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## Texas Rangers Resurrected: Immigration Proposals after September 11th.

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## TEXAS RANGERS RESURRECTED: IMMIGRATION PROPOSALS AFTER SEPTEMBER 11<sup>TH</sup>

ALYSSA GARCIA PEREZ†

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### I. INTRODUCTION

America’s immigration system is also outdated, unsuited to the needs of our economy and to the values of our country. We should not be content with laws that punish hardworking people who want only to provide for their families . . . and invite chaos to our border.

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† St. Mary’s University School of Law, Candidate for J.D., May 2007; University of Texas at Austin, B.A. in Government, August 2003. I wish to thank my family and friends for their love, faith, and support. Especially, *a mis queridos abuelos*, Sofia and Gonzalo Garcia, thank you both for your unwavering love, wisdom and patience, and for showing me the importance of helping others. Because of your example and encouragement, I am realizing my dream. To my mother, Rachel Perez, thank you for instilling in me the confidence to believe I could accomplish anything. To the Editors of *The Scholar*, thank you for your guidance and diligence in finalizing this comment.

It is time for an immigration policy . . . that closes the border to drug dealers and terrorists.<sup>1</sup>

President George W. Bush

In his 2005 State of the Union Address, President Bush announced the urgent need for comprehensive immigration reform to support the economy and national security, reminding Congress and the entire country of the importance of protecting the country's international borders.<sup>2</sup> Despite numerous legislative proposals during the 108th Congress,<sup>3</sup> the Federal Legislature failed to pass overhauling immigration legislation.<sup>4</sup> The 109th Congress is now picking up where the last session left off, but no consensus exists on the best plan of action.<sup>5</sup>

On July 28, 2005, United States Representative John Culberson, along with forty-seven original co-sponsors, introduced H.R. 3622, the Border Protection Corps Act of 2005, to create a volunteer militia deputized to patrol and defend the international border with Mexico and Canada.<sup>6</sup> After finding alarming increases in the number of foreign nationals entering the United States with known affiliation to terrorist organizations, drug smugglers, gang members and violent criminals,<sup>7</sup> the Act authorizes

1. George W. Bush, President of the United States, Address Before a Joint Session of the Congress on the State of the Union (Feb. 2, 2005), in 41 WEEKLY COMP. PRES. DOC. 127-28, Feb. 2005, available at <http://www.gpoaccess.gov/wcomp/v41no05.html>.

2. *Id.*

3. Tisha R. Tallman, *Liberty, Justice, and Equality: An Examination of Past, Present, and Proposed Immigration Policy Reform Legislation*, 30 N.C. J. INT'L L. & COM. REG. 869, 887 n.110 (2005) (providing a non-exhaustive list of immigration legislation introduced in the 108th Congress).

4. In December 2004, Congress passed the Intelligence Reform and Terrorism Prevention Act of 2004, which mandated an increase of at least 2000 Border Patrol agents for the 2006 fiscal year. Unfortunately, the President's budget did not provide adequate funding. See *Comprehensive Immigration Reform: Hearing Before the Senate Committee on the Judiciary*, 109th Cong. (July 26, 2005) (opening statement of Sen. Patrick Leahy), available at [http://judiciary.senate.gov/member\\_statement.cfm?id=1588&wit\\_id=2629](http://judiciary.senate.gov/member_statement.cfm?id=1588&wit_id=2629); see also Interview by Lou Dobbs with Representative John Culberson, *Lou Dobbs Tonight* (CNN television broadcast July 29, 2005) (describing the administration's refusal to ask for additional border agents already authorized by Congress), available at <http://www.culberson.house.gov/news.aspx?A=175>.

5. Michelle Mittelstadt & David McLemore, *Porous Border Frustrates States*, DALLAS MORNING NEWS, Aug. 18, 2005, at A1, available at <http://www.dallasnews.com/shared/content/dws/news/world/mexico/stories/081805dntexborder.176f99da.html> ("While Washington policy-makers are definitely attuned to the growing public anxiety over border security and illegal immigration, they're far from achieving consensus on the proper remedy.").

6. H.R. 3622, 109th Cong. § 3(a) (2005).

7. H.R. 3622, § 2(3); see also Chuck Lindell, *Bill May Create Border Militia: U.S. Lawmaker Calls for Government-Supported Volunteer Group*, AUSTIN AM.-STATESMAN, Aug. 11, 2005 at A1, available at <http://statesman.com/search/content/metro/stories/08/11>

individual border-states to organize citizen volunteer militias to increase the law enforcement presence and fill the gap left by inadequate federal manpower on the border. The bill authorizes citizen volunteers deputized under the Act to use “any means and any force authorized by State law to prevent individuals from unlawfully entering the United States,” and to apprehend individuals so entering.<sup>8</sup>

On May 12, 2005, a bi-partisan group of Senators introduced a plan for comprehensive immigration reform.<sup>9</sup> The Secure America and Orderly Immigration Act of 2005<sup>10</sup> is a broad and “common sense” approach to repair an ailing immigration system.<sup>11</sup> Among other things, the Act provides for implementation of a national strategy for border security,<sup>12</sup> development of framework for security coordination between North American governments,<sup>13</sup> and provides additional funding to reimburse states for costs of illegal immigration.<sup>14</sup> The McCain-Kennedy bill has received strong support from a diverse array of groups, like the U.S. Chamber of Commerce, the United Farm Workers, and the Mexican American Legal Defense and Educational Fund.<sup>15</sup>

On July 20, 2005, Senators John Cornyn and John Kyl proposed S. 1438, the Comprehensive Enforcement and Immigration Reform Act of 2005.<sup>16</sup> This legislation allocates an additional 10,000 border patrol agents, expands expedited removal, and increases penalties for smuggling and status violations.<sup>17</sup> The most unattractive portion of the Act is the provision requiring immigrants currently in the United States illegally to apply for mandatory departure, depart the United States voluntarily, and re-enter the country through normal legal channels.<sup>18</sup>

While Congressional efforts have only recently showed signs of life, another type of enforcement has emerged to challenge federal authority at the border, namely the organization of private civilian militias.<sup>19</sup> Al-

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immig.html; Interview by Lou Dobbs, *supra* note 4 (describing the administration’s refusal to ask for additional border agents already authorized by Congress).

8. H.R. 3622, § 3(b).

9. Secure America and Orderly Immigration Act, S. 1033, 109th Cong. (2005).

10. S. 1033, § 1(a).

11. Press Release, U.S. Federal News, Sens. Kennedy & McCain Detail Their Plan for Comprehensive Immigration Reform (July 26, 2005), 2005 WLNR 11787209.

12. S. 1033, § 111(a).

13. S. 1033, § 131(a).

14. S. 1033, §§ 201-202.

15. Press Release, U.S. Federal News, *supra* note 11.

16. S. 1438, 109th Cong. § 101(a) (2005).

17. S. 1438, § 101.

18. S. 1438, § 201-212.

19. See THE CONGRESSIONAL IMMIGRATION REFORM CAUCUS, RESULTS AND IMPLICATIONS OF THE MINUTEMAN PROJECT 4 (2005) (noting that approximately 900 volunteers

though parallels between the proposed Border Protection Corps and organized civilian militias are undeniable, groups like the Minuteman Project and Ranch Rescue remain largely unchecked, breeding a rash of civil rights abuses in the border area.<sup>20</sup> However, the civilian militia action against immigrants is not confined to bands of seemingly patriotic Americans with only the “best intentions.”<sup>21</sup> Even a few people can make a difference.<sup>22</sup> The Barnett family, one of the most active vigilante groups, operates on the Arizona border and claims to have captured over 5,000 immigrants.<sup>23</sup>

Both the Secure America and Orderly Immigration Act and the Comprehensive Enforcement and Immigration Reform Act provide numerous options for Congress to derive a workable plan for effective immigration reform.<sup>24</sup> However, the Border Protection Corps Act illustrates the trend amongst ordinary citizens to take the law into their own hands, thereby creating a greater risk of violence.<sup>25</sup> H.R. 3622 sanctions this action under color of law.<sup>26</sup> As H.R. 3622 finds, American history “is filled with innumerable examples of honorable and invaluable service by citizen volunteers, organized into well-regulated local militias, who have able defended the frontiers and borders . . . .”<sup>27</sup> This history of citizen volunteer militias is nothing new to Texas.<sup>28</sup> Throughout the Nineteenth and Twentieth Centuries, the Texas Rangers “wreaked havoc” on Mexicans and Mexican-Americans, under the authority provided by state law. In 1835, the governor announced that the first group would be a “corps of rangers” organized to provide “a safeguard to our hitherto unprotected frontier inhabitants, and prevent the depredations of those savage hordes that

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from all regions of the country participated in the project in Arizona over a thirty-day period in April 2005); see also Brooke H. Russ, Comment, *Secrets on the Texas-Mexico Border: Leiva et al. v. Ranch Rescue and Rodriguez et al. v. Ranch Rescue and the Right of Undocumented Aliens to Bring Suit*, 35 U. MIAMI INTER-AM. L. REV. 405, 408-10 (2004) (describing Ranch Rescue and its militia-style tactics).

20. See generally Bob Moser, *Open Season*, SOUTHERN POVERTY LAW CENTER INTELLIGENCE REPORT, Spring 2003, available at <http://www.splcenter.org/intel/intelreport/article.jsp?pid=50>.

21. THE CONGRESSIONAL IMMIGRATION REFORM CAUCUS, *supra* note 19, at 5.

22. *Id.*

23. Jessica Conaway, Comment, *Reversion Back to a State of Nature in the United States Southern Borderlands: A Look at Potential Causes of Action to Curb Vigilante Activity on the United States/Mexico Border*, 56 MERCER L. REV. 1419, 1425 (2005).

24. S. 1438, 109th Cong. § 101(a) (2005); S. 1033, 109th Cong. § 1(a) (2005).

25. H.R. 3622, 109th Cong. (2005).

26. H.R. 3622, § 2(5).

27. H.R. 3622, § 2(5).

28. DAVID MONTEJANO, *ANGLOS AND MEXICANS IN THE MAKING OF TEXAS, 1836-1986*, 117-28 (1987) (describing the violence between Anglos and Mexicans along the Texas border between the years 1915 and 1917).

infest our borders.”<sup>29</sup> After nearly two hundred years, the State of Texas has made little progress in finding a viable solution to the immigration dilemma. This comment will focus on new enforcement tactics, and some alternatives for effective immigration policy.

## II. BACKGROUND

### A. “*Los Rinches*”<sup>30</sup>

The law of 1919 created no new agency . . . for before the first gun of the Texas revolution was fired at Gonzales in December, 1835, before the Declaration of Texas Independence was adopted, before the heroes of the Alamo laid down their lives for freedom, and before the Mexican Army under Santa Ana was destroyed by Sam Houston at San Jacinto, a ranger force was organized in Texas. It was the first organized agency of the Anglo-Saxon immigrants against the lawlessness and disorder which prevailed under the inadequate protection extended to them by Mexico . . . .<sup>31</sup>

Beginning in the second half of the 19th century and into the 20th century, the American West produced more than two hundred vigilante movements that claimed over five hundred victims, the majority of which died by hanging.<sup>32</sup> Texas was no exception. Residents of Texas often intervened in situations where it was perceived that traditional law enforcement authorities were unable to execute their duties.<sup>33</sup> In one instance, after rustling (rounding up and stealing livestock) became a problem in Kimble County, Texas, the Texas Rangers rounded up the entire male population to identify and separate criminals from law-abiding residents.<sup>34</sup>

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29. *Neff v. Elgin*, 270 S.W. 873, 876 (Tex. Civ. App.-San Antonio 1925, writ ref'd) (“It was the first organized agency of the Anglo-Saxon immigrants against the lawlessness and disorder which prevailed under the inadequate protection extended to them by Mexico . . . .”).

30. RICHARD WHITE, “IT’S YOUR MISFORTUNE AND NONE OF MY OWN”: A HISTORY OF THE AMERICAN WEST 241 (1991). This shortened version of “*los rinches de la Kineña*,” or the rangers of King Ranch, referred to those rangers who used the law to help wealthy Anglo ranchers expropriate land. *Id.*

31. *Neff*, 270 S.W. at 876 (upholding as constitutional the State Ranger Act of 1919).

32. WHITE, *supra* note 30, at 332-33.

33. *Id.* at 332.

34. *Id.* Although very few cases exist involving members of the Texas Rangers who were prosecuted either civilly or criminally, some instances do exist. See *Hudson v. St. Louis Sw. Ry. Co. of Tex.*, 293 S.W. 811, 12 (Tex. Comm’n App. 1927) (ranger acting outside of his official capacity shot and killed a man without any justification); *Texas Breeders & Racing Ass’n v. Blanchard*, 81 F.2d 382, 383 (5th Cir. 1936) (ranger recommended a night watchman known to have killed African-American, one while under ar-

The first “Ranger” force recognized in Texas was organized in 1835. The acting Governor of Texas reported as follows:

This corps, well managed, will prove a safeguard to our hitherto unprotected frontier inhabitants, and prevent the depredation of those savage hordes that infest our borders. I conceive this very important at this moment as it is known that the Mexican authorities have endeavored to engage them in a war with us.<sup>35</sup>

Thereafter, a committee on military affairs provided for a corps of nearly 170 men that would operate “independent of the army with different ends in view.”<sup>36</sup> In 1848, the Texas Rangers took a central role in effectuating the state policy of exterminating all Native-Americans living in Texas.<sup>37</sup> By the 1870s, however, Mexicans in Texas became the target for the Texas Rangers.<sup>38</sup> Although the original stated purpose of the Texas Rangers was to protect “the frontier against marauding or thieving parties, and for the suppression of lawlessness and crime throughout the state,”<sup>39</sup> racial conflict between Anglos and Mexicans in Texas served as a backdrop for the new purpose of the Rangers: to combat Mexicans.<sup>40</sup> According to one Texas court, “[t]hey were used by the Governors to assist the civil authorities in upholding law and order, and wherever they were ordered they were received as guardians of peace and defenders of right and justice.”<sup>41</sup>

The Texas Rangers were lauded as a brave organization that cleared the frontier,<sup>42</sup> and praised as “the most famous efficient body of mounted police in the world.”<sup>43</sup> Over the course of a period of five

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rest); *Vaughn v. State*, 166 S.W.2d 139, 140-41 (Tex. Crim. App. 1942) (ranger admitted to assaulting and detaining man arrested for alleged theft of chickens for five days in order to force a confession).

35. *Neff*, 270 S.W. at 876 (discussing the history of Texas Rangers).

36. *Id.* (quoting 1 H.P.N. GAMMEL, *THE LAWS OF TEXAS 1822-1897*, at 524 *et seq.* (1898)).

37. *WHITE*, *supra* note 30, at 90.

38. *Id.* at 241.

39. *Neff*, 270 S.W. at 876 (quoting TEX. CIV. STAT. ANN. art. 6754 (Vernon 1914)).

40. *Id.*

41. *Neff*, 270 S.W. at 877 (emphasis added). *But cf.* Note, *Law, Race, and the Border: The El Paso Salt War of 1877*, 117 HARV. L. REV. 941, 951 (2004):

[A] group of an estimated 400 people, of whom the majority were Mexican-American and at least one-third were Mexican citizens, began to gather in the nearby town of San Elizario, where Howard [an Anglo lawyer and judge from Missouri who attempted to take control of valuable salt beds] was staying. The protestors took control of the area for five days, terrorizing the small band of Texas Rangers that was commissioned to bring peace to the area. *Id.*

42. *Neff*, 270 S.W. at 876.

43. *Id.*

years ending in 1912, the Texas Rangers along with other peace officers killed sixteen Mexicans in Cameron and Hidalgo Counties.<sup>44</sup> Such acts of violence prompted calls in the state legislature to investigate the actions of the Texas Rangers against Mexicans, and Representative J. T. Canales succeeded in reducing the size of the Ranger Corps.<sup>45</sup>

But the Texas Rangers refused to limit their acts of intimidation to threats of physical violence.<sup>46</sup> Newly arriving Anglo farmers poured into Texas and took control over significant amounts of ranch land.<sup>47</sup> Between 1915 and 1917, both the Texas Rangers and United States Army fought Mexicans, claiming the lives of perhaps thousands, while reducing the amount of Mexican land holdings.<sup>48</sup> Land speculators utilized the Texas Rangers to coerce Mexican land holders into transferring title to land, and by 1920, many Mexicans were relegated to tenants or laborers.<sup>49</sup> Anglos often excused the over-zealous activities of the Rangers, while Mexicans despised them as tools of the Anglo elite.<sup>50</sup> Mexicans were oppressed, both physically and economically, eventually leaving them at the bottom of a newly-formed dual labor system of wealthy Anglo ranchers and poor Mexican labor.<sup>51</sup>

Over time, the Texas Rangers evolved into a conventional state police force,<sup>52</sup> but for some, old habits die hard.<sup>53</sup> In the 1960s, Mexican-American farm workers began organizing and protesting labor conditions in the lower Rio Grande Valley.<sup>54</sup> During one such effort, the Texas Rangers were called in to disperse striking laborers, which made an already violent situation worse.<sup>55</sup> In Mission, Texas, the Rangers held two men in

44. MONTEJANO, *supra* note 28, at 116.

45. ARNOLDO DE LEON, *MEXICAN AMERICANS IN TEXAS* 91 (1993); *see also* Tracey R. Marshall, *Excessive Force by Lawless Enforcement Officers Against the Latino Community – Is 42 U.S.C. § 1983 a Viable Solution to the Problem?*, 22 QUINNIPIAC L. REV. 1009, 1013-14 (2004).

46. MONTEJANO, *supra* note 28, at 117-28 (describing the violence between Anglos and Mexicans along the Texas border between the years 1915 and 1917).

47. *Id.* at 109-13.

48. WHITE, *supra* note 30, at 438.

49. *Id.*

50. *Id.* at 335.

51. RICHARD WHITE, "IT'S YOUR MISFORTUNE AND NONE OF MY OWN": A NEW HISTORY OF THE AMERICAN WEST 438-39 (1991).

52. *Id.* at 335.

53. *Allee v. Medrano*, 416 U.S. 802, 806 (1974).

54. MONTEJANO, *supra* note 28, at 282-85.

55. *Medrano*, 416 U.S. at 806 (relating the result of a suit by farm workers against certain Texas Rangers, state officers and county officials seeking injunctive relief restraining interference with rights of free expression, assembly and association).



custody, and held their faces inches away from a passing train.<sup>56</sup> Weeks later, Rangers brutally arrested other union members, one of which was hospitalized for four days after being struck so violently that it caused permanent damage to his spine.<sup>57</sup> In June 1971, a former Ranger was sued for assaulting and threatening to shoot a Mexican-American grocery store clerk.<sup>58</sup>

### B. *La Migra*

La Migra: Let's play La Migra, I'll be the Border Patrol. You be the Mexican maid. I get the badge and sunglasses. You can hide and run, but you can't get away because I have a jeep. I can take you wherever I want, but don't ask questions because I don't speak Spanish. I can touch you wherever I want but don't complain too much because I've got boots and kick—if I have to and I have handcuffs. Oh, and a gun. Get ready, get set, run.<sup>59</sup>

The United States Border Patrol was created in order to secure international borders, but its history is closely intertwined with the Texas Rangers.<sup>60</sup> Rangers patrolled the border in Texas, and Congress followed this model when it passed the Labor Appropriation Act of 1924, establishing a force of 450 agents, many of which were recruited from the Texas Rangers and other local law enforcement groups.<sup>61</sup> With the passage of prohibition<sup>62</sup> and new limits placed on the number of immigrants allowed into the United States,<sup>63</sup> the federal government focused more

56. *Id.* at 807.

57. *Id.*

58. *Lopez v. Allee*, 493 S.W.2d 330, 332 (Tex. Civ. App.—San Antonio 1973).

59. Pat Mora, *La Migra*, in *UNSETTLING AMERICA: AN ANTHOLOGY OF CONTEMPORARY MULTICULTURAL POETRY* 367-68 (Maria Mazziotti Gillan & Jennifer Gillan eds., 1994); see also Elvia R. Arriola, *LatCrit Theory, International Human Rights, Popular Culture, and the Faces of Despair in INS Raids*, 28 U. MIAMI INTER-AM. L. REV. 245, 258 n.41 (1997).

“La migra” is a well-known southwestern colloquialism among Spanish-speaking Chicanas/os and Mexicanas/os referring to the INS. Mention of the term can instill tremendous fear among undocumented workers who fear losing their jobs and being sent far away from their homes. Thus, an employer who knows the impact of the term “la migra” can use it as an effective device for controlling workers’ behavior and attitude about wages, terms, and conditions of employment. *Id.*

60. See generally U.S. Customs and Border Protection, U.S. Border Patrol History, [http://www.cbp.gov/xp/cgov/border\\_security/border\\_patrol/history.xml](http://www.cbp.gov/xp/cgov/border_security/border_patrol/history.xml) (last visited Mar. 9, 2006).

61. *Id.*

62. U.S. CONST. amend. XVIII (repealed 1933).

63. See generally Tory A. Cronin, Comment, *The Wrong Solution: An Examination of President Bush's Proposed Temporary Worker Program*, 7 SCHOLAR 183, 186 (2005) (men-

attention on monitoring the border.<sup>64</sup> After federal immigration legislation enactments in 1921 and 1924, debate over Mexican immigration emerged which would shape immigration policy for years to come.<sup>65</sup> This culminated in a sharp increase in deportation of Mexican immigrants across the southern border, from approximately 1750 in 1925, to more than 15,000 in 1929.<sup>66</sup> Additionally, the economic tension created by the Great Depression brought about mass repatriation of Mexicans in the United States in the 1930s.<sup>67</sup>

At the Border Patrol's inception, the majority of agents were placed on the Canadian border. In 1940, the Border Patrol expanded to over 1500 officers, and agents guarded detention camps, diplomats, and assisted the Coast Guard during World War II.<sup>68</sup> Because of the ongoing need for immigrant labor, particularly during wartime, the United States initiated the Bracero Program in 1943.<sup>69</sup> However, in 1952, the United States ordered another large-scale repatriation of Mexicans, and the Border Patrol coordinated the airlift of 52,000 illegal immigrants to the interior of Mexico.<sup>70</sup> Within one year, economic constrictions ultimately spelled the end of federal deportation policy against Mexican immigrants, but not before the means employed by the Border Patrol took their toll.<sup>71</sup>

Along with decades of mass deportations to Mexico, upon returning to the United States, Mexican immigrants endured degrading inspection procedures newly employed by the Immigration Service at official border crossing stations.<sup>72</sup> Immigrants also faced increased criminalization of their travel in search of work.<sup>73</sup> The Border Patrol was charged with enforcing civil law, but agents were not trained in the criminal enforcement arm of the Immigration Service.<sup>74</sup> The Immigration Service interpreted

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tioning the Immigration Quota Act of 1921 with respect to patrolling the U.S.–Mexico border).

64. U.S. Border Patrol History, *supra* note 60.

65. Tallman, *supra* note 3, at 883-84 (“The restrictionists wanted to limit immigration from Mexico to keep the races from mixing. The anti-restrictionists wanted Mexicans to continue to be allowed to move freely across the border in order to maximize their utility as laborers while not allowing them to completely integrate into the United States.”).

66. See Mae M. Ngai, *The Strange Career of the Illegal Alien: Immigration Restriction and Deportation Policy in the United States, 1921-1965*, 21 LAW & HIST. REV. 69, 84 (2003).

67. Tallman, *supra* note 3, at 884-85 (noting that many of those repatriated were United States citizens).

68. U.S. Border Patrol History, *supra* note 60.

69. Tallman, *supra* note 3, at 884.

70. U.S. Border Patrol History, *supra* note 60.

71. *Id.*

72. Ngai, *supra* note 66, at 85 (“Inspection at the Mexican border involved a degrading procedure of bathing, delousing, medical line inspection and interrogation.”).

73. *Id.* at 87-89.

74. See *id.* at 87.

its Congressional mandate “to apprehend illegal aliens without warrant to apply to anywhere within the interior of the nation.”<sup>75</sup> But as Border Patrol agents flaunted their authority over the southern border area, complaints about aggressive tactics permeated the region, including bribery, hiding misconduct, and general lack of respect for immigrants.<sup>76</sup> According to Ngai, “[t]he Border Patrol functioned within an environment of increased racial hostility against Mexicans; indeed, its activities helped constitute that environment by aggressively apprehending and deporting increasing numbers of Mexicans.”<sup>77</sup>

Today, the Border Patrol employs over 11,000 officers,<sup>78</sup> and based on recent initiatives by the federal government, that number will probably increase in upcoming years. The Border Patrol also employs some of the most advanced technological equipment to detect illegal immigration.<sup>79</sup> Yet some citizens feel that the federal government has failed to combat illegal immigration and are prepared to take up the slack.<sup>80</sup>

### C. *Vigilantes*

As the number of people entering the United States illegally has increased over the past twenty-five years, vigilantes in the Southwest began capturing illegal immigrants, eventually turning them over to the Border Patrol and other law enforcement agencies.<sup>81</sup> After September 11, 2001, vigilantes furthered their activities under the guise of a war on terrorism, patriotism and duty.<sup>82</sup> Some of the more notorious and active groups are Ranch Rescue and the Minuteman Project.

#### 1. Ranch Rescue

“We’re going to come out here and close the border with machine guns.”

Casey Nethercott (former leader of Ranch Rescue)<sup>83</sup>

75. *Id.*

76. *See id.*

77. Ngai, *supra* note 66, at 88.

78. U.S. Border Patrol Overview, [http://www.cbp.gov/xp/cgov/enforcement/border\\_patrol/overview.xml](http://www.cbp.gov/xp/cgov/enforcement/border_patrol/overview.xml) (last visited Mar. 10, 2006).

79. *Id.*

80. *See e.g.*, The Minutemen Project, About the Minutemen Project, <http://www.minutemanproject.com/AboutMMP.html> (last visited Mar. 11, 2006); Ranch Rescue USA, <http://www.ranchrescue.com/index.htm> (last visited Mar. 11, 2006).

81. Conaway, *supra* note 23, at 1419-20.

82. *Id.* at 1420.

83. Andrew Pollack, *2 Illegal Immigrants Win Arizona Ranch in Court Fight*, N.Y. TIMES, Aug. 19, 2005, at A16.

According to their recruitment brochure, Ranch Rescue is “a volunteer network composed of people who believe that when government fails or refuses to act, individual citizens are obliged to act on their own.”<sup>84</sup> The group has headquarters in various places including California, Arizona, New Mexico, Colorado, Texas, Virginia, Oklahoma, and Washington.<sup>85</sup> The group uses militia tactics in apprehending illegal immigrants in order to provide what it sees as “a needed service to the under-staffed United States Border Patrol.”<sup>86</sup> Although Ranch Rescue previously claimed that it operated without harm to immigrants and fully cooperated with local law enforcement authorities, a recent incident involving immigrants resulted in both criminal and civil actions against some of its members, with the court ultimately awarding a seventy-acre ranch used by Ranch Rescue to the immigrants.<sup>87</sup> The immigrants accused Ranch Rescue members of threatening and assaulting them.<sup>88</sup>

## 2. The Minuteman Project

Until very recently, the Minuteman Project mainly operated in Arizona, recruiting citizen volunteers over the Internet to monitor illegal immigration along the border.<sup>89</sup> Approximately 900 volunteers took part, and each volunteer was self-funded.<sup>90</sup> The group does not perform any type of background investigation of its volunteers, but instead requires each volunteer to fund their own investigations.<sup>91</sup>

### III. LEGAL ANALYSIS: THE POWER TO ENFORCE IMMIGRATION POLICY

After more than a century of various attempts at guarding the border and controlling the influx of illegal immigration, the United States is no closer to effectively managing the border than it was in the early Twentieth Century. In the past, tides of immigrants entering the United States paralleled the availability of labor and economic opportunity in the United States.<sup>92</sup> However, with the federal government’s increasing

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84. Ranch Rescue Texas Volunteer Brochure (on file with Brooke H. Russ), *quoted in* Russ, *supra* note 19, at 408.

85. Russ, *supra* note 19, at 409.

86. *Id.* at 410.

87. *Id.* at 410-12; Pollack, *supra* note 83.

88. Pollack, *supra* note 83.

89. THE CONGRESSIONAL IMMIGRATION REFORM CAUCUS, *supra* note 19, at 5; *see also* Jerry Seper, *Border Patrols Inspire Imitation*, WASH. TIMES, Apr. 16, 2005, at A01.

90. THE CONGRESSIONAL IMMIGRATION REFORM CAUCUS, *supra* note 19, at 4.

91. *Id.* at 5.

92. *See* Cronin, *supra* note 63, at 187-90 (outlining the history of immigration and naturalization in the United States).

criminalization of immigration, beginning with the War on Drugs and presently in the War on Terror, the perception of illegal immigrants has transformed from one of poor people seeking a better future, to a threat to national security.<sup>93</sup> In the aftermath of the attacks on September 11th, immigration reform and border control emerged at the forefront of the national agenda, not only as a practical socio-economic issue, but more notably as an issue of homeland security.<sup>94</sup> Amidst a flood of new legislation like the USA Patriot Act<sup>95</sup> and the Homeland Security Act,<sup>96</sup> federal agencies promulgated changes in immigration law, substantially altering policies regarding apprehension and detention of immigrants and immigration enforcement.<sup>97</sup>

#### A. *Basis of Federal Authority*

With the glaring need to find the correct solution to the problem of ineffective immigration regulation, it is important to distinguish which governmental authorities are charged with the duty of guarding the borders. As noted above, the U.S. Border Patrol, who is generally considered the primary enforcer of immigration policy at the nation's borders, eventually replaced the Texas Rangers, a state law enforcement entity.<sup>98</sup> But whose job is it? Does the federal government have exclusive power to regulate the border, and if so, from where is this authority derived? What about state and local law enforcement? The answers have not always been clear, and increasing demands that the borders be closely guarded make these questions particularly relevant to the future of immigration policy. The scope and limitations on federal, state and local governmental authority over immigration is critical to effective enforcement, particularly because of the connection between immigration and the overriding national security objectives post-September 11th. As the War on Terror has become the primary justification for restructuring government, law enforcement and protection of civil liberties,<sup>99</sup> it is important to reexamine the source of official power that regulates immigration.

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93. Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. THIRD WORLD L.J. 81, 118-19 (2005).

94. *Id.* at 120-22.

95. United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56 § 302, 115 Stat. 272, 296-98 (2001) (codified in scattered sections of the U.S. Code).

96. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (codified as amended in scattered sections of U.S. Code).

97. Susan N. Herman & David G. Trager, *Public Policy Symposium: Our New Federalism? National Authority and Local Autonomy in the War on Terror*, 69 BROOK. L. REV. 1201, 1202 (2004).

98. U.S. Border Patrol History, *supra* note 60.

99. Herman & Trager, *supra* note 97, at 1202.

## 1. Constitutional Authority

The Constitution specifically grants the authority “[t]o establish an uniform Rule of Naturalization . . . throughout the United States”<sup>100</sup> to the legislative branch of the federal government, allowing Congress “[t]o make all Laws which shall be necessary and proper” to execute such power.<sup>101</sup> As one court noted, the scope of this authority clearly involves “determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization.”<sup>102</sup> However, it remains unclear whether this reservation of power in the federal government necessarily translates into exclusive dominion over enforcement of all aspects of immigration, precluding state and local government from enforcement activities, such as apprehension and detention of immigrants that enter the country by means other than an authorized port of entry.

Under Article I, Section 10 of the Constitution, the federal government retains nearly all power over foreign affairs.<sup>103</sup> Although the text of the Constitution does not specifically list immigration as a matter falling under foreign affairs, the Supreme Court has long recognized the federal government’s “broad authority over foreign affairs” as one source of authority over federal regulation of immigration.<sup>104</sup> This authority leaves no significant role for the states in immigration policy making;<sup>105</sup> however, utilizing foreign affairs powers as a source for regulation of immigration becomes a tenuous proposition when applied to immigrants who illegally enter the country.<sup>106</sup>

Another source, for the authority over immigration, has been the Foreign Commerce Clause.<sup>107</sup> The Supreme Court’s interpretation of the

100. U.S. CONST. art. I, § 8, cl. 4.

101. U.S. CONST. art. I, cl. 18.

102. *ACLU v. County of Hudson*, 799 A.2d 629, 654 (N.J. Super. Ct. App. Div. 2002) (quoting *Graham v. Richardson*, 403 U.S. 365, 377 (1971)).

103. U.S. CONST. art. I, § 10, cls. 2-3; see Michael J. Wishnie, *Laboratories of Bigotry?: Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493, 539 (2001) (“[T]he Constitution does recognize limited foreign affairs powers to be exercised directly by the states, subject to the consent of Congress. . .”).

104. *Toll v. Moreno*, 458 U.S. 1, 10 (1985).

105. See *Hines v. Davidowitz*, 312 U.S. 52, 66-67 (1941) (holding that immigration is a particular area regulated exclusively by federal law).

106. Pam Belluck, *Towns Lose Tool Against Illegal Immigrants*, N.Y. TIMES, Aug. 13, 2005, at A7; Press Release, Mexican American Legal Defense and Educational Fund, New Hampshire Court Dismisses ‘Trespassing’ Cases Against Immigrants (Aug. 12, 2005), <http://www.maldef.org/news/press.cfm?ID=274&FromIndex=yes>; Wishnie, *supra* note 103, at 553.

107. U.S. CONST. art I, § 8, cl. 3; Wishnie, *supra* note 103, at 544 n.267 (citing *The Head Money Cases*, 112 U.S. 580, 600 (1884) (“Congress ha[s] the power to pass a law

federal government's "authority to regulate interstate commerce" as an "exclusive and absolute power over foreign commerce,"<sup>108</sup> and the perceived necessity that the country "speak with one voice"<sup>109</sup> justified exclusive federal jurisdiction over immigration regulation as a part of the power to regulate foreign commerce.<sup>110</sup>

Federalism is defined as the relationship and distribution of power between national and regional governments within a federal system of government.<sup>111</sup> By virtue of the Supremacy Clause, federal law controls over conflicting state law.<sup>112</sup> However, federalism is limited by the Tenth Amendment, which provides that "powers not delegated to the United States by the Constitution . . . are reserved to the States."<sup>113</sup> In order to determine whether a state law is preempted by federal law, the Court traditionally identified two broad categories of preemption: (1) where federal law expressly preempts state or local law; and, (2) where preemption is implied by a clear congressional intent to preempt state or local law.<sup>114</sup> Express preemption occurs where the federal law contains explicit preemptive language.<sup>115</sup> Implied preemption occurs where (i) the scheme of federal law is so pervasive that Congress leaves "no room for

regulating immigration as a part of the commerce of this country with foreign nations . . . .").

108. Wishnie, *supra* note 103, at 545.

109. *Id.* at 546.

110. *Id.* at 544 n.267 (citing *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875) ("The passage of laws which concern the admission of citizens and subjects of foreign nations to our shore belongs to Congress . . . . [I]t has the power to regulate commerce with foreign nations . . . .").

111. BLACK'S LAW DICTIONARY 644 (8th ed. 2004).

112. U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . ."); *see also* *McCulloch v. Maryland*, 17 U.S. 316, 436 (1819) ("[T]he States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government.").

113. U.S. CONST. amend. X; *see also* Reynaldo Anaya Valencia et al., *Avena and the World Court's Death Penalty Jurisdiction in Texas: Addressing the Odd Notion of Texas's Independence from the World*, 23 YALE L. & POL'Y REV. 455, 498 (2005) (noting the long-standing debate within U.S. constitutional law over the sharing of power between the states and federal government).

114. Erwin Chemerinsky, *Empowering States When it Matters: A Different Approach to Preemption*, 69 BROOK. L. REV. 1313, 1316-17 (2004) (quoting *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992) (deriving preemption for the Supremacy Clause)).

115. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 306 (2001); *see generally* *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992).

the States to supplement it;<sup>116</sup> (ii) where federal and state law conflict,<sup>117</sup> and, (iii) where state law impedes the federal objective.<sup>118</sup> Division of authority between federal, state and local governments hinges upon “whether particular sovereign powers have been granted by the Constitution to the Federal Government or have been retained by the States.”<sup>119</sup> In an attempt to reach a balance between federal and state authority, the Supreme Court recognizes that federal supremacy should not be presumed lightly,<sup>120</sup> creating a presumption against finding preemption.<sup>121</sup>

## 2. Judicial Interpretation: Beyond the Constitution

Insofar as the Supreme Court derived federal authority over immigration from the text of the Foreign Affairs and Foreign Commerce Clauses, another source of the immigration power emerged, namely, “the inherent sovereignty of the nation.”<sup>122</sup> The Court viewed the foreign powers as sovereign powers that inhered in the federal government because “the states severally never possessed international powers.”<sup>123</sup> As an unenumerated power, inherent sovereignty of the nation necessarily in-

116. CHEMERINSKY, *supra* note 115, at 305 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

117. *Id.* (“Even if federal law does not expressly preempt state law, preemption will be found where ‘compliance with both federal and state regulations is a physical impossibility.’” (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963))).

118. *Id.* at 305-06 (“[P]reemption will be found if state law ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’” (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941))).

119. *New York v. United States*, 505 U.S. 144, 155 (1992).

120. Chemerinsky, *supra* note 114, at 1317-18 n.15 (quoting *N.Y. State Dep’t of Soc. Servs. v. Dublino*, 413 U.S. 405, 413 (1973)).

121. *Id.* at 1317-18 (citing *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)). Professor Chemerinsky presents an informative comparison of the Supreme Court’s most recent decisions in light of the presumption against preemption, noting that the Court’s decisions limiting congressional power invalidated laws expanding civil rights, thereby upholding challenges to federalism, see for example *United States v. Morrison*, 529 U.S. 598 (2000); *City of Boerne v. Flores*, 521 U.S. 507 (1997), while maintaining federal supremacy in cases of business challenges to state regulatory law, see for example *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001), and *American Ins. Co. v. Garamendi*, 539 U.S. 396 (2003). Chemerinsky concludes: “The preemption cases show us that this Emperor really has no clothes; federalism is used, as it has been so often throughout American history, to cloak politicized substantive value choices in a seemingly more neutral and palatable garb.” Chemerinsky, *supra* note 114, at 1328.

122. Wishnie, *supra* note 103, at 549.

123. *Id.* at 550 (quoting *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 316 (1936)).



cluded “the power to expel undesirable aliens.”<sup>124</sup> As early as 1889, the Court announced: “The power of exclusion of foreigners [is] an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution . . . .”<sup>125</sup>

The scope of federal power to regulate immigration was more clearly defined in *De Canas v. Bica*.<sup>126</sup> *De Canas* involved a preemption challenge to a state statute that prohibited employers from knowingly hiring illegal immigrants if legal resident workers would be adversely affected.<sup>127</sup> The Court held that, although the power to regulate immigration was exclusively a federal power,<sup>128</sup> this regulation fell within the state’s broad authority under its “police powers to regulate the employment relationship” and was not preempted by Federal Legislation.<sup>129</sup>

Building upon the Court’s narrowed scope of federal immigration authority, the Ninth Circuit tackled the issue of whether federal law precluded local enforcement of criminal provisions of the Immigration and Nationality Act.<sup>130</sup> The circuit court followed *De Canas*, concluding that exclusive federal power over immigration regulation did not “preempt every state activity affecting aliens.”<sup>131</sup> The court also relied on the general rule “that local police are not precluded from enforcing federal statutes.”<sup>132</sup> The court noted, however, that the local claim of authority was limited to assert “only the power to enforce the criminal provisions of the federal immigration laws.”<sup>133</sup> Limiting local enforcement in this manner precluded preemption because both federal and local law enforcement worked toward the same purpose: preventing illegal entry.<sup>134</sup> Applying preemption analysis, the court determined that the Immigration and Naturalization Act constituted a pervasive system of federal regulation with respect to its civil provisions, but distinguished the criminal provisions of the Act as too “few in number and relatively simple in their terms.”<sup>135</sup> The court concluded that the legislative intent of federal regulation over criminal immigration was not a “complete ouster of state power.”<sup>136</sup>

124. *Id.* at 551 (quoting *Curtiss-Wright Export Corp.*, 299 U.S. at 318).

125. *Id.* at 549 n.288 (quoting *Chae Chan Ping v. United States*, 130 U.S. 581 (1889)).

126. *De Canas v. Bica*, 424 U.S. 351 (1976).

127. *Id.* at 352.

128. *Id.* at 354.

129. *Id.* at 356.

130. *Gonzales v. City of Peoria*, 722 F.2d 468 (9th Cir. 1983).

131. *Id.*

132. *Id.* (citations omitted).

133. *Id.* (emphasis added).

134. *Id.*

135. *Gonzales*, 722 F.2d at 474-75.

136. *Id.* at 474 (quoting *DeCanas v. Bica*, 494 U.S. 351, 357 (1976)). The court summarized as follows: “[N]othing in federal law precluded Peoria police from enforcing the

Application of preemption analysis transformed dramatically after September 11th.<sup>137</sup> Pressing concerns of national security, along with pervasive congressional legislative delegation of authority to federal agencies accountable to both non-judicial branches of government, became the basis for determining that federal preemption of state law could occur without reference to traditional preemption analysis.<sup>138</sup> The federal government detained many individuals shortly after the September 11th terrorist attacks, and many of those taken into custody were held in state jails and prisons.<sup>139</sup> In New Jersey, the American Civil Liberties Union petitioned the state and local governments based on state laws that required disclosure of the identity of all individuals held in its prisons.<sup>140</sup> The Immigration and Naturalization Service (INS) prohibited state and local officials from revealing this information due to the need for confidentiality in prosecuting the War on Terror.<sup>141</sup> After the Superior Court ordered disclosure of the inmates' information, the INS promulgated federal regulation specifically directing state and local authorities to maintain such information confidential, irrespective of state or local law.<sup>142</sup> On appeal, the New Jersey Court of Appeals found that this federal regulation preempted state law, holding:

The power to regulate matters relating to immigration and naturalization resides exclusively in the federal government. The State simply has no constitutionally recognized role in this area. Thus, while the State possesses sovereign authority over the operation of its jails, it may not operate them, in respect of INS detainees, in any way that derogates the federal government's exclusive and expressed interest in regulating aliens.<sup>143</sup>

The court's determination of preemption was not based upon any of the traditional bases outlined by the Supreme Court and delineated in *De Canas*.<sup>144</sup> In fact, no conflict existed between the federal and state law,

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criminal provisions of the Immigration and Naturalization Act. Arizona law authorizes local officers to arrest for violations of 8 U.S.C. § 1325 where there is probable cause to believe the arrestee has illegally entered the United States. However, enforcement procedures must distinguish illegal entry from illegal presence and must comply with all arrest requirements imposed by the federal Constitution." *Id.* at 477.

137. See generally Herman & Trager, *supra* note 97, at 1201.

138. *Id.* at 1206-12.

139. Chemerinsky, *supra* note 114, at 1331.

140. *ACLU v. County of Hudson*, 799 A.2d 629, 635-36 (N.J. Super. Ct. App. Div. 2002).

141. *Id.* at 637-38.

142. *Id.* at 638-39.

143. *Id.* at 654.

144. Chemerinsky, *supra* note 114, at 1332.

nor did a federal statute expressly or implicitly preempt the INS regulation.<sup>145</sup>

### B. *Violation of Immigration Law*

Under § 1325 of the Immigration and Naturalization Act, improper entry by an undocumented immigrant results in both civil and criminal penalties.<sup>146</sup> Improper entry consists of:

- (1) entering or attempting to enter the United States at any time or place other than as designated by immigration officers;
- (2) eluding examination or inspection by immigration officers; or
- (3) attempting to enter or obtaining entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact. . .<sup>147</sup>

The criminal penalties for this offense include a fine, imprisonment, or both, with enhanced penalties for subsequent offenses.<sup>148</sup> In addition to any assessed criminal penalties, civil penalties may also be imposed for improper entry, resulting in higher fines.<sup>149</sup>

Section 1325 is the provision most directly associated with undocumented immigrants entering the country illegally.<sup>150</sup> It is a criminal violation of federal immigration law to enter the country in this manner.<sup>151</sup> Because of the general rule that local police are not precluded from enforcing federal statutes<sup>152</sup> where state enforcement activities do not impair federal regulatory interests, concurrent activities by state and local entities are not prohibited.<sup>153</sup> Both federal and local enforcement officers share the interest in preventing the misdemeanor or felony of illegal entry.<sup>154</sup> Therefore, local officers may detain or arrest a person they observe unlawfully entering the country as a violation of federal immigration law, as long as the procedures utilized by local officers are authorized by state law and comport with federal constitutional requirements.<sup>155</sup>

145. *Id.* at 1332 (“If Congress wants to preempt such state laws, it may do so. But until then, states should be accorded the power to act. Rejecting preemption would have better served the goals of federalism: advancing liberty, preventing a power – secret detentions – that runs the risk of tyrannical government action, and allowing states to be laboratories for experimentation.”).

146. *See generally* 8 U.S.C.A. § 1325 (2005).

147. § 1325(a).

148. § 1325(a).

149. § 1325(b).

150. § 1325.

151. § 1325(a).

152. *Gonzales v. City of Peoria*, 722 F.2d 468, 474 (9th Cir. 1983).

153. *Fla. Avocado Growers v. Paul*, 373 U.S. 132, 142 (1963).

154. § 1325(a); *Gonzales*, 722 F.2d at 474.

155. *Gonzales*, 722 F.2d at 477 (citing *Ker v. California*, 374 U.S. 23, 37 (1963)).

Another common violation of immigration law is unlawful presence.<sup>156</sup> Section 1182 defines unlawful presence as being “present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled.”<sup>157</sup> Unlawful presence is generally a civil violation of immigration law.<sup>158</sup> A person could be unlawfully present in the United States without violating any criminal provisions of the Immigration and Naturalization Act by remaining in the United States beyond the terms of a visitor’s or student visa, or by acquiring prohibited employment.<sup>159</sup> In these types of cases, an immigrant may very well be in violation of the civil provision of unlawful presence, but would not have entered the country illegally, which is a criminal violation under § 1325.

The Supreme Court has not directly decided the question of whether local law enforcement may enforce civil provisions of the Immigration and Naturalization Act. However, the traditional approach has been to reserve that enforcement activity to the federal government.<sup>160</sup> Determination of whether a person is illegally present in the country falls within the powers of the federal government.<sup>161</sup> Immigration officers, including Border Patrol and Customs agents, have specific authority and are required to have extensive training to enforce civil and criminal provisions.<sup>162</sup>

#### IV. LEGAL ANALYSIS: IMPLICATIONS OF LOCAL ENFORCEMENT

We will direct every resource at our command – every means of diplomacy, every tool of intelligence, every instrument of law enforcement, every financial influence, and every necessary weapon of war – to the disruption and to the defeat of the global terror network.<sup>163</sup>

After the events of September 11th unfolded and the United States began its War on Terror, the federal government made significant structural and doctrinal changes that significantly altered national security pol-

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156. 8 U.S.C.A. § 1182(a)(9)(B)(ii) (2005).

157. § 1182(a)(9)(B)(ii).

158. *See Gonzales*, 722 F.2d at 476 (noting distinctions between civil and criminal violations the Immigration and Naturalization Act).

159. *Id.*

160. *See generally* Fla. Avocado Growers v. Paul, 373 U.S. 132 (1963).

161. § 1182(a)(9)(B)(ii) (2005).

162. *See generally*, 8 U.S.C.A. § 1357 (2005) (allocating authority to Immigration officers to enforce civil and criminal immigration violations); *see also* 8 U.S.C.A. § 1776 (2005) (authorizing the Homeland Security Secretary to review and evaluate all training programs).

163. George W. Bush, *supra* note 1.

icy.<sup>164</sup> Although no evidence suggested that the terrorists who executed the September 11th attacks evaded border inspection, it became very clear that the hijackers entered and exited the United States on student visas, and lived in this country with little or no scrutiny from immigration officials.<sup>165</sup> Renewed questions about the competency of the immigration agencies returned to the forefront of public debate.<sup>166</sup>

#### A. *The Department of Homeland Security*

On March 1, 2003, President Bush established the Department of Homeland Security, the largest federal government reorganization in over fifty years, and a significant structural change reflecting the needs of this country's new war on terror.<sup>167</sup> As part of the massive restructuring of federal immigration agencies, U.S. Immigration and Customs Enforcement (ICE) took over the investigative and enforcement responsibilities of federal immigration, customs and air security laws,<sup>168</sup> and U.S. Customs and Border Protection (CBP) took responsibility of protecting the country's borders.<sup>169</sup> As a centralized border agency within the Department of Homeland Security, CBP combined the inspectional and border authorities of the U.S. Customs, U.S. Immigration, and the Border Patrol.<sup>170</sup> Although the Border Patrol's traditional missions of interdicting illegal immigrants, drugs and drug traffickers from crossing the border remained important, the overriding mission of the CBP, and particularly the Border Patrol, became homeland security and preventing terrorists and illegal weapons from entering the United States.<sup>171</sup>

Today, the Secretary of Homeland Security oversees the administration and enforcement of immigration laws and other laws pertaining to immigration and naturalization except in cases where said powers are con-

164. Herman & Trager, *supra* note 97, at 1201-02.

165. Kevin R. Johnson, *September 11 and Mexican Immigrants: Collateral Damage Comes Home*, 52 DEPAUL L. REV. 849, 856-57 (2003) (citing James H. Johnson, Jr., *U.S. Immigration Reform, Global Economic Competitiveness in the Aftermath of September 11, 2001 Terrorist Attacks*, 27 N.C.J. INT'L L. & COM. REG. 421, 438-49 (2002) (reviewing the status of the noncitizens that were linked to the September 11, 2001 terrorist attacks)).

166. *Id.* at 849-51.

167. OFFICE OF BORDER PATROL, U.S. CUSTOMS AND BORDER PROTECTION, NATIONAL BORDER PATROL STRATEGY (2004), available at [http://www.cbp.gov/linkhandler/cgov/border\\_security/border\\_patrol/national\\_bp\\_strategy.ctt/national\\_bp\\_strategy.pdf](http://www.cbp.gov/linkhandler/cgov/border_security/border_patrol/national_bp_strategy.ctt/national_bp_strategy.pdf).

168. Department of Homeland Security, Immigration & Borders, *Serving Our Visitors, Securing Our Borders*, [http://www.dhs.gov/dhspublic/theme\\_home4.jsp](http://www.dhs.gov/dhspublic/theme_home4.jsp) (last visited Mar. 8, 2006).

169. *Id.*

170. Customs and Border Protection, *Protecting Our Borders Against Terrorism*, <http://www.cbp.gov/xp/cgov/toolbox/about/mission/cbp.xml> (last visited Mar. 8, 2006).

171. OFFICE OF BORDER PATROL, *supra* note 167, at 2-3.

ferred specifically upon the President, Attorney General, Secretary of State and its departmental officers, or other diplomatic or consular officers.<sup>172</sup> The broad authority of the Secretary of Homeland Security includes the authority to control and regulate U.S. international borders.<sup>173</sup> This delegation of authority to the Secretary is further limited by deference to determinations and rulings of the Attorney General on questions of law.<sup>174</sup>

### B. *The Scope of the "Problem"*

In 1986, the budget of the Immigration and Naturalization Service (predecessor to the Citizenship and Immigration Service under the Department of Homeland Security) was \$474 million, of which the Border Patrol received \$151 million.<sup>175</sup> With increased use of border blockades in the 1990s, by 2002, the budget reached \$1.6 billion, and tripled the number of Border Patrol agents.<sup>176</sup>

Despite formidable efforts to stem unauthorized immigration, federal agencies have failed to make significant dents in the influx of immigrants crossing into the United States.<sup>177</sup> In 2004, the Pew Hispanic Center estimated that out of 35.7 million foreign-born individuals residing in the United States, approximately twenty-nine percent, or 10.3 million, were unauthorized migrants.<sup>178</sup> Of those unauthorized migrants, eighty-one percent come from Mexico and other countries in Latin America.<sup>179</sup> Approximately thirty percent of unauthorized migrants in the United States arrived since the year 2000.<sup>180</sup> U.S. Customs and Border Protection reports that for the 2003 fiscal year, officers arrested and detained over one million people illegally entering the United States, including over 17,000 criminal aliens, nearly five-hundred of whom were detained for national security reasons.<sup>181</sup> Overall, the general consensus is that unauthorized immigration into the United States has steadily increased since the mid-

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172. 8 U.S.C.A. § 1103(a)(1) (2005); *see also* 8 U.S.C.A. § 1182(f) (2005) (extending other immigration authority to the President and Attorney General).

173. § 1103(a)(5).

174. § 1103(a)(1).

175. Douglas S. Massey, *Beyond the Border Buildup: Towards a New Approach to Mexico-U.S. Migration*, IMMIGRATION POLICY IN FOCUS, Sept. 2005, at 3 (on file with *The Scholar*).

176. *Id.*

177. JEFFREY S. PASSEL, PEW HISPANIC CENTER, UNAUTHORIZED MIGRANTS: NUMBERS AND CHARACTERISTICS 5 (2005) (on file with *The Scholar*).

178. *Id.* at 3.

179. *Id.* at 4.

180. *Id.* at 5.

181. Press Release, U.S. Customs and Border Protection, Tight Security, Technology, and Manpower Result in One Million Apprehensions of People Seeking to Illegally Enter

1990s, and additional manpower on the border has merely shifted, rather than decreased, immigration flow.<sup>182</sup>

Recent attempts to deal with this type of immigration have emerged at all levels of government.<sup>183</sup> The initial federal response focused on increasing the number of Border Patrol agents on the border, and utilizing increased technology to monitor border activity.<sup>184</sup> However, state and local governments have made limited efforts to mitigate the effects of illegal immigration on their communities.<sup>185</sup>

In November 1994, the State of California passed Proposition 187, which required state law enforcement, social services, health care and public education personnel to verify and report the immigration status of individuals unlawfully present in the country to state and federal officials, and to deny those persons social services, health care and education.<sup>186</sup> A United States District Court held that several of Proposition 187's provisions were either preempted by federal immigration law or violated the Equal Protection Clause of the Fourteenth Amendment.<sup>187</sup> Commenting on the voters' overwhelming approval of the measure, the district court noted:

The California voters, overwhelming approval of Proposition 187 reflects their justifiable frustration with the federal government's inability to enforce the immigration laws effectively. No matter how serious the problem may be, however, the authority to regulate immigration belongs exclusively to the federal government and state agencies are not permitted to assume that authority.<sup>188</sup> The State is powerless to enact its own scheme to regulate immigration or to devise immigration regulations which run parallel to or purport to supplement the federal immigration laws.<sup>189</sup>

In the 1990s, several state governments sued the United States seeking compensation for educational, medical, and criminal justice expenses al-

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the U.S. in 2003 (Jan. 14, 2004), available at [http://www.cbp.gov/xp/cgov/newroom/press\\_releases/archives/2004\\_press\\_releases/0012004/01142004\\_3.xml](http://www.cbp.gov/xp/cgov/newroom/press_releases/archives/2004_press_releases/0012004/01142004_3.xml).

182. PASSEL, *supra* note 177, at 5.

183. *See generally* Herman & Trager, *supra* note 97, at 1201.

184. OFFICE OF BORDER PATROL, *supra* note 167, at 2-3.

185. The best evidence of this is the fact that in recent years civilian-run vigilante groups have emerged in many states to combat illegal immigration. *See* The Minutemen Project, About the Minutemen Project, <http://www.minutemanproject.com/AboutMMP.html> (last visited Mar. 11, 2006); Ranch Rescue, Ranch Rescue USA, <http://www.ranchrescue.com/> (last visited Mar. 11, 2006).

186. LULAC v. Wilson, 997 F. Supp. 1244, 1249 (C.D. Cal. 1997).

187. LULAC v. Wilson, 908 F. Supp. 755, 785-87 (C.D. Cal. 1995).

188. Gonzales v. City of Peoria, 722 F.2d 468, 474 (9th Cir. 1983).

189. LULAC v. Wilson, 908 F. Supp. at 786.

legedly incurred as a result of undocumented immigration into each state.<sup>190</sup> In the case brought by the State of Texas, the State alleged that the federal government (1) breached its duty to control immigration (as required by the Naturalization Clause) by failing “to pay for the consequences of” failed immigration policy, (2) “commandeered State resources in violation of the Tenth Amendment,” by forcing it to provide services to undocumented immigrants, and (3) “denigrated Texas’ republican form of government,” to a “violation of the Constitution’s guaranty clause.”<sup>191</sup> In each case brought by the various states, the courts dismissed the states’ complaints either under Rule 12(b)(6) for failure to state a claim or as presenting a non-justiciable political question.<sup>192</sup>

After federal immigration agencies became permanently housed within the Department of Homeland Security, a few states approached the issue in a different manner. In August 2005, the governors of New Mexico and Arizona declared states of emergency in counties along the border most severely affected by booming immigration, violence and drug smuggling.<sup>193</sup> The declarations allowed the states to tap into millions of dollars in disaster funds to contend with the increased immigration through their states.<sup>194</sup> The increase in unauthorized border traffic through New Mexico and Arizona emerged as traditional migrant routes through Texas and California became more heavily guarded.<sup>195</sup> Their actions did not go unnoticed by the Department of Homeland Security.<sup>196</sup> Within a week,

190. See, e.g., *Texas v. United States*, 106 F.3d 661 (5th Cir. 1997); *Arizona v. United States*, 104 F.3d 1095 (9th Cir. 1997); *New Jersey v. United States*, 91 F.3d 463 (3d Cir. 1996); *Padavan v. United States*, 82 F.3d 23 (2d Cir. 1996); *Chiles v. United States*, 69 F.3d 1094 (11th Cir. 1995), *cert. denied*, 517 U.S. 1188 (1996).

191. *Texas v. United States*, 106 F.3d at 664. The State’s final claim under the Immigration and Nationality Act was held unreviewable under the Administrative Procedures Act because a court has no workable standard against which to judge the agency’s exercise of discretion. *Id.* at 667 (citing 5 § U.S.C.A. 701-06; *Heckler v. Chaney*, 470 U.S. 821 (1985)).

192. *Id.* at 664 (citing *Arizona* 104 F.3d 1095; *California v. United States*, 104 F.3d 1086 (9th Cir. 1997); *New Jersey*, 91 F.3d 463; *Padavan*, 82 F.3d 23; *Chiles*, 69 F.3d 1094).

193. Susan Carroll & Daniel González, *Napolitano Taps Disaster Funds for Border Counties*, ARIZ. REPUBLIC, Aug. 16, 2005, at A1; CNN.com, *Border Emergency Declared in New Mexico*, CNN, Aug. 13, 2005, available at <http://www.cnn.com/2005/US/08/12/newmexico/index.html>.

194. Carroll & González, *supra* note 193; CNN.com, *supra* note 193.

195. *United States of Emergency*, N.Y. TIMES, Aug. 20, 2005, at A12; see also *Emergency Declaration Sought*, N.Y. TIMES, Aug. 20, 2005, at A10 (noting that Governor Arnold Schwarzenegger saw no crisis along the California border); Mittelstadt & McLemore, *supra* note 5 (quoting a spokesman for Texas Governor Perry as wanting to remind “the federal government that securing the national borders is a federal, not a state, responsibility.”).

196. Chip Scutari, *U.S. to Aid Border Fight; Homeland Security Heeds Governor’s Plea to Help Combat Smuggling*, ARIZ. REPUBLIC, Aug. 23, 2005, at A1.



Homeland Security Secretary Michael Chertoff responded by offering an increased federal presence at the border and improved coordination with state officials.<sup>197</sup>

Another strategy employed by two local police departments in New Hampshire consisted of filing criminal trespassing charges against illegal immigrants.<sup>198</sup> The policy aimed at deterring illegal immigrants from entering these communities.<sup>199</sup> A state judge dismissed all charges, holding that the Supremacy Clause preempted state action<sup>200</sup> and that such matters must remain with federal authorities.<sup>201</sup>

### C. *Balancing Federal and State and Local Involvement*

Given the choice, one should reject a constitutional theory that endorses the creation of state and local laboratories of bigotry against immigrants.<sup>202</sup>

The War on Terror has prompted a renegotiation of authority over immigration policies in which the federal government has been increasingly more willing to delegate some of its power to state and local governments.<sup>203</sup> Currently, the Immigration and Naturalization Act provides for limited state and local enforcement,<sup>204</sup> but as the parameters of this involvement have not been clearly defined in the past, the current political pressure to expand the role of local law enforcement may change policies to make enforcement a shared responsibility of both federal and local agencies.

#### 1. Current rules

Under Title 8, Section 1103(10) of the United States Code, the Attorney General may authorize state or local law enforcement officers to perform or exercise enforcement authority upon the determination “that an actual or imminent mass influx of aliens. . . presents urgent circumstances requiring an immediate Federal response.”<sup>205</sup> Section 1324(c) allows of-

197. *Id.*

198. Belluck, *supra* note 106.

199. *Id.*

200. Press Release, Mexican American Legal Defense and Educational Fund, *supra* note 106.

201. Belluck, *supra* note 106.

202. Wishnie, *supra* note 103, at 553.

203. Johnson, *supra* note 165, at 863.

204. *See* 8 U.S.C.A. § 1103(a)(10) (2005) (regarding “actual or imminent mass influx of aliens”); 8 U.S.C.A. § 1324(c) (2005) (arrests for smuggling, transporting or harboring criminal aliens); 8 U.S.C.A. § 1357(g) (2005) (written agreements between federal and state or local governments).

205. § 1103(a)(10).

ficers whose duty it is to enforce criminal laws to make arrests for smuggling, transporting or harboring aliens.<sup>206</sup> Section 1357(g) is the most specific provision addressing the issue local law enforcement performing immigration officer functions. Under this section, the Attorney General may enter into written agreements with a state or local government that allow qualified officers to carry out the duties of an immigration officer.<sup>207</sup> The provision specifically requires that participating state and local officials “must have knowledge of, and adhere to, Federal law.”<sup>208</sup> The statute also compels certification of “adequate training regarding the enforcement of relevant federal immigration laws.”<sup>209</sup> Combined with the authority to enforce criminal provisions of immigration law, the current immigration scheme provides for a limited role for state and local authorities.

## 2. Proposals

Due to the federal government’s ineffective ability to provide a comprehensive plan to regulate immigration, federal administrative and legislative efforts have focused on expanding the role of local law enforcement with respect to immigration.<sup>210</sup> In an effort to shift current immigration enforcement to a more inclusive system for state and local authorities, several recent proposals in Congress and federal administrative opinions are paving the way to state and local enforcement of immigration law.<sup>211</sup>

Three significant legislative proposals have focused on delegating federal authority over immigration enforcement to state and local law enforcement officials.<sup>212</sup> On June 30, 2005, United States Representative Charlie Norwood reintroduced H.R. 3137, the Clear Law Enforcement for Criminal Alien Removal (CLEAR) Act, in hopes of institutionalizing

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206. § 1324(c).

207. § 1357(g)(1).

208. § 1357(g)(2).

209. § 1357(g)(2).

210. *See, e.g.*, H.R. 3137, 109th Cong. (2005); H.R. 3622, 109th Cong. (2005); Press Release, Office of the United States Senator Kay Bailey Hutchinson, Senator Hutchinson to Introduce Immigration Bill to Strengthen State Immigration Enforcement Authority: Creates Licensed, Volunteer Border Marshall Program (Oct. 5, 2005), *available at* <http://hutchinson.senate.gov/pr1756.htm>; H.R. 3622, 109th Cong. (2005); U.S. Dep’t of Justice, Office of Legal Counsel, Memoranda for the Attorney General (Apr. 3, 2002) (on file with *The Scholar*).

211. *See, e.g.*, H.R. 3137; H.R. 3622; Press Release, Office of the United States Senator Kay Bailey Hutchinson, *supra* note 210; H.R. 3622; U.S. Dep’t of Justice, *supra* note 210.

212. *See* H.R. 3137; H.R. 3622; Press Release, Office of the United States Senator Kay Bailey Hutchinson, *supra* note 210.

cooperation between federal, state, and local law enforcement.<sup>213</sup> This Act explicitly recognizes the inherent authority of local and state law enforcement to apprehend, arrest, detain and remove criminal and undocumented immigrants during the normal course of their duties.<sup>214</sup> Additionally, the Act provides funding to state and local law enforcement agencies that participate.<sup>215</sup>

On July 29, 2005, U.S. Representative John Culberson introduced H.R. 3622, the Border Protection Corps Act of 2005, to create a volunteer militia deputized to patrol and defend the international border with Mexico and Canada.<sup>216</sup> Noting an alarming increase in foreign nationals entering the United States who have ties to terrorist organizations,<sup>217</sup> drug smugglers, gang members and violent criminals,<sup>218</sup> the Act authorizes individual border states to organize citizen volunteer militias to increase the law enforcement presence, thereby filling the gap left by inadequate federal manpower on the border.<sup>219</sup> The Act authorizes citizen volunteers deputized under the Act to use all necessary means provided by state law to interdict illegal aliens.<sup>220</sup>

On October 5, 2005, Texas Senator Kay Bailey Hutchison offered a similar proposal, speaking directly to the authority of local officials to enforce both criminal and civil provisions of federal immigration law.<sup>221</sup> Senator Hutchison cited frustration over the federal government's failure to enforce immigration law and stanch the flow of undocumented immigrants through the Southwest border.<sup>222</sup>

The Department of Justice has also weighed in on the issue.<sup>223</sup> In a Memorandum for the Attorney General dated April 3, 2002, the Office of Legal Counsel determined that "the authority to arrest for violation of federal law inheres in the States, subject only to preemption by federal

213. H.R. 3137 § 2.

214. H.R. 3137 ("Notwithstanding any other provision of law and reaffirming the existing inherent authority of States, law enforcement personnel . . . have the inherent authority of a sovereign entity to investigate, identify, apprehend, arrest, detain, or transfer to Federal custody aliens in the United States. . . . This State authority has never been displaced or preempted by the Congress.").

215. H.R. 3137 § 7.

216. H.R. 3622 § 3(a).

217. H.R. 3622 § 3(a); *see* Lindell, *supra* note 7; *see also* Interview by Lou Dobbs, *supra* note 4.

218. H.R. 3622 § 2(2).

219. H.R. 3622 § 2(7).

220. H.R. 3622 § 3(b).

221. Press Release, Office of United States Senator Kay Bailey Hutchison, *supra* note 210.

222. Gary Martin, *Border Militias Get a Big Boost From Hutchison*, SAN ANTONIO EXPRESS NEWS, Oct. 6, 2005, at A1.

223. U.S. Dep't of Justice, *supra* note 210.

law.”<sup>224</sup> Notably, the opinion further determined that the long-standing policy preventing state and local officers from making arrests based on civil deportability was “mistaken.”<sup>225</sup>

## V. CONCLUSION

If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.<sup>226</sup>

Although these recent proposals attempt to devolve immigration authority to state and local authorities, immigration has long been recognized as a distinctly federal concern.<sup>227</sup> The Supremacy Clause and preemption of state efforts strictly limit devolution of federal immigration authority.<sup>228</sup> The immigration code itself specifically outlines the circumstances under which local and state law enforcement may act, suggesting that the federal government reserves all other authority.<sup>229</sup> Furthermore, as early as the decision in the Chinese Exclusion Case, the Supreme Court has recognized that federal power over immigration is exclusive and not transferable to state or local governments.<sup>230</sup> Inherent in the delegation of federal enforcement authority are issues regarding proper training, supervision and accountability. Recent proposals do not explain how local officers will be trained and certified in federal immigration law.<sup>231</sup> It takes a stretch of the imagination to expect that after several years of ineffective enforcement by current federal agencies, the state and local governments, presumably in conjunction with federal authorities, will produce auxiliary groups of immigration officers capable of effectively handling immigration at the border.

The clearest negative effect of having local enforcement of federal immigration law is that immigrant communities will no longer cooperate with local police in reporting crime in their communities.<sup>232</sup> This implicates Equal Protection concerns in that an immigrant victim of crime may

224. *Id.*

225. *Id.*

226. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 285 (1990) (Brennan, J., dissenting) (quoting *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting)).

227. *Gonzales v. City of Peoria*, 722 F.2d 468, 474 (9th Cir. 1983).

228. *Wishnie*, *supra* note 103, at 552-58 (arguing that devolution would be a terrible public policy).

229. 8 U.S.C.A. §§ 1103(a)(10), 1324(c), & 1357(g) (2005).

230. *Chinese Exclusion Case*, 130 U.S. 581, 609 (1889).

231. *See* H.R. 3137, 109th Cong. (2005); H.R. 3622, 109th Cong. (2005); Press Release, Office of United States Senator Kay Bailey Hutchinson, *supra* note 210.

232. *See* *Miller*, *supra* note 93, at 91.

not be afforded the same protection as a citizen.<sup>233</sup> A policy that permits or requires local officers to question individuals about their immigration status constitutes a denial of “equal protection of the laws”<sup>234</sup> because some would have access to law enforcement without being questioned about their immigration status, while others would forego this protection in order to avoid the risk of deportation.<sup>235</sup> As the Supreme Court noted in *Plyler v. Doe*,<sup>236</sup> the anti-caste sentiment underlying Equal Protection Clause proscribes the denial of police protection to a segment of society because it creates a disadvantaged and victimized underclass.<sup>237</sup> Further, local enforcement of immigration law would have a negative effect on overall public safety and community policing. The chilling effect of immigration enforcement by state and local police would limit public cooperation with police. Police depend on the cooperation of the public, including immigrants, in solving crimes and maintaining public order. Without assurances that they will not be subject to deportation, many immigrants would not come forward, even when heinous crimes are committed against them or their families. This will be felt most immediately in situations of domestic violence, where a victim may not report an abuser because of fear of deportation.

Also related to these Equal Protection concerns is the issue of increased risk of racial profiling against minorities and people of color. In the Department of Justice’s Guidance Regarding the Use of Race by Federal Law Enforcement Agencies, the department did not foreclose racial profiling in cases of “threats to national security or the integrity of the nation’s borders”.<sup>238</sup> As closely related as immigration is to the national security agenda, the potential for widespread racial profiling not only by federal, but also state and local officers is unlimited.

Finally, state and local police do not have the training or expertise to enforce immigration laws. Federal agencies charged with the enforcement and application of immigration law already exist and have proper training.<sup>239</sup> Addressing immigration violations requires specialized

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233. See generally Theodore W. Maya, *To Serve and Protect or to Betray and Neglect?: The LAPD and Undocumented Immigrants*, 49 UCLA L. REV. 1611 (2002).

234. U.S. CONST. amend. XIV, § 1.

235. Maya, *supra* note 233, at 1637.

236. *Plyler v. Doe*, 457 U.S. 202 (1982).

237. *Id.* at 218-19; Maya, *supra* note 233, at 1637.

238. Katherine Culliton, *How Racial Profiling and Other Unnecessary Post-9/11 Anti-Immigrant Measures Have Exacerbated Long Standing Discrimination Against Latino Citizens and Immigrants*, 8 U.D.C.L. REV. 141, 143 (2004) (quoting CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, GUIDANCE REGARDING THE USE OF RACE BY FEDERAL LAW ENFORCEMENT AGENCIES (2003), available at [http://www.usdoj.gov/crt/split/documents/guidance\\_on\\_race.htm](http://www.usdoj.gov/crt/split/documents/guidance_on_race.htm)).

239. OFFICE OF BORDER PATROL, *supra* note 167, at 2-3.

knowledge entirely different from local police training. Determining the immigration status of an individual is better left to agencies designed specifically for that purpose. Without adequate training, local officers are not capable of making these complex determinations. In turn, this opens up the issue of liability for violations of individuals' rights, and whether local police would enjoy some type of sovereign immunity for such violations.

To achieve effective enforcement and compliance with immigration policy, the United States can no longer rely on simply increasing enforcement on the border. Current immigration policy is not tailored to address the reality of this country's immigration "problem." In order to address this issue, comprehensive reform must change policies with respect to immigration from Mexico, providing legal channels for the millions of immigrants who currently cross the border without documentation. In conjunction with administrative procedures to control and track immigration, enforcement must be maintained and streamlined by providing adequate personnel to accommodate the new influx of documented immigrants.

Documentation policies must also take into consideration not only future immigrants, but also those already present in this country. An element of comprehensive reform requires provisions for "legalization" of unauthorized immigrants, albeit with small civil penalty for illegal entry, including provisions for reunification of families. A comprehensive approach addresses both the social and economic concerns regarding immigration, but most importantly, promotes national security by providing a system that can recognize and regulate the immigrant population.

It is clear that any proposed legislation on this matter requires nothing less than comprehensive, innovative and practical reform. The enhanced enforcement proposals by Representatives Norwood and Culberson, and Senator Hutchison, do not address the multitude of factors involved in effectively regulating and documenting immigration.<sup>240</sup> The proposals are short-term and one-sided remedies to the problem. Of the two comprehensive immigration reform plans currently pending in Congress, the Secure America and Orderly Immigration Act of 2005,<sup>241</sup> provides a "common sense" approach to repair an ailing immigration system.<sup>242</sup> The Comprehensive Enforcement and Immigration Reform Act of 2005,<sup>243</sup> proposed by Senators Kyl and Cornyn, contains more stringent enforce-

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240. H.R. 3622 109th Cong. (2005); H.R. 3137, 109th Cong. § 7 (2005); Press Release, Office of United States Senator Kay Bailey Hutchison, *supra* note 210.

241. S. 1033, 109th Cong. § 1(a) (2005).

242. Press Release, U.S. Federal News, *supra* note 11.

243. S. 1438, 109th Cong. § 1(a) (2005).

ment elements, but because it requires mandatory departure of immigrants currently in the country, the Act does not adequately address a significant part of the immigration dilemma.<sup>244</sup> The McCain-Kennedy Act provides for implementation of a national strategy for border security,<sup>245</sup> development of framework for security coordination between North American governments,<sup>246</sup> and supplies funding to reimburse states for costs of illegal immigration.<sup>247</sup> Only this type of broad reform can properly and effectively restructure the immigration system.

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244. S. 1438, § 1(a).

245. S. 1033, § 111(a).

246. S. 1033, § 131(a).

247. S. 1033, §§ 201-202.