

2010

# Imagining a More Humane Immigration Policy in the Age of Obama: The Use of Plenary Power to Halt the State Balkanization of Immigration Regulation

Kristina M. Campbell

*University of the District of Columbia David A Clarke School of Law*, [kcampbell@udc.edu](mailto:kcampbell@udc.edu)

Follow this and additional works at: <https://scholarship.law.slu.edu/plr>

 Part of the [Law Commons](#)

---

### Recommended Citation

Campbell, Kristina M. (2010) "Imagining a More Humane Immigration Policy in the Age of Obama: The Use of Plenary Power to Halt the State Balkanization of Immigration Regulation," *Saint Louis University Public Law Review*: Vol. 29 : No. 2 , Article 6.  
Available at: <https://scholarship.law.slu.edu/plr/vol29/iss2/6>

This Article is brought to you for free and open access by Scholarship Commons. It has been accepted for inclusion in Saint Louis University Public Law Review by an authorized editor of Scholarship Commons. For more information, please contact [erika.cohn@slu.edu](mailto:erika.cohn@slu.edu), [ingah.daviscrawford@slu.edu](mailto:ingah.daviscrawford@slu.edu).

**IMAGINING A MORE HUMANE IMMIGRATION POLICY IN THE  
AGE OF OBAMA: THE USE OF PLENARY POWER TO HALT THE  
STATE BALKANIZATION OF IMMIGRATION REGULATION**

KRISTINA M. CAMPBELL\*

INTRODUCTION

The first decade of the twenty-first century has been grim for immigrants to the United States—both legal and undocumented—and the lawyers and advocates who work on their behalf. Following the failure of comprehensive immigration reform at the federal level, states and municipalities have seen fit to take matters into their own hands and pass a patchwork of local ordinances, statutes, and ballot initiatives ostensibly designed to do what the federal government had failed to do—regulate the flow of immigration into their cities and towns. As the economy continues to spiral downward into what may very well be the next Great American depression, the impact of immigrants to the United States on our economy and the benefits and burdens of their presence continues to be the source of great debate.

With the election of President Barack Obama—himself the son of an immigrant—immigrants’ rights advocates were hopeful that the new Administration would not only reject the George W. Bush Administration’s interpretation of immigration policy—which took a permissive view toward the ability of state and local governments to regulate immigration—but that the Obama Administration would also urge Congress to pass comprehensive immigration reform that reflects a more just and humane approach toward

---

\* Visiting Professor, University of Denver Sturm College Law, 2009-2010; B.A., Saint Mary’s College, 1997; J.D., Notre Dame Law School, 2002. I would like to thank Professor Don Smith at the University of Denver Sturm College of Law, and Judge David Edward, formerly of the Court of Justice of the European Communities, for discussing with me and my students in my Fall 2009 Immigration Law class at the University of Denver the development of the doctrine of freedom of movement within the European Union and how such a concept might apply to immigration law and policy in the United States. I would also like to thank Dean Kevin R. Johnson, Professor of Law and Chicana/o Studies, and Mabie-Apallas Public Interest Law Chair, University of California, Davis, School of Law for his assistance and helpful comments; Cynthia Valenzuela, Director of Litigation at the Mexican American Legal Defense and Educational Fund (MALDEF), and Nancy Ramirez, Western Regional Counsel at MALDEF, for their mentorship, guidance, and friendship; and my parents, Jerry and Virginia Campbell, for their love, patience, and support.

immigrants and their legal and social integration into our society overall. However, with the installation of former Arizona Governor Janet Napolitano as Secretary of Homeland Security, early indications are that the Obama Administration is embracing the immigration policies of the Bush Administration, with an emphasis on enforcement-only policies at the federal level and the continuing delegation of immigration regulation to state and local governments. This policy not only undermines the principles of immigration federalism that is mandated by our Constitution, it further blurs the line between federal and state authority to regulate immigration. As such, any attempts to achieve meaningful comprehensive immigration reform will be fatal unless Congress and the Executive forcefully reassert the federal government's supremacy over immigration matters.

This Article argues for the reassertion of Congress's plenary power to regulate immigration, and examines the possibilities for radical change in immigration policy that are presented to us as we close out the first decade of the twenty-first century and begin looking toward the next. Part I provides an overview of the rise of state and local anti-immigrant laws in the wake of Congress's failure to pass comprehensive immigration reform—as well as examining how Latinos and immigrants' rights advocates have worked to combat these measures through litigation and other means—and the concurrent anti-immigrant sentiment that has gained momentum across the United States in recent years. Part II discusses how the Bush Administration undermined the principles of immigration federalism by combining enforcement-only immigration policies at the federal level with the improper delegation of other aspects of immigration control to states and localities— in particular the increasing reliance on the 287(g) program—and how the federal government's reliance on these policies have not only undermined federal supremacy to regulate immigration, but has given rise to racial profiling and an increase in hate crimes toward immigrants and Latinos.

Part III discusses Congress's plenary power to regulate immigration, and argues that the political branches must act now to reinforce the principle of immigration federalism as a matter of both law and policy. I argue that because the Constitution requires the federal government to maintain a uniform system of immigration laws, Congress must act now and enact truly comprehensive immigration reform that clearly and forcefully sets limits on the ability of state and local governments to regulate immigration. In particular, Congress and the Executive have the power and the ability—and indeed, the obligation—to step in and halt the piecemeal enforcement of immigration on the state and federal level, thus putting an end to the “balkanization” of immigration law that has occurred at a rapid and frightening pace over the last several years. Additionally, by asserting the powers given to Congress and the Executive to create and enforce our nation's immigration regulations, the Obama Administration also has the opportunity to stem the

tide of anti-immigrant and anti-Latino rhetoric by implementing policies and practices at the federal level.

Finally, Part IV discusses how Congress and the Obama Administration can use immigration federalism in a meaningful way to advance the civil and human rights of immigrants and citizens alike. I imagine what our nation would look like if our immigration laws embodied a respect for human dignity regardless of immigration status, and suggest that Congress should not merely amend the Immigration and Nationality Act (INA), but that the time is ripe for a complete reinvention of American immigration law and policy. Drawing from international law—specifically, the European Union concept of “freedom of movement”—I offer suggestions to Congress and the Executive regarding the moral and ethical dimensions that should be taken into consideration in the exercise of their plenary power to regulate immigration, and posit that comprehensive immigration reform in the Obama Administration should reflect global, rather than local, concerns surrounding immigration and migration in the twenty-first century.

#### I. NO ROOM AT THE INN: THE GROWING HOSTILITY TOWARD IMMIGRANTS IN THE FIRST DECADE OF THE 21ST CENTURY

Congress’s recent attempts to enact comprehensive immigration reform at the federal level have been dismal failures.<sup>1</sup> Because immigration reform is a controversial issue on both sides of the aisle, the House and the Senate were unable to craft successful legislation reforming our federal immigration laws, even with the support of the Bush Administration.<sup>2</sup> The failure of the political branches to gain enough votes to pass comprehensive immigration reform has resulted in states and localities, in an attempt to push the envelope of the states’ historic police powers, to pass their own regulations of immigration in their respective jurisdictions.<sup>3</sup> Consequently, there has been a proliferation of conflicting, and often hostile, laws directed at regulating the lives of immigrants in the most mundane aspects of their everyday lives. From local laws prohibiting the rental of property to immigrants on the grounds that doing so is “harboring” aliens,<sup>4</sup> to state sanctions against employers who are found to

---

1. Congress’s most recent attempt to pass comprehensive immigration reform failed to gain approval by the Senate in the summer of 2007. *See, e.g.*, Carolyn Lochhead, *Immigrant Bill Killed in Divided Senate*, SAN FRANCISCO CHRON., June 8, 2007, at A1, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2007/06/08/MNGSVQBV4D1.DTL&hw=immigration+reform&sn=011&sc=247>.

2. *Id.*

3. *See* National Immigration Forum, *Immigration Law Enforcement by State and Local Police*, BACKGROUND (2007), <http://www.immigrationforum.org/images/uploads/Backgrounder-StateLocalEnforcement.pdf> (last visited Feb. 7, 2010).

4. Several cities, such as Escondido, California, attempted to prevent undocumented persons from renting property in their municipalities by drafting laws that would make doing so a

have undocumented immigrants in their employ,<sup>5</sup> states and localities have taken up the mantle of immigration reform in a way that, I argue, was never envisioned by the Framers of the Constitution.

A. *State and Local Anti-Immigrant Ordinances, Statutes, and Ballot Initiatives*

1. Omnibus State and Local Anti-Immigrant Laws

Courts have long recognized that states may have an interest in regulation of immigration within their jurisdictions, so long as their attempts to do so do not conflict with or frustrate the will of Congress.<sup>6</sup> Additionally, it is well-established that some aspects of the regulation of immigrants—for example, employment of undocumented immigrants—falls within the historic police powers of the states.<sup>7</sup> Thus, while the surge in state and local anti-immigrant ordinances in 2006 and 2007 may have seemed to come out of nowhere, these laws are in fact only the most recent attempt by state and local governments to regulate immigration in a long history of state-federal conflict regarding the constitutional limits of immigration federalism.

Prior to the recent targeting of undocumented immigrants by state and local governments, the last time a serious challenge to immigration federalism was launched by the states occurred in the 1990s, when California attempted to pass a comprehensive state law regulating immigration within its borders, Proposition 187.<sup>8</sup> However, while Proposition 187 and other late-20th century state and local anti-immigrant laws tended to focus on the denial of public

---

“harboring” offense similar to the federal criminal harboring statute, 8 U.S.C. § 1324 (2006). For a further discussion of Escondido, see *infra* Part I.A.2.a.

5. See *infra* Part I.A.2.b.

6. See generally Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567 (2008) (arguing that local government can and should play an important role in the regulation of immigration).

7. See *De Canas v. Bica*, 424 U.S. 351, 355 (1976). Although the holding in *De Canas* that California’s state regulation of the employment of undocumented immigrants has long been believed to have been superseded by Congress’s passage of the Immigration Reform and Control Act (IRCA) in 1986, the Ninth Circuit Court of Appeals recently held, relying on *De Canas*, that Arizona may constitutionally regulate the employment of undocumented immigrants through its employer sanctions law, as doing so falls within the states’ historic police power. See *Chicanos Por La Causa v. Napolitano*, 558 F.3d. 856, 864–865 (9th Cir. 2009). For a further discussion of the potential implications of the Ninth Circuit’s decision in *Chicanos Por La Causa*, see *infra* Part III.B

8. See California’s Proposition 187, a ballot initiative that was approved by voters 59–41% in 1994. Proposition 187 was ultimately invalidated by a federal court on the grounds that it was preempted by federal law. Proposition 187, 1994 Cal. Legis. Serv. Prop 187 (West); See *League of United Latin American Citizens v. Wilson*, 908 F. Supp. 755, 786 (C.D. Cal. 1995).

benefits to undocumented immigrants,<sup>9</sup> or to restrict access to entitlements such as drivers licenses,<sup>10</sup> the second generation of proposed anti-immigrant laws differ in the respect that they not only attempted to accomplish broader regulations of immigration by the states—they also attempted to bring regulation of immigration on the sub-federal level into the homes and workplaces of cities and towns across America.<sup>11</sup>

a. San Bernardino, California

Although ultimately unsuccessful, the San Bernardino Illegal Immigration Relief Act Ordinance<sup>12</sup> was the first local ordinance in this new wave of 21st century state and local anti-immigrant laws to gain widespread notoriety. The San Bernardino law, which was created by a group calling itself “Save San Bernardino” and led by San Bernardino resident Joe Turner,<sup>13</sup> took this name from the group that backed California’s notorious Proposition 187 in 1994, Save Our State.<sup>14</sup> Unlike Proposition 187, however, the San Bernardino Illegal Immigration Relief Act Ordinance sought to do much more than deny undocumented immigrants the ability to receive public benefits—it sought to exclude them completely from public life, through a series of draconian provisions that would have made it virtually impossible for anyone without legal status to live or work in San Bernardino.<sup>15</sup>

The San Bernardino Illegal Immigration Relief Act Ordinance was an omnibus local ordinance that would have prevented undocumented persons from living or working in the City of San Bernardino, with civil and criminal penalties for persons in violation of the ordinance.<sup>16</sup> The ordinance also included an “English-only” provision, which went beyond making English the official language of San Bernardino and attempted to penalize persons for speaking languages other than English.<sup>17</sup> While San Bernardino’s anti-

---

9. See, e.g., Proposition 187, 1994 Cal. Legis. Serv. Prop 187 (West).

10. Proof of lawful presence in the United States is required in almost every state in order to receive a state-issued driver license or identity card under the REAL ID Act of 2005. See REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (2005).

11. See Rodríguez, *supra* note 6, at 591.

12. San Bernardino, Cal., Illegal Immigration Relief Act Ordinance §§ 4–8 (2006) [hereinafter San Bernardino Ordinance], available at <http://www.aialoads.org/advo/SanBernardinoIllegalImmigrationOrdinance.pdf>.

13. See Save San Bernardino!, Illegal Immigration Relief Act Ordinance, <http://www.campaignsitebuilder.com/templates/displayfiles/tmpl68.asp?SiteID=843&PageID=12139&Trial=false> (last visited Feb. 7, 2010).

14. See Southern Poverty Law Center, Intelligence Report, *The Nativists*, Winter 2005, <http://www.splcenter.org/intel/intelreport/article.jsp?pid=1266> (last visited Feb. 7, 2010).

15. See San Bernardino Ordinance, *supra* note 12.

16. *Id.*

17. *Id.*

immigrant ordinance was ultimately narrowly rejected by the city council,<sup>18</sup> and an attempt to get the law approved as a ballot initiative for consideration by voters failed,<sup>19</sup> anti-immigrant laws similar to the proposed ordinance in San Bernardino soon began to surface all over the country with alarming regularity. These state and local attempts to regulate immigration, and the consequences that flowed from the involvement of local law enforcement in federal immigration policy, spawned a great deal of controversy both inside and outside the courtroom over the next several years.<sup>20</sup>

b. Hazleton, Pennsylvania

Following the defeat of the San Bernardino proposal, the most high-profile local omnibus anti-immigrant ordinance to come in its wake was the Hazleton Illegal Immigration Relief Act Ordinance,<sup>21</sup> which was approved by the Hazleton City Council on July 13, 2006.<sup>22</sup> The Hazleton Ordinance, which was drafted by Hazleton Mayor Lou Barletta, was inspired by the failed ordinance in San Bernardino<sup>23</sup> and attempted—among other restrictions—to prohibit the provision of housing to and employment of undocumented immigrants within the City of Hazleton.<sup>24</sup> It also contained a “tenant registration” provision, which required all persons wishing to rent property in Hazleton to obtain an occupancy license,<sup>25</sup> an English-only provision,<sup>26</sup> and civil penalties for violation of the ordinance.<sup>27</sup>

18. On May 15, 2006, the San Bernardino City Council rejected the anti-immigrant ordinance by a vote of 4-3. See James Sterngold, *San Bernardino Seeking ‘Relief’; Struggling City’s Proposal Targets Illegal Immigrants*, S.F. CHRON., June 11, 2006, at A-4, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2006/06/11/MNGM5JCE0B1.DTL&type=politics>.

19. Superior Court Judge A. Rex Victor determined that not enough signatures had been gathered for the proposal to qualify as a ballot initiative. See Kelly Rayburn, *Judge Rejects Initiative: Too Few Signatures Gathered for Immigration Measure*, SAN BERNARDINO SUN, June 27, 2006, at B1, available at [http://www.sbsun.com/search/ci\\_3983529](http://www.sbsun.com/search/ci_3983529).

20. See Rigel C. Oliveri, *Between a Rock and a Hard Place: Landlords, Latinos, Anti-Illegal Immigrant Ordinances, and Housing Discrimination*, 62 VAND. L. REV. 55, 60 (2009).

21. See HAZLETON, PA., ORDINANCE 2006-18 (Sept. 21, 2006), available at <http://www.smalltowndefenders.com/node/6>. The Hazleton Ordinance was amended several times as a result of litigation challenging the ordinance’s constitutionality, which is discussed in further detail *infra*, Part I.B.

22. *Id.*

23. See Steve Mocarisky, *Hazleton’s Illegal-Immigration Law a Trendsetter*, THE TIMES-LEADER (Wilkes-Barre, Pa.), July 31, 2006, at A1, available at 2006 WLNR 13173977.

24. ORDINANCE 2006-18.

25. HAZLETON, PA., ORDINANCE 2006-13 (Aug. 15, 2006), [http://www.smalltowndefenders.com/090806/2006-13%20\\_Landlord%20Tenant%20Ordinance.pdf](http://www.smalltowndefenders.com/090806/2006-13%20_Landlord%20Tenant%20Ordinance.pdf).

26. HAZLETON, PA., ORDINANCE 2006-19 (Sept. 21, 2006), [http://www.smalltowndefenders.com/090806/2006-19%20\\_Official%20English.pdf](http://www.smalltowndefenders.com/090806/2006-19%20_Official%20English.pdf).

27. ORDINANCE 2006-18.

Although the Hazleton ordinance was also eventually struck down as preempted under federal law,<sup>28</sup> dozens of states and localities were quick to pick up where Hazleton left off in its attempts to pass comprehensive immigration regulations at the state and local level.<sup>29</sup> Indeed, another local omnibus immigration ordinance—enacted in Valley Park, Missouri<sup>30</sup>—has survived several legal challenges to its constitutionality in both state and federal court,<sup>31</sup> with devastating impacts on the local immigrant and Latino communities.<sup>32</sup>

Although cities and towns enacted some of the most dramatic sub-federal immigration regulations, they were not the only jurisdictions that recently attempted to enact omnibus anti-immigrant laws in excess of their constitutional power. Among the states that have passed comprehensive statutes regulating immigration within their jurisdictions since 2006 are South Carolina,<sup>33</sup> Oklahoma,<sup>34</sup> and Missouri.<sup>35</sup> Though most of these laws have been challenged on the grounds that they are preempted by federal law, the litigation results have been mixed.<sup>36</sup> As such, there is currently far from a uniform mandate from either Congress, the Executive, or the federal courts regarding the permissibility of such state attempts to regulate immigration and when—or

---

28. See *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 521 (M.D. Pa. 2007). The District Court's decision was appealed to the Third Circuit Court of Appeals by the defendants. At the time of this writing, the case remained under consideration by the three-judge panel.

29. See Oliveri, *supra* note 20, at 60–61.

30. See VALLEY PARK, MO., ORDINANCE 1708 (July 17, 2006), <http://www.valleyparkmo.org/docs/Ordinances/Ordinance%201708.pdf>.

31. See *infra* Part I.B.

32. There is a great deal of anecdotal evidence that following the passage of state and local anti-immigrant ordinances, Latino residents—both citizens and immigrants—were subject to harassment and discrimination on the basis of their perceived immigration status. See, e.g., *Valley Park Ordinance Under Fire*, KOMU.COM, Nov. 8, 2006, <http://www.komu.com/satellite/SatelliteRender/KOMU.com/ba8a4513-c0a8-2f11-0063-9bd94c70b769/c98ea7cd-c0a8-2f11-0049-ecddeb0673b1> (discussing racial profiling in the wake of the Valley Park ordinance). There is also evidence that because of this racial and ethnic hostility, Latinos began to voluntarily leave these jurisdictions—what anti-immigrant activists refer to as “self-deportation.” See, e.g., *Illegal Immigrants Fleeing Apartments in Arizona*, IMMIGR. CHRON., Jan. 31, 2008, <http://blogs.chron.com/immigration/archives/2008/01> (discussing the “self-deportation” of immigrants in Arizona following the rash of laws targeting immigrants statewide).

33. South Carolina Illegal Immigration Reform Act, S.C. CODE ANN. § 1-31-40 (2008), available at [http://www.scstatehouse.gov/sess117\\_2007-2008/bills/392.htm](http://www.scstatehouse.gov/sess117_2007-2008/bills/392.htm).

34. See Oklahoma Taxpayer and Citizen Protection Act, OKLA. STAT. tit. 21, § 446 (2007), available at <http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=448995>.

35. See Missouri Omnibus Immigration Act, S.B. 348, 626 & 461, 94th Gen. Assem., 1st Reg. Sess. (Mo. 2007), available at [http://www.senate.mo.gov/07info/BTS\\_Web/Bill.aspx?SessionType=r&BillID=6818](http://www.senate.mo.gov/07info/BTS_Web/Bill.aspx?SessionType=r&BillID=6818).

36. See *infra* Part I.B.

if—such statutes do not run afoul of Congress’s plenary power to regulate immigration.<sup>37</sup>

## 2. State and Local Laws Regulating Housing and Employment of Immigrants

Less comprehensive in scope than the omnibus attempts to regulate immigration—though no less damaging to the immigrant community on a practical level—are the state and local attempts to regulate either the housing or employment of undocumented immigrants, or both. Although some states, such as Tennessee,<sup>38</sup> attempted to enact more narrow immigration legislation—and several states passed laws mandating the use of E-Verify, the federal electronic employment verification program<sup>39</sup>—most of the laws regulating the housing or employment of immigrants have been passed at the local level.<sup>40</sup>

### a. Local Ordinances Regulating the Provision of Housing to Undocumented Immigrants

In 2006, the war being waged on undocumented immigrants hit home—literally. Late that year, the city councils in Escondido, California and Farmers Branch, Texas, engaged in high-profile attempts to prevent undocumented immigrants from being able to rent property from private landlords in their cities.<sup>41</sup> Both of these ordinances would test the limits of a local government’s power to dictate whether and when individuals may rent privately owned property to undocumented immigrants, and if restrictions on such activities may be regulated consistent with the Immigration and Nationality Act’s (INA) harboring provision<sup>42</sup> and HUD regulations governing the federally subsidized Section 8 housing program.<sup>43</sup>

---

37. See Oliveri, *supra* note 20, at 60.

38. The Tennessee Legislature passed a law imposing sanctions on employers who are found to have employed undocumented immigrants. See TENN. CODE ANN. 50-1-103 (2007) (effective Jan. 1, 2008), available at <http://www.michie.com/tennessee/lpExt.dll?f=templates&eMail=Y&fn=main-h.htm&cp=tncode/1d1ba/1d1c4/1d1cb/1d1dc>.

39. State laws mandating that all employers participate in E-Verify have been passed by Arizona, Mississippi, and South Carolina. Other states—including Colorado, Georgia, Idaho, Minnesota, Missouri, North Carolina, Oklahoma, and Utah—have passed legislation requiring the use of E-Verify for government contractors and other public entities. As of this writing, mandatory E-Verify legislation is pending in Arkansas, Indiana, Kansas, Nebraska, Ohio, and Rhode Island. See NumbersUSA, Map of States with Mandatory E-Verify Laws, <http://www.numbersusa.com/content/learn/enforcement/workplace-verification/map-states-with-mandatory-e-verify-laws.html> (last visited Feb. 7, 2010) [hereinafter NumbersUSA].

40. See Oliveri, *supra* note 20, at 60.

41. *Id.*

42. 8 U.S.C. § 1324 (2006).

43. 42 U.S.C. § 1436a (2000) (restriction on use of assisted housing by non-resident aliens).

On October 18, 2006, the Republican-majority Escondido City Council passed an ordinance that would prevent the “harboring of illegal aliens in the City of Escondido”<sup>44</sup> by a vote of 3-2.<sup>45</sup> The ordinance, which was enjoined before it could take effect,<sup>46</sup> would have made it unlawful to “let, lease or rent a dwelling to an illegal alien” in the City of Escondido.<sup>47</sup> The ordinance would have also required the city’s Business License Division to verify the lawful presence of all tenants in the City of Escondido through the federal Systematic Alien Verification for Entitlements (SAVE) database,<sup>48</sup> and provided for fines, suspension, and revocation of business licenses of landlords who were not in compliance with the law.<sup>49</sup>

By contrast, the ordinance at issue in Farmers Branch required landlords in the City of Farmers Branch to verify the lawful immigration status of their individual tenants and to keep records demonstrating that none of their tenants were unauthorized aliens.<sup>50</sup> The Farmers Branch ordinance also attempted to require private landlords to adhere to the requirements set forth by the United States Department of Housing and Urban Development (HUD) that persons who participate in the federally subsidized housing program known as Section 8 prove their lawful presence in the United States.<sup>51</sup> The Farmers Branch ordinance also attempted to impose criminal sanctions of \$500 per day for each violation of the rental housing ordinance.<sup>52</sup>

#### b. State Employer Sanctions Laws

State employer sanctions laws are, generally, broader than state laws mandating the use of E-Verify, and are therefore not found in as great a

44. See ESCONDIDO, CA., ORDINANCE 2006-38 R, [http://www.cooley.com/files/tbl\\_s5SiteRepository/FileUpload21/925/Escondido%20Ordinance.pdf](http://www.cooley.com/files/tbl_s5SiteRepository/FileUpload21/925/Escondido%20Ordinance.pdf).

45. See David Fried, *Escondido Council Approves Illegal Immigrant Rental Ban*, N. COUNTY TIMES (San Diego, Ca.), Oct. 5, 2006, available at [http://www.nctimes.com/news/local/article\\_6e9c96a5-3fed-56bf-ad60-17a22f9954d7.html](http://www.nctimes.com/news/local/article_6e9c96a5-3fed-56bf-ad60-17a22f9954d7.html).

46. See *infra* Part I.B.

47. ORDINANCE 2006-38 R.

48. The SAVE program was created pursuant to the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359; the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 8 U.S.C. §§ 1611 & 1621; the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009; and the REAL ID Act of 2005, Pub. L. 109-13, 119 Stat. 231. See U.S. Citizenship and Immigration Servs., SAVE Governing Laws, <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=d013c2ec0c7e8110VgnVCM1000004718190aRCRD&vgnnextchannel=d013c2ec0c7e8110VgnVCM1000004718190aRCRD> (last visited Feb. 7, 2010).

49. ORDINANCE 2006-38 R.

50. CITY OF FARMERS BRANCH, TX., ORDINANCE 2892 § 2 (2006), [http://lawprofessors.typepad.com/immigration/files/city\\_of\\_farmers\\_branch\\_ordinance\\_no\\_2892\\_2.pdf](http://lawprofessors.typepad.com/immigration/files/city_of_farmers_branch_ordinance_no_2892_2.pdf).

51. *Id.*

52. *Id.* § 4.

number as the mandatory E-Verify laws.<sup>53</sup> Although only a handful of states have passed or attempted to pass state laws providing for sanctions against employers who are found to “knowingly” employ persons who do not have work authorization,<sup>54</sup> the states that have done so have generally used the threat of sanctions to encourage employers to use E-Verify rather than mandate its use.<sup>55</sup>

However, the most notorious state employer sanctions law—the Legal Arizona Workers Act (LAWA)<sup>56</sup>—mandates that all employers use E-Verify *and* provides for sanctions for employers who “intentionally” employ persons that are not legally authorized to work in the United States.<sup>57</sup> Although the LAWA does contain a “safe harbor” provision for employers who use E-Verify to confirm that their employees are work authorized,<sup>58</sup> yet nonetheless discover that their employees are may not legally work in the United States, the practical effect of the LAWA is that an employer may run afoul of the law by not registering for E-Verify, for “intentionally” employing a person without work authorization, or both.<sup>59</sup>

### 3. State Anti-Immigrant Ballot Initiatives

As discussed previously, the first highly-publicized anti-immigrant law was Proposition 187, a 1994 California ballot initiative that restricted undocumented immigrants’ access to health care, public education, and a variety of other social services.<sup>60</sup> Like California, the State of Arizona has used the ballot initiative process to amend its state constitution to put several anti-immigrant laws on the books in the past several years.<sup>61</sup> While far from

---

53. See NumbersUSA, *supra* note 39.

54. See Kevin R. Lashus et al., *Fear the ICE Man: Lessons from the Swift Raids to Warm You Up—The New Government Perspective on Employer Sanctions*, 32 NOVA. L. REV. 391, 402–03 (2008).

55. *Id.*

56. Legal Arizona Workers Act, ARIZ. REV. STAT. ANN. § 23-211 (1995).

57. *Id.* §§ 23-212, 23-212.01.

58. *Id.*

59. Mandatory participation by all Arizona employers in the E-Verify program express provisions of the LAWA. While there are not separate sanctions for not enrolling in the E-Verify program, the LAWA mimics the federal employer-sanctions provisions in the respect that participation in E-Verify provides employers with a “safe harbor” provision should they ultimately be found to have undocumented immigrants in their employ. See *id.* §§ 23-214 and 41-4401.

60. See *supra* notes 8 and 9 and accompanying text.

61. See generally Kevin R. Johnson, *A Handicapped, Not “Sleeping,” Giant: The Devastating Impact of the Initiative Process on Latina/o and Immigrant Communities*, 96 CAL. L. REV. 1259 (2008) (discussing how ballot initiatives, particularly in California, have targeted Latinos and immigrants in recent years and the consequences that have followed).

the only state to use the ballot initiative process for this purpose,<sup>62</sup> Arizona's frequent use of the ballot initiative process to legislate against immigrants exemplifies the "tyranny of the majority" mentality that often prevails in the case of state and local anti-immigrant laws.

a. Arizona Proposition 200

The first state anti-immigrant ballot initiative to pass in Arizona was Proposition 200, which was approved by 56% of the voters on November 2, 2004.<sup>63</sup> This ballot initiative was similar in substance to California's Proposition 187, as its purpose is to prohibit undocumented persons from voting and from receiving access to "state and local" public benefits in the state of Arizona.<sup>64</sup> Proposition 200—which was also known as the Arizona

---

62. *Id.* at 1271–73.

63. See National Immigration Forum, *2004 Election Analysis: Arizona's Proposition 200* (2004), <http://www.immigrationforum.org/images/uploads/AZProp200Analysis.pdf> (last visited Feb. 7, 2010).

64. See ARIZ. SEC'Y OF STATE, PROPOSITION 200, ARIZONA 2004 BALLOT INITIATIVES (Sept. 2004), <http://www.azsos.gov/election/2004/info/PubPamphlet/english/prop200.htm> (last visited Feb. 7, 2010) [hereinafter PROPOSITION 200]. The analysis by legislative council stated:

Proposition 200 would require that evidence of United States citizenship be presented by every person to register to vote, that proof of identification be presented by every voter at the polling place prior to voting, that state and local governments verify the identity of all applicants for certain public benefits and that government employees report United States immigration law violations by applicants for public benefits.

Proposition 200 provides that for purposes of registering to vote, satisfactory evidence of United States citizenship includes: - an Arizona driver or nonoperating identification license issued after October 1, 1996. - a driver or nonoperating identification license issued by another state if the license indicates that the person has provided proof of United States citizenship. - a copy of the applicant's birth certificate. - a United States passport, or a copy of the pertinent pages of the passport. - United States naturalization documents or a verified certificate of naturalization number. - a Bureau of Indian Affairs card number, tribal treaty card number or tribal enrollment number. - other documents or methods of proof that may be established by the federal government for the purpose of verifying employment eligibility.

The county recorder shall indicate this information in the person's permanent voter file for at least two years. A voter registration card from another county or state does not constitute satisfactory evidence of United States citizenship. A person who is registered to vote on the date that Proposition 200 becomes effective is not required to submit evidence of citizenship unless the person moves to a different county. Once a person has submitted sufficient evidence of citizenship, the person is not required to resubmit the evidence when making changes to voter registration information in the county where the evidence has been submitted.

Proposition 200 requires that prior to receiving a ballot at a polling place, a voter must present either one form of identification that contains the name, address and photograph of the person or two different forms of identification that contain the name and address of the person.

Taxpayer and Citizen Protection Act<sup>65</sup>—was ultimately enacted as Arizona Revised Statutes (A.R.S.) § 46-140.01. The law subsequently survived a challenge to its constitutionality by community and civil rights groups in the United States District Court for the District of Arizona,<sup>66</sup> and the Ninth Circuit Court of Appeals later dismissed the plaintiffs appeal for want of jurisdiction.<sup>67</sup> The Arizona Attorney General, Terry Goddard, also issued an advisory opinion regarding the constitutionality of Proposition 200, concluding that the portions of the law prohibiting the receipt of “state and local public benefits” by undocumented persons were likely constitutional, so long as implementation of the state statute was limited to conform with the federal restrictions on public benefits for undocumented persons.<sup>68</sup>

Another key element of Proposition 200 was the voter identification and citizenship verification provisions, which required all persons to prove their United States citizenship at the time they registered to vote and to display

---

Proposition 200 requires that a state or local governmental entity that is responsible for administering “state and local public benefits that are not federally mandated” must: - verify the identity and eligibility for each applicant for the public benefits. - provide other state and local government employees with information to verify immigration status of applicants applying for public benefits and must also assist other state and local government employees in obtaining immigration status information from federal immigration authorities. - refuse to accept any state or local government identification card, including a driver license, to establish identity or eligibility for public benefits unless the governmental entity that issued the card has verified the immigration status of the applicant. - require all state and local government employees to make a written report to federal immigration authorities upon discovering a violation of federal immigration laws by an applicant for public benefits. An employee or supervisor who fails to make the required report is guilty of a class 2 misdemeanor, potentially punishable by a jail sentence of up to 4 months and a fine of up to \$750, plus applicable surcharges.

Any resident of this state would have standing to bring a court action against the state, a local governmental entity or an agent of a state or local governmental entity to remedy a violation of the public benefits verification law including bringing an action to compel a government official to comply with the law.

Proposition 200 does not define the term “state and local public benefits that are not federally mandated.”

*Id.*

65. The group that was the drafter and major proponent of Proposition 200, Protect Arizona Now, gathered signatures for the Proposition 200 ballot initiative under this name.

66. *See* Friendly House v. Napolitano, CV 04-649 TUC DCB (D. Ariz. Dec. 22, 2004).

67. *See* Friendly House v. Napolitano, 419 F.3d 930, 932 (9th Cir. 2005) (holding that the record revealed no case or controversy between the plaintiffs and the State of Arizona).

68. Following an analysis of the statutory language of Proposition 200 and the federal law restricting public benefits to undocumented aliens, Arizona Attorney General Goddard stated that “[The programs] subject to Proposition 200 are those within Title 46 that are subject to eligibility restrictions in 8 U.S.C. § 1621.” Op. Att’y Gen. No. I04-010 (R04-036) (Nov. 12, 2004), <http://www.azag.gov/opinions/2004/I04-010.pdf> (last visited Feb. 7, 2010).

state-issued identification upon voting.<sup>69</sup> Like the public benefits portions of the law, the voter identification requirements of Proposition 200 were unsuccessfully challenged in federal court, and remain requirements for voting in Arizona to this day.<sup>70</sup>

b. Arizona Proposition 100

The fall of 2006 gave rise to a trio of anti-immigrant ballot initiatives in the State of Arizona—Propositions 100, 102, and 300.<sup>71</sup> Arguably the most damaging of these ballot initiatives is Proposition 100, which amended the Arizona Constitution to provide that undocumented persons charged with enumerated felonies are ineligible for bail.<sup>72</sup> Although the language of the ballot initiative was ultimately amended because of vagueness concerns,<sup>73</sup>

69. See PROPOSITION 200, *supra* note 64.

70. See *Gonzalez v. Arizona*, 485 F.3d 1041, 1043–44 (9th Cir. 2007).

71. See ARIZ. LEGISLATIVE COUNCIL, 2006 BALLOT PROPOSITIONS ANALYSES, [http://www.azleg.state.az.us/2006\\_Ballot\\_Proposition\\_Analyses](http://www.azleg.state.az.us/2006_Ballot_Proposition_Analyses) (providing links to Propositions 100, 102, and 300) (last visited Aug. 13, 2010).

72. See ARIZ. SEC'Y OF STATE, 2006 BALLOT PROPOSITIONS AND JUDICIAL PERFORMANCE REVIEW—PROPOSITION 100, <http://www.azsos.gov/election/2006/Info/pubpamphlet/english/Prop100.htm> (last visited Feb. 7, 2010). The Proposition 100 ballot-initiative language that was approved by voters read in part:

Be it resolved by the House of Representatives of the State of Arizona, the Senate concurring:

Article II, section 22, Constitution of Arizona, is proposed to be amended as follows if approved by the voters and on proclamation of the Governor:

22. Bailable offenses

Section 22. A. All persons charged with crime shall be bailable by sufficient sureties, except for: . . .

4. FOR SERIOUS FELONY OFFENSES AS PRESCRIBED BY THE LEGISLATURE IF THE PERSON CHARGED HAS ENTERED OR REMAINED IN THE UNITED STATES ILLEGALLY AND IF THE PROOF IS EVIDENT OR THE PRESUMPTION GREAT AS TO THE PRESENT CHARGE. . . .

The Secretary of State shall submit this proposition to the voters at the next general election as provided by article XXI, Constitution of Arizona.

*Id.*

73. The Legislature defined serious felony offenses and further clarified this exception in ARIZ. REV. STAT. ANN. § 13-3961 (2001) to read:

13-3961. Offenses not bailable; purpose; preconviction; exceptions

A. A person who is in custody shall not be admitted to bail if the proof is evident or the presumption great that the person is guilty of the offense and the offense charged is either:

1. A capital offense.
2. Sexual assault.
3. Sexual conduct with a minor who is under fifteen years of age.
4. Molestation of a child who is under fifteen years of age.

Proposition 100 was eventually implemented as an amendment to Article II, § 22 of the Arizona Constitution<sup>74</sup> and Arizona Revised Statute § 39-3961 (“A.R.S. § 39-3961”).<sup>75</sup>

Although Proposition 100 amended the Arizona Constitution—and is therefore applicable statewide—enforcement of the state law requiring undocumented persons charged with a Class 4 felony or better be held non-bondable has disproportionately occurred in Maricopa County.<sup>76</sup> Maricopa County, which is home to more than half of the state population, includes within its jurisdiction the state’s largest city and capital, Phoenix.<sup>77</sup> Maricopa County is also home to the notorious Sheriff Joe Arpaio—the self-proclaimed “America’s Toughest Sheriff”<sup>78</sup>—and County Attorney Andrew Thomas, who helped draft Proposition 100.<sup>79</sup> The combined efforts of these two law enforcement officers in Maricopa County has led to vigorous—and some would say unconstitutional<sup>80</sup>—enforcement of Arizona’s state laws targeting immigrants, with Proposition 100 emerging as, and remaining,<sup>81</sup> an effective tool in their arsenal.<sup>82</sup>

---

5. A serious felony offense if the person has entered or remained in the United States illegally. For the purposes of this paragraph . . . (b) “serious felony offense” means any class 1, 2, 3 or 4 felony or any violation of section 28-1383.

74. ARIZ. CONST. art. II, § 22.

75. § 13-3961.

76. See Joanna Dodder Nellans, *Day 4: Courts Work Through Prop. 100 Bail Issues*, THE DAILY COURIER (Prescott, Ariz.), Nov. 28, 2007, available at <http://www.dcourier.com/main.asp?SectionID=74&SubSectionID=516&ArticleID=50100&TM=15120.5>.

77. See ARIZ. DEP’T OF COMMERCE, PROFILE: MARICOPA COUNTY, ARIZONA, Dec. 2009, <http://www.azcommerce.com/doclib/COMMUNE/Maricopa%20County.pdf>.

78. SHERIFF JOE ARPAIO WITH LEN SHERMAN, AMERICA’S TOUGHEST SHERIFF: HOW WE CAN WIN THE WAR AGAINST CRIME (1996) (Sheriff Joe Arpaio’s 1996 autobiography).

79. See Nellans, *supra* note 76.

80. The Arizona Court of Appeals has held that Proposition 100 is not unconstitutional. See *Segura v. Cunanan*, 196 P.3d 831, 835–36 (Ariz. Ct. App. 2008). But see Complaint for Declaratory and Injunctive Relief and Petition for Writ of Habeas Corpus, *Lopez-Valenzuela v. Maricopa County*, No. 2:08-cv-00660 (D. Ariz. April 4, 2008), available at <http://bibdaily.com/pdfs/Lopez-Valenzuela%204-4-08.pdf> (a separate challenge to the law’s constitutionality currently pending before Judge Susan R. Bolton.) [hereinafter *Lopez-Valenzuela Complaint*]; Michael Kiefer, *Groups Sue, Challenge Prop. 100*, ARIZ. REPUBLIC, Apr. 8, 2008, at B1, available at <http://www.azcentral.com/news/articles/2008/04/08/20080408aclu0408.html>.

81. Although the constitutional challenge to Proposition 100 that is currently pending in the District of Arizona survived a motion to dismiss by the defendants was certified as a class in December 2008, the plaintiffs did not seek preliminary injunctive relief prohibiting enforcement of the law during the pendency of the litigation. See *Lopez-Valenzuela Complaint*, *supra* note 81. Therefore, at the time of this writing, hundreds—if not thousands—of alleged noncitizens are being held without bond pursuant to Proposition 100.

82. Andrew Thomas has touted Proposition 100 as one of his major accomplishments as Maricopa County Attorney as part of his exploratory run for Governor of Arizona in 2010. See, e.g., ANDREW THOMAS FOR ATTORNEY GEN. EXPLORATORY COMM., FIGHTING FOR CHANGE: A

## c. Arizona Proposition 102

One of the most puzzling anti-immigrant laws to be enacted through ballot initiative in 2006 was Arizona's Proposition 102, which provides that undocumented persons may not receive an award of punitive damages as the result of a civil suit brought in the state of Arizona.<sup>83</sup> To date, the law has not been challenged on constitutional grounds, though it has been raised as a defense to a punitive damages claim in a civil rights lawsuit brought against a southern Arizona rancher who violated the civil rights of individuals on his property he believe to be undocumented immigrants.<sup>84</sup> However, the fact that such a seemingly unnecessary law was even conceived of—much less approved with 74.2% of Arizonans voting “yes”<sup>85</sup>—exemplifies the anti-immigrant hysteria and the antipathy toward undocumented persons in the state of Arizona in general.

## d. Arizona Proposition 300

Because individuals without lawful status may not become residents of the states in which they reside for purposes of receiving benefits—such as in-state tuition at state colleges and universities—many states have passed laws that allow undocumented students who meet certain qualifications to receive out-of-state tuition waivers.<sup>86</sup> With the passage of Proposition 300,<sup>87</sup> however,

---

RECORD OF RESULTS, <http://www.thomasforagexploratory.com/Record.aspx> (last visited Feb. 7, 2010).

83. See ARIZ. SEC'Y OF STATE, 2006 BALLOT PROPOSITIONS AND JUDICIAL PERFORMANCE REVIEW, PROPOSITION 102, Sept. 2006, <http://www.azsos.gov/election/2006/Info/PubPamphlet/english/Prop102.htm>. The 2006 ballot initiative, in its entirety, read:

Be it resolved by the Senate of the State of Arizona, the House of Representatives concurring:

1. Article II, Constitution of Arizona, is proposed to be amended by adding section 35 as follows if approved by the voters and on proclamation of the Governor:

35. *Actions by illegal aliens prohibited*

A PERSON WHO IS PRESENT IN THIS STATE IN VIOLATION OF FEDERAL IMMIGRATION LAW RELATED TO IMPROPER ENTRY BY AN ALIEN SHALL NOT BE AWARDED PUNITIVE DAMAGES IN ANY ACTION IN ANY COURT IN THIS STATE.

2. The Secretary of State shall submit this proposition to the voters at the next general election as provided by article XXI, Constitution of Arizona.

84. See Jerry Seper, *16 Illegals Sue Arizona Rancher*, WASH. TIMES, Feb. 9, 2009, at A03, available at 2009 WLNR 2542937.

85. See ARIZ. SEC'Y OF STATE, 2006 GENERAL ELECTION PROPOSITION 102, <http://www.azsos.gov/results/2006/general/BM102.htm> (last visited Feb. 7, 2010).

86. See Michael A. Olivas, *Lawmakers Gone Wild? College Residency and the Response to Professor Kobach*, 61 SMU L. REV. 99, 106 (2008).

87. See ARIZ. SEC'Y OF STATE, 2006 BALLOT PROPOSITIONS AND JUDICIAL PERFORMANCE REVIEW, PROPOSITION 300, Sept. 2006, <http://www.azsos.gov/election/2006/info/PubPamphlet/english/Prop300.htm>.

Arizona took the opposite approach, and made undocumented persons categorically ineligible to pay in-state tuition at state colleges and universities.<sup>88</sup>

Proposition 300 amended Arizona Revised Statutes §§ 15-191.01, 15-232, 15-1803, 46-801 and 46-803, and added § 15-1825.<sup>89</sup> Like Proposition 200, the amendments under Proposition 300 were styled as a denial of public benefits to persons without lawful immigration status.<sup>90</sup> Unlike other state laws regarding in-state tuition for undocumented persons, however, the Arizona statute takes it a step further and also prohibits undocumented persons from participating in adult education classes, such as English as a Second Language (ESL).<sup>91</sup>

Although there is little empirical data on the effects of Proposition 300 on undocumented students in Arizona, there is anecdotal evidence suggesting that while the law has allowed the state of Arizona to receive some additional revenue by charging undocumented students out-of-state tuition, the law has also had the effect of denying an education to bright young people because of the prohibitive costs associated with obtaining higher education.<sup>92</sup>

---

88. *Id.*

89. *Id.* The amendments that comprised Proposition 300 were specifically referred to as “relating to public program eligibility.” *Id.*

90. *Id.* The section S 15-1825 was added to the Arizona Revised Statutes as a result of the passage of Proposition 300. ARIZ. REV. STAT. ANN. § 15-1825 (2007) reads in its entirety:

§ 15-1825: Prohibited financial assistance; report

A. A person who is not a citizen of the united states, who is without lawful immigration status and who is enrolled as a student at any university under the jurisdiction of the Arizona board of regents or at any community college under the jurisdiction of a community college district in this state is not entitled to tuition waivers, fee waivers, grants, scholarship assistance, financial aid, tuition assistance or any other type of financial assistance that is subsidized or paid in whole or in part with state monies.

B. Each community college and university shall report on December 31 and June 30 of each year to the joint legislative budget committee the total number of students who applied and the total number of students who were not entitled to tuition waivers, fee waivers, grants, scholarship assistance, financial aid, tuition assistance or any other type of financial assistance that is subsidized or paid in whole or in part with state monies under this section because the student was not a citizen or legal resident of the united states or not lawfully present in the united states.

C. This section shall be enforced without regard to race, religion, gender, ethnicity or national origin.

91. § 15-232(B), (C).

92. See Jonathan J. Cooper, *Many Still Apply for Benefits in Spite of Proposition 300*, ARIZ. DAILY STAR, Aug. 10, 2009, at A13, available at [http://azstarnet.com/news/state-and-regional/article\\_f97febae-46cd-5ebc-8723-ba318dac8596.html](http://azstarnet.com/news/state-and-regional/article_f97febae-46cd-5ebc-8723-ba318dac8596.html).

e. Arizona's State Human Smuggling Law

Another statewide law targeting undocumented immigrants is the Arizona State Human Smuggling Statute.<sup>93</sup> Although the legislative history indicates that the Arizona Legislature may have intended the state human smuggling law to apply only to the *coyotes* (smugglers),<sup>94</sup> the law has been interpreted by Maricopa County Attorney Andrew Thomas to include in the statutory definition of “conspiracy to commit human smuggling” the smugglees themselves.<sup>95</sup> This application of the conspiracy statute, while controversial, has withstood legal challenges in Arizona state courts.<sup>96</sup>

Perhaps the most damaging aspect of the Arizona state human smuggling statute is the fact that Maricopa County Sheriff Joe Arpaio has seized on the statute as independent justification for his “crime suppression” sweeps, separate and apart from his agreement with DHS pursuant to INA § 287(g).<sup>97</sup> Based on this interpretation of the state human smuggling statute, Sheriff Arpaio contends that his deputies may continue to question individuals about their immigration status, even though DHS recently revoked Maricopa County's task-force MOA under §287(g).<sup>98</sup> As such, it appears that unless and until the Arizona Legislature amends the state human smuggling law to specifically prohibit charging smuggled persons with conspiracy to smuggle themselves—an amendment which has already been attempted, and failed<sup>99</sup>—local law

---

93. § 13-2319.

94. See H.B. 2539, 47th Leg., 1st Reg. Sess. (Ariz. 2007) (statement of Rep. Paton, Member, House Comm. on the Judiciary, Feb. 10, 2005 minutes, at 3) (statements evidencing an intent on the part of the legislature to criminalize only the actions of the *coyotes*—those who profit from human smuggling—and not the persons who are smuggled).

95. A person is guilty of conspiracy to commit human smuggling under Arizona law if: 1) “with the intent to promote or aid” human smuggling; 2) he agrees with one or more persons that at least one of them or another person will; 3) intentionally transport or procure the transport of a person who is not a United States citizen, permanent resident alien, or otherwise lawfully in Arizona; 4) for profit or commercial purpose; 5) while knowing or having reason to know that the person being transported is not a United States citizen, permanent resident alien, or otherwise lawfully in Arizona; and 6) one of the parties commits an overt act in furtherance of the offense. §§ 13-1003(A); 13-2319(A), (D)(2).

96. See, e.g., *State v. Juan Barragan-Sierra*, 196 P.3d 879 (Ariz. Ct. App. 2008); see also Amanda Lee Myers, *AZ Court: Immigrants Subject to Smuggling Law*, ARIZ. REPUBLIC, July 17, 2008, available at 7/17/08 APALERTAZ 23:06:33.

97. See, e.g., Caleb Groos, *Arpaio Immigration Raids Continue: Under What Authority*, FINDLAW BLOTTER, Oct. 16, 2009, <http://blogs.findlaw.com/blotter/2009/10/arpaio-immigration-raids-continue-under-what-authority.html>.

98. See JJ Hensley, *Sheriff Arpaio May Lose Some Immigrant Authority*, ARIZ. REPUBLIC, Oct. 3, 2009, at A1, available at <http://www.azcentral.com/arizonarepublic/news/articles/2009/10/03/20091003arpaio-ice1003.html>.

99. In 2007, the Arizona Legislature defeated in committee two bills that would have eliminated the application of conspiracy and other preparatory offenses under the human smuggling statute to the persons being smuggled. See H.B. 2270 and 2271, 48th Leg., 1st Reg.

enforcement in Maricopa County will continue to use the statute not as a vehicle for assisting trafficked persons, but as a mechanism for pretextual traffic stops and racial profiling.

f. Pending Anti-Immigrant Legislation and Ballot Initiatives

While the initial fervor by states and municipalities to pass local laws regulating immigration has died down considerably over the past several years,<sup>100</sup> the threat is far from over. Russell Pearce, the Arizona state senator who authored and sponsored the majority of the anti-immigrant laws that have made their way through the Arizona legislature since 2006,<sup>101</sup> continues to draft and propose state laws that target undocumented persons and criminalize their every day behavior.<sup>102</sup> Currently, Senator Pearce has indicated his intention to attempt for a third time to criminalize unlawful presence in Arizona as a trespass—despite strong indications that such a law is unconstitutional<sup>103</sup>—and to outlaw solicitation by day laborers statewide.<sup>104</sup>

---

Sess. (Ariz. 2007), <http://www.azleg.gov/legtext/48leg/1r/bills/hb2270p.pdf> and <http://www.azleg.gov/legtext/48leg/1r/bills/hb2271p.pdf>.

100. At the peak of state and local government attempts to pass sub-federal immigration regulations in 2007, state legislators in 50 states introduced 1,059 immigration-related bills and resolutions, of which 167 were enacted into law. See LAUREEN LAGLAGARON ET AL., MIGRATION POLICY INST., REGULATING IMMIGRATION AT THE STATE LEVEL: HIGHLIGHTS FROM THE DATABASE OF 2007 STATE IMMIGRATION LEGISLATION AND THE METHODOLOGY 3 (Oct. 2008), <http://www.migrationpolicy.org/pubs/2007methodology.pdf>.

101. See *Day to Day: Arizona Voters Face Immigration Initiatives* (NPR radio broadcast Oct. 31, 2006), available at <http://www.npr.org/templates/story/story.php?storyId=6411513>.

102. For example, Senator Pearce has repeatedly sponsored a bill that would make unlawful presence in the State of Arizona a criminal trespass under state law. See Press Release, Ariz. State Senate, Senate Committee Passes Illegal Immigration Bill that Requires Interagency Enforcement, Makes Trespassing by Illegal Immigrants a Crime (June 11, 2009), <http://www.russellpearce.com/archives/newsletters/1175.htm>. Such bills have passed the Arizona legislature twice, and were twice vetoed by former Arizona Governor Janet Napolitano. See Jacques Billeaud, *Arizona House Rejects Immigration Enforcement Bill*, ARIZ. DAILY STAR, July 1, 2009, available at 7/1/09 APALERTAZ 12:49:54.

103. In 2005, New Hampshire attempted to pass a law that would have made illegal presence in the state a criminal trespass. The law was challenged on constitutional grounds and enjoined by a state court before it could take effect. See *New Hampshire v. Barros-Batistele et. al.*, No. 05-CR-1474, 1475, slip op. (Nashua D. Ct. 2005), available at [http://www.courts.state.nh.us/district/orders/criminal\\_trespass\\_decision.pdf](http://www.courts.state.nh.us/district/orders/criminal_trespass_decision.pdf).

104. See JENNIFER ALLEN, BORDER ACTION NETWORK, ARIZONA LEGISLATURE AGAIN SEEKS TO CRIMINALIZE DAY LABORERS, HB2355 PASSES THE HOUSE COW (May 21, 2009), [http://www.borderaction.org/web/index.php?option=com\\_content&view=article&id=138%3Aarizona-legislature-again-seeks-to-criminalize-day-laborers-hb2355-passes-the-house-cow&catid=43%3Aarizona-legislature&Itemid=143&lang=en](http://www.borderaction.org/web/index.php?option=com_content&view=article&id=138%3Aarizona-legislature-again-seeks-to-criminalize-day-laborers-hb2355-passes-the-house-cow&catid=43%3Aarizona-legislature&Itemid=143&lang=en). SB 1070, which was signed into law in April 2010, includes a section prohibiting the solicitation of employment by undocumented persons statewide. See SB 1070, Section 5, which amends Title 13, chapter 29, Arizona Revised Statutes

Senator Pearce has also indicated that if these proposals fail in the legislature, or are vetoed by Governor Jan Brewer, he will seek to get them approved as ballot initiatives in November 2010.<sup>105</sup>

Another anti-immigrant ballot initiative that poses a serious threat in the 2010 election is currently gathering signatures in California. The California Taxpayer Protection Act of 2010,<sup>106</sup> like Proposition 187 before it, seeks to make undocumented persons ineligible for public benefits in the state of California.<sup>107</sup> However, the California Taxpayer Protection Act contains a new and frightening attempt to limit the rights of undocumented persons by targeting their United States citizen children, referring to the births of such children as “birth tourism.”<sup>108</sup> Drafted by an anti-immigrant organization in San Diego, Taxpayer Revolution,<sup>109</sup> the Taxpayer Protection Act attempts to reinterpret the Fourteenth Amendment of the United States Constitution by stating that children born to undocumented persons are not birthright citizens because their parents are not “subject to the jurisdiction” of the United States.<sup>110</sup> If passed, the law would not permit children born in the United States to undocumented parents to receive birth certificates, but would instead require California to issue certificates noting a birth to a “foreign parent.”<sup>111</sup> The law would also require the mother of the child to be fingerprinted, photographed, and have her personal information transmitted to the Department of Homeland Security,<sup>112</sup> presumably in order to assist with federal immigration enforcement.

Although it seems radical, this interpretation of the Fourteenth Amendment has been floated by immigration restrictionists before,<sup>113</sup> and this is not the first

---

by adding sections 13-2928 and 13-2929, <http://www.azleg.gov/legtext/49leg/2r/bills/sb1070s.pdf>.

105. See Matthew Benson, *Immigration Foes Pledge New Bill, Voter Initiative*, ARIZ. REPUBLIC, Oct. 22, 2009, at B1, available at 2009 WLNR 20939214.

106. The full text of the proposed ballot initiative is available at <http://www.taxpayerrevolution.org>, the website of the group Taxpayer Revolution, which drafted the proposal and is gathering signatures in support of the initiative. See CALIFORNIA TAXPAYER PROTECTION ACT, TAXPAYER REVOLUTION, <http://www.taxpayerrevolution.org> (last visited Feb. 9, 2010) [hereinafter TAXPAYER REVOLUTION].

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. See AN INITIATIVE TO HELP CALIFORNIA’S BUDGET DEFICIT CRISIS: CALIFORNIA TAXPAYER PROTECTION ACT BORDER CONTROL BY STOPPING THE MAGNETS, TAXPAYER REVOLUTION, [http://www.taxpayerrevolution.org/index.php?option=com\\_content&task=view&id=2&Itemid=2](http://www.taxpayerrevolution.org/index.php?option=com_content&task=view&id=2&Itemid=2) (last visited Feb. 9, 2010).

112. *Id.*

113. Prominent immigration restriction groups, such as the Federation for American Immigration Reform (FAIR), have long contended that the Fourteenth Amendment of the United

time such a provision has been considered for approval by voters as part of a ballot initiative.<sup>114</sup> Should the Taxpayer Protection Act gain approval by California voters, and amend the California Constitution to redefine birthright citizenship in the manner proposed by the initiative, there will almost certainly be a constitutional challenge to the law—which, it appears, is exactly what the supporters of the law are hoping for.<sup>115</sup> As of November 2009, the organization indicated that a new petition would be available on its website for signature gathering in January 2010.<sup>116</sup>

### B. *Litigation Responses to State and Local Anti-Immigrant Laws*

Predictably, there has been a proliferation of litigation in both state and federal court challenging the constitutionality of the sub-federal immigration restrictions.<sup>117</sup> Perhaps also predictably, the success of this litigation has been mixed.<sup>118</sup> The main legal theory used to challenge these laws—federal preemption—has been generally successful in the housing context, but the challenges to state and local regulations of employment of aliens have been less successful.<sup>119</sup> The Hazleton and Arizona cases, which are the two major

---

States Constitution does not confer birthright citizenship on the children of parents who are not lawfully present in the United States at the time of the child's birth. *See, e.g., A FAIR Review . . . The 14th Amendment Debate*, IMMIGRATION REPORT (Fed'n for Am. Immigr. Reform, Washington, D.C.), Apr. 2005, [http://www.fairus.org/site/PageServer?pagename=research\\_research65c8](http://www.fairus.org/site/PageServer?pagename=research_research65c8). *See also* EDWARD ERLER, THE HERITAGE FOUND., BIRTHRIGHT CITIZENSHIP AND THE CONSTITUTION (Dec. 1, 2005), <http://www.heritage.org/Research/GovernmentReform/wm925.cfm>.

114. Perhaps unsurprisingly, a similar ballot initiative was proposed in Arizona in 2007, though it failed to gather enough signatures to be placed on the ballot in the 2008 election. *See Measures Target Citizenship for Migrants' Kids*, TUCSON CITIZEN, Dec. 3, 2007, <http://www.tucsoncitizen.com/daily/local/70521.php>.

115. *See The Pat Morrison Show: New Ballot Initiative Takes Aim at Illegal Immigrants* (KPCC Southern California Public Radio broadcast July 13, 2009), available at <http://www.scpr.org/programs/patt-morrison/2009/07/13/new-ballot-initiative-takes-aim-at-illegal-immigra>.

116. *See* TAXPAYER REVOLUTION, *supra* note 106.

117. *See generally* STATE AND LOCAL LAW ENFORCEMENT, THE AM IMMIGR. LAW FOUND., [http://www.aifl.org/lac/clearinghouse\\_120706.shtml](http://www.aifl.org/lac/clearinghouse_120706.shtml) (last visited Feb. 9, 2010).

118. *Id.*

119. There is currently a split of authority in both the federal district courts and circuit courts of appeal on the issue of whether such laws are preempted under federal law. The Escondido and Farmers Branch ordinances, which were both local immigration housing ordinances, were enjoined by federal courts on the grounds that they are preempted by federal immigration law. *See supra* Part I. However, in the employment context, there are split decisions out of the Middle District of Pennsylvania and the District of Arizona regarding whether the revocation of state business licenses as a penalty for employing undocumented workers is preempted as a “licensing or similar law” within the meaning of 8 U.S.C. § 1324(a)(h)(2). *See Chicanos Por La Causa v. Napolitano*, 558 F.3d. 856, 860–61 (9th Cir. 2009); *see infra* Part III.

decisions interpreting whether states may regulate the employment of undocumented persons by imposing sanctions on businesses—such as the revocation of state business licenses—have offered contradictory views on Congress’s intent regarding the scope of states’ authority in this area.<sup>120</sup> Therefore, unless Congress sees fit to clarify its meaning regarding when and how states may regulate immigration through “licensing or similar laws,”<sup>121</sup>—or the United States Supreme Court resolves the split of authority interpreting this provision<sup>122</sup>—the ongoing litigation challenging the constitutionality of these state and local immigration regulations seems unlikely to put a rest to these issues any time soon.<sup>123</sup>

## II. THE RISE OF ENFORCEMENT-ONLY IMMIGRATION POLICIES: §287(G), RACIAL PROFILING, ICE RAIDS, AND THE INCREASE OF HATE CRIMES AGAINST IMMIGRANTS AND LATINOS

At the heart of my argument that Congress and the Executive have failed to meaningfully assert their plenary power to regulate immigration is the delegation of federal immigration enforcement powers by Congress to state law enforcement agencies through the enactment of INA § 287(g).<sup>124</sup> I argue

120. See *Lozano v. City of Hazleton*, 459 F. Supp. 2d 332, 338 (M.D. Pa. 2006) (holding that local employer sanctions ordinance could be unlawful); *Arizona Contractors Ass’n, Inc. v. Candelaria*, 534 F. Supp. 2d 1036, 1046 (D. Ariz. 2008) (holding that state employer sanctions law falls within the savings clause of 8 U.S.C. § 1324(a)(h)(2) and is therefore not expressly preempted).

121. See 8 U.S.C. § 1324a(h)(2) (2006).

122. The plaintiffs in *Chicanos Por La Causa* filed a Petition for a Writ of Certiorari to review the decision of the Ninth Circuit Court of Appeals with the United States Supreme Court in July 2009. See Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, Chamber of Commerce of the United States of America et. al. v. Candelaria, No. 09-115 (U.S. July 24, 2009), available at [http://www.scotusblog.com/wp/wp-content/uploads/2009/10/09-115\\_pet.pdf](http://www.scotusblog.com/wp/wp-content/uploads/2009/10/09-115_pet.pdf). On November 2, 2009, the Court asked the Solicitor General to provide a brief expressing the views of the United States on this issue. See Josh Gerstein, *Supreme Court Query Puts Janet Napolitano on the Spot*, POLITICO, Nov. 6, 2009, <http://www.politico.com/news/stories/1109/29222.html>.

123. In addition to the cases on review by the Third and Ninth Circuit Courts of Appeals, challenges to local immigration regulations have also been considered by the Eighth and Tenth Circuit Courts of Appeals, and the issue is likely to eventually reach the Fifth Circuit Court of Appeals, as well. See *Gray v. City of Valley Park*, 567 F.3d 976, 985–87 (8th Cir. 2009) (upholding constitutionality of local anti-immigrant ordinance); *Chamber of Commerce of the United States v. Henry*, No. CIV-08-109-C, 2008 WL 2329164, at \*6–7 (W.D. Okla. June 4, 2008) (preliminarily enjoining statewide anti-immigrant law, H.B. 1804) (oral argument appealing the district court’s decision in the 10th Circuit held June 2009); *Villas at Parkside Partners v. City of Farmers Branch*, 577 F. Supp. 2d 851, 856 (N.D. Tex. 2008) (permanently enjoining anti-immigrant housing ordinance).

124. Although almost always referred to simply by its code section in the Immigration and Nationality Act (INA), the proper title of § 287(g) is “Acceptance of State Services to Carry Out

that if the Obama Administration is serious about accomplishing comprehensive immigration reform in the near future, the first thing President Obama must do is immediately enact a moratorium on the 287(g) program and recommend that Congress repeal the statute in its entirety. In support of that argument, this section describes in some detail the history and substantive provisions of the 287(g) program, and discusses the federal government's Memorandum of Agreement (MOA)<sup>125</sup> with Maricopa County, Arizona, to demonstrate a few of the myriad problems that arise from this form of delegation of immigration enforcement to sub-federal law enforcement entities.<sup>126</sup>

A. *Delegation of Immigration Responsibilities to Local Law Enforcement Pursuant to INA § 287(g)*

Under INA 287(g), there are two models by which local law enforcement officials may enforce federal immigration law.<sup>127</sup> The first is the task-force model, which allows for enforcement of civil immigration law in connection with routine law enforcement activities (such as traffic stops).<sup>128</sup> The second is the jail model, in which Immigration and Customs Enforcement (ICE) officials check the immigration status of persons who are booked into local jails in connection with an arrest pursuant to a violation of state or local law.<sup>129</sup> Although I will discuss each model separately, DHS has the authority to enter into agreements with local law enforcement agencies pursuant to both of these models, and they often do.<sup>130</sup>

---

Immigration Enforcement.” Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, § 133, 110 Stat. 3009-546, 3009-563 (1996) (codified at 8 U.S.C. § 1357).

125. Jurisdictions that enter into 287(g) agreements with the Department of Homeland Security (DHS) sign a Memorandum of Agreement (MOA) with DHS. Previously, these agreements were referred to as Memorandums of Understanding (MOU), and though the name has changed, the form and substance of these agreements remain largely the same. See Memorandum of Agreement between United States Immigration and Customs Enforcement and Maricopa County Sheriff's Office (2009), [http://www.ice.gov/doclib/foia/memorandumsofAgreementUnderstanding/r\\_287gmaricopacountyso102609.pdf](http://www.ice.gov/doclib/foia/memorandumsofAgreementUnderstanding/r_287gmaricopacountyso102609.pdf).

126. For a detailed examination of the particular concerns of the Maricopa County 287(g) program, see AARTI SHAHANI & JUDITH GREENE, JUSTICE STRATEGIES, LOCAL DEMOCRACY ON ICE: WHY STATE AND LOCAL GOVERNMENTS HAVE NO BUSINESS IN FEDERAL IMMIGRATION LAW ENFORCEMENT (Feb. 2009), <http://www.justicestrategies.org/2009/local-democracy-ice-why-state-and-local-governments-have-no-business-federal-immigration-law-en>.

127. See Immigration and Nationality Act § 287(g), 8 U.S.C. 1357 (2006).

128. *Id.*

129. *Id.*

130. See, e.g., Memorandum of Agreement, *supra* note 126 (entering into an agreement with the Maricopa County Sheriff's Office under both the task-force and jail models). In October 2009, DHS chose not to renew its task-force model agreement with the Maricopa County Sheriff's Office, opting instead to only authorize participation in the jail model in Maricopa

### 1. The Task-Force Model

Under the 287(g) task-force model, local law enforcement officers are cross-deputized as ICE officers and authorized to perform limited immigration enforcement functions in connection with their routine enforcement of state and local law.<sup>131</sup> Local law enforcement officers that are cross-deputized pursuant to the 287(g) program also receive extra training regarding immigration law and its enforcement, and are subject to the same rules and regulations as regular ICE officials, although they are primarily supervised by the local law enforcement agency and not DHS.<sup>132</sup>

The task-force model has led to a great deal of variation in the enforcement of immigration laws across jurisdictions that have entered into agreements with DHS pursuant to § 287(g).<sup>133</sup> Because of the lack of oversight by DHS, the implementation of the provisions of the MOA has been left to local law enforcement agencies and has resulted in allegations of improper questioning of immigration status without reasonable suspicion or probable cause, and racial profiling of Latinos and other individuals whom local law enforcement believe may be “foreign.”<sup>134</sup> As such, in jurisdictions that have agreements with DHS pursuant to the task-force model, the practical effect has been the impression—if not the fact<sup>135</sup>—that all local law enforcement officers are also ICE agents, and the impact on public safety has been disastrous.<sup>136</sup>

---

County. See Brent Johnson, *Sheriff Joe Stripped of Powers*, IMMIGRATION LAW REFORM BLOG, Oct. 6, 2009, <http://immigrationlawreformblog.blogspot.com/2009/10/sherriff-joe-stripped-of-powers.html>.

131. See Immigration and Nationality Act § 287(g).

132. See SHAHANI & GREENE, *supra* note 126, at 4.

133. *Id.* at 13.

134. *Id.* at 3. Although Maricopa County is the most notorious example of a local law enforcement agency enforcing immigration laws beyond the scope of their MOA with DHS, other jurisdictions have been accused of improperly using their agency’s § 287(g) agreement in ways that have led to allegations of racial profiling and improper detentions. See, e.g., *Prayer Vigil Community Opposition to 287(g) Program*, TENN. IMMIGRANT AND REFUGEE RIGHTS COAL., Oct. 21, 2009, <http://www.tnimmigrant.org/home/2009/10/21/prayer-vigil-voices-community-opposition-to-287g-program.html>.

135. Under the MOAs with DHS, only local law enforcement officers who receive special training in immigration enforcement may be cross-deputized to perform limited immigration enforcement under § 287(g). However, in some jurisdictions, there is evidence that officers who have not been formally trained and deputized are carrying out immigration enforcement functions in reliance on their agency’s MOA under § 287(g). See SHAHANI & GREENE, *supra* note 126, at 15–16.

136. There is evidence that immigrants, including lawful immigrants and crime victims, are more reluctant to cooperate with local law enforcement agencies with § 287(g) agreements for fear of negative repercussions on their immigration status or the immigration status of their family. See *id.* at 61.

Despite the widespread criticism of the § 287(g) program, it does not appear that Secretary of Homeland Security Janet Napolitano intends to heed the call of civil rights activists to put an end to the program.<sup>137</sup> Although ICE has taken small steps toward possibly reforming federal oversight of jurisdictions participating in § 287(g)—such as the recent revocation of Sheriff Joe Arpaio’s task-force authority under his MOA with ICE in October 2009<sup>138</sup>—the fact remains that more than half of the 67<sup>139</sup> jurisdictions throughout the country are currently enforcing immigration law under 287(g) are participating in the task-force model, with no end in sight.<sup>140</sup>

## 2. The Jail Model

Less controversial than the task-force model is the jail model provision of the 287(g) program.<sup>141</sup> While the jail model has not received as much criticism as the task-force model—due in large part to the absence of the inflammatory racial profiling allegations that have plagued the task-force model<sup>142</sup>—the jail model nonetheless deserves attention. I argue that, although the jail model may at first blush seem more innocuous than the task-force model, the jail model is in reality a more effective form of “devolution”<sup>143</sup> of the federal immigration power to state and local law enforcement authorities than the task-force model. While the jail model relies on actual ICE agents to determine the immigration

137. See, e.g., Janet Napolitano, Prepared Remarks by Secretary Napolitano on Immigration Reform at the Center for American Progress (Nov. 13, 2009), [http://www.dhs.gov/ynews/speeches/sp\\_1258123461050.shtm](http://www.dhs.gov/ynews/speeches/sp_1258123461050.shtm) (discussing plans for immigration reform in the Obama administration, which includes an increased focus on enforcement, but no mention of reform of the 287(g) program).

138. See, e.g., Gary Grado, *Feds Strip Arpaio of Immigration Authority*, THE E. VALLEY TRIB. (Mesa, Ariz.), Oct. 7, 2009, at A4, available at 2009 WLNR 19767953.

139. This figure is current as of October 2009. See News Release, U.S. Immigration and Customs Enforcement, ICE Announces Standardized 287(g) Agreements with 67 State and Local Law Enforcement Partners (Oct. 16, 2009) <http://www.ice.gov/pi/nr/0910/091016washingtondc.htm> [hereinafter USICE News Release].

140. See U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, DELEGATION OF IMMIGRATION AUTHORITY SECTION 287(G) IMMIGRATION AND NATIONALITY ACT (Aug. 18, 2008), [http://www.ice.gov/partners/287g/Section287\\_g.htm](http://www.ice.gov/partners/287g/Section287_g.htm) (featuring a list of participating 287(g) jurisdictions, including type of agreement) [hereinafter USICE Immigration Authority]. Although DHS stopped entering into § 287(g) MOAs with new jurisdictions in 2008, agreements with existing jurisdictions that were set to expire have been renewed, and DHS has issued new guidelines expanding the program under the Obama Administration. See Michelle Waslin, *Policy or Politics? DHS Changes and Expands 287(g) Program*, DICK & SHARON’S L.A. PROGRESSIVE, July 19, 2009, <http://www.laprogressive.com/2009/07/16/policy-or-politics-dhs-changes-and-expands-287g-program>.

141. See Immigration and Nationality Act § 287(g), 8 U.S.C. 1357 (2006).

142. See SHAHANI & GREENE, *supra* note 126, at 36.

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

status of persons who have already been detained pursuant to violations of state or local law—rather than relying on cross-deputized police officers making such determinations in the field—the danger of the jail model lies in its broad reach and wide scope.<sup>144</sup>

What makes the jail model such an effective form of immigration devolution is its ability to check the immigration status of virtually every person who is arrested and booked into a jail facility in a jurisdiction that has an MOA with ICE under § 287(g).<sup>145</sup> While state and local governments are encouraged—and perhaps required<sup>146</sup>—to cooperate with federal immigration authorities to determine the immigration status of alleged criminals in their custody who may be subject to removal, it is quite another thing to station ICE agents in local jails who check the immigration status of all persons who are determined to be foreign-born during the booking procedure.<sup>147</sup>

The jail model continues to be in widespread use across the country by jurisdictions who are participating in the § 287(g) program, either alone or in connection with the task-force model.<sup>148</sup> In fact, screening individuals to determine their immigration status at the time of booking into local jails is becoming more common as ICE has also rolled out the Criminal Alien Program (CAP)<sup>149</sup> in addition to the § 287(g) jail model. These programs, which have shifted detection and identification of undocumented persons from federal agencies to local law enforcement, represent how immigration federalism is currently devolving on a practical, every day level—not merely a theoretical level—and need to be halted if there is to be meaningful comprehensive immigration reform under Obama.

---

144. For a discussion of two large jurisdictions that have jail model MOAs with ICE under § 287(g) and their impact on the local communities—Orange County, California and Los Angeles County, California—see ELIZABETH VENABLE, COAL. FOR HUMANE IMMIGRANT RIGHTS OF L. A., LOCAL LAW ENFORCEMENT AND IMMIGRATION: THE 287(G) PROGRAM IN SOUTHERN CALIFORNIA (Nov. 2008), <http://chirla.org/files/287g%20Factsheet%2011-24-08.pdf>.

145. See USICE News Release, *supra* note 139 (describing the Jail Model and the role of Jail Enforcement Officers).

146. See 8 U.S.C. § 1373 (2006) (federal statute providing for communication between government agencies and federal immigration authorities).

147. See USICE News Release, *supra* note 139 (“Jail Enforcement Officers . . . identify aliens already incarcerated within their detention facilities who are eligible for removal”).

148. See USICE Immigration Authority, *supra* note 140 (list of 287(g) jurisdictions and type of agreements).

149. See U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, CRIMINAL ALIEN PROGRAM (Nov. 19, 2008), [http://www.ice.gov/pi/news/factsheets/criminal\\_alien\\_program.htm](http://www.ice.gov/pi/news/factsheets/criminal_alien_program.htm).

### 3. Maricopa County, Arizona—A Case Study in the Abuse of the 287(g) Program

Proponents of the § 287(g) program argue that the problems that have arisen are not due to lack of proper oversight by DHS and ICE, but rather improper enforcement of the program by overzealous local law enforcement agencies.<sup>150</sup> Supporters of § 287(g) correctly point out that, under their MOAs, participating jurisdictions should not inquire about the immigration status of individuals unless they are detained for something that is “more than a routine traffic stop.”<sup>151</sup> However, the failure of the federal agencies to adequately communicate with participating jurisdictions regarding the scope of their authority under § 287(g)—and their inability or unwillingness to hold jurisdictions who overstep their bounds accountable—has led to a lack of uniformity and serious problems with fair and just enforcement of the program nationwide.

Although many jurisdictions that have entered into 287(g) agreements with DHS have come under scrutiny for uneven enforcement and allegations of racial profiling,<sup>152</sup> none have been subject to more scrutiny, criticism, and charges of civil rights violations than the Sheriff’s Office in Maricopa County, Arizona.<sup>153</sup> Under the leadership of Sheriff Joe Arpaio—a public official who won his fourth-straight election in November 2008 with 55% of the votes<sup>154</sup>—the MSCO’s 287(g) agreement has literally become the poster-child for the abuses inherent in the 287(g) program.<sup>155</sup> From his repeated insistence that he does not need the 287(g) agreement to enforce civil immigration laws,<sup>156</sup> to his

---

150. See ANITA KHASHU, POLICE FOUND., THE ROLE OF LOCAL POLICE: STRIKING A BALANCE BETWEEN IMMIGRATION ENFORCEMENT AND CIVIL LIBERTIES 26–27 (Apr. 2009), <http://www.policefoundation.org/pdf/strikingabalance/Role%20of%20Local%20Police.pdf>.

151. See, e.g., Memorandum of Agreement, *supra* note 125.

152. See SHAHANI & GREENE, *supra* note 126, at 36.

153. There have been a plethora of media and other reports documenting the outrageous and often overtly racist actions of the Maricopa County Sheriff’s Office. See, e.g., William Finnegan, *Sheriff Joe*, THE NEW YORKER, JULY 20, 2009, at 42.

154. See J.J. Hensley, *Poll: 61% of Voters in Arizona Approve of Arpaio’s Job Approach*, ARIZ. REPUBLIC, Oct. 28, 2009, <http://www.azcentral.com/news/articles/2009/10/28/20091028bigbrother1028side.html>.

155. For example, recent congressional hearings examining whether the 287(g) program encourages racial profiling by local law-enforcement officials focused heavily on the actions of Sheriff Arpaio and his deputies. See, e.g., *The Justice Department: Hearing Before the H. Judiciary Comm.*, 111th Cong. 47 (May 13, 2010) (LEXIS, Federal News Service) (Attorney General Eric Holder commenting that the Department of Justice is currently investigating claims against Sheriff Arpaio of civil-rights violations).

156. Sheriff Arpaio has repeatedly asserted that he may stop, question, and detain persons on the basis of determining their immigration status alone as part of his authority to enforce the state human smuggling law. See *infra* Part II.B.3.

“Illegal Immigration Interdiction Unit” (also known as the “Triple I Unit”),<sup>157</sup> to the “crime-suppression sweeps” that he has used to terrorize the Latino residents of Maricopa County over the last several years—often with the assistance of his “posse” of vigilantes, many of whom have white supremacist ties<sup>158</sup>—Sheriff Arpaio’s abuse of MCSO’s 287(g) agreement with DHS is a cautionary tale of the dangers of delegating local law enforcement and permitting them to act as ICE officials without adequate training or oversight.

Arguably the most egregious conduct that Sheriff Arpaio and his deputies have engaged in pursuant their § 287(g) authority are the “crime suppression sweeps” that have become a routine matter in Latino neighborhoods in Maricopa County over the last several years.<sup>159</sup> These checkpoints and blockades, which have been set up all over the county with the express purpose of detaining “illegals,”<sup>160</sup> have resulted in persons of Latino heritage being stopped, detained, and arrested—usually for civil immigration status violations—on the pretext of offenses such as “improper use of a horn.”<sup>161</sup> Persons have been stopped and detained for doing nothing more than walking on the sidewalk,<sup>162</sup> or for having the bad luck to be dropping a parent off at

---

157. See Editorial, *Arpaio’s Illegal Immigration Policy Isn’t Worth Cost*, WESTVALLEYEDITORIALS BLOG, Dec. 12, 2007, <http://www.azcentral.com/members/Blog/WestValleyEditorials/12542> (discussing the role of the Illegal Immigration Interdiction Unit in Maricopa County’s crime suppression sweeps).

158. See Andrea Nill, *Sheriff Joe Arpaio to Recruit and Arm Citizens, Neo-Nazis “Have His Back”*, IMMIGRATION IMPACT, May 8, 2009, <http://immigrationimpact.com/2009/05/08/joe-arpaio-neo-nazi-posse>.

159. In the last several years, Sheriff Arpaio has been conducting immigration raids, which his office refers to as “crime suppression sweeps,” throughout Maricopa County. See Dennis Wagner, *Impact of Arpaio’s Sweeps Is Unclear*, ARIZ. REPUBLIC, October 4, 2008, at A1, available at <http://www.azcentral.com/news/articles/2008/10/04/20081004arpaio-sweeps1004.html>.

160. See, e.g., News Release, Maricopa County Sheriff’s Office, Weekend Crime Suppression Operation Concludes: Deputies Turn Over 19 Suspected Illegal Immigrants to Federal Authorities Without Incident (Oct. 19, 2009), [http://www.mcso.org/include/pr\\_pdf/10-19-2009%20News%20Release.pdf](http://www.mcso.org/include/pr_pdf/10-19-2009%20News%20Release.pdf).

161. A U.S. citizen who was detained in the Maricopa County Sheriff’s Office sweep in May 2008 in Guadalupe, Arizona—a town that is one square mile and whose population is 100% ethnic minority (Yacqui Indian and Latino)—was stopped and questioned about his immigration status on this basis. See Stephen Lemons, *Guadalupe Made it Clear that Joe Arpaio’s Attacking Anyone with Brown Skin*, PHOENIX NEW TIMES, May 29, 2008, <http://www.phoenixnewtimes.com/2008-05-29/news/guadalupe-made-it-clear-that-joe-arpaio-s-attacking-anyone-with-brown-skin>.

162. Julio Mora, a U.S. citizen, and his father, a legal permanent resident, were detained for hours pursuant to one of Sheriff Arpaio’s sweeps of a landscaping business, Handyman Maintenance, Inc., in February 2009. The Moras have since filed a lawsuit alleging violations of their civil rights under 42 U.S.C. § 1983, claiming that they were detained simply because they were Latino. See Stephen Lemons, *Joe Arpaio vs. ACLU: New Lawsuit Tomorrow over Worksite*

work on the day of one of Sheriff Arpaio's sweeps.<sup>163</sup> These raids have created a palpable climate of fear in Maricopa County that can be directly traced to the federal government's delegation of immigration enforcement responsibilities to a local law enforcement agency that has neither the training, nor the oversight, to carry out these functions properly.

A thorough treatment of the civil and human rights abuses that the Maricopa County Sheriff's Office has allegedly engaged in is beyond the scope of this Article.<sup>164</sup> However, when examining the ways in which Sheriff Arpaio has seen fit to implement his authority under § 287(g) to question, detain, and arrest persons solely for suspected civil immigration status violations, it is important to note the way in which the Sheriff has relied upon Arizona state law in accomplishing his goal of ridding Maricopa County of undocumented persons. In particular, Sheriff Arpaio has used the statewide anti-immigrant laws passed in recent years<sup>165</sup> to create an environment where—in collusion with the Maricopa County Attorney's Office—persons who are alleged to be undocumented immigrants are pretextually stopped, arrested, charged, and detained based on little more than race, color, ethnicity, or national origin.<sup>166</sup> As a result, Sheriff Arpaio has been subject to repeated allegations of racial

---

*Raid*, PHOENIX NEW TIMES, Aug. 18, 2009, [http://blogs.phoenixnewtimes.com/bastard/2009/08/sheriff\\_joe\\_arpaio\\_vs\\_aclu\\_new.php](http://blogs.phoenixnewtimes.com/bastard/2009/08/sheriff_joe_arpaio_vs_aclu_new.php).

163. See Testimony of Julio Cesar Mora, *Public Safety and Civil Rights Implications of State and Local Enforcement of Immigration Laws: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Security and Int'l Law and the Subcomm. on the Const., Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. 11 (2009) U.S. House of Representatives, Committee on the Judiciary, Apr. 2, 2009, at 11, [http://judiciary.house.gov/hearings/printers/111th/111-19\\_48439.pdf](http://judiciary.house.gov/hearings/printers/111th/111-19_48439.pdf).

164. The author is currently in the process of writing an Article dedicated solely to the battle over immigration in the State of Arizona. The author hopes to publish the Article, *Historic Police Powers or State-Sanctioned Vigilantism? How Arizona Became Ground Zero for the Immigrants' Rights Movement and the Continuing Struggle for Latino Civil Rights in America*, sometime in 2010.

165. For a discussion of anti-immigrant laws in the State of Arizona, see *supra* Part I.

166. Details of the Maricopa County Sheriff's Office's conduct that raise serious concerns about racial profiling of Latinos can be found in the Pulitzer Prize winning five-part series *Reasonable Doubt*. Ryan Gabrielson & Paul Giblin, *Reasonable Doubt: Tribune Investigates Sheriff's Immigration Campaign: At What Cost?*, E. VALLEY TRIB. (Mesa, Ariz.), July 9, 2008, at A12. Additionally, a federal lawsuit against Maricopa County and the Maricopa County Sheriff's Office is currently pending in the United States District Court for the District of Arizona, alleging racial profiling on behalf of five individuals by the Sheriff's Office based on their Latino ethnicity. See *Ortega-Melendres v. Arpaio*, 598 F. Supp. 2d 1025, 1029 (D. Ariz. 2009). The plaintiffs' motion for class certification was denied on August 24, 2009, with the court holding that it a decision on the motion would be "premature." See *Ortega-Melendres v. Maricopa County*, No.CV-07-2513-PHX-GMS, 2009 WL 2707241, at \*7 (D. Ariz. Aug. 24, 2009).

profiling<sup>167</sup> and has created a reign of terror for all Latinos in Maricopa County—citizen and immigrant alike.<sup>168</sup>

*B. ICE Raids in the Bush Administration*

Although the large-scale raids undertaken by ICE in the waning years of the Bush Administration were not a devolution of immigration federalism in the same way the 287(g) program is, I argue that these types of splashy—and largely ineffective—enforcement-only tactics by ICE are the result of the federal government’s recent laziness in exercising its plenary power over immigration. That is, while Congress and the Executive could make much more meaningful headway on immigration issues by pursuing comprehensive immigration reform at the federal level and penalizing employers who are in violation of the Immigration Reform and Control Act (IRCA),<sup>169</sup> it has been easier for them to delegate enforcement of immigration violations to local authorities and conduct devastating raids on hard-working immigrants that do nothing to solve our immigration problems, but give the appearance of being tough on individuals who have committed the “crime” of working without authorization.

While worksite raids were common in the Bush Administration, the incident that has come to symbolize in the minds of many the tragedy as well as the failure of enforcement-only immigration federalism is the Postville Raid of 2008.<sup>170</sup> The worksite raid at Agriprocessors, Inc., in Postville, Iowa was a devastating and unprecedented event in immigration enforcement in United States immigration policy, both for the employer and the employees who were caught up in the federal government’s dragnet. What sets the Postville raid apart from other ICE raids, both before and since, is the novel theory used by the United States Attorney’s Office of the Northern District of Iowa against the employees who were detained in the raid—the use of their prosecutorial

---

167. See Gabrielson & Giblin, *supra* note 166.

168. Sheriff Arpaio’s deputies are alleged to routinely stop and detain U.S. citizens of Latino heritage based on nothing more than their ethnicity. For example, four of the five named plaintiffs in *Ortega-Melendres* are U.S. citizens who alleged that they were racially profiled by the Maricopa County Sheriff’s Office. See *Ortega-Melendres*, 598 F. Supp. 2d at 1030.

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

170. Federal immigration authorities raided a plant operated by Agriprocessors, Inc., on May 12, 2008, in Postville, Iowa, charging hundreds of undocumented workers with aggravated identity theft in order to procure guilty pleas from the workers. For a summary of the events at Postville and criticism of the actions taken by the government, see generally Julia Preston, *An Interpreter Speaking Up for Immigrants*, N.Y. TIMES, July 11, 2008, at A1; *abUSed—The Postville Raid* (Internet video), Oct. 2008, <http://www.abusedthepostvilleraid.com>.

discretion to charge hundreds of undocumented persons with identity theft under federal criminal law.<sup>171</sup>

Most of the persons charged pursuant to the Postville raids served five months in federal prison and were then deported.<sup>172</sup> However, the egregious due process violations that were noted by attorneys and advocates for the immigrants workers caught up in the Postville raid,<sup>173</sup> as well as the United States Supreme Court's subsequent decision in *Flores-Figueroa v. United States*<sup>174</sup> clarifying under what circumstances prosecutors may charge certain individuals with "aggravated identity theft,"<sup>175</sup> were a watershed moment regarding how ICE and local prosecutors carry out worksite raids.<sup>176</sup> While Secretary Napolitano has not indicated that worksite raids will cease completely—and indeed, raids have continued under the Obama Administration<sup>177</sup>—the lessons learned from the Postville raid make it unlikely that such aggressive enforcement of IRCA violations will continue now that the Bush Administration has come to an end.

---

171. See, e.g., Jens Manuel Krogstad, *Harkin's Nominee for U.S. Attorney Under Fire for Role in Postville Raid*, THE COURIER (Waterloo, Iowa), Apr. 5, 2009, at A1, available at [http://www.wfcourier.com/news/politics/article\\_546da03d-18c5-51b0-a3ef-7ba0c644eb22.html](http://www.wfcourier.com/news/politics/article_546da03d-18c5-51b0-a3ef-7ba0c644eb22.html).

172. See Nigel Duara, William Petroski & Grant Shulte, *Claims of ID Fraud Lead to Largest Raid in State History*, DES MOINES REG., May 12, 2008, available at <http://www.desmoinesregister.com/article/20080512/NEWS/80512012/Claims-of-ID-fraud-lead-to-largest-raid-in-state-history>.

173. See, e.g., Erik Camayd-Freixas, *Interpreting the Largest ICE Raid in History: A Personal Account*, June 13, 2008, at 3–4, <http://graphics8.nytimes.com/images/2008/07/14/opinion/14ed-camayd.pdf>. Dr. Camayd-Freixas, a Professor of Interpreting at Florida International University, served as an interpreter for many of the detained Postville workers and has been extremely critical of the tactics taken by the government in the Postville raid.

174. *Flores-Figueroa v. United States*, 129 S. Ct. 1886 (2009).

175. *Flores-Figueroa* involved a challenge to a defendant's conviction for aggravated identity theft, and the accompanying mandatory minimum sentence of two years, as applied to an individual whose false social security number did not actually belong to another person. The U.S. Attorney in the Northern District of Iowa charged all the persons detained in the Postville raid with aggravated identity theft in order to procure guilty pleas from the defendants, regardless of the underlying facts of how they obtained their false documentation and their individual levels of knowledge. In a 9-0 decision, the Court held that in order for the government to obtain a conviction for aggravated identity theft, the prosecution had to prove that the defendants "knowingly" used the identity information of an actual individual. See *id.* at 1894.

176. The former executive of Agriprocessors, Inc., Sholom Rubashkin, was subsequently prosecuted criminally in connection with his management of the Postville meat-packing plant. On November 12, 2009, he was found guilty of 86 counts of bank fraud, and potentially faces life in prison. Mr. Rubashkin also faces another trial in South Dakota in December 2009 for alleged immigration violations. See Nathaniel Popper, *Former Agriprocessors CEO Rubashkin Sent to Prison*, THE JEWISH DAILY FORWARD, Nov. 18, 2009, <http://www.forward.com/articles/119188/>.

177. See, e.g., Lornet Turnbull, *Immigration Officials Raid Bellingham Plant*, THE SEATTLE TIMES, Feb. 24, 2009, [http://seattletimes.nwsources.com/html/nationworld/2008781541\\_webraid24m.html](http://seattletimes.nwsources.com/html/nationworld/2008781541_webraid24m.html).

C. *The Increase of Hate Crimes Against Immigrants and Latinos in the 2000s*

In the wake of the stepped-up enforcement against undocumented immigrants by the Bush Administration, and the increasing reliance on state and local law enforcement agencies to enforce federal immigration law, the debate surrounding immigration took a tragic—though I argue, not unforeseeable—turn as the rhetoric often used by immigration restrictionists became the calling card of hate against immigrants, Latinos, and other groups that are easily targeted as potentially “foreign.”<sup>178</sup> Although hate crimes against persons of color did, unfortunately, occur prior to the rise of inflammatory immigration rhetoric, it is nearly impossible to deny that the sharp spike in hate crimes against Latinos—a 40% increase between 2003 and 2007<sup>179</sup>—is not somehow connected to the often racist and xenophobic undertones that arise in the immigration debate.<sup>180</sup>

A recent hate crime that had overtly racist overtones against a Latino immigrant was the murder of Luis Ramirez in 2008 in Shenandoah, Pennsylvania,<sup>181</sup> which is not too far from the infamous Hazleton, Pennsylvania.<sup>182</sup> Ramirez, an undocumented Mexican national who had lived in Shenandoah for several years with his fiancé and their children, was murdered by three White high-school students following a confrontation late one night in July 2008.<sup>183</sup> Although the overtly racist elements of the murder were undisputed—the students admitted to uttering racial slurs as they hit, kicked, punched, and stomped Ramirez to death<sup>184</sup>—the students were not

---

178. See Hatewatch, *Anti-Latino Hate Crimes Rise for Fourth Year in a Row*, S. POVERTY L. CENTER, Oct. 29, 2008, <http://www.splcenter.org/blog/2008/10/29/anti-latino-hate-crimes-rise-for-fourth-year>.

179. *Id.*

180. Overtly racist commentary directed toward Latinos—particularly Mexicans—can generally be found in the comments section of any major online newspaper article discussing immigration or immigration reform. See, e.g., Linda Valdez, *Arizona: Give Amnesty to Migrants*, ARIZ. REPUBLIC, Aug. 27, 2007, <http://www.azcentral.com/members/Blog/Valdez/6002> (see comments section) (last visited Feb. 9, 2010). However, for a more thorough analysis of the link between anti-immigrant sentiment and hate crimes, see Anti-Defamation League, *Immigration Reports and Resources*, [http://www.adl.org/civil\\_rights/immigration.asp](http://www.adl.org/civil_rights/immigration.asp) (last visited Feb. 9, 2010).

181. See, e.g., Sean D. Hamill, *Mexican's Death Bares a Town's Ethnic Tension*, N.Y. TIMES, Aug. 5, 2008, <http://www.nytimes.com/2008/08/05/us/05attack.html>.

182. For a discussion on Hazleton, see *supra* Part I.

183. See Hamill, *supra* note 181.

184. See, e.g., Emanuella Grinberg, *Some Satisfied, Others Outraged with Verdict for Immigrant's Death*, CNN, May 3, 2009, <http://www.cnn.com/2009/CRIME/05/02/pa.immigrant.beating/index.html> (last visited Feb. 9, 2010).

charged with a hate crime<sup>185</sup> and were ultimately acquitted of murder by an all-White jury.<sup>186</sup>

Unfortunately, Luis Ramirez is not the only Latino immigrant who lost his life as a result of xenophobic furor.<sup>187</sup> Although the United States Department of Justice is investigating the murder of Luis Ramirez and other Latinos as hate crimes,<sup>188</sup> there is still a great deal of fear in the immigrant and Latino community not only of becoming a target of a racially-motivated crime, but also of potentially being subject to negative immigration consequences for reporting criminal activity.<sup>189</sup>

### III. THE PLENARY POWER DOCTRINE VS. STATE POLICE POWER: WHAT CONGRESS AND THE OBAMA ADMINISTRATION MUST DO TO ACCOMPLISH MEANINGFUL IMMIGRATION REFORM

#### A. *Congress's Plenary Power to Regulate Immigration*

In the wake of what Professor Michael Wishnie has called the “devolution” of the federal immigration power,<sup>190</sup> and the subsequent resurgence of the state and local immigration regulations discussed in Part I, there has been an increasingly lively conversation among immigration law scholars regarding the constitutionality of immigration federalism and how far the plenary power doctrine extends.<sup>191</sup> As has been noted, it has long been accepted that

185. One of the youths, Colin Walsh, pleaded guilty to violating Mr. Ramirez's civil rights in federal court and testified against the other alleged killers in the state prosecution. See Michael Rubinkam, *Luis Ramirez Killers Found Not Guilty After Beating Mexican Immigrant to Death*, HUFFINGTON POST, May 2, 2009, [http://www.huffingtonpost.com/2009/05/04/luis-ramirez-killers-found\\_n\\_195535.html](http://www.huffingtonpost.com/2009/05/04/luis-ramirez-killers-found_n_195535.html).

186. See Grinberg, *supra* note 184.

187. Other Latinos whose deaths are being investigated as hate crimes include Marcelo Lucero, 37, an Ecuadoran immigrant who was murdered by teenagers looking for “beaners” in Patchogue, New York on Nov. 8, 2008; Wilter Sanchez, beaten and then run over in New Jersey on January 21, 2009; and José Sucuzhañay, murdered on December 9, 2008, by individuals yelling racist and anti-gay slurs in New York. See Ramona E. Romero & Cristóbal Josh Alex, *Hispanic Groups Angered by Immigrant Hate Crimes*, LATINO J., Jan. 26, 2009, <http://thelatinojournal.blogspot.com/2009/01/hispanic-groups-angered-by-immigrant.html>.

188. See Frank Eltman, *After Immigrant Killed in NY, Others Tell of Abuse*, ABC NEWS, Nov. 7, 2009, <http://abcnews.go.com/US/wireStory?id=9021630>.

189. *Id.* (reporting that “many victims had always been reluctant to contact police, fearing they would be asked about their immigration status”).

190. See Wishnie, *supra* note 143, at 512.

191. See, e.g., Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787, 807 (2008) (reexamining the constitutionality of federal exclusivity to regulate immigration); Rodríguez, *supra* note 6, at 575–76 (arguing that localities may constitutionally play a role in immigration law and policy and the potential benefits that can flow from such regulation); Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084, 1088–95 (arguing that the federal government has the exclusive

immigration law is primarily, if not exclusively, within the province of the federal government.<sup>192</sup> However, there is also a long history of state regulation of immigration that arises from their inherent police powers.<sup>193</sup> As a result, the lines between where federal dominance of immigration regulation ends, and the states' authority to regulate immigration pursuant to their legitimate interests begins, has become increasingly blurry as time goes on.

### 1. The Doctrine of Immigration Federalism

The word “immigration” does not appear anywhere in the United States Constitution. The only power expressly delegated to Congress in the Constitution concerning immigration is the authority to “establish a[n] uniform Rule of Naturalization.”<sup>194</sup> However, it is well-settled that the federal government has the power to regulate the admission of aliens to this country, as well as the power to exclude and remove them if they see fit.<sup>195</sup> This is because, despite the lack of express authority in the Constitution giving the political branches the power to regulate immigration, the federal courts have consistently held that Congress has “plenary power” to regulate immigration.<sup>196</sup>

Congress's plenary power to regulate immigration is an expansive doctrine that was first announced by the United States Supreme Court in *The Chinese Exclusion Case*.<sup>197</sup> In that case, the Court rejected the claim by a Chinese laborer, Chae Chan Ping, that his exclusion from the United States on the basis of his race violated the Constitution.<sup>198</sup> In holding that Congress has the power to exclude aliens on any basis it sees fit—including race—the Court stated:

Whatever license . . . Chinese laborers may have obtained, previous to the act of October 1, 1888, to return to the United States after their departure, is held at the will of the government, revocable at any time, at its pleasure. Whether a proper consideration by our government of its previous laws . . .

---

authority to regulate immigration); Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373, 1400–01 (2006) (same).

192. See Chae Chan Ping & Fong Yue Ting, *The Origins of Plenary Power*, in IMMIGRATION LAW STORIES 7 (David A. Martin and Peter H. Schuck ed., 2005).

193. See Gerald L. Neuman, *A Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833, 1866–67 (1993).

194. U.S. CONST. art. I, § 8, cl. 4.

195. See, e.g., Adam B. Cox & Cristina Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458 (2010).

196. See Ping & Ting, *supra* note 192.

197. See generally *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

198. *Id.* at 611.

ought to have qualified its inhibition . . . are not questions for judicial determination.<sup>199</sup>

Thus, *The Chinese Exclusion Case* is notable for announcing the plenary power doctrine, holding that regulation of immigration is exclusively within the province of the political branches of the federal government, and that the decisions made by Congress and the Executive regarding whom to admit and whom to exclude.<sup>200</sup>

Since *The Chinese Exclusion Case*, the Supreme Court has repeatedly reaffirmed the federal government's sovereignty over immigration.<sup>201</sup> The Supreme Court has also weighed in rather forcefully regarding the proper role of the states in immigration regulation, stating in *United States v. Pink*<sup>202</sup> that “[p]ower over external affairs is not shared by the States; it is vested in the national government exclusively.”<sup>203</sup> In *Harisades v. Shaughnessy*,<sup>204</sup> the Supreme Court broadly categorized Congress's plenary power to regulate immigration as concerning “any policy toward aliens.”<sup>205</sup> However, despite the unquestionable Supremacy of federal law in immigration matters, the fact remains that the states' historic police powers to regulate in other areas traditionally reserved to them often complicates the question of when a permissible regulation of aliens by a state becomes an impermissible regulation of immigration law.<sup>206</sup> This has led, perhaps inevitably, to the conflict between state and federal regulation of immigration that we face today.

## B. *The States' Historic Police Powers Concerning Immigration*

### 1. Early Interpretations of the States' Immigration Powers

Although the Constitution expressly grants Congress the regulate naturalization—and therefore, impliedly, immigration—Congress did not see fit to establish uniform regulations governing immigration until the late nineteenth century.<sup>207</sup> In fact, it appears that the framers of the Constitution left laws regulating the exclusion of aliens to the several states, while the federal government itself maintained what was more or less an “open borders”

199. *Id.* at 609.

200. *See, e.g.*, Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255.

201. *See, e.g.*, *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

202. 315 U.S. 203 (1942).

203. *Id.* at 233.

204. 342 U.S. 580 (1952).

205. *Id.* at 588.

206. As the U.S. Supreme Court has stated, not every regulation of aliens is a regulation of immigration. *See De Canas v. Bica*, 424 U.S. 351, 355 (1976).

207. *See Neuman, supra* note 193, at 1866–67.

immigration policy.<sup>208</sup> In fact, prior to Congress's passage of laws regulating immigration at the federal level in 1875,<sup>209</sup> it was commonplace for the States to have their own laws and policies regulating who could remain within their territories.<sup>210</sup>

However, despite the fact that the States had an early role in regulating immigration, once the federal government stepped in and asserted its authority over immigration, the States were generally reluctant to challenge that scheme. While the view that the States retain some inherent authority to regulate immigration would arise occasionally over the next century,<sup>211</sup> the prevailing doctrine of Congress's plenary power to regulate immigration largely prevented States from attempting to pass their own immigration laws independent of the federal government.<sup>212</sup> It was not until the late twentieth century that, once again, the States began to assert that their historic police powers not only permit, but require the federal government to defer to the States on certain matters pertaining to aliens within their borders, such as education and employment.<sup>213</sup>

## 2. Modern Interpretations of the States' Authority to Regulate Immigration

Because of what Professor Neuman calls the "lost century" of American immigration law,<sup>214</sup> in which the federal government had virtually no role concerning the regulation of immigration, the debate regarding the proper role of states in modern immigration law and policy rages on to this day. While the INA has been amended countless times since its creation in 1952,<sup>215</sup> Congress has, in general, said precious little about where the federal power to regulate immigration ends and the states' historic police power to govern their affairs by regulating the activities of immigrants within their jurisdiction begins.

---

208. See Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power Over Foreign Affairs*, 81 TEX. L. REV. 1, 81 (2002).

209. See Neuman, *supra* note 193, at 1834.

210. See Rodríguez, *supra* note 6, at 611–14.

211. See, e.g., *Hines v. Davidowitz*, 312 U.S. 52 (1941).

212. *Id.*

213. See, e.g., Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179 (2005) (arguing that the federal government only has enumerated powers, and because immigration regulation is not expressly enumerated in the Constitution as a federal power, it is left to the states to regulate the activities of immigrants within their borders).

214. See Neuman, *supra* note 193, at 1834.

215. The most recent—and sweeping—revision of the INA occurred in 1996. See *Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) of 1996*, Pub. L. 104-208, 110 Stat. 3009-546 (1996).

Perhaps the area in which the line between state and federal regulation of immigration is the most blurred concerns the employment of undocumented immigrants. In 1976, the United States Supreme Court held in *De Canas v. Bica* that California's state law regulating the employment of unauthorized aliens was not preempted under federal law.<sup>216</sup> The decision in *De Canas*, which held that it was within the states' historic police power to regulate the employment of undocumented immigrants, was controlling precedent for the next decade.<sup>217</sup> Then, in 1986, Congress passed the Immigration Reform and Control Act (IRCA),<sup>218</sup> which made the employment of unauthorized workers "central to '[t]he policy of immigration law.'"<sup>219</sup> Therefore, in light of Congress's action, the conventional wisdom since the implementation of IRCA had been that since Congress had enacted a comprehensive federal scheme regulating the employment of aliens, the states no longer had the authority to enact laws like the one upheld in *De Canas* because they would now be preempted under federal law except in limited circumstances.<sup>220</sup>

However, in September 2008, the United States Court of Appeals for the Ninth Circuit held that Arizona's state employer sanctions law was not preempted under the Supremacy Clause because "the power to regulate the employment of unauthorized aliens remains within the states' historic police powers."<sup>221</sup> Although the plaintiffs have petitioned the United States Supreme Court for a writ of certiorari,<sup>222</sup> this decision by the Ninth Circuit has cast serious doubt on the proper role of the States in the enforcement of immigration law post-IRCA, particularly in the area of regulating employment of undocumented immigrants.

Another area in which the United States Supreme Court has weighed in on the battle between state and federal regulation of undocumented aliens is education. Following its decision in *De Canas*, in 1982 the United States Supreme Court struck down a Texas statute that prohibited undocumented immigrant children from receiving free primary and secondary education at the

---

216. *De Canas v. Bica*, 424 U.S. 351, 355–56 (1976).

217. *Id.* at 357.

218. Pub. L. No. 99-603, 100 Stat. 3359 (1986).

219. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002) (quoting *INS v. Nat'l Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 194 n.8 (1991)).

220. IRCA contains several "savings clauses" that permit the states to regulate immigration in a limited fashion. The most prominent saving clause, which carves out an exception for states that permits them to regulate employment through "licensing or similar laws," is contained in § 1324(a)(h)(2), and has been the catalyst for a great deal of litigation in the last several years. See *supra* Part I.B.

221. *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856, 865 (9th Cir. 2009).

222. See *supra* note 122 (discussing the status of the petition in *United States Chamber of Commerce v. Candelaria*).

state's expense in *Plyler v. Doe*.<sup>223</sup> In its holding, the *Plyler* Court stated that “the States do have some authority to act with respect to illegal aliens, at least where such action mirrors federal objectives and furthers a legitimate state goal.”<sup>224</sup> However, the majority held that States did not have the authority to deny undocumented immigrant children the right to an education on equal protection grounds, despite the fact that they also explicitly held found that Texas had a legitimate state interest in attempting to mitigate the financial burden imposed on the State by educating such children.<sup>225</sup>

The holding in *Plyler* has not yet been revisited by the Supreme Court, and it continues to stand for the narrow proposition that undocumented children may not be denied an education at public expense—despite the Court's express holding that education is not a fundamental right.<sup>226</sup> Therefore, although some States occasionally raise the idea of attempting to pass legislation prohibiting undocumented children from receiving a free public education,<sup>227</sup> unless and until the Supreme Court overturns its decision in *Plyler*, it can safely be said that the States may not restrict education to undocumented children as part of their historic police powers.<sup>228</sup>

### C. *The Supremacy Clause and Preemption of State Regulation of Immigration in the Obama Administration*

#### 1. The Role of the Executive in Immigration Regulation as a Matter of Law, Not Policy

Although this article is critical of the enforcement-heavy immigration policies of the Bush Administration,<sup>229</sup> it is a fact that the President has the constitutional authority to enforce federal immigration laws in any manner he

223. 457 U.S. 202 (1982).

224. *Id.* at 230.

225. *Id.* at 223, 228. The holding in *Plyler*, which was the result of a 5-4 split of the Court, has been criticized as not grounded in law but as based on the Court's attempt to avoid a result that would have been a policy disaster.

226. *Id.* at 221, 227.

227. While not advocating for a complete ban against enrolling undocumented students in public school, in April 2009, Pima County, Arizona Sheriff Clarence Dupnik opined that school districts should check the citizenship of students before allowing them to enroll. See *Pima County Sheriff Calls for School Immigration Checks*, ARIZ. REPUBLIC., Apr. 29, 2009, <http://www.azcentral.com/community/pinal/articles/2009/04/29/20090429SchoolChecks29-ON.html>.

228. There are, of course, persons who believe the decision in *Plyler* must be overturned, and are hoping to bring a case that would ultimately reverse *Plyler* up to the Supreme Court. See, e.g., David W. Stewart, *Immigration and School Overcrowding*, THE FED'N FOR AM. IMMIGR. REFORM, Oct. 2, 2009, [http://www.fairus.org/site/PageServer?pagename=iic\\_immigrationissuecenters51f8](http://www.fairus.org/site/PageServer?pagename=iic_immigrationissuecenters51f8) (last visited Feb. 10, 2010).

229. See *supra* Part II.

sees fit, so long as in doing so he does not frustrate the will of Congress.<sup>230</sup> Therefore, while I disagree with the immigration enforcement tactics taken by the Bush Administration as a matter of policy, I do not believe it would have been better to allow state and local governments to take immigration enforcement matters into their own hands simply because they disagree with the policy of the federal government. As stated repeatedly in this Article, I believe that allowing the States to regulate immigration apart from or in addition to the policies set by the federal government—either by being more permissive *or* more restrictive—is not a constitutionally sound policy, and that the Obama Administration should work with Congress to put an end to the growing split of authority on this issue percolating in the federal courts by amending the INA in the very near future.

In this respect, I want to emphasize the difference between affirmative rejection of federal immigration law and policy by state and local governments, as opposed to policy decisions made by local law enforcement that are designed to reinforce federal immigration law. For example, there has been much debate over so-called “sanctuary cities,” which are local jurisdictions that have stated that they will not require or permit local law enforcement officials to enforce federal immigration laws.<sup>231</sup> Critics have accused sanctuary cities of “flouting” federal immigration law, and contend that they are merely the flip-side of the state and local anti-immigrant laws described in Part I.<sup>232</sup> In reality, however, the policies of these cities merely reaffirm the proper lines between state and federal jurisdictions by refusing to require or permit local law enforcement officers to act as federal immigration agents without the training or jurisdiction to do so.<sup>233</sup>

Because these “sanctuary city” laws do not add or subtract to federal immigration law—indeed, they do nothing more than restate what is required under federal law—it cannot accurately be said that such laws must also be preempted under the Supremacy Clause as impermissible regulations of immigration. By contrast, the anti-immigrant laws passed by various states and municipalities have, by and large, been substantive attempts to alter the federal immigration laws set forth in the Immigration and Nationality Act

---

230. See, e.g., Cox & Rodríguez, *supra* note 195.

231. See, e.g., Kobach, *supra* note 213, at 206 (arguing that local governments are preempted by federal law from enacting sanctuary or federal non-cooperation ordinances); Pham, *supra* note 191, at 1402–03 (arguing that the local governments should be permitted, as a matter of sovereignty, to refuse to cooperate with federal immigration authorities).

232. See, e.g., Kobach, *supra* note 213, at 227.

233. See, e.g., Los Angeles Police Dept. Special Order 40, <http://keepstuff.homestead.com/Spec40orig.html> (last visited Feb. 10, 2010). Special Order 40, which was implemented by former Chief Darryl Gates, has been the policy of the Los Angeles Police Department (LAPD) since 1979. *Id.* Special Order 40 states that LAPD officers have the responsibility to enforce state and local law, not federal immigration law, and thus have no jurisdiction to arrest persons for civil immigration violations. *Id.*

(INA).<sup>234</sup> As such, my argument that now is the critical time for the political branches to reassert their dominance in the field of immigration regulation is based on my belief in the principle of immigration federalism, and not on the merits of the policies of either the Bush or Obama Administrations.<sup>235</sup>

## 2. Congress and the Obama Administration Must Act Now to Reassert the Supremacy of Federal Immigration Law

I argue that the first step that must be taken by the Obama Administration in order to reestablish the supremacy of the federal government in immigration matters is to enact an immediate moratorium on the 287(g) program, and to eventually abolish the program altogether.<sup>236</sup> As discussed previously,<sup>237</sup> although § 287(g) expressly provides that the federal government may delegate some of its enforcement of immigration law to state and local law enforcement through Memorandums of Agreements (MOA),<sup>238</sup>—formerly called Memorandums of Understanding (MOU)<sup>239</sup>—I argue that § 287(g) needs to be repealed in its entirety—not merely amended—in order to achieve the clarity necessary on behalf of the federal government to wholly occupy the field of immigration law and halt all state and local attempts to regulate immigration.

Beyond the repeal of § 287(g), I believe that meaningful comprehensive immigration reform will require a complete substantial overhaul of the INA in its entirety, in a way that forcefully reasserts Congress's plenary power to regulate immigration. Historically, Congress has used to its plenary power to regulate immigration through the INA not by giving more rights to immigrants, but by restricting them.<sup>240</sup> I argue that in light of the recent trend of some courts to interpret the proper role of the states in immigration enforcement broadly—that is, to focus on their historic police powers, rather than the supremacy of the federal government in immigration matters—it is essential that Congress amend the INA to expressly preempt state regulation of immigration by the state in all matters. I suggest that rather than attempting to

---

234. *See supra* Part I.

235. Although I do, of course, hold opinions about the merits and morality of the policies of both administrations. *See infra* Part II. *See supra* Part IV.

236. *See supra* Part II. Additionally, immigrants' rights advocates and civil libertarians have been calling for a moratorium on the 287(g) program for some time now. *See, e.g., Raids on Workers: Destroying Our Rights*, NAT'L COMM'N ON ICE MISCONDUCT AND FOURTH AMENDMENT VIOLATIONS, [http://www.icemisconduct.org/docUploads/UFCW%20ICE%20rpt%20FINAL%20150B\\_061809\\_130632.pdf](http://www.icemisconduct.org/docUploads/UFCW%20ICE%20rpt%20FINAL%20150B_061809_130632.pdf) (last visited Feb. 10, 2010).

237. *See supra* Part II.

238. *See supra* Part II.A.3 (exemplifying the pre-2009 § 287(g) MOA is the DHS's agreement with Maricopa County, Arizona).

239. *See supra* note 125.

240. *See generally* Cox & Rodríguez, *supra* note 195 (discussing Congress's historical use of the plenary power doctrine to regulate immigration).

clean up poorly worded statutes, such as the infamously ambiguous “savings clause” in the express preemption provision of 8 U.S.C. 1324(a)(h)(2),<sup>241</sup> Congress needs to simply write a new, catch-all provision of the INA that clearly and succinctly draws the line between state and federal regulation of immigration.

It is possible, of course, that in drawing a bright line between state and federal authority to regulate immigration, that Congress may choose to expand the parameters of what is currently believed to be the legitimate authority of the states in this area. However, even if Congress chooses ultimately to delegate its power in this manner, it will be preferable to having what we have now—which is to say, a hodgepodge of various state and local regulations of immigration, some of which have been held to conflict with federal immigration laws and others which have not.

#### IV. DARING TO DREAM: A RE-INVENTION OF IMMIGRATION LAW AND POLICY IN THE UNITED STATES

##### A. *The Promise of a New Day: Plenary Power, International Law, and Comprehensive Immigration Reform in the Twenty-First Century*

President Obama’s receipt of the Nobel Peace Prize in October 2009<sup>242</sup> demonstrates, more than any of his other accomplishments to date, the potential for radical change under his leadership and the hope that his Presidency embodies not just within our nation, but worldwide. Although critics have charged that this prestigious honor was prematurely bestowed on the President<sup>243</sup>—that he has not yet done anything to merit such recognition less than a year into his Presidency—others see the Nobel Peace Prize as a vote of confidence in President Obama’s ability to be a global leader and innovator of change. It is almost certain that one of the areas in which the world wants—and needs—to see President Obama pursue peace is one of the most pressing issues of our time: international immigration and migration.

While the plenary power to regulate immigration has traditionally been viewed by both Congress and the Executive as an insular act of foreign

---

241. Interpretation of this statute has been addressed by no less than three federal district courts (W.D. Okla., M.D. Pa., and D. Ariz) and one federal appellate court (Ninth Circuit), while two additional federal appellate courts (Tenth Circuit and Third Circuit) currently have the issue under submission. *See supra* note 119.

242. *See* Nobel Peace Prize 2009 [http://nobelprize.org/nobel\\_prizes/peace/laureates/2009/press.html](http://nobelprize.org/nobel_prizes/peace/laureates/2009/press.html) (last visited Feb. 10, 2010).

243. *See, e.g.,* Sam Stein, *Obama’s Nobel Prize Inspires Conservative Outrage and Confusion*, HUFFINGTON POST, Oct. 9, 2009, [http://www.huffingtonpost.com/2009/10/09/obamas-nobel-prize-inspir\\_n\\_315167.html](http://www.huffingtonpost.com/2009/10/09/obamas-nobel-prize-inspir_n_315167.html) (discussing sentiment that President Obama has not yet accomplished anything in his short presidency that would merit the award of the Nobel Peace Prize at this time) (last visited Feb. 10, 2010).

sovereignty,<sup>244</sup> increasing globalization has made it more and more difficult for United States immigration policy to refrain from incorporating at least some norms of international law into our domestic immigration laws.<sup>245</sup> As a result, immigrants' rights advocates have for some time been calling for the United States to draw more liberally from an international human rights perspective in immigration law and policy, particularly as it pertains to the admission and removal of immigrants.<sup>246</sup> Unfortunately, fearing that such an expansion of American immigration laws into the international realm might somehow negatively impact our sovereignty either implicitly or explicitly,<sup>247</sup> Congress has thus far not chosen to amend the INA in a way that reflects many of the precepts of international human rights law.<sup>248</sup>

In my opinion, however, a radical interpretation of the call to incorporate international human rights into American immigration law and policy can be reconciled with both the United States' desire to control our sovereignty and our need for comprehensive immigration reform. In fact, I believe that if there is to be meaningful immigration reform at the federal level, the political branches must do more than simply amend the INA—they must rewrite it to reflect what is rapidly becoming the internationalization of immigration law and policy within our borders. Thus, I propose that—borrowing from the European Court of Justice's doctrine of “freedom of movement”<sup>249</sup>—Congress and the Executive use their plenary power to regulate immigration to reconstruct our immigration laws and policies in a way that recognizes the inherent human right of migration, puts a definitive end to the devolution of

---

244. See, e.g., *Chae Chan Ping v. United States*, 130 U.S. 581, 609 (1889) (holding that the federal government has the authority as a sovereign nation to regulate its borders and the admission of persons into the interior).

245. For example, U.S. refugee and asylum law explicitly incorporates international treaties and pronouncements into the Immigration and Nationality Act. See Immigration and Nationality Act § 208, 8 U.S.C. § 1158 (2008) (codifying asylum and refugee protections under U.S. law).

246. See Saby Ghoshray, *Is There a Human-Rights Dimension to Immigration? Seeking Clarity Through the Prism of Morality and Human Survival*, 84 *DENV. U. L. REV.* 1151, 1153 (2007).

247. There has been a great deal of paranoia that internationalization of our immigration laws will cause the United States to follow the example of the European countries and unite with Mexico and Canada to form a “North American Union.” See, e.g., Phillip Dine, *Where Are They Going with This?*, *SEATTLE TIMES*, May 19, 2007, at A3, available at [http://seattletimes.nwsource.com/html/nationworld/2003713518\\_rumor19.html](http://seattletimes.nwsource.com/html/nationworld/2003713518_rumor19.html).

248. In fact, Congress's most recent comprehensive amendments to the INA in 1996 resulted in the criminalization of more categories of immigrants, with harsher penalties for immigrants convicted of relatively minor crimes, including deportation and mandatory detention pending removal proceedings. See Immigration and Nationality Act § 212(a), 8 U.S.C. § 1182 (2008).

249. Europa.eu, Free Movement of Persons, Asylum, and Immigration, [http://europa.eu/legislation\\_summaries/justice\\_freedom\\_security/free\\_movement\\_of\\_persons\\_asylum\\_immigration/index\\_en.htm](http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_immigration/index_en.htm) (last visited Feb. 10, 2010).

immigration federalism, and moves the United States forward into the global society we inhabit in the twenty-first century.

*B. Freedom of Movement and Common Immigration Policy in the European Union and Meaningful Comprehensive Immigration Reform in the United States*

One of the central principles of the European Union is the directive concerning the free movement of persons within the EU Member States.<sup>250</sup> The European Union's concept of "freedom of movement" began with an idea that, upon reflection, seems rather modest—a commitment to the "freedom of workers" in Europe to migrate in order to make a living and support their families.<sup>251</sup> However, it gradually expanded to cover the freedom of movement of all persons within the EU in order to, among other things, "provide a better definition of the status of family members and to limit the scope for refusing entry or terminating the right of residence."<sup>252</sup>

Out of this commitment to the freedom of movement for EU citizens has grown a comprehensive plan for a common immigration policy for Europe for members of non-EU Member Countries.<sup>253</sup> While recognizing the differing needs of the various member countries, the EU policy on immigration for its member states strives toward a uniform system of immigration for its member states and strives "to work towards making EU and national immigration policies coherent and complementary,"<sup>254</sup> and includes plans for addressing entry and residence,<sup>255</sup> illegal immigration,<sup>256</sup> and return and expulsion.<sup>257</sup>

I propose that, for the Obama Administration to achieve meaningful comprehensive immigration reform in the United States, our national

---

250. See Europa.eu, Right of Union Citizens and their Family Members to Move and Reside Freely Within the Territory of the Member States, [http://europa.eu/legislation\\_summaries/justice\\_freedom\\_security/free\\_movement\\_of\\_persons\\_asylum\\_immigration/133152\\_en.htm#](http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_immigration/133152_en.htm#) (last visited Feb. 10, 2010).

251. *Id.*

252. *Id.*

253. See Europa.eu, A Common Immigration Policy for Europe, [http://europa.eu/legislation\\_summaries/justice\\_freedom\\_security/free\\_movement\\_of\\_persons\\_asylum\\_immigration/jl0001\\_en.htm](http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_immigration/jl0001_en.htm) (last visited Feb. 10, 2010).

254. *Id.*

255. See Europa.eu, Uniform Format for Residence Permits, [http://europa.eu/legislation\\_summaries/justice\\_freedom\\_security/free\\_movement\\_of\\_persons\\_asylum\\_immigration/133043\\_en.htm](http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_immigration/133043_en.htm) (last visited Feb. 10, 2010).

256. See Europa.eu, Policy Priorities in the Fight Against Immigration, [http://europa.eu/legislation\\_summaries/justice\\_freedom\\_security/free\\_movement\\_of\\_persons\\_asylum\\_immigration/114525\\_en.htm](http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_immigration/114525_en.htm) (last visited Feb. 10, 2010).

257. See Europa.eu, Common Standards and Procedures for Returning Illegal Immigrants, [http://europa.eu/legislation\\_summaries/justice\\_freedom\\_security/free\\_movement\\_of\\_persons\\_asylum\\_immigration/jl0014\\_en.htm](http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_immigration/jl0014_en.htm) (last visited Feb. 10, 2010).

immigration policy must reflect the spirit embodied in both the EU principle of freedom of movement for EU members countries and the common immigration policy toward non-EU member states. Invoking the plenary power doctrine to cause the States to recognize and respect the freedom of movement of residents of other states—that is, to not allow the several States to create their own barriers to movement of individuals by enacting independent immigration laws—will put a halt to the state balkanization of immigration regulations we have seen in the past decade. Additionally, adopting the EU model of having the federal government create a comprehensive statement on common immigration policies for the States will not only once again reestablish Congress’s plenary power to regulate immigration, it will clearly signal to the States that they are not permitted to adopt regulations of immigration that conflict with the common immigration policies of the nation, lest they be preempted by federal law.

While not a perfect solution to solving the immigration issue in the United States, I believe that adopting the views of the European Union regarding the inherent right of persons to move freely, and the importance of establishing a common immigration policy among jurisdictions whose interests are intertwined, can go a long way toward stopping the devolution of immigration law and policy. I also think that clearly articulating a common immigration policy at the federal level—which clearly sets the boundaries of the ability of States to regulate in immigration matters—will mitigate much of ambiguity we have seen through repeated and confusing amendments of the INA over the years. Such a national statement on immigration policy can not only serve to clarify our existing federal immigration law, but can also set aspirations for our immigration law and policy as we move into the twenty-first century.

#### CONCLUSION

As President Obama told the nation when he was still Candidate Obama, “Now is the time.”<sup>258</sup> Now is the time not just for comprehensive immigration reform at the federal level, but for humane, meaningful immigration reform that respects the dignity of all persons and reflects both a knowledge and embrace of international human rights law. The Obama Administration must work with Congress now to craft a national immigration policy that embodies not just the hope and promise of President Obama’s election, but the hope and promise of our nation as a country of immigrants. Now is the time, for immigrants and citizens alike, to go forward together into the 21<sup>st</sup> century to

---

258. Then-Senator Obama delivered a powerful speech during his run for President of the United States at the Democratic National Convention in 2008 that subsequently come to be known as the “Now Is the Time” speech. Barack Obama, *Now Is the Time* (Aug. 28, 2008), available at <http://news.bbc.co.uk/2/hi/7587321.stm> (full text of Obama’s speech accepting his nomination as the Democratic Party candidate for President in the 2008 election).

create a global immigration law and policy in the United States that reflects an evolution—not a devolution—of the federal government’s power to establish and enforce “a[] Uniform system of Naturalization”<sup>259</sup> that fulfills the promise of our great nation as a haven for persons the world over regardless of race, color, ethnicity, or national origin. Putting an end to the patchwork of local immigration laws that have sprung up in the last several years—while not the solution to our myriad national immigration issues—is an important first step toward rerouting United States immigration policy in the direction of meaningful comprehensive immigration reform, which must occur at the federal level.

---

259. U.S. CONST. art. I, § 8, cl. 4.