

PUNTING ON THE VALUES OF FEDERALISM IN THE  
IMMIGRATION ARENA? EVALUATING OPERATION  
LINEBACKER, A STATE AND LOCAL LAW  
ENFORCEMENT PROGRAM ALONG THE U.S.-  
MEXICO BORDER

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*Attempting to combat drug trafficking and immigrant smuggling, a coalition of sheriffs' departments increased police presence along the United States's border with Mexico. Dubbed Operation Linebacker, sheriff deputies have increased patrols and, in some cases, set up vehicle checkpoints to deter crime along the border. In Texas, the Governor has provided state resources to support increased police activities. The actions have not gone without criticism, as residents and some lawmakers have complained that the deputies are enforcing federal immigration law—a claim the departments deny. This Note examines the legality of Operation Linebacker and related state and local law enforcement activities. It analyzes whether state enforcement of federal immigration laws is preempted by federal law and considers the effect of such a program on the underlying values of federalism. After examining the history of immigration enforcement by federal and state officials, evaluating issues related to preemption and state authorization, and considering policy implications, this Note ultimately concludes that any independent border enforcement by state and local law enforcement fails to fulfill values of uniformity and legitimacy in an area that implicates national affairs.*

“The border is a tough area to work. Sometimes there are no rules.”<sup>1</sup>

INTRODUCTION

Fifty miles downriver from the large but isolated border city of El Paso<sup>2</sup> lies a low point of the Rio Grande called Neely's Crossing. At 2:10 PM on January 23, 2006, Texas State Troopers and Hudspeth County Sheriff's Department deputies chased three vehicles, two of which fled into Mexico at Neely's Crossing.<sup>3</sup> On the Mexican side of the river, armed persons in a Humvee ushered the vehicle across the river as Texas and Hudspeth County authorities watched helplessly from the riverbanks

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1. David Montgomery, *The Chairman's Turf*, Wash. Post, Jan. 4, 2007, at C1 (quoting U.S. Representative Silvestre Reyes of El Paso, Tex., incoming Chairman of House Committee on Intelligence and former El Paso Sector Chief of U.S. Border Patrol).

2. See generally Spencer S. Hsu, *Border Crackdown Has El Paso Caught in Middle*, Wash. Post, Aug. 21, 2007, at A1 (describing impact of immigration policies on border community).

3. *Armed and Dangerous: Confronting the Problem of Border Incursions*: Hearing Before the Subcomm. on Investigations of the H. Comm. on Homeland Security, 109th Cong. 3 (2006) (statement of Sheriff Arvin West, Hudspeth County, Texas).

on the American side.<sup>4</sup> This event and others caused state and local police departments to recognize the need to deter, rather than merely react to, drug running and immigrant smuggling.<sup>5</sup>

Just outside El Paso lies San Elizario, a small farming community along the Rio Grande. In the spring of 2006, residents complained of being stopped at a vehicle checkpoint manned by El Paso County Sheriff's Office deputies as part of the Department's increased patrols. After asking for drivers' licenses and insurance, the residents said, the deputies would ask one final question: Are you an American citizen?<sup>6</sup> When citizens complained, Department spokesperson Rick Glancey responded: "We are not involved in immigration law."<sup>7</sup>

These stories are typical of the frustrations felt by law enforcement officials and citizens living near the United States's southern border. They provide local perspectives on an issue that has garnered national attention as Congress and the President seek to overhaul federal immigration policy.<sup>8</sup> State and local law enforcement agencies, frustrated by a

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4. *Id.*

5. See Louie Gilot, *Sheriffs Unite, Want Federal Money*, *El Paso Times*, Mar. 25, 2006, at 5B [hereinafter *Gilot, Sheriffs Unite*] ("Border sheriffs, overwhelmed by increased immigration and drug-related activity in their counties, decided Friday to join forces across California, Arizona, New Mexico and Texas to coordinate enforcement operations and go after federal money for border security."); see also James Pinkerton, *Localized Immigration Enforcement on Rise: Federal Inaction Means More than Ever, Nation's Law Agencies Take Issue into Own Hands*, *Houston Chron.*, Oct. 9, 2007, at A1 ("These operations are focused on deterring crime, drug smuggling and human trafficking in our border communities." (quoting spokesperson for Texas Governor Rick Perry)).

6. Louie Gilot, *Petition Pressed: EP Sheriff Attacked for "Harassing" Public*, *El Paso Times*, June 1, 2006, at 1B [hereinafter *Gilot, Petition*] ("Some El Paso County residents said they have been asked for their Social Security cards and immigration papers by El Paso County sheriff's deputies during regular traffic stops . . ."); see also *Complaint at 2-3, Starr v. Samaniego*, No. EP-06-CA-0188 (W.D. Tex. May 26, 2006) ("Deputy asked [bus] driver if passengers looked like his normal riders . . . Deputy then asked six remaining passengers seated towards rear of bus if they had ID . . .").

7. Glancey also said that complaints from other parts of the county regarding such inquiries have proved to be unfounded. *The War Out There*, *Newspaper Tree*, May 29, 2006, at [http://www.newspapertree.com/view\\_article.sstg?c=11de08e9799e4968&mc=54571a9e1df74ca6](http://www.newspapertree.com/view_article.sstg?c=11de08e9799e4968&mc=54571a9e1df74ca6) (on file with the *Columbia Law Review*).

8. See *Address Before a Joint Session of the Congress on the State of the Union*, 43 *Weekly Comp. Pres. Doc.* 57, 59 (Jan. 23, 2007) ("Let us have a serious, civil, and conclusive debate, so that you can pass and I can sign comprehensive immigration reform into law."); Editorial, *The Dallas Morning News Texan of the Year: The Illegal Immigrant*, *Dallas Morning News*, Dec. 30, 2007, at 1P (noting impact of undocumented immigration); Anabelle Garay, *Calls for Immigration Reform Attract Thousands in 10 States*, *Wash. Post*, Apr. 10, 2006, at A7 (recounting immigration reform rallies in cities across United States); "No Turning Back": *Dallas Police Estimate Crowd from 350,000 to 500,000; Boycott Today Aims to Show Hispanics' Economic Power*, *Dallas Morning News*, Apr. 10, 2006, at 1A (describing Dallas immigration reform rally with marchers favoring legal status for eleven million immigrants); *Teresa Watanabe & Hector Becerra, 500,000 Pack Streets to Protest Immigration Bills: The Rally, Part of a Massive Mobilization of Immigrants and Their Supporters, May Be the Largest L.A. Has Seen*, *L.A. Times*, Mar. 26, 2006, at A1 (describing Los Angeles rally).

perceived lack of federal resources and by events like the chase in Hudspeth County, have been increasing their activities along the border.<sup>9</sup> One program in Texas, dubbed Operation Linebacker, has come under intense criticism from immigrant rights advocates, who claim that deputies are using the program directly to enforce federal immigration laws.<sup>10</sup> Local law enforcement officers have responded that they are doing what is necessary to secure the border.<sup>11</sup> Members of Congress have supported Operation Linebacker-type activities across the entire southwestern border and considered explicitly authorizing state peace officers to enforce federal immigration laws.<sup>12</sup>

This Note examines the legality of Operation Linebacker and related state and local law enforcement activities. It analyzes whether state enforcement of federal immigration laws is preempted by federal law and considers the effect of such a program on the underlying values of federalism.<sup>13</sup> Part I reviews the history of immigration regulation and enforcement in the United States, evaluates general preemption principles, and describes when states officers can act. Part II consists of three sections. Part II.A describes Operation Linebacker, and Part II.B evaluates the legality of Operation Linebacker by determining (1) whether enforcement

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9. See Juan Castillo, *State Shifts Officers South: Perry's Border Fight, No Price Tag Put on Effort to Curb Violence Along Rio Grande*, *Austin Am.-Statesman*, Feb. 10, 2006, at A1 ("The governor's initiative shifts existing Texas Department of Public Safety officers and state equipment to troubled border areas to work with local officials.").

10. See Brandi Grissom, *Deputies Instilling Fear in Residents, Groups Say*, *El Paso Times*, May 23, 2006, at 2A [hereinafter Grissom, *Deputies*] ("El Paso County Attorney José Rodríguez said complaints about the operations from [the El Paso Interreligious Sponsoring Organization], the Mexican Consulate in El Paso and the Border Network for Human Rights have been mounting and that he discussed the concerns with Sheriff Leo Samaniego about a week ago.").

11. David McLemore, *Coalition to Add Patrols at Border: Sheriffs from 16 Counties to Split \$6 Million State Grant*, *Dallas Morning News*, Nov. 8, 2005, at 3A ("We've always said that border security is a federal responsibility but that local law enforcement also has a role." (quoting Operation Linebacker Chairman Sigifredo Gonzalez, Sheriff of Zapata County, Texas)).

12. Legislation was introduced in the 109th Congress specific to Operation Linebacker-type activities, but the bills were not reported from committee. See H.R. 6007, 109th Cong. (2006); H.R. 4360, 109th Cong. (2005). The House passed a bill permitting sheriffs along the border to transfer unlawfully present immigrants in their custody to federal officials—a practice they already follow—and providing for prompt payment of costs. H.R. 4437, 109th Cong. § 607 (2005). The bill was referred to committee in the Senate but no action resulted. 152 Cong. Rec. S249 (daily ed. Jan. 27, 2006).

13. Cf. Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 *Colum. L. Rev.* 1001, 1074–81 (1995) (comparing commandeering to "traditional values of federalism"); Barry Friedman, *Valuing Federalism*, 82 *Minn. L. Rev.* 317, 321 (1997) (arguing respecting value of federalism requires maximizing benefits of regulation at multiple levels of government); Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 *UCLA L. Rev.* 903, 907 (1994) (arguing federalism does not achieve purported goals articulated in case law); Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 *Tex. L. Rev.* 1, 51–65 (2004) (evaluating underlying values of federalism).

of federal immigration law is preempted and (2) whether local law enforcement is authorized to enforce federal immigration law. It finds that Operation Linebacker, as it is described by officials as “increased police activity,” is authorized and within state police powers, but that reported actual activities involving independent immigration enforcement are indeed preempted by federal law and unauthorized by state law. Part II.C evaluates the federalism values the Supreme Court has articulated in cases involving foreign affairs and finds that state and local law enforcement of federal immigration laws fails to account for those values, which adds further support for preemption. Finally, Part III recommends that courts must account for the values of federalism in the immigration arena and includes recommendations for policymakers as well. The Note ultimately concludes that any independent border enforcement by state and local law enforcement fails to fulfill the values and doctrine articulated by the Supreme Court regarding state action that implicates international affairs.

## I. LAWS AND ENFORCEMENT OF THE BORDERS

Evaluating the history of immigration laws and their enforcement provides perspective on the appropriate roles of state and federal government in this area. This history reveals the importance placed on uniformity in federal enforcement and the ability of the United States government to speak with one voice regarding issues that involve foreign nationals. Moreover, it demonstrates how the increased role of the United States government and complexity of the federal laws displaced state authority in the area nearly completely. Part I.A examines state and federal regulation and enforcement of immigration. Part I.B briefly recounts the circumstances under which federal law will preempt state action and evaluates the requirement of state authorization.

### A. Regulation and Enforcement

1. *State Regulation.* — Much of the current policy debate about immigration focuses on the federal government’s regulation of the borders.<sup>14</sup> These accounts leave the impression that immigration into the United States was mostly unregulated until the federal government became involved in the late nineteenth century.<sup>15</sup> In fact, however, states regulated

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14. See, e.g., Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. Pa. J. Const. L. 1084, 1088 (2004) [hereinafter Wishnie, *State and Local*] (noting “little federal regulation of immigration” without mentioning historical state regulations); Catherine Etheridge Otto, Comment, *Tracking Immigrants in the United States: Proposed and Perceived Needs to Protect the Borders of the United States*, 28 N.C. J. Int’l L. & Com. Reg. 477, 480–85 (2002) (providing overview of federal enforcement of immigration law).

15. See Gerald L. Neuman, *Strangers to the Constitution* 19 (1996) [hereinafter Neuman, *Strangers*] (“[L]egal discussions of immigration regulation in the United States rest upon a myth, the assertion that the borders of the United States were legally open

early immigration to and throughout the United States.<sup>16</sup> States impeded the right of the poor to travel,<sup>17</sup> imposed laws on travelers intended to maintain slavery,<sup>18</sup> and controlled immigration for health reasons.<sup>19</sup>

Early cases upheld state “immigration” laws, primarily on the grounds of state police power.<sup>20</sup> Challenges to these laws focused on their interference with foreign commerce, a domain over which the federal government held power. But courts demonstrated strong support for the state police power to regulate health, safety, and welfare. For example, in *Mayor of New York v. Miln*, the Supreme Court upheld a New York law requiring the master of a ship to indemnify the state against any passenger who may become a charge of the state.<sup>21</sup> The Court held that the regulation did not interfere with commerce and was a legitimate exer-

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until the enactment of federal immigration legislation . . .”). Professor Neuman goes on to describe state regulation of transborder movement. *Id.*

16. See *id.* at 19–20 (examining categories of state immigration to “recover the legal history obscured by the open-borders myth”). See generally Gerald L. Neuman, *The Lost Century of Immigration Law (1776–1875)*, 93 *Colum. L. Rev.* 1833 (1993) (describing immigration policies of 1800s). Numerous works discussing the history of immigration regulation and enforcement rely on Professor Neuman’s important research on state immigration regulation. E.g., Thomas Alexander Aleinikoff et al., *Immigration and Citizenship: Process and Policy* 171, 177, 443 (5th ed. 2003); Kevin R. Johnson, *Open Borders?*, 51 *UCLA L. Rev.* 193, 213 (2003).

17. For example, Massachusetts required payment of a bond to indemnify against passengers who could become public charges, Neuman, *Strangers*, *supra* note 15, at 25, and a New York state law permitted removal of strangers likely to become public charges, *id.* at 27. States also emphasized regulation of criminal convicts. Prior to the Revolutionary War, English courts banished convicts to the American colonies—a practice that the colonies protested and unsuccessfully attempted to restrict. *Id.* at 21. After independence, states passed legislation restricting the transportation of convicts into their territories, with some state laws even barring the transportation of convicts from other states. *Id.* at 21–22. States primarily handled the regulation and enforcement of these measures, as the federal government limited its involvement in this area to diplomatic protests against foreign nations banishing their convicts to the United States. *Id.* at 21–22. Until the federal government enacted its first prohibition on the immigration of convicts in 1875, Congress’s involvement in this area included requests for information from the executive branch regarding the immigration of convicts into the United States and an 1866 resolution protesting foreign governments sending convicts to the United States. *Id.* at 22.

18. Slave states barred the immigration of free blacks to their territories and prohibited free black sailors serving as crewmen on ships from disembarking and communicating with the local black population. See *id.* at 37–40.

19. Individuals arriving at seaports could face quarantine, and enforcement could vary depending on a variety of factors, including weather, the origin of the ship, and whether passengers and crew were exhibiting illness. *Id.* at 32. The federal government provided support for such state enforcement measures. Federal legislation in the late 1700s, for example, authorized the President to “direct federal customs officials to aid in the execution of state quarantine and health laws.” *Id.* at 33–34 (citing Act of May 27, 1796, ch. 31, 1 Stat. 474).

20. See, e.g., *Mayor of N.Y. v. Miln*, 36 U.S. (11 Pet.) 102 (1837) (affirming constitutionality of New York passenger law based on state police power).

21. *Id.* at 130–31 (describing statute).

cise of the state's police power to keep foreign paupers out of its boundaries.<sup>22</sup> Even in cases in which courts ruled against the state, which included issues involving foreign nationals, states still asserted their authority contrary to federal court orders. For example, in *Elkison v. Deliesseline*, a case involving South Carolina officials who imprisoned a black sailor on a British ship while the ship was in Charleston harbor, the court held that the state law infringed on foreign commerce.<sup>23</sup> Demonstrating the power of the states in the early federal republic, South Carolina continued to enforce the statute that had been in question.<sup>24</sup> While *Miln* showed the Court's willingness in the early republic to recognize state authority even in an area that impacted foreign commerce, and *Elkison* demonstrated the general power exercised by states, such authority would be short-lived.

2. *Federal Regulation.* — The federal government's early actions in immigration were limited by today's standards.<sup>25</sup> The Naturalization Acts of the early republic established the procedures for free whites to become naturalized citizens and authorized both federal and state courts to naturalize new citizens.<sup>26</sup> Provisions of the Alien Sedition Acts increased the required time that a person must be in the United States before qualify-

22. *Id.* at 132 (“[W]e are of opinion, that the act is not a regulation of commerce, but of police; and that being thus considered, it was passed in exercise of a power which rightfully belonged to the states.”).

23. *Elkison v. Deliesseline*, 8 F. Cas. 493 (C.C.D.S.C. 1823) (No. 4,366) (“[T]he right of the general government to regulate commerce with the sister states and foreign nations is a paramount and exclusive right . . .”).

24. See Neuman, *Strangers*, *supra* note 15, at 38 (noting that *Elkison* opinion was “violently denounced” in South Carolina and that “[i]ncidents continued in that and other states”).

25. See Lawrence H. Fuchs & Susan Forbes Martin, *Immigration and U.S. History—The Evolution of the Open Society*, in Aleinikoff et al., *supra* note 16, at 149 (describing history of federal immigration regulation).

26. See Act of May 26, 1824, ch. 186, 4 Stat. 69 (facilitating naturalization of free white minors); Act of Mar. 22, 1816, ch. 32, 3 Stat. 258 (requiring certificate from “proper clerk,” detailing intention to naturalize, and to be read into record of court); Act of July 30, 1813, ch. 36, 3 Stat. 53 (allowing naturalization of persons who made declaration of intention to naturalize prior to June 18, 1812, as well as those eligible for citizenship as of that date, regardless of status as “enemy alien”); Naturalization Act of 1804, ch. 47, 2 Stat. 292 (allowing naturalization of free white persons who lived in jurisdiction of United States from 1798 to 1802); Naturalization Law of 1802, ch. 28, 2 Stat. 153 (establishing conditions under which “a free white person . . . may be admitted to become a citizen of the United States”); Naturalization Act of 1798, ch. 54, 1 Stat. 566 (establishing five year notice period and fourteen year residency period for person to naturalize and requiring registration of each alien, to be reported to Secretary of State); Naturalization Act of 1795, ch. 20, 1 Stat. 414 (establishing three year notice and five year residency period for naturalization and requiring declaration of intent “before the supreme, superior, district or circuit court of some of the states . . . or a circuit court or district court of the United States”); Naturalization Act of 1790, ch. 3, 1 Stat. 103 (“[A]ny alien, being a free white person[,] . . . may be admitted to become a citizen . . . on application to any common law court of record . . .”).

ing for naturalization.<sup>27</sup> These laws authorized the President to deport an immigrant dangerous to the United States<sup>28</sup> and to detain and deport an immigrant whose country was at war with the United States.<sup>29</sup> But, aside from these early naturalization laws, immigration enforcement was primarily an activity of the states,<sup>30</sup> and Congress authorized federal support for some of that activity.<sup>31</sup>

The federal government's role increased substantially in the decades following the Supreme Court's explicit statement in 1849 that "a State cannot prohibit the introduction of foreigners brought to this country under the authority of Congress."<sup>32</sup> After the Court's ruling in *Mayor of New York v. Miln*, New York imposed a fee on all vessels entering the harbor from a foreign port to pay for a quarantine hospital,<sup>33</sup> and Massachusetts imposed a \$2 per passenger tax on all ships from foreign ports to pay for individuals who could become charges of the state.<sup>34</sup> Massachusetts also required ship owners to post a bond for individuals deemed likely to be public charges by state inspectors.<sup>35</sup> The Supreme Court struck down these laws in *The Passenger Cases*, holding that the imposition of taxes by states was regulation of foreign commerce in violation of the Constitution.<sup>36</sup> In the opinion, the Court recognized the importance of uniformity<sup>37</sup> and the importance of the national government speaking with one voice in instances that "take[e] into view our relations with other countries."<sup>38</sup> In fact, the national government's exclusive authority over foreign commerce required the exclusion of state authority in the area.<sup>39</sup> Left without means of financing their immigration measures, state delegations to the federal government were left with no choice but to support federal regulation of immigration.<sup>40</sup>

27. Naturalization Act of 1798, ch. 54, 1 Stat. 566.

28. An Act Concerning Aliens, ch. 58, 1 Stat. 570 (1798).

29. An Act Respecting Alien Enemies, ch. 66, 1 Stat. 577 (1798) (codified as amended at 50 U.S.C. §§ 21–24 (2000)).

30. See *supra* Part I.A.1.

31. Congress authorized the President to "direct revenue officers . . . to aid in the execution of . . . the health laws of the states . . ." Act of May 27, 1796, ch. 31, 1 Stat. 474. Congress also established procedures to count the immigrants on ships entering U.S. ports, requiring captains to supply the Collector of Customs a passenger manifest. Fuchs & Martin, *supra* note 25, at 149.

32. *Smith v. Turner (The Passenger Cases)*, 48 U.S. (7 How.) 283, 406 (1849).

33. See Neuman, *Strangers*, *supra* note 15, at 27–29.

34. See *id.* at 24–26.

35. See *id.*

36. *The Passenger Cases*, 48 U.S. (7 How.) at 408–09.

37. *Id.* at 405 ("To secure this uniformity was one of the motives which led to the adoption of the Constitution.").

38. *Id.* at 409.

39. See *id.* at 408–09.

40. S. Rep. No. 61-747, at 568 (1911) ("The only alternative was the recommendation of the Supreme Court that Congress assume control of immigration legislation, and New York representatives in Congress immediately endeavored to secure passage of a general immigration law.").

Furthermore, in 1875, the Supreme Court issued several rulings that restricted the states' rights to regulate immigration. The Court extended preemption on immigration matters (not just when "foreign commerce" is at issue, as it had done in *The Passenger Cases*) when it struck down New York regulations requiring a ship's captain to report the names, previous addresses, and occupations of non-United States citizens to the Mayor of New York City or provide a bond, on the grounds that the matter related to international relations and thus required uniformity.<sup>41</sup> Later that year, the Supreme Court struck down a California statute excluding Chinese immigrants except upon payment of a bond, holding: "The passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the States."<sup>42</sup>

The federal government affirmatively entered into general immigration regulation with the Immigration Act of 1882.<sup>43</sup> Similar to many of the state laws in effect during the previous decades, the federal law barred the entry of any "convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge"<sup>44</sup> and also imposed a tax on all persons entering the United States via boat.<sup>45</sup> In the following decades, Congress's regulations became more pervasive, further displacing any state regulations that related to foreign-born individuals.<sup>46</sup>

Again, during this period, the Supreme Court found that federal law preempted state regulation of immigration, holding that immigration was

41. *Henderson v. Mayor of N.Y.*, 92 U.S. 259, 273 (1875) ("[T]he matter of these statutes may be, and ought to be, the subject of a uniform system or plan. The laws which govern the right to land passengers in the United States from other countries ought to be the same in New York, Boston, New Orleans, and San Francisco.")

42. *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875) ("[Congress] has the power to regulate commerce with foreign nations: the responsibility for the character of those regulations, and for the manner of their execution, belongs solely to the national government.")

43. Immigration Act of 1882, ch. 376, 22 Stat. 214.

44. *Id.* § 2.

45. See *id.* ("That there shall be levied, collected, and paid a duty of fifty cents for each and every passenger not a citizen of the United States . . .").

46. The Immigration Act of 1891 barred polygamists and individuals with dangerous diseases from entering the United States. Act of March 3, 1891, ch. 551, § 1, 26 Stat. 1084, 1084 (barring "[a]ll idiots, insane persons, paupers[,] . . . persons suffering from a loathsome or a dangerous contagious disease . . . [and] polygamists"). The 1891 Act also established the Office of the Superintendent of Immigration within the Treasury Department. See *id.* § 7, at 1085 ("That the office of superintendent of immigration is hereby created and established . . ."). The 1917 Act increased the tax on each immigrant entering via ship, prohibited entry for illiterate adults, and created the "Asiatic Barred Zone," which excluded immigrants from Asia. Immigration Act of 1917, ch. 29, §§ 2–3, 39 Stat. 874, 875, 876–77 (barring "[a]ll aliens over sixteen years of age, physically capable of reading, who can not read the English language, or some other language or dialect" and individuals from Asian countries). Congress established quotas limiting the number of immigrants who could enter the United States in 1921, Immigration Act of 1921, ch. 8, § 2, 42 Stat. 5, 5–6, and the 1924 Act set additional limits excepting immigrants from the Americas, Immigration Act of 1924, ch. 190, §§ 4–8, 11, 43 Stat. 153, 155–57, 159–60.

the exclusive province of the federal government.<sup>47</sup> In a challenge to the Chinese Exclusion Act, the Supreme Court ruled that the federal government had the authority to exclude foreigners under its sovereign powers delegated by the Constitution.<sup>48</sup> The Court also struck down attempts by states to regulate immigration, finding impermissible early twentieth century regimes such as registration requirements, limitations on employment, and even the denial of fishing licenses.<sup>49</sup> The federal government further entrenched its role in regulating immigration with major reforms and complex regulatory schemes throughout the twentieth century and into the early part of this decade.<sup>50</sup>

States' near exclusive control over immigration at the beginning of the republic was greatly diminished in the nineteenth century, and increasing federal regulation preempted any state attempts to exert control in this area.<sup>51</sup> Moreover, current U.S. immigration law is "detailed and

47. *Edye v. Robertson* (Head Money Cases), 112 U.S. 580, 600 (1884) ("Congress ha[s] the power to pass a law regulating immigration as a part of the commerce of this country with foreign nations . . .").

48. *Chae Chan Ping v. United States*, 130 U.S. 581, 609 (1889). Elsewhere in the opinion, the Court put the proposition even more forcefully: "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." *Id.* at 603.

49. See, e.g., *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948) (striking state law denying fishing license to legal immigrant ineligible for citizenship); *Hines v. Davidowitz*, 312 U.S. 52 (1941) (striking state law requiring immigrants over age of eighteen to register with state, pay annual registration fee, and receive and carry alien identification card); *Truax v. Raich*, 239 U.S. 33 (1915) (striking state law regulating immigrant employment).

50. Overturning a veto by President Truman, Congress enacted its most comprehensive immigration law in 1952 that formed the basis of immigration law today. See Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.). The law abolished racial restrictions but still maintained quotas and also authorized the deportation of communist sympathizers. See *id.* at 175-81, 205. In 1965, the amendments to the Immigration & Nationality Act eliminated quotas and gave preference to relatives of U.S. citizens. Act of Oct. 3, 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified as amended in scattered sections of 8 U.S.C.). For the first time, a cap was placed on the number of visas available to immigrants from the Americas. See *id.* In 1986, Congress passed the Immigration Reform & Control Act, which granted amnesty to undocumented immigrants present in the United States prior to 1982 and criminalized the hiring of undocumented immigrants. Immigration Reform & Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified in scattered sections of 8 U.S.C.). In 1996, Congress changed deportation proceedings and barred permanent residency to any immigrant convicted of a crime. Illegal Immigration Reform & Immigrant Responsibility Act of 1996 (IIRAIRA), Pub. L. No. 104-208, 110 Stat. 3009 (codified at 18 U.S.C. § 758 and in scattered sections of 8 U.S.C.). In 2004, the REAL ID Act established national standards for identification cards and drivers' licenses, waived laws barring construction of physical barriers at the border, and defined issues related to terrorism. REAL ID Act of 2005, Pub. L. No. 109-13, div. B, 119 Stat. 302 (to be codified at 8 U.S.C. §§ 1101, 1155).

51. See *supra* notes 47-50. This does not mean that Congress has preempted all state regulations that touch on immigration. In *De Canas v. Bica*, the Supreme Court held that a state law barring immigrants from employment did not regulate immigration because it

complex,'” being “termed ‘second only to the Internal Revenue Code in complexity.’”<sup>52</sup> Much of the complexity of immigration laws is attributed to the fact that the laws are both criminal and civil in nature.<sup>53</sup> This complexity is further exacerbated by the practical difficulties associated with implementation; enforcement of immigration laws, immigrant classifications, agency coordination, and adjudication of claims all present unique challenges.<sup>54</sup>

As this section indicates, the federal government has implemented a complex system of regulations pertaining to immigration. Many of the academic articles evaluating the validity of state and local law officials enforcing federal immigration policy have evaluated the laws but touched only briefly on the history of law enforcement on the border.<sup>55</sup> The following section addresses the history of immigration enforcement.

3. *Federal Enforcement.* — Federal authority over immigration has vastly increased and that immigration law has grown more complex over time. The United States did not maintain a federal police force to enforce federal immigration laws during the 1800s, but as early as 1819, customs inspectors collected ship manifests at major sea ports and provided the information to the Secretary of State.<sup>56</sup> Following the enact-

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did not determine “who should or should not be admitted into the country, and the conditions under which a legal entrant may remain.” 424 U.S. 351, 355 (1976). Recent state laws regulating employment that touch on immigration have been upheld. See *Ariz. Contractors Ass’n v. Napolitano*, No. CV07-1355-PHX-NVW, 2007 WL 4570303, at \*12–\*14 (D. Ariz. Dec. 21, 2007).

52. Memorandum from Cong. Research Serv. to the House Comm. on the Judiciary 2–4 (Jul. 28, 2005), available at <http://www.ilw.com/immigdaily/news/2005,0824-crs.pdf> (on file with the *Columbia Law Review*) [hereinafter CRS Memo] (quoting 1 Charles Gordon, Stanley Mailman & Stephen Yale-Loehr, *Immigration Law and Procedure* § 2.01 (rev. ed. 2005) & *Castro-O’Ryan v. INS*, 821 F.2d 1415, 1419 (9th Cir. 1987)).

53. Immigration laws detail a series of civil procedures and outline civil violations as well as criminal violations. See, e.g., 8 U.S.C. §§ 1321–1330 (detailing civil and criminal penalties for different violations and crimes).

54. See CRS Memo, *supra* note 52, at 3–7 (describing multiple categories of immigrants, problems of border enforcement, and complexity of legal issues presented to immigration courts).

55. See, e.g., Muzaffar A. Chishti, *The Role of States in U.S. Immigration Policy*, 58 N.Y.U. Ann. Surv. Am. L. 371, 371–72 (2002) (offering brief description of federal and state collaboration efforts before September 11, 2001); Karl Manheim, *State Immigration Laws and Federal Supremacy*, 22 *Hastings Const. L.Q.* 939, 955 (1995) (providing brief description of modern efforts to strengthen border enforcement); Wishnie, *State and Local*, *supra* note 14, at 1105 (listing number of border arrests made in 2000); Jill Keblawi, *Comment, Immigration Arrests by Local Police: Inherent Authority or Inherently Preempted*, 53 *Cath. U. L. Rev.* 817, 838–46 (2004) (discussing legality of state and local law enforcement activities); Tiffany Walters Kleinert, *Note, Local and State Enforcement of Immigration Law: An Equal Protection Analysis*, 55 *DePaul L. Rev.* 1103 (2006) (examining equal protection issues related to local and state enforcement of immigration law while only briefly describing past failures of immigration enforcement).

56. See U.S. Nat’l Archives, *Mexican Border Crossing Records*, at <http://www.archives.gov/genealogy/immigration/border-mexico.html> (last updated Dec. 12, 2007) (on file with the *Columbia Law Review*) (“An act of March 2, 1819 required the captain or

ment of the Chinese Exclusion Acts, customs inspectors at sea ports collected federal passenger taxes, maintained manifests, and issued certificates for Chinese laborers departing the United States.<sup>57</sup> The Secretary of the Treasury controlled enforcement of regulations until 1891, when Congress created the Office of the Superintendent of Immigration in the Treasury Department.<sup>58</sup> Four years later, the Office was upgraded to the Bureau of Immigration.<sup>59</sup> The primary task of the Bureau was to collect passenger manifests, and it hired immigrant inspectors and stationed them at major ports of entry for this purpose. Reflecting the view that federal immigration regulations were primarily intended to protect domestic labor, the Bureau of Immigration was transferred to the Department of Commerce and Labor in 1903,<sup>60</sup> with the focus on U.S. seaports.<sup>61</sup>

The Chinese Exclusion Acts provided the impetus for a specific border police force to stop illegal immigration.<sup>62</sup> The United States Border Patrol, with a headquarters office in El Paso, Texas, was founded to curb illegal Chinese immigration through the border city.<sup>63</sup> In 1904, mounted watchmen patrolled the United States border with Mexico, watching for Chinese border crossers, with the number of patrolmen never surpassing

master of a vessel arriving at a port in the United States or any of its territories from a foreign country to submit a list of passengers to the collector of customs.” (citation omitted)); *supra* note 31.

57. Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58 (requiring customs collectors to examine passenger certificates and lists for entry to the United States).

58. See Immigration Act of 1891, ch. 551, § 7, 26 Stat. 1084, 1085.

59. Omnibus Appropriations Act of 1895, ch. 177, 28 Stat. 764, 780–81; U.S. Customs & Border Prot., U.S. Dep’t of Homeland Sec., U.S. Immigration and Naturalization Service—Populating a Nation: A History of Immigration and Naturalization, at [http://www.cbp.gov/xp/cgov/toolbox/about/history/ins\\_history.xml](http://www.cbp.gov/xp/cgov/toolbox/about/history/ins_history.xml) (last visited Mar. 7, 2008) (on file with the *Columbia Law Review*) [hereinafter U.S. Customs and Border Protection, INS].

60. U.S. Customs and Border Protection, INS, *supra* note 59.

61. While the majority of federal inspectors were placed at seaports, the United States had large unprotected borders with Canada and Mexico. Records at designated land crossings were not kept until 1895 along the Canadian border and until approximately 1906 on the Mexican border. U.S. Nat’l Archives, *supra* note 56. As immigration quotas did not apply to countries in the Americas, there was no need for a border police force. There were, however, health inspectors placed at land ports of entry who would enforce provisions of the Immigration Act of 1917. See David Dorado Romo, *Ringside Seat to a Revolution: An Underground Cultural History of El Paso and Juarez: 1893–1923*, at 235–40 (2005) (describing physical inspection of Mexicans by health officials at U.S.-Mexico border).

62. See Romo, *supra* note 61, at 198 (“Chinese immigrants would take a circuitous route from the ports of Manzanillo, Ensenada or Mazatlán, where they would hire a Mexican guide to smuggle them across the border through Juárez [into El Paso].”).

63. See *id.*; U.S. Customs & Border Prot., U.S. Dep’t of Homeland Sec., U.S. Border Patrol—Protecting Our Sovereign Borders, at [http://www.cbp.gov/xp/cgov/toolbox/about/history/bp\\_historcut.xml](http://www.cbp.gov/xp/cgov/toolbox/about/history/bp_historcut.xml) (last visited Mar. 7, 2008) (on file with the *Columbia Law Review*).

seventy-five for the thousand-mile border with Mexico.<sup>64</sup> In 1915, Congress authorized another group of patrolmen and provided them with broader arrest authority.<sup>65</sup> Their focus, however, was still on Chinese immigrants.<sup>66</sup> The United States military provided intermittent border security, but typically just redirected an immigrant to an inspection station.<sup>67</sup> Congress officially established the Border Patrol as part of the Immigration Act of 1924 to secure the border between inspection stations, and state and local law enforcement agency personnel filled the majority of the new federal positions.<sup>68</sup>

Prior to World War II, a shift in focus from commercial and labor concerns to security interests prompted placement of the Immigration Bureau under the control of the Attorney General in the Department of Justice.<sup>69</sup> Border Patrol agents manned immigrant detention camps and supported the Coast Guard in protecting the United States from enemy saboteurs.<sup>70</sup> Even after the repeal of the Chinese Exclusion Acts in 1943, the Border Patrol continued to fight undocumented immigration, as the United States still had immigration quotas in place.<sup>71</sup> Moreover, in the 1950s, the Border Patrol was given authority to arrest in the interior of the United States, resulting in the deportation of thousands of immigrants to Mexico.<sup>72</sup> Following the September 11, 2001, terrorist attacks and contemporary concern for security, the Border Patrol—then under the Immigration and Naturalization Service—merged with the U.S. Customs Service into the newly formed Department of Homeland Security.<sup>73</sup>

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64. U.S. Customs & Border Prot., U.S. Dep't of Homeland Sec., *Border Patrol History* (2003), at [http://www.cbp.gov/xp/cgov/border\\_security/border\\_patrol/border\\_patrol\\_ohs/history.xml](http://www.cbp.gov/xp/cgov/border_security/border_patrol/border_patrol_ohs/history.xml) (on file with the *Columbia Law Review*) [hereinafter U.S. Customs and Border Protection, *Border Patrol*].

65. *Id.*

66. *Id.*

67. *Id.* During Prohibition, a substantial number of the new Border Patrol agents were stationed along the U.S.-Canada border to stop illegal alcohol smuggling. *Id.*

68. *Id.*

69. See *The Role of Immigration in the Department of Homeland Security Pursuant to H.R. 5005, The Homeland Security Act of 2002: Hearing on H.R. 5005 Before the Subcomm. on Immigration, Border Security, and Claims of the H. Comm. on the Judiciary, 107th Cong. 31* (2002) (statement of Mark Krikorian, Executive Director, Center for Immigration Studies) (recounting history of immigration and discussing how fear of enemy saboteurs prompted transfer of immigration authority to agency in charge of homeland security).

70. U.S. Customs and Border Protection, *Border Patrol*, *supra* note 64.

71. See *supra* note 46.

72. See U.S. Customs and Border Protection, *Border Patrol*, *supra* note 64 (describing deportation of 50,000 undocumented immigrants in early 1950s).

73. See *Homeland Security Act of 2002*, Pub. L. No. 107-296, § 101, 116 Stat. 2135, 2142 (to be codified at 6 U.S.C. § 111). The Immigration & Naturalization Service, of which the Border Patrol was a part, was split into three agencies within the new Department of Homeland Security. U.S. Citizenship & Immigration Services (USCIS) handles naturalization, Immigration & Customs Enforcement (ICE) covers investigations,

4. *State and Local Enforcement.* — As previously discussed, early in the country's history, state officials enforced their own immigration laws.<sup>74</sup> Even after the federal government began regulating immigration, customs officials contracted with local officials to enforce the federal laws.<sup>75</sup> Along the southern border, Texas Rangers were sometimes assigned by the state to patrol along the Rio Grande.<sup>76</sup> With the decline and outright prohibition of state immigration laws, however, state enforcement also declined, and federal officials assumed the role of state officers.<sup>77</sup>

Generally, state and local police are limited to enforcement of state criminal matters, with authority to arrest for federal crimes without a warrant if authorized by the state.<sup>78</sup> Arguably, a state or local law enforcement officer can enforce the criminal provisions of immigration law but cannot enforce civil violations.<sup>79</sup> The difficulty in enforcement lies in determining which violation—bearing a civil or criminal penalty—the local law officer is enforcing.

To overcome this issue, the federal government established a framework by which state and local police officers could enforce federal immigration law.<sup>80</sup> The 1996 amendments to the Immigration and Nationality

and U.S. Customs & Border Protection (CBP), which includes Border Patrol, manages border functions. See *id.* §§ 401–478, 116 Stat. 2135, 2177–212 (to be codified in scattered sections of 5, 6, 7, 8, 19, 49 U.S.C.).

74. See *supra* Part I.A.1.

75. Immigration Act of 1882, ch. 376, § 2, 22 Stat. 214, 214. The statute read: The Secretary of the Treasury . . . shall have the power to enter into contracts with such State commission, board, or officers as may be designated for that purpose by the governor of any state to take charge of the local affairs of immigration . . . ; and it shall be the duty of such State commission, board, or officers so designated to examine the condition of passengers . . . .

*Id.*

76. See U.S. Customs and Border Protection, Border Patrol, *supra* note 64. The Texas Rangers' history of border police enforcement is fraught with stories of violence and bloodshed. With the Mexican Revolution causing civil unrest in the border region and fear of German attack via Mexico during World War I, Texas Rangers killed 5,000 Hispanics from 1914 to 1919, leading the State of Texas to completely overhaul the force to "restore public confidence" and "to attract 'men of high moral character.'" After the overhaul, the Rangers' duties included patrolling the Rio Grande against tequila smugglers during Prohibition and cattle rustlers. See Tex. State Historical Ass'n, Handbook of Texas Online, Texas Rangers (2001), at <http://www.tsha.utexas.edu/handbook/online/articles/TT/met4.html> (on file with the *Columbia Law Review*).

77. See U.S. Customs and Border Protection, Border Patrol, *supra* note 64 (describing recruitment of sheriff's deputies and Texas Rangers to take new employment in newly-formed Border Patrol).

78. The practice of arresting a suspect without a warrant for violating federal law by state peace officers was upheld in *United States v. Di Re*, in which the Court ruled that the standard for arrest was dictated by the states. 332 U.S. 581, 591 (1948).

79. See Michael M. Hethmon, *The Chimera and the Cop: Local Enforcement of Federal Immigration Law*, 8 UDC/DCSL L. Rev. 83, 86 (2004) ("The intention of Congress at that juncture cannot be misunderstood. Arrests for violation of section 1324 were to be made only by federal personnel, while by clear implication section 1325 and section 1326 arrests were to be made by state and local officers as well.").

80. See 8 U.S.C. § 1357(g) (2000).

Act created a voluntary program—commonly referred to as 287(g)—in which a Memorandum of Agreement is agreed to by the Attorney General (and now the Department of Homeland Security) and a participating state law enforcement agency for the state officers to receive training from federal officers in immigration enforcement.<sup>81</sup> Few agencies participate in the program.<sup>82</sup> In fact, in the years preceding the program, some states and localities were moving in the other direction by barring their law enforcement officers from even cooperating with federal immigration officers at all.<sup>83</sup> Congress responded to these efforts by passing a law explicitly barring certain types of noncooperation agreements;<sup>84</sup> the government has never challenged the noncooperation ordinances in court.<sup>85</sup> This federal law barring the noncooperation of state and local officers, however, seemingly contradicts the intent of other provisions that limit state and local enforcement of federal immigration laws to cer-

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81. Section 287(g) of the Immigration and Nationality Act, codified at 8 U.S.C. § 1357(g), authorizes the Attorney General (and now the Secretary of the Department of Homeland Security) to train local law enforcement officials in immigration enforcement. See 8 U.S.C. § 1357(g)(1)–(10). Section 287(g) “authorizes the secretary of the U.S. Department of Homeland Security (DHS) to enter into agreements with state and local law enforcement agencies, permitting designated officers to perform immigration law functions . . . .” U.S. Immigration & Customs Enforcement, U.S. Dep’t of Homeland Sec., Fact Sheet: Section 287(g), Immigration and Nationality Act; Delegation of Immigration Authority (June 22, 2007), at <http://www.ice.gov/pi/news/factsheets/070622factsheet287progover.htm> (on file with the *Columbia Law Review*).

82. Alabama and Florida state police and a few agencies in California signed early agreements with the federal government and sent officers from their agencies to attend trainings on enforcement of federal immigration law. See 287(g) Program: Ensuring the Integrity of America’s Border Security System Through Federal-State Partnerships: Hearing Before the Subcomm. on Management, Integration, and Oversight of the H. Comm. on Homeland Security, 109th Cong. 6–11 (2005) (statement of Paul M. Kilcoyne, Deputy Assistant Director of Investigative Services Division, U.S. Immigration & Customs Enforcement, U.S. Dep’t of Homeland Sec.). More agencies have signed Memorandums of Agreement, including agencies in Arizona, Colorado, Florida, Georgia, Massachusetts, North Carolina, New Hampshire, Oklahoma, Tennessee, and Virginia. U.S. Immigration & Customs Enforcement, Partners, at [http://www.ice.gov/partners/287g/Section287\\_g.htm](http://www.ice.gov/partners/287g/Section287_g.htm) (last modified Jan. 28, 2008) (on file with the *Columbia Law Review*).

83. See Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. Cin. L. Rev. 1373, 1375 (2006) [hereinafter Pham, *Constitutional Right*] (citing that “some forty-nine cities and towns and three states have noncooperation laws limiting or prohibiting their police and other authorities from cooperating in immigration law enforcement”). Cities initially passed noncooperation agreements in the 1980s during an influx of El Salvadorans and Guatemalans fleeing civil war. *Id.* at 1382.

84. See 8 U.S.C. § 1644 (“[N]o State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from the Immigration and Naturalization Service information regarding the immigration status, lawful or unlawful, of an alien in the United States.”).

85. See Pham, *Constitutional Right*, *supra* note 83, at 1384 (explaining that while “the executive branch [has] criticized the laws,” they have never “sued to challenge” them). Following the terrorist attacks of September 11, 2001, many municipalities again passed noncooperation ordinances after the federal government pushed for increased enforcement of immigration laws. *Id.* at 1386–87.

tain situations and classes of immigrants.<sup>86</sup> It is important to note that the law is merely a prohibition on noncooperation and does not mandate enforcement.

State immigration enforcement currently follows three types of practices: (1) incidental arrests in which state and local law enforcement officers encounter an undocumented immigrant while investigating a state criminal violation; (2) joint efforts in which Border Patrol agents accompany state officers; and (3) independent enforcement by state and local officials of federal immigration law.<sup>87</sup> Few state and local departments are directly enforcing immigration laws by authorizing some of their police officers to arrest for civil immigration violations, sending the officers to the federal government for requisite training, and signing Memorandums of Agreement with the federal government under the 287(g) agreements.<sup>88</sup> Joint, coordinated efforts between Border Patrol and state and local police are not prevalent,<sup>89</sup> while incidental arrests are

86. The statute reads:

In the event . . . 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.

8 U.S.C. § 1103(a)(8) (emphasis added).

Another section outlines the procedures under which state and local law enforcement officers may place an immigrant under arrest:

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 . . . .*

Id. § 1252c(a) (emphasis added).

87. See Linda Reyna Yañez & Alfonso Soto, *Local Police Involvement in the Enforcement of Immigration Law*, 1 *Hispanic L.J.* 9, 43–50 (1994) (discussing different practices of local police involving immigration enforcement).

88. See *supra* note 82 (listing states where agencies have arranged training or signed such agreements).

89. Reports cite limited joint border patrol-local police enforcement efforts over the past decades. See, e.g., *INS' Relationship with State and Local Law Enforcement: Hearing Before the Subcomms. on Government Efficiency, Financial Management and Intergovernmental Relations; Criminal Justice, Drug Policy and Human Resources; and National Security, Veterans Affairs and International Relations of the H. Comm. on Government Reform*, 107th Cong. 3 (2001) (statement of Joseph R. Greene, Acting Deputy Executive Associate Comm'r for Field Operations, Immigration & Naturalization Service) (describing joint investigations in Atlanta, Georgia, and New Orleans, Louisiana); Yañez & Soto, *supra* note 87, at 48–49 & n.272 (describing joint efforts in El Paso, Texas,

a common result of state and local police encounters with undocumented immigrants.<sup>90</sup>

The precise source for the authority of state and local law enforcement to engage in *independent* enforcement of federal immigration law, especially with regard to federal civil violations, is murky. In 1996, the Justice Department specifically concluded that state and local police *do not* have the “legal authority to stop and detain an alien solely upon suspicion of civil deportability, as opposed to a criminal violation of the immigration laws or other laws.”<sup>91</sup> This conclusion was countered by a 2002 statement by Attorney General John Ashcroft, which claimed that local police had the “inherent authority” to detain and arrest individuals for civil immigration violations. Ashcroft’s Justice Department drafted a memorandum claiming that the 1996 Department memorandum “was mistaken.”<sup>92</sup>

As this section indicates, enforcement of federal immigration law poses a challenge as state and local law enforcement officers are likely to encounter undocumented immigrants while conducting routine police duties. Part I.B, which follows, will discuss the current legal standards for evaluating state immigration efforts.

#### B. *When Does Federal Law Preempt State Action and When Can State Officers Act?*

To determine if programs such as those undertaken by county sheriffs and the State of Texas are legal, it is necessary to evaluate whether the enforcement activities are preempted by the federal government. Congress can preempt state law via (1) an express statement or (2) implied conflict or implied occupation of the field.<sup>93</sup> The result of the preemption test is consensus that police can enforce federal criminal laws, but there is dispute as to whether federal law preempts enforcement of civil laws.

1. *Express Preemption.* — State action may be preempted by an express statement in a statute under the authority of the Supremacy Clause

and citing effort in San Diego, California, in early 1990s); Gail Pendleton, ABA Comm’n on Domestic Violence, *Local Police Enforcement of Immigration Laws and Its Effects on Victims of Domestic Violence 2*, available at [http://www.nationalimmigrationproject.org/DVPage/DVSA\\_CLEAR\\_Article.doc](http://www.nationalimmigrationproject.org/DVPage/DVSA_CLEAR_Article.doc) (last visited Mar. 7, 2008) (on file with the *Columbia Law Review*) (describing joint effort in Chandler, Arizona, in late 1990s).

90. Telephone Interview with Rick Glancey, Spokesperson, El Paso County Sheriff’s Office, Executive Dir., Tex. Border Sheriffs’ Coal., in El Paso, Tex. (Nov. 2, 2006). The current Executive Director at the time of this publication is Donald Reay.

91. Assistance by State and Local Police in Apprehending Illegal Aliens, 20 Op. Off. Legal Counsel 26 (1996) [hereinafter Office of Legal Counsel, Assistance].

92. Office of Legal Counsel, U.S. Dep’t of Justice, *Non-Preemption of the Authority of State and Local Law Enforcement Officials to Arrest Aliens for Immigration Violations 2–3* (Apr. 3, 2002), available at <http://www.aclu.org/FilesPDFs/ACF27DA.pdf> (on file with the *Columbia Law Review*) [hereinafter Office of Legal Counsel, Non-Preemption].

93. Kathleen M. Sullivan & Gerald Gunther, *Constitutional Law* 329 (15th ed. 2004).

of the Constitution.<sup>94</sup> No express statement in federal immigration laws prevents state and local law enforcement agencies from enforcing those laws,<sup>95</sup> as courts across the country have uniformly held.<sup>96</sup>

2. *Implied Preemption*. — There is a debate over whether enforcement by state and local agencies (in cases such as Operation Linebacker) is implicitly preempted. Federal law will preempt state law “by implication from the depth and breadth of a congressional scheme that occupies the legislative field, or by implication because of a conflict with a congressional enactment.”<sup>97</sup> In fact, conflicts between state and federal laws pertaining to immigration will require an evaluation for implied preemption since the Supreme Court’s opinion in *De Canas v. Bica*.<sup>98</sup> In *De Canas*, the Court upheld a state law that barred employment of immigrants and articulated a test to determine whether a state law will be upheld in the context of immigration, stating that not “every state enactment which in any way deals with aliens is a regulation of immigration and thus *per se* preempted . . . .”<sup>99</sup> The analysis is further complicated by the fact that the Supreme Court has not spoken on the matter of state enforcement of federal immigration laws and because the circuit courts have evaluated incidents of state and local law enforcement of federal immigration law with conflicting statements regarding preemption.<sup>100</sup>

94. U.S. Const. art. VI, cl. 2 (“[T]he Laws of the United States . . . shall be the supreme Law of the Land . . . .”); see, e.g., *Cipollone v. Liggett Group, Inc.*, 505 U.S. 514, 514 (1992) (evaluating express preemption clause of statute barring state laws on cigarette labeling); *Rath v. Jones Packing Co.*, 430 U.S. 519, 540 (1977) (finding legislative history suggesting that statutory language intended express preemption).

95. Cf. Immigration Reform & Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.).

96. See, e.g., *United States v. Vasquez-Alvarez*, 176 F.3d 1294, 1297 (10th Cir. 1999) (stating that IRCA “cannot reasonably be read as express preemption of preexisting state law”); see also *Balbuena v. IDR Realty LLC*, 845 N.E.2d 1246, 1255–56 (N.Y. 2006) (finding no express preemption regarding employment issues).

97. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541 (2001) (citation omitted).

98. 424 U.S. 351 (1976).

99. *Id.* at 355. The Court ruled: “[T]he fact that aliens are the subject of a state statute does not render it a regulation of immigration, which is essentially a determination of who should or should not be admitted into the country. . . .” *Id.* The ruling has been characterized as a “standard preemption inquiry: has the federal government occupied the field, and if not, does state law nonetheless present an obstacle to the achievement of the federal objective or frustrate the purposes of the federal scheme.” Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 Mich. L. Rev. 567, 620 (2008).

100. Compare *United States v. Santana-Garcia*, 264 F.3d 1188, 1194 (10th Cir. 2001) (“[S]tate and local police officers had implicit authority within their respective jurisdictions ‘to investigate and make arrests for violations of federal law, including immigration laws.’” (quoting *Vasquez-Alvarez*, 176 F.3d at 1295)), *Vasquez-Alvarez*, 176 F.3d at 1299 (“This court finds no federal preemption of state law implicit in the design of [8 U.S.C.] § 1252c.”), *Lynch v. Cannatella*, 810 F.2d 1363, 1371 (5th Cir. 1987) (“No statute precludes other federal, state, or local law enforcement agencies from taking other action to enforce this nation’s immigration laws.”), and *United States v. Salinas-Calderon*, 728 F.2d 1298, 1301 (10th Cir. 1984) (“Applying the objective probable cause test to these

There is much academic debate as to whether and how state and local law enforcement may enforce federal immigration law in light of federal preemption issues.<sup>101</sup> The conflicting statements by the Department of Justice have further exacerbated the debate.<sup>102</sup> Opponents of local enforcement of immigration laws argue that officers lack any authority to enforce civil immigration law, citing the 1996 memorandum by the Department of Justice Office of General Counsel articulating that point.<sup>103</sup> The argument against local enforcement of federal immigration law rests on Supreme Court cases holding that immigration is the exclusive province of the federal government.<sup>104</sup> Proponents of local enforcement of immigration laws point to the 2002 statement by Attorney General Ashcroft (and the subsequently released redacted memorandum) arguing that state police have the “inherent power” to detain and

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facts, it is our view [that the arresting state police officer] had probable cause to make a warrantless arrest for violation of the immigration laws at this point in time.”), with *Gonzales v. City of Peoria*, 722 F.2d 468, 474–75 (9th Cir. 1983) (“We assume that the civil provisions of the Act regulating authorized entry, length of stay, residence status, and deportation, constitute such a pervasive regulatory scheme, as would be consistent with the exclusive federal power over immigration.”), overruled by *Hodges-Durgin v. de la Vina*, 199 F.3d 1037 (1999). It is worth noting that the *Gonzales* court did not state that *criminal* enforcement was preempted. (In *Hodges-Durgin v. de la Vina*, the Ninth Circuit overruled its holding in *Gonzales* regarding plaintiff standing. 199 F.3d at 1040 n.1.)

101. See, e.g., Hethmon, *supra* note 79; Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 *Alb. L. Rev.* 179 *passim* (2005) [hereinafter Kobach, *Quintessential*] (arguing that states have inherent authority to make arrests for immigration violations and authority is not preempted); Michael J. Wishnie, *Introduction: Immigration and Federalism*, 58 *N.Y.U. Ann. Surv. Am. L.* 283, 285–87 (2002) (introducing series of papers that discuss federalism issues with immigration and stating that “recent developments have destabilized” “principles of federalism in immigration law [that] were relatively uncontroversial”); Laurel R. Boatright, Note, “Clear Eye for the State Guy”: Clarifying Authority and Trusting Federalism to Increase Nonfederal Assistance with Immigration Enforcement, 84 *Tex. L. Rev.* 1633, 1663–74 (2006) (arguing that federal government permit rather than coerce state action on immigration enforcement); Keblawi, *supra* note 55, at 838–46 (arguing against “inherent authority” position); Kleinert, *supra* note 55, at 1115–35 (evaluating separate spheres of duties between federal and state officials and evaluating legislative proposals that would authorize local enforcement activities of immigration laws).

102. Compare John Ashcroft, U.S. Attorney General, Press Conference on Tracking of Foreign Visitors (June 5, 2002), available in LEXIS (prepared remarks from Federal News Service) (noting that “arresting aliens who have violated [immigration law] criminal provisions . . . or civil provisions that render an alien deportable” is “within the inherent authority of the States”), and Office of Legal Counsel, *Non-Preemption*, *supra* note 92, at 8 (“[The INA] does not in any respect preempt the inherent authority of the States to make arrests for violation of immigration laws.”), with Office of Legal Counsel, *Assistance*, *supra* note 91, at 2 (“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.”).

103. See Office of Legal Counsel, *Assistance*, *supra* note 91.

104. See *supra* notes 32–39, 41–42, 47–49 and accompanying text for the cases that develop this doctrine.

arrest individuals suspected of violating civil immigration laws.<sup>105</sup> Advocates of enforcement look to the states' sovereign authority and to the historical involvement of state officials in creating and enforcing immigration laws during the first one hundred years of the country's history.<sup>106</sup> Moreover, they note that the power of state authorities to act derives from their status as sovereigns, independent of the Constitution.<sup>107</sup>

The Ninth Circuit stated that state and local enforcement of civil provisions is preempted by federal law, specifically by way of field preemption. In *Gonzales v. City of Peoria*, eleven individuals of Mexican descent filed suit against the City of Peoria, Arizona, claiming that local police officers were unlawfully stopping, questioning, and detaining individuals based on their appearance.<sup>108</sup> The plaintiffs claimed that they had been required to provide identification or proof of legal status in the United States.<sup>109</sup> The court noted that testimony from officers and local officials "revealed substantial confusion as to what the policies permitted and what state and federal law required."<sup>110</sup> The Ninth Circuit stated that local police may arrest individuals for violations of criminal provisions of immigration law, provided that the enforcement is authorized under state law, but that the federal government has preempted the field of enforcement for violations of *civil* provisions.<sup>111</sup> The court noted that the case involved criminal provisions, but went further, stating: "We assume that the civil provisions of the Act regulating authorized entry, length of stay, residence status, and deportation, constitute such a pervasive regulatory scheme, as would be consistent with the exclusive federal power over immigration."<sup>112</sup> Such a view would mean that federal law preempts state officers from enforcing civil portions of immigration law.

The Tenth Circuit has provided the most analysis regarding state and local law enforcement of federal immigration law.<sup>113</sup> In *United States v.*

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105. See Ashcroft, *supra* note 102; Office of Legal Counsel, Non-Preemption, *supra* note 92, at 2.

106. See, e.g., Kris W. Kobach, State and Local Authority to Enforce Immigration Law: A Unified Approach for Stopping Terrorists, Background (Ctr. for Immigration Stud., Wash., D.C.), June 2004, at 2–3 [hereinafter Kobach, State and Local] ("The source of the state governments' power is entirely independent of the U.S. Constitution.").

107. See Kobach, Quintessential, *supra* note 101, at 199–200 ("It is well established that the authority of state police to make arrests for violations of federal law is not limited to those situations in which [they] are exercising [delegated federal power] . . . it is a general and inherent authority based on the fact that the states retain their sovereignty.").

108. 722 F.2d 468, 472 (9th Cir. 1983).

109. *Id.*

110. *Id.* at 474. The officers also noted that they were given no training in federal immigration law. *Id.*

111. *Id.* at 474–75.

112. *Id.*

113. Proponents of state and local enforcement of immigration point to cases such as *United States v. Salinas-Calderon*, 728 F.2d 1298 (10th Cir. 1984), for justification that federal law does not prevent state action. See, e.g., Kobach, State and Local, *supra* note 106, at 3.

*Vasquez-Alvarez*<sup>114</sup> and *United States v. Santana-Garcia*,<sup>115</sup> the court of appeals ruled that federal immigration law did not displace state authority to make arrests for violations of federal immigration law. In *Vasquez-Alvarez*, the defendant was arrested by an Edmond, Oklahoma, police officer based solely on his illegal immigration status.<sup>116</sup> The court stated that immigration provisions indicated that there was no conflict between state and federal immigration enforcement.<sup>117</sup> While federal law did not itself authorize the arrest of an immigrant by a state officer, it did not displace state authority to do so.<sup>118</sup> In fact, the court noted that the portions of immigration law that outline how states may cooperate with the federal government “evince[ ] a clear invitation from Congress for state and local agencies to participate in the process of enforcing federal immigration laws.”<sup>119</sup>

The Tenth Circuit cited *Vasquez-Alvarez* two years later in *United States v. Santana-Garcia*, a case involving a Utah state trooper who pulled over a vehicle that failed to stop at an intersection.<sup>120</sup> While ultimately concluding that the officer had probable cause to stop the vehicle in the first place, the court stated that “federal law as currently written does nothing ‘to displace . . . state or local authority to arrest individuals violating federal immigration laws.’”<sup>121</sup>

3. *State Enforcement.* — Even if the Immigration and Naturalization Acts do not preempt state enforcement, an additional element must be present before state officials can enforce federal immigration law: express authorization under state law to enforce federal law. Even in *Gonzales*, in which the court of appeals stated that state enforcement of civil immigration provisions was preempted by federal law, enforcement

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While the Tenth Circuit ruled that state police have general investigatory authority to inquire into possible immigration violations, it is important to note that the court did not distinguish between criminal and civil violations and did not engage in preemption analysis. In that case, a Kansas police officer pulled over a vehicle for driving erratically, and upon stopping the vehicle, the officer learned that the passengers were illegally present in the United States. *Salinas-Calderon*, 728 F.2d at 1299. The driver was cited for the state violation of driving without a license and subsequently charged with the federal crime of knowingly transporting undocumented immigrants in the United States. *Id.* at 1299, 1300 & n.2. The defendant attempted to suppress the statements, but the court noted that there was probable cause for the officer to stop the vehicle and that the witnesses were all provided their Miranda rights. *Id.* at 1302. The Fifth Circuit has stated in dicta, without engaging in preemption analysis, that state law enforcement is not precluded from enforcing federal immigration law. See *Lynch v. Cannatella*, 810 F.2d 1363, 1371 (5th Cir. 1987).

114. 176 F.3d 1294 (10th Cir. 1999).

115. 264 F.3d 1188 (10th Cir. 2001).

116. 176 F.3d at 1296.

117. *Id.*

118. *Id.*

119. *Id.* at 1300.

120. 264 F.3d at 1190.

121. *Id.* at 1193 (quoting *Vasquez-Alvarez*, 176 F.3d at 1300).

of criminal provisions was allowed only if state law authorized such enforcement.<sup>122</sup>

This Part has provided a brief account of the nation's complex immigration laws as well as the long history of enforcement in the United States, which has culminated in near exclusive control of immigration by the federal government. In addition, it has introduced the general preemption tests undertaken by courts with regard to evaluating state laws, including those pertaining to immigration. This Note now evaluates Operation Linebacker and analyzes it to determine if it is preempted.

## II. EVALUATING OPERATION LINEBACKER

This Part evaluates whether programs such as Operation Linebacker are authorized. Authorization depends on two elements: (1) whether federal law preempts the state action and (2) whether state law authorizes such action.<sup>123</sup> This Note uses Operation Linebacker itself as the model for this evaluation, so, when state law is discussed, this Note refers to Texas state law. Part II.A introduces and describes Operation Linebacker as well as other state activities along the border. Part II.B evaluates how Operation Linebacker comports with the tests outlined in Part I.B. The result, however, reveals a disconnect between how the programs are officially implemented and how they are reportedly practiced.

### A. *Operation Linebacker and Additional State Enforcement*

This section discusses Operation Linebacker<sup>124</sup> and other state enforcement activities along the 1,254-mile Texas-Mexico border, summarizing the history and enforcement activities of the program.

The unique law enforcement needs of the border prompted the development of Operation Linebacker. Aside from the crossing of undocumented immigrants along the southwestern border, some desolate regions of the desert have become corridors for drug smugglers, resulting in high-speed chases with state and local police ending in armed standoffs over the Rio Grande.<sup>125</sup> Mexican or American police—state or federal—have sometimes accidentally crossed into the neighboring country while chasing a suspected criminal. These accidents have resulted in

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122. *Gonzales v. City of Peoria* 722 F.2d 468, 476 (9th Cir. 1983).

123. See *supra* Part I.B.

124. Background information regarding Operation Linebacker has been acquired via newspaper articles, available records, and a telephone interview with El Paso County Sheriff's Office spokesperson Rick Glancey. Glancey, *supra* note 90. El Paso County Sheriff Leo Samaniego died in December 2007, and his chief deputy was appointed to serve out his term. Border sheriffs still continue enforcement efforts in the Southwest and in Texas are securing funding for their continued efforts. Some Counties Say State Border Security Money Is Slow in Coming, Associated Press, Jan. 15, 2008, at <http://www.statesman.com/news/content/region/legislature/stories/01/15/0115border.html> (on file with the *Columbia Law Review*).

125. See *supra* Introduction.

apprehensions by neighboring police and required diplomatic resolution between the two countries, reminding policymakers that the United States-Mexico border is an international boundary between two sovereign nations.<sup>126</sup>

A perceived lack of federal support along the U.S.-Mexico border prompted state and local law enforcement agencies to begin to take matters into their own hands.<sup>127</sup> In September 2005, the Texas Border Sheriffs' Coalition, a group comprised of the sheriffs representing the state's sixteen counties that border Mexico, announced a plan to enhance border security in Texas.<sup>128</sup> Dubbed "Operation Linebacker," the program seeks to enhance security along the U.S.-Mexico border through the use of increased manpower and better equipment.<sup>129</sup> The program also originally called for the creation of a task force to aid in border security.<sup>130</sup>

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126. A number of incidents have been reported in which the United States Border Patrol, Mexican federal police or military, as well as state and local authorities from both sides of the border, make accidental incursions into the neighboring country. These incidents typically result in the detention of the party that has made the incursion and confiscation of weapons, requiring Mexican and American diplomats to resolve the issues. Authorities have sometimes found themselves in standoffs at the border with weapons drawn over criminal issues. See Nicole Gaouette, *Danger, Disorder in Patrol of South Border: Mexican Military and Police Incursions Add to the Chaos for U.S. Law Enforcement, According to Federal Files Obtained by a Watchdog Group*, L.A. Times, Sept. 12, 2006, at A14 ("Mexican soldiers and police officers made more than 200 unauthorized incursions into U.S. territory from 1996 to Sept. 30, 2005, according to internal Homeland Security intelligence reports."); David McLemore, *Mexico Says Troops Cross by Accident: Lawmaker Fears Criminal Motive, but Officials on Both Sides Skeptical*, Dallas Morning News, May 4, 2002, at 29A ("There are about 20 to 30 cross-border incidents each year involving military or law enforcement agents from both sides, ranging from the trivial to the serious, according to the U.S. Immigration and Naturalization Service.").

[M]ost [crossings] are accidental or result from hot pursuit, an INS official said. The most serious cross-border incident by Mexican troops occurred March 24, 2000, when 14 Mexican army soldiers in two Humvees crossed the border near Santa Teresa, N.M., by mistake and went a half-mile into the United States.

Challenged by two Border Patrol agents on horseback, the Mexican soldiers drew their weapons, believing they had encountered drug dealers. When the agents also drew their weapons, shots were fired. No one was hurt during the incident, which ended when one Humvee and its passengers were briefly detained by U.S. officials while the other raced back into Mexico.

Id.

127. For example, Governors Janet Napolitano (D-Arizona) and Bill Richardson (D-New Mexico) declared a state of emergency along their own state borders with Mexico, making additional state funds available to law enforcement officers in border counties. See Leslie Linthicum, *Stories Set Fire Under Gov.: Border 'Under Siege' Inspired Declaration*, Albuquerque J., Aug. 22, 2005, at A1.

128. Tammy Fonce-Olivas, *Coalition to Boost Border Security*, El Paso Times, Sept. 17, 2005, at 1B.

129. See *id.*

130. *Id.*

Operation Linebacker and the activities implemented by the State of Texas are reportedly comprised of the following activities: (1) increased patrols in high crime areas;<sup>131</sup> (2) random vehicle checkpoints in high crime areas;<sup>132</sup> (3) dedication of additional state resources to border law enforcement agencies;<sup>133</sup> and (4) use of state-funded cameras along the Rio Grande.<sup>134</sup>

Regarding local activities, the El Paso County Sheriff's Office reports that it follows procedures outlined for incidental contact of an undocumented immigrant; that is, if an individual cannot be identified during a traffic stop or is suspected of illegal presence in the country during investigation of a possible state crime, then Border Patrol is notified to help identify the individual.<sup>135</sup> If the individual is undocumented or faces other federal immigration measures and will be charged with a state violation, the suspect is left in the custody of state officials until state proceedings are completed.<sup>136</sup> If the individual is not subject to state criminal charges, the suspect is immediately taken into custody by U.S. Border Patrol.<sup>137</sup> Governor Rick Perry announced his support of the program, including it as a component of his Border Security Plan<sup>138</sup> and pledging \$9.7 million in state money acquired via federal grants.<sup>139</sup>

131. Brandi Grissom, Sheriff to Use \$375,000 State Grant to Protect Border, *El Paso Times*, Nov. 8, 2005, at 1A; see Glancey, *supra* note 90.

132. There appears to be a dispute as to whether random vehicle checkpoints are officially part of Operation Linebacker. News reports and interviews tend to characterize the vehicle checkpoints as part of the increased enforcement activities of Operation Linebacker. However, a November 2006 news report indicates that vehicle checkpoints are not part of the Operation's activities. Brandi Grissom, Operation Linebacker Catches More Immigrants Than Criminals, *El Paso Times*, Nov. 20, 2006, at 1A [hereinafter Grissom, Linebacker] ("Vehicle stationary checkpoints are completely separate' from Operation Linebacker, El Paso County Sheriff's Office spokesman Rick Glancey said. 'I don't know how many times I have to say this to you, to other reporters and to everyone else in this community.'"). In any case, the practice is included in this Note as it is associated with increased enforcement along the border.

133. See Press Release, Office of the Governor, State of Tex., Gov. Perry Launches State-Led Border Security Operation (Feb. 9, 2006) (on file with the *Columbia Law Review*) [hereinafter Press Release, Launches].

134. See Texas Border Watch Test Site, at <http://www.texasborderwatch.com> (last visited Mar. 7, 2008).

135. Glancey, *supra* note 90; see also Brandi Grissom, Reports Find Linebacker Caught 860 Immigrants, *El Paso Times*, June 23, 2006, at 1A [hereinafter Grissom, Reports] ("[S]heriff's departments said they also turn over undocumented immigrants when they find them . . .").

136. Telephone Interview with Agent Rogelio Garcia, Spokesperson, U.S. Border Patrol, El Paso Sector (Nov. 2, 2006) [hereinafter Telephone Interview with Agent Garcia].

137. *Id.*

138. Press Release, Office of the Governor, State of Tex., Gov. Perry Announces Comprehensive Border Security Plan for Texas (Oct. 12, 2005) (on file with the *Columbia Law Review*) [hereinafter Press Release, Comprehensive].

139. Mariano Castillo, Border Sheriffs Getting Millions, *San Antonio Express-News*, Oct. 13, 2005, at 1A. On December 12, 2005, Governor Perry awarded \$6 million from the federal Edward Byrne Memorial Justice Assistance Program, which is administered by the

Regarding state activities, the Governor pledged the support of state police, requesting the Texas Department of Public Safety to assign fifty-four criminal investigators to support border law enforcement agencies in their border security efforts.<sup>140</sup> Efforts were extended with continued funding<sup>141</sup> and the implementation of other programs by the Governor called Operation Rio Grande, to coordinate state, local, and federal officers by providing intelligence and resources from state police and other state executive agencies,<sup>142</sup> and Operation Wrangler, to increase police activities along undisclosed portions of the border.<sup>143</sup> The state also developed a pilot program in which security cameras were placed at strategic points along the Rio Grande, allowing citizens to watch online and report suspicious activities to law enforcement.<sup>144</sup> Through the use of better equipment and additional manpower, the sheriffs' goal is to place more uniformed officers in "high crime group areas." To pay for these increased patrols, the sheriffs submit records to the coalition for reimbursement from the state using money acquired via grants.<sup>145</sup>

Enforcement measures of this type are no longer limited to Texas and are spreading across the Southwest. Recently, border sheriffs from counties along the U.S.-Mexico border from California, Arizona, and New Mexico, along with the Texas border sheriffs, called for the formation of a multistate group and increased patrols along the U.S.-Mexico border.<sup>146</sup> The sheriffs plan to implement Operation Linebacker-type activities across the entire southwestern border by increasing patrols and visibility.<sup>147</sup>

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Governor's Criminal Justice Division, to the state's sixteen border county sheriffs' departments (\$367,500 each) and \$120,000 to the Texas Border Sheriffs' Coalition. Press Release, Office of the Governor, State of Tex., Gov. Perry Awards \$6 Million to Border Counties for Border Security (Dec. 5, 2005) (on file with the *Columbia Law Review*).

140. Office of the Governor, State of Tex., Border Security Plan for Texas, at [http://www.governor.state.tx.us/priorities/other/border/border\\_security](http://www.governor.state.tx.us/priorities/other/border/border_security) (last visited Mar. 7, 2008) (on file with the *Columbia Law Review*).

141. Press Release, Office of the Governor, State of Tex., Gov. Perry Awards \$3.8 Million More for Border Security (Feb. 2, 2006) (on file with the *Columbia Law Review*).

142. Press Release, Launches, *supra* note 133.

143. Press Release, Office of the Governor, State of Tex., Gov. Perry Announces Phase II of State-Led Border Security Operation: Operation Wrangler Expands Border Crime Initiatives Statewide (Jan. 22, 2007) (on file with the *Columbia Law Review*).

144. The website was a pilot project in operation in October 2006. The state has proceeded "with a formal request for proposals to implement a permanent Texas Border Watch web site." Texas Border Watch Test Site, *supra* note 134.

145. The coalition was receiving funds as a group, but the state now requires each county to submit for reimbursement individually. See Brandi Grissom, Sheriffs on Border Can't Obtain Grant as Group, *El Paso Times*, Sept. 12, 2007, at 1B.

146. See Louie Gilot, Sheriff's Coalition Looks for Ways to Combat Illegal Immigration, Drugs, *El Paso Times*, Oct. 24, 2006, at 1A.

147. See Gilot, Sheriffs Unite, *supra* note 5 ("The federal money the sheriffs are asking for would pay for extra officers and overtime for current patrols."). In Maricopa County, Arizona (with a county seat of Phoenix and buffered from Mexico by Pima County, Arizona), the Sheriff is using a state law against smuggling to increase patrols that

Even though Operation Linebacker representatives argue that the local enforcement activities follow incidental arrest procedures, residents claim that sheriff deputies are doing more than just increasing patrols and are engaging in independent enforcement of federal immigration law. They contend that sheriff deputies are targeting undocumented immigrants to detain them and turn them over to Border Patrol.<sup>148</sup> In El Paso County, Texas, the sheriff's department instituted random vehicle checkpoints that have led to the apprehension of undocumented immigrants.<sup>149</sup> Reports have also surfaced that deputies are inquiring about social security cards and legal status,<sup>150</sup> but the sheriffs' departments have steadfastly denied these claims.<sup>151</sup> In November 2006, reports from the sixteen Texas county sheriffs' departments along the border showed that undocumented immigrants were caught seven times more than criminals.<sup>152</sup> The money allocated by the Texas Governor for Operation Linebacker is to be used to combat violent crime and drugs, yet critics use this statistic to indicate that the money is actually being used to enforce federal immigration law.<sup>153</sup> Critics also claim that the sheriff's department in El Paso County engaged in racial profiling.<sup>154</sup> Official com-

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have resulted in arrests of smugglers and undocumented immigrants who are charged with conspiring with "coyotes"—the term used for smugglers—to be smuggled into the United States. See Randal C. Archibold, *Arizona County Uses New Law to Look for Illegal Immigrants*, N.Y. Times, May 10, 2006, at A19. At least 500 individuals have been prosecuted. Immigrants who plead guilty are required to "plead guilty to a felony . . . [that] greatly undermines the ability of such defendants to immigrate to the country legally or become a U.S. citizen." Press Release, Maricopa County Attorney's Office, *500th Defendant Prosecuted Under Human Smuggling Statute: Latest Milestone in Fight Against Illegal Immigration* (Dec. 2, 2007) (on file with the *Columbia Law Review*).

148. See Gilot, *Petition*, supra note 6 ("Some El Paso County residents said they have been asked for their Social Security cards and immigration papers by El Paso County sheriff's deputies during regular traffic stops, traffic checkpoints or while traveling by bus during the past few months.").

149. *Id.*; see also Grissom, *Reports*, supra note 135; Michael Hernandez, *Operation Linebacker Finds 25 Immigrants*, El Paso Times, Jan. 23, 2006, at 1B.

150. Gilot, *Petition*, supra note 6.

151. See, e.g., Brandi Grissom & Louie Gilot, *Border Crime Decreases: Many Still Fear Policy Targets Immigrants*, El Paso Times, Feb. 25, 2007, at 1A ("[The Sheriff] has maintained adamantly that his officers do not enforce immigration laws . . ."); *The War Out There*, supra note 7 ("We are not involved in immigration law. We are here strictly trying to enforce Texas law." (quoting Rick Glancey, Spokesman, El Paso County Sheriff's Office)).

152. Grissom, *Linebacker*, supra note 132 (analyzing reports indicating requests for Border Patrol assistance with 4,756 undocumented immigrants compared to arrests of 702 individuals over six-month period).

153. See Brandi Grissom, *Samaniego Accused of Doing Illegal Work on Border*, El Paso Times, May 23, 2006, at 2A.

154. *Id.*; see also Daniel Borunda, *Immigrants Fear License Checks*, El Paso Times, May 19, 2006, at 1B ("[A] county housing coordinator who works in colonias[ ] has also heard complaints of 'racial profiling' and of the Border Patrol being called to traffic stops."). The El Paso County Sheriff turned over twenty-five undocumented immigrants in one day to the Border Patrol early in 2006. Hernandez, supra note 149.

plaints<sup>155</sup> have led the Governor to refer the concerns to the United States Attorney.<sup>156</sup>

### B. *Evaluating Operation Linebacker and Related Activities Specifically*

This section evaluates whether Operation Linebacker is preempted and/or authorized by state law. The analysis is muddled, however, by a standard that is unclear regarding state enforcement, as explained in Part II.B.1. The analysis in Part II.B.2 shows that the program is authorized as envisioned on paper, but unauthorized in practice.

1. *The Meaning of the Tenth and Ninth Circuit Decisions.* — The Tenth Circuit and Ninth Circuit cases are not dispositive on the issue of preemption, specifically with regard to the type of state enforcement occurring on the Texas border. *Santana-Garcia* examined whether a state officer had probable cause to arrest an individual for valid *state* crimes as well as federal immigration violations against the petitioner's challenge that he was illegally detained, without evaluating preemption specifically.<sup>157</sup> *Vasquez-Alvarez*, which was decided in 1999, involved an issue that is generally not disputed: State officials with valid state authorization may arrest an individual for *criminal* violations of federal immigration law.<sup>158</sup> However, interpretations that classify *Vasquez-Alvarez* as stating that federal immigration laws do not preempt state enforcement are overbroad. In *Vasquez-Alvarez*, the court held that 8 U.S.C. § 1252c, which authorizes state and local officials to arrest and detain certain criminal, undocumented immigrants,<sup>159</sup> did not preempt state arrest authority.<sup>160</sup> In its analysis, the court cited other immigration provisions that involve state enforcement as a "clear invitation from Congress for state and local agencies to participate in the process of enforcing federal immigration law."<sup>161</sup> The appeals court, however, failed to note that within the myriad of complex federal immigration laws, references to state and local law enforcement are limited to a few specific provisions, such as those that detail procedures for arrest,<sup>162</sup> authorize the Attorney General (and now

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155. See Letter from State Senator Juan Hinojosa, Chairman, Tex. Senate Hispanic Caucus, to Governor Rick Perry, Tex. (May 19, 2006) (on file the *Columbia Law Review*) ("These raids and roadblocks are questionable in their legality . . .").

156. Elizabeth Pierson, *Perry Refers Linebacker Questions to U.S. Attorney*, Monitor (McAllen, Tex.), June 2, 2006, at 2B.

157. *United States v. Santana-Garcia*, 264 F.3d 1188, 1194 (10th Cir. 2001) (presuming that there was "no state or local law to the contrary").

158. See *United States v. Vasquez-Alvarez*, 176 F.3d 1294, 1300 (10th Cir. 1999) (explaining that state and local officers have power to arrest "criminal illegal aliens").

159. 8 U.S.C. § 1252c (2000) authorizes the arrest and detention of 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 . . . confirmation from the [I.N.S.]." *Id.*

160. 176 F.3d at 1300.

161. *Id.*

162. 8 U.S.C. § 1252c.

the Secretary of Homeland Security) to establish agreements for local enforcement,<sup>163</sup> and merely prohibit noncooperation agreements.<sup>164</sup> These limited circumstances do not seem to serve as a blanket invitation to state and local authorities to enforce criminal and *civil regulatory* aspects of federal immigration law.<sup>165</sup>

Furthermore, the court noted that § 1252c was itself passed in 1996 to “eliminate perceived federal limitations” on the ability of state officers to arrest for immigration violations.<sup>166</sup> Even the Tenth Circuit’s analysis begins from the premise that Congress’s authorizations provided the states with something they lacked: inherent authority to enforce federal immigration law.

Alternatively, the Ninth Circuit’s ruling in *Gonzales v. City of Peoria* does not provide a definitive answer on which opponents of state and local immigration law can rely. The court clearly indicated that Congress did not intend to occupy the field with regard to criminal enforcement;<sup>167</sup> however, the court admitted that field preemption was not the disputed issue of the case.<sup>168</sup> In spite of the lack of clarity regarding enforcement of civil immigration laws, which lower courts have historically struck down,<sup>169</sup> the cases agree that a state or local police officer may arrest an individual for criminal violations of federal law.

2. *Applying the Preemption Standard.* — As previously noted, there is no express preemption that prevents state and local law enforcement officers from enforcing federal immigration law, but there is a question as to whether Congress has occupied the field in this area. Therefore, activities would be preempted only as a result of conflict with federal law, and such conflicts do occur with state and local law enforcement activities.

As it is officially reported, Operation Linebacker consists of increased patrols and checkpoints, and the state has used security cameras along the border. None of these activities are precluded by federal law or state law, since such activities would fall under the state police power.

163. *Id.* § 1357(g).

164. *Id.* § 1644.

165. Cf. Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 Fla. St. U. L. Rev. 965, 980 (2004) [hereinafter Pham, *Inherent Flaws*] (“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.”).

166. *Vasquez-Alvarez*, 176 F.3d at 1299.

167. *Gonzales v. City of Peoria*, 722 F.2d 468, 474–75 (9th Cir. 1983) (“We therefore hold that federal law does not preclude local enforcement of the criminal provisions of the [Immigration and Naturalization Act].”), overruled by *Hodges-Durgin v. de la Vina*, 199 F.3d 1037 (1999) (overruling *Gonzales* on standing issue unrelated to issue cited).

168. *Id.* at 475.

169. See, e.g., *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 764 (C.D. Cal. 1995) (upholding preliminary injunction against application of Proposition 187 in California).

Increasing patrols in high crime areas is a legitimate police activity.<sup>170</sup> Moreover, dedicating resources to law enforcement agencies to target crime would seem to fall under the police powers of the state.<sup>171</sup> The state may also rely on its police powers to place cameras along remote portions of the border.<sup>172</sup> Given the danger associated with illegal drug trafficking and human smuggling—both state and federal crimes—the state would simply be targeting its security resources to maximize their effect.

The use of vehicle checkpoints, as reported, tends to suggest that they comply with federal civil rights requirements outlined by the Supreme Court.<sup>173</sup> Texas authorities regularly establish vehicle checkpoints for licenses and liability insurance.<sup>174</sup> While such checkpoints are sometimes viewed as inefficient, sheriff's deputies in El Paso claim that they are using their vehicle checkpoints in high crime areas as a visible deterrent to illegal activity and to enforce state law by checking for licenses and insurance.<sup>175</sup>

Defenders of the program assert that the increased contact with undocumented immigrants is *incidental* to the increased police activities. But, in practice, that may not be the case. Public reports indicate that the local law enforcement officers do not intend to enforce federal immigration law, but other official comments have described the officers as a “sec-

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170. Criminal law enforcement is an area in which “[s]tates historically have been sovereign.” *United States v. Lopez*, 514 U.S. 549, 564 (1995).

171. See *id.*

172. Some cities across the country have placed cameras in high crime areas. Chicago has 560 cameras monitored by police, and San Francisco is implementing a pilot program. Demian Bulwa, *Chicago's Crime Cameras—Picture Isn't Perfect*, S.F. Chron., Sept. 24, 2007, at A1. Dallas installed thirty-four surveillance cameras in the city's downtown area in 2006. Tanya Eiserer, *Cameras to Watch for Crime: Downtown Dallas to Get 34 Devices; Some View It As Orwellian*, Dallas Morning News, Jan. 20, 2006, at 1A.

173. The case establishing the authority for a checkpoint without judicial warrant is *United States v. Martinez-Fuerte*, in which the Supreme Court upheld the use of permanent checkpoints established by the United States Border Patrol outside border cities to check for undocumented immigrants. 428 U.S. 543, 545 (1976). These checkpoints are present along the border and operated by federal officers. In *Delaware v. Prouse*, the Supreme Court held that a local police officer could not stop a vehicle to check for a drivers' license and insurance without reasonable suspicion. 440 U.S. 648, 663 (1979). However, the court stated that its ruling did not “cast doubt on the permissibility of roadside truck weighstations and inspection checkpoints, at which some vehicles may be subject to further detention for safety and regulatory inspection than are others.” *Id.* at n.26. Checkpoints to check for sobriety were upheld in *Michigan Department of State Police v. Sitz*. 496 U.S. 444 (1990). In *City of Indianapolis v. Edmond*, the Supreme Court held that police cannot conduct roadblocks “whose primary purpose is to detect evidence of ordinary criminal wrongdoing.” 531 U.S. 32, 38 (2000).

174. The purpose of this Note is not to evaluate the constitutionality of vehicle checkpoints for licenses and insurance.

175. See Tammy Fonce-Olivas, *Samaniego Will Reinstate Controversial Checkpoints*, El Paso Times, Oct. 11, 2006, at 1A (“[The sheriff] said the purpose of the checkpoints is to make sure motorists are complying with traffic laws.”).

ond line of defense” on the border.<sup>176</sup> Local residents, the Mexican Consulate, and border rights organizations have criticized local law enforcement officers for directly enforcing federal immigration laws and acting beyond the scope of their authority.<sup>177</sup> Specifically, the El Paso County Sheriff’s Office has been criticized for allegedly inquiring into individuals’ immigration status, following up on immigration reports of the location of undocumented immigrants, and establishing checkpoints to indirectly determine that status.<sup>178</sup> If true, these activities are (1) pre-empted as independent enforcement activities of federal civil immigration law<sup>179</sup> and (2) unauthorized by state law.<sup>180</sup>

Individually, each activity—whether part of Operation Linebacker or an independent police activity—is arguably permissible as an increase in police activity. Taken as a whole (especially when considering the immigration-related comments made by officials<sup>181</sup>), however, the intent of the activities appears to be targeting undocumented immigrants. Requests for funds to increase border security have been coupled with requests for direct congressional authorization for state and local police to enforce federal immigration law.<sup>182</sup> In addition, the high number of immigrant arrests supports the contention that “increased police activities” are being used as a guise to enforce federal immigration law.<sup>183</sup>

Interestingly, a set of documents disclosed via the Texas Public Information Act has contradicted official claims that sheriffs are not enforcing federal immigration law.<sup>184</sup> According to the records, in one inci-

176. Should Mexico Hold Veto Power over U.S. Border Security Decisions?: Hearing Before the H. Comm. on the Judiciary, 109th Cong. 6–11 (2006) [hereinafter Hearing] (statement of Sheriff Leo Samaniego, El Paso County, Tex.). The name of the program employs a football analogy viewing federal Border Patrol agents as the defensive line with state and local law enforcement serving as linebackers (the second group of defenders).

177. Grissom, *Deputies*, supra note 10.

178. *Id.*; infra notes 184–187 and accompanying text.

179. See supra Part I.B.2.

180. See supra Part I.B.3.

181. See, e.g., Hearing, supra note 176, at 6–11, 59–76 (statements of Sheriff Leo Samaniego, El Paso County, Tex., and Chief Richard Wiles, El Paso Police Dep’t) (discussing enforcement of immigration laws); Press Release, Comprehensive, supra note 138 (“In this post 9-11 era, there is no such thing as homeland security without border security.”).

182. See Hearing, supra note 176, at 6–11 (statement of Sheriff Leo Samaniego, El Paso County, Tex.) (urging passage of bill that would “give [state and local law enforcement agencies] all the authority [they] need to enforce immigration law”).

183. See Grissom, *Reports*, supra note 135 (“Although decreasing crime and preventing terrorism is the public mission of Operation Linebacker along the border[,] . . . it has been most effective in detaining undocumented immigrants.”).

184. According to an e-mail obtained via the request:

Agent Salas [a “federal” agent] appeared to be disturbed over us being at the location with the referrals. Agent Salas inquired if I had contacted ICE prior to going to any of the locations. I told him that our instructions had been to call Border Patrol who would in turn call ICE if they deemed it necessary. Upon further discussion with Agent Salas he became mean spirited and sarcastic with me and appeared to be visibly upset over us following up on our information.

dent, El Paso County sheriff deputies followed up on a report of the location of undocumented immigrants.<sup>185</sup> After investigating the report and securing the location, deputies finally notified federal agents, one of whom “appeared to be visibly upset over [the sheriff deputies] following up on [the] information.”<sup>186</sup> Additionally, records of Operation Linebacker activities track the number of undocumented immigrants captured as a result of police activities.<sup>187</sup> Such activity conflicts with federal enforcement by obstructing the Border Patrol’s or Immigration and Customs Enforcement’s ability to enforce immigration law as Congress intended.<sup>188</sup> As such, this enforcement is preempted, but evaluating preemption does not end the inquiry.

As previously noted, state law also determines whether state enforcement is authorized.<sup>189</sup> In Texas, where Operation Linebacker is being conducted, the State Code of Criminal Procedure allows state peace officers to arrest an individual for criminal violations committed within an officer’s presence.<sup>190</sup> State officers also have the authority to arrest an individual for a violation of federal law.<sup>191</sup> With regard to federal immigration law, a Texas Attorney General Opinion is on point, interpreting state and federal law to allow arrests for criminal immigration violations

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E-mail from Timothy Rutter, Sergeant, El Paso County Sheriff’s Office, to Jack Waite, Lieutenant, El Paso County Sheriff’s Office, et al. (Apr. 28, 2006, 04:24 MST), available at <http://www.aclutx.org/files/Undocumented%20Immigrant-Call%20out.pdf> (on file with the *Columbia Law Review*) [hereinafter E-mail]. This is not unique to El Paso County. In Otero County, New Mexico, reports suggest deputies actively sought undocumented immigrants in spite of reports to the contrary. Louie Gilot, Records Show Immigrants Were Focus of Otero Actions, *El Paso Times*, Nov. 12, 2007, at 1A.

185. See E-mail, *supra* note 184 (“A total of 17 persons were referred to the Border Patrol . . . for a combined total of 24 referrals.”).

186. *Id.*

187. The purpose of the statistic is unclear. Opponents of the program allude that it is being used as a performance measure, but this claim is not independently verified. See Press Release, American Civil Liberties Union of Texas, Documents Obtained by ACLU Reveals Lies from El Paso County Sheriff’s Department (June 20, 2006), available at <http://www.aclutx.org/article.php?aid=327> (on file with the *Columbia Law Review*) (“The monthly reports focus on how many undocumented men, women, and/or children intercepted as being the main output measure.”).

188. See *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (noting that conflict preemption occurs when state action “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress”).

189. See *supra* Part I.B.3; see also Lisa M. Seghetti, Stephen R. Vina & Karma Ester, Cong. Research Serv., *Enforcing Immigration Law: The Role of State and Local Law Enforcement* CRS-7 (2005) (“To the degree that it is not preempted, the authority of state and local law enforcement officers to investigate and arrest for violations of federal law is determined by reference to state law.”).

190. See Tex. Code Crim. Proc. Ann. art. 14.01(b) (Vernon 2005) (“A peace officer may arrest an offender without a warrant for any offense committed in his presence or within his view.”).

191. See *Ex parte Jones*, 208 S.W. 525, 525–26 (Tex. Crim. App. 1919) (accepting that state officer can arrest individual for violation of federal law).

but not civil immigration violations.<sup>192</sup> Under this opinion, state officers do *not* have the authority to arrest an individual for illegal presence, a civil violation of immigration law,<sup>193</sup> but they arguably could arrest an individual whom they actually witness enter the country at an unauthorized location, a criminal violation.<sup>194</sup> In fact, the opinion states explicitly that a peace officer “may not arrest without warrant an alien solely on the suspicion that he has entered the country illegally.”<sup>195</sup> The opinion also notes the action that officers in the El Paso sector of the border claim to follow, involving *incidental* contact with an undocumented immigrant: If peace officers believe that an individual in their custody has entered the country illegally, they should notify immigration authorities and release the suspect to federal custody “after disposition of State criminal charges.”<sup>196</sup>

Direct enforcement of civil immigration law is unauthorized under state law.<sup>197</sup> While it is expected—especially on the U.S.-Mexico border—that state law enforcement agencies will engage undocumented immigrants incidental to regular police activities,<sup>198</sup> direct investigation of the location of undocumented immigrants is in no way incidental to or part of a state criminal investigation. Without the requisite memorandum of agreement with the federal government, and without authorization by the state to enforce federal civil immigration law,<sup>199</sup> the practice reported in the e-mail by the El Paso County Sheriff’s Office, as well as similar activities by other departments, is unauthorized enforcement of civil immigration law.

192. Authority of Local Peace Officers to Arrest Illegal Aliens Without a Warrant, Op. Att’y Gen. No. H-1029 (Tex. July 28, 1977), available at <http://www.oag.state.tx.us/opinions/opinions/45hill/op/1977/pdf/jh1029.pdf> (on file with the *Columbia Law Review*).

193. See *id.* at 2 (“Texas peace officers . . . do not have authority to arrest an individual solely upon suspicion that he has previously entered the country illegally . . .”).

194. 8 U.S.C. § 1325 (2000) (“Any alien who . . . enters or attempts to enter the United States at any time or place other than as designated by immigration officers . . . shall . . . be fined . . . or imprisoned . . .”).

195. Authority of Local Peace Officers to Arrest Illegal Aliens Without a Warrant, Op. Att’y Gen. No. H-1029, at 4.

196. See *id.* at 2 (“If local officials perceive a likelihood that an alien in custody on other charges has entered the country illegally, they should notify federal INS officers of their suspicion, and may release the suspect to the custody of federal officials after disposition of State criminal charges.”); see also Telephone Interview with Agent Garcia, *supra* note 136.

197. See *supra* note 192 and accompanying text.

198. In defense of Operation Linebacker and increased police enforcement along the border, the Texas Governor’s office reiterated that this is incidental contact, and the sheriff’s department argued that normal law enforcement duties cannot be conducted without contact with undocumented immigrants. See Grissom, Linebacker, *supra* note 132.

199. See Authority of Local Peace Officers to Arrest Illegal Aliens Without a Warrant, Op. Att’y Gen. No. H-1029, at 2 (“Texas peace officers do not . . . have authority to arrest an individual solely upon suspicion that he previously entered the country illegally . . .”).

As this Part has demonstrated, the reported police activities are not preempted, but in practice the enforcement not only conflicts with federal enforcement measures it is unauthorized by state law. The result is a significant disconnect between reported activities and actual practice. This development poses a problem as policymakers in Washington will increasingly rely on local enforcement that burdens state agencies, especially in the border region, and invites a host of policy problems that impact the safety of law enforcement officers and the rights of U.S. citizens and undocumented immigrants alike. Moreover, it displaces the balance of power between federal and state authorities in an area that calls for federal control. The following Part addresses the values necessary to strike this balance.

### C. *Accounting for Federalism Values in Immigration*

1. *Legitimacy, Interaction with Foreign Nations, and Uniformity.* — As early as the 1800s, the Supreme Court began to articulate the values fulfilled by federal immigration law: uniformity and legitimacy with foreign nations.<sup>200</sup> Early cases related to immigration asserted the exclusivity of federal control over immigration law because of the concern of interaction with foreign nations,<sup>201</sup> and noted that immigration was an area in which uniformity was necessary.<sup>202</sup> Uniformity provides an air of legitimacy to immigration law, as the Supreme Court noted.<sup>203</sup>

The Court also voiced concern about the potential for states to embroil the United States in conflict with foreign nations over immigration matters.<sup>204</sup> Even before the Court stated that immigration regulation is an exclusively federal matter, the issue had worried the federal government in its dealings with foreign powers.<sup>205</sup> The Court explicitly cited this as a reason for its declaration that the federal government's regula-

200. See *supra* Part I.A.2.

201. See cases cited *supra* notes 47–49 and accompanying text.

202. “[T]he matter of these statutes may be, and ought to be, the subject of a uniform system or plan. The laws which govern the right to land passengers in the United States from other countries ought to be the same in New York, Boston, New Orleans, and San Francisco.” *Henderson v. Mayor of N.Y.*, 92 U.S. 259, 273 (1875).

203. *Id.* at 274 (“We are of opinion that this whole subject has been confided to Congress by the Constitution; that Congress can more appropriately and with more acceptance exercise it than any other body known to our law . . .”).

204. See *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875) (“[T]he responsibility for the character of those regulations, and for the manner of their execution, belongs solely to the national government. If it be otherwise, a single State can, at her pleasure, embroil us in disastrous quarrels with other nations.”).

205. Professor Neuman discusses conflicts between European countries and the United States over laws passed by Southern states regulating the entry of free black sailors on ships arriving in Southern ports. The British even engaged Southern states directly regarding their regulations. According to Professor Neuman: “The controversy . . . is particularly important as an instance in which state immigration law created a persistent diplomatic embarrassment for the United States . . .” Neuman, *Strangers*, *supra* note 15, at 38–39.

tion of immigration trumped state laws.<sup>206</sup> The Court also noted the incongruity of forbidding states to negotiate with foreign powers or declare war, yet permitting them to act in ways that could render the federal government liable to foreign nations.<sup>207</sup> The Supreme Court has repeatedly stated that treatment of one country's citizens in another country is a component of foreign affairs<sup>208</sup> and that conflicts between nations may arise as a result of wrongs committed against those individuals.<sup>209</sup>

2. *Applying These Values to Linebacker-like Activities.* — The possibility of state and local peace officers enforcing federal immigration law without adequate training, and merely supporting border enforcement measures without adequate guidance, is of particular concern. In light of the values articulated by the Supreme Court, enforcement of federal immigration law by state and local law enforcement frustrates uniformity and hence legitimacy in foreign affairs.<sup>210</sup> Nonuniform enforcement of federal immigration laws poses this problem, as Texas could impose different enforcement measures than those used by California, and Arizona could impose enforcement measures that differ from New Mexico's.<sup>211</sup> Even within a state, the problem of nonuniformity occurs, since the sheriff's department of El Paso County, Texas, might undertake enforcement measures differently than the sheriff's department of Hudspeth County, Texas.<sup>212</sup> While it is arguable that border patrol sectors modify enforcement activities to address the needs of a particular area,<sup>213</sup> uniformity exists due to that sector's accountability to one national government, which is not the case with state and local law enforcement agencies.

Almost any police activity along the border impacts foreign relations.<sup>214</sup> Such activity undoubtedly results in incidental contact with un-

206. See *Chy Lung*, 92 U.S. at 280.

207. *Id.* (“[H]as the Constitution . . . done so foolish a thing as to leave it in the power of the States to pass laws whose enforcement renders the general government liable . . . while it does not prohibit to the States the acts for which it is held responsible?”).

208. See, e.g., *Hines v. Davidowitz*, 312 U.S. 52, 64 (1941) (“One of the most important and delicate of all international relationships, recognized immemorially as a responsibility of government, has to do with the protection of the just rights of a country's own nationals when those nationals are in another country.”).

209. *Id.* (“Experience has shown that international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted, or permitted, by a government.”).

210. See *Pham*, *Inherent Flaws*, *supra* note 165, *passim*.

211. See *id.* at 995 (“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.”).

212. *Cf. id.*

213. The United States Border Patrol is divided into twenty sectors with nine along the U.S.-Mexico border. U.S. Customs & Border Prot., *Border Patrol Sectors*, at [http://www.cbp.gov/xp/cgov/border\\_security/border\\_patrol/border\\_patrol\\_sectors/](http://www.cbp.gov/xp/cgov/border_security/border_patrol/border_patrol_sectors/) (last visited Mar. 7, 2008) (on file with the *Columbia Law Review*).

214. See *supra* notes 125–126 and accompanying text.

documented immigrants.<sup>215</sup> Operation Linebacker, as it currently exists, and the increased use of checkpoints in El Paso County, may be a permissible increase of police activities, but they are resulting in significant contact with undocumented immigrants who may not be in violation of any federal criminal provision.<sup>216</sup> Coupled with the statements by lawmakers supporting state and local authority for arrest, the increased police action seemingly has more than some incidental or indirect effect on foreign affairs.<sup>217</sup>

The state's activity conflicts with the decisions of the federal executive branch agency charged with securing the southern border, making the state's police activities along the border preempted under the standards articulated in *Zschernig v. Miller* and *American Insurance Ass'n v. Garamendi*, which are discussed in Part III.<sup>218</sup>

### III. EVALUATING IMMIGRATION ENFORCEMENT WITH AN EYE TOWARD FEDERALISM VALUES AND MAINTAINING THE BALANCE

The previous Parts indicate that there is a significant disconnect between the analysis of state enforcement of federal immigration laws and actual practice. Evaluating state enforcement of federal immigration law entails the standard preemption analysis.<sup>219</sup> Federalism is an overriding concern, as states—especially border states and states with busy ports—must contend directly with immigration. As one author argues: “[T]he federal government, the states, and localities form part of an integrated regulatory structure that helps the country as a whole to absorb immigration flows and manage the social and cultural change that immigration inevitably engenders.”<sup>220</sup> In particular, the current legal analysis and academic literature tend to focus exclusively on the domestic aspects of federalism,<sup>221</sup> looking to history and applying Supreme Court cases to determine the existence of “inherent authority” or preemption,<sup>222</sup> or on the

215. See Grissom, Reports, *supra* note 135 (“We just stumble upon them, quite frankly’ . . . Sheriffs in some other border counties said they also often come across undocumented immigrants in their Operation Linebacker work.”).

216. See *supra* notes 181–188 and accompanying text.

217. See Hearing, *supra* note 176, at 7 (statement of Sheriff Leo Samaniego, El Paso County, Tex.).

218. See *infra* Part III.A.

219. See *supra* notes 96–97.

220. Rodríguez, *supra* note 99, at 571.

221. See *supra* note 101 and accompanying text. But cf. Cecilia Renn, Comment, State and Local Enforcement of the Criminal Immigration Statutes and the Preemption Doctrines, 41 U. Miami L. Rev. 999, 1002 (1987) (arguing that immigration policy cannot be left to vagaries of state arrests).

222. See, e.g., Hethmon, *supra* note 79, at 84 (defending “inherent authority of local police to enforce federal immigration law”); Kobach, Quintessential, *supra* note 101, at 182 (finding inherent arrest authority of states never preempted by Congress); Manheim, *supra* note 55, at 944 (discussing preemption as method for analyzing state immigration law); Wishnie, State and Local, *supra* note 14, at 1088 (discussing “validity and implications” of state law enforcement’s “inherent authority” to make immigration

policy implications of state and local enforcement of federal immigration law.<sup>223</sup> Their analysis ignores how federalism concerns play out, where, as with immigration laws, international relations are also affected. This Part argues that courts should account for those values and concerns. As Part II shows, the current preemption doctrine would require courts to uphold an immigration enforcement policy that is preempted in practice and fails to account for the values of federalism. As a practical matter, this divergence allows federal policymakers to fail to address an issue of national concern at the expense of the states and traditional federal authority. This Part shows that, by focusing on the values of federalism, the federal government will not place states and localities in a position where their law enforcement agencies will enforce federal immigration law. In addition, this Part will provide recommendations to policymakers, on the front lines and in Washington, to adhere to the values of federalism in immigration policy.

#### A. *Courts and Policymakers Must Account for the Values of Federalism*

Courts and policymakers must take notice of the values of federalism that the Supreme Court has articulated in the immigration arena.<sup>224</sup> While Supreme Court cases that establish the federal government's authority over federal immigration law and foreign affairs are over a hundred years old,<sup>225</sup> cases involving state interference with federal control over foreign affairs are not unfounded in modern times. While much of the academic literature tends to brush over the impact of state enforcement actions on foreign affairs, the Supreme Court has struck down state action in recent cases based on this concern.<sup>226</sup> In *Zschernig v. Miller*, the

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arrests); Keblawi, *supra* note 55, at 818 (discussing inherent authority and legality of state enforcement in face of federal preemption).

223. See, e.g., Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. Third World L.J. 81, 86 (2005) (describing how new regime of immigration law "blurs distinctions between illegal aliens, criminal aliens, and terrorists"); Yañez & Soto, *supra* note 87, at 50 (citing policy problems with Congress allowing state participation in immigration enforcement); Kleinert, *supra* note 55, at 1119 (discussing policy impacts of new immigration legislation); Theodore W. Maya, Note, *To Serve and Protect or to Betray and Neglect?: The LAPD and Undocumented Immigrants*, 49 UCLA L. Rev. 1611, 1612-13 (2002) (describing need for special policies for police interactions with undocumented immigrants).

224. Arguments have been presented for Congress to explicitly preempt state action in the immigration arena. Karla Mari McKanders, *Welcome to Hazleton! "Illegal" Immigrants Beware: Local Immigration Ordinances and What the Federal Government Must Do About It*, 39 Loy. U. Chi. L.J. 1, 44 (2007). While that would be one solution, this Note is written from the perspective that there is an incentive for Congress to actually involve state and local police in federal immigration enforcement.

225. See *supra* notes 47-49 and accompanying text.

226. See *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 491 (2003) (striking state statute requiring insurance companies to provide information about Holocaust-era policies as impermissible interference with foreign affairs); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 366 (2000) (striking state law barring state agencies from purchasing goods and services from companies doing business with Burma); *Zschernig v. Miller*, 389 U.S.

Court invalidated a state law that impacted foreign affairs, holding that state actions have “great potential for disruption or embarrassment” and may have “more than ‘some incidental or indirect effect in foreign countries.’”<sup>227</sup> The Supreme Court has also deferred to the federal government over state action in recent years in the arena of foreign affairs.<sup>228</sup> Even when a state acts within an area of “traditional competence,”<sup>229</sup> the likelihood that state action would have “more than ‘some incidental or indirect effect’” on foreign affairs has come into play in evaluating whether the state action is preempted.<sup>230</sup> This conflict with foreign policy need not be limited to conflict with legislative action; it may occur with executive branch action regarding foreign affairs.<sup>231</sup>

These cases reflect the value of uniformity, particularly in an area that impacts foreign affairs, such as immigration.<sup>232</sup> Given the potential for one state’s actions to result in diplomatic controversy—or, in the extreme scenario, conflict—the Court has demonstrated a preference for uniformity among the states.

As has been noted, uniformity in immigration laws and issues touching foreign affairs are of the utmost importance. “[T]here is no reason to allow states or municipalities to experiment with immigrants’ rights.”<sup>233</sup> Working from the baseline that the federal government has exclusive authority over immigration, local enforcement interferes with fulfillment of that objective.<sup>234</sup> By taking account of these values of federalism in immigration, the analysis in Part II would not prove so difficult. Moreover, it

429, 432 (1968) (invalidating state statute regarding testamentary property as intrusion by state into foreign affairs).

227. *Zschernig*, 389 U.S. at 434–35 (quoting *Clark v. Allen*, 331 U.S. 503, 517 (1947)). In *Zschernig*, the Supreme Court examined an Oregon law allowing foreign heirs to take property of the deceased only if the foreign nation gave a reciprocal right to U.S. citizens. 389 U.S. at 430. Recognizing the concern articulated in *Hines v. Davidowitz*, 312 U.S. 52 (1941), that “[e]xperience has shown that international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another’s subjects inflicted, or permitted, by a government,” the Court struck down the state law. *Zschernig*, 389 U.S. at 441 (quoting *Hines*, 312 U.S. at 64).

228. See *Garamendi*, 539 U.S. at 442 (instructing deference to Executive when it has spoken clearly to issue at hand); *Crosby*, 530 U.S. at 386 (“[T]he state Act stands in the way of Congress’s diplomatic objectives.”).

229. *Zschernig*, 389 U.S. at 459.

230. *Id.* at 434.

231. In *Garamendi*, the Court found that California state law conflicted with executive authority to conduct foreign policy. 539 U.S. at 491. There was no congressional action or standing law, yet the Court still found that the state law was preempted by executive action. *Id.* at 414 (describing President’s authority to act).

232. For a thorough discussion on the importance of uniformity in immigration policies, see Pham, *Inherent Flaws*, supra note 165, *passim* (“[I]mmigration power is an exclusively federal power that must be exercised uniformly.”).

233. McKanders, supra note 224, at 43.

234. Cf. *id.* at 44 (arguing that “local laws only serve as an obstacle to the purposes of federal legislation enacted pursuant to [Congress’s plenary] power” in discussion of local laws impacting immigration).

would serve as a guide for general policymaking as lawmakers seek to require collaboration with or even deputize state and local law enforcement officers to enforce federal law.

### B. *Considering Countervailing Values*

A key element of federalism is that both the federal and state governments are sovereign entities. The state has the authority to ensure the safety, health, and well-being of its citizens, and the local nature of state authority means that the states may provide solutions to the problems unique to a particular area that the federal government cannot address adequately.<sup>235</sup> State action may also bring issues to the federal government's attention that would otherwise be neglected.<sup>236</sup> The Supreme Court has recognized the power of a state to regulate its own affairs, even within the subject area of immigration, stating that "speculative and indirect impact on immigration" does not render a state law preempted.<sup>237</sup> This section argues, however, that the benefits of state and local law enforcement (1) are trumped by uniformity and foreign affairs concerns and (2) have already been achieved.

As previously discussed, diversity of regulation is not necessarily a positive value with regard to immigration reform.<sup>238</sup> The merit of uniformity over diversity is of particular importance for issues involving foreign affairs and immigration.<sup>239</sup> Unlike other areas where independent relationships between states and foreign governments are beneficial,<sup>240</sup> immigration involves the nationals of a foreign power, the treatment of whom is a pressing matter for the involved nations.<sup>241</sup> Moreover, the activities of Operation Linebacker have more than a speculative and indirect impact on immigration, as the program serves as a "second line of

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235. See Young, *supra* note 13, at 52 (suggesting state autonomy and diversity of regulatory outcomes from state to state as core values of federalism).

236. See Roderick M. Hills, *Against Preemption: How Federalism Can Improve the National Legislative Process* 16 (Univ. of Mich. Law, Public Law and Legal Theory Research Paper No. 27, 2003), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=412000](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=412000) (on file with the *Columbia Law Review*) ("State law, therefore, are [sic] an important influence on the agendas in Congress.").

237. See *De Canas v. Bica*, 424 U.S. 351, 355 (1976). It should be noted that the Supreme Court did not decide the case based on whether the statute stood "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress' in enacting the INA." *Id.* at 363 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

238. See *supra* Part II.C.1.

239. See *supra* Part II.C.1.

240. For example, many cities have economic relationships with cities around the world to create sister cities programs. Moreover, state governors regularly meet with counterparts on issues of common concern. See Daniel Halberstam, *The Foreign Affairs of Federal Systems: A National Perspective on the Benefits of State Participation*, 46 *Vill. L. Rev.* 1015, 1028-37 (2001).

241. See *supra* note 204 and accompanying text.

defense” and in many senses supplements the police activities of federal Border Patrol agents.<sup>242</sup>

State action has already brought national attention to the task of addressing a unique problem facing residents along the southwestern border. Congress and some national media have taken notice of sheriffs across the entire southwestern United States increasing police activity, and congressional representatives have filed bills to fund the increased police activities.<sup>243</sup> In a sense, this challenge to federalism values has achieved a desired value of federalism—bringing national attention to a regional issue—but the question remains: What are the costs of continuing these activities now that the issue is on the national stage?

The problem with proposed bills and requests for further authority for state and local law enforcement to enforce federal immigration laws directly, however, is that they exacerbate the problems they seek to address. First, state and local authorities complain that the federal government has not provided enough support to police the border effectively.<sup>244</sup> Using state and local law enforcement officers to police the border adds to this problem by providing an incentive for Congress to further shirk federal responsibility for the border.<sup>245</sup> Another problem is

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242. See *supra* Part II.A.

243. See Gilot, *Sheriffs Unite*, *supra* note 5 (discussing sheriffs’ coalition across Southwest border); discussion *supra* note 12.

244. See, e.g., Randal C. Archibold, *Phoenix Mayor Shifts on Officers Asking for Immigration Status*, *N.Y. Times*, Dec. 4, 2007, at A22 (“[Phoenix Mayor Phil] Gordon said the government had not done enough to patrol the border and to enact changes to immigration law to slow the pace. He said he now advocated giving the police the authority to check the immigration status of anyone accused of breaking the law.”); Governor Janet Napolitano, *Ariz., Address to the National Press Club Regarding Immigration, Border Security 1* (Feb. 27, 2007), available at [http://azgovernor.gov/dms/upload/NR\\_022707\\_NATIONAL%20PRESS%20CLUB%20FINAL.pdf](http://azgovernor.gov/dms/upload/NR_022707_NATIONAL%20PRESS%20CLUB%20FINAL.pdf) (on file with the *Columbia Law Review*) (“The failure to adequately control our borders reveals deep cracks in our Department of Homeland Security, unfairly affects states like mine that are on the border, and gives rise to ugly and unproductive political rhetoric.”); Press Release, Office of the Governor, State of Tex., Perry: First High Intensity Phase of Operation Wrangler Made Texas Safer (Feb. 13, 2007) (on file with the *Columbia Law Review*) (quoting Governor as saying: “[U]ntil the federal government fulfills its responsibility to secure the nation’s borders, we will continue to exhaust all available means at the state level to secure the Texas-Mexico border and protect our families and communities.”); Governor Bill Richardson, N.M., *Speech on Comprehensive Immigration Reform at Georgetown University 6* (Dec. 7, 2006), available at <http://www.governor.state.nm.us/MEDIA/PDF/Comprehensive%20Immigration%20Reform%20Speech%20at%20Georgetown%20University.pdf> (on file with the *Columbia Law Review*) (“The Federal government has failed to deal with illegal immigration, forcing state governors to deal with the consequences of this failure.”); Letter from Governor Arnold Schwarzenegger, Cal., to U.S. Senate Leaders (June 13, 2006), available at <http://gov.ca.gov/press-release/982/> (on file with the *Columbia Law Review*) (“Border security and immigration reform are the exclusive jurisdiction of the federal government. Despite this, our states are now actively working with the federal government to help secure the border region.”).

245. See Letter from Raymond Flynn, Chairman, Catholic Alliance, David Keen, Chairman, Am. Conservative Union & Grover Norquist, President, Ams. for Tax Reform, to

that the proposed expansion of border police activities, increase in the number of state-operated cameras, and potential authority for state and local law enforcement to arrest individuals directly for civil immigration violations all interfere with uniformity in immigration enforcement, impeding the ability of the federal government to speak with one voice regarding foreign affairs.<sup>246</sup> Finally, the federal government's respect for the sovereignty of state governments diminishes as it imposes enforcement of a federal directive on state and local authorities.<sup>247</sup>

### C. *Actions in the Field*

1. *Officers Should Be Adequately Trained to Ensure that They Are Not Enforcing Federal Immigration Law.* — The analysis in Part II also demonstrates the disconnect between the way a policy is reported and the ways it is practiced on the ground. Among the practical policy solutions to the problems faced by state and local law enforcement officials on the border is ensuring that officers are trained adequately. As state or local police officers in a border community are likely to encounter immigrants, it is imperative that they be aware of the activities that constitute police activities and those activities that cross the line into immigration enforcement. As immigration statutes constitute a complex body of law, it is unlikely that state and local law enforcement officers have the proper training to enforce those laws.<sup>248</sup> Training local officials to enforce those laws, however, is not the solution, as it provides an incentive for federal officials to place the burden of enforcement on local officials.<sup>249</sup>

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President George W. Bush (May 30, 2002), available at <http://www.immigrationforum.org/DesktopDefault.aspx?tabid=182> (on file with the *Columbia Law Review*) [hereinafter Letter] (fearing state and local law enforcement of federal immigration laws would “force state and local governments to pay for enforcement of laws intended to be enforced by federal law enforcement agencies”).

246. See *supra* Part II.C.1.

247. This situation differs from *Printz v. United States*, 521 U.S. 898 (1997), in which state law enforcement officers were required to conduct background checks before an individual could purchase a handgun, *id.* at 908, in that federal authorization to enforce federal immigration law would be voluntary for state and local police agencies. Because of the demands on state and local law enforcement, the federal government could leave state and local law enforcement agencies, especially those along the border, with a Hobson's Choice: enforce federal immigration law and receive funds for increased police enforcement, or continue to enforce state criminal laws without the necessary federal support in the form of a sufficient number of federal officers.

248. Int'l Ass'n of Chiefs of Police, *Enforcing Immigration Law: The Role of State, Tribal and Local Law Enforcement* 3–4 (2004), available at <http://www.theiacp.org/documents/pdfs/Publications/ImmigrationEnforcementconf.pdf> (on file with the *Columbia Law Review*).

249. See Craig E. Ferrell Jr., *Immigration Enforcement: Is It a Local Issue?*, *The Police Chief: The Prof'l Voice of L. Enforcement*, Feb. 2004, at 36, 38–39 (“[S]tate and local police do not have the training or expertise to enforce immigration laws . . . [and] many executives feel they do not have the resources to tackle this additional federal issue. There are federal agencies specifically charged with the enforcement and application of the complex immigration laws and regulations.”).

A key element to policing is trust between the police officers who enforce the laws and the community that is being policed.<sup>250</sup> “Local police agencies depend on the cooperation of immigrants, legal and illegal, in solving all sorts of crimes and in the maintenance of public order.”<sup>251</sup> There is also concern that immigration enforcement by state and local officers increases the possibility of racial profiling, particularly for individuals of Mexican descent.<sup>252</sup> To avoid these policy problems, it is imperative that state and local police maintain a separate sphere of control: control over state crimes. Overstepping the line of state and local law enforcement, such as asking for a drivers’ license from a driver in a vehicle, into determining citizenship with no probable cause or asking riders on a bus for social security numbers, is a small but crucial step into blurring the lines between state and federal enforcement duties. This leads to the next action that state and local police should follow.

2. *State and Local Police Should Oppose Blurring the Line Between Federal and State Authority.* — State and local law enforcement must make their opposition to arrest authority clear. Recently, the El Paso County Sheriff requested authorization to enforce federal immigration law—which would entail civil and criminal enforcement.<sup>253</sup> Such requests yield two results: (1) They invite further skepticism that the intent of Operation Linebacker is just to enforce state law, and (2) they provide an incentive for the federal government to pass border enforcement activities on to the states.

Increased police activities may be necessary in some remote portions of the border for the safety of residents and law enforcement officers; however, the purpose of increased police action is drawn into question when the same officers championing the program are requesting direct authority to arrest and detain undocumented immigrants.<sup>254</sup> Implicit in

250. Carrie L. Arnold, Note, Racial Profiling in Immigration Enforcement: State and Local Agreements to Enforce Federal Immigration Law, 49 *Ariz. L. Rev.* 113, 122 (2007); see also Erica Molina Johnson, Chaparral Arrests Rankle: Advocates Urge Sheriff to Stop, *El Paso Times*, Sept. 20, 2007, at 1B (describing protest against actions of Otero County, New Mexico, Sheriff with advocate stating that “some residents are not reporting crimes for fear of deportation”); Erica Meltzer, Sheriff Drops Plan to Have Border Agents Deputized: Immigrant-Rights Activists Ask Supervisors to Reject Idea, *Ariz. Daily Star* (Tucson), Jan. 9, 2008 (“Critics of the proposal said crime victims would be afraid to report crimes . . .”). See generally Orde F. Kittrie, Federalism, Deportation, and Crime Victims Afraid to Call the Police, 91 *Iowa L. Rev.* 1449 (2006) (discussing deterrent effect that deportation has on reporting of crimes by immigrants).

251. Int’l Ass’n of Chiefs of Police, *supra* note 248, at 5.

252. See Arnold, *supra* note 250, at 119–21 (“There is evidence of racial profiling when state and local officers have teamed up with federal officers to investigate immigration violations.”).

253. See Hearing, *supra* note 176, at 7 (statement of Sheriff Leo Samaniego, El Paso County, Tex.)

254. A number of police departments across the country have opposed authorization to enforce federal immigration law. See Nat’l Immigration Forum, Background: Immigration Law Enforcement by State and Local Police (May 2004), at <http://www.immigrationforum.org/DesktopDefault.aspx?tabid=572> (on file with the *Columbia Law*

the authorization to enforce federal immigration law is an element of control that state and local law enforcement agencies will give to the federal government. While such control may fulfill a value of uniformity, it destroys sovereign control that states have over law enforcement, potentially resulting in a “nationalized” police force.<sup>255</sup> By opposing proposed measures to authorize state and local law enforcement to enforce civil immigration law, law enforcement agencies can ensure their independence from federal control and ensure that the federal government will not encroach on state sovereignty.

3. *The Federal Government Should Fulfill Its Obligations Along the Border.* — The proceeding proposal is much easier said than done as states have implemented and are implementing increased enforcement actions as a result of federal inaction.<sup>256</sup> Should the federal government shoulder its burden of border security, there would be diminished need for state and local officers to engage in federal immigration enforcement.<sup>257</sup> In addition to providing manpower, “[i]nvestments in technology and infrastructure can effectively leverage manpower and maximize the capacity of fed-

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*Review*). Within El Paso County, the city of El Paso’s police department has opposed the authorization, arguing that the department is already overburdened. See Hearing, *supra* note 176, at 60, 63–64 (statement of Chief Richard Wiles, El Paso Police Dep’t). There is also a concern that the enforcement of federal immigration law by state and local law enforcement will diminish the capacity of officers to effectively police the community as local residents would distrust police officers. See *id.*; Nat’l Immigration Forum, *supra* (“The success of community policing hinges upon a relationship of trust between community residents and law enforcement officials, a relationship that is broken down when immigrants fear immigration-related consequences for approaching state or local police.”). There are claims of such fear in El Paso County, where residents have reported their concern about reporting state criminal violations because of their civil immigration status. See Grissom, *Deputies*, *supra* note 10. It is also imperative to note the distinction between civil and criminal law. Attempts have been made to classify all immigration violations as criminal, which would effectively give all law enforcement the ability to detain and arrest any undocumented immigrant. See S. 2454, 109th Cong. § 206 (2006); H.R. 4437, 109th Cong. § 203 (2005); see also Michael John Garcia, *Criminalizing Unlawful Presence: Selected Issues 5–6* (2006), available at <http://www.ilw.com/immigdaily/news/2006,0509-crs.pdf> (on file with the *Columbia Law Review*). Opponents argue that such criminalization would result in a substantial burden on law enforcement and the justice system. See *supra* Part III.C.1.

255. The Executive Directors of traditionally conservative organizations wrote President George W. Bush in 2002 opposing the “inherent authority” of state and local police officers to arrest undocumented immigrants for violations of civil law, arguing that “it will set a dangerous precedent with regard to the authority of state and local law enforcement agencies to enforce civil violations of many Federal laws.” Letter, *supra* note 245.

256. See *supra* note 244.

257. See Ferrell, *supra* note 249, at 40 (arguing from perspective of Houston Police Department Deputy Director and Administration General Counsel that “federal government should address the real threats the nation faces and the issue of illegal immigration without making the job of state and local police more difficult”).

eral border enforcement agents in securing the borders<sup>258</sup> rather than placing the burden on state officials.<sup>259</sup> An area of exclusive federal control requires that the federal government fulfill its obligations to provide border security and alleviate the burden that its inaction is placing on state and local officials. Failure to do so places state officials in the position to engage in policies impacting immigration that the federal government will not address,<sup>260</sup> gives Washington an incentive to further place the burden on state and local officers, and diminishes values of federalism important in this arena.

#### CONCLUSION

This analysis has revealed key concerns involving the policing of the border area. While public statements indicate that Operation Linebacker and related police activities are not preempted by any federal regulations and are within the authority of state laws, actual reported practices are unauthorized by state law and may be preempted by federal law. It is undeniable that the issues facing state and local law enforcement officers from Brownsville, Texas, to San Ysidro, California, present daunting challenges unlike those faced elsewhere in the country. These challenges provide an easy opportunity for the federal government to shift its responsibilities to state and local law enforcement officers, but doing so undermines the values of federalism in matters of foreign affairs, including legitimacy, uniformity, and maintenance of state and federal sovereignty. The current preemption analysis fails to account for those values. Values of federalism, especially in the foreign affairs context, should be considered more fully when assessing the authority of state and local police officers to enforce federal immigration law. Once policymakers, and ultimately the courts, clearly recognize the importance of federalism values implicit in this issue, practical needs will not force state and local governments to engage in policies that subvert those constitutional values.

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258. Nat'l Conference of State Legislatures, NCSL Interim Policy on Immigration Reform (May 6, 2006), available at <http://www.ncsl.org/programs/press/2006/impolicy.htm> (on file with the *Columbia Law Review*).

259. Cf. Nat'l Conference of State Legislatures, 2007–2008 Policies for the Jurisdiction of the Law & Criminal Justice Committee, at <http://www.ncsl.org/statefed/LAWANDJ.HTM> (last updated Mar. 3, 2008) (on file with the *Columbia Law Review*) (“NCSL also opposes shifting traditional federal responsibilities, such as civil immigration enforcement, to state and local law enforcement personnel.”).

260. Local police in Irving, Texas, a suburb of Dallas, referred over 2,170 immigrants to U.S. Immigration & Customs Enforcement, most of whom had been charged with misdemeanors. Citing a lack of resources, the federal agency sent a memorandum to state and local departments telling the agencies that it could focus only on immigrants facing serious crimes. See Brandon Formby, ICE Still Taking Class C Suspects: Minor Offenders Lacking ID Still Face Deportation Despite Agency's Memo, *Dallas Morning News*, Jan. 20, 2008, at 1B.