IMMIGRATION FEDERALISM: THE CASE OF IMMIGRATION ENFORCEMENT BY NON-FEDERAL AGENCIES

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Since 2002, state and local governments have passed many laws and ordinances designed to regulate immigration. This sort of activism, combined with the failure of the federal government to enforce immigration laws, has blurred the line between who should and should not be enforcing immigration laws. This study seeks to clarify the debate concerning the enforcement of immigration laws in the United States. Through an analytical review of the U.S. Constitution, relevant U.S. Supreme Court rulings, and critical lower court cases, this study contends that the federal government is entitled to exclusive enforcement of immigration laws. This conclusion centers on four main arguments: (a) the U.S. Constitution and relevant court cases have established the federal government as the main enforcer of immigration laws; (b) the complexity of immigration laws concerning the enforcement of criminal and civil regulation may result in federal preemption for states and localities that overstep their formal agreements with the federal government; (c) the unnecessary immigration enforcement by states can cause local officers to disregard their traditional job and use their resources to enforce federal laws; and (d) local enforcement of immigration laws has further distanced immigrant communities by the voluntary or involuntary violation of civil rights.
enforcement to look for factual evidence regarding enforcement support for federal and non-federal regulation. Fourth, I analyze two court cases that support immigration enforcement and two cases that allow for state and local enforcement. Fifth, I argue that non-federal enforcement is likely to result in the alienation of the immigrant community, is subject to lack of immigration expertise by non-federal agents, may violate civil rights and civil liberties, and that non-federal enforcement is an unnecessary expenditure. Finally, I analyze the implications of federal preemption through explicit statutory language, congressional intent, and direct conflict of state and federal law.

**KEY POINTS IN U.S. IMMIGRATION HISTORY**

In order to understand why a defined line in immigration enforcement has not been established, I briefly explain the history of immigration enforcement in the United States. In this section I include an analysis of the Bracero Program, the Immigration and Nationality Act of 1952, the Immigration Reform and Control Act of 1986, the Illegal Immigration Reform and Immigration Responsibility Act of 1996, and the Antiterrorism and Effective Death Penalty Act of 1996. The paper will analyze what the Constitution says regarding immigration enforcement in a later section.

**The Constitutional Convention of 1787**

In 1787, a constitutional convention was called for the purpose of amending the inefficient Articles of Confederation of the United States. In this meeting, delegates from all the states, except Rhode Island, traveled to Philadelphia to consider reforms. The delegates, however, decided to propose the creation of a new constitutional arrangement rather than amend the Articles of Confederation. On May 29, 1790, after Rhode Island ratified the Constitution, the new Constitution took effect and became the law of the land in the United States.

Huntington (2008) advanced the idea that any discussion of immigration in the Constitutional Convention would have implicated issues of slavery. Thus, the current debate about who should enforce immigration laws can be traced to the events that occurred during the Convention. James Madison was concerned that the separation between the southern and northern states was a great danger to the unity of the general government. The problematic opposition between the north and south regions of the U.S. blocked some of the most important problems from being discussed during the Convention. One of these problems was the issue concerning slavery. “The institution of slavery was an incendiary and divisive subject during the Constitutional Convention” (Huntington, 2008, p. 812). Thus, the delegates decided to deal with the topic of slavery with the 3/5 compromise and avoided talking about immigration enforcement altogether. Since “immigration was explicitly the province of state authorities under the Articles of Confederation,” the ratified Constitution did not establish who was the primary enforcer of immigration laws (Sullivan, 2009, p. 570). It is this uncertainty and lack of textual provision in the Constitution that surrounds the controversy of the current immigration enforcement debate.

**The First 100 Years: State and Local Domination in Immigration Efforts**

During the first 100 years of the history of this country, states were the main actors in immigration enforcement. The lack of a strong centralized government, even after the ratification of the new Constitution, allowed non-federal agencies to enforce their own immigration laws (Kalhan, 2007). Under the Articles of Confederation, the federal government was restricted from regulating the flow of immigrants. Even though the federal government was able to obtain more power after the ratification of the new Constitution, the question of immigration enforcement was still open to individual state interpretation. The result was a continuous wave of state and local legislation that directly affected non-citizens and questioned the role of immigration enforcement.

In 1842, the Supreme Court of the United States officially established the federal government as the primary enforcer of immigration laws. In their decision, the Supreme Court struck down laws in the states of Massachusetts and New York that required bonds on arriving immigrants. Even though the states wanted to offset the costs of processing foreign papers, the Court came to a conclusion that states were directly interfering with international commerce. Furthermore, according to C. M. Rodriguez (2008), “The doctrine of federal exclusivity began to take shape, taking off on the Commerce Clause grounds articulated by the plurality in the Passenger Cases” (p. 612). Directly influenced by the conclusion of the Civil War and the Reconstruction amendments, the federal government gained substantial power over the issues dealing with citizens and non-citizens alike.

The federal exclusivity in immigration enforcement became official by the late 1800s, and, as C. M. Rodriguez (2008) has argued, the foundation of the current federal exclusivity principle was consolidated in Chae Chan Ping v. United States (1889). Rodriguez contends that this case provided excellent evidence that the constitutionality of complex federal regulatory schemes provided for the exclusion and deportation of Chinese laborers. The passage of the Immigration Act in 1882 further established federal exclusivity over immigration policy. What this legislation solidified was the idea of federal exclusivity, which supported the overall understanding that immigration is federal in nature and should therefore be enforced by the national government.

Having increased its influence through direct legislation and court rulings, the federal government established its “historical” call to enforce immigration laws. By the same token, in 1891, Congress created the Superintendent of Immigration in the Treasury Department whose job became to control immigration enforcement. When the office became the Bureau of Immigration, the federal government established full control in the subject of immigration regulation.

**Enforcement and Legislation During the 1900s**

During the 1900s, the federal government spent a lot of energy trying to take control of national agencies that would further support federal supremacy. In 1904, as a way to limit the border crossings of Chinese laborers, the federal government sent a group of watchmen to patrol the U.S.-Mexico border. Two years later, the Bureau of Investigation came to be “in charge of maintaining a national catalog of fingerprints and rap sheets that local law enforcement agencies could access” (Sullivan, 2009, p. 584). What was initially called the Bureau of Investigation changed its name to the Federal Bureau of Investigation (FBI) in 1935. While the FBI had jurisdiction in federal cases, local law enforcement officials had jurisdiction in alleged violations of state or local laws.

After the passage of the Immigration Act of 1924, Congress formally established the Border Patrol as an agency of the United States Department of Labor. When the office became the Bureau of Immigration, the federal government established full control in the subject of immigration regulation.
As the new law legally forbade state involvement in Act. The INA, which addressed issues of immigration means. It established that any alien in the U.S. must apply for their legaliza
tion of status after 30 days. The individuals who do not comply with this law would be guilty of a misdemeanor and subject to be arrested by federal agents.

In the new amendments, Congress granted more opportunities for non-federal agencies to work alongside the federal government in immigration enforcement. As the main actor, the federal government would allow non-federal governments to choose if they want to come into an agreement with the federal government. Without recognizing state and local inherited power, the federal government managed to maintain its supremacy over immigration enforcement while also giving the task for enforcement to the federal government.

In 1986, Congress approved the passage of the Immigration Reform and Control Act (IRCA) to specifically regulate the employment of undocumented immigrants. Among the most important provisions, IRCA forced employers to check the immigrant status of their employees, made it illegal to knowingly hire undocumented workers, granted amnesty to individuals who entered the U.S. before 1982, and gave legal status to immigrants who worked in seasonal agricultural sectors. IRCA recognized the supreme power of the federal government in immigration enforcement while limiting the power of non-federal authorities. The primary purpose of IRCA was to prevent undocumented immigrants from working and thus reduce the attractiveness of coming to the United States. Under IRCA, states cannot pass laws that enable employers to hire undocumented workers because those laws would conflict with its provisions.

Since labor demand was the main motivation for immigrants to go to the United States, sanctioning the companies that provided jobs was to be an alternative way to discourage immigration. Speasmaker (2007) for example, stated, “IRCA contains employer sanctions, yet through the language used in the bill, employers [were] generally able to circumvent the legislation” (p. 12). Even after specific text regarding how the hiring of undocumented workers would violate civil and criminal laws, employers managed to continue illegal hiring. In addition, Speasmaker (2007) argued, IRCA specifically preempted state and local agencies instituting employer sanctions (p. 13). IRCA increased the preemption power of the federal government over state and local activity. In this case, IRCA imposed civil and criminal sanctions upon employers who knowingly hired or recruited undocumented immigrants.

In 1996, Congress expanded the power of non-federal governments by amending and passing the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). Similar to the INA, IIRIRA set “a comprehensive set of rules for legal immigration, naturalization, deportation, and enforcement” (Seghetti, Ester, & Garcia, 2009, p. 2). The IIRIRA created opportunities for state and local governments to become involved in immigration enforcement, therefore weakening the federal government’s exclusive jurisdiction that previous legislation had asserted. In the new amendments, Congress granted more opportunities for non-federal agencies to work
congressional grant to non-federal agencies to choose to enforce federal immigration laws through a formal written agreement. As this amendment states, the local office will have the opportunity to perform a function of a federal immigration enforcer. Since state and local entities are not allowed to enforce federal laws, Congress provided a legal way for local officers to perform work as an immigration officer but not be considered as one. Jorgensen (1997) explained that the agreements “created under this section may grant local officers all of the powers exercised by federal immigration officers and the section provides that the designated local officers will enjoy federal immunity” (p. 7). By enforcing federal law, local police would work in the investigation, detention, and apprehension of non-citizens.

As part of the INA, section 287 encouraged non-federal enforcement by formalizing state collaboration with the federal government in immigration enforcement. In 1996, Congress approved section 287(g) that created a memorandum of agreement that made it possible for the Attorney General to have a written agreement with non-federal agencies in order to participate in immigration enforcement. The memorandum of agreement included a training requirement for local officers that was to be conducted by federal immigration agents. According to Decker, Lewis, Provine, and Varsanyi (2008), the amendments to section 287(g) of the INA made it possible for local “police officers to be trained by and to join the federal government in enforcing immigration laws within the interior of the United States” (p. 170). Section 287 provided the legal support for states to enforce federal immigration laws. This voluntary action became a gateway for local and state governments that wanted to enforce immigration laws.

The passage of the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996 further expanded the criminal aspects of immigration offenders. In their work, Decker et al. (2008) stated that most importantly the AEDPA “gives local police the authority to arrest previously deported non-citizen felons” (p. 169). In order for state and local agents to have the authority to detain these individuals, the Immigration and Naturalization Service must provide appropriate confirmation for non-federal agents to make the arrest. Section 439 of the AEDPA gives state and local law enforcement the authority to detain any non-citizen who has been convicted of a felony in the U.S. The criminal provisions are enforceable by non-federal agents because the individual is considered to be present in U.S. territory illegally.

Section 439 of the AEDPA can be used as a tool by state and local enforcement of immigration laws. Nonetheless, the authorized power exists only when an alien commits a felony. Even with the authorization of section 439, state and local officers are not able to enforce the criminal provision “unless officers are authorized to make warrantless arrests for misdemeanors committed outside the arresting officer’s presence” (Jorgensen, 1997, p. 10). What Jorgensen (1997) implied in his argument is that since an officer cannot predict who has committed felonies, he/she will have to make an arrest for a less serious offense such as a misdemeanor. This practice would be difficult to conduct since “it requires state and local officers to verify a suspect’s deportation and felon status with INS before making an arrest” (Jorgensen, 1997, p. 10). This section would be difficult to apply during an ordinary traffic stop since verifying a suspect’s immigration status would take too much time and resources. Finally, section 439 has not been used in an efficient manner because of the lack of appropriate communication between the Attorney General and non-federal police. While section 439 expanded the level of interaction between state and federal agencies, it did not establish a sufficiently effective communication mechanism to fulfill its mission.

Ultimately, the 9/11 attacks forged a new collaboration between the federal government and non-federal agencies with the purpose of administering immigration issues. Since national security became a top U.S. priority, the federal government began an unprecedented approach to centralize its enforcement agencies and utilize non-federal agencies in order to expand their access to information and manpower. “The post-9/11 era marked the birth of a new generation of interoperable databases that sit at the crossroads of intelligence and law enforcement, reshaping immigration enforcement at the federal, state, and local levels through increased information collection and sharing” (Mittelstadt, Speaker, Meissner, & Chishti, 2011, p. 2). For example, in 2008, the Department of Homeland Security (DHS) launched the Secure Communities program designed to obtain custody of immigration violators found in federal and non-federal jails. As of 2011, ICE has convicted more than 187,300 immigrants and deported more than 86,600 non-citizens (Mittelstadt et al., 2011, p. 11). Another program includes the National Fugitive Operations Program (NFP) approved in 2003 to allow ICE to find and apprehend non-citizens who have violated their orders to leave the U.S. Federal, state, and local authorities have shared the information of inmates and arrested individuals as a way to support the efforts of DHS to fight terrorism post-9/11.

Overall, the IIRIRA and the AEDPA increased state and local involvement in immigration law and policy. This so-called immigration federalism defines a growing involvement of sub-national entities and their attempt to implement law and policy relating to immigration. These changes meant that states and localities were allowed to enforce civil and criminal portions of immigration law. Therefore, after 1996, it became harder to distinguish who the main enforcer of immigration law was. The federal government began allowing and even requesting local enforcement, which blurred the lines of jurisdiction that had been so clearly set through 1986. Since both the federal government and non-federal actors were technically allowed to enforce the same laws, with special federal exclusivity, the IIRIRA and the AEDPA further heated the immigration enforcement debate.

LEGAL FRAMEWORK FOR IMMIGRATION ENFORCEMENT

In this section, I define the civil and criminal portions of immigration law. Since federal immigration laws are divided into civil and criminal law, the purpose of this section is to understand the complexities of these laws and how they complicate enforcement efforts. In the case of non-federal enforcement, state and local authorities must be able to distinguish between civil and criminal sections of immigration when making arrests.

Understanding Civil and Criminal Immigration Laws

The difference between civil and criminal laws is part of the confusion regarding state versus federal law. Since immigration has criminal and civil provisions in its policy, scholars have put heavy emphasis on the difference between these two types of laws. For instance, when an immigrant resides in the United States illegally, he/she is only breaking the civil section of the INA, not the criminal portion. In cases of civil defiance, the non-citizen would be accused of INA violation and subject to deportation or other procedures related to civil proceedings. With this in mind, any non-citizen who was admitted legally to the United States may become deportable if his/her visa expires or his/her student status changes. Likewise, when a non-citizen is lacking legal immigration status that individual is subject to civil proceedings. Even though an immigrant can be living in the U.S.
illegally, he/she would not be violating INA’s criminal entry condition. On the other hand, criminal violations include re-entry after deportation and failure to depart U.S. territory after a deportation or a voluntary departure. In order for those acts to be considered of criminal offense, the government must prove that those acts were committed willfully. The extreme complications and the constant changes in immigration laws have made the federal government hestitant to give such enforcement to local and state officials who are less likely to fully understand the guidelines. Therefore, “The civil provisions of the INA have been assumed to constitute a pervasive and preemptive regulatory scheme” (Seghetti et al., 2009, p. 5). The complexity and preemptive status has greatly limited the ability of non-federal agents to enforce local immigration laws.

The difference between criminal law and civil law makes it very hard to distinguish the borderline in the immigration field. In immigration enforcement, state and local officers are to some extent prohibited from enforcing civil violations of the law and instead only enforce the criminal aspect of the law. “State officers do not have the authority to arrest an individual for illegal presence, a civil violation of immigration law, [although] they arguably could arrest an individual whom they actually witness enter the country at an unauthorized location, a criminal violation” (A. J. Rodríguez, 2008, p. 1256). This example illustrates the complexity of immigration laws. In that example, the main difference was the distance of the undocumented immigrant from the physical border. For this purpose, McKenzie (2004) argued that when making an arrest, non-federal enforcement agencies would have a difficult time distinguishing between criminal and civil laws. Even if the INA permits local and state officers to enforce criminal provisions, they still have to be cautious not to overstep those legal lines.

In the case of Gonzales v. City of Peoria (1983), the Ninth Circuit clarified the difference between criminal and civil law. Jorgensen (1997) restated this idea when he discovered: “The Ninth Circuit also emphasized that although state law authorized the Peoria police to enforce the INA’s provisions, it did not authorize them to enforce the INA’s civil statutes” (p. 5). The Ninth Circuit made it clear that the failure to have proper documentation does not mean that an immigrant is in violation of the criminal section of the INA. Otherwise, the court insisted that “in implementing the arrest authority granted by state law, local police must be able to distinguish between criminal and civil violations and the evidence pertinent to each” (Jorgensen, 1997, p. 5). What the court tried to show was the possibility that states and localities might overstep their enforcement powers and interfere with civil provisions, a section normally left to the federal government. In Gonzales, the Ninth Circuit determined that the illegal entry offense is not a continuous offense because it was only done at the time that immigrants cross the border. Not only this, but the offense must be committed at the borderline at the presence of an officer. In order to legally engage in criminal enforcement, the state and local police agencies must have a memorandum of agreement with the federal government. When state or local governments get involved in regulating the entry, stay, residency, and the deportation, they get involved in civil regulation and therefore those activities would be limited by the powers of the federal government.

THE CONSTITUTIONALITY OF IMMIGRATION ENFORCEMENT

This section will analyze the U.S. Constitution to look for evidence of federal preemption and supremacy on immigration matters. Beginning with the Constitutional Convention of 1787, the differences between the northern and southern parts of the 13 states made it impossible for the attending delegates to agree upon matters of slavery and immigration enforcement. I argue that, after ratification of the Constitution, the Supremacy Clause, Naturalization Clause, Foreign Affairs Clause, and the Commerce Clause all support federal enforcement. A lack of clarity in the Naturalization Clause, and the Migration Clause, however, supports enforcement by non-federal agents. Thus, this section shows that the Constitution allows for an argument for either federal or local authorities to control immigration enforcement. The Constitution gives support to the federal government and, to some extent, to non-federal players as well.

The Case for Constitutional Evidence for Federal Enforcement

The United States Constitution granted the federal government primary powers to enforce immigration laws. Article I, Section 8, established Congress with the power to defend the general welfare of the United States, to regulate commerce with foreign nations, establish naturalization laws, and to pass all laws that are necessary and proper. Since Article I details the responsibilities and the powers of the legislative branch, it grants the power to create immigration laws to Congress. Since legislative actions are federal, the constitutional power given to Congress is also given to the federal government. Thus, Article I supports federal enforcement through the work of Congress.

1. The Supremacy Clause

In the U.S. Constitution, the Supremacy Clause has supported the historical power of the federal government to enforce immigration laws. The U.S. Constitution explicitly states that “the Laws of the United States...shall be the supreme Law of the Land...any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” The Supremacy Clause gives the federal government authority to preempt any state action that interferes with a federal mandate. By establishing the Constitution as the supreme law of the land, the Constitution mandates that non-federal entities must follow federal law in cases where a conflict arises. Considering the fact that states provided the central government with supreme power when the Constitution was created in 1787, the federal government was formed with entitlement over issues that deal with broader affairs such as commerce and international issues. Hence, scholars have looked at the Supremacy Clause and concluded that it gives primary power to the federal government to deal with immigration matters. When a state approves a law that provides local police with extreme powers to enforce immigration laws, which in most cases deal with civil laws, the federal government has historically received supreme power to preempt those state actions. According to Huntington (2008), the Supremacy Clause authorizes the national government to preempt non-federal conduct. Another scholar, Boatright (2006), argued that “even if states have constitutional authority to enforce immigration law, federal law preempts inconsistent state law under the Supremacy Clause where concurrent jurisdiction exists” (p. 1655).

2. The “Uniform Rule of Naturalization” Clause

The Constitution of the United States produced a mechanism for the new country to work with uniformity and organization. In Article I, Section 8,
Clause 4, the Constitution gave Congress the right “to establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States.” Naturalization in the United States established laws that control citizenship, foreign visitors, and ways to live and work in the country. In other words, naturalization is also related to the immigration field. In the field of the naturalization of non-citizens, Sullivan (2009) argued that the U.S. Constitution gives the federal government power to regulate over these issues. Furthermore, Sullivan (2009) also made the argument that commerce is connected to the immigration area. Thus, the movement of individuals and workers may affect commerce and the interests of the national government as well. For this reason, if states and localities affect the naturalization process of immigrants, they will violate the constitutional mandate given to the federal government.

In Article I, the federal government receives most of its power to conduct issues of national uniformity and naturalization laws. In the area of naturalization, the government has passed laws such as the Immigration Naturalization Act to manage how non-citizens can lose or obtain certain rights, such as the opportunity to become U.S. citizens. The “uniform Rule of Naturalization” also establishes that “only Congress may enact laws pertaining to admission into the United States” (McKenzie, 2004, p. 2). The powers of admission and removal, therefore, belong only to the federal government. The “uniform Rule of Naturalization” clause has further provided federal support in immigration enforcement as well as the administration of the admission and removal of non-citizens.

3. The Foreign Affairs Clause

It is impossible to talk about immigration and not mention its implication regarding foreign affairs. For instance, the treatment of foreign citizens automatically entails their foreign government and their constitutional rights. It is in no surprise that a government, in this case the U.S. government, worries about leaving the subject of international affairs to 50 different states. For example, “The Supreme Court has repeatedly stated that treatment of one country’s citizens in another country is a component of foreign affairs and that conflicts between nations may arise as a result of wrongs committed against those individuals” (A. J. Rodriguez, 2008, p. 1258). The complexity of having 50 different immigration policies multiplies the risk of falling into conflicts with other nations.

When sub-national entities create their own immigration laws, the interests of the entire nation become attached to those laws as well. Huntington (2008) agreed and stated that sub-national “governments cannot exercise immigration authority because to do so necessarily implicates national interests” (p. 813). In order to deal with such implications, many scholars have asked for uniformity to reduce the ambiguity in immigration enforcement. A. J. Rodriguez (2008) further argued that non-federal enforcement complicates uniformity and the legitimacy of the United States in foreign affairs. When a country approves numerous laws by more than one governing body, the international community may become confused about who governs or what laws to obey. Further, Boatright (2006) stated that when an individual state acts with its own reason, the state has the power to embroil the United States in international conflicts. Similarly, Sullivan (2009) added that the possibility of federal preemption is especially relevant in this area since it influences international relations and other areas of national concern.

4. The Commerce Clause

Supporters of federal exclusivity have constantly used the Commerce Clause to show that the U.S. Constitution grants the federal government the right to enforce immigration laws. Article I, Section 8, Clause 3 of the Constitution reads that Congress has the power “to regulate Commerce with foreign Nations, and among the several States.” In other words, the federal government maintains supremacy over international commerce as well as over interstate commerce, especially when states become involved in commercial activity that does not support the interest of the nation. After the 1890s, federal exclusivity began to take shape on the grounds of the Commerce Clause and further articulated by the famous Passenger Cases (C. M. Rodriguez, 2008). Interstate commerce, international commerce, and trading may connect states with international partners. Since commerce also includes the movement of labor and other factors, it is parallel to the immigration field. C. M. Rodriguez (2008) explained, “The dormant Commerce Clause doctrines [support]…interstate commerce from certain burdens imposed by state regulation” (pp. 638-639). In order to protect and make interstate commerce possible, the Commerce Clause gives power to the federal government to facilitate interstate commerce and avoid international conflicts.

Court Rulings Cases Supporting Federal Exclusivity

There have been many court cases that have ruled in favor of immigration enforcement by the federal government. Mainly focusing on the admission and removal of foreigners, the U.S. Supreme Court has made a constant push to provide such power to the federal government. “The Supreme Court has stated that ‘the authority to control immigration—to admit or exclude aliens—is vested solely in the Federal Government’” (Jorgensen, 1997, p. 1). The delicacy of dealing with foreign nationals has been one of the main elements used by the courts to express their agreement with federal enforcement. Just like scholars looking at the U.S. Constitution, scholars who have deeply analyzed the Supreme Court rulings have also favored federal exclusivity on the grounds of uniformity.

The Supreme Court has recognized that immigration enforcement belongs to the national government. “The Supreme Court ‘began denying powers of immigration regulation to the states’ during the 19th century ‘in part because their actions were visibly abusing those powers’” (Kalhan, 2007, pp. 6-7). This statement takes us back to the issue that when all states have the power to regulate an international matter, their actions are very likely to differ and cause international tension. In the same way, early cases asserted federal exclusivity because of the concern of interaction with the international community (A. J. Rodriguez, 2008). Therefore, although state and local entities deal with foreign nationals in a daily basis, it should be the job of the national government to pass legislation in that matter.

1. Chy Lung v. Freeman (1875)

The issue in this case was based on principles of federalism and federal supreme power to limit state power. Chy Lung represented a case that served as a model for other cases to understand the Supreme Court’s view on immigration enforcement. When Chinese nationals such as Chy Lung arrived in San Francisco, the state of California required them to pay a bond of $500. In Chy Lung, the Court found California’s laws inconsistent with the federal powers. The Supreme Court held the state law unconstitutional.
because only Congress had the power to enact legislation that affected the admission of foreigners. The California law intervened with foreign commerce and foreign relations that resulted in unauthorized activity in an area normally reserved for the federal government. “The Supreme Court expressed concern that mistreatment of non-U.S. citizens by state officials might antagonize foreign governments and render the federal government liable for claims arising from such mistreatment” (Kalhan, 2007, p. 7). The power to deal with foreigners at an international border was reserved for the federal government, not the state of California. The statute could therefore inflict the U.S. in an international conflict.

2. The Passenger Cases (1842)

The Passenger Cases included the combination of two similar cases, Smith v. Turner and Norris v. Boston. These cases were important because they established standards for states to follow in order to comply with federal regulations on treatment of non-citizens. The Passenger Cases of 1842 constitute a series of laws in Massachusetts and New York that levied fees on arriving foreign passengers. With the intentions to offset the cost of caring for foreign papers, these two states acted unilaterally and acted as the national government. The actions taken by Massachusetts and New York compromised international commerce and violated this federal-centered constitutional responsibility. The responsibility of the federal government to control the area of foreign commerce implied the total exclusion of state authority in the area.

The Supreme Court responded to the Massachusetts and New York laws by striking them down as unconstitutional. The Supreme Court’s decision established that the imposition of taxes by a state on foreign commerce violated the Constitution. According to A. J. Rodríguez (2008), “The Court recognized the importance of the national government speaking with one voice in instances that ‘take into view our relations with other countries’” (p. 1232). In this case, the Court was concerned with uniformity when relationships with foreign nations are at stake. The one-voice argument persisted in the minds of the Supreme Court members during the decision of these series of cases. The issue of foreign commerce restricted the states’ rights to regulate immigration. A. J. Rodríguez (2008) explained that the Court’s agreement to federal exclusivity extended preemption on immigration matters and gave this right to the federal government. Federal preemption and the issue of constitutionality convinced the Supreme Court to stop the states from enforcing commerce-related laws that impacted the circulation of foreign nationals. The Passenger Cases set the federal government to regulate the area of immigration laws that affect foreign nationals.

Cases Supporting State and Local Enforcement

The Supreme Court has looked at the Constitution and found that there is still an opening for sub-national governments to participate in the enforcement process (Kalhan, 2007). There are many laws that recognize immigration federalism. Jorgensen (1997) found that “Congress had specifically authorized local enforcement of 8 U.S.C. [Section] 1324(c)” (p. 4). Since this law criminalizes the transportation and harboring of undocumented immigrants, Congress recognized the need to use the local resources available. Likewise, “Congress’s silence about local enforcement of the INA’s criminal entry provision displayed an intent to withhold local enforcement authority” (Jorgensen, 1997, p. 4). What this means is that if an institution does not mention who should enforce those laws, then the enforcement is open to all parties. Since the Constitution does not mention in text that local institutions are prohibited from enforcing them, Jorgensen (1997) argued, it also means that they are allowed to enforce immigration laws.


Gonzales gives the opportunity to explore non-federal enforcement and also to understand the risks of enforcement by states and localities. Aside from risks of preemption, cases such as Gonzales provide information regarding racial profiling and situations where non-federal agents have enforced federal immigration laws. In Gonzales, 11 Mexican individuals sued the City of Peoria, Arizona, for an unlawful traffic stop by the local police. The plaintiffs claimed the police stop was questionable and discriminated against them based on their appearance. The plaintiffs of Mexican ancestry affirmed that the police officers were in the practice of arresting individuals who violated federal immigration laws. Thus, the plaintiffs sued the City of Peoria for allowing its police force to enforce federal immigration laws that were not supposed to be within their jurisdiction. In addition, the plaintiffs claimed that the stop was not based on them violating a law, but on physical characteristics. For this reason, the Ninth Circuit court examined the criminal entry provision of the INA to analyze the legality of the arrest of the undocumented immigrants.

One of the main questions regarding the arrest of the plaintiffs dealt with the applicability of probable cause. Did the local police officers have probable cause when they arrested the undocumented immigrants in the City of Peoria? During the analysis of the Ninth Circuit, the court held that “local police officers may, subject to state law, constitutionally stop or detain individuals when there is reasonable suspicion or, in the case of arrests, probable cause that such persons have violated, or are violating, the criminal provisions of the INA” (Seghetti et al., 2009, p. 8).

Therefore, the court ought to consider if state law gives power to the local police to enforce these regulations. The City of Peoria approved laws that allowed local officers to arrest undocumented entrants who were in violation of the criminal provision of the INA. However, even with authorization from the state to enforce federal laws, the local police must also establish probable cause when making an arrest. In Gonzales, probable cause could not be established because “to believe that an alien has violated the INA’s criminal entry provision…lack of documentation may serve as a basis for reasonable suspicion and further questions of a suspect” (Jorgensen, 1997, p. 12). In other words, reasonable suspicion is not evidence enough to detain individuals such as the plaintiffs unless they can satisfy the requirements to have probable cause. The conclusion of the court focused on the civil provision of the INA. By the same token, the Ninth Circuit “held that the Peoria police department could not enforce the civil offense of illegal presence” based on civil provisions and the Arizona state law (Jorgensen, 1997, p. 12).


The De Canas case presented an argument for states and localities to justify their involvement in enforcing federal law. Since employment is one of the driving forces for undocumented immigration, this case helps understand current enforcement efforts by state and local governments. In this case, the Supreme Court was given the task to decide if local officers can enforce unlawful hiring of undocumented workers in a field that belongs to the federal government. Section 2805(a) of the California Labor Code established
GOOD REASONS FOR STATE AND LOCAL ENFORCEMENT?

Although the federal government has achieved supremacy over immigration enforcement, it has failed to effectively enforce immigration laws. States and localities have perceived the need to get involved in immigration enforcement due to the federal government’s failure to do so. According to Ellis (2004), the ineffectiveness has been caused by “a lack of direct U.S. government responsibility for the social costs of immigration because social policy is devolved to the states, and [because of] the conjunction of a national ideology that [favors] unregulated markets as well as vigorously supporting individual civil liberties” (p. 52). Since undocumented immigrants impact (negatively and positively) local labor force, social programs, schools, civic organizations and many other social forums, non-federal lawmakers have shown frustration for the lack of effective federal enforcement. The dilemma faced by non-federal governments is that “states and localities have no control over who enters or exits but bear a considerable degree of responsibility, some of it mandated by federal law, for all who are resident” (Ellis, 2004, pp. 52-53). In addition, states and localities have shown dissatisfaction with ICE given that it has historically refused to take custody of undocumented immigrants citing a lack of resources and detention space (Boatright, 2006). All these cases have encouraged non-federal agents to increase their immigration enforcement efforts and put pressure on the federal government to pass a comprehensive immigration reform.

The participation of state and local governments would increase the number of available resources as well as provide the federal government with needed manpower to enforce immigration laws. Since national security became a top priority to the United States post-9/11, some non-federal agents have argued that state and local participation will enhance national security and add more manpower to the more than 2,000 federal immigration agents (McKenzie 2004). Specifically, the participation of non-federal agents would benefit immigration enforcement due to their constant contact with the general public. Not only are state and local policemen most likely to get in contact with criminals, but they are also more likely to have the personnel to respond to violations of immigration law. For example, local police encountered three of the terrorists who participated in the 9/11 attacks. Likewise, Boatright (2006) added that since state and local police represent approximately 95% of the U.S. law enforcement, these officers would cover a lot more ground and support the severely understaffed ICE.

The advantage of using state and local enforcement officers as counter-terrorism tool is important “because, during the course of daily duties, [non-federal agents] may encounter foreign national criminals and immigration violators who pose a threat to national security or public safety” (Stana, 2009, p. 1).

OVERSTEPPING BY STATE AND LOCAL GOVERNMENTS

Up to this point, I have argued that the Constitution and some court cases do allow states and localities to enforce immigration laws with some significant prohibitions against enforcing civil provisions. In this section, I shift from legal arguments to practical ones. My argument will be based on evidence that shows how non-federal enforcement alienates immigrant communities and creates unnecessary enforcement spending, and how non-federal agents attempting to enforce immigration laws are likely to violate the constitutional rights of minorities because of their lack of expertise.

Local Police Enforcement and the Alienation of the Immigrant Community

When state and local police enforce immigration laws, the relationship between them and their respective communities can be jeopardized. When the community fears the local police force, the level of trust and cooperation is seriously undermined. In the case of undocumented immigrants, they are less likely to come forward and report crimes due to the possibility of deportation. When the community does not cooperate with the local police, the ability for the police force to effectively perform their duties is destabilized. Most immigrants would be discouraged to participate with the local police either because of fear of deportation or distrust. Thus, a great number of prospective witnesses of crime would not be willing to cooperate, decreasing the chances of a case being solved. For instance, “Many...immigration groups that may be vulnerable to high rates of victimization come from countries where distrust of authorities” is common (Decker et al., 2008, p. 170). So, when local residents perceive their local officers to have business with federal immigration officers, they would be reluctant to participate due to fear and lack of trust.

Local Police Lack of Immigration Expertise

In the United States, as it is the case in most countries, the immigration system is complicated and hard to understand, even to officers who are trained to enforce those laws. Boatright (2006) argued, “The immigration code is complex, arguably too complex for state and local police to enforce without a high degree of training and expertise” (p. 1648). In particular,
in a field where even professionals make mistakes, scholars seem to be skeptical regarding less knowledgeable agents enforcing these types of laws. The concerns many institutions and social groups have about non-federal agents enforcing these complex laws are widespread. The uncertainly and likelihood of making mistakes greatly increases when local agents enforce immigration laws, an activity that can easily result in overstepping and even preemption by the federal government.

Decker et al. (2008) are mainly concerned about the “expanding universe of crimes” that the immigration field covers. As more complex categories are added to immigration enforcement (terrorism, hate crimes, human trafficking, gangs, and electronic crimes), the local and state police would require a lot more advanced resources and training in order to understand the already complex system. For instance, this continuous expansion will also be subject to higher-than-usual uncertainty that can result in controversial legal issues once their errors are found. When state and local police engage in activities outside their traditional policing responsibilities, the likelihood of committing unconstitutional activities, racial profiling, and inefficient ways of using local resources are greatly increased. Most rational law enforcers would not want to overstep their given legal boundaries, however, in the complex immigration field the understanding and interpretation of the laws might result in a violation even if that was not initially intended.

Violation of Civil Rights and Liberties

Another concern regarding sub-national agencies enforcing federal immigration laws is that their insufficient training in federal immigration laws leaves them vulnerable to violate constitutional rights of non-citizens. “State and local governments must seriously consider the risks of local immigration enforcement and must be prepared to dedicate the resources necessary to prevent civil rights violations before implementing any immigration enforcement plan” (Jorgensen, 1997, p. 13).

Individuals who violate civil rights are committing unconstitutional acts. The Fifth Amendment to the U.S. Constitution states, “No person shall…be deprived of life, liberty, or property, without the due process of law.” The Fifth Amendment, which applies to all individuals regardless of immigration status, forces all officers to respect its legal power. Similarly, the Fourteenth Amendment protects all individuals from the power of states to deny “any person within its jurisdiction the equal protection of the laws.” The Equal Protection Clause has been one of the main clauses utilized by civil rights advocates who have recognized a differential treatment to specific groups.

Some of the most recent legislation that protects against discrimination is Title VI of the Civil Rights Act of 1964, which prohibits discrimination on grounds of race. Previously, the Civil Rights Act of 1871 provided monetary damages as a remedy for harm caused by deprivation of federal constitutional rights by state and local government agencies. Likewise, the Violent Crime and Control and Law Enforcement Act of 1994 authorized the Department of Justice to bring legal actions against any police agency engaged in unconstitutional actions. The civil actions were intended to target those illegal actions for equitable and declamatory relief (Seghetti et al., 2009, p. 20).

Since police officers stop individuals on a day-to-day basis, as they focus on identifying their immigration status they might well end up discriminating against that individual. Many laws are already established to punish those types of activities, even against states and local governments. Thus, without expertise in enforcement of immigration, local and state enforcers might end up violating the civil rights of individuals especially to racially identified residents.

Racial Profiling

Opponents of state and local enforcement have been concerned about racial profiling, a violation of the Fourth Amendment and the Fourteenth Amendment.4 “Under the current interpretation of the Equal Protection Clause… the Supreme Court has made it clear in recent years that all racial classifications are constitutionally suspect” (Johnson, 2001, p. 23). Nonetheless, in 1975, the Supreme Court classified Mexican appearance as a legitimate reason for making an immigration stop.4 Making race a reasonable classification to stop an individual can easily undermine the Equal Protection Clause and result in violations of constitutional rights. “Latino residents experienced racial affronts targeted at their Mexicanness indicated by skin-color, bilingual speaking abilities, or shopping in neighborhoods highly populated by Latinos” (Romero, 2006, p. 448). When the complexity of immigration laws are added to factors of racial profiling, the provability of a constitutional rights violation is more likely to occur. The International Association of Chiefs of Police expressed the concern that probable cause in immigration law is much harder to be discerned by non-federal agents. A DHS's Office of Inspector General (OIG) report concluded that “287(g) training does not fully prepare officers for immigration enforcement duties,” highlighting their inadequate training on civil rights and on the Fourth Amendment. As a result, the lack of adequate training for non-federal agents and the ability for them to use Mexican appearance as a legitimate reason to stop a person means that they are more likely to commit constitutional violations than ICE agents.

Unnecessary Local and State Spending to Enforce Federal Laws

After the “great recession” of 2008, economic efficiency and strategic spending became major concerns for governments across the world. Since resources have become scarce, enforcement agencies have looked at all types of ways to save money and continue their enforcement efforts. To compensate for local expenses, the federal government established the State Criminal Alien Assistance Program (SCAAP). SCAAP has provided funding for states that participate in the incarceration of undocumented criminal immigrants who committed a felony or at least two misdemeanors. After entering into a contractual program, the participants would be compensated with an average cost determined by the Attorney General.

ICE can reimburse law enforcement agencies for (1) detention of incarcerated aliens in local facilities who are awaiting processing by ICE upon completion of their sentences and (2) transportation of incarcerated aliens, upon completion of their sentences, from a jurisdiction's facilities to a facility or location designated by ICE. (United States Government Accountability Office, 2009, p. 8)

Still, the funding provided by the ICE and the SCAAP programs are too small to help with the enforcement cost. The research conducted by Booth (2006) determined that SCAAP provided less than 5% of the annual budget allocations for those programs. What was even more surprising is that average federal aid was about 0.6% of the states’ annual budget and only provided less than 1% of total expenditures in 39 states (Booth, 2006).
CONCLUSION

There are significant reasons why immigration enforcement, especially in the criminal realm, is squarely located in federal jurisdiction. The preemption seen in the Constitution can also be recognized in cases where Congress intended to give enforcement rights to the federal government. In the field of immigration enforcement, federal preemption exists “when a state entity regulates ‘in a field that Congress intended the federal government to occupy exclusively’” (Seghetti et al., 2009, p. 4). For example, the federal government has the power to control federal laws and resulting programs such as the INA, IRCA, and the Bracero Program. Since Congress intended to occupy the field of immigration enforcement, any sub-national activity can be preempted. And, since Congress occupies the legislative field, the depth and breadth of congressional action can restrict sub-national enforcement if intended to. In cases of field preemption, the federal government maintains absolute regulatory scheme to completely limit enforcement activity for states/localities (McKenzie, 2004). Intentional federal exclusivity results in cases of field preemption intended by Congress.

In short, implications of federal preemption serve as a roadblock that may encompass state attempts to make and enforce immigration law and policy. Understanding that Congress has express explicit statutory language that provides the federal government with clear textual evidence that makes immigration enforcement a federal issue, federal preemption has the power to stop non-federal enforcement. Likewise, Congress has blunted the lines of immigration enforcement by intending immigration law to belong to the federal government. In other words, congressional actions symbolize a present risk to states and localities that would like to participate in enforcing immigration laws.

By enforcing immigration laws, state and local governments jeopardize overstepping and violating constitutional rights of non-citizens. In addition, their enforcement also breeds alienation between the community and the local authorities. In a country where local community collaboration is essential to combat local crime, alienation from the local police can result in an increased percentage of crime rates. Not only that, since immigration is a very complex field, state and local officers sometimes do not receive enough training to truly understand immigration laws, especially criminal and civil laws. In many cases, this lack of understanding these laws has resulted in violation of civil rights and racial profiling. In a time when money is not as available as it used to be, state and local agencies should use their resources wisely and only engage in law enforcement that falls under the local jurisdiction. Even though in some case enforcing immigration laws can serve as a security measure, those laws are federal laws and should therefore be enforced by the federal government. Instead, the local officers should focus in building bridges among cultures and strengthening their connection with the entire community.

Even though the United States Constitution does not specify who is entitled to enforce immigration law, the federal government has established itself as the exclusive enforcer through congressional legislation and recognition by Supreme Court rulings. State and local governments may voluntarily come into written agreements with the federal government to enforce criminal and, to some extent, civil provisions of the U.S. immigration law but they are still restricted to federal preemption. Therefore, states and localities should not engage in immigration enforcement since the likelihood of overstepping their legal boundaries may occur due to the lack of expertise and the risk of violating civil rights and civil liberties of racial minorities.

As states and localities engage in immigration enforcement, the possibility of federal preemption is likely to increase as well. Thus, investing enormous amounts of time, money, and energy in immigration enforcement might not be the best choice for local enforcers. Since Congress can at any time pass legislation that influences immigration enforcement, local enforcement is not stable and is likely to change in any given session. Whenever a local law conflicts with federal mandate, the national government will most likely interfere in order to maintain its power. In recent times, sub-national governments have been granted with extensive flexibility to enforce criminal and civil immigration laws. The complexity of immigration laws is likely to result in federal preemption, community isolation, and unnecessary spending in a field where the federal government holds the last word in immigration enforcement.

The easiest and most effective way to solve the confusion in immigration enforcement would be to pass a comprehensive immigration reform where the federal government receives full authority over the criminal and civil portions of immigration law. Since the number of undocumented immigrants continues to rise, the alternative cannot be a complete ignorance of immigration enforcement. Instead, the federal government should become the only enforcer of immigration laws and give an end to programs such as 287(g) that involve non-federal agents. The federal government should dramatically increase the number of federal immigration agents as well as increase its annual budget in order to cover those costs. With more resources and manpower, the federal government would increase the number of apprehensions, detentions, and deportations of undocumented immigrants whom they consider to be of great threat to national security. To maximize their available resources, the federal government should focus on finding only non-citizens who are committing serious crimes or multiple felonies. In this program, the federal government would continue to have personnel on the entire international border; however, most of their energy would be focus on going after incarcerated immigrants and those involved in acts of terrorism and drug trafficking.

This approach would allow states and localities to focus more on fighting local crimes and use their limited resources to work closely with the community in order to fight crimes more effectively. This would allow all individuals to participate in the apprehension of criminals without having to worry about their own deportation when exposing their immigration status. In order to ease the cost associated with immigrant influx (e.g., schools, prisons, or social services), the federal government would create a reimbursement program, such as SCAAP, with the mission to provide a percentage of expenses to non-federal governments. The higher efficiency by the federal government will relax tensions between the federal government and non-federal entities as well as allocate enforcement resources to the hands of better-trained federal agents. In this alternative, non-federal agents will not be subject to federal preemption, which will dramatically decrease the likelihood of violating constitutional rights of non-citizens. The only participation states and localities would have will be providing the federal government with information regarding the criminals who have a strong history of unlawful activity.

“The easiest and most effective way to solve the confusion in immigration enforcement would be to pass a comprehensive immigration reform where the federal government receives full authority over the criminal and civil portions of the law.”
ENDNOTES

1. The Bureau of Immigration is the precursor to the Immigration and Naturalization Service (INS) that would ultimately become the current Immigration and Customs Enforcement (ICE).

2. The Border Patrol, which during that time was under the supervision of the INS, came under the umbrella of the newly formed Department of Homeland Security (DHS) (C. M. Rodríguez, 2008). The DHS was established on March 1, 2003, to replace the Department of Immigration Services. Similarly, the former INS was divided into three different sections within the Department of Homeland Security. The United States Citizenship and Immigration Services (USCIS) became responsible for providing most of the services and benefits for immigrants. The second component became the Bureau of Immigration and Customs Enforcement (ICE) in charge of enforcing immigration. Finally, the third section became the Bureau of Customs and Border Protection (CBP). The third bureau became responsible for protecting the borders of the United States. These federal entities served as parts of the national body of government and as a symbol of federal supremacy in enforcement efforts.

3. Racial profiling is defined as the practice of targeting individuals based on their race or ethnicity in the belief that minority groups are more likely to engage in unlawful behavior or be present in the United States illegally (Seghetti et al., 2009).


REFERENCES


