Local Enforcement and Federal Preemption

by Alicia Triche

Some confusion exists as to whether states have inherent authority to participate in the enforcement of civil immigration law.[1] Two circuit courts have issued opposite opinions, and the Attorney General seems to keep changing his mind. In this Congress, the House passed portions of the controversial "CLEAR Act," declaring that state law officials have "the inherent authority of a sovereign entity to investigate, identify, apprehend, arrest, detain or transfer … for the purpose of assisting in the enforcement of immigration laws."[2] Yet the Senate's bill stated almost the opposite: "Nothing in this subtitle shall be construed to authorize State or local law enforcement agencies or their officers to exercise Federal immigration law enforcement authority."[3]

For their part, state policy makers are exhibiting behavior that is equally schizophrenic. On the one hand, States have heartily resisted attempts to mix immigration and criminal law enforcement, viewing the former as a serious impediment to the latter.[4] The New York *Times* recently reported on the prevalence of local "sanctuary" rules, under which police are forbidden from enquiring about immigration status during routine law enforcement activities.[5] On the other hand, some states have sought to expand their own capabilities to enforce immigration law.[6] Exemplifying this approach is Ohio Senate Bill 9, codified in part at Ohio Revised Code Annotated §2909.30, which provides:

> (B) The Department of Rehabilitation and Correction monthly shall compile a list of suspected aliens who are serving a prison term. the list shall include the earliest possible date of release of the offender, whether through expiration of prison term, parole, or other means. the department shall provide a copy of the list to the Immigration and Customs Enforcement section of the United States Department of Homeland Security for the section to determine whether it wishes custody of the suspected alien. if the Immigration and Customs Enforcement section indicates it wishes custody, the Department of Rehabilitation and Correction is responsible for the suspected alien until the section takes custody.[7]

There is a legal answer to this debate, and it lies in a reasoned application of established constitutional principles. In short, the Ohio provision, along with others like it, should be struck down. To the extent that it mandates investigation of "suspected alien" status, it injects additional enforcement mechanisms into the federal immigration regime — and that is a clear violation of constitutional law. Unless their actions are requested and supervised by DHS, States have no authority to investigate, apprehend, or detain those suspected of civil immigration violations.

What follows is a practitioner's argument that unsupervised state enforcement of civil immigration law is preempted by the Immigration and Nationality Act.[8] Part I outlines the basics of the preemption doctrine as it applies to U.S. immigration law, and also summarizes existing authority at hand. Part II argues that "conflict preemption" applies to unauthorized state enforcement activities. Part III argues that "field preemption" also applies to such actions. The

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[1] *See* April McKenzie, *A Nation of Immigrants or a Nation of Suspects? State and Local Enforcement of Federal Immigration Laws Since 9/11,* 55 Ala. L. Rev. 1149, 1160 (2004). For a collection of online resources, see the National Immigration Forum's compilation, *available at* www.immigrationforum.org/DesktopDefault.aspx?tabid=567 (last visited Nov. 16, 2006).

[2] Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. §220 (2005).

[3] Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. §130 (2006).

[4] For example, last year, the Maryland legislature rejected House Bill 1217, which provided that Baltimore police "shall inform the Bureau of Citizenship and Immigration Services ... as soon as possible after the police officer has detained an undocumented alien." *available at* http://house.state.md.us/2005rs/bills/hb/hbl1217f.pdf (last visited Nov. 21, 2006); http://house.state.md.us/2005rs/billfile/hb1217.htm (last visited Nov. 21, 2006). Section 1 of the bill would have added Maryland Code Annotated, Criminal Procedure §2-108.

[5] Jesse McKinley, *Immigrant Protection Rule Draws Fire*, N.Y. Times, Nov. 12, 2006, at 22 ("[A]bout 50 cities and counties have enacted variations on sanctuary…") (citing the National Immigration Law Center).

[6] The National Conference of State Legislatures keeps track of the status of state bills affecting immigration. See www.ncsl.org/programs/immig (last visited Nov. 16, 2006).

[7] 126th Gen. Ass., Reg. Sess., signed Jan. 11, 2006, effective April 14, 2006, codified at Ohio Rev. Code Ann §2909.30 (LexisNexis 2006).

[8] 8 U.S.C. §§1101–1503 [hereinafter INA or the Act].

Conclusion considers the implications of resorting to extra-legal actions in the realm of immigration enforcement.

PART I: OVERVIEW: PREEMPTION AND STATE IMMIGRATION ENFORCEMENT

It is well established that state police may apprehend and detain people suspected of federal crimes.[9] So long as it complies with their own laws, state officers may arrest for *criminal* violations of U.S. immigration law.[10]

Whether States may arrest suspects of *civil* immigration violations, however, is more complicated, and the issue is unaddressed in all but two circuits. Under the Supremacy Clause of the Constitution,[11] state actions are preempted if they conflict with federal legislation — including the INA.[12] The Ninth Circuit has commented (in dicta) that all such arrests are pre-empted by the INA.[13] In contrast, the Tenth Circuit has ruled that such arrests are constitutional, even outside the confines of the INA, as long as they comply with applicable state law.[14]

The Justice Department has expressed varying opinions on the matter. In 1996, the Office of Legal Counsel (OLC) issued an official position that "state and local police lack recognized legal authority to stop and detain an alien *solely on suspicion of civil deportability*, as opposed to a criminal violation of the immigration laws or other laws."[15] However, "in 2002, the Office of Legal Counsel withdrew the advice set forth" in that document.[16] There is now no official legal opinion to take its place — at least not one released to the public.[17] Instead, the "official" position of the Attorney General's office consists of a public announcement made by John Ashcroft and a letter written from Alberto Gonzales (when he was White House Counsel) to the Migration and Policy Institute.[18] The letter from Mr. Gonzales summarizes the official position as follows: "state and local police have inherent authority to arrest and detain persons who are in violation of immigration laws *and whose names have been placed in the National Crime Information Center (NCIC)*."[19] The letter goes on to state: "Only high-risk aliens who fit a terrorist profile will be placed in the NCIC" and that the current policy has been formulated in an "effort to strengthen homeland security and combat terrorism."[20] Notwithstanding the administration's preferred methods for the "war on terror," however, the legality

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[9] *See, e.g.,* United States v. Haskin, 228 F.3d 151 (2d Cir. 2000); Dep't of Public Safety & Corr. Servs. v. Berg, 674 A.2d 513, 517, 342 Md. 126, 135–36 (1996) (citing Marsh v. United States, 29 F.2d 172 (2d Cir. 1928).

[10] United States v. Villa-Velazquez, 282 F.2d 553 (8th Cir. 2002) (felonious re-entry after a deportation order issued); United States v. Daigle, 2006 U.S. Dist. LEXIS 14533 (D. Me. 2005) (felony entry without inspection); Gates v. Sup. Ct. of Los Angeles Ct'y, 193 Cal. App. 3d 205, 238 Cal. Rptr. 592 (Ct. App. 1987) (misdemeanor entry without inspection).

[11] U.S. Const., Art. VI, cl. 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

[12] Toll v. Moreno, 458 U.S. 1 (1982); De Canas v. Bica, 424 U.S. 351 (1976); *see also* City of Charleston v. A. Fisherman's Best, Inc., 310 F.3d 155, 168–70 (4th Cir. 2002) (Fourth Circuit's "[o]verview" of both conflict and field preemption).

[13] Gonzales v. City of Peoria, 722 F.2d 468 (9th Cir. 1983), *overruled on other grounds,* Hodgers-Durgin v. De La Vina, 199 F.3d 1037 (9th Cir. 1999).

[14] United States v. Vasquez-Alvarez, 176 F.3d 1294 (10th Cir. 1999).

[15] Teresa Wynn Roseborough, Deputy Ass't Att'y General, Office of Legal Counsel, *Assistance by State and Local Police in Apprehending Illegal Aliens* (Memorandum Opinion for the U.S. Attorney, Southern District of California) (Feb. 5, 1996) (emphasis in original), *available at* www.usdoj.gov/olc/immstopo1a.htm (last visited Nov. 14, 2006), 1 INS & DOJ Legal Opinions §96-2 (LEXIS).

[16] *Id.*

[17] *See* National Lawyers Guild, Immigration Law & Crimes §8:6 (West 2006) (reporting release of the official opinion was "delayed, after protest by police, Latino and civil rights groups"); Jill Keblawi, Comment, *Immigration Arrests by Local Police: Inherent Authority or Inherently Preempted?*, 53 Cath. U.L. Rev. 817, 817–18 (2004). But, following litigation, the opinion is available in redacted form at 10 Bender's Immigration Bulletin 1530 (App. C) (Oct. 1, 2005) and www.aclu.org/FilesPDFs/ACF27DA.pdf (last visited Nov. 27 2006).

[18] Keblawi, 53 Cath. U.L. Rev. at 817 n. 2 (citing John Ashcroft, U.S. Att'y Gen., "Prepared Remarks on the National Security Entry-Exit Registration System" (Jun. 6, 2002)) and 838 n. 136 (citing Letter from Alberto R. Gonzales, Counsel to the President, to Demetrios G. Papademetriou, Migration Policy Institute (June 24, 2002), *available at* www.migrationpolicy.org/files/whitehouse.pdf (last visited Nov. 14, 2006)). The Ashcroft speech is no longer located where she cites it; it has been moved to the archives, *at* www.usdoj.gov/archive/ag/speeches/2002/060502agpreparedremarks.htm (last visited Nov. 14, 2006). The internal memorandum upon which these remarks were based has now been obtained through FOIA litigation and is available as cited in note 17.

[19] (Emphasis in original). The Gonzales letter further explains, "NCIC is a database maintained by the FBI and used by federal, state and local law enforcement to identify wanted persons."

[20] Gonzales letter, *supra* note 18.

of state enforcement activities must turn on their conformity with the Constitution -- in this case, whether they are preempted by the INA.

Preemption of state action may be either "express" or "implied." The plurality in Part II of *Gade v. National Solid Waste Management Association*[21] provided a useful general overview:

> Pre-emption may be either expressed or implied, and "is compelled whether Congress" command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." Absent explicit pre-emptive language, we have recognized at least two types of implied pre-emption: field pre-emption, where the scheme of federal regulation is "'so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,'" and conflict pre-emption, where "compliance with both federal and state regulations is a physical impossibility," or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[22]

Overall, " '[t]he question whether a certain state action is pre-empted by federal law is one of congressional intent. "The purpose of Congress is the ultimate touchstone." ' "[23]

The INA does not (yet) include an explicit prohibition of state enforcement,[24] so explicit preemption is not applicable.[25] However, there are strong arguments to be made that both conflict and field preemption preclude independent state enforcement activities.

PART II: CONFLICT PREEMPTION

Conflict preemption occurs where "state action ... interferes with or is contrary to the laws of Congress."[26] The two need not be "contradictory on their faces" for preemption to apply.[27] Instead, it applies whenever state action "in fact imposes burdens bringing it into conflict with the INA."[28]

Whenever States seek to unilaterally enforce civil immigration law, conflict preemption comes into play. In conjunction with the Attorney General, the Department of Homeland Security (DHS) holds the ultimate authority to apprehend, detain, and remove noncitizens. A vast and complex legal structure prescribes this removal process. At the heart of the structure, and critical to its success, is the idea that DHS must act as the sole supervisor of alien apprehension and detention. State officers are authorized to assist in carrying out DHS decisions — but only as agents. They are not independent.

State authority to conduct civil immigration investigations is not, therefore, an inherent power. Instead, it is limited to what is specifically contained in the INA. This is clear from the statute itself, which could not contain so many different grants of limited, specific authority if "inherent authority" already existed — and from a major purpose of the statute, which is to grant DHS sole and effective *supervisory* authority over apprehension and detention.

Two related interpretations of the INA will be argued in this part. The first is that Congress clearly intended States' authority to apprehend "illegal aliens" to be limited to that which is found in the INA. In other words, such authority is delegated, not inherent. The second argument follows from the first: that "cooperation" provisions of the INA such as those found in section 287(g)(10) do not provide authority for state police to initiate civil immigration investigations.

The federal government's role as supervisor of removal is clear from the opening sections of the Act. Under 8 U.S.C. § 1103(a)(1), "[t]he Secretary of Homeland Security shall be charged with the administration and enforcement of this Act and all other laws relating to the immigration and naturalization of aliens ...."[29] If he is to effectively "administ[er]" and "enforce," the Secretary must necessarily be in charge. He must be the supervisor in all areas, including apprehension and detention.[30]

General authority to apprehend and detain is granted at section 236(a) of the Act, which provides:

> (a) Arrest, detention, and release. On a warrant issued by the Attorney General,[31] an alien may be arrested and detained pending a decision on whether the alien is to be removed

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[21] 505 U.S. 88 (1992).
[22] 505 U.S. at 98 (citations omitted).
[23] *Id.* at 96 (citations omitted).
[24] See S. 2611 § 130, *supra* note 3.
[25] Justice Kennedy concluded that express preemption can exist without such an "explicit statement." *Gade*, 505 U.S. at 112 (Kennedy, J., concurring).
[26] *City of Charleston*, 310 F.3d at 169 (citation omitted).
[27] *Id*.
[28] De Canas v. Bica, 424 U.S. at 358.
[29] (LEXIS 2006).
[30] According to the 2006 Oxford English Dictionary, "administer" means "[t]o manage as a steward, to carry on, or execute (an office, affairs, etc.); to manage the affairs of (an institution, town, etc.)," *available at* www.oed.com (last visited Mar. 7, 2006).
[31] As of March 2003, authority to apprehend and detain was transferred from the Attorney General to DHS. Homeland Security Act of 2002, Pub. L. No. 107-296, §§402, 441, 116 Stat. 2135, 2178, 2192 (codified at 6 U.S.C. §§202, 251).

from the United States. Except as provided in subsection (c) and pending such decision, the Attorney General —

(1) may continue to detain the arrested alien; and

(2) may release the alien on —

(A) bond of at least $ 1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or

(B) conditional parole; but

(3) may not provide the alien with work authorization (including an "employment authorized" endorsement or other appropriate work permit), unless the alien is lawfully admitted for permanent residence or otherwise would (without regard to removal proceedings) be provided such authorization.[32]

Clearly, under this section, arrest and detention may occur *only* "on a warrant issued by the Attorney General." The two clauses are dependent. It is crystal clear that any detention must be authorized by DHS warrant.[33] States cannot issue DHS warrants. From this section alone, it would appear that states are authorized neither to arrest nor to detain.

However, an interpretation of the INA must consider that statute in its entirety. "It is familiar law that in such an examination the entire Act is to be looked at and the meaning of the words determined by their surroundings and connections."[34] Several portions of the INA (and its regulations) address specific instances in which outside authorities may apprehend noncitizens. For example, 8 U.S.C. § 1252c is titled "Authorizing state and local law enforcement officials to arrest and detain certain illegal aliens."[35] It provides:

(a) In general. Notwithstanding any other provision of law, to the extent permitted by relevant State and local law, State and local law enforcement officials are authorized to arrest and detain an individual who —

(1) is an alien illegally present in the United States; and

(2) has previously been convicted of a felony in the United States and deported or left the United States after such conviction,

but only after the State or local law enforcement officials obtain appropriate confirmation from the Immigration and Naturalization Service of the status of such individual and only for such period of time as may be required for the Service to take the individual into Federal custody for purposes of deporting or removing the alien from the United States.

(b) Cooperation. The Attorney General shall cooperate with the States to assure that information in the control of the Attorney General, including information in the National Crime Information Center, that would assist State and local law enforcement officials in carrying out duties under subsection (a) is made available to such officials.

Read in isolation, the above might seem to imply state officers have authority to investigate whether suspects meet its expressed criteria (i.e., conviction for a felony followed by departure or deportation). However, the INA as a whole makes it apparent that no such authority is being granted. First of all, the terms of subsection (a), paragraph (2) itself hold that DHS must provide "confirmation" of the alien's inclusion in the category. The necessary assumption is that DHS has conducted the only authoritative investigation. Second, and more importantly, section 287 of the Act makes it clear that "investigation" may take place only within the terms of a memorandum of understanding (MOU).

Section 287 is titled "Powers of Immigration Officers and Employees." It opens with specific rules regarding DHS powers to arrest aliens, including when a warrant is required.[36] The remainder of section 287 provides:

(g) Performance of certain functions by State officers and employees.

(1) Notwithstanding section 1342 of title 31, United States Code, the Attorney General may enter into a written agreement with a State, or any political subdivision of

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[32] 8 U.S.C. §1226(a) (LEXIS 2006). Authority to detain is found in numerous other sections of the INA. Each grant is specifically designated to the Attorney General (now DHS). 8 U.S.C. § 1225(b)(1)(B)(ii)(IV) (AG shall detain asylum applicants during credible fear interviews); 8 U.S.C. § 1225(b)(2)(A) (arriving aliens not clearly admissible "shall be detained" for removal proceeding); 8 U.S.C. § 1231(a)(2) ("During the removal period, the Attorney General shall detain the alien"); 8 U.S.C. § 1226a(a)(1) ("The Attorney General shall take into custody" any alien who endangers the national security). Authority to grant conditional parole is contained at 8 U.S.C. § 1182(d)(5)(A).

[33] *See also* 8 C.F.R. § 287.7 (LEXIS 2006) (describing use of Form I-247).

[34] Carlson v. Landon, 342 U.S. 524, 542 (1952); *see also* Leocal v. Ashcroft, 543 U.S. 1, 9 (2004) ("[W]e construe language in its context and in light of the words surrounding it").

[35] (LEXIS 2006).

[36] 8 U.S.C. §1357(a)–(f) (LEXIS 2006).

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

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

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

(4) In performing a function under this subsection, an officer or employee of a State or political subdivision of a State may use Federal property or facilities, as provided in a written agreement between the Attorney General and the State or subdivision.

(5) With respect to each officer or employee of a State or political subdivision who is authorized to perform a function under this subsection, the specific powers and duties that may be, or are required to be, exercised or performed by the individual, the duration of the authority of the individual, and the position of the agency of the Attorney General who is required to supervise and direct the individual, shall be set forth in a written agreement between the Attorney General and the State or political subdivision.

(6) The Attorney General may not accept a service under this subsection if the service will be used to displace any Federal employee.

(7) Except as provided in paragraph (8), an officer or employee of a State or political subdivision of a State performing functions under this subsection shall not be treated as a Federal employee for any purpose other than for purposes of chapter 81 of title 5, United States Code [5 U.S.C. §8101 et seq.] (relating to compensation for injury), and sections 2671 through 2680 of title 28, United States Code (relating to tort claims).

(8) An officer or employee of a State or political subdivision of a State acting under color of authority under this subsection, or any agreement entered into under this subsection, shall be considered to be acting under color of Federal authority for purposes of determining the liability, and immunity from suit, of the officer or employee in a civil action brought under Federal or State law.

(9) Nothing in this subsection shall be construed to require any State or political subdivision of a State to enter into an agreement with the Attorney General under this subsection.

(10) Nothing in this subsection shall be construed to require an agreement under this subsection in order for any officer or employee of a State or political subdivision of a State —

(A) to communicate with the Attorney General regarding the immigration status of any individual, including reporting knowledge that a particular alien is not lawfully present in the United States; or

(B) otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.[37]

Notably, this is the only provision of the INA discovered by the author that explicitly calls for state "investigation" of immigration status.

Section 287's permission for "a State ... to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States"[38] does not include the right to conduct unilateral enforcement activities (including unsolicited investigations). Read in light of the Secretary's clear supervisory function, the term "cooperate" cannot include the initiation of an investigation. Instead, any cooperation must occur at the request of, and under the direction of, DHS. Only then can it be considered consistent with the purposes of the statute. This interpretation is also consistent

[37] (LEXIS 2006). The INA also directs DHS to assist state entities to identify "illegal" aliens already located within the criminal justice system. 8 U.S.C. § 1226(d).

[38] 8 U.S.C. §1357(g)(10)(B).

with the plain meaning[39] of "cooperate," which is "[t]o work together, act in conjunction (*with* another person or thing, *to* an end or purpose, or *in* a work)."[40] It is also mandated by the textual interpretation established throughout this section — that state police have no inherent authority to arrest or detain. The word "cooperate" thus cannot be read to invest additional powers upon local law enforcement authorities. States may only "cooperate" using the powers they have.[41]

Although it does not use the term per se, the INA also directs DHS to cooperate when States apprehend certain criminals for drug-related crimes:

> (d) Detainer of aliens for violation of controlled substances laws. In the case of an alien who is arrested by a Federal, State, or local law enforcement official for a violation of any law relating to controlled substances, if the official (or another official) —
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> (1) has reason to believe that the alien may not have been lawfully admitted to the United States or otherwise is not lawfully present in the United States,
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> (2) expeditiously informs an appropriate officer or employee of the Service authorized and designated by the Attorney General of the arrest and of facts concerning the status of the alien, and
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> (3) requests the Service to determine promptly whether or not to issue a detainer to detain the alien,
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> the officer or employee of the Service shall promptly determine whether or not to issue such a detainer. If such a detainer is issued and the alien is not otherwise detained by Federal, State, or local officials, the Attorney General shall effectively and expeditiously take custody of the alien.[42]

This provision sheds further light on what is envisioned by joint enforcement. Even if state authorities have "reason to believe" an arrestee is an alien, they are not authorized to investigate on their own. Instead, they are encouraged to contact DHS — which is then required to conduct its own timely investigation. Although the section is silent on *how* the officers may have acquired "reason to believe," it is no doubt assumed they must have done so legally — and that means consistently with the doctrine of preemption (in addition to any other applicable law).

One final category of shared enforcement authority appears in the context of "mass influx":

> In the event the Attorney General determines that an actual or imminent mass influx of aliens arriving off the coast of the United States, or near a land border, presents urgent circumstances requiring an immediate Federal response, the Attorney General may authorize any State or local law enforcement officer, with the consent of the head of the department, agency, or establishment under whose jurisdiction the individual is serving, to perform or exercise any of the powers, privileges, or duties conferred or imposed by this Act or regulations issued thereunder upon officers or employees of the Service.[43]

Overall, then, there are three instances under the INA where States are authorized to apprehend and detain: (1) when aliens apprehended have been previously convicted of felonies (8 U.S.C. § 1252c(a)), (2) under the highly detailed procedures prescribed for an MOU (8 U.S.C. § 1357(g)), and (3) if the Attorney General asks them to during an officially declared situation of mass influx (8 U.S.C. §1103(a)(10)). Likewise, States are authorized to "investigate" only under the precise terms of an MOU. In each of these instances, the law contains highly specific instructions as to when and how States may act.

Agency implementation of these provisions has been even more specific. Regarding mass influxes, for example, detailed regulations were promulgated in July 2002.[44] Likewise, under INA §287(g), two MOUs

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[39] "When interpreting a statute, we must give words their 'ordinary or natural' meaning." Leocal v. Ashcroft, 543 U.S. at 9.

[40] Oxford English Dictionary Online (2006), *at* www.oed.com (last visited Mar. 6, 2006).

[41] This argument applies equally to 8 U.S.C. 1226(d)(1), titled "Identification of criminal aliens":

> (1) The Attorney General shall devise and implement a system --
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> (A) to make available, daily (on a 24-hour basis), to Federal, State, and local authorities the investigative resources of the Service to determine whether individuals arrested by such authorities for aggravated felonies are aliens;
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> (B) to designate and train officers and employees of the Service to serve as a liaison to Federal, State, and local law enforcement and correctional agencies and courts with respect to the arrest, conviction, and release of any alien charged with an aggravated felony; and
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> (C) which uses computer resources to maintain a current record of aliens who have been convicted of an aggravated felony, and indicates those who have been removed.

(LEXIS 2006).

[42] 8 U.S.C. §1357(d).

[43] 8 U.S.C. §1103(a)(10).

[44] 28 C.F.R. §§65.80–.85 (2006).

have been established (with Florida and Alabama),[45] each of which is "comprehensive."[46] In testimony before Congress, DHS emphasized the high level of technicality involved in the MOU process:

> Section 287(g) agreements are a dynamic, yet closely monitored force multiplier ... [They] must be comprehensive and define the scope and limitations of each authority to be exercised ... It [§287(g)] mandates a rigorous, multi-week training program that encompasses immigration and naturalization laws, statutory authority, racial profiling and cultural awareness training, which mirrors the training that ICE agents receive. It establishes the supervisory structure over the officers with authority under Section 287(g) and prescribes an agreed-upon complaint process governing officer conduct during the life of the agreement.[47]

Such highly specialized "grants" of authority to state police must indicate that no "inherent authority" already exists. If state police already possessed enforcement powers, why would they need to be granted them in detail? To rule otherwise would violate the effectiveness principle, which is one of the most basic canons of statutory construction. The Supreme Court applied this principle to the INA during an interpretation of its "crime of violence" provisions:[48]

> Interpreting §16 to include DUI offenses, as the Government urges, would leave §101(h)(3) practically devoid of significance. As we must give effect to every word of a statute wherever possible, *the distinct provision for these offenses under §101(h)* bolsters our conclusion that §16 does not itself encompass DUI offenses.[49]

If local police already possessed inherent authority to arrest and detain, the "distinct provision[s]" of that authority in sections 1103, 1252, and 1357 would also be "practically devoid of significance."[50]

Indeed, Congress has consistently understood that local police do *not* possess such power. That is why the sponsor of 8 U.S.C. § 1252c stated during House debate that "current Federal law prohibits State and local law enforcement officials from arresting and detaining criminal aliens whom they encounter[] through their routine duties."[51]

'The ultimate touchstone of preemption analysis is the intent of Congress."[52] Here, the intent of Congress is exemplified not only by the statement above, but by the crystal clear instructions of the INA. Through the designations in sections 1103, 1252 and 1357, the statute demonstrates the intent to grant enforcement authority to States in only certain designated instances. State power to enforce civil immigration law is not inherent. It is delineated.

But that is not the end of the argument on conflict preemption. State action is ultimately preempted when "it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress' in enacting the INA."[53] The INA unquestionably expresses the intent that DHS supervise the apprehension process — especially during joint activity with local officers. As noted above, DHS is tasked with "administration and enforcement" of the Act in its entirety.[54] If this goal is to be effected, the apprehension and detention process must necessarily be subject to strict supervision, and unsolicited "local" investigations cannot be allowed. The intent that DHS supervision be pervasive and hands-on is clearly exemplified in the provisions regarding MOUs, 8 U.S.C. 1357(g), and in the detailed nature of the "mass influx" provisions, 8 U.S.C. §

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[45] News Release, ICE, Alabama troopers complete federal immigration training (Sept. 1, 2006), *available at* www.ice.gov/pi/news/newsreleases/articles/060901dc.htm (last visited Nov. 28, 2006).

[46] 287(g) Program: Ensuring the Integrity of America's Border Security Through Federal-State Partnerships, Statement of Paul M. Kilcoyne to House Comm. on Homeland Security, Subcomm. on Management, Immigration and Oversight (Jul. 27, 2005) at 4, *available at* www.ice.gov/doclib/pi/news/testimonies/050727kilcoyne.pdf(last visited Nov. 15, 2006).

[47] *Id.* at 4.

[48] 8 U.S.C. §1101(a)(43)(F) defines "crime of violence" by reference to 18 U.S.C. §16. The Court's reference to §101(h)(3) describes that section of the INA, which is located at 8 U.S.C. §1101(h)(3).

[49] Leocal v. Ashcroft, 543 U.S. 1, 12 (2004) (emphasis added) (citation omitted).

[50] *Id.* United States v. Vasquez-Alvarez, 176 F.3d 1294 (10th Cir. 1999) was, therefore, wrongly decided. In its interpretation of 8 U.S.C. §1252c, the Tenth Circuit did not give proper weight to the effectiveness rule, and its interpretation of Representative Doolittle's comments seems to conclude the opposite of what was actually stated.

[51] 142 Cong. Rec. 4619 (comments of Rep. Doolittle, *cited in Vasquez-Alvarez*, 176 F.3d at 1298. The court determined Representative Doolittle's statements comprised the extent of relevant legislative history of 8 U.S.C. §1252c. 176 F.3d at 1298.).

[52] *City of Charleston*, 310 F.3d at 169 (*citing* Malone v. White Motor Corp., 435 U.S. 497, 504 (1978)).

[53] *De Canas v. Bica*, 424 U.S. at 364 (citations omitted).

[54] 8 U.S.C. §1103(a)(1).

1103(a)(10) and 28 C.F.R. §§65.80–.85. It is also exemplified by DHS's own statement that MOUs must be "closely monitored" and contain a "supervisory structure."[55] When states unilaterally attempt enforcement measures, they not only act outside of their specifically delineated authority, but they frustrate the overall purpose of the INA. This is why such actions are subject to conflict preemption.

PART III: FIELD PREEMPTION

Field preemption serves as a second, alternative ground for invalidation of unilateral state enforcement. It applies when state action, "although harmonious with federal regulation, must nevertheless be invalidated under the Supremacy Clause" because Congress has entirely occupied the subject area in question.[56] The test for field preemption is strict — it applies only where "persuasive reasons" indicate "Congress has unmistakably so ordained" it. [57]Accordingly, there must be a demonstration that "complete ouster of state power ... was the 'clear and manifest purpose of Congress' " in the applicable subject area.[58] Thus, even if the *Vasquez-Alvarez* court was correct that delineation of specific enforcement powers does not preclude the existence of other, inherent ones, the non-delineated powers could still be precluded through field preemption.

The Ninth Circuit has stated 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."[59] Indeed, a "pervasive" array of federal laws addressing apprehension and detention has already been cited — and even that list was not entirely exhaustive.[60] The INA's enforcement provisions are so specific, and so numerous, that it is hard to imagine Congress could have envisioned States entering the area.

There is an even more compelling argument for field preemption, however, and it looms as large as the proverbial elephant. Enforcement is directly incident to plenary power. It is well understood that the "[p]ower to regulate immigration[61] is unquestionably exclusively a federal power."[62] Since States ultimately have no power to control entry and exit of noncitizens, it stands to reason that they have no authority to enforce this power that they do not have. Furthermore, state enforcement mechanisms can implicate international relations in precisely the manner the plenary power doctrine seeks to prevent. As Manheim notes, "state [immigration enforcement] laws have a penchant for heightening tension with foreign governments."[63]

Were it not for the provisions in the INA, then, there would be a strong argument that States have no authority at all to enforce immigration law. Enforcement and regulation are too strongly intertwined to be severable. Accordingly, Manheim states, "preclusion of state power goes beyond standard preemption doctrine; states cannot enforce immigration law because they have no power to do so."[64] Likewise, during the historic Proposition 187 litigation, the district court judge concluded under a plenary power analysis that "[t]he sole stated purpose and the sole effect" of the California law enforcement provisions was "to impermissibly regulate immigration."[65] In a pre-IIRAIRA assessment, the district judge found that powers exactly like the ones discussed in this article were barred as *ultra vires* — that is, as impermissible state immigration regulation:

> Under the first *De Canas* test, a state may not require its agents to (i) make independent determinations of who is and who is not in this

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[55] Statement of Paul M. Kilcoyne, *supra* note 46, at 4.
[56] De Canas v. Bica, 424 U.S. 356 (1976).
[57] *Id.* (citing Florida Lime & Avacado Growers v. Paul, 373 U.S. 132, 142 (1963)).
[58] 424 U.S. at 357.
[59] Gonzales v. Peoria, 722 F.2d at 474–75. This decision was issued before the passage of 8 U.S.C. §§1357(g) (in 1997) and 1252c (in 1996). *See Vasquez-Alvarez*, 176 F.3d at 1298, 1300.
[60] For example, the C.F.R. further regulates each of the powers to detain found in the INA. *See, e.g.,* 8 C.F.R. pts. 1212 (parole), 1236 (bond) and 1241 (post-removal-order detention).
[61] In this context, regulating immigration means "essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." De Canas v. Bica, 424 U.S. at 355.
[62] *De Canas*, 424 U.S. 351, 354 (1976) (citations omitted); *see also* Mathews v. Diaz, 426 U.S. 67, 81 n.17 (1976); United States v. Curtis-Wright Export Corp., 299 U.S. 304, 315–16 (1936); The Chinese Exclusion Case, 130 U.S. 581, 609 (1889). The INA also provides: "An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien," 8 U.S.C. §1229a(a)(1), and, "[u]nless otherwise specified," this "shall be the sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States." 8 U.S.C. §1229a(a)(3).
[63] Karl Manheim, *State Immigration Laws and Federal Supremacy*, 22 Hastings Const. L.Q. 939, 983 (1995). Louis Henkin noted, with some alarm, that immigration regulation and other foreign relations powers have been considered to be derived not from the Constitution, but directly from the British Crown. Louis Henkin, Foreign Affairs and the US Constitution 17 (2d Ed. 1997).
[64] 22 Hastings Const. L. Q. at 975.
[65] League of United Latin American Citizens v. Wilson, 908 F. Supp. 755, 769 (C.D. Ca. 1995).

> country "in violation of immigration laws;" (ii) report such determinations to state and federal authorities; or (iii) "cooperate" with the INS, solely for the purpose of ensuring that such persons leave the country. The sole stated purpose and the sole effect of section 4 is to impermissibly regulate immigration. Accordingly, section 4 is entirely preempted by federal law under the first *De Canas* test.[66]

CONCLUSION

Undoubtedly, state enforcement officers will encounter suspected "illegal aliens" in the course of their regularly conducted activities. When they do so, they are far from powerless to respond. As has been seen, they are encouraged to contact DHS — and, in most instances, DHS is required by law to respond promptly. What local officials cannot do, however,[67] is investigate or apprehend based *solely* upon immigration status. Once state authority for a criminal investigation has been exhausted, the encounter is over. The interrogation must end, the arrest must not take place, and a detained suspect must be released. Whether this proscription lies in conflict preemption, field preemption, plenary power, or all three, it is equally authoritative.

Legally speaking, the main problem with Ohio's "make a list" requirement is that it will inevitably lead to unsolicited, independent investigations of "suspected" prisoners' immigration statuses. Although this article has not firmly concluded whether an MOU would be required for such investigations, it is clear that at the very least they must be requested and supervised in some fashion by DHS.

In 1995, Manheim stated that "[t]hroughout our history, states have reacted when they felt the federal government incompetent or unwilling to properly regulate immigration."[68] In the context of the "War on Terror," States may be even more inclined to react, and this could explain their current tendency to push the boundaries of the preemption doctrine.

The Attorney General's most recent position on state enforcement betrays a similar motivation.[69] He has requested that States independently investigate the immigration statuses of all those the Department has labeled to be terror suspects and, if necessary, apprehend them. The unstated implication is that, so long as the Executive Branch truly *needs* them to do so, States have authority to discount federal rules of preemption.

Although this may be a sincere attempt to enhance "national security," it ultimately hurts it. When any government actor claims authority to act extra-legally, it erodes the integrity of the Constitution and, eventually, the democratic rule of law.[70] Ultimately, this renders the nation less safe — not only from "illegal" immigrants, but from itself.

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RESEARCH TIP:

You can **check for updates of the FAM** by looking for Transmittal Letters at **http://www.foia.state.gov/REGS/svtl.asp?famid=10.** See the FAM itself at **http://www.foia.state.gov/REGS/fams.asp?level=2&id=10&fam=0.**

[66] *Id.* at 771.
[67] That is, unless they are authorized by the MOUs in Florida or Alabama….
[68] Manheim at 1017.
[69] *See* Letter from Alberto R. Gonzales, June 24, 2002, *supra* note 18.
[70] *See* Laurence Lustgarten & Ian Leigh, In from the Cold: National Security and Parliamentary Democracy 19 (Oxford 1994) ("When the cry of 'the nation in danger' is heard, what is called for above all is an instinctive, hard-headed scepticism.").