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Cecilia Renn

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State and Local Enforcement of the Criminal Immigration Statutes and the Preemption Doctrine

I. INTRODUCTION

Responding to concern that the Immigration and Naturalization Act (INA) was doing little to restrain escalating illegal immigration,¹ Congress passed the controversial Immigration Reform and Control Act (IRCA) in 1986.² The Act employs a three-tiered scheme of civil and criminal sanctions designed to discourage illegal immigration while rewarding legal immigration.³ Its most innovative, and hotly debated, element imposes penalties on employers who hire undocumented aliens.⁴ Also controversial is the IRCA's grant of amnesty to specific classes of undocumented aliens currently residing in the

1. See H.R. REP. NO. 682, 99th Cong., 2d Sess. 46-47, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 5649. Congress amended the Immigration and Naturalization Act (INA) in 1965, overturning the national origin quotas contained in the original 1952 Act and, for the first time, imposing a limit on legal entry from countries in the Western Hemisphere. See 8 U.S.C. § 1152 (1982). The 1965 amendments also established a system of "preference categories" controlling the issuance of entry visas. A substantial increase in illegal immigration followed these amendments, and since the 1970's, illegal immigration has swelled to alarming rates. See D. NORTH, *ENFORCING THE IMMIGRATION LAW: A REVIEW OF OPTIONS* iii (1980); S. PEDRAZA & L. BAILEY, *POLITICAL AND ECONOMIC MIGRANTS IN AMERICA* 69-75 (1985). Senator Alan K. Simpson, who spearheaded efforts to push the immigration reform bill through Congress, warned that "uncontrolled immigration is one of the greatest threats to the future of this country." Wall St. J., Mar. 10, 1985, at 33, col. 4. A number of politicians echoed similar sentiments during the debate over immigration reform. For an informative comment on the politics of the immigration reform movement, see Fallows, *Immigration: How It Is Affecting Us*, ATLANTIC MONTHLY, Nov. 1983, at 55.

2. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986) (to be codified in scattered sections of 8 U.S.C.) [hereinafter IRCA].

3. Although the Act contains other new features, such as state verification of the immigration status of aliens applying for government benefits and a distinct temporary agricultural worker program, IRCA §§ 121, 301, it relies primarily on employer sanctions, legalization, and increased enforcement resources to control illegal immigration. See *infra* notes 4-7; see also H.R. REP. NO. 682, *supra* note 1, at 46 ("This legislation seeks to close the back door on illegal immigration so that the front door on legal immigration may remain open.").

4. See IRCA § 274A. This section makes it unlawful to knowingly hire or continue to employ unauthorized aliens. Section 274A(f) contains criminal penalties for employers who engage in a "pattern or practice of violations of subsection (a)(1)(A) or (a)(2)." IRCA § 274A(f)(1). Because the IRCA, like the INA, is silent on the issue, the employer penalty section raises the same questions regarding state and local enforcement as those raised by the illegal entry provisions of the INA. See *infra* note 76.

United States.⁵ Immigration reform advocates faced few battles, however, over the Act's third element: enforcement. Congress merely amended the enforcement provisions of the INA by tightening loopholes in the alien smuggling statute⁶ and providing increased resources for Immigration and Naturalization Service (INS) enforcement efforts.⁷

The enforcement element of the INA is comprised of civil deportation and interrelated criminal statutes. Although the INS typically processes undocumented aliens under the civil INA provisions, it has the alternative of criminal proceedings in many cases.⁸ Aliens who enter the country without INS inspection, for example, are both civilly deportable under 8 U.S.C. § 1251⁹ and subject to criminal charges under 8 U.S.C. § 1325.¹⁰ Aliens deported for illegal entry

5. See IRCA §§ 201-204.

6. See H.R. REP. NO. 682, *supra* note 1, at 65, 66; see also IRCA § 112 (amending 8 U.S.C. § 1324 (1982)).

7. IRCA § 111. Congress deemed increased enforcement an essential element of the program for immigration reform. See H.R. REP. NO. 682, *supra* note 1, at 63. Although budget allocations in the past have left the INS undermanned and overwhelmed by its task, the Reagan administration's budget proposal for the fiscal year 1988 contains major increases for the INS. See 64 INTERPRETER RELEASES 25 (1987). If Congress approves the Reagan budget request, the INS will become a billion dollar a year agency in 1988. *Id.*

8. See Harwood, *Arrests Without Warrant: The Legal and Organizational Environment of Immigration Law Enforcement*, 17 U.C. DAVIS L. REV. 505, 511 (1984). As Professor Harwood points out, the INA's civil and criminal provisions overlap considerably. See *id.* at 511-12. An alien who "enters without inspection," for example, is subject to either section 1251 civil deportation or section 1325 criminal penalties. See *infra* notes 9-13. Nevertheless, the vast majority of violators are processed in civil rather than criminal proceedings, and Professor Harwood reports that the INS in 1982 officially deported less than three percent of all apprehended aliens. (The INS *unofficially* deported the remainder). Harwood, *supra*, at 511-12. Because the likelihood of criminal prosecution is so small, local police who apprehend an alien suspected of entry without inspection are in substance enforcing civil deportation provisions of the INA in addition to the criminal provisions that they are authorized to enforce. See *infra* note 15.

9. Title 8, section 1251 of the United States Code specifies a number of conditions under which the INS can civilly deport noncitizens. Aliens who enter the country legally but subsequently violate the terms of their visas, for example, are illegally present under section 1251 and subject to deportation. 8 U.S.C. § 1251(a)(9) (1982). Similarly, aliens who "enter without inspection" are subject to expulsion under section 1251(a)(2). 8 U.S.C. § 1251 (a)(2) (1982).

10. 8 U.S.C. § 1325 (1982). Section 1325 provides:

Any alien who (1) enters the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or (3) obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact, shall, for the first commission of any such offenses, be guilty of a misdemeanor and upon conviction thereof be punished by imprisonment for not more than six months, or by a fine of not more than \$500, or by both, and for a subsequent commission of any such offenses shall be guilty of a felony and upon conviction

who again enter the country illegally commit a felony.¹¹ The IRCA left these sections of the INA untouched but amended a third criminal statute, the harboring and smuggling provision.¹² The IRCA additionally contains criminal penalties for employers who make a "pattern or practice" of hiring undocumented aliens.¹³ Both Acts require the services of the INS, a federal agency exclusively devoted to enforcement of the federal immigration laws.¹⁴

But the INS is not alone in apprehending illegal aliens. State statutes grant local police the authority to arrest individuals who violate federal criminal law, including the criminal immigration statutes.¹⁵ Courts upholding state enforcement have stated that, in the

thereof shall be punished by imprisonment for not more than two years, or by a fine of not more than \$1,000, or both.

11. 8 U.S.C. § 1326 (1982). Section 1326 provides that any alien who:

(1) has been arrested and deported or excluded and deported, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to any alien previously excluded and deported, unless such respect to an alien previously excluded and deported, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act, shall be guilty of a felony, and upon conviction thereof, be punished by imprisonment of not more than two years, or by a fine of not more than \$1,000, or both.

12. See IRCA §§ 111-112 (amending 8 U.S.C. 1324 (1982)). Under the harboring statute, the INS can charge with a felony any person, regardless of citizenship, who knowingly or recklessly transports an alien within the country, assists an alien in illegally entering the country, conceals, attempts to conceal, or harbors an alien.

13. See *supra* note 4.

14. The INS is under the jurisdiction of the Justice Department and holds primary responsibility for enforcing the civil and criminal provisions of the INA and IRCA. See 8 U.S.C. § 1103(a) (1982) (assigning the Attorney General responsibility for enforcing the immigration laws and authorizing him to delegate "any of the duties and powers imposed on him in this chapter").

15. Implicit in a line of Supreme Court decisions is the rule that local police may apprehend and arrest individuals who perpetrate federal crimes. See *Ker v. California*, 374 U.S. 23, 31 (1963) (application of the fourth amendment to the states "implied no total obliteration of state laws relating to arrests and searches in favor of federal law"); *Miller v. United States*, 357 U.S. 301, 305 (1958) ("[I]n the similar circumstance of an arrest for violation of federal law by state peace officers . . . the lawfulness of the arrest without warrant is to be determined by reference to state law."); *United States v. Di Re*, 332 U.S. 581, 589 (1948) (The validity of an arrest for a federal crime by state police officers is determined by state law.). Because the INA does not expressly prohibit local enforcement, states maintain that local police can arrest people suspected of violating the criminal immigration statutes. See *United States v. Salinas-Calderon*, 728 F.2d 1298, 1301 n.3 (10th Cir. 1984) (Kansas state police have general investigatory authority to inquire into immigration violations); *Gonzales v. City of Peoria*, 722 F.2d 468 (9th Cir. 1983) (discussed in Section III(A)); *People v. Barajas*, 81 Cal. App. 3d 999, 147 Cal. Rptr. 195 (1978) (discussed in Section III(A)); see also *infra* notes

absence of a limitation, federal criminal law becomes the law of the land and states are bound by the supremacy clause to enforce it.¹⁶ Inherent in this rule is the notion that local enforcement of federal criminal law *effectuates* federal policy. Indeed, the supremacy clause does not bar state arrest of individuals who violate federal criminal law for this very reason.¹⁷

The passage of the IRCA accentuates the need to carefully analyze whether the states may play a role in formulating immigration policy through the exercise of their power to arrest individuals committing federal crimes. This Comment takes the position that state and local arrests for criminal immigration violations are likely to thwart critical federal interests in the immigration context. Because of the delicate interests involved,¹⁸ and because the Constitution so commands,¹⁹ immigration regulation must be uniform. Yet enforcement practices vary from state to state and among municipalities.²⁰

22-25 (discussing the interrelationship between state arrest statutes and the criminal immigration statutes).

16. See *Barajas*, 81 Cal. App. 3d at 1006, 147 Cal. Rptr. at 201 (using supremacy clause argument to justify local arrests for immigration violations). For the principle that, in the absence of limitation, the supremacy clause binds the states to enforce federal law, see *Hauenstein v. Lynham*, 100 U.S. 483, 490 (1880) ("[I]t must always be borne in mind that the Constitution, laws, and treaties of the United States are as much a part of the law of every State as its own local laws and Constitution."). But see *infra* note 23 (suggesting that while the supremacy clause grants state executive agents the power to enforce state law, it is not clear that the clause *requires* them to execute federal law).

17. Perhaps because the answer seems obvious, the Supreme Court has never considered whether local enforcement of federal criminal statutes is consistent with federal policy. Supreme Court dictum, however, has described local enforcement as "federal-state cooperation in the solution of crime." *Mapp v. Ohio*, 367 U.S. 643, 658 (1961). This dictum suggests that the Court has simply assumed that local enforcement is not a threat to the policy interests underlying federal law. See *generally* cases cited *supra* note 15.

18. See *generally* *Hines v. Davidowitz*, 312 U.S. 52, 64 (1941) (treatment of foreign nationals is "one of the most important and delicate of all international relationships").

The United States's relations with Mexico illustrate the sensitive nature of immigration policy. Mexico has on a number of occasions expressed concern over the discriminatory treatment of Mexican nationals by United States law enforcement officials. See *Castaneda, A Flawed Immigration Law*, N.Y. Times, Nov. 13, 1986, at A31, col. 2 (fearing that immigration reform will exacerbate racist tendencies); *Mexicans Expecting No Good of Immigration Law*, N.Y. Times, Nov. 6, 1986, at A22, col. 2 (new era of discrimination and mistreatment of Mexicans at hands of authorities); *Wall St. J.*, May 4, 1982, at 1, col. 3 (Mexico protests roundup of illegal aliens, charging that diplomatic procedures were violated and that Mexicans were pressured into accepting a precipitated exit).

19. U.S. CONST. art. I, § 8.

20. Although state statutes determine the scope of a state or local police officer's authority to make arrests for federal crimes, see cases cited *supra* note 15, state warrantless arrest statutes vary, particularly with regard to arrests for misdemeanors. See, e.g., CAL. PENAL CODE § 836 (West 1968) (officer may arrest when he has reasonable cause to believe that the person to be arrested has committed a "public offense" in his presence); DEL. CODE ANN. tit. 11, § 1904 (1984) (arrest without warrant for a misdemeanor is lawful where officer has reasonable ground to believe that arrestee has committed a misdemeanor in his presence or

Although courts and the Department of Justice have indicated that local police can apprehend persons suspected of criminal immigration law violations, neither courts nor the executive branch have been consistent in this pronouncement.²¹ The authority to enforce the criminal

outside his presence *if* law enforcement officers of the state where the misdemeanor was committed request an arrest and the accused will not be apprehended unless immediately arrested); GA. CODE ANN. § 17-4-20 (1981) (an arrest for a crime may be made without a warrant if the offense is committed in the officer's presence or within his immediate knowledge if the offender is endeavoring to escape, if the officer has probable cause to believe that an act of family violence has been committed, or for any other cause if there is likely to be a failure of justice); LA. CODE CRIM. PROC. ANN. art. 213 (West 1981) (officer can arrest without warrant if he has reasonable cause to believe that the arrestee has committed a misdemeanor, although not in the presence of the officer); MINN. STAT. § 629.34 (1985) (a peace officer can make an arrest without warrant when a "public offense" has been committed or attempted in his presence); TENN. CODE ANN. § 40-7-103 (1986) (officer may, without a warrant, arrest a person for a public offense committed or breach of peace threatened in his presence).

21. The United States Court of Appeals for the Ninth Circuit and a California appellate court have held that federal immigration statutes do not preempt state enforcement and that state and local police can enforce the criminal immigration statutes where state law permits. *Gonzales v. City of Peoria*, 722 F.2d 468 (9th Cir. 1983); *People v. Barajas*, 81 Cal. App. 3d 999, 147 Cal. Rptr. 195 (1978). The Tenth Circuit stated even more expansively in dictum that "a state trooper has general investigatory authority to inquire into possible immigration violations." *United States v. Salinas-Calderon*, 728 F.2d 1298, 1301 n.3 (10th Cir. 1984).

Federal district courts in Arkansas and Washington, on the other hand, have permanently enjoined local enforcement of the immigration laws. *Vivanco-Zepeda v. Fish*, No. C82-1199C (W.D. Wash. Jan. 13, 1984) (consent decree), reprinted in 61 INTERPRETER RELEASES 103, 118-19 (1984); *Nunez v. Sanders*, No. PB-C-82-228 (E.D. Ark. Dec. 18, 1983) (consent decree), reprinted in 61 INTERPRETER RELEASES 334-36 (1984). Not even the *Zepeda* and *Nunez* consent decrees are consistent, however; the *Nunez* order appears directed toward enjoining only local enforcement of the civil immigration statutes, see 61 INTERPRETER RELEASES, at 335, while the Washington district court drafted its order more broadly. See 61 INTERPRETER RELEASES, at 118-19. The *Zepeda* defendants were enjoined from "stopping, detaining, interrogating, holding or arresting [persons of hispanic or Mexican appearance] for the purpose of ascertaining their immigration status or in any other way attempting to enforce federal immigration laws." *Id.*

Justice Department vacillation on the enforcement issue may be attributable more to political exigencies than uncertain legal footing. INS activities were hamstrung in 1983 and 1984 by an overwhelmingly negative reaction in communities with substantial alien populations. In California's Silicon Valley, for instance, immigration raids by the INS caused an uproar that forced the agency to beat a quick retreat. L.A. Daily J., Aug. 2, 1984, at 1, col. 6. The Reagan administration, coveting the Hispanic vote, decided that heavy-handed federal enforcement tactics would not help its vote getting efforts. *Id.* An expanded state enforcement role thus served to take the political pressure off the federal government. In 1983, then United States Attorney General William French Smith announced a policy reversal opening immigration enforcement to the states. See Justice Department Press Release, reported in 60 INTERPRETER RELEASES 172-73 (1983). The new policy called for "top priority to be given to apprehending illegal aliens through cooperation with state and local authorities." See N.Y. Times, Sept. 11, 1983, at 14, col. 1.

Although congressional intent on the matter is far from clear, see *infra* notes 88 & 116, Congress refused to openly embrace the administration's view. Republican Senator Charles Grassley offered an amendment to the INA in 1982 that would have expressly permitted independent local enforcement of the immigration laws. L.A. Daily J., Mar. 17, 1983, at 2, col. 5. Congress rejected the Grassley amendment. *Id.*

provisions, the scope of this authority, and the standards limiting enforcement activity are unclear.

Moreover, a number of factors make state enforcement of the criminal immigration laws haphazard. First, the states and the Justice Department maintain that state officials may exercise discretion in arresting and detaining individuals suspected of violating criminal immigration statutes.²² State and local governments have no duty to enforce the immigration laws²³ and, apparently, can choose whether to cooperate with federal immigration officials.²⁴ Second, police

22. The 1979 INS guidelines stated that "whether local or state law enforcement officers have the legal authority to enforce the criminal provisions of the immigration laws is a question of state law, since nothing in the Constitution or federal law prohibits such enforcement." INS Guidelines M-69, at 40-41 (rev. June 1979). The 1983 revisions of these guidelines encourage an even more active state and local police role in enforcing the criminal immigration statutes. See Revised INS Guidelines, 60 INTERPRETER RELEASES 172-73 (1983). Importantly, the language in these revisions is *permissive*:

INS agents and local officers *may* also engage in joint operations which are expected to uncover violations of both immigration and state laws. . . . In many local jurisdictions, state law authorizes local officers to enforce the criminal provisions of federal law, including criminal immigration provisions. Such operations are conducted by local officers under their local authority and will not be directed by the Service.

Id. (emphasis added); see also Note, *Illegal Aliens and Enforcement: Present Practices and Proposed Legislation*, 8 U.C. DAVIS L. REV. 127, 149 (1975) ("[T]he states maintain that the silence of [the immigration statutes] gives them the discretion whether or not to enforce immigration statutes.").

23. In the absence of a limitation, the supremacy clause grants state and local law enforcement officials the authority to enforce federal criminal statutes. See cases cited *supra* note 15. It is not clear, on the other hand, that the clause *requires* state and local police to execute federal law. The supremacy clause expressly imposes a duty to enforce federal laws upon state judges, but makes no mention of state executive officers:

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.

U.S. CONST. art. VI, cl. 2.

In a nonbinding opinion, the California Attorney General determined that California peace officers and judges have "no general legal duty . . . to report knowledge they might have about persons who have entered the U.S. by violating title 8 U.S.C. § 1325." 67 Cal. Op. Att'y Gen. 331 (1984). The opinion distinguished between "affirmative" duty and "nonimperative," or moral, duty. *Id.* at 333. Because no penalty arises from the failure to report criminal immigration violations, the California Attorney General concluded that peace officers have no general legal duty, in the sense of a positive obligation, to enforce the criminal immigration statutes. *Id.*

24. See *infra* notes 27-28. Local governments may perceive enforcement of the immigration laws as an unwanted burden for two reasons. Enforcement is expensive, and to some, it is wrong. Enforcement of federal law by local governments means that those governments must bear the cost of detaining and arresting undocumented aliens. One author estimated in 1984 that the cost of detaining an illegal alien was forty to seventy dollars a day. Harwood, *supra* note 8, at 517. Los Angeles administrators complain of spiraling criminal

arrest upon reasonable suspicion.²⁵ Yet because both civil and criminal immigration violations, with the exception of the smuggling statute, turn on alienage,²⁶ probable cause to suspect criminal immigration violations is difficult to distinguish from probable cause

justice costs and argue that the federal government should absorb the added expense of jailing undocumented aliens, providing interpreters, and processing additional paperwork. See *Supervisor Says Undocumented Aliens Straining County Jails, Courthouses*, L.A. Daily J., Aug. 2, 1984, at 1, col. 6.

Although title V of the IRCA addresses state reimbursement, it does not reimburse the states for the cost of detaining undocumented aliens for immigration violations. Title V provides that "the attorney general shall reimburse a state for the costs incurred by the state for the imprisonment of any illegal alien or Cuban national who is convicted of a felony by such state." IRCA § 501(a). Senator Alfonse M. D'Amato, who introduced title V as an amendment to the IRCA, stated that Congress designed title V to reimburse states where there was no adequate safeguard to protect them from large influxes of potential criminals. D'Amato, *Aliens in Prison—The Federal Response to New Criminal Justice Emergency*, 4 DET. C.L. REV. 1163, 1168 (1983). The Senator also noted that the incarceration of alien felons who have been through some sort of immigration screening process does not trigger title V reimbursement. See *id.* Senator D'Amato's comments suggest that title V contemplates reimbursement for the incarceration of aliens convicted of felonies on independent state grounds, not the detention of aliens for immigration violations.

Furthermore, a significant number of local governments resist immigration policy for ideological reasons. Since 1980, a number of cities have passed resolutions declaring themselves sanctuary cities in response to the efforts of private, generally church affiliated, organizations assisting illegal aliens. Most of the sanctuary resolutions direct local authorities to avoid cooperation with immigration officials unless required to do so by law or court decision. For reprints of some of these resolutions, see 63 INTERPRETER RELEASES 135-37 (1986) (Los Angeles, California and Seattle, Washington resolutions); 63 INTERPRETER RELEASES 643-46 (1986) (resolution adopted by Oakland, California); 62 INTERPRETER RELEASES 382-85 (1985) (Cambridge, Massachusetts resolution). For an analysis of the sanctuary movement, see generally *Ecumenical, Municipal and Legislative Challenges to United States Refugee Policy*, 21 HARV. C.R.-C.L. L. REV. 495 (1986) [hereinafter *Ecumenical Challenges*].

25. While it is not clear whether the supremacy clause requires state executive agents to execute federal criminal law, see *supra* note 23, the clause does demand that state and local police officers who choose to arrest for federal crimes do so within constitutional boundaries. See *Mapp v. Ohio*, 367 U.S. 643, 658 (1961) (federal-state cooperation in the solution of crime under constitutional standards will be promoted, if only by recognition of their new mutual obligation to respect the same fundamental criteria in their approaches); cf. *Developments in the Law—Immigration Policy and the Rights of Aliens*, 96 HARV. L. REV. 1286, 1372-84 (1983) (discussing the need for the INS, as a law enforcement agency, to remain within the permissible bounds placed on police conduct and that fourth amendment prohibitions are applicable to law enforcement activities even where directed toward the apprehension of noncitizens).

26. See 8 U.S.C. §§ 1325, 1326, 1357(a) (1982); *supra* notes 9-12. As one author noted, an INS agent must make two determinations before taking an alien into custody for an immigration violation: alienage and deportability. Harwood, *supra* note 8, at 519. This requirement arises from the fourth amendment's demand that searches and seizures be "reasonable." See *United States v. Brignoni-Ponce*, 422 U.S. 873, 885-86 (1975).

The same rule applies to state or local police officers, except that state and local police must also distinguish between merely deportable aliens and aliens who have committed an immigration misdemeanor or felony. Because the civil and criminal provisions overlap, all aliens chargeable with a section 1325 or 1326 crime are also deportable. Not all deportable

to suspect civil violations.²⁷ The power to apprehend criminal immigration violators is an effective carte blanche to apprehend persons violating civil immigration statutes as well. Thus fourth amendment constraints on police behavior do not ensure uniform or principled local arrest procedures for violations of the criminal immigration laws. Third, state arrest statutes must affirmatively permit enforcement of federal criminal law.²⁸ Many do, but a number do not.²⁹ Fourth, local rules regarding the apprehension or detention of undocumented aliens are either nonexistent or ambiguous.³⁰ Immigration law consequently becomes a tool in the hands of untrained local law enforcement officials to treat minorities in a discriminatory and nonuniform fashion.³¹

aliens, however, are in violation of criminal sections 1325 and 1326. *See* Harwood, *supra* note 8, at 511-12.

27. *See supra* text accompanying notes 92-98.

28. *See* cases cited *supra* note 15 (state law determines the lawfulness of arrests for federal crimes); *see also* *Gonzales v. City of Peoria*, 722 F.2d 468, 475 (9th Cir. 1983) ("[W]e must now consider whether state law grants Peoria police the affirmative authority to make arrests under [the criminal provisions of the INA].").

Illegal entry is a misdemeanor under 8 U.S.C. § 1325. Because most encounters between local police and undocumented aliens involve warrantless arrests, the officer's authority to apprehend a section 1325 violator will turn on whether state arrest statutes permit an arrest for a misdemeanor occurring outside the presence of the officer. A section 1325 misdemeanor is completed at the time of entry, and therefore is not a "continuing" offense that occurs in the presence of the arresting officer. *United States v. Rincon-Jiminez*, 595 F.2d 1192, 1194 (9th Cir. 1979) (illegal entry is not a continuing offense that occurs in the presence of an arresting officer).

29. Under the common law rule, an officer could execute a warrantless arrest for a misdemeanor only when it was committed in the officer's presence. A number of states have statutorily abrogated this rule. *See, e.g.*, statutes cited *supra* note 20.

30. *See* *People v. Barajas*, 81 Cal. App. 3d 999, 1016, 147 Cal. Rptr. 195, 212 (1978) (Reynoso, J., dissenting); *see also* Note, *supra* note 22 at 148.

31. *See* Sotomayor, *Police Abuse: The Most Volatile Issue*, 13 PERSP. CIV. RTS. Q. 15-32 (1980) (describing abuse of Hispanics and undocumented aliens by local police); *see also* Dion, *And a Sweep in Utah*, PROGRESSIVE, Aug. 1986, at 18 (reporting abuses during a raid in Wendover, Utah); Dubose, *A Texas Roundup*, PROGRESSIVE, Aug. 1986, at 17. Affidavits filed in a suit for damages and injunctive relief arising out of the Wendover raid stated that local police jailed small children without diapers or food, deported a four-year-old without notifying his parents, assaulted a woman trying to provide her husband's documentation, kicked in doors at midnight shouting obscenities, and stopped people solely because they looked Hispanic. *See* Affidavits for the Plaintiffs, *Rodriguez v. INS*, No. 86-C-0326J (D. Utah filed April 17, 1986). In a letter to *Interpreter Releases*, counsel for the plaintiffs in *Nunez v. Sanders*, No. PB-C-82-228 (E.D. Ark. Dec. 18, 1983), wrote:

As you are well aware, local police agencies frequently use the threat, and reality, of arrest for alleged violations of the immigration laws in an attempt to intimidate migrant farmworkers and other immigrant workers. All too often the intimidation tactics are used to benefit employers. . . . [C]onditions for the workers are abysmal. These conditions are enforced, in part, with the help of local police agencies.

61 INTERPRETER RELEASES 334-35 (1984). As this letter indicates, undocumented aliens are

In the absence of clear congressional intent to the contrary, however, lower courts have refused to find that the congressional scheme embodied in the INA preempts local enforcement of the federal immigration laws. This Comment attributes that result to the standards defining federal preemption. Two of the tests for federal preemption focus on congressional intent and presumptively favor concurrent state activity. Although the third preemption standard is facially attentive to federal purposes, it relies on the courts to identify those purposes. The standard thus permits judicial discretion, and the two courts confronted with the enforcement issue have consequently overlooked significant national interests.³²

Part II examines the preemption doctrine in relation to a state activity—arrest of immigration law violators—that directly affects the federal immigration power.³³ That section concludes that the preemption standards are insensitive to national interests in the immigration enforcement context because they neglect two important factors—substance and impact. Part III asserts that states, by arresting individuals for immigration violations, directly regulate a substantive federal power. It then analyzes the two lower court decisions addressing the state enforcement issue. Both of these opinions illustrate the insensitivity of preemption tests to federal interests in the immigration enforcement context. Part III proposes a modified preemption standard that corrects the deficiencies of current preemption tests. Finally, it concludes that federal law preempts state arrests for violations of the criminal immigration statutes.

II.

Because its standards are rigorous,³⁴ the preemption doctrine

often victims of crimes committed by law enforcement agencies and others who know of the aliens' reluctance to seek justice at the risk of discovery and deportation. *See also* *United States v. Otherson*, 637 F.2d 1276 (9th Cir. 1980) (recounting the beating of an undocumented alien by INS agents and comment by the defendant: "We find it necessary to do things like this because the criminal justice system doesn't do anything to these assholes"); *Developments in the Law—Immigration Policy and the Rights of Aliens*, *supra* note 25, at 1437.

Harassment by local police must particularly disgruntle Mexicans who enter the United States legally, as many of them wait eight years or more to receive visas. Rout, *For Most Mexicans, Legal Entry is Impossible Dream*, Wall St. J., Mar. 4, 1982, at 1, col. 4. American embassy officials in Mexico describe long lines and years of patient waiting for visa applicants. *Id.* Latin American Studies Professor Ronald Grennes, of Trinity University in San Antonio, Texas, notes that "[i]t is a mind-blowing event to try to come in legally [It is] miraculous that they wait as long as they do." *Id.*

32. *See infra* text accompanying notes 99-119.

33. *See infra* text accompanying notes 34-81.

34. Unless Congress expressly states its intent to preempt state law, courts must determine whether an inference of preemptive intent can be drawn from federal "occupation of the field"

creates a presumption favoring state activity. Thus the doctrine protects power reserved to the states by the constitutional structure and is an appropriate tool for the courts when the challenged action is within the purview of "all other powers" not reserved to the federal government.³⁵ A presumption favoring state law is not justified, however, when state activity directly interferes with the federal immigration authority.³⁶ The Constitution reserves the immigration power to the federal government, and this power should not fall to the states absent express constitutional delegation.³⁷ Yet two courts mechanically applying the preemption standards have concluded that federal authority does not preempt a direct state regulation of immigration.³⁸

or whether state law conflicts with federal law or policy. *See generally* Note, *The Burger Court and the Preemption Doctrine: Federalism in the Balance*, 60 NOTRE DAME L. REV. 1233 (1985). The Supreme Court has stated that a hypothetical conflict will not preempt state law; rather, the state action at issue must constitute "an irreconcilable conflict between federal and state regulatory schemes." *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982). The Court has also required a strict showing of federal occupation before it is willing to infer preemptive intent. *See* text accompanying notes 56-59; *see also* Note, *supra*, at 1247 ("Occupation of the field is the most comprehensive type of preemption and affords state law little chance of survival. Accordingly, the Court has been hesitant to find that federal legislation occupies the field."). Furthermore, the Court's focus on the comprehensiveness of federal legislation with respect to the *narrow purpose* of the state legislation at issue means that parties challenging state legislation must meet an even stricter burden. *See* *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 144-45 (1963) (Federal regulation of agricultural picking and processing, "however comprehensive for those purposes . . . does not of itself import displacement of state control over the distribution [of agricultural products]"). Thus the evidence favoring preemption must be very clear, whether a party is claiming the support of the express, inferred, or conflict standards. *See generally* *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707 (1985) (discussing express, inferred, and conflict preemption); *Michigan Canners & Freezers Ass'n v. Agricultural Mktg. Bd.*, 467 U.S. 2518, 2523 (1984) (discussing express preemption); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 222-24 (1947) (same).

35. U.S. CONST. amend. X.

36. *See infra* text accompanying notes 39-81.

37. *See* U.S. CONST. art. I, § 8; *see also* *Hines v. Davidowitz*, 312 U.S. 52, 62-68 (1941). Justice Black, writing for the majority, observed

[T]he supremacy of the national power in the general field of foreign affairs, including power over immigration, naturalization and deportation, is made clear by the Constitution. . . . Our system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference.

Id. at 62, 68 (emphasis added); *see also* *Mathews v. Diaz*, 426 U.S. 67, 84 (1976) ("[I]t is the business of the political branches of the Federal Government, rather than that of either the states or the Federal Judiciary, to regulate the conditions of entry and residence of aliens.").

38. For a discussion of *Gonzales v. City of Peoria* and *People v. Barajas*, *see infra* Section III(A). Although prior to the Supreme Court's decision in *De Canas v. Bica*, 424 U.S. 351 (1976), a number of lower courts held that the federal immigration laws preempted state legislation prohibiting the employment of undocumented aliens, this kind of state legislation is an *indirect*, not a direct, regulation of immigration. *See infra* text accompanying notes 46-53. *See generally* *Nozewski Polish Style Meat Prods. v. Meskill*, 376 F. Supp. 610 (D. Conn.

This result is attributable to both the insensitivity of the preemption doctrine to federal interests in the immigration context and the courts' failure to distinguish between direct and indirect interference with a substantive federal power.

The authority to *directly* regulate immigration should never fall to the states absent express congressional delegation for three reasons. First, the Constitution expressly places the power to regulate immigration in the hands of Congress. Article I charges Congress with the duty "to establish a uniform rule of naturalization."³⁹ The framers clearly intended the immigration power, like the foreign relations power, to exclusively reside in the federal government.⁴⁰ Second, the immigration power arises not only from article I, but also from an extra-constitutional notion of sovereignty.⁴¹ As an incident of sovereignty, immigration affects the collective interests of all the states, not matters concerning one state alone. Moreover, the treatment accorded aliens in this country has significant international overtones. The Supreme Court has therefore recognized that "immigration, naturalization, and deportation fall within the general field of foreign affairs," and that "any concurrent state power that may exist is restricted to the narrowest of limits."⁴² Third, absent comprehensive federal control, state regulation of immigration impairs national interests. The federal government has a paramount interest in the uniformity of the immigration laws.⁴³ Yet state enforcement is far from

1974); *De Canas v. Bica*, 40 Cal. App. 3d 976, 115 Cal. Rptr. 444 (1974), *rev'd*, 424 U.S. 351 (1976); *Dolores Canning Co. v. Howard*, 40 Cal. App. 3d 673, 115 Cal. Rptr. 435 (1974).

39. U.S. CONST. art. I, § 8.

40. "The powers [of the federal government] . . . provide for the harmony and proper intercourse among the states . . . to establish an uniform rule of naturalization. . . . The dissimilarity in the rules of naturalization, has long been remarked as a fault in our system, and as laying a foundation for intricate and delicate questions." THE FEDERALIST No. 42, at 213-15 (J. Madison) (G. Wills ed. 1982). For further discussion concerning the danger of permitting state action in matters relating to foreign affairs, see generally THE FEDERALIST Nos. 3, 4, 5, 80 (G. Willis ed. 1982).

41. See *Hines v. Davidowitz*, 312 U.S. 52, 63 & n.11 (1941); *Eiku v. United States*, 142 U.S. 651, 659 (1892); *Chae Chan Ping v. United States*, 130 U.S. 581, 603 (1889) (The Chinese Exclusion Case); see also *Plyler v. Doe*, 457 U.S. 189, 225 (1982) ("Drawing upon its [article 1, § 8] power, upon its plenary authority with respect to foreign relations and international commerce, and upon the inherent power of a sovereign to close its borders, Congress has developed a complex scheme governing admission to our Nation and status within our borders." (emphasis added)); accord *Toll v. Moreno*, 458 U.S. 1, 10-14 (1982).

42. *Hines*, 312 U.S. at 68.

43. Although the Constitution's command that Congress establish a uniform rule of naturalization is enough in itself to establish a national interest in uniform immigration policy, uniformity is critical because of the relationship between immigration and foreign relations. See U.S. CONST. art. 8, cl. 4; see also cases cited *supra* note 37. Justice Miller, when confronted with a California statute designed to prevent immigration by imposing penalties on classes of travelers, cogently summarized the argument for uniform immigration laws: "If the

uniform,⁴⁴ and the constitutional structure may render uniform state enforcement an impossibility.⁴⁵

This is not to say that the preemption doctrine is an inappropriate analytical tool when courts are confronted with a state exercise of police power that *indirectly* infringes on federal immigration authority. Indeed, Supreme Court dictum has arguably attached some significance to a direct-indirect distinction. In *De Canas v. Bica*,⁴⁶ the Court examined a section of the California Labor Code prohibiting an employer from knowingly hiring an alien who was not a lawful resident of the United States if such employment would have an adverse effect on lawful resident workers.⁴⁷ Noting that states possess broad authority under their police powers to regulate employment, the Court concluded that federal law did not preempt state laws indirectly affecting immigration.⁴⁸

[United States] should get into a difficulty which would lead to war, or to suspension of intercourse, would California alone suffer, or all the Union?" *Chy Lung v. Freeman*, 92 U.S. 275, 279 (1875); see also *supra* text accompanying note 19.

44. See *supra* text accompanying notes 22-31; see also *Gonzales v. City of Peoria*, 722 F.2d 468, 474 (9th Cir. 1983); *People v. Barajas*, 81 Cal. App. 3d 999, 1014, 147 Cal. Rptr. 195, 210 (1978) (Reynoso, J., dissenting); Benke, *The Doctrine of Preemption and the Illegal Alien: A Case for State Regulation and a Uniform Preemption Theory*, 13 SAN DIEGO L. REV. 166, 172 (1975); Note, *supra* note 22, at 147-48.

45. See *supra* note 23. This Comment argues that a prohibition on state and local enforcement of the criminal immigration statutes will protect the national interest in uniform immigration policy. The reverse, however, would also achieve this end: Congress or the courts could impose an *affirmative* duty on all of the states to enforce the immigration statutes and could enact guidelines binding on all state and local governments sufficiently comprehensive to control police discretion so that enforcement would be uniform.

This alternative, however, is not realistic, as it poses virtually insurmountable implementation problems. Congress would either have to devise a sort of "super" agency to oversee local enforcement or rely on current methods of assuring police compliance with arrest and detention standards—the exclusionary rule and state law and federal statutes creating civil causes of action against law enforcement officials who abuse their authority. But the exclusionary rule and civil liability are designed to protect *individual* interests, not federal interests. Additionally, the Supreme Court held in *INS v. Lopez-Mendoza* that the exclusionary rule does not apply in deportation proceedings. 468 U.S. 1032, 1050 (1984). Moreover, undocumented aliens are unlikely to bring civil actions against law enforcement officials because they risk exposure and deportation in so doing. See *supra* note 31.

46. 424 U.S. 351 (1976).

47. *Id.* at 352-54.

48. *Id.* at 365. The Court stated that it "has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus *per se* preempted by this constitutional power, whether latent or exercised." *Id.* at 355. It went on to distinguish earlier Supreme Court cases invalidating state regulations affecting aliens:

"[T]he fact that aliens are the subject of a state statute does not render it a regulation of immigration. . . . Indeed, there would have been no need, in cases such as *Graham*, *Takahashi*, or *Hines v. Davidowitz* even to discuss the relevant congressional enactments in finding preemption of state regulation if all state regulation of aliens was *ipso facto* regulation of immigration. . . ."

Id. (citations omitted).

Language in *De Canas* suggests, however, that the Court would have reached a different result had the state regulation *directly* affected the federal immigration power: "The fact that aliens are the subject of a state statute does not render it a regulation of immigration [E]ven if such local regulation has some purely speculative and *indirect impact* on immigration, it does not thereby become a constitutionally proscribed regulation of immigration" ⁴⁹ The Court, in finding that federal law does not preempt state exercise of its traditional police powers indirectly affecting immigration, implied that a direct regulation of immigration can exceed state authority. ⁵⁰ But it was persuaded as much by the substance of the regulation as it was by the regulation's impact. Justice Brennan, writing for the majority, observed that a "regulation of immigration . . . is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." ⁵¹ He went on to stress that California designed its statute to protect its fiscal interests, workforce, and economy. ⁵² Because these interests were within the "main-stream of . . . police power regulation," the statute was not a regulation of immigration. ⁵³

The *De Canas* opinion signaled the emergence of two factors in the immigration context—substance and impact—that, if appreciated, will inject sensitivity into preemption analysis. Courts addressing direct interference with the substantive federal immigration power, however, have failed to recognize the importance of the direct-indirect distinction. ⁵⁴ This oversight may be attributable to the Court's failure to indicate the doctrinal role that impact and substance are to play. ⁵⁵

49. *Id.* at 355-56 (emphasis added).

50. *But see Developments in the Law—Immigration Policy and the Rights of Aliens*, *supra* note 25, at 1449 (suggesting that *De Canas* can be seen as a *sub silentio* attempt to define a more expansive state role in controlling illegal immigration).

51. *De Canas*, 424 U.S. at 355.

52. *Id.* at 357. As one author noted, "[T]he complexity of the socioeconomic and political context of immigration has made Congressional attempts to regulate the field difficult." Note, *Federalism and Undocumented Immigration*, 1 LA RAZA L.J. 119 (1984). Only in recent years, however, have congressional attempts to regulate immigration recognized the socioeconomic forces within this country that draw undocumented aliens. *See supra* note 1 and accompanying text. Federal regulation of these forces means regulation of employment, education, and welfare matters traditionally reserved to the states. *See* IRCA §§ 101-315 (1986); *see also* Note, *supra*, at 122 (describing "quasi-immigration" issues such as employment, education, and social services that are particularly suited to state authority and policy formulation).

53. *De Canas*, 424 U.S. at 356.

54. *See Gonzales v. City of Peoria*, 722 F.2d 468 (9th Cir. 1983); *People v. Barajas*, 81 Cal. App. 3d 999, 147 Cal. Rptr. 195 (1978). Both cases are discussed in Section III(A).

55. *De Canas*, 424 U.S. at 355-56. The subject matter of the state activity in question clearly influences the Supreme Court's preemption analysis. *See* Note, *supra* note 34, at 1238

Moreover, the Supreme Court's preemption tests do not lend themselves to a direct impact analysis.

Part of the blame lies with the preemption doctrine's emphasis on congressional intent. The Supreme Court has identified three types of preemption,⁵⁶ and two of them turn on stringent tests for intent.⁵⁷ Express preemption occurs when Congress specifically states in a federal statute that it intends to preempt state activity.⁵⁸ Additionally, courts can infer preemptive intent from a pervasive regulatory scheme that evidences the "clear and manifest purpose of Congress" to oust concurrent state action.⁵⁹ A showing of direct impact, not particularly germane to the quest for intent, will not preclude state action under either of these tests.

Nor have the courts been receptive to the direct-indirect distinction under the third preemption test—the conflict test.⁶⁰ This is true even though conflict preemption, unlike the intent standards, focuses on the effect of the state activity on federal interests. Under the conflict test, federal law preempts state regulation conflicting with a specific federal mandate or posing an obstacle to the accomplishment of congressional purposes.⁶¹ Courts must interpret the federal legisla-

(observing that the Burger Court was less willing to preempt state law when the subject matter was local in nature); see also Note, *A Framework for Preemption Analysis*, 88 YALE L.J. 363, 389 (1978) (concluding that the Court generally will not preempt state laws protecting "vital state interests"). But subject matter in itself does not structure the Court's preemption inquiry—this is left to the intent, occupation of the field, and conflict tests. In *Florida Lime & Avocado Growers, Inc. v. Paul*, for instance, the Court repeatedly reflected on the character of a state statute regulating avocado production while pursuing its intent, occupation, and conflict preemption inquiry. 373 U.S. 132, 143, 144, 146 (1963) ("the maturity of avocados seems to be an inherently unlikely candidate for exclusive federal regulation"; "the maturity of avocados is a subject matter of the kind this Court has traditionally regarded as properly within the scope of state superintendence"; "a state regulation of this kind is an exercise of the historic police powers of the States"). Similarly, substance—and impact—are strong currents in *De Canas*. See *De Canas*, 424 U.S. at 355-56.

56. The three tests are express preemptive intent, pervasive federal scheme—from which preemptive intent can be inferred—and conflict preemption. See *Michigan Canners & Freezers Ass'n v. Agricultural Mktg. Bd.*, 467 U.S. 461, 466 (1984) (discussing express, inferred, and conflict preemption); *Florida Lime & Avocado Growers*, 373 U.S. at 141-46 (setting forth the strict preemptive intent test); *Pennsylvania v. Nelson*, 350 U.S. 497, 499 (1956) (articulating the pervasive scheme test).

57. See *supra* note 34.

58. See, e.g., *Florida Lime & Avocado Growers*, 373 U.S. at 142.

59. *Id.*; see also *Hillsborough County v. Automated Medical Laboratories, Inc.*, 105 S. Ct. 2371, 2375 (1985) (intent to preempt may be inferred where federal regulation is sufficiently comprehensive to make reasonable the inference that Congress left no room for supplementary state regulation).

60. See cases discussed *infra* Section III(A).

61. See, e.g., *Douglas v. Seacoast Prods., Inc.*, 431 U.S. 265 (1977) (Virginia statute limiting the rights of aliens to fish in state waters conflicted with federal statute granting fishing licenses); *Hines v. Davidowitz*, 312 U.S. 52 (1941) (conflict arose when state alien

tion to ascertain its objectives and to determine whether state action poses an obstacle to those objectives. Accordingly, the test permits considerable discretion as courts are free to "select" congressional goals.⁶²

The conflict test is not inconsistent with a direct-indirect impact inquiry in that both tests focus on the effect of state activity. The two differ, however, in an important respect. The impact test is satisfied upon a finding that state activity directly affects a substantive federal concern while the conflict test requires that any effect, whether direct or indirect, actually impair federal purposes. Unlike the impact test, conflict preemption does not demand direct impact, and it does not demand that state action affect an area of traditional federal concern. The impact test thus assumes that state activity within a limited sphere impairs federal purposes; the conflict test leaves this determination to the courts.

Courts charged with ascertaining legislative objectives under the conflict test, however, are faced with a notoriously subjective task.⁶³ The conflict test has no internal standards guiding judicial selection of objectives. Moreover, the incidence of political compromise renders

registration law posed "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress").

62. See Note, *supra* note 34, at 1236. The authors observed that the "determination of federal objectives permits room for judicial legislation, perhaps allowing a state law to operate where Congress would have preempted it or vice versa." *Id.* at 1236 n.19 (citing *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190 (1983), as an example of the Supreme Court's refusal to fill a legislative role).

63. See, e.g., Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983). Professor Easterbrook notes that

[i]f the question of a statute's domain may not often be resolved by reference to the actual design, it may never properly be resolved by reference to imputed design. To impute design to Congress is to engage in an act of construction. . . . If [even] powerful evidence of the intent of Congress about the domain of its statutes is not dispositive in matters of construction . . . the usual kind of evidence is even less helpful.

Id. at 537, 539; cf. Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392, 399-40 (1980). The conflict preemption test is analogous to Professor Brainerd Currie's choice of law theory, Interest Analysis, and is open to many of the criticisms leveled at Currie's work. See Currie, *Notes on Methods and Objectives in the Conflicts of Laws*, 1959 DUKE L.J. 171, 177-78 (The initial step in Interest Analysis is to determine whether a conflict exists by examining the policies underlying the respective state laws.); see also Brilmayer, *supra* (criticizing Interest Analysis for its assumption that courts can accurately ascertain legislative intent). Both theories guide courts that must allocate power vis-a-vis competing sovereigns. Indeed, the question of whether federal law preempts state law is very much like a choice of law problem with constitutional rules—when Congress says so, federal law controls. But unlike choice of law issues, the stakes are high in preemption cases because the ascendancy of federal law extinguishes competing state activity. See, e.g., *Hines v. Davidowitz*, 312 U.S. 52, 74 (1944) (Pennsylvania Registration Act preempted by federal law and therefore "[could] not be enforced").

this selection even more indeterminate. Even congressional inaction, like that reflected in the state enforcement issue, is a product of political compromise.⁶⁴ To avoid cries of "judicial legislation," the Supreme Court accordingly has opted for a result reminiscent of the preemption intent tests in circumstances where the congressional purpose is not clear.⁶⁵

In the absence of an actual conflict, courts are not willing to find that state activity impairs federal purposes. Conflict preemption in practice offers federal interests little more protection than that offered by intent preemption. This result is disturbing in the immigration context, where courts analyzing the constitutionality of state enforcement of the criminal immigration laws have overlooked the significance of substance and impact.⁶⁶ The preemption doctrine as a result has proved insensitive to paramount federal immigration interests.⁶⁷ This is particularly so in the case of local enforcement of the criminal immigration laws, where state action directly implicates an area of substantive federal concern.

III.

With enforcement of federal law and cooperation with federal authorities its express goal,⁶⁸ state enforcement of the criminal immigration laws clearly has a direct impact on a substantive federal power. The police officer on the street has considerable discretion and makes federal immigration policy every time he stops, arrests, or

64. See Easterbrook, *supra* note 63 (positing a hypothetical of congressional inaction and the difficulty of discerning legislative intent).

65. See *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 223 (1983) (realizing that it would end up performing a legislative role, the Court refused to find that federal regulation preempted concurrent state activity); see also *supra* note 62.

66. See cases discussed *infra* Section III(A).

67. But see *Toll v. Moreno*, 458 U.S. 1 (1982) (state regulation that discriminates against aliens is preempted if it imposes burdens not contemplated by Congress); *Graham v. Richardson*, 403 U.S. 365 (1971) (state welfare statute discriminating against aliens conflicted with federal immigration policies). As *Toll* and *Graham* demonstrate, the Supreme Court has used a light hand in applying the preemption standards to state legislation that discriminates against aliens. Compare *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 144-45 (1963) (under the inferred intent test, federal legislation preempts a concurrent state statute only if the federal legislation is comprehensive as to the narrow objective of the state law) with *Graham*, 403 U.S. at 377, 380 (state welfare statute conflicted with broad congressional intent that aliens be accorded treatment equal to that received by citizens).

68. State arrests for federal crimes are conducted in the spirit of comity to prevent crime and control society. See *Gonzales v. City of Peoria*, 722 F.2d 468, 474 (9th Cir. 1983) ("[F]ederal and local enforcement have identical purposes—the prevention of the misdemeanor or felony of illegal entry."); see also *Mapp v. Ohio*, 367 U.S. 643, 658 (1961) (suggesting that states cooperate "in the solution of crime").

ignores people who appear to be undocumented aliens.⁶⁹ As one California judge admonished, "[e]ffectuation of federal immigration policy is not a matter that can be left to the vagaries of state arrest and detention law nor to the discretion of the local police officer."⁷⁰ The criminal immigration laws, which make undocumented entry and harboring subject to criminal penalty,⁷¹ have no state counterparts, nor could states enact such laws if they so desired.⁷² Criminal immigration law is an incident of sovereign power that has never been reserved to the states.⁷³

A. *Gonzales v. City of Peoria* and *People v. Barajas*

A state district court and a federal court of appeals have nevertheless concluded that the INA does not preempt state enforcement of the criminal immigration statutes.⁷⁴ Neither court attached significance to the *De Canas* direct-indirect distinction, and both opinions demonstrate that the preemption standards—in creating a presumption favoring state activity and permitting courts to ignore federal interests—are insensitive to critical national interests in the immigration context.

In *Gonzales v. City of Peoria*,⁷⁵ eight Mexican nationals, two resi-

69. Most police departments vest considerable discretion with street-level officers in deciding to make in-custody arrests. See Schubert, *Police Policy and Rulemaking: The Need for Definition*, 9 J. POLICE SCI. & ADMIN. 261 (1981). Moreover, there is much variation in defining police policy and considerable ambiguity as to persons vested with policymaking authority regarding police operations. *Id.* at 262. Police officers and communities seem to prefer the kind of "individualized" justice that is linked to police discretion. Steinman, *Managing and Evaluating Police Behavior*, 14 J. POLICE SCI. & ADMIN. 285, 287 (1986). One author goes so far as to state that "police supervision is a fiction." Kelling, *On the Accomplishments of the Police*, in *CONTROL IN THE POLICE ORGANIZATION* 152, 160 (M. Punch ed. 1983).

Because line officers have discretion, they develop informal norms to avoid procedures and policies that they view as dysfunctional. Steinman, *supra* at 287. Furthermore, street police tend to devote their limited resources to those activities viewed as important by their communities. See Alpert & Dunham, *Community Policing*, 14 J. POLICE SCI. & ADMIN. 212, 220 (1986). Because communities vary tremendously in prioritizing apprehension of undocumented aliens, see *supra* note 24, local enforcement of the immigration laws also varies considerably at the street level. This variation is both attributable to and compounded by society's ambivalent perception of the undocumented alien. As one journalist noted, even the "government hasn't decided whether its on the side of the INS or the illegal immigrant." Moffett, *The Gatekeepers*, Wall St. J., May 9, 1985, at 1, col. 1.

70. *People v. Barajas*, 81 Cal. App. 3d 999, 1016, 147 Cal. Rptr. 195, 212 (Reynoso, J., dissenting).

71. See *supra* notes 10-13.

72. See *Hines v. Davidowitz*, 312 U.S. 52, 62-68 (1941).

73. See *supra* notes 18, 39-42.

74. See *Gonzales v. Peoria*, 722 F.2d 468 (9th Cir. 1983); *People v. Barajas*, 81 Cal. App. 3d 999, 147 Cal. Rptr. 195 (1978).

75. 722 F.2d 468 (9th Cir. 1983).

dent aliens, and one United States citizen sued for damages and injunctive relief under 42 U.S.C. § 1983 based on a city policy that authorized its police officers to detain persons suspected of illegal entry into the United States in violation of the INA. The Ninth Circuit held that federal law does not preclude local enforcement of the criminal provisions of the INA.⁷⁶ The court's reasoning is noteworthy for two reasons. First, it relied on the ability of local police to distinguish between reasonable suspicion of a civil versus a criminal violation to hold that federal law did not preempt local enforcement of the criminal provisions of the INA. Second, it ignored the effect of local enforcement on uniformity.

Initially, the court conceded that "substantial confusion" existed as to the scope of the city policy.⁷⁷ When first enunciated in 1978, the policy indicated that "state law enforcement officers have the author-

76. *Id.* at 477. The *Gonzales* holding is not limited to the illegal entry provisions, 8 U.S.C. §§ 1325-1326. Compare *Barajas*, 81 Cal. App. at 1006, 147 Cal. Rptr. at 202 ("Since there is no limitation relative to sections 1325 and 1326, the Lodi police officers had the power to arrest for their violations.") with *Gonzales*, 722 F.2d at 475 ("We therefore hold that federal law does not preclude local enforcement of the *criminal provisions* of the Act." (emphasis added)). *Gonzales*, although a pre-IRCA case, raises the question of whether local police can arrest employers subject to criminal penalty under the pattern or practice provision of the IRCA. See IRCA § 274A(f)(1).

Like the illegal entry provisions, uniformity is an important federal interest underlying section 274(A). See IRCA § 115 ("It is the sense of Congress that the immigration laws of the United States should be enforced vigorously and uniformly."). Unlike the illegal entry provisions, however, the IRCA employer penalties overlap a sphere of traditional state control—employment relations. See *De Canas v. Bicas*, 424 U.S. 351, 355-56 (1976) (upholding state legislation that imposed penalties on employers who hired illegal aliens). While the IRCA expressly preempts concurrent state legislation "imposing civil or criminal sanctions . . . upon those who employ, or recruit . . . unauthorized aliens," IRCA § 274A(h)(2), it does not address state and local enforcement of the criminal employment provisions. See generally IRCA tit. I, pt. A (making employment of unauthorized aliens unlawful).

An analogous issue has arisen recently under the Occupational Safety and Health Act (OSHA), 29 U.S.C. §§ 651-678 (1982), where state and local authorities have asserted the authority to prosecute employers in criminal violation of section 666 of the Act. See *Miami Herald*, Mar. 29, 1987, at 4C, col. 2 (reporting a comment by Kings County District Attorney Elizabeth Holtzman that "state and local authorities must step in [to prosecute OSHA violations] where the federal government has walked out"). One OSHA case, in which the circuit court of Cook County, Illinois, sentenced three executives to jail in the cyanide poisoning death of a worker, is being appealed on the basis that OSHA preempts local prosecution. *Id.* at col. 4; cf. *Five Migrant Farmworkers v. Hoffman*, 136 N.J. Super. 242, 345 A.2d 378 (1975). In *Five Migrant Farmworkers*, the plaintiffs challenged state executive inaction under a state statute mirroring OSHA provisions for the inspection of migrant labor camps. The Superior Court of New Jersey held that "the State has neither the authority nor the obligation to make inspections" because OSHA preempted the New Jersey statute requiring occupancy inspections. *Id.* at 246, 345 A.2d at 382. Interestingly, the court narrowly construed 29 U.S.C. 677(a), which reserves concurrent state authority under OSHA. *Id.* at 244-45, 345 A.2d at 380-81.

77. *Gonzales*, 722 F.2d at 474.

ity to make arrests for federal violations . . . [including] the authority to take illegal aliens into custody.”⁷⁸ The subsequent history of the policy indicated that the Peoria police were unaware of definitions and the nature of violations under the INA.⁷⁹ Moreover, in 1979, the department apparently reversed itself, issuing a memorandum that directed “at no time will any Illegal Alien be arrested because he is an Illegal Alien.”⁸⁰ The city changed its policy again in 1982.⁸¹ An operations order stated that officers were permitted to detain persons suspected of illegal entry for a period “not to exceed twenty-four hours, with the exception of weekends.”⁸² Not surprisingly, the officers testifying at trial were uncertain as to what the policies permitted.⁸³

The court attributed this confusion to the police department’s failure to distinguish between civil and criminal violations of the INA, noting that arrest of a person for civil violations would exceed the authority granted city police by state law.⁸⁴ Furthermore, the court suggested that local officials correct the shortcoming by implementing “refinements of both the written policies and officer training programs.”⁸⁵

Because it viewed the civil enforcement problem as curable, the court considered only whether federal law preempted the city’s limited claim of authority.⁸⁶ The court turned first to the conflict test and concluded that state and federal enforcement have “identical purposes.”⁸⁷ The city asserted only the power to enforce the criminal provisions of the Act, and accordingly, “nothing inherent in th[e] specific enforcement activity . . . conflict[ed] with federal regulatory interests.”⁸⁸ The court also refused to infer preemptive intent from

78. *Id.* at 472 (quoting City of Peoria, Arizona, Police Department Memorandum (Jan. 9, 1978)).

79. *Id.* at 472-74.

80. *Id.* at 473 (quoting City of Peoria, Arizona, Police Department Memorandum (Jan. 9, 1978)).

81. *Id.* at 473.

82. *Id.* (quoting City of Peoria, Arizona, Police Department Operations Order D-9 (Jan. 1, 1982)).

83. *Id.* at 474.

84. *Id.* at 476.

85. *Id.* at 477.

86. *Id.*

87. *Id.* at 474.

88. *Id.* at 475. Because Congress expressly authorized local enforcement of *only* the harboring and smuggling statute, 8 U.S.C. § 1324(c) (1982), the *Gonzales* plaintiffs argued that Congress’s failure to expressly provide for local enforcement of illegal entry statutes, 8 U.S.C. §§ 1325-1326 (1982), evidenced its intent to withhold enforcement authority as to those two sections. 722 F.2d at 475. The Ninth Circuit rejected this argument. Relying heavily on the California appellate court’s review in *Barajas* of the INA’s legislative history, the court found

the structure of the Act. The INA contained no express indication of an intent to preempt local enforcement.⁸⁹ Moreover, the criminal provisions of the Act were few in number and were not "supported by a complex administrative structure."⁹⁰ The court was therefore unwilling to infer preemptive intent from federal occupation of the immigration field.

The *Gonzales* court noted, however, that federal law does preempt local enforcement of the *civil* immigration statutes. The court observed that the civil provisions constituted a system of federal regulation sufficiently pervasive to exclude state activity.⁹¹ Implicit in the court's preemption analysis is the assumption that local police can distinguish between civil and criminal provisions of the INA. Because police act upon probable cause, the court's reasoning also assumes that law enforcement officials can distinguish between the probable cause to suspect a criminal immigration violation and the probable cause to suspect a civil immigration violation.

Such a distinction is illusory at best. Most of the civil provisions have criminal counterparts.⁹² An alien who is "illegally present" under section 1325, for example, is committing a civil violation of the immigration laws.⁹³ On the other hand, an alien who illegally enters the country commits a misdemeanor.⁹⁴ Both aliens will nevertheless lack proper documentation. Both may appear to be foreign nationals. Both may even admit illegal presence. While alienage and lack of identification alone are not enough to create a reasonable suspicion of illegal entry,⁹⁵ the arresting officer need only have some "additional evidence" of a criminal violation.⁹⁶ The additional factors are highly subjective. Officers rely on behavioral traits, clothing, or their own

that a compromise amendment striking the words "of the United States," so that *all* officers have authority to arrest for 1324(c) violations, could not be read as an implied limitation on sections 1325 and 1326. *Id.* (citing S. CONF. REP. NO. 1505, 82d Cong., 2d Sess., reprinted in 1952 U.S. CODE CONG. & ADMIN. NEWS 1358, 1360-61). Instead, the court concluded that the 1324(c) amendment "implicitly made the enforcement authority as to all three identical." *Id.*

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

90. *Id.*

91. *Id.* at 476.

92. Harwood, *supra* note 8, at 512.

93. 8 U.S.C. 1357(a) (1982).

94. 8 U.S.C. 1325 (1982).

95. The *Gonzales* court attempted to distinguish the probable cause to suspect a civil as opposed to a criminal immigration violation, stating that "although the lack of documentation or other admission of illegal presence may be some indication of illegal entry, it does not, *without more*, provide probable cause of the criminal violation of illegal entry." 722 F.2d at 476-77 (emphasis added).

96. *Id.* at 477; see also *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975).

experience.⁹⁷ Because it is easy to argue after the fact that an alien's glance was furtive, this ephemeral probable cause standard results in what field officers describe as "canned p.c."⁹⁸ Furthermore, these factors, resting as they do on the alien's unconscious betrayal of his own wrongful activity, do not distinguish between civil and criminal violations of the INA. An alien who is illegally present is no less likely to anticipate trouble at the appearance of an officer than an alien who has illegally entered the country.

The *Gonzales* court's failure to recognize the impracticability of a civil-criminal distinction, however, does not render its intent preemption analysis meritless. The distinction is logical in theory and may be useful for focusing on congressional intent. Nevertheless, the practical difficulty of distinguishing between civil and criminal probable cause should have alerted the court to the weakness of its conflict preemption analysis. Instead, the Ninth Circuit used the civil-criminal distinction to maneuver its conflict inquiry along an overly narrow path. Concluding that local and federal enforcement of the criminal statutes served "identical purposes,"⁹⁹ and that local police could cure haphazard enforcement by training police to distinguish between civil and criminal immigration violations,¹⁰⁰ the court dismissed—or ignored—the federal interest in uniform enforcement of the immigration laws.¹⁰¹

Because it lacks guidelines for identifying congressional objectives and state consistency with those objectives, the conflict test is open to *Gonzales*-like judicial gerrymandering. The Constitution expressly embraces a national interest in uniform immigration policy.¹⁰² Despite this express objective, the court avoided analyzing the effect of state and local arrests of immigration violators on uniform enforcement of the immigration laws. Thus the conflict preemption test, because it is devoid of standards, invites courts to ignore federal interests.

97. See Harwood, *supra* note 8, at 531 (describing routine INS immigration law enforcement practices observed by the author). The author notes that

it is easy to come up with the necessary articulable facts after the fact. When this occurs it is referred to as "canned p.c." (probable cause). Who is to say if a glance was furtive and who is to judge whether the clothing an individual was wearing was Mexican? Any strenuous effort by the courts to properly enforce the reasonable suspicion standard would probably come to naught.

Id. at 531-32.

98. *Id.*

99. *Gonzales*, 722 F.2d at 474.

100. *Id.* at 477.

101. *Id.*

102. U.S. CONST. art. I, § 8.

The Ninth Circuit, however, is not the only court that has been insensitive to the federal interests at stake when local police arrest undocumented aliens. In *People v. Barajas*,¹⁰³ a California appellate court similarly held that federal law does not preempt local arrests for criminal immigration violations. Two local police officers arrested the defendant, an undocumented alien, on independent state grounds. The defendant Barajas claimed to have a "green card" but was unable to produce it. Furthermore, he gave the officers a false name and was unable to tell them where he lived.¹⁰⁴ Although the police released Barajas after arresting him for possession of a knife and narcotics, they contacted an INS officer and described the defendant's "vital statistics."¹⁰⁵ Convinced that Barajas was a repeat illegal entry offender and therefore was violating section 1326 of the INA,¹⁰⁶ the INS officer asked the local police to arrest Barajas. The police arrested the defendant near a bar and found contraband in his pocket.¹⁰⁷ A jury subsequently convicted Barajas for possession of heroin.

The defendant contended on appeal that the local police did not have authority to make arrests for violations of the INA illegal entry statutes, 8 U.S.C. §§ 1325-1326.¹⁰⁸ Beginning with a search for congressional intent in the history of the Act, the court found that Congress did not intend to preclude local arrests for violations of the immigration laws.¹⁰⁹ The court's analysis resembled an intent preemption inquiry, but the court did not expressly state that it was engaged in preemption analysis.¹¹⁰ Nor did it consider federal objectives and the possibility of a federal and state conflict. Instead, the court simply stated that "the supremacy clause is a two-edged sword, and in the absence of a limitation, the states are bound by it to enforce violations of the federal immigration laws."¹¹¹ Because the INA contained no limitations, the court held that local police had the power to arrest Barajas for violating 8 U.S.C. § 1326.¹¹²

Its reliance on the supremacy clause indicates that the court was aware that it was confronted with a preemption issue. Nevertheless, the court's abbreviated preemption analysis suggests that it was uncertain of the correct legal rules applicable to local arrest for immi-

103. 81 Cal. App. 3d 999, 147 Cal. Rptr. 195 (1978).

104. *Id.* at 1003, 147 Cal. Rptr. at 197.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at 1004, 147 Cal Rptr. at 198.

109. *Id.* at 1005-06, 147 Cal Rptr. at 198.

110. *See id.*, 147 Cal Rptr. at 198-99.

111. *Id.* at 1006, 147 Cal Rptr. at 199.

112. *Id.*

gration law infringements. Preemption issues typically deal with concurrent state legislation.¹¹³ Because law enforcement is an arm of the executive branch, local police arrests for federal law violations present an unusual preemption question.¹¹⁴ The State of California did not pass a statute that encroached on federal territory; its agents merely arrested an individual suspected of violating a federal law.

Thus doctrinal confusion may explain the *Barajas* court's failure to apply the conflict preemption test. The court appeared to conclude that arrests for violations of federal law—which, it assumed, advanced federal interests—need only survive an analysis of congressional intent. But courts cannot assume that local enforcement advances federal interests simply because it *purports* to advance federal interests. Given the importance of uniformity in the immigration context, such an assumption is unwarranted. Moreover, it bows to state authority at the expense of national concerns, even though the state's interest is limited.¹¹⁵

Barajas also demonstrates the inadequacy of the intent preemption tests where state action directly affects a substantive federal concern. As did the Ninth Circuit in *Gonzales*, the court found no indication of congressional intent sufficiently specific to preclude local arrests for immigration violations in the INA or its history.¹¹⁶ It conceded, however, that sections of the Act constrain the INS' power to arrest without mention of a commensurate limit on state and local police authority.¹¹⁷ Local enforcement would accordingly permit

113. Consider, for example, the Burger Court's conflict preemption cases. All involved a conflict with state legislative action. See, e.g., *Michigan Canners & Freezers Ass'n v. Agricultural Mktg. Bd.*, 467 U.S. 461 (1984) (Michigan Agricultural Marketing and Bargaining Act); *Southland Corp. v. Keating*, 465 U.S. 1 (1984) (California Franchise Investment Law); *Aloha Airlines v. Director of Taxation*, 464 U.S. 7 (1983) (Hawaii statute taxing airline income); *Shaw v. Delta Airlines*, 463 U.S. 85 (1983) (New York Human Rights Law); *Toll v. Moreno*, 458 U.S. 1 (1982) (university policy); *Edgar v. Mite Corp.*, 457 U.S. 624 (1982) (Illinois Business Takeover Act).

114. See *supra* note 68.

115. But cf. *Ecumenical Challenges*, *supra* note 24, at 591-92 (arguing that federal law does not preempt city sanctuary resolutions—which discourage local police enforcement of the immigration laws—because the resolutions primarily serve the state's interest in ensuring public health and safety by removing the fear of deportation and thus encouraging aliens to report crimes).

116. *Barajas*, 81 Cal. App. 3d at 1006, 147 Cal. Rptr. at 202.

117. *Id.* Under one section of the INA, an INS officer's authority is more limited than that of other law enforcement officials. Amended section 1357 of the INA abrogates the open fields doctrine with regard to INS raids of farms and other outdoor business operations. IRCA § 116 (amending 8 U.S.C. § 1357 (1982)). Because the open fields doctrine allows any other law enforcement official to enter outdoor farming operations without a warrant, state enforcement in this instance would circumvent section 1357's restriction on INS powers, a result certainly not contemplated by Congress. Under section 1357(a)(1), however, an INS officer's power is more expansive than that traditionally accorded local authorities because of

police to circumvent the Act's restrictions on INS arrest powers, a result that Congress surely did not intend.¹¹⁸ Faithful to the strict intent demanded by the intent preemption tests, however, the court responded with a verbal shrug: "There are reasons why Congress might choose to limit local enforcement . . . but Congress has not done so."¹¹⁹

Neither the Ninth Circuit nor the California appellate court considered the factors suggested by the Supreme Court in *De Canas*—substance and impact. Moreover, because the three preemption tests are insensitive to federal interests when a state directly regulates a substantive federal concern, both courts applying those tests failed to recognize that local enforcement threatens uniform immigration policy. The opinions demonstrate that the preemption tests are inadequate for two reasons. First, the intent tests create a presumption favoring state authority, and second, the conflict test hands courts the discretion to choose objectives. The following section proposes a remedy for these preemption test flaws that presumes a threat to national interests where courts find a direct state regulation of immigration.

B. *A Modified Preemption Standard*

The preemption doctrine protects the states' interests in exercising powers reserved to them in the tenth amendment by demanding that courts strictly construe congressional intent. Thus the doctrine will not allow ambiguous assertions of federal "occupation" to pre-

the specialized training that the immigration officers receive. See *United States v. Martinez-Fuerte*, 428 U.S. 543, 563 n.3 (1976). Although immigration violations are inextricably bound to a standard (alienage) that in any other context would be constitutionally unacceptable, an INS officer has the authority under section 1357(a)(1) to "interrogate any alien" and request proof of legal presence. 8 U.S.C. § 1357(a)(1) (1982).

Section 1357 of the INA appears to grant INS officers the authority to interrogate on the basis of the mere belief that the subject is an alien. See 8 U.S.C. § 1357(a)(1) (1982) (providing that INS officers may, without a warrant, "interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States"). The courts have not agreed on whether merely a reasonable suspicion of alienage, as opposed to *illegal* alienage, justifies a section 1357 interrogation. See *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 n.9 (1975). In either case, the INS officer's authority exceeds that of a state law enforcement officer. For an excellent analysis of constitutional limits on the INS's authority to interrogate and detain aliens, see Note, *The Immigration and Naturalization Service and Racially Motivated Questioning: Does Equal Protection Pick Up Where the Fourth Amendment Left Off?*, 86 COLUM. L. REV. 800 (1986).

118. The *Barajas* defendant argued that permitting local police officers to make warrantless arrests for immigration violations undermines the congressional warrant policy expressed in section 1357 of the INA. See 8 USC § 1357(a) (1982) (describing limited circumstances in which an immigration officer or employee can arrest without warrant). In theory, federal officials could avoid the warrant requirement by simply asking local police to make arrests for them. *Barajas*, 81 Cal. App. 3d at 1006, 147 Cal. Rptr. at 202.

119. *Barajas*, 81 Cal. App. 3d at 1006, 147 Cal. Rptr. at 202.

clude state regulation of a field in which the states have a constitutional interest. The *Gonzales* and *Barajas* courts were unable to discern any specific indication of preemptive intent in the INA and its history, and the intent preemption standards bound both courts to hold that local law enforcement officers can arrest persons suspected of violating the criminal immigration statutes. This is so even though the states' goal was to effectuate a federal purpose—a purpose not reserved to the states by the tenth amendment. Moreover, the conflict test, which purports to entertain federal interests but provides no guidelines for so doing, permitted the *Gonzales* court to select one interest and ignore all others. All three preemption tests accordingly permitted Arizona and California to encroach directly on an extra-constitutional federal power even though the states' own interests were limited.

Gonzales and *Barajas* demonstrate the insensitivity of the preemption standards to national interests when the state action at issue directly affects an incident of the federal sovereign power. Uniformity is critical to the exercise of sovereign authority. For this reason, the framers reserved the sovereign powers to Congress and not to the states. They recognized that, without such a reservation, each state would be free to create its own immigration and foreign relations policy. Indeed, state enforcement of the criminal immigration statutes embodies the framers' fears: its result is the cacophony of a thousand local governments making immigration policy. In holding that local police have the authority to make arrests for immigration violations, both courts ignored the significance of uniformity.

Because of the sensitive nature of the immigration power, state arrests for immigration crimes should only be permitted where there is express congressional indication that they may do so. Accordingly, this section proposes a test that permits courts to infer preemptive intent where sensitive extra-constitutional interests are at stake. To protect the constitutional balance of state and federal power, however, this test requires a narrow predicate: the court must determine that first, the state action *directly* affects the federal immigration power; second, the power affected is an incident of sovereign authority; and third, the state action primarily *serves* interests reserved to the federal government.

This substance-impact test does not displace the intent tests, but operates in union with them. In contrast to the conflict test, however, the impact-substance inquiry does not ask courts to identify federal objectives and then determine whether state activity hinders those objectives. As *Gonzales* demonstrates, this discretion allows courts to

overlook critical interests. Instead, the impact-substance test presumes that a direct regulation of federal immigration power harms important national concerns. The test therefore forces courts to protect national interests when the states have no independent and primary police power interest.

IV. CONCLUSION

State and local law enforcement officials should not have the authority to stop, detain, interrogate, or arrest individuals solely on suspicion of an immigration violation. Unlike state and local enforcement of other federal criminal statutes, local arrests for immigration violations do not necessarily effectuate federal policy. Moreover, courts analyzing the state enforcement issue have failed to recognize that state and local arrests for immigration violations hinder the federal interest in uniform immigration enforcement. The modification of the preemption standards suggested above would force courts to respond to national interests in the immigration context. But whether such a modification is practicable or not, the INA, and indeed the supremacy clause itself, should be construed to prohibit state and local arrests of undocumented aliens.

CECILIA RENN*

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