⁰⁵

In *Gonzales*, the Ninth Circuit reviewed the case brought by “[e]leven persons of Mexican descent,” who challenged the authority of local police to make federal immigration arrests, claiming that federal law preempted state action.¹⁰⁶ The *Gonzales* court decided that the preemption question rested on the “nature of the regulated subject matter;” thus, it distinguished between the criminal and civil provisions of the INA.¹⁰⁷ The court asserted that the INA’s “pervasive” and “complex administrative structure” evidenced congressional intent to preclude states from enforcing the Act’s civil provisions.¹⁰⁸ Then, the court distinguished the criminal provisions as being “few in number and relatively simple in their terms.”¹⁰⁹ The court further noted that in the criminal immigration field, federal and local authorities “have identical purposes” in preventing crimes.¹¹⁰ Thus, in *Gonzales*, the Ninth Circuit

104. See, e.g., AEDPA § 439 (granting local police the authority to arrest only criminal aliens who are illegally present); IIRIRA § 133 (delegating arrest authority for immigration offenses carrying criminal penalties); INA § 1103(a)(10) (allowing local police to arrest civil and criminal immigration violators, but only in an immigration emergency).

105. See *Gonzales*, 722 F.2d at 474; *Fl. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963) (“The test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives.”); OLC Opinion, *supra* note 85 (“It is well-settled that state law enforcement officers are permitted to enforce federal statutes where such enforcement activities do not impair federal regulatory interests.”); see also *People v. Barajas*, 81 Cal. App. 3d 999, 1006 (Cal. Ct. App. 1978). The *Barajas* Court stated:

The supremacy clause is a two-edged sword, and in the absence of a limitation, the states are *bound* by it to enforce violations of the federal immigration laws.

The statutory law of the United States is part of the law of each state just as if it were written into state statutory law.

Id.

106. *Gonzales*, 722 F.2d at 472, 474.

107. *Id.* at 474.

108. *Id.* at 474, 475. The court explained that “federal law does not preclude local enforcement of the criminal provisions of the [Immigration and Naturalization] Act,” but the civil provisions of the INA “constitute such a pervasive regulatory scheme, as would be consistent with the exclusive federal power over immigration.” *Id.* at 475. The Court named some of these civil provisions, including “regulating authorized entry, length of stay, residence status, and deportation.” *Id.* at 474-75.

109. *Id.* at 475.

110. *Id.* at 474.

sustained local enforcement of criminal immigration laws and asserted the federal preemption of enforcement of the civil immigration laws.¹¹¹

In deciding *United States v. Vasquez-Alvarez*, the Tenth Circuit's rationale regarding local authority to make civil immigration arrests diverged from the Ninth Circuit's analysis.¹¹² In *Vasquez-Alvarez*, the defendant challenged the police officer's arrest authority, claiming that it did not comport with the AEDPA amendment to 8 U.S.C. § 1252c because the arresting officer did not confirm with the INS that the defendant was a felon who had illegally reentered the country.¹¹³ The officer made his decision to arrest Vasquez "based solely on the fact that [he]" was illegally present—a civil immigration violation—without knowledge of Vasquez's previous felony and deportation, which, with his additional re-entry, amounted to a violation of the criminal provision in Section 1252c.¹¹⁴ The defendant further claimed that Section 1252c "sets forth the only circumstances under which a state or local law enforcement official can arrest for violations of federal immigration laws," and thus, any state enforcement not conforming with Section 1252c was preempted.¹¹⁵ Disagreeing with the defendant, the court held that Section 1252c did not limit the "preexisting" arrest authority of local police; rather, it "merely create[d]" an additional way to make immigration arrests.¹¹⁶ The Tenth Circuit based its reasoning on the principle that local police can enforce violations of federal law, as long as state law grants such authority.¹¹⁷ The court then cited its proposition made in *United States v. Salinas-Calderon*¹¹⁸ that "state law-enforcement

111. *Id.* at 474-75.

112. *United States v. Vasquez-Alvarez*, 176 F.3d 1294 (10th Cir. 1999).

113. *Id.* at 1295. An INS officer had contacted the local police because he was suspicious of Vasquez-Alvarez's immigration status, but when the police officer arrested Vasquez-Alvarez, he did not contact the INS to determine whether he was a prior felon. *Id.* at 1295, 1296.

114. *Id.* See also Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. 104-132, § 439, 110 Stat. 1276 (codified as amended at 8 U.S.C. § 1252c (2000)). The defendant was in violation of this statute because he previously had been convicted of a felony, and at the time of the arrest, was illegally present. *Vasquez-Alvarez*, 176 F.3d at 1296.

115. *Vasquez-Alvarez*, 176 F.3d at 1295.

116. *Id.*

117. *Id.*

118. 728 F.2d 1298, 1301 (10th Cir. 1984) (holding that a state trooper had probable cause to investigate a situation in which a driver appeared to be bringing illegal aliens into the country). The *Salinas-Calderon* court stated in dicta that "[a] state trooper has general investigatory authority to inquire into possible immigration violations." *Id.* at 1301 n.3. Although this language is broad, the arrest actually stemmed from 8 U.S.C. § 1324(a)(2), a criminal violation. 728 F. 2d at 1300. The case's central question was whether the police officer had probable cause to arrest the defendant. *Id.*; see also Lazos Vargas, *supra* note 92, at 784 (explaining that *Salinas* is generally cited as "going to the appropriateness of

officers have the general authority to investigate and make arrest for violations of federal immigration laws.”¹¹⁹ The *Vasquez-Alvarez* court attacked the defendant’s preemption argument by analyzing the plain words and the legislative history of Section 1252c.¹²⁰ The court asserted that the purpose of Section 1252c was to “displace a perceived federal limitation on the ability” of local police to make immigration arrests.¹²¹ Thus, the Tenth Circuit understood that local police have a general authority to make immigration arrests—a position inconsistent with that of the Ninth Circuit.¹²²

In addition to expressly delegated authority and congressional intent to preempt state police powers, examining the actions of the Executive Branch helps determine whether states can enforce immigration law.¹²³ For example, the Bureau of Immigration and Customs Enforcement (ICE) can regulate when necessary to enforce its functions under statute.¹²⁴ As one commentator noted, “[w]hen valid in scope and issued

probable cause for a stop when an officer has reason to suspect that the driver is an illegal immigrant”).

119. *Vasquez-Alvarez*, 176 F.3d at 1296.

120. *Id.* at 1297-98. In particular, the court cited Representative Doolittle’s reasons for amending 8 U.S.C. § 1252c to allow state enforcement. *Id.* at 1298. Doolittle had stated that “[w]ith such a threat to our public safety posed by criminal aliens, . . . I was dismayed to learn that the current Federal law prohibits State and local law enforcement officials from arresting and detaining criminal aliens whom they encountered through their routine duties.” *Id.* (citing 142 CONG. REC. 4619 (1996) (comments of Rep. Doolittle)).

121. *Id.* at 1298-99.

122. *Compare id.* at 1296 (stating that “state law-enforcement officers have the general authority to investigate and make arrest for violations of federal immigration laws”), with *Gonzales v. City of Peoria* 722 F.2d 468, 474-75 (9th Cir. 1983) (stating that the civil provisions of the INA are consistent with the federal power over immigration and, thus, are preempted).

123. *Cf. Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (“The question in each case is what the purpose of Congress was.”). Congressional intent to preempt state police powers can be determined in a number of ways. *Id.* One way to determine congressional intent is to examine the regulations promulgated by the Executive Branch. *Id.* In particular, the *Santa Fe Elevator Corp.* Court stated, “[t]he scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.” *Id.*; *See also* *Yañez & Soto*, *supra* note 77, at 22 (arguing that “Congressional intent can be determined from express statutory language or inferred from various sources”). *Yañez* and *Soto* suggest that “[l]egislative history, occupation of the area, uniform enforcement, and the conflict between federal and state law are potential sources of inference in support of congressional preemptive intent.” *Id.*

124. *See* 8 U.S.C. § 1103(a)(1)(3) (2000 & Supp. 2003); Press Release, U.S. Department of Homeland Security Facts for March 1, 2003, at <http://www.dhs.gov/dhspublic/display?theme=&content=817&print=true>. Until recently, federal immigration authority was vested with the former Immigration and Naturalization Service, a division within the Department of Justice. *Id.* As of March 1, 2003, all immigration authority shifted to the Department of Homeland Security (DHS). *Id.* The

in accordance with congressional guidance, these regulations can preempt state action in a particular field.”¹²⁵ In addition, the Department of Justice (DOJ) previously has issued advisory opinions guiding states on the enforcement of immigration laws.¹²⁶ In 1996, the DOJ issued an opinion that stated, “State police lack recognized legal authority to arrest or detain aliens solely for the purposes of *civil* deportation proceedings, as opposed to criminal prosecution.”¹²⁷ Thus, until the recent DOJ announcement, the Executive Branch’s understanding of this area of immigration law traditionally has been consistent with case law stemming from the *Gonzales* case.¹²⁸

immigration enforcement authority is now housed in the Bureau of Immigration and Customs Enforcement (ICE), within DHS. *Id.*

125. *Yañez & Soto*, *supra* note 77, at 36. *See also* *Fid. Fed. Savings & Loan Ass’n v. De La Cuesta*, 458 U.S. 141, 153 (1982) (“Federal regulations have no less pre-emptive effect than federal statutes.”). The *De La Cuesta* Court explained that if the administrative agency intended to preempt state law, and if this action was within its congressionally delegated powers, the preemption is valid. *Id.* at 153-54.

126. The most recent advisory opinion dates from 1996. OLC Opinion, *supra* note 85. The one previous to that was an advisory opinion from 1989. *See id.* at 31 (citing Memorandum for Joseph R. Davis, Assistant Director, Federal Bureau of Investigation, from Douglas W. Kmiec, Assistant Attorney General, Office of Legal Counsel, *Re: Handling of INS Warrants of Deportation in Relation to NCIC Wanted Persons File* (Apr. 11, 1989)). A Department of Justice press release from 1978 stated a similar policy. *Yañez & Soto*, *supra* note 77, at 36 n.202; *see also id.* at 36 (“The most clear direction from the federal government on the role of states in immigration enforcement has come in the form of Department of Justice Press Releases.”).

127. OLC Opinion, *supra* note 85, at 27; *see also* CHISHTI, *supra* note 4, at 85 (pointing out that the 1996 amendments were adopted only a few months after the OLC’s legal opinion, which stated that local police lack the authority to arrest people on civil immigration violations). Chishti further noted that “[i]f Congress had intended to alter the Executive’s interpretation of the INA, it would likely have granted the states broad civil enforcement authority expressly, which it did not.” *Id.*

128. *See* OLC Opinion, *supra* note 85, at 32 (“[W]e conclude that state and local police lack recognized legal authority to stop and detain an alien *solely on suspicion of civil deportability*, as opposed to a criminal violation of the immigration laws or other laws.”); *id.* (citing Memorandum for Joseph R. Davis, Assistant Director, Federal Bureau of Investigation, from Douglas W. Kmiec, Assistant Attorney General, Office of Legal Counsel, *Re: Handling of INS Warrants of Deportation in Relation to NCIC Wanted Persons File* (Apr. 11, 1989)). In addition, a 1978 Justice Department Press Release stated that local police should not detain “any person not suspected of a crime, solely on the ground that they may be deportable aliens.” *Yañez & Soto*, *supra* note 77, at 36. It further “advised against police involvement in immigration enforcement, unless it occurred through incidental brushes with undocumented aliens arrested on independent state grounds.” *Id.*

D. The Legal Landscape Prior to the Announcement of the “Inherent Authority” Opinion

As the Supreme Court’s jurisprudence consistently has held for an exclusive federal power over immigration, the Court has struck down any state law that impairs federal immigration policy.¹²⁹ Because the Supreme Court has remained silent as to whether states can *enforce* immigration law, the issue should be approached by examining congressional intent.¹³⁰ Local enforcement of the immigration power has been authorized in limited instances by congressional statute.¹³¹ Yet, by expressly authorizing local police to make civil immigration arrests, the proposed CLEAR Act would give substance to the Tenth Circuit’s position that such arrests are not preempted.¹³² Thus, these conflicting positions on the question of preemption constitute the legal setting in which to examine the “inherent authority” position.¹³³

II. THE “INHERENT AUTHORITY” POSITION HAS CONFUSED
ADMINISTRATION OFFICIALS AND RELIES ON VAGUE TENTH CIRCUIT
OPINIONS

A. The Administration’s Own Officials Have Taken Actions Inconsistent with the OLC’s “Inherent Authority” Position

On June 6, 2002, Attorney General John Ashcroft announced the Office of Legal Counsel’s conclusion that state and local police have the “inherent authority” to arrest “aliens who have violated criminal provisions of Immigration and Nationality Act or civil provisions that render an alien deportable, and who are listed on the [National Crime and Information Center (NCIC) database].”¹³⁴ Ashcroft further stated

129. See *supra* Parts I.A and I.B.

130. See *supra* Part I.C (discussing congressional intent, and, due to absence of Supreme Court cases on the issue, examining federal circuit court opinions).

131. See *supra* Part I.C.

132. Compare Clear Law Enforcement for Criminal Alien Removal (CLEAR) Act, H.R. 2671, 108th Cong. (2003) (“[R]eaffirming the existing general authority, law enforcement personnel of a State . . . are fully authorized to investigate, apprehend, detain, or remove aliens in the United States . . . in the enforcement of the immigration laws of the United States”), with *United States v. Vasquez-Alvarez*, 176 F.3d 1294, 1296 (10th Cir. 1999) (holding that local police have the “general authority . . . [to] make arrests for violations of federal immigration laws”).

133. See *infra* Part.II.A-B.

134. Ashcroft Remarks, *supra* note 2. See generally Federal Bureau of Investigation, National Crime Information Center (NCIC), at <http://www.fas.org/irp/agency/doj/fbi/is/ncic.htm> (last visited Jan. 30, 2004). The National Crime and Information Center database is “a computerized index of criminal justice information” including criminal records, wanted persons, stolen properties, and missing persons. *Id.*; see also Letter from American Civil Liberties Union, et. al., to Mitch E. Daniels, Jr., Director, Office of

that the Justice Department was asking the states to utilize their “inherent authority” for the “anti-terrorism mission.”¹³⁵ Various Administration officials, in their attempts to explain and implement the “inherent authority” policy only have served to muddle the meaning of the OLC’s interpretation.¹³⁶ These officials not only contradict each other, but also leave the public unsure of the policy’s legal basis.¹³⁷

In response to an inquiry about the inherent-authority policy, White House Counsel Alberto Gonzales narrowly interpreted the policy in a manner consistent with the states’ general police powers to arrest criminals.¹³⁸ Referring to the position taken by the DOJ Office of Legal Counsel, Gonzales stated that local police have the “inherent authority” to arrest “only [those] high-risk aliens who fit a terrorist profile” and who are “in violation of immigration laws.”¹³⁹ Gonzales suggested that he interpreted the OLC’s conclusion to mean that state and local police have the “inherent authority” to arrest an alien when they have *both* violated immigration law *and* have a criminal record—one that fits a terrorist profile—on the NCIC database.¹⁴⁰ This position seems to reflect Congress’s intent in 8 U.S.C. § 1252c, which authorizes local officials to arrest only those illegally-present aliens who have committed a crime.¹⁴¹ Thus, the White House Counsel’s interpretation would limit the meaning of the OLC policy to reflect the Ninth Circuit’s position that local police have inherent authority to arrest *only* criminal aliens.¹⁴²

Management and Budget (April 8, 2003), available at <http://www.aclu.org/CriminalJustice/CriminalJustice.cfm?ID=12306&c=15> (last visited Jan. 30, 2004) (asserting that the NCIC is accessed by federal, state and local law enforcement agencies across the country an average of 2.8 million times a day).

135. Ashcroft Remarks, *supra* note 2.

136. See Letter from Alberto R. Gonzales, Counsel to the President, to Demetrios G. Papademetriou, Migration Policy Institute (June 24, 2002), available at <http://www.migrationpolicy.org/files/whitehouse.pdf> [hereinafter Letter from Alberto R. Gonzales]; *INS signs Agreement with Florida to Authenticate State, Local Officers to Perform Immigration Enforcement Functions*, 79 INTERPRETER RELEASES 1113, 1120 (July 29, 2002) (discussing the Memorandum of Understanding between Florida and the INS).

137. Michele Waslin, *Immigration Enforcement by Local Police: The Impact on the Civil Rights of Latinos*, 9 NCLR ISSUE BRIEF at 3 (Feb. 2003) (stating that the contradictory statements have confused “immigrant communities, immigrant and civil rights advocates, and law enforcement agencies”).

138. Letter from Alberto R. Gonzales, *supra* note 136.

139. *Id.*

140. *Id.* Gonzales stated that “state and local police have inherent authority to arrest and detain persons who are in violation of immigration laws *and whose names have been placed in the [NCIC database].*” *Id.* According to Gonzales, “only high-risk aliens who fit a terrorist profile will be placed in [NCIC’s database].” *Id.*

141. See *supra* note 78 for the text of 8 U.S.C. § 1252c (2000).

142. See Waslin, *supra* note 137, at 3.

The second action by the Administration that fundamentally contradicted the OLC's position occurred on July 19, 2002, when the former Immigration and Naturalization Service (INS) announced it had entered into a formal agreement with the State of Florida.¹⁴³ In this agreement, called a Memorandum of Understanding (MOU), the Department of Justice agreed to authorize local police officers in Florida to enforce immigration law, pursuant to section 133 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).¹⁴⁴ Under the Florida MOU:

[T]he authority to enforce federal immigration laws does not extend to the more conventional enforcement actions that the INS carries out every day in Florida. State law enforcement officers covered by the MOU will not be involved in immigration enforcement activities that do not involve terrorism or domestic security issues.¹⁴⁵

Here, the MOU specified that not *all* enforcement activities were being delegated to Florida, but only those involving national security.¹⁴⁶ This statement suggested that Florida had no authority outside the MOU to make civil immigration arrests.¹⁴⁷ Thus, this agreement directly conflicted with the DOJ's announcement, which suggested that states have enforcement authority for all immigration violations.¹⁴⁸ In addition, if Florida understood that it had "inherent authority" in immigration enforcement, it would not have entered into a written agreement that would have served to limit any of its enforcement powers.¹⁴⁹ The INS clearly did not believe Florida had any "inherent authority;" otherwise, it

143. *Id.* In July 2002, the State of Florida became the first state to enter into a MOU with the INS. *Id.*

144. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), 8 U.S.C. § 1357 (2000) ("[T]he Attorney General may enter into a written agreement with a State . . . [allowing an officer of the State who is qualified] to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States.").

145. Waslin, *supra* note 137, at 5.

146. *Id.*

147. *See id.* at 3, 5.

148. Ashcroft Remarks, *supra* note 2. Although Ashcroft stated that the inherent authority would not be used "beyond our narrow anti-terrorism mission," he clearly stated that arresting aliens who have violated criminal and civil provisions of the INA "is within the inherent authority of the states." *Id.*

149. *See Police May Soon Be Able to Arrest Illegal Immigrants*, FLORIDA TIMES-UNION (Mar. 4, 2002), available at <http://www.jacksonville.com/tuonline/apnews/stories/030402/D711J06O0.html>. Florida Domestic Security Chief Steve Lauer said that he "expects the state to join an unprecedented relationship with the federal government that would allow police to arrest illegal immigrants." *Id.* Another officer would like even more authority delegated to the state police: Florida Law Enforcement Commissioner Tim Moore stated, "It's a start. Ideally, we would like even more authority." *Id.*

would not have entered into an MOU only one month after Ashcroft's announcement.¹⁵⁰

In sum, the three inconsistent messages the Administration has given the public are: 1) states have the inherent authority to enforce both civil and criminal immigration law;¹⁵¹ 2) states have the inherent authority to arrest illegal and criminal aliens;¹⁵² and 3) states have no inherent authority at all, but must enter into a formal written agreement with the Department of Justice to make civil immigration arrests.¹⁵³ These contradictions suggest that even the federal government remains unsure of any legal basis that would support the new "inherent authority" policy.

B. Comparing the Circuits: State Enforcement of Civil Immigration Law

That state police powers include local enforcement of criminal immigration law remains undisputed.¹⁵⁴ However, the Ninth and Tenth Circuits disagree as to whether the INA's civil provisions preempt state powers.¹⁵⁵ In addressing state involvement in the immigration field, the Supreme Court always has adhered to the principle that the "[p]ower to regulate immigration is unquestionably exclusively a federal power."¹⁵⁶ When the Supreme Court conducted its preemption analysis in *De Canas* and *Plyler*, it balanced the federal government's exclusive power over immigration with the state's police powers.¹⁵⁷ Although the issues facing the Ninth and Tenth Circuits differed factually from the Supreme Court cases, a preemption analysis still was warranted.¹⁵⁸ Thus, the Court's *De Canas* three-prong test, together with its *Plyler* decision, serve as guides

150. Compare 79 INTERPRETER RELEASES, 1113, 1120 (July 29, 2002), with Ashcroft Remarks, *supra* note 2. The MOU was entered into in July 2002, one month after the announcement of the "inherent authority" position. Compare 79 INTERPRETER RELEASES, 1113, 1120 (July 29, 2002), with Ashcroft Remarks, *supra* note 2.

151. Ashcroft Remarks, *supra* note 2.

152. Letter from Alberto R. Gonzales, *supra* note 136.

153. See 79 Interpreter Releases, 1113, 1120 (July 29, 2002) (discussing the Florida MOU).

154. *But see supra* note 89.

155. See *supra* Part I.C.

156. *De Canas v. Bica*, 424 U.S. 351, 354 (1976); see also *supra* Part I.A.

157. *Plyler v. Doe*, 457 U.S. 202, 225 (1982); *De Canas*, 424 U.S. at 355-57, 363 (1976).

158. See Jay T. Jorgensen, *The Practical Power of State and Local Governments to Enforce Federal Immigration Laws*, 1997 BYU L. REV. 899, 908 (stating that the Ninth Circuit applied the *De Canas* preemption analysis to the *Gonzales* facts). The cases in the Ninth and Tenth Circuits were different because the issue concerned whether state law enforcement officers were preempted from enforcing federal law, while the Supreme Court's cases in *De Canas* and *Plyler* concerned state laws that concerned immigration. Compare *Gonzales v. City of Peoria*, 722 F.2d 468 (9th Cir. 1983), and *United States v. Vasquez-Alvarez*, 176 F.3d 1294 (10th Cir. 1999), with *De Canas*, 424 U.S. 351 (1976) and *Plyler*, 457 U.S. 202 (1982).

for determining when state enforcement infringes upon the federal power.¹⁵⁹

The first *De Canas* prong is irrelevant to the circuits' opinions because neither state was attempting to regulate immigration.¹⁶⁰ The second *De Canas* prong required explicit congressional intent to oust state power; however, *Plyler* appeared to modify this requirement, implying that such intent to preempt state power did not have to be explicitly stated.¹⁶¹ Based on these Supreme Court analyses, the Tenth Circuit's analysis of congressional intent in *Vasquez-Alvarez* was inherently flawed.¹⁶² In examining 8 U.S.C. § 1252c, the *Vasquez-Alvarez* court used one Congressman's concern for a specific problem and unjustifiably extended it to rationalize that the statute intended to oust a "perceived" federal preemption of state enforcement.¹⁶³ However, the plain words of Representative Doolittle's comments illustrate that he intended to change the existing federal limitation on state enforcement for the narrow purpose of public safety.¹⁶⁴ The concern that prompted Representative Doolittle to sponsor the amendment was that "current federal law prohibits state and local law enforcement officials from arresting and detaining *criminal* aliens."¹⁶⁵ The Tenth Circuit, however,

159. See *supra* Part I.B (enumerating the three prongs of the *De Canas* test and discussing the *Plyler* decision). But see Jorgensen, *supra* note 158, at 911. In applying the *De Canas* preemption analysis to the *Gonzales* facts, Jorgensen asserts that the Ninth Circuit altered the *De Canas* prong to fit the enforcement context and joined its inquiry of state and local immigration enforcement authority with the *De Canas*' analysis of preemption in the regulatory context. *Id.*

160. *De Canas*, 424 U.S. at 355 (explaining the first prong as a query of whether the law was a regulation of immigration).

161. *Plyler*, 457 U.S. at 225-26.

162. See Waslin, *supra* note 137, at 8. Waslin asserts that the Tenth Circuit's reliance on the *Salinas-Calderon* opinion in deciding *Vasquez-Alvarez* is unfounded because the *Salinas-Calderon* court "did not define what it meant by an immigration violation and did not discuss—or even appear to recognize—the difference between civil and criminal immigration offenses." *Id.* The distinction between civil and criminal immigration violations is important to determine whether the arresting officer had the requisite probable cause to stop an undocumented alien. See *Gonzales v. City of Peoria*, 722 F.2d 468, 477 (9th Cir. 1983).

163. *Vasquez-Alvarez*, 176 F.3d at 1298. The only legislative history available for 8 U.S.C. § 1252c is "the floor debate on the amendment which took place in the House of Representatives," during which Representative Doolittle described his purpose in sponsoring the amendment. *Id.*

164. See *id.* In particular, Representative Doolittle stated, "current Federal law in this area places our communities at risk and has led me to offer this amendment to H.R. 2703, an amendment I feel will help put some sense back into our laws dealing with the re-entry of criminal aliens into this country." *Id.*

165. *Id.* at 1298-99 (emphasis added). The law allowed local police only to "release the felon and contact the INS with the details of the incident." *Id.* at 1298. Thus, Doolittle's purpose in sponsoring the amendment was to create a congressional

used Doolittle's statements to assert that Section 1252c eliminated a falsely "perceived" federal limitation on *all* local immigration enforcement.¹⁶⁶ The court went a step further and claimed that Section 1252c was an additional source of enforcement authority, rather than a limitation to it.¹⁶⁷ However, if Congress had understood the states to have preexisting authority to make immigration arrests, it would not have enumerated such specific requirements in Section 1252c.¹⁶⁸ Thus, Section 1252c was not amended to allow an additional means of state enforcement to an already existing power; rather its purpose was to delegate enforcement authority for the narrow purpose of arresting "criminal aliens."¹⁶⁹

The Ninth Circuit applied the second prong of the *DeCanas* test in *Gonzales* in concluding that the criminal provisions were not preempted.¹⁷⁰ Applying a test similar to *Plyler's* modification, the Court inferred that Congress, by its "complex administrative structure,"

authorization for states to arrest "criminal aliens." *Id.* Representative Doolittle further stated:

With my amendment, law enforcement officials would no longer be required to release known dangerous felons back into our communities. Instead, this amendment would give those with the responsibility of protecting our public safety the ability to take a known criminal alien off our streets and put him behind bars.

142 CONG. REC. H2191 (daily ed. Mar. 13, 1996) (statement of Rep. Doolittle).

166. *Vasquez-Alvarez*, 176 F.3d at 1299. In fact, Representative Doolittle's concern was with "known dangerous felons," not all violators of immigration law. 142 CONG. REC. H2191 (daily ed. Mar. 13, 1996) (statement of Rep. Doolittle).

167. *Vasquez-Alvarez*, 176 F.3d at 1298-1300. *Vasquez-Alvarez* claimed that evidence of his arrest should have been suppressed because it did not comport with 8 U.S.C. § 1252c. *Id.* at 1295. The court saved the evidence of the arrest from suppression by claiming that Section 1252c was not the only way in which an officer could legally arrest an undocumented immigrant. *Id.*

168. CHISHTI, *supra* note 4, at 84-85. Further, "[i]f state and local authorities did have such authority, the new INA provisions would be superfluous." *Id.* at 85.

169. *See* 142 CONG. REC. H2191 (daily ed. Mar. 13, 1996) (statement of Rep. Doolittle).

170. *Gonzales v. City of Peoria*, 722 F.2d 468, 474 (9th Cir. 1983) ("Although the regulation of immigration is unquestionably an exclusive federal power, it is clear that this power does not preempt every state activity affecting aliens."); *see also* Jorgensen, *supra* note 158, at 908 (stating that in *Gonzales v. City of Peoria*, the Ninth Circuit applied the *De Canas* preemption analysis). Jorgensen, however, argues:

[T]he question of whether state and local officers may enforce the INA is really a two-part inquiry. First, a court must ask whether Congress has preempted state and local enforcement of the federal law in question. Second, since state governments have authority to control the activities of state and local officers, a court must look to state law to determine if state and local officers are authorized to enforce the federal provision.

Id. at 910.

intended to preempt state civil immigration enforcement.¹⁷¹ The Ninth Circuit's preemption analysis confirmed that state enforcement without congressional delegation "breaches core federalism principles and the established understanding of federal preemption in the immigration field."¹⁷² Thus, the Ninth Circuit correctly analyzed the question of congressional intent, while the Tenth Circuit improperly expanded the meaning of Section 1252c.¹⁷³

The *Plyler* Court modified the third *De Canas* prong, that state law cannot act as an "obstacle" to federal policy, in declaring that state action must "mirror[] federal objectives."¹⁷⁴ In *Vasquez-Alvarez*, the Tenth Circuit's rationale plainly did not mirror federal objectives; instead, it surpassed them.¹⁷⁵ Representative Doolittle's comments made clear that the federal objective in amending Section 1252c was authorizing local police to arrest "criminal aliens" who threatened public safety.¹⁷⁶ These "federal objectives" did not include arrests of undocumented immigrants who had not committed crimes.¹⁷⁷ The *Vasquez-Alvarez* court, however,

171. *Gonzales*, 722 F.2d at 474-75; see also Manheim, *supra* note 71, at 975-76 (asserting that in *Gonzales*, the Ninth Circuit "held that states could not enforce the civil provisions of federal immigration law"). In addressing the situation in which local police arrest an undocumented immigration, it is, as Manheim states:

[P]resuppose[d] that local [law enforcement] officials are competent to determine immigration status. Whether an alien is "legal" or "illegal" depends upon a variety of factors beyond mere definitions contained in the INA. For instance, many persons without standard immigration documents may nonetheless have a claim of right to residency, or may be in the process of applying for asylum, adjustment of status, or relief from deportation. In addition to these statutory routes for changed status, INS may simply use its discretion not to act against an otherwise deportable alien.

Id. Manheim further asserts that establishing one's immigration status can involve "a herculean task of reviewing voluminous documentation." *Id.* at 976. In fact, the INA is so intricate that it is considered "second only to the Internal Revenue Code in complexity," and bears a "striking resemblance" to "Minos' Labyrinth in ancient Crete." *Id.*

172. CHISHTI, *supra* note 4, at 80.

173. Waslin, *supra* note 137, at 8-9 (calling the Tenth Circuit's decisions "erroneou[s]" and the DOJ's reliance on them "dubious, at best").

174. *Plyler v. Doe*, 457 U.S. 202, 225 (1982); *DeCanas v. Bica*, 424 U.S. 351, 363-364 (1976).

175. *United States v. Vasquez-Alvarez*, 176 F.3d 1294, 1298 (10th Cir. 1999); see also Waslin, *supra* note 137, at 8. Waslin argued that the *Vasquez-Alvarez* court "relies only on cases that authorize police enforcement of federal *criminal* offenses, and thus there is no support for an expanded interpretation covering civil offenses." *Id.*

176. 142 CONG. REC. H2191 (daily ed. Mar. 13, 1996) (statement of Rep. Doolittle); see also CHISHTI, *supra* note 4, at 84 (explaining that Doolittle's purpose in offering the amendment was aimed specifically at criminal immigrants, not civil immigration violators).

177. See 142 CONG. REC. H2191 (daily ed. Mar. 13, 1996) (statement of Rep. Doolittle). In fact, the federal objectives included only "arresting and detaining criminal aliens whom" local police encounter in their routine duties. *Id.*

extended the “general authority to investigate” rationale from its criminal context in *Salinas-Calderon* to civil enforcement.¹⁷⁸ The Tenth Circuit unjustifiably extended this rationale without discussing the critical difference between civil and criminal immigration provisions.¹⁷⁹

In stating that federal and state authorities have “identical purposes” in preventing criminal immigration violations, the Ninth Circuit implied that states do not share the federal goal of maintaining the “pervasive regulatory scheme” of immigration laws.¹⁸⁰ Further, the *Gonzales* court suggested that state enforcement might create an obstacle to the federal interest in the enforcement of civil provisions when it stated that “no opportunity for state activity remains.”¹⁸¹ Thus, the Ninth Circuit suggested that the civil provisions contain nothing inherently local, so that no asserted state police power could mirror the objectives of the federal power.¹⁸²

The previous opinions of the DOJ also recognize “the distinction between the civil and criminal provisions of the INA for purposes of state law enforcement authority.”¹⁸³ Those opinions, coupled with Administrative actions consistent with that position, only serve to bolster the concept that Congress intended to permit state enforcement of immigration laws only in limited situations—when Congress delegates arrest authority and when undocumented immigrants violate criminal

178. *Vasquez-Alvarez*, 176 F.3d at 1296. The court not only cites the *Salinas-Calderon* case to support its proposition that police have this general investigatory authority, but it also cites the Ninth Circuit’s *Gonzales* case, which did not extend the general authority to the civil provisions. *Id.*; see also *Gonzales v. City of Peoria*, 722 F.2d 468, 474-75 (9th Cir. 1983). It is unclear whether the *Vasquez-Alvarez* court based its decision on the underlying criminal violation, or the arresting officer’s perceived violation of a civil provision. See *Vasquez-Alvarez*, 176 F.3d 1294 (10th Cir. 1999). It is possible that in citing language from *Salinas-Calderon*, the Tenth Circuit extended enforcement authority from criminal violations to civil immigration violations. See *id.* at 1296. If *Vasquez-Alvarez* did extend the rationale, the Tenth Circuit would find that enforcement of the civil provisions is within states’ police powers. See *Lazos Vargas*, *supra* note 92, at 786-787 (noting that the “interpretive tension” that this case caused remains unresolved).

179. See *Waslin*, *supra* note 137, at 8 (noting that the *Salinas-Calderon* court did not acknowledge the difference between civil and criminal immigration laws); *supra* Part I.C (identifying the distinction between criminal and civil provisions of immigration law as discussed in *Gonzales*).

180. *Gonzales*, 722 F.2d at 474-75.

181. *Id.* at 474.

182. *Id.* (juxtaposing the “identical purposes” in criminal immigration enforcement with the fact that the “system of federal regulation is so pervasive that no opportunity for state activity remains”).

183. *E.g.*, OLC Opinion, *supra* note 85.

immigration law or state laws.¹⁸⁴ Many local officials have long relied on this concept as it clearly distinguishes the roles of local police from federal officials.¹⁸⁵

III. LOCAL POLICE SHOULD ONLY MAKE IMMIGRATION ARRESTS WHEN NEEDED TO ALLEVIATE COMMUNITY CONCERNS

A. *Maintaining Safe Communities Requires Police To Focus On Crime, Not Immigration Violations*

To protect their communities, local police should ignore the Attorney General's appeal to make civil immigration arrests.¹⁸⁶ Many police departments already refuse to enforce civil immigration laws because they believe that "community policing" would decline.¹⁸⁷ These police departments contend that the community will become less safe if undocumented immigrants stop reporting crimes because they fear deportation.¹⁸⁸ Instead of seeking to arrest non-criminal immigrants, state legislatures should follow Oregon's example of affirmatively enacting legislation that prohibits police officers from making civil immigration arrests.¹⁸⁹

184. See Jorgensen, *supra* note 158, at 920 (stating that there is no preemption issue when congressional intent clearly manifests that local police can enforce immigration laws).

185. See Nat'l Immigration Forum, *Opposition to Local Law Enforcement of Immigration Laws* (May 22, 2002) at http://www.immigrationforum.org/currentissues/articles/052002_quotes.htm [hereinafter Nat'l Immigration Forum] (last visited Jan. 24, 2004). David Cohen, a spokesperson for the San Diego Police stated, "Our policy has been and continues to be that we are not federal immigration officers, and our department guidelines for dealing with undocumented persons are very strict and are unlikely to change." *Id.*

186. See Ashcroft Remarks, *supra* note 2.

187. See generally Nat'l Immigration Forum, *supra* note 185 (presenting views of various police departments around the country). In April 2002, in anticipation of the announcement of the new policy, twenty-six police departments made statements criticizing the policy. See *id.*

188. See also *id.* As Armando Mayoya of the San Joaquin County (CA) Sheriff's Office stated, "[i]f police officers start reporting to the INS, more undocumented workers could wind up as victims. Criminals soon would realize that undocumented workers would be unlikely to call police for fear of being deported and target them for attacks." *Id.* See also *New York City's 'Sanctuary' Policy and the Effect of Such Policies on Public Safety, Law Enforcement, and Immigration: Hearing Before the House Comm. on the Judiciary Subcomm. on Immigration, Border Security, and Claims, 108th Cong. (2003)* ("In 1998, Elena Gonzalez, an immigrant in New Jersey, was found murdered in the basement of her apartment. Friends of the woman said that the suspected murderer, her former boyfriend, threatened to report her to the INS if she did not do what she was told.")

189. See Lazos Vargas, *supra* note 92, at 792 n.88 ("Oregon law prohibits law enforcement from apprehending 'any persons whose only violation of law is that they are persons of foreign citizenship residing in the United States in violation of federal

Alternatively, the states could adopt the policies like those of New York City's Mayor Bloomberg, who signed an executive order stating that law enforcement officers in his city may not inquire about a person's immigration status, unless they are suspected of a crime.¹⁹⁰ Even absent a state or municipal prohibition, police departments nevertheless should refuse to make such arrests.¹⁹¹ Contrary to proponents of the "inherent authority" stance, these non-enforcement policies do not offer shelter for criminal aliens.¹⁹² Rather, these proactive initiatives send the message to the immigrant community, and to the federal immigration authorities, that local police departments are committed to the safety of their populations and will not be hindered by a federal agenda.¹⁹³

Immigration enforcement by local police not only undermines community safety, it also harms the national interest in preventing terrorism.¹⁹⁴ If forced to focus on an immigrant's status, rather than his criminal conduct, police departments risk overlooking potential terrorism threats by concentrating instead on more trivial violations, such as dropping below the minimum credit hours required to maintain a student visa.¹⁹⁵ The federal government depends on local police as the

immigration laws.'") (citing OR. REV. STAT. § 181.850 (2001)). Alaska has a similar statute. See *Clear Law Enforcement for Criminal Alien Removal Act of 2003 (CLEAR Act): Legislative Hearing on H.R. 2671, Before the House Comm. on the Judiciary, Subcomm. on Immigration, Border Security, and Claims*, 108th Cong. 38 (2003)[hereinafter *CLEAR Act Legislative Hearing*] (statement of Gordon Quan, Member, City Council, Houston, Texas), available at <http://www.house.gov/judiciary/89636.PDF>.

190. New York City, Exec. Order No. 41, City-Wide Privacy Policy and Amendment of Executive Order No. 34 Relating to City Policy Concerning Immigrant Access to City Services (Sept. 17, 2003) [hereinafter Exec. Order No. 41]. The text states that "Law enforcement officers shall not inquire about a person's immigration status unless investigating illegal activity other than mere status as an undocumented alien." *Id.* § 4(a).

191. See Nat'l Immigration Forum, *supra* note 185. Assistant Police Chief Rudy Landeros of the Austin, Texas, Police Department stated, "Our officers will not, and let me stress this because it is very important, our officers will not stop, detain or arrest anybody solely based on their immigration status. Period." *Id.*

192. See Press Release, Michael R. Bloomberg, Mayor, New York City, Mayor Michael R. Bloomberg Signs Executive Order 41 Regarding City Services for Immigrants (Sept. 17, 2003). Mayor Bloomberg stated that "[t]he promise of confidentiality is not for everyone, only for those who abide by the law. It offers no protection to terrorists and violent criminals who seek to avoid responsibility for their crimes. Nor is it a shield for law-breakers to hide behind." *Id.*

193. See Exec. Order No. 41, *supra* note 190, § 4(c) ("It shall be the policy of the Police Department not to inquire about the immigration status of crime victims, witnesses, or others who call or approach the police seeking assistance.").

194. Waslin *supra* note 134, at 15-16; *CLEAR Act Legislative Hearing*, *supra* note 189, at 40 (statement of Gordon Quan, Member, City Council, Houston, Texas).

195. James M. Lindsay & Audrey Singer, *Local Police Should Not Do an I.N.S. Job*, N.Y. TIMES, May 8, 2002, at A31. The article states:

first defense against terrorism; however, asking them to exhaust their resources investigating the eight million undocumented immigrants currently in the United States will hinder terrorism investigations by diverting police from their everyday enforcement responsibilities.¹⁹⁶ By prioritizing the safety of their communities over civil immigration violations, local police actions conform to the federal preemption principle that states should exercise their police powers primarily for local concerns.¹⁹⁷

B. Civil Immigration Arrests Create Liability for Police Departments

In addition to fostering unsafe communities, participation in immigration enforcement leaves local police departments vulnerable to the high costs of litigation.¹⁹⁸ Without the training that federal officials receive, local police may make arrests on the basis of ethnicity, without probable cause.¹⁹⁹ Such improper arrests spurred litigation in Chandler,

[I]t is doubtful that turning state and local police loose on illegal immigrants will do much to stop terrorism State and local police probably would not have prevented Sept. 11 even if they had been empowered to enforce immigration laws. The 19 hijackers all entered the United States legally, and 17 of them still had valid visas on Sept. 11.

Id.; see Tramonte, *supra* note 93. Jeanne Butterfield, Executive Director of the American Immigration Lawyers Association said, "A terrorist does not need to overstay his visa to carry out his plans, and will not likely show up at the INS to register himself as the Justice Department might want him to." *Id.* Law enforcement should not base their search for terrorists on country of origin. Victor C. Romero, *Decoupling "Terrorist" from "Immigrant": An Enhanced Role for the Federal Courts Post 9/11*, 7 J. GENDER RACE & JUST. 201, 206 (2003). Romero stated:

Targeting certain groups is overinclusive because interrogating and detaining thousands of noncitizens based on accidents of birth offends our notions of liberal equality and individual civil rights. It is also underinclusive because, as mentioned before, there are U.S. citizens and other foreign nationals who may also be terrorist threats.

Id.

196. See *supra* note 195.

197. See *supra* Part I.B (discussing the validity of states' asserted police powers and when it overcomes a preemption challenge).

198. See Waslin *supra* note 137, at 16. One lawsuit in Chandler, Arizona, stemming from the local police's improper arrest of undocumented immigrants resulted in a settlement of \$400,000. *Id.*; see Lazos Vargas, *supra* note 92, at 821-22; Tramonte, *supra* note 93.

199. Waslin, *supra* note 137, at 9-13; see also Bureau of Immigrations and Customs Enforcement, Department of Homeland Security, *Core Occupations*, at <http://www.immigration.gov/graphics/workfor/careers/core.htm#ia> (last modified Jan. 21, 2002). Federal immigration agents are federally trained in immigration law, alien removal process and procedures, fraudulent document detection, constitutional law, civil liberties and liabilities. *Id.*; see also *United States v. Brignoni-Ponce*, 422 U.S. 873, 887 (1975) ("Mexican appearance . . . does not justify stopping all Mexican-Americans to ask if they are aliens"); *Gonzales v. City of Peoria*, 722 F.2d 468, 477 (9th Cir. 1983) ("If the

Arizona, when police conducted a city-wide immigration raid in 1997.²⁰⁰ The Chandler police unconstitutionally stopped people based on their Hispanic appearance and use of the Spanish language; these infringements cost the city \$400,000 in settlements.²⁰¹ Like Chandler, other cities and states remain susceptible to lawsuits because courts review their constitutional infringements in the immigration arena with a strict scrutiny standard, while courts use a rational basis standard to review federal enforcement.²⁰² Thus, the Chandler, Arizona incident serves as a reminder to all police departments that when local police act outside of their jurisdiction—even under the direction of federal immigration agents—they can become subject to civil rights liability and lose the trust of the community.²⁰³

C. Congressional Legislation Would Only Aggravate the Issues

Proponents of the Justice Department's "inherent authority" stance have proposed the CLEAR Act, which could become the first congressional statute to declare that local police have the inherent authority to enforce immigration law.²⁰⁴ Many police departments have

seizure involves anything more than the brief and narrowly-defined intrusion . . . it must be justified by probable cause.”). Lazos Vargas points out that the “zeal to enforce immigration laws could lead unwittingly to racial profiling”. Lazos Vargas, *supra* note 92, at 821. Lazos Vargas quotes Sheriff Ralph Lopez of San Antonio, who “puts the issue in this way: ‘what are we saying? “Hey you’ve got an accent. Let me see your passport.” It damn near leads us to racial profiling.” *Id.*

200. Waslin, *supra* note 137, at 12; *see also* Tramonte, *supra* note 93. Tramonte stated: [T]he most notorious incident involved a joint local police-INS operation that took place in Chandler, Arizona in 1997. During a raid, Chandler law enforcement agents . . . stopp[ed] people they suspected of being undocumented immigrants and often verbally or physically abus[ed] them. The officers reportedly did not consider “probable cause” to believe that a criminal violation had been committed.

Id.

201. Lazos Vargas, *supra* note 92, at 796-97; Waslin, *supra* note 137, at 12-13 (2003); Tramonte, *supra* note 93.

202. *See Mathews v. Diaz*, 426 U.S. 67, 79-80 (1976) (“In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.”); *supra* Part I.B (discussing *Graham v. Richardson*, 403 U.S. 365 (1971)).

203. *See* Waslin, *supra* note 137, at 13 (“Chandler police acted outside of their jurisdiction and attempted to enforce immigration law.”); Michael A. Fletcher, *Police in Arizona Accused of Civil Rights Violations; Lawsuit Cites Sweep Aimed at Illegal Immigrants*, WASH. POST, Aug. 20, 1997, at A14.

204. *See* Clear Law Enforcement for Criminal Alien Removal (CLEAR) Act, H.R. 2671, 108th Cong. (2003). As the ACLU stated, “[d]espite its title, the CLEAR Act seeks to entangle local police officers with the enforcement of civil, not criminal, violations of federal immigration law.” *CLEAR Act Legislative Hearing*, *supra* note 189, at 108. *See also*, Nat’l Immigration Forum, *The CLEAR Act*, at <http://www.immigrationforum.org/>

criticized the CLEAR Act out of concern that it would result in unsafe communities and increased racial profiling.²⁰⁵ In addition, the CLEAR Act would force states to adopt policies that require police to report undocumented immigrants to federal authorities; this would force communities in Oregon and New York City to repeal their sanctuary policies, or else face revocation of federal funding.²⁰⁶

currentissues/clear.htm (last visited Jan. 28, 2004). The CLEAR Act would mandate that local police investigate students who have “dropped from full-time to part-time status, individuals who have remained in the U.S. longer than the date on their tourist visa allows, or businesses that have hired immigrants without legal papers.” *Id.*

205. See Nat'l Immigration Forum, *The CLEAR Act: Dangerous Public Policy According to Police, Local Governments, Opinion Leaders and Communities*, available at <http://www.immigrationforum.org/currentissues/clear.htm> (last visited Jan. 28, 2004). Police spokespersons from many cities with large immigrant populations have spoken against the bill. *Id.* The Commissioner of the Boston Police Department criticized the CLEAR Act in a letter to Senator Kennedy. *Id.* Boston (MA) Police Department Commissioner Paul Evans stated, “[t]he Boston Police Department . . . [has] worked diligently to gain the trust of immigrant residents By turning all police officers into immigration agents, the CLEAR Act will discourage immigrants from coming forward to report crimes and suspicious activity, making our streets less safe as a result.” *Id.* The CLEAR Act’s potential effects on community policing and racial profiling are similar to the effects that would result in those communities that choose to adhere to Ashcroft’s policy. See *supra*, Part III.A-B; *CLEAR Act Legislative Hearing*, *supra* note 189, at 110 (statement from the ACLU). The ACLU stated:

Any benefits that might result from enlisting state and local police to enforce complex federal immigration laws would be far outweighed by the serious consequences of such a change. A wholesale reversal of policies that separate immigration enforcement from local law enforcement would (1) harm the civil rights and civil liberties of immigrant communities and lead to widespread racial profiling, (2) harm public safety by driving a wedge between immigrant communities and the police who serve and protect them, (3) harm our federal system by authorizing state and local police to enforce a civil federal regulatory scheme, and (4) complicate President Bush’s stated position of supporting state and local enforcement only in certain “narrow” circumstances said to be related to terrorism.

Id.; see also The Nat'l Immigration Forum, *The CLEAR Act*, at <http://www.immigrationforum.org/currentissues/clear.htm> (“[W]hen immigrants begin to see local police as agents of the federal government, with the power to deport them or their family members, they are less likely to approach local law enforcement with tips on crimes or suspicious activity.”).

206. CLEAR Act, H.R. 2671, 108th Cong. § 102 (2003). See *CLEAR Act Legislative Hearing*, *supra* note 189, at 38 (statement from Gordon Quan, Mayor Pro Tem, Houston, Texas). Quan stated:

Section 102 of H.R. 2671 would require state and local governments to pass laws authorizing their law enforcement officers to enforce federal immigration laws or risk losing reimbursement from the federal government for costs related to the incarceration of illegal immigrants. Put simply, Section 102 would preempt state and local laws that bar their law enforcement officers from assuming the federal responsibility of enforcing immigration laws.

Two conservatives, David Keene, Chairman of the American Conservative Union, and Grover Norquist, President of Americans for Tax Reform, would call such a law a nationalization of local law enforcement.²⁰⁷ They wonder “[i]f local police are to enforce our immigration laws, will they soon be required to seek out and apprehend those who violate our environmental laws, or the Americans with Disabilities Act as well?”²⁰⁸ Additionally, Keene and Norquist allude to another federalism issue: whether such an action would constitute a form of commandeering.²⁰⁹ Currently, Ashcroft merely encourages police to adopt his proposal.²¹⁰ Federal legislation, however, may command local police to make civil immigration arrests.²¹¹ Such legislation could amount to “commandeering” of state officials.²¹² Even if

Id.; see also National Immigration Forum, Summary of Clear Law Enforcement for Criminal Alien Removal Act of 2003, Nat’l Immigration Forum, available at <http://www.immigrationforum.org/currentissues/clear.htm>. Those states that refuse to enact such laws will be “ineligible for federal funding under [the INA].” *Id.*

207. Eric Schmitt, *Two Conservatives Tell Bush They Oppose Plan for Police*, N.Y. TIMES, June 2, 2002, A24.

208. *Id.*

209. *Id.* In asking whether local police will be “required” to perform federal tasks, Keene and Norquist imply that such action might breach federalism principles. See *id.*; See Lazos Vargas, *supra* note 92, at 781-82 (arguing that forcing law enforcement to enforce immigration law can be considered commandeering).

210. Ashcroft Remarks, *supra* note 2 (“We are asking state and local police to undertake [this mission] voluntarily.”). Some police departments, however, interpret Ashcroft’s invitation as more of an order. See Nat’l Immigration Forum, *supra* note 185. San Antonio Police Chief Albert Ortiz stated, “Any time we get mandates and more work without a commensurate amount of resources, something has to suffer. If that [mandate] happens . . . [it] would be a setback [for the community].” *Id.* Whatcom County (WA) Sheriff Dale Brandland declared, “[The federal government has been trying to get us to do this] for years.” *Id.*

211. See *Printz v. United States*, 521 U.S. 898, 935 (1997) (holding that forcing a state agency to adopt a federal program amounts to “commandeering”). Under *Printz*, commandeering occurs when the federal government “conscript[s] state officers” directly. *Id.* at 925. *Printz* held unconstitutional a federal statute that commanded “state and local law enforcement officers to conduct background checks on prospective handgun purchasers.” *Id.* at 902.

212. See *id.* at 925. The federal government may encourage states to enforce immigration laws, but it is prohibited by the anti-commandeering jurisprudence laid down in *Printz* and *New York v. United States* from mandating that states enforce immigration laws. *Id.*; *New York v. United States*, 505 U.S. 144, 188 (1992) (holding that the federal government may not commandeer a state legislature to enact federally-mandated regulatory programs); see also Jorgensen, *supra* note 158, at 926. In *Printz*, the federal government attempted to argue that enlisting local officials in the federal task was most practical. *Printz*, 521 U.S. at 931-32. The federal government pointed out that “[t]he Brady Act serves very important purposes, is most efficiently administered by [local officials] during the interim period, and places a minimal and only temporary burden upon state officers.” *Id.* at 931-32. This unsuccessful rationale is very similar to the possible rationales the Bush Administration might give for enlisting local police in the enforcement

such legislation does not make local enforcement mandatory, it might encourage local police to adopt a more widespread approach than Ashcroft's suggested "narrow anti-terrorism mission."²¹³ This would result in more unconstitutional arrests and unsafe communities.²¹⁴

IV. CONCLUSION

Tightening immigration laws and monitoring undocumented immigrants is an important goal of the federal government.²¹⁵ Fighting the war on terrorism is also a top priority.²¹⁶ The two issues should not be mistaken as one.²¹⁷ If community safety and national security are truly top priorities, local police should focus on preventing criminal acts, rather than enforcing civil immigration violations.²¹⁸ The announcement

of immigration law. In particular, the Administration most likely finds that enforcing immigration law "serves [an] important purpose" in combating terrorism; that it would be "most efficient" for local law enforcement to participate as they number 650,000; and is only a "temporary burden" for the narrow anti-terrorism mission. See generally Ashcroft Remarks, *supra* note 2. However, as *Printz* warned against 'expedient solution[s] to the crisis of the day,' the federal government, in its attempts to get through the crisis of today, is encroaching on the principles of federalism by potentially commandeering state officers. See *Printz*, 521 U.S. at 933 (quoting *New York v. United States*, 505 U.S. at 157). The CLEAR Act avoids the problem of commanding state officials by relying on the taxing and spending power. Under Section 102 of the CLEAR Act, if the states do not enact the statute mandating local police to arrest undocumented immigrants, the federal government will take away the federal funding that it provides to the states under the INA § 241(i). See Nat'l Immigration Forum of 2003, *Summary of Clear Law Enforcement for Criminal Alien Removal Act*, available at <http://www.immigrationforum.org/currentissues/clear.htm> (last visited Jan. 28, 2004).

213. See *op. cit.* CLEAR Act Legislative Hearing *supra* note 186 at 110 ("President

that local police have the “inherent authority” to make immigration arrests encourages officers to leave the sphere of inherently local concerns and subject their communities to less police protection and more civil liberties infringements.²¹⁹ As local police traditionally have refrained from making civil immigration arrests, they should continue to ensure community safety by arresting only those immigrants who have committed a crime, and they should leave civil enforcement to the properly trained federal officers.²²⁰

219. *See supra* Parts III.A and III.B.

220. *See supra* Part III.A.

