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## **The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution, *Immigr. & Nat'lity L. Rev.***

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**THE INHERENT FLAWS IN THE INHERENT  
AUTHORITY POSITION: WHY INVITING LOCAL  
ENFORCEMENT OF IMMIGRATION LAWS  
VIOLATES THE CONSTITUTION**

HUYEN PHAM\*

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I. INTRODUCTION

In the fanfare that surrounded the announcement of the National Security Entry-Exit Registration System,<sup>1</sup> Attorney General John Ashcroft's comment that the Department of Justice (DOJ) would ask state and local police to enforce both civil and criminal immigration laws seemed like an afterthought. State authorities, DOJ concluded,

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1. The National Security Entry-Exit Registration System [hereinafter N-SEERS] requires nonimmigrant males sixteen years or older from certain countries (mostly Arab and Muslim countries) to register with the federal government. See *infra* notes 35-42 and accompanying text.

have “inherent authority” as sovereign entities to enforce these laws, though Ashcroft was careful to limit this invitation to local participation only to “our narrow anti-terrorism mission.”<sup>2</sup>

But to attorneys, law enforcement officers, and others working in the immigration field, Ashcroft’s announcement was a bombshell. Not only was DOJ’s announced position a reversal from previous legal positions taken by the Department (and a departure from existing legal precedent), but the announcement, if put into effect, raises many fundamental questions. If local authorities do indeed have “inherent authority” to enforce federal immigration laws, would they need any legislative authorization (federal or state) to do so? Would their inherent authority be limited only to the immigration law enforcement that advances the “narrow anti-terrorism mission” that Attorney General Ashcroft proposed, or could local authorities expand their enforcement to all immigration laws? And what result if local authorities, declining to exercise their inherent authority, choose not to enforce immigration laws?

Answering these questions requires a fundamental examination of the scope of the immigration power and more specifically, consideration of the constitutional barriers to local enforcement. However, the current debate about local enforcement has largely focused on policy effectiveness and the legal issue of preemption. In the legal debate, courts have focused on preemption analysis—determining what role, if any, Congress intended for local authorities to have in the enforcement of immigration laws.<sup>3</sup> In the policy debate, advocates and opponents of local enforcement have disagreed fiercely about its effectiveness. Advocates argue that local enforcement is necessary to plug up the holes in the nation’s immigration system that became so painfully apparent after 9/11.<sup>4</sup> Opponents counter that local enforcement will lead to less, not more, effective law enforcement as immigrant communities become distrustful of local police departments and

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2. Attorney General John Ashcroft, Prepared Remarks on the National Security Entry-Exit Registration System (June 6, 2002), <http://www.usdoj.gov/ag/speeches/2002/060502agpreparedremarks.htm> (last visited March 19, 2004) [hereinafter Ashcroft Remarks on N-SEERS]. N-SEERS will eventually be subsumed by US-VISIT, an automated entry-exit system applicable to all nonimmigrant visitors to the United States. See *infra* note 36.

3. Most courts (and DOJ itself before its recent policy reversal) have treated immigration law enforcement as the exclusive province of the federal government, but the circuits have disagreed about whether any exceptions for local enforcement exist. See *infra* Part II, notes 57-78 and accompanying text.

4. Advocates like FAIR (Federation for American Immigration Reform) argue that local enforcement is good policy because local police who are already out patrolling American cities and towns will be able to increase multi-fold the manpower available to enforce immigration laws. See *infra* Part II, notes 31-42 and accompanying text.

less willing to report crimes or cooperate in criminal investigations.<sup>5</sup>

Though preemption and policy effectiveness are important issues, a more fundamental consideration, and one that has been overlooked in the current debate, is the constitutional barrier to local enforcement. The immigration power, as derived from specific constitutional powers and from the U.S.'s status as a sovereign entity, must be exercised uniformly. This power, because of its effect on foreign policy, must be exercised exclusively and uniformly at the federal level.<sup>6</sup>

But DOJ's position, because of its voluntary nature and the expansive discretion it gives to local officials, will necessarily violate the constitutional requirement of uniform immigration laws. DOJ's inherent authority position strongly suggests that local authorities may enforce immigration laws without requiring any legislative authorization (either federal or state) and without being restricted to enforcing a subset of the immigration laws, as Attorney General Ashcroft has requested.<sup>7</sup>

And most disturbing for the constitutional mandate for uniform immigration laws, DOJ's position allows local officials to decide, in the first instance, whether to participate at all; those local officials who do decide to participate are subject to different state laws affecting their arrest authority. The result is that federal immigration laws will be enforced differently from state to state and even from town to town. This "thousand borders" problem flies in the face of the constitutional mandate for immigration uniformity.

In Part II, I explain the evolution of DOJ's inherent authority position. I start by examining the norm among local authorities of not enforcing immigration law and then explore the policy reasons why these authorities have chosen nonenforcement. Next I discuss past attempts at local enforcement and the legal and political obstacles that they encountered. I conclude by explaining how the inherent authority position, with its emphasis on voluntary participation, attempts (with mixed results) to avoid these obstacles.

In Part III, I lay out the theoretical framework for my thesis: that the immigration power is an exclusively federal power that must be exercised uniformly. Courts and scholars alike trace the immigration power to two sources: several specific constitutional provisions (including the Naturalization Clause) and the authority that the U.S. government exercises as a sovereign entity.<sup>8</sup> These sources establish

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5. See *infra* Part II, notes 15-18, 79-109 and accompanying text; see also Kevin R. Johnson, *September 11 and Mexican Immigrants: Collateral Damage Comes Home*, 52 DEPAUL L. REV. 849, 863-64 (arguing that the involvement of local police in immigration law enforcement may be one of the most significant and negative results of 9/11).

6. See *infra* Part III, notes 113-62 and accompanying text.

7. See Ashcroft Remarks on N-SEERS, *supra* note 2.

8. See *infra* Part III, notes 113-27 and accompanying text.

a uniform, exclusively federal immigration power. The immigration power must be exercised exclusively by the federal government because of the link between immigration and foreign policy. And the immigration power must be exercised uniformly because of the need for the nation to speak with one voice on foreign policy matters.<sup>9</sup> Courts have struck down state law immigration legislation because of these same uniformity and foreign policy concerns. Because non-uniform enforcement has the same effect as nonuniform policy, non-uniform enforcement is also constitutionally prohibited.<sup>10</sup>

In Part IV, I seek to demonstrate that DOJ's invitation to local authorities to enforce immigration laws violates the constitutional mandate for uniform immigration laws. Looking at the very different reactions among local authorities to DOJ's proposal (some have eagerly embraced local enforcement while others have passed laws strictly limiting this enforcement), I argue that allowing local authorities to choose whether to enforce immigration laws will result in patchwork enforcement, even within the same state. And even if all local authorities within a state agree to enforce immigration laws, their enforcement will likely be different from enforcement in a neighboring state because local authorities are subject to different state laws affecting their authority to make arrests.<sup>11</sup> Taken together, these inconsistencies violate the constitutional requirement for uniform immigration laws and make DOJ's invitation for local enforcement unconstitutional.

## II. THE EVOLUTION OF THE INHERENT AUTHORITY POSITION

Though its announcement surprised attorneys, law enforcement, and others working in the immigration field, the structure of the inherent authority position is not surprising, given the context of local enforcement of immigration laws. As explained below, the issue of local enforcement has had a complicated history, confronting the pitfalls of legal preemption and political opposition. DOJ's position then, with its invitational structure and its inherent authority premise, attempts to maneuver around these pitfalls to achieve its goal of local enforcement.

### A. *Norm of Nonenforcement*

Except for limited instances, the majority of local law enforcement officials do not enforce federal immigration laws. These local officials may likely follow procedures similar to that of the Houston Police Department: officers do not arrest or detain people solely on the be-

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9. See *infra* Part III, notes 128-49 and accompanying text.

10. See *infra* Part III, notes 150-61 and accompanying text.

11. See *infra* Part IV, notes 163-89 and accompanying text.

lief that they are illegally present in the country.<sup>12</sup> And if a Houston officer stops someone for a nonimmigration violation (e.g., a traffic stop), the officer is prohibited from asking about the person's immigration status.<sup>13</sup> Only if the person is arrested on a criminal charge more serious than a Class C misdemeanor and the officer knows that the person is in the country illegally may the officer contact federal immigration authorities.<sup>14</sup>

The nonenforcement policy of these local authorities may be the result of one or several factors: (1) a statute or ordinance that prohibits such enforcement;<sup>15</sup> (2) a policy decision by law enforcement departments not to damage their relationship with immigrant communities, damage that could harm their ability to fight crime;<sup>16</sup> or (3) a pragmatic decision by law enforcement officials to concentrate their scarce resources on violence and other crimes that immediately affect the safety of their communities, leaving the enforcement of immigration violations to the federal government.<sup>17</sup> Some of these nonen-

12. Sam Nuchia, Chief of Police, Houston Police Department, *General Order to the Houston Police Department* (June 25, 1992) (on file with author) [hereinafter *Nuchia Order*]; see also Peggy O'Hare, *HPD Policy on Aliens Is Hands-Off / Status of Immigrants Viewed as Federal Issue*, HOUS. CHRON., Mar. 3, 2003, at 15 [hereinafter *O'Hare, Mar. 3, 2003*], 2003 WL 3241310; Peggy O'Hare, *'Sanctuary' Policy Irks Some in HPD / Accused Killer Helped by 'Hands-Offs' Proviso*, HOUS. CHRON., Mar. 8, 2003, at 31 [hereinafter *O'Hare, Mar. 8, 2003*], 2003 WL 3242562.

13. See *Nuchia Order*, *supra* note 12; see also *O'Hare, Mar. 3, 2003*, *supra* note 12; *O'Hare, Mar. 8, 2003*, *supra* note 12.

14. See *Nuchia Order*, *supra* note 12. Under Texas law, a class C misdemeanor is punishable by fine only. TEX. PENAL CODE ANN. § 12.41 (Vernon 2003). Examples of Class C misdemeanors include possession of alcohol on public school grounds (see TEX. EDUC. CODE ANN. § 37.122 (Vernon 1996)) and a minor's operation of a motor vehicle while under the influence of alcohol (see TEX. ALCO. BEV. CODE ANN. § 106.041 (Vernon 2003)).

15. For example, in January 2003 Seattle's city council unanimously passed an ordinance that prohibits police and other municipal workers from stopping people or checking their identification solely to determine their immigration status. The ordinance strengthens a 1991 policy that had applied only to police officers. *Seattle Adopts "Don't Ask" Police Policy on Immigration*, ASSOCIATED PRESS, Jan. 28, 2003, 06:56:00, WESTLAW, Allnewsplus Database.

16. Houston's policy, discussed above, seems to be motivated mostly by concerns that the police maintain a cooperative relationship with immigrant communities. "Without the assurances they will not be deported, many illegal immigrants with critical information would not come forward," said Craig Ferrell, deputy director and administrative general counsel for the Houston Police Department (HPD) Chief's Command Legal Services. Ferrell further noted that, "Police depend on the cooperation of immigrant communities to help them solve all sorts of crimes and to maintain public order." *O'Hare, Mar. 3, 2003*, *supra* note 12. The HPD policy itself states, "[W]e must rely upon the cooperation of all persons, including citizens, documented aliens, and undocumented aliens, in our effort to maintain public order and combat crime." *Nuchia Order*, *supra* note 12.

17. Many smaller police departments, while not disputing the policy wisdom of local enforcement, have expressed skepticism about the resources required. Mark Brewer, legal adviser for the Lake County, Florida, Sheriff's Office, described DOJ's proposal as "an unfunded mandate. Now law-enforcement officers who should be looking for burglars and robbers are going to be looking for illegal aliens, with no additional monies for deputies coming down." Pedro Ruz Gutierrez, *Some Police Eager to Help INS Agents; Sheriffs in Or-*

forcement policies predate the events of 9/11, but some were implemented in specific response to DOJ's invitation and other pressures for local enforcement of immigration laws.<sup>18</sup>

### B. Instances of Local Enforcement

The local authorities who have taken up DOJ's invitation for local enforcement have done so, for the most part, informally. For example, in Northampton, Pennsylvania, District Attorney John Morganello has instructed his office to investigate and arrest undocumented immigrants in the county.<sup>19</sup> And in Washington County, Utah, the sheriff's department arrests people for immigration violations.<sup>20</sup> Neither of these law enforcement agencies makes immigration arrests pursuant to a formal policy or with the sanction of a state or local ordinance; rather, the agencies do so at the direction of their head law enforcement officer.<sup>21</sup>

The most prominent exception to this pattern of informal enforcement is the state of Florida, which entered into a Memorandum of Understanding (MOU) with DOJ that authorizes thirty-five Florida state and local law enforcement officers to conduct immigration-related functions, such as making warrantless arrests of illegal aliens.<sup>22</sup> Under the MOU, which originally lasted from July 2, 2002 until September 1, 2003,<sup>23</sup> the Florida officers work under federal supervision<sup>24</sup> but continue to be paid by their local departments.<sup>25</sup>

Though the federal legislation authorizing such MOUs was added

*ange and Seminole Want to Make Immigration Arrests, but Smaller Agencies Don't*, ORLANDO SENTINEL, Apr. 5, 2002, at A1, 2002 WL 3039779. The federal CLEAR Act (Clear Law Enforcement for Criminal Alien Removal), introduced by Representative Charlie Norwood and still pending as of the publication date of this Article, seeks to encourage local enforcement by providing \$1 billion in federal funding each fiscal year to those local authorities who take up the task of immigration enforcement. H.R. 2671, 108th Cong. (2003). The CLEAR Act is discussed in more detail, *infra* note 56.

18. See, e.g., *Seattle Adopts "Don't Ask" Police Policy on Immigration*, *supra* note 15.

19. Tyra Braden, *District Attorney Seeks to Crack Down on Illegal Immigrants, Northampton County Prosecutor Blames INS for Problems*, ALLENTOWN MORNING CALL, Nov. 14, 2002, at B7, 2002 WL 101913084.

20. Tim Sullivan, *Should Police, Deputies Help INS Enforce the Law?*, SALT LAKE TRIB., Aug. 26, 2002, at D3, 2002 WL 4267638.

21. Braden, *supra* note 19; Sullivan, *supra* note 20.

22. Memorandum of Understanding Between the INS and the State of Florida (July 26, 2002), reprinted in 79 INTERPRETER RELEASES 1138, app. II at 1140 (2002) [hereinafter Florida MOU]. These officers were trained by the INS and then placed in Florida's seven Regional Domestic Security Task Forces. *Id.* at 1140-41.

23. This MOU expired without renewal, but Florida is considering signing another MOU. Interview by Timothy Peters with Jose Luis Rodriguez, Office of Florida Governor Jeb Bush (Dec. 2, 2003).

24. Florida MOU, *supra* note 22, at 1143.

25. *Id.* at 1142.

in 1996,<sup>26</sup> Florida was the first entity to actually sign an MOU with the federal government. In 1998, Salt Lake City considered signing an MOU but dropped the idea after fierce political protests from Latino groups concerned about racial profiling.<sup>27</sup> Even in the post 9/11 period where Florida's special vulnerability to terrorism attacks became apparent,<sup>28</sup> Florida was careful to limit the authority of its officers to "counter-terrorism and domestic security goals."<sup>29</sup> South Carolina and Alabama have also expressed interest in signing similar MOUs.<sup>30</sup>

### C. Potential Efficiencies of Local Enforcement

On its face, the proposal outlined by Attorney General Ashcroft for local participation in the enforcement of immigration laws seems like a practical way to address a complicated problem: how to effectively patrol the vast U.S. borders and stem the rising tide of illegal immigration. After 9/11, the problem took on more urgent security dimensions, as the holes in the U.S. immigration system became apparent. Americans were dismayed to discover that of the nineteen terrorists, at least ten were in the United States in violation of U.S. immigration laws.<sup>31</sup>

Seized by the understandable fear of future terrorist attacks, the American public clamored for tighter control of the country's borders and better tabs kept on those visitors who are lawfully admitted. In response, the Bush administration proposed a series of major changes to the U.S. immigration system. The most dramatic change, enacted under the Homeland Security Act of 2002, removed the Im-

26. 8 U.S.C. § 1357(g)(1)-(3) (2000) (authorizing states and localities to enter into memorandums of understanding with DOJ to jointly enforce immigration laws).

27. Mary Beth Sheridan, *Plan to Have Police in Florida Help INS Stirs Rights Debate; Activists Say Immigrants' Trust at Issue*, WASH. POST, Mar. 6, 2002, at A17, 2002 WL 15844763.

28. Of the nineteen hijackers, thirteen spent time in Florida, getting Florida drivers' licenses and attending flight training school there. That its governor, Jeb Bush, is the brother of the President also makes Florida stand out as a target for future terrorist attacks. See *Florida Plan for Cooperation in Immigration Law Enforcement Is Model for the Rest of the Nation*, Says FAIR, U.S. NEWSWIRE, Mar. 5, 2002, 2002 WL 4575001.

29. Florida MOU, *supra* note 22, at 1138.

30. See Jeffrey McMurray, *Alabama Troopers Begin Basic Training in Immigration Law*, ASSOCIATED PRESS NEWSWIRE, May 20, 2003, 18:10:00, WESTLAW, Allnewsplus, Database; Press Release, South Carolina Attorney General's Office, Condon Tells Ashcroft that South Carolina Is 'Ready to Assist' in Illegal Immigration Fight (Oct. 15, 2001) (on file with author).

31. These violations included obtaining a visa under false pretenses, being granted a visa despite a woefully inadequate visa application, and overstaying an otherwise valid visa. See, e.g., Steven A. Camarota, *How the Terrorists Get In*, PUB. INT., Oct. 1, 2002, at 6578, 2002 WL 5720087; Michelle Malkin, *Dismissing the Dangers of Illegal Immigration*, INSIGHT ON THE NEWS, Sept. 2, 2002, at 46, 2002 WL 8339102; Douglas Pasternak, *A Welcome Mat for Terrorists*, U.S. NEWS & WORLD REP., Oct. 8, 2001, at 31, 2001 WL 30366038.



migration and Naturalization Service (INS) from the Department of Justice and placed it under the Department of Homeland Security.<sup>32</sup>

Furthermore, INS's dual functions of law enforcement and immigration services were split. The newly created Bureau of Citizenship and Immigration Services (BCIS) is now responsible for immigration services like the processing of citizenship applications. The enforcement functions of INS are now split between the Bureau of Immigration and Customs Enforcement (BICE—responsible for investigations, detentions, and removal) and the Bureau of Customs and Border Protection (BCBP—responsible for point of entry inspections and border patrol), both of which are under the Division of Border & Transportation Security (BTS) and answer to Undersecretary Asa Hutchinson.<sup>33</sup> In the post 9/11 environment, both pro-immigration and restrictionist groups agree that immigration enforcement will take precedence over immigration services under this new structure.<sup>34</sup>

The task that BTS faces is formidable. In addition to inheriting the enforcement responsibilities that INS had before 9/11, BTS is also responsible for enforcing the flurry of measures that DOJ announced post 9/11. Many of these measures were already mandated under current law but had never been enforced. Perhaps most controversially, DOJ resurrected the requirement that all aliens be registered and fingerprinted,<sup>35</sup> tweaked it, and renamed it the National Security Entry-Exit Registration System (N-SEERS).

Under N-SEERS,<sup>36</sup> nonimmigrant males sixteen years or older from certain countries (mostly Arab and Muslim countries) are re-

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32. Stanley Mailman & Stephen Yale-Loehr, *Immigration Law: Immigration in a Homeland Security Regime*, N.Y. L.J., Dec. 23, 2002, at 3, available at WESTLAW, 12/23/2002 N.Y. L.J. 3.

33. Judith Golub, *Is Homeland Security Our Security Blanket?*, IMMIGR. L. TODAY, Mar./Apr. 2003, at 15, 21. There have been previous calls to separate the enforcement and service functions of INS. In 1997, the U.S. Commission on Immigration Reform (appointed by Congress to study immigration and naturalization policy) proposed a reorganization along those lines. See U.S. COMMISSION ON IMMIGRATION REFORM, BECOMING AN AMERICAN: IMMIGRATION AND IMMIGRANT POLICY 148-83 (1997), available at <http://www.utexas.edu/lbj/uscir/reports.html> (last visited Feb. 12, 2004).

34. See Philip Shenon, *For Immigrants, the Watchword Suddenly Is Enforcement*, N.Y. TIMES, Dec. 8, 2002, § 4, at 4, LEXIS, News Library, NYT File.

35. Noncitizens who are fourteen years or older and remain in the United States for thirty days or more are required to register and be fingerprinted. Immigration and Nationality Act § 262, 8 U.S.C. § 1302 (2000). Before 9/11, registration and fingerprinting were waived for most groups except for nationals of Iraq, Iran, Sudan, and Libya. See Press Release, Department of Justice, National Security Entry-Exit Registration System 1-2 (June 5, 2002) (citing to 8 C.F.R. § 264.1(f) (2003)) [hereinafter N-SEERS Press Release]. The age for required registration under N-SEERS is sixteen, compared with fourteen under federal law. See Immigration and Nationality Act § 262, 8 U.S.C. § 1302 (2000).

36. DOJ has extended the registration requirements to include all nonimmigrants visiting the United States. This new electronic system, called U.S. Visitor and Immigrant Status Indication Technology (US-VISIT), records certain physical attributes of visitors

quired to register at their port-of-entry into the United States or, if they entered before N-SEERS went into effect, register with their local immigration office.<sup>37</sup> These aliens must also report before leaving the country<sup>38</sup> and, like all noncitizens, inform immigration authorities within ten days if they move to a different address.<sup>39</sup> Failure to abide by these requirements would be a criminal violation; the alien would be listed in the National Crime Information Center (NCIC) system<sup>40</sup> and be subject to fines, incarceration, and deportation.<sup>41</sup>

In this context of increased enforcement responsibilities, DOJ's proposal makes sense. State and local law enforcement, who are already out on "the beat" in America's cities and towns, could assist BTS with its gargantuan task of enforcing N-SEERS and other im-

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(e.g., fingerprints or iris scans) when they enter and leave the U.S. See Press Release, State Department, New U.S. Entry-Exit System Aims to Enhance Security—Department of Homeland Security Fact Sheet and Frequently Asked Questions on US-VISIT (Jan. 5, 2004), 2004 WL 59149150 [hereinafter US-VISIT Press Release].

37. The list of countries originally subject to N-SEERS included the four countries required to register before 9/11 (Iran, Iraq, Libya, and Sudan), as well as Syria, Afghanistan, Algeria, Bahrain, Eritrea, Lebanon, Morocco, North Korea, Oman, Qatar, Somalia, Tunisia, United Arab Emirates, and Yemen. See Statement, U.S. Department of Justice, Immigration and Naturalization Service, INS Reminds Certain Temporary Foreign Visitors of Eighteen Countries of Registration Requirement (Dec. 6, 2002), <http://uscis.gov/graphics/publicaffairs/statements/ReminderState.htm> (last visited Feb. 11, 2004). Pakistan and Saudi Arabia, two important American allies, were conspicuously left off the original list and were only added in December 2002. See Registration of Certain Nonimmigrant Aliens from Designated Countries, 67 Fed. Reg. 77,136 (Dec. 16, 2002), 2002 WL 31785000.

When N-SEERS initially went into effect, these nonimmigrant males were also required to report to immigration authorities annually with proof of (1) residence and (2) employment or educational enrollment. See N-SEERS Press Release, *supra* note 35, at 4. The annual interview requirement has now been suspended. See US-VISIT Press Release, *supra* note 36.

38. See N-SEERS Press Release, *supra* note 35, at 4.

39. *Id.*; see also Jonathan Peterson, *Noncitizens Must Report if They Move Immigration: The Justice Department, Citing a 50-Year-Old Law, Demands Notification Within 10 Days of Moving. Penalty Could Be Deportation*, L.A. TIMES, July 23, 2002, at A1, 2002 WL 2491756; Immigration and Nationality Act § 265, 8 U.S.C. § 1305 (2000) (requiring all noncitizens required to register to provide change of address information to the Attorney General within ten days of moving).

40. The NCIC is a computer database maintained by the FBI that contains criminal justice information (criminal record history information, fugitives, stolen properties, and missing persons). NATIONAL CRIME INFORMATION CENTER, FEDERAL BUREAU OF INVESTIGATION, <http://www.fas.org/irp/agency/doj/fbi/is/ncic.htm> (last modified April 8, 2003).

41. N-SEERS Press Release, *supra* note 35, at 4. N-SEERS has been strongly criticized as a misguided example of racial profiling and an ineffective and poorly administered anti-terrorism mechanism, resulting in mistaken arrests and inconsistent enforcement among different immigration offices. See Rachel Swarns & Christopher Drew, *Fearful, Angry or Confused, Muslim Immigrants Register*, N.Y. TIMES, Apr. 25, 2003, at A1, LEXIS, News Library, NYT File. Some of the men who were detained for deportation had applied for permanent residency through a one-time visa offered in 2001; these men showed up for registration mistakenly expecting that they would be granted leniency because they were in the process of adjusting their immigration status. See *Immigration Guidelines "Trap" Muslims*, DAILY PRESS (Va.), Apr. 30, 2003, at C6, 2003 WL 19285551.

migration laws. Local enforcement would add sorely needed manpower and, though it would have some financial costs to the local departments, it would be cheaper than hiring more federal officers solely dedicated to immigration enforcement. In announcing the N-SEERS system, Attorney General Ashcroft described his vision of local enforcement in specific terms: during traffic stops and other routine encounters, local officers would check the National Crime Information Center system (a system they check regularly) and arrest the alien if he is listed as violating civil or criminal immigration laws (including the aforementioned registration laws).<sup>42</sup>

But the issue of local enforcement is more complicated than just the advantage of potential efficiencies in the wake of national security concerns. Even prior to 9/11, courts, law enforcement agencies, and Congress struggled to define the line between federal and local authority in immigration law enforcement. As described below, they did not reach the same answers, and the answers they did reach were largely unworkable or susceptible to legal or political challenge.

In large part then, the inherent authority doctrine is an attempt to avoid these legal and political pitfalls. The gist of the doctrine, according to DOJ sources, is that states and localities are "sovereign entities" with "inherent authority" to enforce immigration laws.<sup>43</sup> In its opinion, DOJ's Office of Legal Counsel purportedly cites to as authority *United States v. Salinas-Calderon*.<sup>44</sup> In *Salinas-Calderon*, the Tenth Circuit upheld the defendant's conviction for knowing transport of illegal aliens in violation of 8 U.S.C. § 1324(a)(2). In a footnote, the court dismissed the defendant's arguments that the state trooper who stopped the defendant, for erratic driving, did not have authority to detain the defendant and his passengers while the trooper inquired into federal immigration matters.<sup>45</sup> "A state trooper,"

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42. Ashcroft Remarks on N-SEERS, *supra* note 2.

43. Marcus Stern & Mark Arner, *Police May Gain Power to Enforce Immigration; Plan Has Local Officers, Rights Groups on Edge*, SAN DIEGO UNION-TRIB., Apr. 3, 2002, at A1, 2002 WL 4594382.

44. 728 F.2d 1298 (10th Cir. 1984). DOJ, to date, has not released the Office of Legal Counsel (OLC) opinion, so it is not possible to confirm the basis for, or the scope of, the opinion. In April 2003, a coalition of immigrant rights and civil rights groups (including National Council of La Raza) filed a federal lawsuit against DOJ, seeking disclosure of the OLC opinion. See Press Release, American Civil Liberties Union, ACLU Seeks Disclosure of "Secret Law" on Local Police Enforcement of Federal Immigration Laws (Apr. 14, 2003), <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=12358&c=206>.

45. The trooper asked the defendant for a driver's license and then for a green card, neither of which the defendant had. *Salinas-Calderon*, 728 F.2d at 1299. Defendant's wife, who was also in the truck, explained that her husband was from Mexico, did not speak English, and did not have a driver's license. She further explained that the six passengers in the back of the truck were also from Mexico. *Id.* at 1299-1300. The trooper called an INS agent who read the *Miranda* warnings in Spanish to the defendant and his passengers. The trooper then arrested the defendant for knowingly transporting aliens in violation of 8 U.S.C. § 1324(a)(2). *Id.* at 1300.

the Tenth Circuit held, “has general investigatory authority to inquire into possible immigration violations.”<sup>46</sup>

As I discuss below, an assertion by local authorities that they have inherent authority to enforce federal immigration laws raises numerous questions.<sup>47</sup> Assuming though that states and localities do have inherent authority to enforce immigration laws, then supporters of DOJ’s position would argue that those states and localities may do so without having to grapple with the complicated questions of Congressional preemption discussed below. Moreover, because the authority is “inherent,” local authorities may arguably enforce immigration laws without requiring legislative action, action that might spark political opposition.

#### D. *Why an Invitation? Tenth Amendment Constraints*

Before launching into an analysis of the inherent authority position itself, it is important to understand why DOJ has structured its position as an invitation to local enforcement, rather than as a mandate.<sup>48</sup> Simply stated, the Tenth Amendment would prohibit such a mandate.<sup>49</sup> As interpreted by the Supreme Court in *New York v. United States*<sup>50</sup> and *Printz v. United States*,<sup>51</sup> the Tenth Amendment is violated by federal legislation that *commandeers* the machinery of the states. “The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.”<sup>52</sup>

Requiring local authorities to enforce federal immigration laws would be precisely the sort of federal commandeering prohibited by

46. *Id.* at 1301 n.3. Other courts have cited to *Salinas-Calderon* in upholding local enforcement of immigration laws. See *infra* note 78.

47. See *infra* notes 57-109 and accompanying text.

48. In remarks to the International Association of Chiefs of Police Conference, Attorney General Ashcroft was careful to describe his request for local enforcement of immigration laws as a request. “This assistance is entirely voluntary—if state and local officials do not wish to assist us in arresting violators of federal immigration laws, they are free to choose not to.” Attorney General John Ashcroft, Prepared Remarks for the International Association of Chiefs of Police Conference (Oct. 7, 2002), <http://www.usdoj.gov/ag/speeches/2002/100702chiefsopolicemn1.htm> [hereinafter Ashcroft Remarks for Chiefs of Police].

49. The Tenth Amendment states that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. amend. X.

50. 505 U.S. 144 (1992) (holding that Congress lacked authority, the Court struck down the provision in the Low-Level Radioactive Waste Policy Amendments Act of 1985 that required states to “take title” of nuclear waste generated within their borders or to enact legislation to dispose of the waste).

51. 521 U.S. 898 (1997) (holding that Congress went beyond its authority in the Brady Handgun Violence Prevention Act in requiring local law enforcement to determine whether a proposed gun sale would violate federal law).

52. *Id.* at 935.

*New York* and *Printz*. Local authorities, though employees of the state or its political subdivisions, would be compelled to enforce the federal immigration program.<sup>53</sup> The concerns about accountability that the Supreme Court expressed in *New York* and *Printz* would also be applicable here: local authorities who are enforcing the immigration laws would bear the brunt of any public disapproval, while the federal officials who actually created the laws would be insulated.<sup>54</sup> Moreover, local authorities would be required to absorb the costs of immigration enforcement, while federal officials could claim the credit cost-free.<sup>55</sup>

Arguably, the accountability concerns are still present if local authorities take up DOJ's invitation to enforce immigration laws (or are enticed by federal funds to do so), but federal encouragement of state action that stops short of coercion is constitutionally permissible.<sup>56</sup> Thus, DOJ's proposal must be structured as an invitation to local law enforcement to pass Tenth Amendment muster.

#### *E. Preemption: The Legal Quagmire*

Existing legal authorities that have considered the question of local enforcement have focused almost exclusively on a preemption analysis: did Congress intend for local enforcement of immigration laws and, if so, to what extent? While acknowledging that federal authority over immigration is plenary, most courts have carved out a role for local enforcement as well.<sup>57</sup> On the assumption that Congress may allow local enforcement of immigration laws, courts and other authorities have used a preemption analysis to determine the appro-

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53. *See id.*

54. *See New York*, 505 U.S. at 169 ("Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate . . .").

55. *See Printz*, 521 U.S. at 930 ("By forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for 'solving' problems without having to ask their constituents to pay for the solutions with higher federal taxes.").

56. *See New York*, 505 U.S. at 166. Thus, it appears that the CLEAR Act (Clear Law Enforcement for Criminal Alien Removal), as proposed by Representative Norwood, was drafted with the 10th Amendment in mind: the Act does not require local authorities to enforce immigration laws, but rather, ties federal funding to that enforcement. H.R. 2671, 108th Cong. §§ 101, 106 (2003); *see supra* note 17. The Act requires states who receive federal reimbursement under section 241(i) of the Immigration and Nationality Act (8 U.S.C. § 1231(i)) for the detention of criminal aliens (known as SCAAP or the State Criminal Alien Assistance Program) or who want to receive additional federal funds available under the CLEAR Act to pass laws permitting local enforcement of immigration laws. H.R. 2671. The Supreme Court has approved similar types of tie-ins as a valid exercise of Congress' spending power. *See S. Dakota v. Dole*, 483 U.S. 203 (1987) (upholding constitutionality of a statute conditioning state receipt of federal highway funds on adoption of minimum drinking age).

57. *See, e.g., Gonzales v. City of Peoria*, 722 F.2d 468 (9th Cir. 1983), *overruled in part on other grounds by Hodgers-Durgin v. De La Vina*, 199 F.3d 1037 (9th Cir. 1999).

priate line between federal and local action. But courts have reached substantively different answers and, as explained below, the answers are largely inconsistent and unworkable, resulting in a legal quagmire.

#### F. *Civil v. Criminal Immigration Laws*

A common position, one taken by the Ninth Circuit and, until recently, the Department of Justice, is that local police may enforce criminal, but not civil, provisions of the Immigration and Naturalization Act (INA).<sup>58</sup>

Applying a traditional preemption analysis, the Ninth Circuit in *Gonzales v. City of Peoria* held that because the civil provisions of the INA constitute such a pervasive regulatory scheme, local enforcement of the civil laws must be preempted.<sup>59</sup> By contrast, because the criminal provisions of the INA are so “few in number and relatively simple in their terms,” the Ninth Circuit concluded that there is room for concurrent local enforcement of these provisions.<sup>60</sup>

Citing to *Gonzales*, the Office of Legal Counsel (OLC) in a 1996 opinion letter made the same civil/criminal distinction.<sup>61</sup> Noting that federal law imposes significant restrictions on even federal enforcement of civil immigration laws,<sup>62</sup> the OLC concluded 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.”<sup>63</sup>

58. *Id.* at 474-75; Memorandum from the Office of Legal Counsel of the U.S. Department of Justice, for the United States Attorney for the Southern District of California, Assistance by State and Local Police in Apprehending Illegal Aliens II.B. (Feb. 5, 1996), at <http://www.usdoj.gov/olc/1996opinions.htm> [hereinafter 1996 DOJ Memo on Local Assistance].

59. 722 F.2d at 475-76.

60. *Id.* The Peoria police officers arrested Gonzales and the other plaintiffs for immigration violations. *Id.* at 472. After determining that federal law did not preempt local enforcement of criminal immigration laws, the court found that state law did not authorize arrest for the criminal offense of illegal entry unless the arresting officer saw the illegal entry occur or had probable cause to believe that it occurred (inability to produce proper documentation did not constitute probable cause). *Id.* at 476-77. For other cases agreeing with *Gonzales'* distinction between civil and criminal immigration laws, see *Farm Labor Organizing Committee v. Ohio State Highway Patrol*, 991 F. Supp. 895, 903 (N.D. Ohio 1997) (holding that Ohio state highway patrol officers may enforce criminal provisions of INA); *Gutierrez v. City of Wenatchee*, 662 F. Supp. 821, 824 (E.D. Wash. 1987) (holding that local police cannot detain individuals who are only suspected of violating civil immigration laws); *Gates v. Los Angeles Superior Court*, 238 Cal. Rptr. 592, 600 (2d Ct. App. 1987) (holding that INS has exclusive authority to enforce civil provisions of the INA).

61. 1996 DOJ Memo on Local Assistance, *supra* note 58.

62. Before a federal officer may make a warrantless arrest for purposes of civil deportation, the officer must reasonably believe that the alien is in the United States illegally and is likely to escape before a warrant can be obtained for his or her arrest. 8 U.S.C. § 1357(a)(2) (2000).

63. 1996 DOJ Memo on Local Assistance, *supra* note 58.

As a matter of judicial interpretation, the accuracy of the *Gonzales* court's characterization that criminal provisions in the INA are "few in number and relatively simple in their terms" is questionable. As Yañez and Soto point out, there are at least twenty-five criminal immigration offenses defined in the INA, not just the three that the *Gonzales* court focused on.<sup>64</sup> Nor are these criminal provisions a "narrow and distinct element" of the INA as the Ninth Circuit concluded.<sup>65</sup> The criminal provisions are closely interrelated with the civil provisions and, together, they provide the total immigration regulation scheme. For example, the immigration crime of illegal entry is punishable by deportation, a civil measure, or imprisonment, a criminal punishment.<sup>66</sup> And other immigration crimes are defined by reference to civil immigration violations.<sup>67</sup>

As a practical matter, there is substantial potential for overlap between the civil and criminal immigration provisions. Officers on the beat either (1) may have difficulty in distinguishing between probable cause to arrest for a criminal immigration violation and probable cause to arrest for a civil violation<sup>68</sup> or (2) may be tempted to manufacture criminal probable cause after the fact to assert jurisdiction.<sup>69</sup>

For these reasons, the position that local law officers may enforce criminal but not civil immigration laws presents serious problems, both in terms of judicial interpretation and practical enforcement.

### *G. Emphasis on State Authority with Limited Preemption Analysis*

On the issue of local enforcement, the Tenth Circuit took a narrower approach to the preemption analysis, emphasizing state authority. In *United States v. Vasquez-Alvarez*, the issue was the authority of state officers to arrest for immigration violations where the

64. Linda Reyna Yañez & Alfonso Soto, *Local Police Involvement in the Enforcement of Immigration Law*, 1 HISP. L.J. 9, 27 (1994).

65. *Gonzales*, 722 F.2d at 475.

66. Yañez & Soto, *supra* note 64, at 29.

67. *Id.*; see, e.g., Immigration and Nationality Act, 8 U.S.C. § 1326 (2000) (making it a crime to reenter after deportation—a civil immigration proceeding).

68. For example, an officer untrained in immigration law may not be able to distinguish between the probable cause needed to arrest a person who has illegally entered (a misdemeanor), compared with a person who is illegally present in the United States (a civil violation). See Cecilia Renn, *State and Local Enforcement of the Criminal Immigration Statutes and the Preemption Doctrine*, 41 U. MIAMI L. REV. 999, 1018 (1987). Both persons will probably lack proper documentation, appear to be foreign nationals, and may admit to being illegally present. *Id.* The requisite additional evidence needed to arrest for illegal entry is highly subjective, including a defendant's behavior or clothing or the officer's own experience with patterns of immigration violations. *Id.* at 1018-19.

69. Thus, though the *Gonzales* court held that the arresting officers did not have probable cause to arrest *Gonzales* for illegal entry merely because he was of Mexican origin and did not have proper documentation, the additional evidence to justify his arrest could have been as subjective as a furtive glance from him. See *id.* at 1019.

arrest was authorized by state law but not federal law.<sup>70</sup> Under Oklahoma law, local officers have authority to make arrests for federal offenses, but under the INA, local officers may arrest an alien who is illegally present in the United States only if the officers first confirm with INS that the alien was previously convicted of a felony and deported.<sup>71</sup>

The officers arrested Vasquez-Alvarez for illegal presence without any knowledge or confirmation of his previous felony conviction and deportation.<sup>72</sup> Nonetheless, the Tenth Circuit held that his arrest was valid.<sup>73</sup> Because the arrest was authorized by state law, the court held that the officers did not need specific authorization from a federal statute; furthermore, looking only to the specific language and intent of § 1252c (as opposed to the whole structure of the INA considered by the Ninth Circuit in *Gonzales*), the Tenth Circuit found that the federal provision did not preempt state enforcement action.<sup>74</sup>

Applied more broadly to the issue of local enforcement, the *Vasquez-Alvarez* decision is troubling. As the Tenth Circuit itself conceded, its decision made § 1252c meaningless.<sup>75</sup> If state law is always looked to to determine local authority to make immigration ar-

70. 176 F.3d 1294 (10th Cir. 1999).

71. Section 1252c reads in relevant part:

Notwithstanding any other provision of law, to the extent permitted by relevant State and local law, 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 and deported or left the United States after such conviction, but only after the State or local law enforcement officials obtain appropriate confirmation from the Immigration and Naturalization Service of the status of such individual and only for such period of time as may be required for the Service to take the individual into Federal custody for purposes of deporting or removing the alien from the United States.

8 U.S.C. § 1252c(a) (2000).

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

73. *Id.* at 1296-97.

74. Reading § 1252c(a) line-by-line, the court rejected Vasquez's argument that the federal statute expressly preempted Oklahoma law. *Id.* at 1297-98. The court also concluded that § 1252c's legislative history reflected Congressional intent that the federal statute provide an additional vehicle for local enforcement, not displace any preexisting authority that local officers already had. *Id.* at 1298-99. The court noted that around the same time that Congress enacted § 1252c, Congress also passed provisions to encourage federal-state cooperation in the enforcement of immigration laws. For example, 8 U.S.C. § 1357(g)(10)(B) provides that a "formal agreement is not necessary for state and local officers 'to cooperate with the'" INS. *Id.* at 1300. These provisions, the court concluded, "evinced[] a clear invitation from Congress for state and local agencies to participate in the process of enforcing immigration laws." *Id.* In dicta, the Ninth Circuit in *Mena v. City of Simi Valley* reached the opposite conclusion in its interpretation of § 1252c, suggesting that local authority to make immigration arrests was limited to that permitted by § 1252c and other federal statutes. 332 F.3d 1255, 1266 (9th Cir. 2003). Interestingly enough, the Ninth Circuit cited to *Vasquez-Alvarez* as support for its conclusion. *Id.* at 1265 n.15.

75. "Accordingly, it might be argued that this court's interpretation of § 1252c leaves the provision with no practical effect." *Vasquez-Alvarez*, 176 F.3d at 1300.



rests, then the purpose of federal statutes like § 1252c that specify the circumstances for local enforcement becomes questionable. Indeed, if applied more widely, the *Vasquez-Alvarez* holding casts doubt on the effect of other INA provisions like 8 U.S.C. § 1357(g)(1)-(3) and 8 U.S.C. § 1103(a) that, respectively, allow local authorities to act as INS officers when their state enters into a written agreement with the Attorney General or when there is an immigration emergency.<sup>76</sup>

A position on local enforcement like that taken by the Tenth Circuit is troubling because, though it claims to engage in a preemption analysis, it will almost never find federal preemption where state law allows for enforcement of federal laws.

### H. State Authority Trumps

The third approach taken by courts on local enforcement is to focus on the authority of the locality under state law, with little or no acknowledgment of the federal preemption debate. *United States v.*

76. 8 U.S.C. § 1357(g)(1)-(3) (2000) reads in relevant part:

(1) [T]he Attorney General may enter into a written agreement with a State, or any political subdivision of a State, pursuant to which an officer or employee of the State or subdivision, who is determined by the Attorney General to be qualified to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States (including the transportation of such aliens across State lines to detention centers), may carry out such function at the expense of the State or political subdivision and to the extent consistent with State and local law.

(2) An agreement under this subsection shall require that an officer or employee of a State or political subdivision of a State performing a function under the agreement shall have knowledge of, and adhere to, Federal law relating to the function, and shall contain a written certification that the officers or employees performing the function under the agreement have received adequate training regarding the enforcement of relevant Federal immigration laws.

(3) In performing a function under this subsection, an officer or employee of a State or political subdivision of a State shall be subject to the direction and supervision of the Attorney General.

This section was added as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208. 8 U.S.C. § 1103(a)(10) (2000) reads in relevant part:

In the event 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.

In fifty years, this provision has only been used once. In 1994, DOJ invoked § 1103 to deputize Florida law enforcement to cope with the influx of 30,000+ Cuban and Haitian refugees who arrived on Florida's shores. MIGRATION POLICY INST., AUTHORITY OF STATE AND LOCAL OFFICERS TO ARREST ALIENS SUSPECTED OF CIVIL INFRACTIONS OF FEDERAL IMMIGRATION LAW 6 (June 11, 2002), <http://www.migrationpolicy.org/files/authority.pdf> (last visited Mar. 8, 2004).

*Salinas-Calderon*, previously discussed,<sup>77</sup> took this approach. Other courts have cited to *Salinas-Calderon* in upholding local enforcement of immigration laws.<sup>78</sup>

The main problem with this approach is that it fails to adequately explain the supposed basis for local authority or to explain the appropriate dividing line, if any, between local and federal enforcement of immigration laws. May local authorities enforce all immigration laws, even civil laws that involve only minor infractions? (*Salinas-Calderon* and progeny involved criminal immigration violations, so arguably, they are just following the criminal/civil distinction laid out in *Gonzales*.) Where state law allows for local enforcement, may Congress preempt this local enforcement? And if so, what types of evidence would be sufficient under this approach to show federal pre-emptory intent?

Because this third approach looks only to state law without acknowledging any of the issues relevant to the preemption debate, it leaves these important questions unanswered.

### I. *Opposition: The Political Quagmire*

Local enforcement of immigration laws has historically evoked a strong reaction from opponents. Those opponents have included not only immigrants and advocates for immigrants but also law enforcement officials and community leaders. Austin, Texas, Police Assistant Chief Rudy Landeros said, “[o]ur 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.”<sup>79</sup>

Why such vehement opposition? Opponents of local enforcement point to three interrelated concerns: (1) local police are not trained in the intricacies of immigration law and may resort to racial profiling of Hispanics and other visible minorities (including permanent residents and U.S. citizens); (2) immigrant communities will become distrustful of local police, with the result that immigrants will be less likely to report crimes or volunteer information to assist criminal investigations; and (3) valuable police resources will be diverted from fighting violent crime, decreasing safety for the entire community.<sup>80</sup>

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77. 728 F.2d 1298 (10th Cir. 1984).

78. See *United States v. Perez-Sosa*, 164 F.3d 1082, 1084 (8th Cir. 1998) (upholding state trooper’s arrest of defendant for transporting illegal aliens); *Gomez v. State*, 517 So. 2d 110, 111 (Fla. 3d DCA 1987) (upholding state officer’s authority to inquire about defendant’s immigration status after routine traffic stop).

79. *Austin Police Won’t Arrest People Only for Immigration Status* (KEYE CBS Austin television broadcast, Apr. 5, 2002), at [http://www.immigrationforum.org/currentissues/articles/043002\\_foi.htm](http://www.immigrationforum.org/currentissues/articles/043002_foi.htm) (last visited Feb. 21, 2004).

80. See *infra* notes 81-107 and accompanying text.

The first concern, that lack of immigration law training will lead to racial profiling by local police, is shared by both advocates for immigrants and local authorities alike. It is clearly established law that a person cannot be stopped and questioned about her immigration status merely because of her race.<sup>81</sup> Instead, an immigration officer must have reasonable suspicion that the person being stopped is in the country illegally.<sup>82</sup> In the border area, reasonable suspicion for stopping a vehicle may be based on a number of factors: characteristics of the area where the car is traveling (proximity to the border and usual patterns of traffic), the driver's behavior ("erratic driving or obvious attempts to evade officers"), the appearance of the person or persons being stopped (mode of dress or haircuts characteristic of persons living in Mexico), or aspects of the vehicle itself (vehicles with large compartments that could be used to transport illegal aliens or heavily loaded vehicles).<sup>83</sup> "In all situations the officer is entitled to assess the facts in light of his experience in detecting illegal entry and smuggling."<sup>84</sup>

Yet local authorities untrained in the nuances of immigration law and inexperienced in the detection of illegal immigration may be tempted to rely solely on prohibited factors like the person's race, foreign appearance, or use of a foreign language like Spanish.<sup>85</sup> Immigrant advocacy groups cite racial profiling as one of the consequences of local enforcement that they fear most.<sup>86</sup> But the concern about racial profiling is also shared by law enforcement officers who would be responsible for implementing local enforcement. Says Eric Nishimoto, spokesperson for the Ventura County Sheriff's Department,

We're not in favor of having our department being responsible for that function [immigration law enforcement] . . . . The number one risk is the potential for civil rights violations. Right now we're in-

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81. *United States v. Brignoni-Ponce*, 422 U.S. 873, 886-87 (1975) (holding that Border Patrol's stop of a vehicle and questioning of its occupants based only on the occupants' Mexican ancestry violated the Fourth Amendment).

82. *Id.* at 881. Reasonable suspicion is enough for limited, *Terry*-type stops where the immigration officer questions "the driver and passengers about their citizenship and immigration status" and asks "them to explain suspicious circumstances." *Id.* at 881-82. Any further detention or search requires consent or probable cause. *Id.* at 882.

83. *Id.* at 884-85.

84. *Id.* at 885.

85. In its 1997 sweep, police officers of Chandler, Arizona, used these prohibited factors to determine whom to stop and question about possible immigration violations. See CIVIL RIGHTS DIVISION, OFFICE OF THE ATTORNEY GENERAL GRANT WOODS, SURVEY OF THE CHANDLER POLICE DEPARTMENT-INS/BORDER PATROL JOINT OPERATION (1997) (on file with the National Immigration Project) [hereinafter CHANDLER REPORT]. The Chandler operation is discussed in more detail *infra* notes 102-07 and accompanying text.

86. ACLU Statement on New York City's Policy Regarding Local Law Enforcement and Immigration Before the House Judiciary Subcommittee on Immigration, Border Security and Claims (Feb. 27, 2003), <http://www.aclu.org/ImmigrantsRights/ImmigrantsRights.cfm?ID=11937&c=22> (last visited Feb. 11, 2004).

volved in preventing any kind of racial profiling and this type of function could open us to that kind of risk. . . . We feel our officers are not equipped to make that kind of determination of who is legal.<sup>87</sup>

Even without the specter of racial profiling, immigrants who know that their local police department is enforcing immigration laws will avoid contacting the police. The result is that immigrants will be less likely to provide information that could assist criminal investigations and immigrant victims will be less likely to report crimes for fear of deportation.<sup>88</sup> Even those immigrants with legal status may not contact police because they do not want to bring undocumented friends, family members, or neighbors to the attention of the authorities.<sup>89</sup> According to police officials across the country, growing distrust between their departments and immigrant communities would be a public safety disaster, affecting both the documented and undocumented communities.<sup>90</sup>

This problem was dramatically brought to the nation's attention in October 2002 during the tense investigation of the District of Columbia sniper attacks.<sup>91</sup> Several of the sniper attacks occurred in suburban areas with large immigrant communities, and immigrants emerged as important witnesses to the investigation.<sup>92</sup> But after the

87. Frank Moraga, *Police Balk at Having to Do INS Work; Several Local Agencies Denounce Justice Plan*, VENTURA COUNTY STAR, Apr. 6, 2002, at B01, LEXIS, News Library, VNCST File.

88. See Jason Stein, *Should Local Police Help the INS; Sauk County Situation Reflects a National Situation: Contact with Authorities Often Results in Latinos Being Deported*, WIS. ST. J., Aug. 4, 2002, at B1, 2002 WL 24280982. "If there's an accident, we're afraid we'll be picked up," said Raul, who asked that his last name be withheld out of fear of being deported, "If a man is hitting his wife, we can't talk about it because we're frightened." *Id.*

89. "All Latinos, regardless of their citizenship status, are going to be more distrustful of police and less likely to report crimes," says Michele Waslin, a senior immigration policy analyst at the National Council of La Raza. For example, she says, a Latino permanent resident may not call the police if she is not carrying her green card for fear of being arrested. Mary Jacoby, *Safety and Rights in the Balance*, ST. PETERSBURG TIMES, Sept. 16, 2002, at 1A, 2002 WL 100420262.

90. Says Hillsboro, Oregon Police Chief Ron Louie, "We're trying to build bridges with people living in fear. . . . If police officers become agents of the Immigration and Naturalization Service, . . . their ability to deal with issues such as domestic violence and crime prevention will be severely curtailed." Rosario Daza, *Helping People Without Papers*, PORTLAND OREGONIAN, Apr. 5, 2002, at C01, 2002 WL 3954137. Lieutenant Tomas Padilla of the Hackensack, New Jersey, Police Department recounts an example of immigrant assistance: "[T]wo immigrants recently helped us solve a crime. . . . Maybe they were undocumented, we didn't ask. But maybe that cooperation would not have occurred if we were forced to ask them for their immigration documents. . . . When immigrants fear they might be deported, they are not going to report the crime." Miguel Perez, *Ashcroft Comes to His Senses*, RECORD (Bergen County, N.J.), June 10, 2002, at L01, 2002 WL 4661090.

91. Mary Beth Sheridan & Sylvia Moreno, *Police Appeal to Immigrants for Help in Search for Sniper*, WASH. POST, Oct. 24, 2002, at A13, 2002 WL 101779119.

92. *Id.*

arrest and deportation of two Hispanic men unrelated to the snipers (they had the bad luck of driving a white van that police mistakenly thought was linked to the snipers and of making phone calls from a phone booth that police were monitoring), Hispanic immigrants were afraid to come forward.<sup>93</sup> Listeners called into Spanish language radio stations to express their fears about providing information, and the Montgomery police department received tips from Spanish-speaking callers who did not leave any contact information for follow-up.<sup>94</sup> Recognizing the importance of immigrant assistance to the ongoing investigation, both Montgomery Police Chief Charles Moose and then INS Commissioner James Ziglar made a special appeal to immigrants, promising that INS would not seek any immigration information that witnesses provided to the local authorities.<sup>95</sup>

Perhaps the most widely shared objection to local enforcement is the concern that valuable police resources will be diverted from fighting violent crime. Even police chiefs who favor local enforcement as a policy matter are reluctant to give their officers more work and responsibilities. Rather, in these times of declining local budgets, many police chiefs have instructed their officers to focus on preventing and investigating the violent crime that most directly affects their communities.<sup>96</sup>

Many police officials regard immigration law enforcement as the responsibility of the federal government (both politically and fiscally),<sup>97</sup> and many officials, particularly those in the border states, are skeptical that the federal government is serious about fulfilling that responsibility. Local police recount experiences like that of the Houston Police Department (HPD): in January 2003, HPD picked up eight immigrants presumed to be undocumented (the human cargo of a smuggling operation), but released them when INS did not respond to HPD's call.<sup>98</sup> INS defended itself as "too short-staffed" to respond to every call<sup>99</sup> but, to former HPD chief Sam Nuchia, the incident was part of a regular pattern of INS behavior, reflecting the federal gov-

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93. *Id.*

94. *Id.*

95. *Id.*

96. Police Foundation President Hubert Williams questions the relative importance of immigration law enforcement. "Where does [local enforcement] fit in the context of priorities? . . . Would it go ahead of robbery, homicide, drug offenses, any of those things?" Karen Brandon, *U.S. Weighs Local Role on Immigration; Some Police Fear Dual Duty Would Hurt Minority Ties*, CHI. TRIB., Apr. 14, 2002, at 10, 2002 WL 2644608.

97. About local enforcement, Minneapolis Police Chief Robert Olson says, "We are not the INS, and we do not want to be the INS. . . . That is a federal issue." Jackie Crosby, *Minneapolis Chief, Mayor Vow to Work with City's Somalis; Police Issues Raised at Community Forum*, STAR TRIB. (Minneapolis-St. Paul), June 7, 2002, at 03B, 2002 WL 5376311.

98. Edward Hegstrom, *Mix-up over 8 Immigrants to Be Probed*, HOUS. CHRON., Jan. 9, 2003, at 19, 2003 WL 3229308.

99. *Id.*

ernment's ambivalence about enforcing immigration laws.<sup>100</sup> In response to this ambivalence and to fears that immigrants were at risk of being victimized, Nuchia implemented the department's current policy prohibiting officers from arresting people for being in the United States illegally.<sup>101</sup>

Critics of local enforcement point to the joint operation of the Chandler, Arizona, police department and the INS, in July 1997, as an example of all the things that can go wrong with local enforcement of immigration laws. The purpose of the joint operation was to rid the community of undocumented residents and, during this five day operation, 432 undocumented persons (all Hispanic) were arrested and deported.<sup>102</sup> Responding to complaints from American citizens and permanent residents who were also swept up by the joint operation, the Arizona Attorney General found evidence of numerous constitutional and statutory violations.<sup>103</sup>

Specifically, the Attorney General found that citizens and permanent residents were stopped by Chandler police officers multiple times (some stops within short distances of each other) "for no other apparent reason than their skin color or Mexican appearance or use of the Spanish language."<sup>104</sup> Moreover, the city police (often unaccompanied by INS/Border Patrol agents) stopped children, checked in and around schools, and entered homes and businesses, all to investigate the citizenship of occupants and all without warrants or particularized information suggesting criminal activity.<sup>105</sup> As a result of its local enforcement, the city was slapped with two civil rights lawsuits and had to pay out more than half a million dollars in settlements.<sup>106</sup> Perhaps more damaging was the distrust that the local enforcement caused with the local immigrant community, creating, in the words of the Arizona Attorney General, "an atmosphere of fear and uncertainty in the particular targeted zone and beyond."<sup>107</sup>

Even in the post 9/11 environment, there is still fierce political opposition to local enforcement of immigration laws. True, some po-

100. *Id.*

101. *Id.*

102. See CHANDLER REPORT, *supra* note 85, at 1.

103. *Id.* at 30, 32.

104. *Id.* at 31.

105. *Id.* at 31-32.

106. Hernan Rozemberg, *INS Duty for Local Officers Criticized*, ARIZ. REPUBLIC, Apr. 6, 2002, at 1B. Though his survey focused on the treatment of American citizens and legal residents, the Attorney General also raised questions about the mistreatment of undocumented individuals during the joint operation. See CHANDLER REPORT, *supra* note 85, at 28. Specifically, the Attorney General noted that undocumented individuals were loaded into a van with closed windows and no drinking water or bathroom facilities during the extreme July heat and in at least one instance, INS agents had to restrain Chandler police officers from using inappropriate physical force. *Id.*

107. CHANDLER REPORT, *supra* note 85, at 32.

lice departments have taken up Attorney General Ashcroft's invitation to enforce immigration laws, and Florida has signed a Memorandum of Understanding with DOJ, allowing a limited number of its officers to perform immigration-related functions.<sup>108</sup> But post 9/11, at least two states and thirty cities and towns have passed laws directing their police departments and/or city workers not to enforce immigration laws. Many of these laws were passed at the urging of immigrants' rights groups.<sup>109</sup>

While the specific numbers of local authorities who decide to enforce or not enforce immigration laws may fluctuate, the issue of local enforcement is sure to be stuck in a political quagmire for some time to come.

*J. Inherent Authority: Avoiding the Legal and Political Quagmire*

By asserting that the local authority to enforce immigration laws derives from their status as sovereign entities, DOJ seeks to avoid the legal and political problems discussed above. If states and localities have inherent authority, then they do not have to try to discern congressional intent, avoiding the preemption debate altogether. And because authority based on sovereign status does not require legislative or executive action, local authorities can start enforcement immediately and quietly, avoiding the political fallout that might come from taking more overt action (like signing a Memorandum of Understanding).<sup>110</sup>

Another advantage of the DOJ position for local authorities is that it leaves the door open for them to enforce all immigration laws, both criminal and civil. Attorney General Ashcroft has defined his request for local assistance narrowly: to help BTS pick up those per-

108. See *supra* Part II.B., notes 19-30 and accompanying text.

109. For example, Seattle's policy that prohibits police and other municipal workers from asking about the immigration status of people they encounter was strongly backed by the Hate Free Zone Campaign of Washington, the Northwest Immigrants' Rights Project, People's Coalition for Justice, and Northwest Labor and Employment Law Office. See *Seattle Adopts "Don't Ask" Police Policy on Immigration*, *supra* note 15.

110. The National Council of La Raza, the largest civil rights organization representing Hispanic Americans, condemned the MOU as another anti-immigration measure "driving the undocumented population deeper underground." Darryl Fears, *Hispanic Group Assails INS Enforcement Plan; La Raza Says Fla. Pact Stirs Immigrant Fears*, WASH. POST, July 23, 2002, at A3, 2002 WL 23855457. Despite such criticism, Florida Governor Jeb Bush clearly felt he had enough electorate support to sign the MOU four months before he was up for reelection. And his political gamble paid off, as he was reelected with fifty-six percent of the vote. See Florida Department of State, Division of Elections, Nov. 5, 2002 General Election, Official Results, Governor and Lieutenant Governor, <http://election.dos.state.fl.us/elections/resultsarchive/Index.asp?ElectionDate=11/5/02&DATAMODE=>. Analysts estimate that Jeb Bush won 56-65% of the Hispanic vote. See Ruy Teixeira, *Where the Democrats Lost*, AM. PROSPECT, Dec. 16, 2002, at 1618, 2002 WL 776174; Stephen Dinan, *Parties Wooed Hispanics with Record Ad Spending; GOP Claims Solid Gains from Language Strategy*, WASH. TIMES, Nov. 22, 2002, at A04, 2002 WL 2922132.

sons listed in the National Crime Information Center system as violating the registration requirements of N-SEERS.<sup>111</sup> However, inherent authority based on sovereign status would support local enforcement beyond this narrow mission, everything from picking up undocumented farm workers to checking the citizenship status of all persons that local authorities encounter, not just those listed in the NCIC.<sup>112</sup>

For those who favor local enforcement, the inherent authority position has the advantage of arguably avoiding the complex legal and political questions discussed above. But the position runs into a more insurmountable barrier: the constitutional requirement that the nation's immigration laws be enforced uniformly.

### III. THE CONSTITUTIONAL MANDATE FOR UNIFORM ENFORCEMENT

The Constitution requires uniform enforcement in immigration laws because the immigration power is an exclusively federal power that must be exercised uniformly. This conclusion is compelled by an examination of the sources of the immigration power, as well as by the power's inextricable foreign policy implications. Moreover, the constitutional mandate for uniformity requires uniform enforcement, as well as uniform laws, because in the immigration law context, nonuniform enforcement has the same negative effect as nonuniform laws and implicates the same foreign policy concerns.<sup>113</sup>

#### A. *The Exclusively Federal Sources of the Immigration Power*

An analysis of the sources of the immigration power shows that the power was intended by the Framers to be exclusively federal and to be exercised uniformly. As explained further below, this conclusion has also been adopted by courts analyzing the nature of the immigra-

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111. See Ashcroft Remarks for Chiefs of Police, *supra* note 48. Alberto Gonzales, Counsel to the President, has also emphasized that the local enforcement sought by the federal government will be limited to anti-terrorism efforts. "[S]tate 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 National Crime Information Center (NCIC). . . . Only high-risk aliens who fit a terrorist profile will be placed in NCIC." Letter from Alberto R. Gonzales, Counsel to the President, to Demetrios G. Papademetriou, Migration Policy Institute (June 24, 2002) (on file with author).

112. Certainly, *United States v. Salinas-Calderon*, which DOJ purportedly relies on as support, does not contain any limiting language. 728 F.2d 1298 (10th Cir. 1984). Opponents of local enforcement fear that DOJ's invitation will result in local attempts to enforce all immigrations laws. In Temecula, California, for example, a field worker was arrested by a deputy sheriff and held for deportation. The sheriff's office said he was arrested as part of a traffic stop, but immigrant advocates believe that he was stopped for no other reason than to check the validity of his immigration status. See Vanessa Colon, *Groups Watch Arrest Case; Immigration; The Incident Near Temecula Might Shed Light on Enforcement by Police*, PRESS-ENTERPRISE (Riverside, Cal.), May 9, 2003, at B01, 2003 WL 19924180.

113. See *infra* notes 114-62 and accompanying text.



tion power.

The authority of the federal government to regulate immigration is a widely accepted principle.<sup>114</sup> But unlike the powers to declare war and enter into treaties,<sup>115</sup> the immigration power is not expressly enumerated in the Constitution. Instead, courts and scholars have understood the immigration power as emanating from two sources: specific constitutional provisions and the nation's status as a sovereign entity.<sup>116</sup>

Both of these sources as they pertain to the immigration power are exclusively federal. The textual sources that have been identified at various times by the Supreme Court as giving rise to the immigration power—the Naturalization Clause, the Foreign Affairs Clauses, and the Commerce Clause—were intended to be and have been treated by courts as establishing exclusively federal powers.<sup>117</sup> For example, the Framers drafted the Naturalization Clause because they were dissatisfied with the divergent naturalization laws that individual states implemented under the Articles of Confederation.<sup>118</sup>

114. See, e.g., *Chae Chan Ping v. United States* (The Chinese Exclusion Case), 130 U.S. 581, 603 (1889) (“That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation.”). *Chae Chan Ping* is discussed *infra* notes 122-24 and accompanying text.

115. U.S. CONST. art. I, § 8, cl. 11; *id.* art. II, § 2, cl. 2.

116. See Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493, 532-52 (2001).

117. *Id.* at 533-49. The Naturalization Clause authorizes Congress “[t]o establish a uniform Rule of Naturalization . . . throughout the United States.” U.S. CONST. art. I, § 8, cl. 4. The Foreign Affairs Clauses include the Congressional powers to declare war, *id.* art. I, § 8, cl. 11, the Senate power to advise and consent to the appointment of ambassadors, *id.* art. II, § 2, cl. 2, and the Presidential power to make treaties, with the advice and consent of the Senate, *id.* art. II, § 2, cl. 2. The Commerce Clause empowers Congress “[t]o regulate commerce with foreign nations, and among the several States, and with the Indian tribes.” *Id.* art. I, § 8, cl. 3; see also T. ALEXANDER ALEINIKOFF ET AL., *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 177-82 (5th ed. 2003) (discussing possible delegated sources of the immigration power).

118. Wishnie, *supra* note 116, at 534-35. Some courts and scholars have interpreted the Naturalization Clause more broadly as the source of the general immigration power, rather than just naturalization standards. See, e.g., Gilbert Paul Carrasco, *Congressional Arrogation of Power: Alien Constellation in the Galaxy of Equal Protection*, 74 B.U. L. REV. 591, 631 (1994) (arguing that federal legislation authorizing states to discriminate against immigrants in distributing state welfare benefits conflicts with the Naturalization Clause's mandate for uniform immigration policy); see also *Aliessa v. Novello*, 754 N.E.2d 1085 (N.Y. 2001) (striking down state law that terminated state-funded Medicaid benefits for certain classes of noncitizens because it created nonuniform immigration policy, federal authorization notwithstanding), discussed in more detail, *infra* notes 183-89 and accompanying text.

The same provision that grants Congress the authority to establish a “uniform Rule of Naturalization” also gives it authority to establish “uniform Laws on the subject of Bankruptcies.” U.S. CONST. art. I, § 8, cl. 4. One may wonder whether the tolerance of nonuniform state bankruptcy laws means that we should similarly tolerate state involvement in immigration law. But the Naturalization Clause differs from the Bankruptcy Clause in

And in implementing the Naturalization Clause, the majority of courts that have considered the issue developed a federal common law of what it means for a naturalization applicant to be of "good moral character," rather than incorporate divergent state laws on adultery and sodomy.<sup>119</sup>

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several important respects: the Naturalization Clause calls for the establishment of a singular "Rule" while the Bankruptcy Clause uses the plural "Laws," suggesting that the uniformity requirement in these clauses is different, and courts have interpreted the federal bankruptcy power to be concurrent with states' authority in this area. *See, e.g., Kosto v. Lausch*, 16 B.R. 162, 164-65 (M.D. Fla. 1981) (upholding federal law that allowed states to determine bankruptcy exemptions because states have concurrent legislative authority in this area); *Wishnie, supra* note 116, at 536-37.

119. *Wishnie, supra* note 116, at 535 n.22 (citing to *Soloranzo-Patlan v. Immigration and Naturalization Serv.*, 207 F.3d 869, 874 (7th Cir. 2000) (because of need for uniformity in immigration law, courts must develop federal common law definition of "burglary," rather than incorporate different state law definitions)); *see also Nemetz v. Immigration and Naturalization Serv.*, 647 F.2d 432, 435 (4th Cir. 1981) (The court rejected Virginia sodomy law as a basis for concluding that applicant for citizenship committed crime of moral turpitude and thus lacked necessary good moral character: "Development of a federal standard for making that determination provides the only certain means of creating the constitutionally required uniform rule; reference to laws which vary from state to state can only lead to differing and often inconsistent results."). *But see Brea-Garcia v. Immigration and Naturalization Serv.*, 531 F.2d 693, 698 (3d. Cir. 1976) (adopting state law definition of adultery in denying applicant's request for voluntary departure in lieu of deportation).

Professor Howard Chang reaches the opposite conclusion: that immigration law often incorporates divergent state laws. Howard F. Chang, *Public Benefits and Federal Authorization for Alienage Discrimination by the States*, 58 N.Y.U. ANN. SURV. AM. L. 357, 360 (2002). For example, he argues that noncitizens are often treated differently under federal immigration laws depending upon the state in which they got married (because state laws determine whether a marriage is valid for the purpose of obtaining an immigration visa) or committed a crime (because state laws determine whether a criminal act constitutes a crime of moral turpitude and thus could be the basis for inadmissibility or deportation). *Id.*

Several responses are possible. On the issue of marriage laws, these laws actually vary very little in substance from state to state, so that incorporating state definitions of marriage does not violate the federal mandate for uniform immigration laws. For example, while New York requires parties to a marriage to be at least eighteen, *see* N.Y. DOM. REL. § 7 (1999), and Arkansas has a lower minimum age requirement (seventeen for males and sixteen for females), *see* ARK. CODE ANN. § 9-11-102 (1987), this difference is not as significant as it may appear. Under New York law, nonage does not per se void a marriage but is only one among many factors to be considered by the courts. *See* N.Y. DOM. REL. § 7 (1999).

As to the argument that state statutory definitions are the sole basis for determining whether a crime involves moral turpitude, at least some of the case law suggests otherwise. Some courts and the Board of Immigration Appeals have looked beyond state definitions to determine what moral turpitude means for immigration law purposes. *See, e.g., Goldeshtein v. Immigration and Naturalization Serv.*, 8 F.3d 645, 648 (9th Cir. 1993) ("Even if intent to defraud is not explicit in the statutory definition, a crime nevertheless may involve moral turpitude if such intent is implicit in the nature of the crime.") (internal quotations omitted); *In re Flores*, 17 I. & N. Dec. 225, 226 (B.I.A. 1980) (holding that though federal statute prohibiting the counterfeiting of immigration documents does not require a showing of intent to defraud, such intent is inherent in the act of counterfeiting so that violating the statute constitutes a crime of moral turpitude). Even those courts that have limited their analysis of moral turpitude to the language of state statutes have focused on the "inherent nature" of the crime, as defined by the state statutes. *See, e.g., Nguyen v. Reno*, 211 F.3d 692, 695 (1st Cir. 2000) ("The focus of the moral turpitude

The U.S.'s status as a sovereign nation—also identified by the Supreme Court as a source of the immigration power—further supports the proposition that the immigration power is exclusively federal.<sup>120</sup> Because it is a sovereign nation, the United States must necessarily have the exclusive power to control entry and exit from its borders; otherwise, it would be subject to the control of other nations.<sup>121</sup>

The Supreme Court first articulated this theory in the infamous *Chinese Exclusion Case*, upholding an 1888 federal law that prohibited Chinese laborers from entering the United States (even in those cases where the laborers had left the United States with official government permission to return).<sup>122</sup> The Court characterized the federal government's ability to exclude foreigners as "an incident of sovereignty" and "part of those sovereign powers delegated by the Constitution."<sup>123</sup> The Court compared the immigration power to the power to declare war and make treaties, and reasoned that because they all affect foreign policy, the powers belong exclusively to the federal government and are "incapable of transfer to any other parties."<sup>124</sup> The Court reiterated this theory in subsequent immigration cases as well.<sup>125</sup>

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analysis is on the inherent nature of the crime of conviction, as opposed to the particular circumstances of the actual crime committed.").

120. See Wishnie, *supra* note 116, at 549-52.

121. Though it reaches the opposite legal conclusion, the Department of Justice also recognizes the link between sovereignty and immigration policy. In its opinion, the Office of Legal Counsel reportedly cites to the status of states and local authorities as "sovereign entities" to authorize their enforcement of federal immigration laws. See Marcus Stern & Mark Arner, *Police May Gain Power to Enforce Immigration Plan Has Local Officers, Rights Groups on Edge*, SAN DIEGO UNION-TRIB., Apr. 3, 2002, at A1, 2002 WL 4594382. But states and local authorities cannot, of course, control entry and exit from their borders, except for narrow instances of criminal law enforcement (e.g., setting up road blocks to catch criminal fugitives). Rather, they must cede this authority to the federal government. See *Mathews v. Diaz*, 426 U.S. 67, 85 (1976) ("[W]hereas the Constitution inhibits every State's power to restrict travel across its own borders, Congress is explicitly empowered to exercise that type of control over travel across the borders of the United States.").

122. *Chae Chan Ping v. United States* (The Chinese Exclusion Case), 130 U.S. 581, 609 (1889).

123. *Id.* at 609.

124. *Id.*

125. See *Ekiu v. United States*, 142 U.S. 651, 659 (1892) ("It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions. . . . In the United States this power is vested in the national government."); see also *Fong Yue Ting v. United States*, 149 U.S. 698, 707 (1893) (upholding a federal law that required Chinese laborers to produce a white witness to attest to their lawful residence or face arrest and deportation because the right to expel or deport foreigners is an "essential attribute [ ] of sovereignty") (citations omitted); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953) ("Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control."); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950) ("The exclusion of aliens is a fundamental act of sovereignty. The

Even apart from its foreign policy implications,<sup>126</sup> the conclusion that the immigration power is a sovereign one suggests that it can only be exercised by the sovereign; otherwise, the sovereign's transfer of that power would be tantamount to a surrender of its sovereignty.<sup>127</sup>

Though the immigration power cannot be traced definitively to any one source, the sources that have been cited establish that the power is an exclusively federal one.

### B. Foreign Policy and the Requirement of Uniformity

Inextricably linked to the proposition that the immigration power is exclusively federal is its link to foreign policy.<sup>128</sup> Because immigration policy affects our relations with other nations, it must, like other aspects of foreign policy, be exercised uniformly and exclusively by the federal government.<sup>129</sup>

right to do so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation.”) (citing to *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936)).

126. See *infra* notes 128-49 and accompanying text.

127. Wishnie, *supra* note 116, at 552. Professor William Cohen argues for the opposite conclusion: if the federal government may constitutionally adopt a policy, he believes that it should be able to consent to states' adoption of the same policy, even if that policy would otherwise be constitutionally prohibited. William Cohen, *Congressional Power to Validate Unconstitutional State Laws: A Forgotten Solution to an Old Enigma*, 35 STAN. L. REV. 387 (1983). In the context of immigration law, he posits that the federal government could give its constitutional blessing to state laws preferring U.S. citizens over noncitizens, because the federal government has the authority to adopt these laws directly. *Id.* at 419-21.

Cohen's proposition is problematic for several reasons. Though he acknowledges that the consent principle may be problematic against a constitutional requirement of national uniformity, *id.* at 404-05, he does not consider the legal and historical support for a uniform immigration system or the possible chaos that would result from differing state immigration policies. These consequences present both doctrinal and policy reasons to restrict state action in the immigration field, even with federal endorsement. See generally Wishnie, *supra* note 116, at 565-66 (also arguing that the consent principle ignores the equal protection analysis in Supreme Court cases like *Graham v. Richardson*, 403 U.S. 365 (1971), that made state immigration laws subject to strict scrutiny).

128. Cf. Peter J. Spiro, *Explaining the End of Plenary Power*, 16 GEO. IMMIGR. L.J. 339, 340-41 (2002) (arguing that a relatively stable international system has lessened the foreign policy impact of immigration law and consequently decreased the need for judicial deference to federal immigration policy).

129. See *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000) (holding that a Massachusetts law restricting the ability of state agencies to buy goods or services from companies that did business with Burma violated the Supremacy Clause because it interfered with the President's ability to forge foreign policy); *Am. Ins. Ass'n v. Garamendi*, 123 S. Ct. 2374, 2386 (2003) (holding that the California Holocaust Victim Insurance Relief Act, which was designed to force defaulting insurers to pay on insurance policies issued to Jews before and during World War II, unconstitutionally interfered with President's foreign policy power to settle claims with other countries; state law affecting foreign policy “must yield to the National Government's policy, given the concern for uniformity in this country's dealings with foreign nations that animated the Constitution's allocation of the foreign relations power to the National Government in the first place”) (internal quotations omitted).

The same Supreme Court cases that held the immigration power to be vested exclusively in the federal government did so, at least in part, because of immigration's effect on the nation's foreign policy. In upholding an 1891 federal statute that entrusted final factfinding authority to immigration inspectors (allowing inspectors to exclude immigrants from the United States without opportunity for judicial review), the Supreme Court in *Ekiu v. United States* reasoned that the immigration power was part and parcel of the federal government's authority over foreign affairs generally: "In the United States this [immigration] power is vested in the national government, to which the Constitution has committed the entire control of international relations, in peace as well as in war."<sup>130</sup>

Just what effect do immigration laws have on the nation's foreign policy? History shows that the U.S.'s immigration laws, specifically those that determine which foreign nationals to admit or expel and under what circumstances, have affected its relations with the home countries of those nationals. And the reverse is also true—that immigration laws have been used as instruments to achieve the nation's foreign policy objectives.

Of the first proposition, perhaps the best example is the United States' relationship with Mexico. One credible estimate, based on the 2000 census data, is that there are 4.5 million undocumented Mexican nationals present in the United States.<sup>131</sup> United States immigration policies toward these undocumented migrants has spilled over to affect its political relations with Mexico.

An example from recent events: shortly after their elections, U.S. President George W. Bush and Mexican President Vicente Fox started serious discussions about the possibility of a historic bilateral agreement on migration. Fox lobbied for greater labor migration and the opportunity for many undocumented Mexican workers already in the United States to gain legal status;<sup>132</sup> for its part, the Bush administration wanted a revised guest worker program. The agreement ran into problems even before the events of 9/11,<sup>133</sup> but the terrorist attacks in New York and Washington, D.C. dealt a terrible blow, as U.S. policy shifted to restricting immigration, not expanding it.<sup>134</sup>

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130. *Ekiu v. United States*, 142 U.S. 651, 659 (1892).

131. Eduardo Porter, *Illegal Immigrants May Total 8.5 Million*, WALL ST. J., Aug. 14, 2001, at A4, 2001 WL 2872500.

132. Ginger Thompson, *U.S. and Mexico to Open Talks on Freer Migration for Workers*, N.Y. TIMES, Feb. 16, 2001, at A1, LEXIS, News Library, NYT File.

133. Eric Schmitt and Ginger Thompson, *Mexico Takes Small Steps to Improving Its U.S. Ties*, N.Y. TIMES, Sept. 5, 2001, at A6, LEXIS, News Library, NYT File.

134. Ronald Brownstein, *Green Light, Red Light: Is the Push to Liberalize Immigration Policy a Casualty of the Surprise Terrorist Attacks on September 11?*, AM. PROSPECT, Nov. 19, 2001, at 2831, 2001 WL 7681289; Julia Malone, *Immigration Takes Back Seat to Security; Strong Pact with Mexico Uncertain*, ATLANTA J.-CONST., Mar. 20, 2002, at 3A, LEXIS,

Failure to obtain a favorable migration agreement from the United States hurt Fox's political popularity at home, which in turn had political consequences for the United States. Fox made a migration accord one of his top priorities,<sup>135</sup> and his failure to obtain the accord deepened voters' disappointment with him and his National Action Party (PAN).<sup>136</sup> In an attempt to shore up his standing with Mexican voters who overwhelmingly opposed the war in Iraq, Fox cast Mexico's vote as a member of the U.N. Security Council against military action and in support of France's request for diplomatic solutions.<sup>137</sup> Consequently, United States-Mexico relations have grown noticeably colder.<sup>138</sup>

Of the second proposition, immigration laws used to achieve United States foreign policy objectives, numerous examples exist. Under the Refugee Act of 1980, the system of refugee admissions is structured to reflect U.S. foreign policy priorities. The President, in consultation with Congress, decides how many refugees will be admitted each year and, significantly, how the admissions of refugees from various countries and regions are allocated.<sup>139</sup> So from 1980 until the collapse of communism, Presidents allocated almost all of the refugee admissions to people fleeing communist countries like Vietnam or other United States adversaries like Iran.<sup>140</sup>

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News Library, ATLJNL File. There has been some subsequent Congressional movement toward guest worker/legalization legislation. See Bruce Alpert, *Bill Would Legalize Foreign Workers' Status; Immigrants Would Get Unwanted Jobs*, TIMES-PICAYUNE, Aug. 6, 2003, at 01, 2003 WL 60057592.

135. Fox's former foreign minister, Jorge Castaneda, said that on migration issues, Mexico wanted the "whole enchilada." Gary Martin, *Voters Could Pan Fox's Party; Border Issues, Slump Likely to Cost Mexican President at the Polls*, SAN ANTONIO EXPRESS-NEWS, July 4, 2003, at A1, 2003 WL 58414606. Castaneda resigned in January 2003 out of frustration at the lack of progress with the United States on migration issues. *Mexico Says U.S. Immigration Deal May Take 30 Years*, REUTERS ENGLISH NEWS SERVICE, Feb. 7, 2003, 11:49:00, WESTLAW, Allnewsplus Database.

136. Martin, *supra* note 135.

137. Gary Martin, *Mexican Official Touts U.S. Relations; Foreign Minister Downplays White House Snub of Cinco de Mayo*, SAN ANTONIO EXPRESS-NEWS, May 8, 2003, at A1, 2003 WL 20247272. Despite this foreign policy stance, Fox's PAN Party received only 30.5% of the vote in the 2003 midterm elections; its rival Institutional Revolutionary Party won 34% of the popular vote and four of six state governorships. *Mexican Press Review*, GUARDIAN (London), July 9, 2003, at 24, 2003 WL 56694539.

138. In 2003, the White House cancelled its traditional Cinco de Mayo celebration, the Mexican holiday that celebrates the Mexican military victory over French forces at the Battle of Puebla in 1862, citing scheduling conflicts. Also, the half-page statement that the White House issued commemorating the holiday did not mention Fox. Martin, *supra* note 137.

139. Admissions "shall be allocated among refugees of special humanitarian concern to the United States." Immigration and Nationality Act § 207(a)(3), 8 U.S.C. § 1157(a)(3) (2000).

140. See, e.g., Presidential Determination No. 91-3 of Oct. 12, 1990, 55 Fed. Reg. 41,979-80 (Oct. 17, 1990) (authorization for refugee admissions in 1991 as representative of foreign policy pattern).

More recently in January 1990, one month after Chinese government troops fired on prodemocracy demonstrators in Tiananmen Square, the Attorney General issued interim regulations that automatically made any person who has a well-founded fear of coerced abortion or sterilization eligible for political asylum.<sup>141</sup> Congress then amended the statutory definition of "refugee" to specify that any forced abortion or sterilization, or persecution for refusing to submit to a forced abortion or sterilization, constituted persecution on account of political opinion.<sup>142</sup>

Because of its effect on foreign policy, the immigration power must be exercised uniformly and exclusively by the federal government. Concerns about uniform foreign policy have been the rationale for striking down state laws that attempted to regulate immigration, while upholding similar federal laws. For example, in *Graham v. Richardson*, the Supreme Court ruled that state laws denying welfare benefits to resident aliens or to resident aliens who have not resided in the United States for a specified number of years violated the Equal Protection Clause and encroached on the federal government's exclusive immigration power.<sup>143</sup> If states were allowed to discriminate on the basis of alienage, individual states would be able, in effect, to deny aliens the full rights of entry and abode, as indigent aliens would only be able to settle in hospitable states, in contravention of federal law.<sup>144</sup>

By contrast, in *Mathews v. Diaz*, the Supreme Court upheld a similar federal law that limited Medicare eligibility to permanent resident aliens who had continuously resided in the United States for five years or more.<sup>145</sup> The Court linked the federal government's immigration power to its foreign policy powers and expressed reluctance to subject the federal government to similar constitutional restrictions in this realm.<sup>146</sup> In distinguishing this case from *Graham*, the Court noted that states have no similar foreign policy interests justifying discrimination based on alienage.<sup>147</sup>

In fact, state attempts to regulate immigration may actually impair federal interests by creating nonuniform foreign policy. In *Graham*, the contested state laws appeared, at first blush, only to have domestic ramifications (that is, restrictions on the internal movement of resident aliens). But as the Court noted in striking down the laws,

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141. See, e.g., Refugee Status, Withholding of Deportation, and Asylum; Burden of Proof, 55 Fed. Reg. 2803-05 (Jan. 29, 1990) (to be codified at 8 C.F.R. pts. 208, 242).

142. See Immigration and Nationality Act § 101(a)(42), 8 U.S.C. § 1101(a)(4) (2000).

143. 403 U.S. 365, 376-77 (1971).

144. *Id.* at 379-80.

145. 426 U.S. 67, 87 (1976).

146. *Id.* at 81.

147. *Id.* at 84-85.

those restrictions impact foreign policy in ways that the federal government, in its balancing of international objectives, decided not to make.<sup>148</sup> Though it would be the individual states making immigration policy, it would be the federal government that would have to respond if this policy offends a country whose citizens are subject to these internal restrictions.<sup>149</sup>

Because of its effect on foreign policy, the immigration power must be exercised exclusively and uniformly by the federal government.

### C. *Unconstitutionality of Nonuniform Enforcement*

Nonuniform enforcement of immigration laws poses the same constitutional problems as would nonuniform immigration laws. As explained further in Part IV, DOJ's invitation for local enforcement will result in a "thousand borders" problem, violating the constitutional mandate for uniform immigration laws as local authorities will enforce federal immigration laws differently, creating, in effect, different immigration laws.<sup>150</sup>

Moreover, nonuniform enforcement also implicates foreign policy concerns. The thousand borders problem, coupled with the real possibility of rogue local enforcement, will exacerbate uncertainty as to how a country's nationals will be treated within the United States, which will, in turn, affect that country's relations with the United States.<sup>151</sup>

### D. *Nonuniform Enforcement as Setting Policy*

Local enforcement of federal immigration laws suffers from the same constitutional flaws as local immigration legislation would. As explained in Part IV, patchwork enforcement by local authorities will result in a thousand borders, as the local authorities decide, as an

148. *Graham*, 403 U.S. at 379-80.

149. The Supreme Court raised this objection in striking down a California law that demanded payment from foreign passengers as a condition for allowing them to land. *Chy Lung v. Freeman*, 92 U.S. 275, 279-80 (1875). Though the plaintiff in this case was a Chinese citizen, the Court considered the possibility of British citizens being subjected to this demand for payment.

[C]an any one doubt that this matter would have been the subject of international inquiry, if not of a direct claim for redress? Upon whom would such a claim be made? Not upon the State of California; for, by our Constitution, she can hold no exterior relations with other nations. It would be made upon the government of the United States.

*Id.* at 279; *cf.* *De Canas v. Bica*, 424 U.S. 351 (1976) (holding California statute that prohibited employers from knowingly employing undocumented workers was not preempted by federal immigration law because the statute regulated employment of *illegal* workers).

150. See *infra* notes 163-89 and accompanying text.

151. See *infra* note 162 and accompanying text.



initial matter, whether to enforce immigration laws and then whether to enforce all immigration laws or only some subset (like criminal immigration laws).<sup>152</sup>

Though local authorities would, in theory, enforce the same federal immigration laws, differences in their state laws will often result in their enforcing, in reality, different immigration laws. For example, because California law only allows a warrantless arrest for a misdemeanor if the misdemeanor occurs in the arresting officer's presence, a California law officer is unlikely to be able to arrest for illegal entry unless he or she sees the actual illegal crossing.<sup>153</sup> However, the federal statute defining illegal entry does not require that the arresting officer witness the illegal crossing,<sup>154</sup> and federal immigration officials are not subject to such a requirement.<sup>155</sup> Thus, because of differing state laws affecting their enforcement ability, local authorities may in effect be enforcing different immigration laws.

Moreover, given the realities of limited federal resources for immigration law enforcement (particularly in interior areas of the country),<sup>156</sup> a decision by local authorities to enforce immigration laws may have the effect of setting immigration policy because the local enforcement may constitute the only enforcement of these laws in their particular jurisdictions. Thus a decision by local authorities in a particular state to enforce immigration laws may actually create immigration policy in their state because of the dearth of federal resources to enforce immigration laws.

The unconstitutionality of nonuniform local enforcement does not mean, however, that current federal enforcement, which may vary from jurisdiction to jurisdiction, is also unconstitutional. Differing enforcement of immigration laws at the federal level is constitutional because it reflects a unitary federal policy about how many resources to devote to immigration enforcement, where to concentrate enforce-

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152. See *infra* notes 163-67 and accompanying text.

153. See CAL. PENAL CODE § 836(a)(1) (West 2003).

154. 8 U.S.C. § 1325(a) (2000).

155. A federal immigration officer may make a warrantless arrest if the officer has "reason to believe" that the arrested person has violated immigration laws and is likely to escape before a warrant can be obtained. 8 U.S.C. § 1357(a)(2) (2000).

156. There are currently only 2000 federal immigration officials available to enforce interior immigration laws. See JOHN L. MARTIN ET AL., FED'N FOR AM. IMMIGRATION REFORM, *State of Insecurity: How State and Local Immigration Policies Are Undermining Homeland Security*, 2, available at <http://www.fairus.org/news/NewsPrint.cfm?ID=1626&c=55> (last visited Feb. 22, 2004); see also Thomas Ginsberg & Maria Panaritis, *U.S. Agents Limit Scrutiny of Illegal-Immigrant Arrests; Local Cases Are Ignored if the Person Is Not from a "High Risk" Country or a Known Criminal*, PHILA. INQUIRER, Sept. 9, 2003, at A01 (noting that there are only fourteen federal immigration agents for a 5800 square mile area of southeastern Pennsylvania and South Jersey).

ment, and even when to refrain from enforcement.<sup>157</sup> Local enforcement, even at the invitation of the federal government, could never be similarly unitary. It was this concern for unitary immigration policy that caused the Supreme Court to strike down the state welfare law in *Graham v. Richardson*, while upholding a similar federal law in *Mathews v. Diaz*.<sup>158</sup>

In addition, the possibility of rogue enforcement of immigration laws, where officers employ racial profiling and other prohibited practices, is much more likely to occur at the local levels, compounding the uniformity problem. Consider that under DOJ's invitation, there is no provision, or more importantly, funding, to train local authorities in the complexities of immigration law. Compare that to the 1-5½ months of training that federal immigration officers receive, including courses in immigration and nationality law, statutory arrest authority, constitutional law, and behavioral sciences.<sup>159</sup> This lack of training, coupled with lack of hands-on enforcement experience, may tempt local authorities to rely on racial profiling and other prohibited practices in enforcing immigration laws.<sup>160</sup>

And to the extent that there exists anti-immigrant sentiments within a community (perhaps as a result of perceived economic competition with immigrants for scarce jobs), these sentiments may more likely be expressed by local authorities who live within those communities, rather than outside federal authorities.<sup>161</sup> These factors—lack of training, lack of experience, and local anti-immigrant senti-

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157. The federal government, for foreign policy reasons, occasionally declines to enforce its immigration laws. For example, there appears to be a "gentleman's agreement" not to enforce immigration laws in areas immediately surrounding Mexican consulates. When this agreement was breached by the August 2003 arrest of a Mexican family as the family was walking to a Mexican consulate in San Diego, Mexico protested strenuously to the Bureau of Customs and Border Protection (BCBP, the Border Patrol's parent agency). BCBP agreed to investigate and to stop all such enforcement. See Leonel Sanchez, *Mexican Consulate Line Shorter After Family's Arrest*, SAN DIEGO UNION-TRIB., Aug 5, 2003, at B3, 2003 WL 6600198.

158. See *supra* notes 143-48 and accompanying text.

159. See U.S. CITIZENSHIP & IMMIGRATION SERV., U.S. DEP'T OF HOMELAND SEC., WORKING FOR IMMIGRATION PROGRAMS, CORE OCCUPATIONS, <http://uscis.gov/graphics/workfor/careers/core.htm> (last visited Feb. 12, 2004).

160. For example, because they lack experience to recognize signs of illegal immigration or smuggling, local authorities may be tempted to question people about their immigration status solely based on the person's Mexican ancestry or use of Spanish, practices clearly prohibited by the Constitution. See *United States v. Brignoni-Ponce*, 422 U.S. 873, 885-86 (1975) (holding that occupants' apparent Mexican ancestry did not provide reasonable grounds for immigration officers to stop their vehicle and inquire about their citizenship status); see also *supra* notes 81-87 and accompanying text.

161. In arguing for devolution of immigration powers to the local level, Peter Spiro suggests that localized expressions of anti-immigrant sentiments (e.g., state laws that restrict immigrant eligibility for public aid) actually benefit immigrants because this local expression acts as a safety valve for local frustrations and prevents anti-immigrant sentiments from being expressed at the national level. Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 CONN. L. REV. 1627, 1628-39 (1997).

ments—make rogue enforcement of immigration laws more likely at the local level, raising further uniformity concerns about local enforcement. Faced with the potential for heightened and multiple levels of rogue enforcement, the federal government would be hard pressed to maintain a unitary immigration policy.

*E. Foreign Policy Implications of Nonuniform Enforcement*

If, as argued above, local authorities make immigration policy when they enforce immigration laws, then other countries may rightly feel more uncertainty about how their nationals will be treated under that policy than they would under a unitary federal policy. This heightened uncertainty could have spillover effects on U.S. relations with these countries. And if each state or local authority can enforce immigration laws as a sovereign, then a country that disagrees with the treatment of its nationals in a particular instance may not have a consistent or effective way to protest that treatment.<sup>162</sup>

Because nonuniform enforcement affects immigration policy and foreign policy, it is as constitutionally problematic as nonuniform immigration laws.

IV. VIOLATING THE CONSTITUTIONAL MANDATE FOR UNIFORMITY

The Department of Justice's inherent authority proposal violates the constitutional mandate for uniform immigration laws because it results in the nonuniform enforcement of these laws. The nonuniform enforcement is an inevitable result of the proposed structure: in the first place, states and localities decide whether they want to enforce immigration laws, and in the second place, if they do choose to enforce, they are bound by different state laws that affect their enforcement authority. The result would be that an immigration violation would be prosecuted in one jurisdiction but ignored in the neighboring jurisdiction.

*A. Nonuniformity: The Invitation for Enforcement*

Because the Department of Justice has structured its proposal as an invitation, individual state and localities decide for themselves whether to enforce federal immigration laws. Attorney General Ashcroft has emphasized repeatedly that local participation in immi-

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162. Consider BCBP's decision not to enforce immigration laws around Mexican consulates, as discussed in note 157, after Mexico lodged protests with the United States government. If the offending enforcement had instead been carried out by local or state police, the ability of Mexico to get that enforcement stopped in a timely manner would have been questionable, as Mexico would have had to deal with another level of governmental authority.

gration law enforcement is voluntary.<sup>163</sup> As a result, local authorities choose whether to enforce immigration laws, and the responses have been drastically different.

Generally, big cities with large immigrant communities have opposed local enforcement of immigration laws. Some, like Houston, had policies against local enforcement before the events of 9/11, and others, like Seattle, passed their policies in response to 9/11 and the subsequent clamor for tougher immigration law enforcement.<sup>164</sup>

But in smaller cities and towns and in rural areas, more local authorities have accepted DOJ's invitation and started to enforce immigration laws.<sup>165</sup> For example, in Bryan, Texas, just 100 miles northwest of Houston, the local police and sheriff's department engage in immigration law enforcement, through racial profiling of Hispanics and close cooperation with federal immigration officials.<sup>166</sup>

So if a person with an expired visa were to be stopped in Houston for a traffic violation, she would not be asked about her immigration status and would only be cited for the traffic offense. However, if she had committed the same traffic violation in Bryan, she would have her immigration status checked and would likely be placed in deportation proceedings.<sup>167</sup>

This differing enforcement, even between neighboring cities in the same state, violates the constitutional mandate for uniform immigration laws.

### B. Nonuniformity: Differing State Laws

Even if all the local authorities within a state agreed to enforce federal immigration laws, their enforcement would likely be different from the enforcement implemented by local authorities in neighboring states. The enforcement authority of local and state police comes from state laws and those laws vary widely as to whether they allow local enforcement and, if so, under what conditions. The variation in

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163. See Ashcroft Remarks on N-SEERS, *supra* note 2. As discussed *supra* Part II, notes 48-56 and accompanying text, the Tenth Amendment requires that DOJ's proposal be structured as an invitation.

164. See Nuchia Order, *supra* note 12; *Seattle Adopts "Don't Ask" Police Policy on Immigration*, *supra* note 15.

165. As discussed *supra* Part II, notes 88-95, 102-07 and accompanying text, police are reluctant to enforce immigration laws for fear of sowing distrust between their departments and local immigrants. For police who work in cities with large immigrant communities, this distrust would drastically reduce their ability to effectively enforce criminal laws.

166. Edward Hegstrom, *Family Looking for Justice After Deadly INS Raid*, HOUS. CHRON., July 28, 2002, at 1, 2002 WL 23211929.

167. Says Steve Gongora, a Bryan businessman and member of the Hispanic Group (a local group of Latino leaders), "In cases of Hispanics or people who look like they could be from Mexico, (police) will ask where they were born, and then they will ask for proper documentation." Hispanics who cannot show proper identification are jailed and federal immigration authorities are called. *Id.*

local laws adds another layer of nonuniformity that makes the invitation to local enforcement unconstitutional.

The authority of local and state police to make arrests is determined by state law.<sup>168</sup> Thus, any analysis of local enforcement must look to the laws of individual states to determine whether and, if so, under what circumstances, state law authorizes the types of arrests that local enforcement requires.<sup>169</sup> For example, Arizona law allows officers to make a warrantless arrest for a misdemeanor if they have probable cause to believe that the misdemeanor occurred, regardless of whether the offense occurred in their presence.<sup>170</sup> But in neighboring California, by contrast, officers may only make a warrantless arrest for a misdemeanor if the misdemeanor is actually committed in their presence.<sup>171</sup>

The result is uneven enforcement of immigration laws, even as between neighboring states. Arizona officers would be able to arrest for the misdemeanor of illegal entry even if they had not seen the person cross the border, as long as they had probable cause to suspect that the person had entered the United States illegally.<sup>172</sup> In California, however, officers are unlikely to arrest for illegal entry unless they happen to be assigned to a border area and to have seen the actual illegal crossing.<sup>173</sup> So, though the offense of illegal entry is defined by one federal law,<sup>174</sup> in practice, it will be enforced as different laws by local authorities.

This different enforcement by local authorities between states will necessarily violate the constitutional mandate for uniform immigration laws.

### C. The "Thousand Borders" Problem

The sum result of this nonuniformity—created by the invitational structure of DOJ's proposal and different state laws—would be a "thousand borders." As the examples discussed above demonstrate, an immigration violation would be subject to prosecution in one ju-

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168. See *Gonzales v. City of Peoria*, 722 F.2d 468, 475-76 (9th Cir. 1983), *overruled in part on other grounds by* *Hodgers-Durgin v. De La Vina*, 199 F.3d 1037 (9th Cir. 1999).

169. The Ninth Circuit in *Gonzales* determined that the Arizona law in effect at the time allowed officers to arrest for misdemeanors not committed in their presence, as long as they have probable cause to believe that the arrestee committed the offense. *Id.* at 476. For the misdemeanor of illegal entry, officers must have more evidence than that the non-citizen lacked proper paperwork, as there are other reasons not related to illegal entry to explain why he or she may not have proper papers (expired visa, etc.). *Id.*

170. ARIZ. REV. STAT. ANN. § 13-3883 (West 2003).

171. CAL. PENAL CODE § 836 (West 2003).

172. See ARIZ. REV. STAT. ANN. § 13-3883 (West 2003).

173. See CAL. PENAL CODE § 836 (West 2003).

174. Immigration and Nationality Act § 275, 8 U.S.C. § 1325 (2000).

risdiction but not in another, even neighboring, jurisdiction.<sup>175</sup> This differing enforcement violates the constitutional mandate for uniform immigration laws. Though officially there would be only one set of federal immigration laws, in reality there would be numerous sets of laws, as a result of the differing enforcement among jurisdictions and among states.

Constitutional arguments aside, what, if anything, is wrong with having differing enforcement of immigration laws? Proponents of local enforcement argue that any additional enforcement of immigration laws, even if uneven, is an improvement from the scattered enforcement currently being provided by the federal authorities.<sup>176</sup>

But additional enforcement, per se, does not equal good immigration policy. Knowing that the neighboring authorities do not enforce immigration laws, states and localities could use local enforcement to discourage the formation of immigrant communities in their jurisdictions. Even legal immigrants could be intimidated from settling in a particular area if they believe that they will be subject to racial profiling from local authorities.<sup>177</sup> The constitutional rights of these legal immigrants to travel could be limited by anti-immigrant sentiment from localities.<sup>178</sup>

Additionally, local enforcement would shift at least some immigration policy making power from the federal government to local authorities, with negative implications for the nation's foreign policy. Local authorities could choose to enforce immigration laws in geographical areas that the federal government, for foreign policy reasons, has chosen not to enforce. For example, federal immigration officials were strongly criticized for the August 2003 arrest of an undocumented Mexican family as they were walking to the Mexican consulate in San Diego.<sup>179</sup> Mexico protested these arrests to the United States, arguing that immigration law enforcement so close to the consulate prevented Mexican officials from performing their consular duties, including the issuance of the controversial Mexican ID cards to its citizens.<sup>180</sup> In response, federal officials agreed to stop

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175. See *supra* notes 163-74 and accompanying text.

176. See Representative Charlie Norwood, *Cracking Down on Criminal Illegals*, HOUS. CHRON., Aug. 15, 2003 (on file with author); JOHN L. MARTIN ET AL., FED'N FOR AM. IMMIGRATION REFORM, *State of Insecurity: How State and Local Immigration Policies Are Undermining Homeland Security*, 2-3, available at <http://www.fairus.org/news/News-Print.cfm?ID=1626&c=55> (last visited Feb. 22, 2004).

177. See *supra* notes 85-95 and accompanying text.

178. See *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (holding that constitutional protections apply to all persons who enter the country); *Mem'l Hosp. v. Maricopa County*, 415 U.S. 250, 254-55 (1974) (holding that the right to travel is a constitutional right).

179. Leonel Sanchez, *Mexican Consulate Line Shorter After Family's Arrest*, SAN DIEGO UNION-TRIB., Aug. 5, 2003, at B3, 2003 WL 660198.

180. *Id.*

making arrests close to consulate buildings.<sup>181</sup> But if local authorities, acting on their inherent authority, decided to enforce immigration laws in these politically sensitive areas, the federal government would likely encounter problems (either legal or political) in stopping this enforcement, though it would be the federal government that would face the foreign policy consequences of the enforcement.

Moreover, unlike federal enforcement, which critics contend is also unevenly and inconsistently applied, local enforcement can *never* be made uniform because of Tenth Amendment restrictions. Though the federal government may be able to require states to make their enforcement laws uniform through exercise of the Supremacy Clause, it cannot “commandeer” state machinery and require local authorities to enforce immigration laws.<sup>182</sup> Thus unlike federal enforcement, which could be made uniform through legislation and increased funding, attempts to make local enforcement uniform face insurmountable constitutional hurdles.

It was this concern for uniform immigration laws that prompted the Court of Appeals of New York (the state’s highest court) to strike down a state law that terminated state-funded Medicaid benefits for certain classes of noncitizens.<sup>183</sup> The state argued that federal law, namely the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), authorized it to discriminate on the basis of alienage.<sup>184</sup> Acknowledging that federal immigration legislation is usually subject only to rational basis scrutiny because of the federal government’s plenary power in that area, the court nonetheless subjected the state law to strict scrutiny analysis.<sup>185</sup>

The court looked at a long line of Supreme Court cases, including *Graham v. Richardson* and *Mathews v. Diaz*, and concluded that they all required a uniform immigration policy.<sup>186</sup> Because New York was not following a uniform federal immigration policy but rather was deciding for itself whether to deny Medicaid benefits based on alienage, New York could not ride on the coattails of federal immigration ple-

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181. *Id.*

182. *See* *Printz v. United States*, 521 U.S. 898, 935 (1997); *see also supra* notes 48-56 and accompanying text.

183. *Aliessa v. Novello*, 754 N.E.2d 1085 (N.Y. 2001). The state law denied state-funded Medicaid to permanent resident aliens (green card holders) who entered the United States after August 22, 1996 and to PRUCOL residents (permanently residing in the U.S. under color of law—i.e., not lawfully admitted but whom the INS has no plans to deport). *Id.* at 1088.

184. PRWORA purports to allow states to deny state-funded Medicaid benefits to noncitizens, even when the noncitizens may be eligible for federal Medicaid benefits. Conversely, PRWORA also allows states to extend state benefits to noncitizens ineligible for federal benefits. *Id.* at 1098 (citing to 8 U.S.C. §§ 1621(d), 1622(a)).

185. *Id.* at 1096.

186. *Id.* at 1096-98.

nary power, federal authorization notwithstanding.<sup>187</sup> “In the name of national immigration policy, it impermissibly authorizes each State to decide whether to disqualify many otherwise eligible aliens from State Medicaid.”<sup>188</sup> The court then concluded that New York’s law violated equal protection because the state, unlike the federal government, has no compelling interest in making distinctions based on alienage.<sup>189</sup>

Similarly, because DOJ’s invitation allows local authorities to decide for themselves whether to enforce immigration laws and would result in nonuniform immigration policy, it is necessarily unconstitutional.

#### IV. CONCLUSION

The inherent authority position—that state and local authorities have authority as sovereigns to enforce immigration laws—is problematic for many reasons. Courts that have previously considered the related question of local enforcement have focused on preemption and the murky task of discerning congressional intent; opponents of local enforcement, including police departments and immigrant rights groups, have focused on the negative policy implications of having local police enforce immigration laws in their communities.

But even beyond these important policy and legal problems, the inherent authority position faces an insurmountable hurdle in the Constitution itself. As demonstrated above, immigration law, as a constitutional matter, must be exercised uniformly. The inherent authority position violates that mandate by creating a thousand borders—the result of allowing local authorities to decide for themselves whether to enforce immigration laws and then having those local authorities be bound by different state laws that affect their enforcement authority. The nonuniformity inherent in the inherent authority position is a fatal flaw that dooms DOJ’s invitation for local enforcement.

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187. *Id.* at 1098.

188. *Id.*

189. *See id.*



