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In recent years, political debate over illegal immigration has taken on a decidedly local flavor. State and local governments increasingly complain that the federally controlled immigration system is failing and that the burdens created by that failure are borne at the local level.[1] Rather than accepting those burdens, state and local governments recently sparked nationwide debate by demanding reform of federal immigration laws,[2] pay-

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1. *See, e.g.*, REBECCA L. CLARK ET AL., URBAN INSTITUTE, FISCAL IMPACTS OF UNDOCUMENTED ALIENS: SELECTED ESTIMATES FOR SEVEN STATES (1994) (reporting the results of a study commissioned by the Justice Department of the economic burden of illegal immigration on seven states); Lawton Chiles, *Chiles: Let U.S. Bear Burden of Immigration*, ORLANDO SENTINEL, Mar. 20, 1994, at G3 ("[F]ederal immigration policy has created a nightmare for state and local governments in Florida.") (Mr. Chiles is Florida's governor); *Immigration, —Who Will Pay?*, WASH. POST, Jan. 3, 1994, at A18 (noting states' complaint that they are bearing increased financial burdens as a result of the failure of the federal immigration system and editorializing that the federal government should accept responsibility for those burdens); Ross Ramsey & James Pinkerton, *Texas to Join Federal Suit to Recoup Immigrant Cost*, HOUS. CHRON., May 27, 1994, at A1 ("The failure of the U.S. government to adequately enforce our immigration laws is placing an enormous strain upon state government, municipalities, counties and our citizens." (quoting letter from Dan Morales, Texas Attorney General, to Ann Richards, Govenor of Texas)); *The Unfair Immigration Burden*, N.Y. TIMES, Jan. 11, 1994, at A20 (agreeing with states' complaint that, while Washington sets the nation's immigration laws and determines how carefully they are enforced, the states bear the greatest share of immigration costs); *Who'll Pay For Illegal Immigrants?*, CHI. TRIB., Feb. 7, 1994, (Editorial), at 10 (complaining that states bear the expense of providing federally mandated services to immigrants while the federal government collects the bulk of immigrants' taxes); *Wilson's $1.45-Billion Plea to Feds: Pay up Governor Makes Strong Case for Immigrant-aid Money*, L.A. TIMES, Jan. 18, 1993, (Metro), at B6.

2. *See, e.g.*, David LaGesse, *Approval of Overhaul Caps Immigration Fight*, DALLAS MORNING NEWS, Oct. 1, 1996, at 1A (noting years of nationwide demand for immigration reform); George de Lama, *Immigration Politics: California Anger May Set Tone for a Messy Debate*, CHI. TRIB., Sep. 18, 1994, (Perspective), at 1 (reporting bipartisan support for some immigration reforms). While the recent immigration debate has been driven by localized concerns, state and local politicians disagree on how federal immigration law should be reformed and if reforms are even necessary. *See* Robert B. Gunnison, *New Education Leader Is No Wilson Puppet*, S.F. CHRON., Oct. 2, 1996, at A12 (noting that Governor Pete Wilson and his cabinet secretary for education disagree over whether California should provide educational services to the children of illegal immigrants); Dale Russakoff, *New York Mayor Galls GOP by Becoming Champion of Immigrants*, WASH. POST, Oct. 7, 1996, at A4 (reporting New York City

ment of federal funds to reimburse states for social services[3] provided to illegal immigrants,[4] and an increase in federal resources allocated to immigration enforcement.[5] Several states bearing the largest immigration burdens even sued the federal government to compel federal enforcement of immigration laws and to recoup the costs of providing social services to illegal immigrants.[6]

Mayor Rudolph Giuliani's opposition to proposed immigration reforms); Art Torres, *Don't Give Me Your Tired, Your Poor . . .*, SAN DIEGO UNION-TRIB., Jan. 9, 1994, at G1 (expressing a California state senator's opinion that federal immigration policy has failed, but disagreeing with proposed immigration reforms).

3. Unless indicated otherwise, this Comment will use the phrases "social services" or "services" to include educational services, cash payment and in-kind welfare programs, and law enforcement and correctional systems, including incarceration and parole.

4. *See, e.g.*, Melita Marie Garza, *Illegal Immigrant Tab $196 Million*, CHI. TRIB., May 2, 1994, (Chicagoland), at 3 (reporting Illinois' plan to lobby the federal administration for reimbursement of state expenditures on federally mandated services to illegal immigrants); Maria Puente, *States Bemoan Costs of Illegal Immigration*, USA TODAY, Mar. 18, 1994, at 7A (reporting governors' demand that the federal government reimburse states for the cost of providing services to illegal immigrants); *Wilson's $1.45-Billion Plea to Feds*, *supra* note 1, at B6 (noting Governor Wilson's demand that the federal government pay $1.45 billion in promised aid to reimburse California for providing federally mandated services to immigrants).

5. *See, e.g.*, Jeff Barker, *Arizona Scolded for Suit U.S. Assails Bid to Get Reimbursed for Illegals*, ARIZ. REPUBLIC, June 22, 1994, at A1 (noting former Governor Fife Symington's complaint that Arizona's immigration problem worsened as scarce border patrol resources were allocated elsewhere); *Illegal Aliens in Kentucky May Go Free if Discovered*, COURIER-J. (Louisville, Ky.), Oct. 2, 1996, at 2B (reporting the release of illegal immigrants discovered by Kentucky State Police because the Immigration and Naturalization Service lacked resources to detain and deport them); Vlae Kershner, *Governors Threaten to Sue U.S.*, S.F. CHRON., Feb. 1, 1994, at A2 (reporting that seven states and the federal government agreed to work on finding ways to strengthen border patrol enforcement); Marcus Stern, *INS Weighs Stepped-up Effort in East County*, SAN DIEGO UNION-TRIB., Sep. 17, 1996, at A1 (reporting a plan to temporarily reallocate border patrol resources to respond to the complaints of local residents).

6. *See, e.g.*, Barker, *supra* note 5, at A1 (reporting that Arizona, California, Florida, and Texas filed suits against the federal government for failing to enforce federal immigration laws and for reimbursement of costs incurred in providing social services to illegal immigrants); Kim Cobb, *States Bill Illegal Immigration Costs*, HOUS. CHRON., Apr. 10, 1994, at A20 (stating that New York filed suit to compel the federal government to take custody of illegal immigrants in state prisons). While these suits have suffered from fatal legal infirmities—*see* Texas v. United States, No. B-94-228 (S.D. Tex. Aug. 7, 1995) (dismissing Texas' claims), *aff'd*, 106 F.3d 661 (5th Cir. 1997); New Jersey v. United States, No. 94-cv-03471 (D.N.J. Aug. 3, 1995) (dismissing New Jersey's claims), *aff'd*, 91 F.3d 463 (3d Cir. 1996); Arizona v. United States, No. 94-0866 (D. Ariz. Apr. 18, 1995) (dismissing Arizona's claims), *aff'd*, 104 F.3d 1095 (9th Cir. 1997); Padavan v. United States, No. 94-CV-1341 (N.D.N.Y., Apr. 18, 1995) (dismissing New York's claims), *aff'd*, 82 F.3d 23 (2d Cir. 1996); California v. United States, No. 94-0674-K (S.D. Cal. Mar. 3, 1995) (dismissing California's claims), *aff'd*, 104

This "chorus of complaints"[7] has been extraordinarily successful in extracting federal concessions. The states not only secured federal financial aid to partially offset the cost of providing social services to illegal immigrants,[8] but also motivated Congress and the President to substantially reform federal immigration laws[9] and to vastly increase the federal resources dedicated to enforcing those laws.[10]

Prominent among recent immigration reforms are provisions granting state and local governments greater authority to enforce federal immigration laws.[11] Part I of this Comment examines state and local immigration enforcement authority in light of these recent reforms.[12] This discussion examines the various options state and local governments have under the reforms to tailor their immigration enforcement activities to meet unique

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F.3d 1086 (9th Cir. 1997); Chiles v. United States, 874 F. Supp. 1334, 1344 (S.D. Fla. 1994) (dismissing Florida's claims), *aff'd*, 69 F.3d 1094 (11th Cir. 1995); Daniel M. Weintraub, *Experts Say Suit Over Immigrant Costs Will Fail*, L.A. TIMES, Apr. 29, 1996, at A3 (analyzing legal weaknesses in the states' cases)—they have been successful in motivating federal reform. *See infra* notes 7-10 and accompanying text. *See also* Nancy Cleeland, *Immigrant-cost Suits Gain Popularity Across U.S.*, SAN DIEGO UNION-TRIB., Apr. 28, 1994, at A1; Maria Puente, *States' Immigration Lawsuits Have More Bark Than Bite*, USA TODAY, Apr. 29, 1994, at A3 (reporting that states' immigration suits prompted federal concessions despite legal weaknesses).

7. William Booth, *Florida Plans to Sue U.S. Over Illegal Immigrants*, WASH. POST, Dec. 30, 1993, at A1.

8. *See, e.g.*, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, §§ 562-563, 110 Stat. 3009 (authorizing federal payments to state and local governments to reimburse costs of providing certain ambulance services and emergency medical care to illegal immigrants); Marcus Stern, *$33.5 Million for Cost of Jailing Illegal Migrants*, SAN DIEGO UNION-TRIB., Oct. 7, 1994, at A1 (reporting the allocation of federal funds to partially reimburse states for the cost of incarcerating illegal immigrant felons).

9. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (to be codified at 8 U.S.C. §§ 1101-1642 and in scattered sections of 18 U.S.C.).

10. *See id.* §§ 101-103, 110, 121-134, 204, 386-387. These sections authorize the Attorney General to hire 5000 additional border patrol agents, 1500 border patrol support personnel, 1200 immigration investigators and 25 assistant United States attorneys. They also authorize construction of extensive physical barriers, roads and facilities to deter illegal border crossings; acquisition of substantial equipment to detect, interdict and deport illegal immigrants; and development of an automated entry and exit control system to track aliens entering the United States under temporary visas.

11. *See id.* §§ 133, 303, 372-373. The federal government has also restricted the ability of state and local governments to hamper federal efforts to enforce the immigration laws. *See id.* § 642 (barring state and local governments from refusing to communicate with the INS regarding a person's immigration status). These provisions are discussed *infra* in Parts I and II.

12. Although recent immigration reforms have also granted authority to state and local governments to deny certain social services to illegal immigrants, *see id.* §§ 502, 510, 553, those provisions are not analyzed in this Comment.

local needs. Part II discusses various social, political, legal and economic difficulties that state and local governments have encountered, or may encounter, in exercising their new authority over immigration. Part III concludes that state and local governments should welcome the recent reforms as both an opportunity to respond to local problems and as a model for developing cooperative, rather than coercive, law enforcement relationships between federal and local authorities.

I. THE OPPORTUNITY TO ACT: STATE AND LOCAL POWER IN A FEDERALLY DOMINATED IMMIGRATION SYSTEM

The fundamental principle of immigration law is that the federal government has "plenary" power to regulate immigration and naturalization.[13] Because Congress has constitutional power to establish a "uniform Rule of Naturalization,"[14] and because U.S. immigration policies have national impact both domestically and in "our relations with foreign powers,"[15] the federal courts have repeatedly held that the power to regulate immigration is exclusively vested in the political branches of the federal government.[16] The Supreme Court has stated that "[t]he authority to control immigration—to admit or exclude aliens—is vested

13. *See, e.g.*, Kleindienst v. Mandel, 408 U.S. 753, 766 (1972) ("The Court without exception has sustained Congress' 'plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.'" (quoting Boutilier v. INS, 387 U.S. 118, 123 (1967))); Chiles v. United States, 874 F. Supp. 1334, 1339 (S.D. Fla. 1994) ("It is undisputed that the Federal Government's control over immigration is plenary."), *aff'd*, 69 F.3d 1094 (11th Cir. 1995); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990) (reviewing the history and current application of the plenary power doctrine).

14. U.S. CONST. art. I, § 8, cl. 4.

15. Mathews v. Diaz, 426 U.S. 67, 81 (1976).

16. *See, e.g.*, Reno v. Flores, 507 U.S. 292, 305 (1993) ("For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government." (quoting *Mathews*, 426 U.S. at 81)); Toll v. Moreno, 458 U.S. 1, 10 (1982) ("Our cases have long recognized the preeminent role of the Federal Government with respect to the regulation of aliens within our borders."); Fiallo v. Bell, 430 U.S. 787, 792 (1977); *Kleindienst*, 408 U.S. at 766 ("The power of Congress to exclude aliens . . . and to have its declared policy in that regard enforced exclusively through executive officers . . . is settled by our previous adjudications." (quoting Lem Moon Sing v. United States, 158 U.S. 538, 547 (1895))).

solely in the Federal Government"[17] and "[o]ver no conceivable subject is the legislative power of Congress more complete."[18]

To implement its exclusive power, the federal government has enacted and extensively amended the Immigration and Nationality Act ("INA" or "Act").[19] The INA establishes a set of rules for legal immigration and naturalization,[20] provides a system for processing and deporting illegal immigrants,[21] and specifies civil and criminal penalties for violation of its provisions.[22] The Supreme Court has referred to the INA as a "comprehensive federal statutory scheme for regulation of immigration and naturalization."[23] To enforce the INA, Congress created a national immigration bureaucracy—the Immigration and Naturalization Service ("INS").[24]

A. Federal Preemption of State and Local Efforts to Enforce Federal Law

Because the power to control immigration is vested exclusively in the federal government, state and local authorities in areas with immigration problems are in a potentially difficult position. While these local authorities may face political and budgetary pressure to enforce immigration laws, federal preemption stands as a possible roadblock to any state or local[25] immigration enforcement effort.[26] Accordingly, before addressing the

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17. Graham v. Richardson, 403 U.S. 365, 379 (1971) (quoting Truax v. Raich, 239 U.S. 33, 42 (1915)); *see also* De Canas v. Bica, 424 U.S. 351, 354 (1976) ("Power to regulate immigration is unquestionably exclusively a federal power.").

18. *Reno*, 507 U.S. at 305 (quoting *Fiallo*, 430 U.S. at 792).

19. 8 U.S.C. §§ 1101-1525 (1994). The most recent amendments to the INA were motivated by the growing wave of complaints from state and local governments. Many of those amendments are embodied in the Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009, which was signed into law on October 3, 1996.

20. *See* 8 U.S.C. §§ 1151-1204, 1401-1458 (1994).

21. *See id.* §§ 1225-1227, 1251-1254.

22. *See id.* §§ 1221(d), 1252(e), 1306-1330.

23. De Canas v. Bica, 424 U.S. 351, 353 (1976).

24. *See* 8 U.S.C. §§ 1551-1557 (1994).

25. State laws and local ordinances are subjected to identical analysis for purposes of federal preemption. *See* Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 605 (1991).

26. Of course, the argument can be made that state and local authorities may prefer to be limited in their ability to enforce federal immigration laws since the preemption straightjacket allows them to either avoid discussing tough immigration issues or to place blame for local immigration problems on the federal government. The reasons why state and local governments may prefer to stay out of immigration enforcement are discussed at greater length *infra* in Part II. However, if state and

recent immigration reforms, this Comment will discuss the effect of federal preemption on state and local immigration enforcement.

1. Preemption's analytical framework

Under the preemption analysis established by the Supreme Court, federal laws enacted pursuant to constitutional power may preclude state and local regulation or enforcement of the federal scheme.[27] The essential inquiry in analyzing federal preemption is whether Congress expressly or impliedly intended to preempt local action.[28] Courts will find a congressional intent to preempt local regulation or enforcement when Congress expresses preemptive intent in "explicit statutory language,"[29] when a state or local government regulates conduct "in a field that Congress intended the Federal Government to occupy exclusively,"[30] or when a state or local government's activities "actually conflict[] with federal law."[31]

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local governments desire to use their resources to respond to a community's particular immigration problems, they may be frustrated by federal preemption of local immigration enforcement efforts.

27. *See generally* Barnett Bank v. Nelson, 116 S. Ct. 1103, 1107-08 (1996) (explaining that Congress may expressly or impliedly preempt state and local regulation); Gonzales v. City of Peoria, 722 F.2d 468, 474-75 (9th Cir. 1983) (applying federal preemption analysis to local enforcement of federal laws).

28. *See, e.g., Barnett Bank*, 116 S. Ct. at 1107 (citing California Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 280-81 (1987)); Gade v. National Solid Wastes Management Ass'n, 505 U.S. 88, 96 (1992); English v. General Elec. Co., 496 U.S. 72, 78-79 (1990) ("Pre-emption fundamentally is a question of congressional intent.").

29. *English*, 496 U.S. at 79; *see also Barnett Bank*, 116 S. Ct. at 1107-08; *Gade*, 505 U.S. at 98; Northwest Cent. Pipeline Corp. v. State Corp. Comm'n, 489 U.S. 493, 509 (1989).

30. *English*, 496 U.S. at 79. Courts will infer a congressional intent to completely occupy a field from a

> "scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it," or where an Act of Congress "touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."

Id. (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

31. *Id.* The Supreme Court has found actual conflict with federal law where compliance with both the stata and federal regulatory requirements would be a "physical impossibility," *Barnett Bank*, 116 S. Ct. at 1108 (quoting Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963)), or where the state regulation "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *English*, 496 U.S. at 79 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

2. De Canas v. Bica: *applying the federal preemption framework to state and local regulations that impact immigration*

In *De Canas v. Bica*,[32] the Supreme Court considered whether the INA preempts state and local regulations that impact immigration. While *De Canas* explored the ability of state governments to enact regulations affecting immigration, the Court's analysis also illustrates when federal preemption will preclude state and local enforcement of federal immigration laws.[33]

In *De Canas*, the petitioners challenged a California state statute that imposed penalties on employers for hiring illegal immigrants.[34] The California courts had held that since the federal government has exclusive constitutional power to regulate immigration, the state statute was constitutionally prohibited.[35] Additionally, the state courts held that even if the state provision was not constitutionally prohibited, it was preempted by the INA.[36]

a. The De Canas *petitioners' constitutional prohibition claim.* The Supreme Court agreed with the petitioners' assertion that immigration is exclusively a federal power, but held that the state statute was not a prohibited local regulation of immigration merely because it regulated the employment of aliens.[37] The Court distinguished between regulating immigration, which is "essentially a determination of who should or should not be admitted into the country, [along with] the conditions under which a legal entrant may remain,"[38] and regulating other topics, such as employment, in a way that impacts immigrants.[39] The Court held that "the fact that aliens are the subject of a state statute does not render it a regulation of immigration."[40] Under the Court's rationale, state and local governments

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32. 424 U.S. 351 (1976).

33. In fact, the Ninth Circuit in *Gonzales v. City of Peoria*, 722 F.2d 468 (9th Cir. 1983), expressly relied on *De Canas*' regulatory preemption analysis to decide whether the INA preempts state and local enforcement of federal immigration laws. *See infra* text accompanying notes 56-58, 68-73.

34. *See* 424 U.S. at 352-53 & n.1.

35. *See id.* at 352-54.

36. *See id.*

37. *See id.* at 354-56.

38. *Id.* at 355.

39. *See id.* at 354-56.

40. *Id.* at 355.

are constitutionally prohibited from regulating the conditions on legal entrance and residency in the United States, but they may enact otherwise valid regulations that impact immigrants.

b. The petitioners' preemption claim. To analyze the petitioners' preemption claim, the Court in *De Canas* employed the traditional federal preemption analysis discussed above.[41] The Court could not identify any explicit statutory language in the INA indicating a congressional intent to preempt state and local regulation of the employment of illegal aliens, but rather found evidence that Congress intended states to regulate in this area "consistent with federal law."[42] The Court did not determine whether the state regulation conflicted with the INA so that compliance with both statutes was a physical impossibility because the California court of appeals had not considered the issue.[43] The Court remanded the conflict question to enable the California courts to construe the state provision and compare its requirements, as construed, with the INA's commands.[44] However, the Court noted that federal preemption would prevent state and local governments from enacting regulations that discriminate against aliens lawfully admitted to the United States if the regulations "impose[] additional burdens not contemplated by Congress."[45]

Finally, the Court considered whether, by enacting the INA, Congress intended to completely occupy the immigration field so as to preclude even harmonious state regulation.[46] Ordinarily, this "field pre-emption"[47] turns on whether the federal statute in question is so "comprehensive" or "pervasive" in its regulation that a court may infer that "Congress left no room for the States to supplement it."[48] While the Court recognized that the INA

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

42. *De Canas*, 424 U.S. at 361.

43. *See id.* at 363-65.

44. *See id.*

45. *Id.* at 358 n.6. The Court also noted that state activities which conflict with or burden federal law should be preempted only to the extent necessary to remove the conflict or burden. *See id.* at 357 n.5. The Court explained that "the proper approach is to reconcile the operation of both statutory schemes with one another rather than holding [the state scheme] completely ousted." *Id.* (quoting Merrill Lynch, Pierce, Fenner & Smith v. Ware, 414 U.S. 117, 127 (1973) (alteration in original) (internal quotation marks omitted)).

46. *See id.* at 357-363.

47. Gade v. National Solid Wastes Management Ass'n, 505 U.S. 88, 98 (1992).

48. *Id.* at 98 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)); *see also* Northwest Cent. Pipeline Corp. v. State Corp. Comm'n, 489 U.S. 493, 509

comprehensively regulates immigration and naturalization, it found that Congress did not intend to completely occupy the immigration field to the exclusion of state activity.[49] The Court based this conclusion on two rationales. First, the Court found that the INA's "central aim" was simply to regulate the "conditions of admission to the country and the subsequent treatment of aliens lawfully in the country."[50] Since the California statute did not regulate the conditions of admission and only affected the treatment of *illegal* aliens, the Court found that Congress did not intend to preempt it.[51] Second, the Court noted that the comprehensive detail of the INA was to be expected. "Given the complexity of the matter addressed by Congress . . ., a detailed statutory scheme was both likely and appropriate, completely apart from any questions of pre-emptive intent."[52]

Much of the Court's holding in *De Canas* can be explained by the fact that the Court founded its entire preemption analysis on a general presumption against federal preemption.[53] The Court emphasized that "[f]ederal regulation . . . should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained."[54] The Court rejected the petitioners' assertion that regulation of the employment of illegal aliens is a subject matter that "permits no other conclusion" but federal

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(1989) (The Court infers a congressional intent to preempt state law where "Congress has legislated comprehensively to occupy an entire field of regulation, leaving no room for the States to supplement federal law.").

49. *See De Canas*, 424 U.S. at 359-63.

50. *Id.* at 359.

51. *See id.* at 356-58.

52. *Id.* at 359-60 (quoting New York Dep't of Soc. Servs. v. Dublino, 413 U.S. 405, 415 (1973)) (alteration in original).

53. The Court invokes this presumption in cases such as *De Canas* where federal preemption allegedly restricts traditional state powers. *See, e.g.*, Medtronic, Inc. v. Lohr, 116 S. Ct. 2240, 2250 (1996); New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 654 (1995) ("[W]e have never assumed lightly that Congress has derogated state regulation, but instead have addressed claims of pre-emption with the starting presumption that Congress does not intend to supplant state law."); Department of Revenue v. ACF Indus., Inc., 510 U.S. 332, 345 (1994) (stating that federal preemption of traditional state powers will not be lightly presumed); R.J. Reynolds Tobacco Co. v. Durham County, 479 U.S. 130, 140 (1986); Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 522 (1981) (stating that the "exercise of federal supremacy is not lightly to be presumed" (quoting *New York Dep't of Soc. Servs.*, 413 U.S. at 413)).

54. *De Canas*, 424 U.S. at 356 (quoting Florida Lime & Avocado Growers Inc. v. Paul, 373 U.S. 132, 142 (1963)).

preemption and concluded that Congress had not unmistakably ordained that the INA should preempt such state regulation.[55]

3. Gonzales v. City of Peoria: *applying* De Canas*'s preemption analysis to state and local enforcement of the INA*

In *Gonzales v. City of Peoria*,[56] the Ninth Circuit applied *De Canas*'s preemption analysis to determine whether state and local governments are precluded from enforcing the INA.[57] Congress has amended the INA several times since *Gonzales* was decided,[58] but the Ninth Circuit's application of *De Canas* provides an analytic structure for defining the scope of state and local enforcement authority under the INA's current provisions.

a. The facts of Gonzales. In *Gonzales*, the City of Peoria's police department implemented a series of policies authorizing local officers to arrest illegal immigrants for violating the crimi-

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55. *Id.*

56. 722 F.2d 468 (9th Cir. 1983).

57. *See id.*

58. *See, e.g.*, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009; Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, 108 Stat. 4305; Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, 105 Stat. 1733; Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978; Immigration Technical Corrections Act of 1988, Pub. L. No. 100-525, 102 Stat. 2609; Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359.

nal entry provision of the INA.[59] At that time, the INA's criminal entry provision provided:

> 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 thereof shall be punished by imprisonment for not more than two years, or by a fine of not more than $1,000, or both.[60]

The plaintiffs in *Gonzales* alleged that, in carrying out these various policies, the Peoria police department stopped, questioned, and detained persons of Mexican descent based on their

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59. *See Gonzales*, 722 F.2d at 472-74. The history of these varied policies illustrates the confusion that state and local governments may encounter in determining the scope of their immigration enforcement authority. Initially, the Peoria police department's immigration enforcement policy stated that "[v]iolators of Federal Immigration Laws w[ould] be arrested[,] . . . booked," and held by the Peoria police until they could be turned over to the Border Patrol. *Id.* at 472. After the plaintiffs challenged this policy, the Peoria police chief clarified the department's procedures by stating that officers "made no special effort to arrest illegal aliens," but only arrested illegal immigrants when an officer had an independent reason to question an individual and discovered the person's illegal status during that questioning. *Id.* at 473. The department later revised this initial policy to direct the Peoria police not to book illegal immigrants "unless a specific criminal or traffic offense ha[d] been charged against the subject." *Id.* This revised policy also directed officers to notify the Border Patrol of an arrest of illegal immigrants since, according to the policy, "only I.N.S. agents can take suspect aliens into custody." *Id.* Three months after revising their initial policy, the Peoria police dramatically altered their approach to immigration enforcement. A new policy ordered that "[a]t no time will any Illegal Alien be arrested just because he is an Illegal Alien . . . or because he was with a subject who was the principal of a traffic stop or field interview." *Id.* Finally, the Peoria police department revised its immigration enforcement policy to state that, although "neither the Constitution nor federal law prohibited local enforcement of [the INA], no state law authorized such enforcement." *Id.* This policy therefore directed police officers not to stop, question or arrest suspects "solely on the grounds that they may be depertable aliens." *Id.* However, the new policy still authorized officers to temporarily detain persons suspected of illegal entry while contacting the Border Patrol, but the detention was "not [to] exceed twenty-four (24) hours, with the exception of weekends." *Id.*

60. 8 U.S.C. § 1325 (1982). The current § 1325 is broader in that it criminalizes attempted prohibited entries as well as successful entries. *See* 8 U.S.C. § 1325 (1994).

race and appearance and without probable cause.[61] They claimed that persons stopped by the Peoria police were required to produce identification or proof of their legal presence in the United States, and that the police detained persons not carrying such documentation until the Border Patrol could take custody of them.[62] The plaintiffs alleged that these policies and practices violated the Fourth and Fourteenth Amendments to the federal Constitution and the Civil Rights Act of 1871.[63]

b. The Ninth Circuit's analysis. The Ninth Circuit began its examination of the petitioners' claims by inquiring whether the Peoria police had authority under state and federal statutes to enforce the INA's provisions.[64] This approach demonstrates that the question of whether state and local officers may enforce the INA is really a two-part inquiry. First, a court must ask whether Congress has preempted state and local enforcement of the federal law in question. Second, since state governments have authority to control the activities of state and local officers, a court must look to state law to determine if state and local officers are authorized to enforce the federal provision.[65]

(1) Has Congress preempted state and local enforcement of the INA? Just as the Court in *De Canas* based its preemption

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61. *See Gonzales*, 722 F.2d at 472, 478-79.

62. *See id.*

63. *See id.* at 472. These civil rights claims are representative of the claims that could be spurred by state and local immigration enforcement. This potential is discussed *infra* in Part II.

64. *See id.* at 472, 474-75.

65. *See id.; see also* Gates v. Los Angeles Superior Ct., 238 Cal. Rptr. 592, 598 (Ct. App. 1987) ("The propriety of an arrest for a violation of federal law by state peace officers is determined by reference to state law." (citing Miller v. United States, 357 U.S. 301, 305 (1958))). The Supreme Court's recent holding in *Printz v. United States*, 117 S. Ct. 2365 (1997), solidifies this two-step analysis. Before *Printz* was decided, there was some uncertainty whether courts were always required to proceed to the second prong of this inquiry. In the past, the federal government has occasionally ordered state officers to enforce federal statutes. *See, e.g.*, 18 U.S.C. § 922(s) (1994) (requiring state and local law enforcement officers to perform background checks on prospective handgun purchasers). If Congress could constitutionally require state officers to enforce federal law and chose to do so, then certainly a court would not need to inquire whether the state has also authorized the state officers to perform the mandated activity. However, in *Printz* the Court held that the federal government may not constitutionally commandeer officers of the state executive branch in this manner. *See* 117 S. Ct. at 2375-83. Accordingly, since state governments set the limits of their officers' authority, a court must always proceed to the second prong of this two-step analysis in deciding whether state officers may enforce a federal law.

For a more complete discussion of the relationship between *Printz* and the recent immigration reforms, see *infra* Part III.

analysis on a presumption favoring state regulation, the Ninth Circuit in *Gonzales* founded its preemption analysis on a presumption favoring state and local enforcement of federal law. The court relied on "[t]he general rule . . . that local police are not precluded from enforcing federal statutes"[66] to conclude that concurrent enforcement of federal law is permitted unless state and local enforcement actually "impair[s] federal regulatory interests."[67] The court also intertwined its enforcement analysis with *De Canas*' regulatory preemption analysis, adopting *De Canas*' refusal to find federal preemption "in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained."[68]

Once the Ninth Circuit joined its inquiry of state and local immigration enforcement authority with *De Canas*' analysis of preemption in the regulatory context, it was almost certain to find that the INA does not entirely preclude concurrent state and local immigration enforcement. After all, *De Canas* held that while federal power over immigration is "exclusive," it is not so exclusive that it prohibits all state activities affecting aliens.[69] Moreover, *De Canas* concluded that since the scope and detail of the INA was to be expected in light of its complicated subject matter and since the INA's purpose is only to regulate the admission of aliens and the treatment of lawful immigrants, a court could not infer that Congress intended for the INA to completely occupy the immigration enforcement field.[70] The Ninth Circuit essentially echoed these conclusions in *Gonzales*, holding that the exclusive nature of federal power over immigration does not *per se* prevent local enforcement of the INA and the structure of the INA does not manifest "an intent to preclude local enforcement of the Act's criminal provisions."[71] The Ninth Circuit

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66. *Gonzales*, 722 F.2d at 474 (citing Ker v. California, 374 U.S. 23 (1963)); *see also Miller*, 357 U.S. at 305; Johnson v. United States, 333 U.S. 10 (1948); United States v. Di Re, 332 U.S. 581 (1948)).

67. *Gonzales*, 722 F.2d at 474 (citing Florida Lime & Avocado Growers Inc. v. Paul, 373 U.S. 132, 142 (1963)).

68. *Id.* (quoting De Canas v. Bica, 424 U.S. 351, 356 (1976)).

69. *See De Canas*, 424 U.S. at 354-55.

70. *See id.* at 359-60.

71. *Gonzales*, 722 F.2d at 474 (The INA's provisions regulating "criminal immigration activity by aliens" are "few in number and relatively simple in their terms. . . . It therefore cannot be inferred that the federal government has occupied the field of criminal immigration enforcement.").

did, however, conclude that the INA's civil provisions "regulating authorized entry, length of stay, residence status, and deportation" are sufficiently comprehensive to infer congressional intent to completely occupy those portions of the immigration field to the exclusion of state or local enforcement activity.[72]

With several of the traditional preemption bases eliminated by *De Canas*, the plaintiffs in *Gonzales* could only demonstrate congressional intent to preempt Peoria's enforcement of the INA's criminal entry provision by showing "explicit statutory language" to that effect or by proving that state and local enforcement of the provision "actually conflicts with federal law" because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[73]

The Ninth Circuit found no explicit statutory language in the INA restricting the enforcement of its criminal entry provision to federal officers, and it refused to imply a limiting congressional intent from the fact that certain other criminal provisions of the INA specifically authorized local enforcement.[74] The plaintiffs urged that because Congress had specifically authorized local enforcement of 8 U.S.C. § 1324(c), which criminalizes the transportation and harboring of illegal aliens, Congress' silence about local enforcement of the INA's criminal entry provision displayed an intent to withhold local enforcement authority.[75] While courts have accepted similar arguments,[76] the Ninth Circuit reviewed the INA's legislative history and found that Congress actually intended to authorize state and local enforcement of the Act's criminal entry provision.[77] The court noted that the original

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72. *See id.* at 474-75. The California Court of Appeals, citing *Gonzales*, reiterated these conclusions in *Gates v. Los Angeles Superior Ct.*, 238 Cal. Rptr. 592, 597-98 (Ct. App. 1987).

73. English v. General Elec. Co., 496 U.S. 72, 79 (1990) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)). These preemption tests are discussed *supra* in Part I.A.1.

74. *See Gonzales*, 722 F.2d at 475.

75. *See id.* (discussing U.S.C. § 1324(c) (1982), which "expressly authorize[d] local police to enforce the [INA's] prohibitions against transporting and harboring certain aliens").

76. In fact, this argument is an application of a common rule of statutory construction: expressio unius est exclusio alterius. "The maxim establishes the inference that, where certain things are designated in a statute, 'all omissions should be understood as exclusions.'" Croft v. Pan Alaska Trucking, Inc., 820 P.2d 1064, 1066 (Alaska 1991) (quoting Puller v. Municipality of Anchorage, 574 P.2d 1285, 1287 (Alaska 1978) and 2A C. SANDS, SUTHERLAND STATUTORY CONSTRUCTION § 47.23 (4th ed. 1973)).

77. *See Gonzales*, 722 F.2d at 475 (citing People v. Barajas, 147 Cal. Rptr. 195, 198-99 (Ct. App. 1978) for its "careful[]" review of the legislative history of tha INA).

House version of the INA's criminal provisions, which are codified at 8 U.S.C. §§ 1324-26, did not refer to enforcement authority.[78] However, when the Senate passed its version of the criminal provisions, it amended 8 U.S.C. § 1324 to limit enforcement of that particular section to federal officers.[79] The court noted that the Senate's change from the House version gave rise to a "clear implication" that Congress had intended to authorize local enforcement of the INA's other criminal provisions.[80] The House and Senate conferrees later agreed to remove the language limiting the enforcement of § 1324 to federal officers and inserted the specific language authorizing local enforcement that the plaintiffs relied on in *Gonzales*.[81] Because that language was intended to restore the authority of local officers to enforce § 1324, the court held that it could not be implied to limit local authority to enforce the INA's other criminal provisions. "Instead, it implicitly made the [local] enforcement authority as to all three [criminal] statutes identical."[82]

To analyze whether the city's enforcement of the INA's criminal entry provision actually conflicted with federal law, the Ninth Circuit looked to whether the city's activities frustrated the functional purpose of the criminal entry provision. The court concluded that the city's enforcement activities were in harmony with the enforcement activities of federal officials because both "[f]ederal and local enforcement ha[d] identical purposes—the prevention of the misdemeanor or felony of illegal entry."[83] Because the city's immigration enforcement activities furthered the same functional purpose as federal enforcement, the court found that the city's local immigration enforcement did not conflict with federal law.[84] Since the Ninth Circuit decided that Congress intended to authorize, rather than preclude, local enforcement of the INA's criminal provisions and since it found that local enforcement actually helped, rather than hindered the fulfillment

78. *See id.* (citing *Barajas*, 147 Cal. Rptr. at 198).
79. *See id.* (citing CONF. REP. NO. 1505, 82nd Cong., 2d Sess. (1952), *reprinted in* 1952 U.S.C.C.A.N. 1358, 1360-61).
80. *See id.*
81. *See id.*
82. *Id.*
83. *Id.* at 474.
84. *See id.* at 475.

of Congress' objectives, it held that "federal law does not preclude local enforcement of the criminal provisions of the Act."[85]

(2) Did Arizona law authorize the Peoria police department to enforce the INA? As discussed previously,[86] the federal criminal entry provision enforced by the Peoria police declared that any alien who entered the country at an improper time or place, or who gained admittance by eluding or willfully misleading immigration officers was guilty of a misdemeanor for the first incident and a felony for each repeat offense.[87] The plaintiffs in *Gonzales* alleged that the Peoria police enforced this provision through warrantless arrests. Therefore, the Ninth Circuit analyzed whether Arizona state law granted Peoria police the authority to enforce the INA's criminal provisions by examining state officers' authority to make warrantless misdemeanor arrests.[88]

The Ninth Circuit acknowledged that, under the common law rule, officers can effect a warrantless misdemeanor arrest only when the offense is committed in the officer's presence.[89] However, Arizona state statutes in effect at the time of the arrests in *Gonzales* changed the common law rule. Under those statutes, an officer could execute a warrantless misdemeanor arrest when he had probable cause to believe a misdemeanor had been committed either in or out of his presence and probable cause to believe the suspect had committed the offense.[90]

The statutory authority to make warrantless arrests for misdemeanors committed outside an officer's presence was crucial to the Ninth Circuit's decision. The court noted that the city had based one if its enforcement policies on the "position that illegal

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85. *Id.*

86. *See supra* note 60 and accompanying text.

87. *See Gonzales*, 722 F.2d at 473 n.1 (quoting 8 U.S.C. § 1325 (1982)).

88. *See id.* at 475-76. The Ninth Circuit did not mention state officers' authority to arrest for felonies. *See id.* Presumptively, the Peoria police had not made felony arrests under the INA's criminal provisions or the plaintiffs did not challenge any felony arrests that were made.

89. *See id.* at 475. This has been widely recognized as the common law rule. *See, e.g.*, United States v. Watson, 423 U.S. 411, 418 (1976) ("[T]he ancient common-law rule [was] that a peace officer was permitted to arrest without a warrant for a misdemeanor or felony committed in his presence."); Scott v. District of Columbia, 101 F.3d 748, 754 (D.C. Cir. 1996), *cert. denied*, 117 S. Ct. 1824 (1997); State v. Whatcom County Dist. Ct., 575 P.2d 1094, 1096 (Wash. Ct. App. 1978), *aff'd*, 593 P.2d 546 (Wash. 1979).

90. *See Gonzales*, 722 F.2d at 476 (citing ARIZ. REV. STAT. ANN. § 13-3883 (West 1978)).

entry was a continuing offense," and thus was committed in "the presence of any arresting officer and could give rise to a warrantless arrest."[91] However, the court noted that it had previously held that a violation of the INA's criminal entry provision is completed at the time of entry, thereby precluding this continuing violation theory.[92] Nevertheless, because Arizona's state law authorized warrantless misdemeanor arrests for offenses committed outside the officer's presence, the Ninth Circuit concluded that Arizona state law authorized the Peoria police to enforce the INA's criminal entry provision.

The Ninth Circuit also emphasized that although state law authorized the Peoria police to enforce the INA's criminal provisions, it did not authorize them to enforce the INA's civil statutes.[93] The court noted that an alien could be illegally present in the United States without violating the INA's criminal entry provision. For example, the court pointed out that "expiration of a visitor's visa, change of student status, or acquisition of prohibited employment" could put an alien in violation of the INA's civil, but not criminal, provisions.[94] The court felt that references to "illegal aliens" in the Peoria police policies blurred this distinction between criminal entry and the mere civil violation of illegal presence.[95] Moreover, the court emphasized that an arresting officer could not assume that an alien who admits he lacks documentation is in violation of the INA's criminal entry provisions. The court stated that "[a]lthough 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."[96] Therefore, the court insisted that "[i]n implementing the arrest authority granted by state law, local police must be able to distin-

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91. *Id.* at 475. For an explanation of the Peoria police department's various immigration enforcement policies, see *supra* note 59.

92. *See id.* at 475-76 (citing United States v. Rincon-Jiminez, 595 F.2d 1192, 1194 (9th Cir. 1979)).

93. *See id.* at 476.

94. *Id.*

95. *See id.* The court referred to a civil violation of the INA as "illegal presence" and a violation of the criminal entry provision as "criminal entry." This Comment will accordingly adopt that terminology.

96. *Id.* at 476-77 ("Arrest of a person for [mere] illegal presence would exceed the authority granted Peoria police by state law.").

guish between criminal and civil violations and the evidence pertinent to each."[97]

Finally, the Ninth Circuit stressed that immigration arrests, even if authorized by state law, must not violate federal constitutional requirements.[98] The court stated that the city's final immigration enforcement policy was "based on a misconception" of the Fourth Amendment's search and seizure limitations.[99] As noted previously,[100] the final enforcement policy concluded that Arizona state law did not authorize state and local officers to enforce the INA,[101] but the policy still instructed officers to temporarily detain persons suspected of illegal entry for up to twenty-four hours while contacting the Border Patrol.[102] The Ninth Circuit pointed out that, under the Supreme Court's Fourth Amendment jurisprudence, any seizure involving more than "a brief stop and interrogation and, under proper circumstances, a brief check for weapons" constitutes an arrest that must be supported by probable cause.[103] In fact, the Supreme Court had previously ruled that a "detention" procedure identical to that authorized by Peoria's final immigration policy effected arrests that must be supported by probable cause.[104] Therefore, the court held that "[p]rior to invoking this [detention] procedure, the police must . . . have probable cause to believe either that illegal entry has occurred or that another offense has been committed."[105] Because simple lack of documentation, standing alone, could not prove illegal entry, the court held that it could not provide probable cause to believe that an alien had violated the criminal entry provision.[106]

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97. *Id.* at 477.

98. *See id.* (citing Ker v. California, 374 U.S. 23, 37 (1963)).

99. *Id.*

100. *See supra* note 59.

101. As discussed in the text accompanying notes 87-92, the court's decision in *Gonzales* demonstrated that this conclusion was erroneous.

102. *See Gonzales*, 722 F.2d at 473.

103. *Id.* at 477 (citing Dunaway v. New York, 442 U.S. 200, 210-14 (1979); United States v. Brignoni-Ponce, 422 U.S. 873, 881-82 (1975); Terry v. Ohio, 392 U.S. 1, 27 (1968)).

104. *See id.* (citing *Dunaway*, 442 U.S. at 210-14).

105. *Id.*

106. *See id.*

B. Practical Power: Applying Gonzales *and* De Canas *to the INA's Provisions Following the Illegal Immigration Reform and Immigrant Responsibility Act of 1996*

This section applies the analytic principles used in *Gonzales* and *De Canas* to several of the INA's current provisions, including two significant amendments enacted in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("Reform Act").[107] The purpose of this discussion is to determine what authority state and local governments have under these provisions to enforce the INA in their communities.

1. The authority of state and local governments to enforce their own laws

As an initial matter, it is important to note that the preemption framework used in *De Canas* and *Gonzales* could potentially affect the power of state and local governments to enforce local laws that impact immigration. Under the Court's rationale in *De Canas*, state and local laws are invalid and therefore unenforceable if they are either constitutionally prohibited or federally preempted.[108]

a. When are state and local laws unenforceable because they are constitutionally prohibited by the federal government's exclusive immigration power? As discussed above, *De Canas* held that, despite the exclusive nature of the federal immigration power, not every state and local law that impacts immigrants is a prohibited regulation of immigration. In *De Canas*, the Court emphasized that a constitutionally prohibited local regulation of immigration involves "a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain."[109] Since most state and local laws do not even remotely attempt to regulate who may come to and stay in the United States, very few state and local laws should be constitutionally prohibited by the federal government's exclusive power to regulate immigration, even if they impact immigrants.[110]

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107. Pub. L. No. 104-208, 110 Stat. 3009.

108. *See supra* text accompanying notes 34-55.

109. De Canas v. Bica, 424 U.S. 351, 355 (1976).

110. However, at least one court has interpreted *De Canas*' prohibition test as a gauge that measures the extent to which a state regulation impacts immigrants. *See* League of United Latin Am. Citizens v. Wilson, 908 F. Supp. 755, 768-70 (C.D. Cal.

b. When are state and local laws unenforceable because they are preempted by the INA? As discussed above, traditional preemption analysis requires a finding that a state or local law is preempted by the INA and thus unenforceable in three situations: if Congress manifests a preemptive intent through explicit statutory language, if the state or local law regulates in a field (or portion of a field)[111] that Congress has completely occupied, or if the law conflicts with the accomplishment of the full purposes of federal law. However, because *De Canas* established a preemption analysis favorable to state and local regulations—including invoking a presumption against federal preemption and holding that the INA does not completely occupy the immigration field[112]—it is clear that few state and local laws will actually be preempted by the INA. Certainly most state and local laws that do not regulate immigration directly will not be

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1995). Under this interpretation of *De Canas*, a state or local law apparently constitutes a prohibited regulation of immigration if it impacts immigrants in a "direct and substantial" manner. *Id.* at 769. Applying this interpretation of *De Canas*, the court in *League of United Latin American Citizens* concluded that California could not implement a law requiring state employees to inquire about individuals' immigration status, inform illegal immigrants that they must leave the United States, and report illegal immigrants to the INA. *See id.* at 768-70. However, the precedential value of this decision is questionable. First, the result in *League of United Latin American Citizens* contradicts the widely held principle that the police may notify the INS when they have a person in custody that they suspect is an illegal immigrant. *See, e.g.*, Gates v. Superior Ct., 238 Cal. Rptr. 592, 600-01 (Ct. App. 1987) ("Where [a local] officer legitimately comes across information in the course of investigating a crime which reasonably leads to the belief the person arrested is illegally present in the country, nothing in either the state or the federal constitution prevents the officer from advising INS of this data.") (citing 67 Op. Cal. Att'y Gen. 331 (1984)); Ignatius Bau, *Cities of Refuge: No Federal Preemption of Ordinances Restricting Local Government Cooperation with the INS*, 7 LA RAZA L.J. 50, 58 (1994) (reporting Attorney General Griffin Bell's request that state and local officers contact the INS if they arrest an individual for a non-immigration criminal violation and suspect that the person may be an undocumented alien). Second, while the Court in *De Canas* commented that a state law is not constitutionally prohibited merely because it has an indirect and insubstantial effect on immigration, the Court did not use the "indirect and insubstantial" language as a test for constitutional prohibition. Rather, the Court recognized that the employment statute at issue in *De Canas* impacted illegal immigrants but nevertheless held that it was not a constitutionally prohibited local regulation of immigration because it did not determine "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. 351, 355-56 (1976). This latter language appears to be the proper test for determining whether a state immigration law is constitutionally prohibited.

111. *See supra* text accompanying nots 72 (noting that, in *Gonzales*, tha Ninth Circuit found that some of the INA's civil provisions manifested a congressional intent to completely occupy a portion of the immigration field).

112. *See supra* text accompanying notes 34-55.

preempted except in the most unusual circumstances. It is imprudent to make a blanket statement that none of the state and local laws routinely enforced by state officers will ever be preempted by the INA,[113] but federal courts have recognized that the INA generally does not preclude state and local governments from enforcing their own nonimmigration related laws against immigrants.[114] The Ninth Circuit expressed this conclusion when it noted that state officers can arrest suspects only when they have "probable cause to believe either that illegal entry has occurred *or that another offense has been committed.*"[115]

Because, under *Gonzales* and *De Canas*, state and local laws will not be invalidated as constitutionally prohibited regulations of immigration unless they regulate the conditions of entry and residence in the United States, and because *Gonzales* and *De Canas* establish a preemption framework favorable to state and local regulation, state and local governments should be able to enforce nearly all of their own laws without regard to the suspect's immigration status.

2. *Explicit congressional grants of authority for state and local enforcement of the INA*

Among the Reform Act's recent amendments to the INA are several explicit congressional grants of immigration enforcement authority to state and local governments. State and local governments' authority to enforce the INA's provisions is clearest under explicit grants of authority such as these, because only one of the

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113. No blanket statement is possible because individual state and local laws are varied and changing, and because Congress changes the INA's provisions frequently. *See supra* note 58 (reviewing several recent amendments to the INA). However, the test for whether individual state and local laws are federally preempted is likely to remain constant.

114. *See, e.g.*, New Jersey v. United States, 91 F.3d 463, 467 (3d Cir. 1996) (New Jersey's prisons contain illegal immigrant criminals because "[t]he state has made its own decision to prosecute illegal aliens for acts they committed in violation of New Jersey's own criminal code."). In fact, the Supreme Court's decision in *De Canas* illustrates that even immigration-related state and local laws generally will not be preempted; *see* 424 U.S. 351 (1976). Moreover, Congress itself has noted that states and their political subdivisions have prosecuted illegal aliens under state laws without running afoul of the INA; *see* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208 § 305, 110 Stat. 3009 (authorizing the Attorney General to deport, at the request of state or local executives, certain illegal immigrants incarcerated in state or local prisons).

115. Gonzales v. City of Peoria, 722 F.2d 468, 477 (9th Cir. 1983) (emphasis added).

three analytic considerations raised by *Gonzales* and *De Canas*—that of authority under state law—must be resolved on an individual basis.

The two analytic considerations from *Gonzales* and *De Canas* that are resolved in cases of explicit congressional grants of authority are federal preemption and constitutional prohibition. First, since federal preemption analysis is essentially an inquiry into congressional intent,[116] federal preemption cannot bar state and local immigration enforcement where Congress' intent to authorize such enforcement is evident. Therefore, explicit congressional grants of authority to state and local governments resolve *Gonzales*' preemption question.

Second, the Constitution's delegation of exclusive immigration power to the federal government could theoretically bar state and local enforcement of the INA, even in cases of express congressional intent to authorize such enforcement, since Congress could not authorize state and local activity that is constitutionally prohibited. However, since the Supreme Court has held that the Constitution only prohibits local immigration activity that determines who may be admitted to the country and "the conditions under which a legal entrant may remain,"[117] Congress is not prohibited from authorizing state and local enforcement of the INA. The activities of arresting, holding, and transporting aliens associated with local enforcement of the INA are not a "determination" of the conditions on entrance and residency; they are enforcement of the previously determined conditions.[118] Thus, the only question that remains to be resolved where Congress explicitly grants state and local authority to enforce the INA's provisions is whether state and local immigration enforcement is authorized by state law. That question must be resolved by examining the laws of individual state and local jurisdictions, because each jurisdiction's laws may authorize different immigration enforcement activities.[119] While such an individual examination is beyond the scope of this Comment, general principles common to all jurisdictions will be discussed in order to assist state and local authorities in analyzing the scope of their author-

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116. *See supra* note 28 and accompanying text.

117. De Canas v. Bica, 424 U.S. 351, 355 (1976).

118. *See Gonzales*, 722 F.2d 468 (affirming state officers' authority to enforce the INA's criminal provisions).

119. *See generally Gonzales*, 722 F.2d at 475-77 (inquiring whether Arizona law authorized enforcement of the INA's criminal provisions).

ity under existing laws and to help lawmakers understand what reforms are necessary to empower or restrict local law enforcement under the immigration enforcement reforms.

a. Explicit congressional grants of state and local immigration enforcement authority in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. This Comment will focus on sections 133 and 372 of the Reform Act[120] because these two provisions authorize significant state and local immigration enforcement activities.

(1) Immigration enforcement agreements. Congress' most sweeping authorization of state and local immigration enforcement activity is contained in section 133 of the Reform Act. That section authorizes the U.S. Attorney General to enter into written agreements with state and local governments to accept the services of state officers or employees in enforcing the INA.[121] Under these agreements, state and local governments may designate officers or employees ("local officers")[122] that will be authorized to "perform a function of [a federal] immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States."[123] The Attorney General's acceptance of the agreement[124] essentially transforms the designated local officer into a limited federal immigration official.[125] The designated local officer is subject to the "direction and supervision of the Attorney General" while performing the immigration enforcement function and, if the written agreement so specifies,

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120. Pub. L. No. 104-208, §§ 133, 372, 110 Stat. 3009 (1996) (to be codified at 8 U.S.C. §§ 1103(a), 1357).

121. *See id.* § 133.

122. While section 133 makes clear that its provisions apply to both state and local officers and employees, for ease of reference this Comment will simply refer to "local officers."

123. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 133. The authorized functions include "the transportation of such aliens across State lines to detention centers." *Id.*

124. The Attorney General may not accept the agreement unless a number of requirements are met. The Attorney General must determine that the designated officer is qualified to perform the agreed-upon immigration function; the agreement must require the designated officer to know and adhere to federal law relating to the function; and the Agreement must contain a written certification that the designated officer(s) "have received adequate training regarding the enforcement of relevant Federal immigration laws." *Id.* Additionally, the agreement must specify the officer's "powers and duties . . ., the duration of the [officer's] authority" and the Department of Justice agency who will supervise and direct the officer on behalf of the Attorney General. *Id.*

125. *See id.*

may use federal property and facilities to accomplish that function.[126] While section 133 emphasizes that the designated officer is not a federal employee, agreements created under this section may grant local officers all of the powers exercised by federal immigration officers and the section provides that the designated local officers will enjoy federal immunity.[127] However, the local officers must carry out their immigration functions at the expense of the state or local government.[128]

Section 133 is an extraordinary grant of authority to state and local governments because it allows them to tailor their officers' authority to local immigration enforcement needs. The section clearly contemplates that multiple officers could be authorized to perform one or more immigration enforcement functions.[129] Moreover, section 133 does not require designated officers to stop performing their state or local duties as a prerequisite to performing the authorized immigration enforcement function.[130] In fact, the section provides that the scope and duration of the officer's immigration enforcement authority is negotiable.[131] Thus, a state or local government could agree with the Attorney General to authorize its law enforcement officers to enforce the INA's civil[132] and/or criminal provisions without dedicating those officers to full-time immigration enforcement.

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126. *Id.*

127. *See id.* Section 133's insistence that the designated state or local officer is not a federal employee merely evidences a concern for federal pension, job security, and other labor considerations because the section grants the designated officer the same sword and shield given to immigration officials. The agreements authorized by the section can grant state or local officers all of the powers exercised by federal immigration officers and the section provides that the designated state and local officers will enjoy federal immunity identical to that granted to federal immigration officers. *See id.*

128. *See id.*

129. *See id.* (referring to the immigration enforcement "functions" of various state and local officers).

130. *See id.* (stating that a designated state or local officer will be subject to the direction of the Attorney General only while performing an immigration enforcement function).

131. *See id.* (stating that an agreement between a state or local government and the Attorney General will state the "specific powers and duties" and the "duration of the authority" of each state or local officer authorized to perform an immigration enforcement function).

132. By allowing the Attorney General to authorize local officers to enforce the INA's civil provisions, section 133 offers state and local governments authority that they did not have under *Gonzales* since the Ninth Circuit concluded in *Gonzales* that the INA's civil provisions are sufficiently comprehensive to preempt state and local enforcement. *See supra* text accompanying notes 71-72.

(2) Applying Gonzales *and* De Canas *to section 133's immigration enforcement agreements.* As discussed above, the constitutional prohibition and federal preemption concerns raised in *Gonzales* should not affect state and local immigration enforcement under section 133 because the state immigration enforcement activity authorized by section 133 agreements will not establish the conditions of entry and residence in the United States and because the section expresses a clear congressional intent to authorize state and local immigration enforcement.[133] Therefore, the remaining obstacle to state and local immigration enforcement under section 133 is whether state law authorizes such enforcement.[134] Section 133 explicitly recognizes that authorization under state law is a prerequisite to state and local immigration enforcement; it provides that state or local officers can only carry out an immigration enforcement function under the section "to the extent consistent with State and local law."[135]

While this Comment will not review the laws of every state and local jurisdiction to inquire whether state and local officers are authorized to perform various immigration enforcement functions, some broad principles may nevertheless be noted. First, because state and local officers' immigration enforcement authority is dependent on state authorization,[136] state and local governments will not be able to take advantage of the broad grants of authority available under section 133 unless their current laws authorize state and local officers to carry out immigration enforcement functions or they pass provisions granting such authority.[137] Second, a careful analysis of existing state and local laws may reveal that state and local officers are already authorized to carry out many immigration enforcement functions. For

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133. *See supra* text accompanying notes 116-18.

134. *See supra* text accompanying notes 64-65 (noting that *Gonzales*' two-part inquiry requires a court to look to state law to determine if state and local officers are authorized to enforce federal statutes).

135. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 133, 110 Stat. 3009.

136. *See supra* note 65 and accompanying text.

137. Of course, the limitations of state and local law restrict local officers even without a section 133 agreement. As noted *supra* in the text accompanying notes 93-97, a lack of state authorization to make warrantless misdemeanor arreste prevented the Peoria police from enforcing the INA's criminal entry provision. The effect of section 133 is to allow the Attorney General's authorization to remove the federal barriers to state and local immigration enforcement. However, state and local authorities must still grant their peace officers the authority te act before they can put this federal authorization to use. *See also supra* note 65 and accompanying text.

example, state and local laws may authorize officials to make warrantless misdemeanor and felony arrests, detain and transport criminal suspects, and enforce civil penalties.[138] When these state laws are coupled with a section 133 agreement, all of *Gonzales*' analytic bars to state and local immigration enforcement will be satisfied. Third, state and local decisionmakers must realize that a state or local government's participation in a section 133 agreement could be construed as authorizing state and local officers to carry out the enforcement function authorized in the agreement.

For example, if a state legislature authorized their governor to enter into an immigration enforcement agreement with the United States Attorney General authorizing local police officers to investigate, arrest and transport illegal immigrants, that legislative authorization could be construed as also authorizing local officers to carry out those immigration enforcement functions. However, because state and local governments cannot be certain that a court would construe the execution of a section 133 agreement as authorization for state and local officers to carry out the agreement's provisions, the wiser course for state and local authorities seeking to make full use of their potential power under section 133 would be to analyze whether local peace officers can perform the desired immigration enforcement activities under existing state and local law and to consider specifically authorizing local officers to enforce the INA to the full extent of any section 133 agreement.

(3) Emergency immigration enforcement. Section 372 of the Reform Act provides additional enforcement authority to that of section 133. Section 372 amends the INA to give the Attorney General power to authorize state and local immigration enforcement in emergency situations.[139] The section provides that the Attorney General may authorize state or local officers to enforce the INA if she determines that "an actual or imminent mass influx of aliens arriving off the coast of the United States,

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138. For an example of how courts analyze state laws to determine if they authorize state and local officers to enforce federal law see *Gonzales v. City of Peoria*, 722 F.2d 468, 475-77 (9th Cir. 1983) (concluding that Arizona law authorized state officers to enforce the INA's criminal entry provision because it authorized officers to make warrantless arrests for misdemeanors committed outside the arresting officer's presence).

139. Pub. L. No. 104-208, § 372, 110 Stat. 3009 (1996) (to be codified at 8 U.S.C. 1103(a)).

or near a land border, presents urgent circumstances requiring an immediate Federal response."[140] This emergency authorization may grant a state or local officer "any of the powers, privileges, or duties" conferred by the INA on INS officers.[141] While the Attorney General's authorization is contingent on the consent of the head of the agency or department in which the officer serves, the section does not expressly require the state or local officer's enforcement of the INA to be authorized by state or local law.[142]

(4) Applying Gonzales *and* De Canas *to section 372's emergency authorization.* As with section 133, the only analytic requirement from *Gonzales* not satisfied by section 372's explicit grant of authority is that state law authorize state and local officers to perform the immigration enforcement function. However, depending on how section 372's "consent" requirement is construed, the section could be read to indicate a congressional intent to allow state or local officers to enforce the INA in an emergency without authorization under state law. Since section 372 does not mention the restrictions of state law and only requires the consent of a state or local officer's department head as a prerequisite to the Attorney General's emergency authorization, the "consent" condition could be interpreted as merely requiring the department head's agreement independent of state law.[143] This argument is bolstered by the fact that Congress explicitly stated in section 133 of the Reform Act that state and local officers could only enforce immigration laws under that section to the extent permitted by state and local law.[144] As the plaintiffs unsuccessfully argued in *Gonzales*, Congress' expression of concern for the restrictions of state law in section 133 can give meaning to its silence in section 372.[145] Moreover, congressional intent for section 372 to empower state officers beyond the constraints of state law can be implied from the state of the law at the time Congress enacted section 372.

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140. *Id.*
141. *Id.*
142. *See id.*
143. For example, a local sheriff could consent for his deputies to provide emergency immigration enforcement, even though state law does not authorize deputies to perform the functions necessary to enforce the INA's civil or criminal provisions.
144. *See supra* text accompanying note 135.
145. *See supra* notes 74-82 and accompanying text.

When Congress passed section 372 in 1996, federal district courts were divided on whether Congress could direct state officers to enforce a federal law,[146] but the Ninth Circuit had upheld such federal direction of state officials.[147] Assuming congressional awareness of the Ninth Circuit's holding, a plausible argument can be made that Congress intended section 372 to allow the Attorney General to authorize state law enforcement activity despite the constraints of state law.

However, to the extent that Congress intended section 372 to grant the Attorney General power to enlist the aid of state and local officers despite the restrictions of state law, its intent is frustrated by the Supreme Court's recent decision in *Printz v. United States*.[148] *Printz* held that Congress may not commandeer state officers to enforce a federal scheme.[149] Therefore, under *Printz*, the Attorney General could not, with the approval of a state agency head, simply override a lack of authority (or an express prohibition) in state law that limits the immigration enforcement functions that state and local officers may undertake.

Accordingly, although section 372 can be read in these two inconsistent manners, there are three reasons why courts should read it to state that the Attorney General may authorize state and local officers to perform emergency immigration enforcement functions only to the extent consistent with state law. First, a different reading would create unnecessary conflict between section 372 and the constitutional principles discussed in *Printz*. Second, a strong argument can be made that, in enacting section 372's consent requirement, Congress recognized that state and local department heads cannot normally consent to have their officers perform functions not authorized by state and local law,[150] and therefore, section 372's explicit requirement of

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146. *Compare* McGee v. United States, 863 F. Supp. 321, 326-27 (S.D. Miss. 1994) (holding that Congress may not "direct and compel" state officers to enforce a federal scheme), *aff'd sub nom.*, Koog v. United States, 79 F.3d 452 (5th Cir. 1996), *and cert. denied*, 117 S. Ct. 2507 (1997), *with* Koog v. United States, 852 F. Supp. 1376 (W.D. Tex. 1994) (holding that Congress could require state law enforcement officers to act pursuant to a federal mandate), *rev'd*, 79 F.3d 452 (5th Cir. 1996), *and cert. denied sub nom.* United States v. Gonzalez, 117 S. Ct. 2507 (1997).

147. *See* Mack v. United States, 66 F.3d 1025, 1029 (9th Cir. 1995), *rev'd sub nom.* Printz v. United States, 117 S. Ct. 2365 (1997).

148. 117 S. Ct. 2365 (1997).

149. *See supra* note 65.

150. *See generally* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 101

the department head's consent contains an implicit requirement that the functions consented to are authorized by state and local law. Third, courts should prefer this interpretation since reading section 372 to allow federal authorization to overcome state restrictions could render state law invalid and *De Canas* emphasized that courts will not lightly presume that Congress intended such an invalidation.[151]

b. Explicit congressional grants of enforcement authority in other recent amendments to the INA. Congress also explicitly authorized certain state and local immigration enforcement activity in the recently enacted criminal alien provisions of the Antiterrorism and Effective Death Penalty Act of 1996.[152] Section 439 of that act provides:

> 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--
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> (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 [INS] to take the individual into Federal custody for purposes of deporting or removing the alien from the United States.[153]

As with sections 133 and 372 of the Reform Act, the state and local enforcement activities authorized by this provision clear *Gonzales*' first two analytic hurdles because the enforcement activities could not be federally preempted and do not meet

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n.11 (1984) (explaining that a state officer's acts are "ultra vires" when the officer lacks delegated power); United States v. Sanford, 547 F.2d 1085, 1090 (9th Cir. 1976) (holding that federal officials may not violate state laws unless so authorized by state officials); Parker v. Township of West Bloomfield, 231 N.W.2d 424, 430 (Mich. Ct. App. 1975) (explaining that the doctrine of "ultra vires" will prevent a municipality "from engaging in a course of conduct where it specifically lacks the authority to do so").

151. *See* 424 U.S. 351, 357 n.5 (1976) (discussed *supra* at notes 45-53).

152. Pub. L. No. 104-132, 110 Stat. 1214.

153. *Id.* § 439 (codified at 8 U.S.C. § 1252(c) (1994)).

the test for constitutional prohibition.[154] Thus, state and local law enforcement's ability to carry out the arrests authorized under this provision is only dependent upon license from state and local law. Unlike section 372 of the Reform Act, however, this provision adopts that requirement in its terms.

(1) When will state and local law permit the arrests authorized in section 439? As was the case with sections 133 and 372, an application of section 439 to the law of each state and local jurisdiction would not be feasible in this Comment. The general points above regarding how state and local governments may utilize section 133's grant of authority will also guide state and local governments in analyzing and structuring their law to take advantage of the grant of authority in this section.[155]

To determine whether state and local law permits local law enforcement officers to make the arrests authorized by section 439, state and local governments need to know whether section 439 authorizes local enforcement of civil or criminal penalties. The Ninth Circuit's opinion in *Gonzales* informs that inquiry. In *Gonzales*, the court emphasized a difference between the ability to enforce the civil offense of illegal presence and the criminal offense of illegal entry.[156] The court held that the Peoria police department could not enforce the civil offense of illegal presence for two reasons. First, the court concluded that the civil provisions governing illegal presence constituted a sufficiently comprehensive and detailed federal statutory scheme to infer that Congress had occupied that portion of the immigration field to the exclusion of state activities.[157] Second, the court concluded that Arizona state law did not confer authority on the Peoria police to enforce the INA's civil provisions.[158]

The language of section 439 supports a conclusion that Congress has overridden the *Gonzales* court's holding that local enforcement of the INA's civil provisions is federally preempted. The section authorizes state and local law enforcement officers to arrest any alien who is "illegally *present* in the United States" and who once was deported or left the country after being con-

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154. *See supra* text accompanying notes 116-18 for a discussion of the analysis supporting these conclusions.

155. *See supra* text accompanying notes 135-41.

156. *See* Gonzales v. City of Peoria, 722 F.2d 468, 476-77 (9th Cir. 1983).

157. *See id.* at 474-75.

158. *See id.* at 475-77.

victed of a felony.[159] The phrase "illegally present," as opposed to "illegally entered," suggests that Congress intended to authorize state and local law enforcement officers to enforce the INA's civil prohibition against illegal presence.[160] However, although section 439 undermines the Ninth Circuit's conclusion that Congress intended to preempt local enforcement of the civil violation of illegal presence, local officers still need authority from state and local law to enforce that civil provision.[161] If local authorities desire to grant such authority, they should note that, in *Gonzales*, the Ninth Circuit found that a general grant of power to the police to enforce civil penalties was insufficient to confer authority to enforce the INA's civil provisions.[162] Accordingly, if state and local governments elect to take advantage of section 439's authorization for local law enforcement to enforce the INA's civil provisions, they should explicitly grant authority to enforce the INA's civil provisions to their law enforcement officers.

While the term "illegal presence" as it is used in section 439 is broad enough to encompass violations of the INA's civil provisions, it should also encompass the criminal violation of illegal entry. It follows that one who entered the country illegally is illegally present, even if, as *Gonzales* found, the converse is not necessarily true.[163] However, because section 439 imposes greater restrictions on state and local authority than are imposed by the INA's criminal entry provision, state and local officers should not use section 439 as an enforcement vehicle against aliens who are illegally present merely because they violated the INA's criminal entry provision. Under *Gonzales*, state and local officers may enforce the INA's criminal entry provision if they are authorized to make warrantless arrests for offenses committed out of the officer's presence.[164] Under section

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159. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 439, 110 Stat. 1214, 1276 (emphasis added).

160. This argument assumes that Congress understood the difference, enunciated by the Ninth Circuit in *Gonzales*, between the criminal violation of illegal entry and the civil violation of illegal presence.

For a review of various ways an alien could be illegally present in the United States, *see supra* text accompanying notes 93-97 (discussing *Gonzales*).

161. *See Gonzales*, 722 F.2d at 475-77 (holding that Arizona law did not authorize law enforcement officers to enforce the INA's civil provisions).

162. *See id.*

163. *See supra* text accompanying notes 93-97 (explaining that an alien may be illegally present in the United States without violating the INA's criminal entry provision).

164. *See supra* text accompanying notes 87-92.

439, officers could enforce the criminal entry provision against such aliens because they are illegally present, but only if the officer confirms that the suspect has been previously convicted of a felony and deported or left the United States.[165] Since the INA's criminal entry provision does not impose the confirmation requirement or the previous felony requirement, it provides broader authority for state and local officers in the criminal entry context.

However, state and local governments must remember that local officers will not be able to enforce the INA's criminal entry provision either directly or through section 439 unless the officers are authorized to make warrantless arrests for misdemeanors committed outside the arresting officer's presence. The Ninth Circuit made clear in *Gonzales* that illegal entry is an offense that is completed at the time of entry, and therefore is not an ongoing offense. Furthermore, it is not likely to be committed in an officer's presence except in border and point-of-entry situations.[166] Thus, while the civil offense of illegal entry is an ongoing offense that would be committed in any officer's presence, local officers need a specific grant of authority to enforce the INA's civil provisions under section 439. At the same time, local officers may enforce the INA's criminal entry provision either directly or through section 439 if they have authority to make warrantless misdemeanor arrests. If a jurisdiction's officers do not enjoy these powers, they will be barred by state and local law from making effective use of section 439's grant of authority.

(2) Practical difficulties that will prevent state and local law enforcement from using section 439 as an effective immigration enforcement tool. Section 439 is not a very potent immigration enforcement tool for state and local governments. Because the section can only be enforced against illegal aliens who have been convicted of a felony, and because it requires state and local officers to verify a suspect's deportation and felon status with the INS before making an arrest,[167] state and local officers will not be able to use the section's authority to arrest many illegal

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165. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 439, 110 Stat. 1214 (codified at 8 U.S.C. § 1252(c) (1994)). The officers also must confirm the suspect's felon status with the INA prior to making any arrest. This may prove impracticable for routine immigration enforcement. *See infra* text accompanying notes 167-69.

166. *See Gonzales*, 722 F.2d at 475-77.

167. *See* Antiterrorism and Effective Death Penalty Act of 1996 § 439.

aliens they encounter. Certainly aliens whom state and local officers encounter "on the beat" will not be subject to a section 439 arrest because the officers will probably not have the resources or time to confirm a suspect's immigration status with the INS. Given greater time, officers may be able to contact the INS about a particular suspect, but, as the Ninth Circuit made clear in *Gonzales*, officers may not detain a suspect for more than a brief period without probable cause to believe that he has committed a crime.[168] That brief period will probably not provide opportunity to contact the INS. Section 439 requires the Attorney General to cooperate with the states to disseminate immigration information in her control,[169] but it is unlikely that this information dissemination system will allow officers on the street to verify a suspect's immigration status with the INS in the efficient manner necessary to make participation in the section 439 program desirable.

3. *State and local enforcement of provisions requiring aliens to register and carry registration papers*

Aside from deciding how best to use the explicit grants of authority just discussed, state and local governments seeking to enforce the immigration laws should also consider whether they can enforce the INA's documentation provisions. The INA requires all aliens who are in the United States for more than thirty days to apply for registration papers,[170] which are com-

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168. *See Gonzales*, 722 F.2d at 476-77.

169. *See* Pub. L. No. 104-132, §§ 432, 439(b), 110 Stat. 1214, 1273, 1276.

170. *See* 8 U.S.C. § 1302(a) (1994). The text of the statute states:

> (a) It shall be the duty of every alien now or hereafter in the United States, who (1) is fourteen years of age or older, (2) has not been registered and fingerprinted . . . and (3) remains in the United States for thirty days or longer, to apply for registration and to be fingerprinted before the expiration of such thirty days.
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> (b) It shall be the duty of every parent or legal guardian of any alien now or hereafter in the United States, who (1) is less than fourteen years of age, (2) has not been registered . . . and (3) remains in the United States for thirty days or longer, to apply for the registration of such alien before the expiration of such thirty days. Whenever any alien attains his fourteenth birthday in the United States he shall, within thirty days thereafter, apply in person for registration and to be fingerprinted.
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> (c) The Attorney General may, in his discretion . . . waive the requirement of fingerprinting specified in subsections (a) and (b) of this section in the case of any nonimmigrant.

Id.

monly known as "green cards."[171] Any alien who is required to register and willfully fails to apply is guilty of a misdemeanor.[172] All aliens who are at least eighteen years old and who have received registration papers are required to carry the papers at all times;[173] failure to do so is a criminal misdemeanor.[174]

a. Applying Gonzales *and* De Canas *to the INA's documentation requirements.* Because violation of the INA's documentation requirements is easily ascertainable, the requirements could serve as an effective tool for state and local immigration enforcement if such enforcement is authorized under the framework established by *Gonzales* and *De Canas*. First, since state and local enforcement of the documentation requirements would not determine the conditions of entrance and residency in the United States, such enforcement easily clears *Gonzales'* constitutional prohibition hurdle.[175] However, *Gonzales'* second analytic hurdle—federal preemption—is somewhat more problematic. Unlike the criminal entry provision, the INA's legislative history is silent regarding Congress' intent to allow or preclude local enforcement of the documentation provisions.[176] But that silence does not necessarily indicate that Congress intended to preempt local enforcement of the documentation provisions. Rather, *Gonzales* and *De Canas* establish that an analysis of whether local enforcement of the INA's documentation provisions is preempted must begin with a presumption against federal preemption.[177] Under that presumption, a court will not find that local enforcement of the INA's documentation provisions is

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171. *See, e.g.*, Etuk v. Slattery, 936 F.2d 1433, 1436-37 (2d Cir. 1991); Martinez v. Nygaard, 831 F.2d 822, 823 (9th Cir. 1987).

172. *See* 8 U.S.C. § 1306(a) (1994). If the alien's parent or legal guardian is required to register the alien and willfully fails to apply, then the parent or guardian is guilty of a misdemeanor. *See id.*

173. *See* 8 U.S.C. § 1304(e) (1994). The text of the statute states:

> Every alien, eighteen years of age and over, shall at all times carry with him and have in his personal possession any certificate of alien registration or alien registration receipt card issued to him pursuant to . . . this section. Any alien who fails to comply with the provisions of this subsection shall be guilty of a misdemeanor and shall upon conviction for each offense be fined not to exceed $100 or be imprisoned not more than thirty days, or both.

Id.; *see also* United States v. Ritter, 752 F.2d 435, 437-38 (9th Cir. 1985) (sustaining the constitutionality of § 1304(e)).

174. *See* 8 U.S.C. § 1304(e) (1994); *see also Etuk*, 936 F.2d at 1436.

175. For a more detailed analysis of constitutional prohibition that also applies to these documentation provisions, see *supra* text accompanying notes 118-23.

176. *See* 1952 U.S.C.C.A.N. 1653, 1723.

177. *See supra* text accompanying notes 53-56, 66-68.

preempted "in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained."[178]

A court is unlikely to find that immigration is a subject matter that "permits no other conclusion" but federal preemption of local activity, because, in *De Canas* and *Gonzales*, both the Supreme Court and the Ninth Circuit rejected that assertion.[179] A court is also unlikely to find "persuasive reasons" to hold that local enforcement of the documentation provisions is preempted because *Gonzales* established a general rule that state and local officers "are not precluded from enforcing federal statutes," unless the local enforcement "impair[s] federal regulatory interests."[180]

In *Gonzales*, the Ninth Circuit measured impairment of federal regulatory interests by examining the functional purposes of both state and federal enforcement of the INA's criminal entry provision.[181] Since Peoria's immigration enforcement furthered the same functional purpose as federal enforcement, the court found that their local activities did not conflict with the INA.[182] If a court uses a similar broad functional purpose test when analyzing local enforcement of the documentation provisions, it is likely to conclude that federal law does not preclude local enforcement. Because both federal and local enforcement would punish the same activity—willful failure to register or failure to carry registration papers—a court would probably conclude that local enforcement of the documentation provisions furthers, rather than impairs, the federal regulatory interest.

Likewise, a court should conclude that Congress did not "unmistakably ordain" that enforcement of the documentation provisions would be limited to federal officers because the three traditional tests for discovering congressional intent do not point to a such a conclusion.[183] First, the documentation provisions do not contain "explicit statutory language" precluding local enforce-

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178. De Canas v. Bica, 424 U.S. 351, 356 (1976) (quoting Florida Lime & Avocado Growers Inc. v. Paul, 373 U.S. 132, 142 (1963)); *see also* Gonzales v. City of Peoria, 722 F.2d 468, 474 (9th Cir. 1983) (quoting *De Canas*, 424 U.S. at 356).

179. *See De Canas*, 424 U.S. at 356 (quoting *Florida Lime*, 373 U.S. at 142); *Gonzales*, 722 F.2d at 474 (quoting *De Canas*, 424 U.S. at 356).

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

181. *See id.* at 474-75.

182. *See id.*

183. These traditional preemption bases are discussed *supra* at notes 27-31.

ment.[184] Second, under the Court's rationale in *De Canas,* a court should hold that Congress did not occupy the documentation-enforcement portion of the immigration field. In *De Canas,* the Court found that the "central aim" of the INA was merely to regulate "the conditions of admission to the country and the subsequent treatment of aliens lawfully in the country."[185] Since the state statute at issue in *De Canas* did not regulate the conditions of admission to the country and only affected the treatment of *illegal* aliens, the Court found that the state statute was not federally preempted.[186] In the context of the INA's documentation provisions, it is clear that local enforcement would not establish the conditions of admission to the country, and, just as the state activity in *De Canas,* local enforcement of the documentation provisions would primarily affect the treatment of illegal immigrants.[187] Therefore, a court should find that local enforcement of the INA's documentation provisions is not precluded by field preemption.[188] Finally, local enforcement of the documentation provisions would not "actually conflict[] with federal law" for the same reasons that it would not impair the federal regulatory interest—both federal and local enforcement would punish the same illegal activity.[188] For these reasons, a court should conclude that, under the preemption framework established by *Gonzales* and *De Canas,* local enforcement of the INA's documentation provisions is not federally preempted.

The last element of *Gonzales'* analysis is whether state and local law authorizes local enforcement of the INA's documentation provisions. As *Gonzales* demonstrates, this question can

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184. *See* 8 U.S.C. §§ 1302, 1304, 1306 (1994).

185. De Canas v. Bica, 424 U.S. 351, 359 (1976).

186. *See id.* at 356-58.

187. Local enforcement of the documentation provisions would not solely affect illegal immigrants because legal immigrants could be arrested for failing to carry their registration papers. *See* 8 U.S.C. § 1304(e). Nevertheless, local enforcement would not alter the treatment of legal aliens since they are required to carry registration papers and are subject to identical penalties for failure to comply whether the provisions are enforced federally or locally.

188. The *De Canas* Court also based its holding that the INA does not completely occupy the immigration field on a finding that the scope and detail of the INA was to be expected in light of its complicated subject matter. *De Canas,* 424 U.S. at 359-60. That rationale continues to support a conclusion that Congress does not intend for the INA to completely occupy the immigration field because immigration is certainly as complicated a subject matter today as it was in 1976.

189. *See supra* text accompanying notes 181-82. This analysis is similar to the Ninth Circuit's reasoning in *Gonzales v. City of Peoria,* 722 F.2d 468, 474 (9th Cir. 1983).

only be answered by determining whether violations of the documentation provisions are committed in or out of the arresting officer's presence.

In *Gonzales*, the Peoria police claimed authority to enforce the INA's criminal entry provision, which provides that aliens who enter the United States by certain methods are guilty of a misdemeanor.[190] Since criminal entry is a misdemeanor that happens at the time the alien physically enters the United States, the Ninth Circuit inquired whether state law authorized the Peoria police to make warrantless arrests for misdemeanors committed outside the officers' presence.[191]

A violation of the INA's documentation provisions is also a misdemeanor,[192] but a court should hold that the violation is committed in the officer's presence. Unlike the one-time offense of physically entering the United States illegally, failing to register is an ongoing offense. Failing to carry registration papers is a physical act similar to illegal entry that could be a one-time offense, but if an alien fails to carry registration papers at the time he encounters a state or local officer, the violation is committed in the officer's presence. Therefore, under the Ninth Circuit's rationale from *Gonzales*, a court should find that state and local officers are authorized to enforce the INA's documentation provisions if state law authorizes those officers to make warrantless misdemeanor arrests for violations committed in the officer's presence.

b. Procedural limitations on state and local enforcement of the INA's documentation provisions. State and local governments must observe several procedural limitations in enforcing the INA's documentation provisions. First, courts have required that officers tailor immigration charges to the specific documentation provision that a suspect has violated before making an arrest.[193] For example, § 1304(e) only requires an alien to carry registration papers if such papers have been issued to him.[194] Thus, if an alien has never applied for registration papers, state

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190. *See Gonzales*, 722 P.2d at 472-74.

191. *See id.* at 476-76.

192. *See* 8 U.S.C. §§ 1302, 1304, 1306 (1994).

193. *See* United States v. Mendez-Lopez, 528 F. Supp. 972 (N.D. Okla. 1981) (granting a motion to dismiss where the suspect was charged with failure to carry registration papers when he had actually violated the INA provision requiring aliens to apply for registration).

194. *See* 8 U.S.C. § 1304(e) (1994).

and local officers cannot arrest him for failure to carry his registration papers.[195] However, if the alien has been in the United States for more than thirty days and has willfully failed to apply for registration, state and local officers may arrest the alien for willfully failing to register.[196] Conversely, state and local officers cannot arrest an alien who has received registration papers for failing to apply for registration, but they could arrest him for failing to carry the papers he has received.

Second, while failing to obtain and carry documentation may be a crime in itself, the *Gonzales* court emphasized that mere lack of documentation, without more, cannot establish probable cause to believe that an alien has violated the INA's criminal entry provision.[197] It is entirely possible that an alien may be illegally present in the country (and may have failed to register) without having violated the criminal entry prohibition.[198] However, lack of documentation may serve as a basis for reasonable suspicion and further questioning of a suspect.[199]

To satisfy these limitations, state and local officers must learn whether a suspect has violated the INA's criminal entry provision and/or documentation provisions before taking the suspect into custody. Officers may usually learn this information through questioning suspects regarding their immigration status and by asking suspects who claim to be legal aliens to produce their registration papers. Courts have held that, in a normal immigration inquiry,[200] the Fifth Amendment privilege against self-incrimination does not prevent officers from requiring an alien to produce his registration papers,[201] and a suspect's claim that he is a lawfully admitted alien, coupled with his failure to produce a green card, provides probable cause for an arrest under the INA's documentation provisions.[202]

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195. *See Mendez-Lopez*, 528 F. Supp. at 973-74.

196. *See* 8 U.S.C. §§ 1302(a), 1306(a) (1994); *Mendez-Lopez*, 528 F. Supp. at 974.

197. *See* Gonzales v. City of Peoria, 722 F.2d 468, 476-77 (9th Cir. 1983).

198. *See id.* at 476.

199. *See, e.g.*, United States v. Tarango-Hinojos, 791 F.2d 1174, 1175 (5th Cir. 1986); *Gonzales*, 722 F.2d at 476-77.

200. The term "normal immigration inquiry" refers to the fact that officers may question individual suspects, but may not "'round[] up . . . suspects' *simply* in order to investigate aliens' immigration status." Mountain High Knitting, Inc. v. Reno, 51 F.3d 216, 219 (9th Cir. 1995).

201. *See* Mineo v. INS, No. 93-1631, 1994 WL 65051, at *3 (4th Cir. Feb. 24, 1994) (unpublished opinion); United States v. Campos-Serrano, 430 F.2d 173, 176-77 (7th Cir. 1970), *aff'd*, 404 U.S. 293 (1971).

202. *See Mountain High Knitting*, 51 F.3d at 218; United States v. Joseph, No. 91-

II. PRUDENT CONSIDERATIONS: SHOULD STATE AND LOCAL GOVERNMENTS EXERCISE THEIR IMMIGRATION ENFORCEMENT AUTHORITY?

Part I demonstrated that the INA's historical provisions and recent amendments confer substantial authority on state and local governments to enforce federal immigration laws. However, the fact that state and local governments have such authority does not mean that every jurisdiction should allow their police to become part-time immigration officers. The questions of whether state and local governments have immigration enforcement authority and whether they should use that authority are distinct.

One of the purposes of this Comment is to encourage state and local governments to carefully analyze their immigration enforcement options in light of individual local circumstances. Before a state or local government elects to implement its immigration enforcement power, it should weigh a variety of factors to determine if the benefits of local enforcement outweigh the costs. This section will discuss a few of the factors that state and local governments should consider in this deliberative process.

A. Economic Considerations

As the introduction to this Comment suggests, the recent state and local outcry for immigration reform is largely driven by economic considerations.[203] States particularly complain that the combination of federal mandates requiring them to provide social services to immigrants and the flood of illegal immigration permitted by the federal government's failure to enforce the immigration system places an enormous financial burden on state budgets.[204] However, in analyzing their immigration enforcement options, state and local governments should look beyond these recent economic pressures. Recent immigration reforms may alleviate part of the existing financial burden on state governments, and thus the economic incentive for states to aggressively enforce the INA may dissipate. For example, Congress has agreed to reimburse states for many costs incurred in providing

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3277, 1993 WL 53187, at *1-*2 (D.D.C. Feb. 24, 1993) (unpublished opinion); Martinez v. Nygaard, 831 F.2d 822, 828 (9th Cir. 1987).

203. *See supra* notes 1-8 and accompanying text.

204. *See, e.g.*, the sources cited *supra* note 1.

social services to illegal immigrants.[205] Additionally, Congress has authorized states to avoid many of the costs of illegal immigration. For example, under the Reform Act states may deny certain social services to illegal immigrants[206] and may petition the INS to deport illegal aliens in state prisons.[207]

While more effective immigration enforcement may have been economically lucrative to state and local governments before Congress began assuming some of the costs of providing social services to illegal immigrants, under these recent immigration reforms the increased costs associated with local immigration enforcement may outweigh any financial benefit local governments obtain from more deportations and greater deterrence. Effective state and local immigration enforcement will require specialized training of officers,[208] dedication of employee-hours, increased and possibly specialized enforcement equipment,[209] and may expose officers to greater safety risks.[210] Given

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205. *E.g.*, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 328, 110 Stat. 3009 (noting that Congress appropriated $130,000,000 in fiscal year 1995 and $66,000,000 in fiscal year 1996 to reimburse states for the costs of incarcerating illegal immigrant felons). However, the flow of federal money will probably only continue as long as state and local governments continue to make the cost of immigration a political issue. *See id.* § 328(b) (noting that the Department of Justice vigorously distributed appropriated reimbursement monies to the states immediately before the 1994 election, but failed to continue distributing appropriated monies after the elections were over).

206. *See id.* §§ 502, 510, 553.

207. *See id.* § 303.

208. *See* Humberto Benitez, *Flawed Strategies: The INS Shift from Border Interdiction to Internal Enforcement Actions*, 7 LA RAZA L.J. 154, 179 (1994) ("Local police and other city authorities are not properly trained to enforce federal immigration laws. They do not have the expertise in distinguishing between legal residents and undocumented immigrants. When local police enforce or assist the INS, the potential for abuse of individual's civil rights is great."); Daniel W. Sutherland, *The Federal Immigration Bureaucracy: The Achilles Heel of Immigration Reform*, 10 GEO. IMMIGR. L.J. 109, 125 (1996) (noting that officers need specialized training to effectively enforce immigration laws). This Comment's discussion of the procedural limitations on state and local enforcement of the INA's documentation provisions, *supra* notes 193-202, illustrates the need for specialized training for state and local officers who will enforce the INA.

209. *See* William Branigin, *Armies of the Night Terrorize Texas Border*, SACRAMENTO BEE, Oct. 6, 1996, at F3 (reporting that border-crossing drug smugglers use specialized equipment, including night-vision devices, assault weapons, cellular telephones, radio scanners, digital pagers, fax machines and global-positioning systems). However, state and local governments may be able to use some federal property to carry out immigration enforcement functions under section 133 of the Reform Act. *See supra* text at note 126.

210. *See* Jodi Bizar, *2 West Texas Towns Draw Drug Dealers*, SAN ANTONIO EXPRESS-NEWS, Sep. 2, 1996 (reporting that alien drug smugglers "can be dangerous

these potential increased costs and a possible decreased need for state and local immigration enforcement following recent federal reforms,[211] state and local governments must carefully analyze whether implementing their immigration enforcement power would produce a cost benefit and they must weigh any cost benefit with civil rights concerns and voter sentiment regarding local immigration enforcement.

B. Civil Rights Concerns

Because most illegal immigrants are members of minority groups,[212] it is reasonable to assume that state and local officials who enforce the federal immigration laws will focus their efforts on minorities. Accordingly, state and local immigration enforcement is likely to increase the amount of confrontation between state and local officers and minority groups. In such a situation of heightened confrontation, there is a danger that police activity will infringe on constitutional rights.[213] Since any abuse of a person's civil rights is reprehensible and inimical to a constitutional society, state and local governments must seriously consider the risks of local immigration enforcement and must be prepared to dedicate the resources necessary to prevent civil rights violations before implementing any immigration enforcement plan.

Even if no civil rights abuses occur, state and local immigration enforcement may raise public concerns about civil rights

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and usually have no regard for the safety of others and will do anything to avoid capture"); William Branigin, *Armies of the Night Terrorize Texas Border*, SACRAMENTO BEE, Oct. 6, 1996, at F3 (reporting twenty-four "armed encounters and assaults" against Border Patrol agents in a small sector of the U.S.-Mexico border during an eight month period).

211. Federal reimbursement is not the only factor that may alleviate the need for state and local immigration enforcement. The recent increase in federal resources dedicated to federal immigration enforcement may stem the tide of illegal immigration, see *supra* note 10 and accompanying text. State and local governments should consider this possibility in their cost-benefit deliberations.

212. *See* Jonathan C. Drimmer, *The Nephews of Uncle Sam: the History, Evolution, and Application of Birthright Citizenship in the United States*, 9 GEO. IMMIGR. L.J. 667, 712 & n.315 (1995).

213. *See* Benitez, *supra* note 208, at 179; Roberto L. Martinez, *NAFTA's Effect on Human Rights at the Border*, 27 U.C. DAVIS L. REV. 979, 980 (1994) ("Legislation expanding the size, power, and scope of the authority of immigration law enforcement agents will increase the number and intensity of abuses unless adequate safeguards are implemented."); Sutherland, *supra* note 208, at 125 (stating that allowing inexperienced officers to enforce federal immigration laws "is likely to significantly increase violence and civil rights abuses.").

violations,[214] and thus could expose state and local governments to increased civil rights litigation. The petitioners' suit in *Gonzales* is representative of the civil rights claims that could be prompted by state and local immigration enforcement.[215] In that case, the Ninth Circuit rejected the petitioners' civil rights claims against the Peoria police because the court concluded that the city and police acted in objective and subjective good faith.[216] However, even if state and local governments prevail in civil rights litigation, they must factor the fiscal costs of defending such suits into their immigration enforcement cost-benefit analysis and must also consider the social costs of defending those suits in court and in the media.[217]

C. Public Opinion / Voter Sentiment

Many state and local complaints about federal immigration enforcement have come because of public sentiment favoring immigration reform. However, support for immigration reform is not universal,[218] and support for specific immigration proposals varies among jurisdictions.[219] In fact, leaders in some jurisdictions have actively sought to prevent state and local employees from assisting in federal immigration enforcement.[220]

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214. *See* Charles W. Hall & Steve Bates, *Illegal Immigrants Pose Issues Of Cost, Conscience for Area*, WASH. POST, Apr. 25, 1994, at A1 (reporting a local government employees' belief that cutting social services to illegal immigrants "smacks of racism").

215. *See supra* notes 61-63 (discussing the *Gonzales* petitioners' civil rights claims).

216. Gonzales v. City of Peoria, 722 F.2d 468, 479-81 (9th Cir. 1983) ("There is no indication that the police intended to use the law as a pretext to harass persons of Mexican descent.").

217. For example, involving local officers in immigration enforcement could potentially alienate members of minority communities and increase racial strife.

218. *See, e.g.*, Roger E. Hernandez, *Decency Triumphs*, OREGONIAN, Oct. 4, 1996, at B8 (attacking certain immigration reform proposals and the legislators who sponsored them); George Ramos, *Group Recruits Latinos for March on Washington*, L.A. TIMES, Oct. 3, 1996, at B9 (reporting on efforts to organize a march and rally in Washington to demand increased amnesty for illegal immigrants in the United States); Vincent J. Schodolski, *Employers Gain Under New Law on Immigrants: Requirements Eased; Rights Groups Unhappy*, CHI. TRIB., Oct. 3, 1996, (Business), at 1 (reporting that immigrant rights groups are unhappy with the Reform Act's provisions).

219. *See, e.g.*, articles cited *supra* note 2 (reporting state and local politicians' opposition to proposed immigration reforms).

220. *See, e.g.*, Charles J. Gans, *A Welcome Mat Turns the City Into a Doormat*, NEWSDAY, Dec. 29, 1994, at A26 (reporting that New York Mayor Rudolph Giuliani endorsed former Mayor Koch's executive order forbidding city workers from giving information about an immigrant's status to federal authorities); Greg Lucas, *4 Immigration Bills Signed by Governor*, S.F. CHRON., Oct. 5, 1993, at A17 (reporting that California Governor Wilson signed a law prohibiting a San Francisco sanctuary

Since state and local governments exist to respond to the needs and demands of their citizens, individual governments must evaluate whether their citizens favor dedicating state and local resources to immigration enforcement. State and local governments are under no obligation to dedicate their resources to immigration enforcement, and, to the extent that they are authorized to enforce the INA, they may tailor their immigration enforcement efforts to meet their citizens' particular concerns.

III. CONCLUSION: THE RECENT IMMIGRATION REFORMS ARE BOTH AN OPPORTUNITY TO RESPOND TO LOCAL PROBLEMS AND A MODEL FOR DEVELOPING COOPERATIVE LAW ENFORCEMENT RELATIONSHIPS BETWEEN FEDERAL AND STATE AUTHORITIES

Regardless of whether state and local governments choose to enforce the INA, they should welcome the recent immigration reforms as both an opportunity to respond to local problems and a model for future federal legislation. In the past, Congress has occasionally attempted to augment its resources by commanding state and local cooperation in federal regulatory programs.[221] However, the Supreme Court has recently clarified that Congress cannot constitutionally compel state legislation or enforcement of a federal regulation.[222] While invalidating Congress' coercive measures, the Court has noted that Congress may employ many mechanisms to enforce its dictates. Within the realm of its constitutional authority Congress may pass laws that operate directly on individuals and may enforce those laws by creating and funding federal agencies.[223] Congress may also use conditional spending to encourage state and local governments to adopt or enforce federal programs.[224] Additionally, as long as state and local regulation of a particular activity is not constitutionally prohibited, Congress may offer states an opportunity to

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ordinance which forbade San Francisco police from reporting illegal aliens to federal authorities). The Reform Act prohibits such state and local attempts to prevent federal enforcement of the INA. *See supra* note 11; *see also* City of New York v. United States, 971 F. Supp. 789 (S.D.N.Y. 1997) (sustaining the Reform Act's prohibition against various constitutional challenges).

221. *See, e.g.*, Printz v. United States, 117 S. Ct. 2365 (1997) (discussing Congressional attempts to commandeer state law enforcement officers); New York v. United States, 505 U.S. 144 (1992) (discussing Congressional attempts to commandeer state legislative processes).

222. *See Printz*, 117 S. Ct. at 2373-80; *New York*, 505 U.S. at 149, 166.

223. *See New York*, 505 U.S. at 166.

224. *See id.* at 166-67 (citing South Dakota v. Dole, 483 U.S. 203, 206 (1987)).

cooperatively participate in a federal scheme.[225] This "cooperative federalism,"[226] of which the recent immigration reforms are an example, is advantageous to state and local governments because it allows local decisionmakers to tailor a relationship with federal authorities that responds to local needs and concerns.[227] However, state and local governments cannot put cooperative federal measures such as the recent immigration reforms to use until they understand the extent of Congress' invitation to regulate or enforce federal law and analyze whether unique local circumstances merit accepting the invitation.

Accordingly, state and local governments must evaluate and inform their citizens of the potential costs and benefits of local immigration enforcement and must look to those citizens for direction on specific immigration enforcement proposals. In the end, state and local governments exist to serve the localized needs of the governed. While state and local governments have the opportunity to act in the immigration enforcement arena, citizens must decide whether they want their local representatives to exercise their immigration enforcement powers.

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225. *See id.* at 167.

226. *Id.* (quoting Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 299 (1981)).

227. While conditional spending also affords state and local governments an opportunity to decline to participate in the federal program, state and local governments should prefer the type of cooperative federalism manifested in the recent immigration reforms since this system does not subject local authorities to the severe fiscal pressures inherent in conditional spending.