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Safe Localities Through Cooperation: Why the Secure Communities Program Violates the Constitution

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NOTE

SAFE LOCALITIES THROUGH COOPERATION: WHY THE SECURE COMMUNITIES PROGRAM VIOLATES THE CONSTITUTION

I. INTRODUCTION

An undocumented immigrant and a single mother, Tatiana arrived in the United States almost eleven years ago. Since then, she has been working very hard to support her three minor children, all of whom are U.S. citizens. She is a maid and a nanny working for minimum wage, as she does not have valid employment documents. Even though her income is small, she says that she is happy living in this country because her children will have a better future here than they would have had living in their home country.

Tatiana has to drive to work. She says that she is scared to get into her car every day because if she gets pulled over by the police for even a minor traffic violation, she may end up in removal proceedings even though she has no past criminal convictions. Tatiana lives in a jurisdiction that has activated the Secure Communities Program ("Secure Communities"). She knows that if she gets deported, her minor children will end up in a foster home. While the stated goal of Secure Communities "is to identify and remove dangerous criminals from local communities," the data shows that more than fifty-six percent of the removed individuals had no criminal convictions.[1]

The September 11th, 2001 ("9/11") terrorist attacks marked a significant turning point in the nature of U.S. immigration law enforcement.[2] Since then, even though immigration law enforcement has continued at the U.S. border, it has also shifted its focus towards the

1. Stephanie Kang, Note, *A Rose by Any Other Name: The Chilling Effect of ICE's "Secure" Communities Program*, 9 HASTINGS RACE & POVERTY L.J. 83, 107-08 (2012).

2. *See* Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563, 1572 (2010) (noting that the number of federal immigration agents prior to 9/11 was less than 2000 for the interior enforcement, and that by 2010 many of ICE's 20,000 employees are for interior enforcement).

country's interior—a new phenomenon.[3] A drastic increase in immigration-related criminal convictions has accompanied this transformation over the past decade.[4] In fact, immigration offenses currently constitute one-half of federal criminal prosecutions.[5]

In the wake of the growing focus on immigration enforcement in the U.S. interior and the rising number of criminal immigration-related convictions, localization of immigration enforcement has become prominent. Congress, as well as relevant administrative agencies, have enacted laws and regulations that allow deputization of local and state law enforcement agents to implement federal immigration laws.[6] Secure Communities is one of these federal regulatory programs.[7] Arguably, federal programs that delegate enforcement authority to localities increase enforcement efficiency and result in the removal of the most dangerous criminals.[8] However, since its inception in 2008, Secure Communities has generated much criticism.[9] Opponents of the program have argued that it targets not only the most dangerous criminal aliens but also affects undocumented immigrants with no criminal convictions.[10] This criticism is corroborated by U.S. Immigration and Customs Enforcement ("ICE") detention and removal statistics. ICE reports that as of June 2012, 147,440 *convicted* criminal aliens were removed from the United States,[11] while the *total* number of removals through Secure Communities was 202,756.[12] The difference between

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3. *See id.*

4. *Id.* at 1575.

5. *Id.*

6. *See* Rachel Zoghlin, Note, *Insecure Communities: How Increased Localization of Immigration Enforcement Under President Obama Through the Secure Communities Program Makes Us Less Safe, and May Violate the Constitution*, MODERN. AM., Fall 2010, at 21 (discussing the increased localization of immigration enforcement through "Memorandums of Agreement (MOAs) with state and local enforcement agencies").

7. *See id.*

8. *See* Nicholas D. Michaud, Note, *From 287(g) to SB 1070: The Decline of the Federal Immigration Partnership and the Rise of State-Level Immigration Enforcement*, 52 ARIZ. L. REV. 1083, 1085, 1108 (2010) (noting that the 287(g) Program was one of the cooperative federal programs that combined forces of local law enforcement agents and the federal authorities and that it prioritizes the removal of the most dangerous criminals); *see also* Zoghlin, *supra* note 6, at 21 ("Over the past decade, increasing numbers of state and local law enforcement agencies have begun to collaborate with the federal government to enforce federal immigration law.").

9. *See, e.g.*, Zoghlin, *supra* note 6, at 22 (concluding that Secure Communities "falls short . . . of meeting its projected goal[s]").

10. *See, e.g., id.* at 20, 22 (indicating that as of June 2010, nearly half of the individuals removed from the United States through Secure Communities had never been convicted of a crime).

11. U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, DEP'T OF HOMELAND SEC., ACTIVATED JURISDICTIONS (2012), http://www.ice.gov/doclib/secure-communities/pdf/sc-activated1.pdf. [hereinafter ACTIVATED JURISDICTIONS].

12. U.S. IMMIGR. & CUSTOMS ENFORCEMENT, DEP'T OF HOMELAND SEC., SECURE

these numbers demonstrates that Secure Communities results in the detention and removal of individuals who are not part of the program's targeted population.[13]

This Note explores Secure Communities in the context of a larger federal government initiative leading to increased localization of immigration enforcement. After a thorough analysis of the goals and criticisms of Secure Communities, this Note will demonstrate that this program is unconstitutional because it violates the anti-commandeering principle from constitutional case law, as well as the Tenth Amendment. Part II presents a brief overview of U.S. immigration law enforcement and the plenary power doctrine. Part III then analyzes the underlying reasons for increased localization of immigration enforcement during the last decade despite the plenary power doctrine. Specifically, the Part discusses two of the most prominent federal initiatives, the 287(g) Program and Secure Communities, which utilize local and state law enforcement authorities in the enforcement of federal immigration law. Further, Part IV focuses on the anti-commandeering doctrine in the context of the three landmark cases: *New York v. United States*,[14] *Printz v. United States*,[15] and *Reno v. Condon*.[16] Part V concludes that Secure Communities, which has become mandatory for all jurisdictions nationwide, violates the anti-commandeering doctrine as it conscripts state officers to implement the federal program. Part VI presents a comprehensive solution to the unconstitutional aspect of Secure Communities, which simultaneously focuses on the goal of detaining and possibly removing the most dangerous criminals. Finally, Part VII concludes.

COMMUNITIES MONTHLY STATISTICS THROUGH JUNE 30, 2012, at 2 (2012), *available at* http://www.ice.gov/doclib/foia/sc-stats/nationwide_interop_stats-fy2012-to-date.pdf; *see also* U.S. IMMIGR. & CUSTOMS ENFORCEMENT, DEP'T OF HOMELAND SEC., SECURE COMMUNITIES MONTHLY STATISTICS THROUGH SEPTEMBER 30, 2011, at 2 (2011), *available at* http://www.ice.gov/doclib/foia/sc-stats/nationwide_interoperability_stats-fy2011-to-date.pdf (stating that as of 2011, ICE reported that it had removed 104,819 *convicted* aliens, while the total number of removed aliens was 142,090).

13. *See, e.g.*, Kang, *supra* note 1, at 108 (indicating that more than fifty-six percent of removed individuals either did not have criminal convictions or have minor criminal convictions).

14. 505 U.S. 144 (1992).

15. 521 U.S. 898 (1997).

16. 528 U.S. 141 (2000).

II. U.S. IMMIGRATION LAW ENFORCEMENT: A HISTORIC OVERVIEW

It is an established principle that the federal government has the exclusive power to regulate immigration even though this "power is not expressly enumerated in the Constitution."[17] Since the late 1800s, the U.S. Supreme Court has sought to justify exclusive federal power over immigration law.[18] In several landmark cases, the Court has declared that federal immigration power derives from the United States' status as a sovereign nation.[19] This exclusive power recognized in case law was eventually codified in the Immigration and Nationality Act (the "INA") of 1952,[20] the most comprehensive federal legislation on immigration regulation and enforcement in the United States.[21]

A. Establishment of Federal Monopoly over Immigration Law: The Plenary Power Doctrine

It has been established since the nineteenth century[22] that the federal government has the power to regulate U.S. immigration law.[23] The U.S. Constitution expressly grants Congress the power to regulate commerce and to adopt rules for naturalization.[24] However, there is no

17. Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 FLA. ST. U. L. REV. 965, 987-88 (2004).

18. *See id.* at 988 (noting that the Supreme Court has identified several textual sources for the federal immigration power, including the Naturalization Clause, the Foreign Affairs Clauses, and the Commerce Clause); *see also* Anne B. Chandler, *Why Is the Policeman Asking for My Visa? The Future of Federalism and Immigration Enforcement*, 15 TULSA J. COMP. & INT'L L. 209, 211 (2008) (noting that "[t]he Supreme Court has generally been receptive to" the idea that exclusive federal control over immigration policy "is implicit in the Constitution" as there is no "clear textual support for broad and exclusive federal control" in that document).

19. *E.g.*, Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 609 (1889) (concluding that the federal government's authority to exclude foreigners is "part of those sovereign powers delegated [to it] by the Constitution").

20. Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101–1537 (2006)).

21. *See* Chandler, *supra* note 18, at 212 (concluding that the INA has been perceived as being consistent with the federal plenary power over immigration).

22. KEVIN R. JOHNSON, OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDERS AND IMMIGRATION LAWS 52 (2007) (stating that several states attempted to regulate immigration until 1885, at which time the federal government stepped in to enact the first federal immigration laws).

23. M. Isabel Medina, *Symposium on Federalism at Work: State Criminal Law, Noncitizens and Immigration Related Activity – An Introduction*, 12 LOY. J. PUB. INT. L. 265, 265 (2011); *see also* Jill Keblawi, Comment, *Immigration Arrests by Local Police: Inherent Authority or Inherently Preempted?*, 53 CATH. U. L. REV. 817, 824 (2004) (concluding that the immigration power belongs exclusively to the federal government).

24. U.S. CONST. art. I, § 8, cls. 3–4.

similarly enumerated power regarding immigration.[25] Even though it has been argued that the Commerce, Naturalization, and Foreign Affairs Clauses confer this power, the Constitution does not specifically empower the federal government to admit and deport non-citizens.[26] Instead, the courts have attributed this power to "two sources: [the aforementioned] constitutional provisions and the nation's status as a sovereign entity."[27] The power to regulate immigration is therefore implied.[28]

Additionally, both types of sources establish that the federal government's power to regulate immigration is exclusive.[29] The specific constitutional provisions—the Commerce, Naturalization, and Foreign Affairs Clauses—"were intended to . . . establish[] exclusive[] federal" jurisdiction over this issue.[30] The Framers, for example, included the Naturalization Clause to make sure that the states would not pursue "divergent naturalization laws" of their own.[31] The status of the United States as a sovereign nation also supports the notion of exclusive federal enforcement of immigration law.[32] As a sovereign nation, the United States must be able to control arrival and departure of aliens from its borders so as not to be vulnerable to control by other nations.[33] The Supreme Court has consistently upheld federal control of immigration regulation since the late 1800s by holding that the federal government's power is plenary.[34] This essentially precludes judicial consideration and review of the political branch's immigration-related decisions.[35] The Court has consistently articulated the plenary power doctrine in its cases.[36]

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25. Pham, *supra* note 17, at 988.

26. *See* MICHAEL A. SCAPERLANDA, IMMIGRATION LAW: A PRIMER 25 (2009) (noting that "no express immigration or alienage power [is] enumerated in the Constitution"); Medina, *supra* note 23, at 265.

27. Pham, *supra* note 17, at 988.

28. *See* Medina, *supra* note 23, at 265 (explaining that since the Constitution does not refer to the "power to admit and expel noncitizens," it must be "inherent in [the United States'] sovereignty").

29. Pham, *supra* note 17, at 988.

30. *Id.*

31. *Id.*

32. *Id.* at 990.

33. *Id.*

34. *See* SCAPERLANDA, *supra* note 26, at 25; Chandler, *supra* note 18, at 211.

35. *See* Hiroshi Motomura, *Federalism, International Human Rights, and Immigration Exceptionalism*, 70 U. COLO. L. REV. 1361, 1369 (1999) [hereinafter Motomura, *Federalism*].

36. *See, e.g.*, Pham, *supra* note 17, at 990 (discussing how "[t]he Supreme Court first articulated [the] theory" that the immigration power is exclusively federal in *Chae Chan Ping v. United States* and that "[t]he Court has reiterated [that] theory in subsequent immigration cases as well").

Chae Chan Ping v. United States[37] is the first case that stands for the plenary power doctrine.[38] Here, the Supreme Court formulated the principle that courts will defer to immigration-related decisions of Congress.[39] The main disputed issue in this case was the validity of the Chinese Exclusion Act of 1882, which outlawed immigration of Chinese laborers to the United States for ten years.[40] However, pursuant to the Act, those laborers already present in the United States could obtain a certificate entitling the person to come back to the United States after a short trip.[41] Chae Chan Ping had obtained such certificate but upon return from his trip, he was denied entry because, during his absence, Congress had passed a law annulling previously issued certificates.[42] The Supreme Court upheld the statute, holding that the federal government could exclude foreign nationals because of the sovereignty conferred to it by the Constitution.[43] The Court further asserted "that the government of the United States, through the action of the legislative department, can exclude aliens from its territory."[44]

Another landmark case in plenary power doctrine jurisprudence is *Ekiu v. United States*.[45] Here, a Japanese woman was excluded from the United States on the ground that she was likely to become a public charge.[46] The Court rejected her Due Process argument, which challenged the proposition that she was not entitled to a review of the administrative finding regarding her exclusion.[47] After asserting the same sovereignty argument articulated in *Chae Chan Ping*, the Court emphasized that Congress could delegate its power to regulate immigration to various political branches of the federal government.[48]

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37. The Chinese Exclusion Case, 130 U.S. 581 (1889).

38. Motomura, *Federalism*, *supra* note 35, at 1369-70.

39. *Id.* at 1369.

40. *Id.* at 1370.

41. *See The Chinese Exclusion Case*, 130 U.S. at 589, 598.

42. *See id.* at 589.

43. *Id.* at 609. The Court held:

> The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution, the right to its exercise at any time . . . cannot be granted away or restrained on behalf of any one. The powers of government are delegated in trust to the United States, and are incapable of transfer to any other parties.

Id.

44. *Id.* at 603.

45. Ekiu v. United States, 142 U.S. 651 (1892); Motomura, *Federalism*, *supra* note 35, at 1371.

46. *Ekiu*, 142 U.S. at 656; Motomura, *Federalism*, *supra* note 35, at 1371.

47. *Ekiu*, 142 U.S. at 660, 663-64.

48. *See id.* at 659 (finding that a nation's right to exclude aliens from its territory stems from its sovereignty).

Here, Congress had authorized the border inspection officers to exclude aliens, and intended that the officers' decisions be reviewable only by the superintendent of immigration and the Secretary of the Treasury.[49] Thus, the Court concluded that it would defer to congressional intent and not review the inspector's decision.[50]

Moreover, in *Fong Yue Ting v. United States*,[51] Chinese laborers were deported because they had failed to obtain certificates of residence pursuant to the Act of Congress of 1892, and did not satisfy their burden of providing witnesses attesting to their residence.[52] The Court affirmed the order of their deportation.[53] It concluded that the U.S. government's exclusive power over immigration includes not only exclusion but also decisions on deportation.[54]

After resolution of these core plenary power doctrine cases, the Supreme Court has repeatedly recognized that the federal government can control immigration "to the exclusion of the states."[55] This widespread acceptance of the federal government's plenary power over immigration regulation eventually resulted in the enactment of the INA in 1952.[56] Even though there were other statutes regulating immigration prior to 1952, none were as comprehensive as the INA.[57]

B. The Immigration and Nationality Act of 1952 and the Subsequent Amendments

The 1952 INA, the first federal statute regulating the vast majority of U.S. immigration, affirmed the federal government's plenary power over immigration law.[58] This comprehensive statute enumerates in detail

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49. *Id.* at 662-63.

50. *See id.* at 663-64 (concluding "that the act of 1891 [was] constitutional and valid; the inspector of immigration was duly appointed" and since his decision to exclude Ekiu was not appealed to the superintendent of immigration, his "decision was final and conclusive").

51. 149 U.S. 698 (1893).

52. *See id.* at 731-32.

53. *See id.* at 732.

54. *See id.* at 713-14 (holding that the power to exclude aliens and the power to expel them derive from the same source, and that power is vested in the political department of the government to be regulated by an act of Congress and implemented by the executive branch).

55. *See* Chandler, *supra* note 18, at 212 (discussing the history of the plenary power doctrine).

56. *Id.*

57. *See* SCAPERLANDA, *supra* note 26, at 2-3 (discussing the substance and scope of various immigration statutes prior to 1952, and concluding that currently, the INA is the principal statute regulating immigration).

58. *See* Chandler, *supra* note 18, at 212 (explaining that the INA is a comprehensive immigration statute, which details the rules of admission and naturalization to the United States, as well as the rights of non-citizens); *see also* U.S. Sen. Jeff Sessions & Cynthia Hayden, *The Growing Role for State & Local Law Enforcement in the Realm of Immigration Law*, 16 STAN. L. & POL'Y REV. 323, 341 (2005) ("[T]he INA brought into one comprehensive statute the multiple laws which,

the rules of naturalization, admission, and removal.[59] Furthermore, it creates a complex administrative body headed by the Department of Homeland Security ("DHS"), which is in charge of issuing further regulations and enforcing U.S. immigration laws.[60] In addition to DHS, various other legislative and executive branches also cooperate to create an extensive federal enforcement mechanism to implement the INA provisions through various schemes and programs geared towards "apprehension, detention, and deportation of the violators."[61]

Since its enactment in 1952, the INA has been amended several times.[62] In 1965, Congress "abolished the national provision system and established a new quota system."[63] Congress passed the Immigration Reform and Control Act of 1986 (the "IRCA")[64] to reduce illegal immigration.[65] Under the IRCA, employers would get more severe criminal punishments for hiring illegal aliens.[66] Also in 1986, the Immigration Marriage Fraud Amendments made marriage exclusively for the purpose of obtaining immigration benefits illegal.[67] In 1990, yet another wave of INA amendments changed the worldwide visa allocation, and the Enhanced Border Security and Visa Entry Reform Act of 2002[68] tried to address the immigration system flaws revealed by the 9/11 terrorist attacks.[69]

In sum, the identification by the judiciary that the federal government's ability to regulate foreigners within its borders was a necessary corollary to the United States' sovereignty, subsequently developed into the plenary power doctrine.[70] Throughout the twentieth century, this doctrine was codified into a comprehensive congressional legislation, the INA.[71] However, by the 1980s, the federal government

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before its enactment, governed immigration and naturalization in the United States." (internal quotation marks omitted)).

59. Chandler, *supra* note 18, at 212.

60. *See id.* (stating that the DHS and its various components "ha[ve] been developed to further define immigrant rights").

61. *Id.*

62. Sessions & Hayden, *supra* note 58, at 341.

63. *Id.*

64. Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.).

65. Sessions & Hayden, *supra* note 58, at 341.

66. *Id.*; *see also* 8 U.S.C. § 1324a(f)(1) (2006).

67. 8 U.S.C. § 1186a(b); Sessions & Hayden, *supra* note 58, at 341.

68. Pub. L. No. 107-173, 116 Stat. 543 (codified as amended in scattered sections of 8 U.S.C.).

69. Sessions & Hayden, *supra* note 58, at 341.

70. *See* Chandler, *supra* note 18, at 211 (concluding that the Supreme Court recognized that the plenary power was implicit in the Constitution and derived from the notion of sovereignty).

71. *See id.* at 212 (noting that the INA reflected the plenary power doctrine).

recognized that instead of maintaining an absolute monopoly over immigration, it would be more efficient if the states could also participate in immigration law enforcement.[72]

III. INCREASED LOCALIZATION OF FEDERAL IMMIGRATION LAW ENFORCEMENT IN STATES

Even though the federal government's plenary power over immigration law has been continuously upheld through congressional legislation, as well as in Supreme Court case law, several recent amendments to the INA, combined with the growing focus on interior enforcement, have channeled the same legislative and enforcement powers to the states.[73] The 9/11 terrorist attacks have significantly changed the nature of U.S. immigration law enforcement.[74] Specifically, significant ICE[75] resources have been dedicated to interior, rather than border enforcement efforts.[76] This recent increase in interior enforcement has, to a large degree, resulted from the rise in prosecution of immigration-related criminal offenses, which take place in the domestic criminal justice system.[77] In fact, half of federal criminal cases are immigration offenses.[78]

These developments—"the increasing prosecution of immigration crimes, the use of civil removal system as an adjunct for criminal punishment, and the criminalization of the means and mechanisms of civil removal—have all contributed to the criminalization of immigration in the United States."[79] This outcome has called for more active local and state involvement in immigration law enforcement.[80] The federal government has recognized this trend, and over the past

72. *See* Chacón, *supra* note 2, at 1579-80 (recognizing that over the past decade, local law enforcement agencies have become increasingly involved in federal immigration law enforcement, partly as a result of a variety of congressional legislation).

73. *See* Chandler, *supra* note 18, at 213 (noting that over the past decade, the federal government has sought the participation of the state and local law enforcement agencies in implementation and regulation of federal immigration law).

74. *See* Chacón, *supra* note 2, at 1572 (stating that while prior to 9/11, the INS had fewer than 2000 agents to enforce the immigration law in the interior, "[i]n 2010, ICE [had] 20,000 employees, many of whom [were] dedicated to internal enforcement efforts" (footnote omitted)).

75. "ICE is the principal investigative and interior enforcement arm of the [DHS]." *ICE Overview,* U.S. IMMIGR. & CUSTOMS ENFORCEMENT, http://www.ice.gov/about/overview/ (last visited Nov. 5, 2012).

76. Chacón, *supra* note 2, at 1572.

77. *See id.* at 1573-74 (emphasizing the importance of evolution of "crimmigration" law, where the immigration and criminal justice system are intertwined, and how this trend relates to the increased focus on the interior enforcement (internal quotation marks omitted)).

78. *Id.* at 1575.

79. *Id.* at 1579.

80. *Id.*

decade, has enlisted the aid of states and localities in immigration enforcement, including enforcement of civil violations of federal immigration law.[81] Many of these decisions have been made in light of a cost-benefit analysis: it is more efficient to recruit state and local services to assist with enforcement than to broaden federal enforcement capabilities.[82] The solicitation of this aid has taken several forms, two of which are discussed below.

A. INA Section 287(g): Express Delegation by the Federal Government to State and Local Officers to Engage in Enforcement of Federal Immigration Law

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA")[83] amended the INA and modified the established principle that the federal government possesses exclusive power over immigration legislation and its enforcement.[84] IIRIRA effectively allowed the U.S. Attorney General (now the Secretary of DHS) to authorize state and local law enforcement officials to enforce civil violations of immigration law when there is a "mass influx of aliens" requiring immediate federal response.[85] IIRIRA added Section 287(g) (the "287(g) Program") to the INA as part of the larger overarching regulatory framework of ICE Agreements of Cooperation in Communities to Enhance Safety and Security ("ACCESS") service.[86] Under ACCESS, state and local law enforcement agents ("LEAs"), provided that they act under the authority delegated to them and are properly trained, are allowed to pursue enforcement of matters that are in ICE's exclusive jurisdiction.[87]

81. Chandler, *supra* note 18, at 213.

82. *See* Rick Su, *Notes on the Multiple Facets of Immigration Federalism*, 15 TULSA J. COMP. & INT'L L. 179, 198 (2008).

83. Pub. L. No. 104-208, 11 Stat. 3009-546 (codified as amended in scattered sections of 8 U.S.C.)

84. *See* Zoghlin, *supra* note 6, at 21 (noting that "Congress amended the [INA] through the [IIRIRA] to facilitate more rigorous enforcement of immigration laws" by authorizing the federal government to enter into agreements with state and local agencies to assist in enforcement of federal immigration law (footnote omitted)).

85. Chacón, *supra* note 2, at 1580 (internal quotation marks omitted).

86. Michaud, *supra* note 8, at 1094.

87. Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV. 1, 34 (2011).

Specifically, the 287(g) Program allows the Secretary of DHS to directly deputize LEAs to enforce federal immigration law.[88] The delegation of federal powers commences when the Secretary enters into voluntary Memoranda of Agreements ("MOAs") with the state and local law enforcement agencies.[89] Once an MOA has been signed and finalized, local officers may pursue federal immigration law enforcement functions, such as investigation, apprehension, and detention of illegal immigrants.[90] While the deputized officers are employed by the locality, they are considered to be federal employees under the supervision of the Secretary of DHS for the purposes of determining government liability.[91] Furthermore, under the 287(g) Program, the localities that have completed MOAs cannot obstruct federal access to local information.[92] "[T]here is also no requirement that an alien be in a specific stage of criminal proceeding . . . before the individual's information is [disclosed] to the federal authorities."[93] The 287(g) Program agreements are nonetheless limited in scope, and as such, only trained LEAs may participate in the program.[94] States may also opt out of the program by terminating the written agreement.[95]

88. *See* Michaud, *supra* note 8, at 1093 (explaining that once the Attorney General enters into agreements with LEAs, local and state LEAs will be authorized to perform certain functions of federal immigration officers); *see also* Brian R. Gallini & Elizabeth L. Young, *Car Stops, Borders, and Profiling: The Hunt for Undocumented (Illegal?) Immigrants in Border Towns*, 89 NEB. L. REV. 709, 730-31 (2011) (arguing that the 287(g) Program provides for the most extensive partnership between federal, state, and local law enforcement by allowing the federal government to directly deputize local officers).

89. *See* 8 U.S.C. § 1357(g) (2006); Michaud, *supra* note 8, at 1093.

90. Gallini & Young, *supra* note 88, at 731. Once an MOA is signed, LEAs may engage only in certain federal immigration law enforcement activities, such as investigation, arrest, or detainment of aliens; however, they may not remove aliens from the United States. Yule Kim, *The Limits of State and Local Immigration Enforcement and Regulation*, 3 ALB. GOV'T L. REV. 242, 252 (2010). Furthermore, these LEAs are required to know and adhere to federal immigration law. *Id.*

91. 8 U.S.C. § 1357(g)(3); Gallini & Young, *supra* note 88, at 731.

92. *See* 8 U.S.C. § 1357(g)(1) (indicating that the officers employed by the state and participating in the 287(g) Program may perform the function of immigration enforcement "at the expense of the State or political subdivision"); Gallini & Young, *supra* note 88, at 731.

93. Gallini & Young, *supra* note 88, at 731.

94. *See, e.g.*, 8 U.S.C. § 1357(g)(2) (providing that the officers participating in MOAs must be trained in enforcement of relevant federal immigration laws); Michaud, *supra* note 8, at 1093 (stating that MOAs follow two training models: officers investigating immigration violations and those focusing on jail enforcement).

95. *See* Chacón, *supra* note 2, at 1586.

The 287(g) Program has been instrumental in achieving numerous federal and local law enforcement goals. On the federal level, the federal immigration authorities refer to it as "an essential component of federal immigration enforcement strategy."[96] In practice, the program assists federal enforcement efforts by supplementing the federal government's limited resources with LEAs.[97] Furthermore, these LEAs have valuable knowledge of the localities, which would otherwise be difficult and more time-consuming for the federal agents to access.[98] The availability of this information further contributes to the federal efforts to address the immigration problems more comprehensively.[99] On the local level, despite the increased costs, LEAs are willing to participate in federal immigration law enforcement to limit the number of illegal aliens in their communities.[100] Despite the perceived advantages of the program on both sides, the 287(g) Program has been widely criticized for essentially allowing racial profiling by LEAs and for its detrimental effect on the efficacy of community policing.[101]

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96. Michaud, *supra* note 8, at 1094 (internal quotation marks omitted).

97. *See id.* at 1094-95 (giving an example that in 2008, the 287(g) Program had added five ICE jail agents working in Maricopa County, Arizona resulting in enhancement of jail enforcement efforts).

98. *See id.* at 1095.

99. *Id.*

100. *Id.* (stating that LEAs perceive illegal aliens as placing fiscal burden on their communities, as well as the possibility of increased criminal activity in the localities attributable to them); *see* 8 U.S.C. § 1357(g)(1) (2006) (providing that the costs of implementation of MOAs will be borne by the states); Carrie L. Arnold, Note, *Racial Profiling in Immigration Enforcement: State and Local Agreements to Enforce Federal Immigration Law*, 49 ARIZ. L. REV. 114, 142 (2007) (emphasizing that racial profiling and negative effects on community policing may be the cost of entering into MOAs); *see also* Kris W. Kobach, *Reinforcing the Rule of Law: What States Can and Should Do to Reduce Illegal Immigration*, 22 GEO. IMMIGR. L.J. 459, 459-60 (2008) (proposing that the fiscal burden placed on states and localities by aliens who do not pay taxes are the primary motivators for enacting state regulations that discourage illegal immigration).

101. Michaud, *supra* note 8, at 1097, 1101; *see also* Letter from Marielena Hincapie, Exec. Dir., Nat'l Immigration Law Center, to Barack Obama, U.S. President (Aug. 25, 2009), *available at* http://ochla.ohio.gov/ASSETS/E2093AC2AB024A72B3DA4CDA4BE03D92/IPB-stateandlocal.%20287g-Letter-2009-08-25.pdf (urging the President to terminate the 287(g) Program due to racial profiling and various civil rights abuses). *Compare* Michaud, *supra* note 8, at 1097, *with* Memorandum of Agreement between U.S. Immigration & Customs Enforcement and Law Enforcement Agency 4, *available at* http://www.ice.gov/doclib/detention-reform/pdf/287g_moa.pdf (indicating that for the state and local LEAs to become certified under the 287(g) Program, they must undergo training in civil rights and liberties), *and* Memorandum of Agreement between U.S. Immigration & Customs Enforcement and Maricopa Cty. Sheriff's Dep't 4 (Sept. 30, 2009), *available at* http://www.ice.gov/doclib/foia/memorandumsofAgreementUnderstanding/r_287gmaricopacountyso102609.pdf (requiring that pursuant to the MOA entered between ICE and Maricopa County, authorized LEAs be trained in civil rights and civil liberties practices). Many opponents fear that unlike federally trained immigration officers, LEAs lack specialized training and knowledge of civil rights law, which may lead to racially motivated questioning and unconstitutional searches and seizures primarily in communities of color. *See, e.g.*, Michaud, *supra*

In response to these criticisms, the 287(g) Program was modified in July 2009 in two key aspects.[102] First, it implemented a priority scheme targeting dangerous criminal aliens.[103] The policy behind the priority scheme was to prevent arrests for minor offenses merely as a pretext for initiation of removal proceedings.[104] Second, it required the LEAs to pursue any criminal charges that resulted from the arrest of the alien before ICE initiated removal proceedings.[105] Similar to the priority scheme, this second change also prevents arrests for minor offenses solely for these purposes.[106]

Currently, ICE has MOAs with sixty-eight LEAs in twenty-four states.[107] It has also trained and certified more than 1500 LEAs to enforce immigration law.[108] Since January 2006, the 287(g) Program has identified more than 279,311 potentially removable aliens.[109]

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note 8, at 1097. Other critics believe that participating in the 287(g) Program will negatively affect the relationship of trust and support between LEAs and both legal and illegal alien communities; which will, in turn, reduce the effectiveness of local community policing because public trust and support are vital for it. *See, e.g.*, *id.* at 1101.

102. Michaud, *supra* note 8, at 1102-03.

103. *See id.* at 1103. Michaud explained:

> [T]he newly standardized MOA sets forth a series of three priority levels: (1) Priority Level One, consisting of Aliens convicted/arrested for major drug offenses and/or violent offenses such as murder, manslaughter, rape, robbery, and kidnapping; (2) Priority Level Two, consisting of Aliens convicted/arrested for minor drug offenses and/or mainly property offenses; and (3) Priority Level Three, consisting of Aliens who have been convicted or arrested for other offenses.

Id. (internal quotation marks omitted).

104. *Id.* at 1104; *see* Chacón, *supra* note 2, at 1584-85.

105. Chacón, *supra* note 2, at 1584-85 ("[T]he revised MOAs clarified the fact that law enforcement agencies are required to pursue all criminal charges that originally caused the offender to be taken into custody."); Michaud, *supra* note 8, at 1106. Michaud stated:

> ICE will only take custody of aliens (1) who have been convicted of State, local, or federal offenses and have served their full sentences; (2) who have prior criminal convictions and when immigration detention is required by statute; and (3) when ICE decides, on a case-by-case basis, to take custody of an alien who does not belong to one of the classes of alien described.

Id.

106. *Id.* at 1106-07.

107. *Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, http://www.ice.gov/news/library/factsheets/287g.htm (last visited Nov. 5, 2012).

108. *Id.*

109. *Id.*

B. The Secure Communities Program

Secure Communities, which became effective in 2008, is another ACCESS initiative that operates in conjunction with the revised 287(g) Program.[110] Even though Secure Communities also involves the utilization of state and local law enforcement agencies, it is different from the 287(g) Program in several ways.[111] Under the 287(g) Program, LEAs are trained in federal immigration law, which they enforce by checking the immigration status of aliens.[112] Under Secure Communities, however, LEAs who are not trained by federal immigration agents "are authorized to send the fingerprints of all individuals who have been charged with, but not yet convicted of crime to ICE."[113]

1. Purposes and Goals

The main goal of Secure Communities is to prioritize the detention and removal of the most dangerous criminals, thereby making U.S. communities safer.[114] To achieve this goal, Secure Communities uses a three-tier priority system very similar to the one used in the revised 287(g) Program.[115] The first tier includes violent offenders ("murderers, rapists, kidnappers, and major drug offenders") who are the first priority for removal.[116] The second tier includes individuals convicted of minor drug and property offenses.[117] The third, and the lowest priority, encompasses aliens that commit public disorder, minor traffic violations, and other minor offenses.[118]

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110. *See* Michaud, *supra* note 8, at 1108-09 (discussing other ACCESS programs that, similar to the 287(g) Program, focus on cases of criminal aliens).

111. *See* Zoghlin, *supra* note 6, at 21 (comparing Secure Communities with the 287(g) Program).

112. *Id.*

113. *Id.*; *see also Secure Communities*, NAT'L IMMIGRATION FORUM, http://www.immigrationforum.org/images/uploads/Secure_Communities.pdf (last visited Nov. 5, 2012) (comparing the 287(g) Program with Secure Communities and emphasizing that while the 287(g) Program requires training of the deputized officers, Secure Communities does not have the same requirement).

114. *See* Michaud, *supra* note 8, at 1110; *see also Secure Communities*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, http://www.ice.gov/secure_communities/ (last visited Nov. 5, 2012) [hereinafter *Secure Communities*, ICE] (declaring that Secure Communities is designed to carry out ICE's main priority, which is "the removal of criminal aliens . . . pos[ing]" the greatest danger "to public safety, and repeat immigration law violators").

115. *See* Zoghlin, *supra* note 6, at 21; *supra* note 103 and accompanying text.

116. Zoghlin, *supra* note 6, at 21.

117. *See id.* at 21-22 (identifying the specific offenses that fall into the second category: "burglary, larceny, fraud, and money laundering").

118. *Id.* at 22.

2. How Does It Work?

Secure Communities is based on cooperation between LEAs, DHS, and the Federal Bureau of Investigation ("FBI").[119] The program uses integrated records and biometric data technology to identify criminal aliens for ICE removal.[120] Under this program, LEAs must send the fingerprints of the apprehended individuals who have not yet been convicted to the FBI criminal database.[121] If the fingerprints match with the FBI database, ICE is automatically notified.[122] ICE will register a match if an immigration official has previously fingerprinted the apprehended individual.[123] ICE then determines whether that individual is removable.[124] If the determination is affirmative, ICE issues a detainer on the person, requesting that the local detention facility hold the individual for up to forty-eight hours.[125] After interviewing the individual, if ICE decides that the person is removable, the individual will be taken into ICE custody.[126] As of June 5, 2012, 3074 jurisdictions had activated Secure Communities in fifty-four states and territories.[127] By 2013, ICE plans to expand the program's coverage nationwide.[128] By the first half of 2009, more than 266,000 fingerprints were transferred to the integrated biometric system, and there were 32,000 matches.[129]

The significant controversial issue regarding Secure Communities is whether it is mandatory for states. ICE has clarified that states cannot opt out of the program, which effectively means that it is mandatory for all states.[130] Furthermore, ICE has also clarified that it would be cancelling already effective MOAs that it had entered into with several localities in order to activate Secure Communities.[131]

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119. *See id.* at 21.

120. *See Secure Communities*, ICE, *supra* note 114.

121. *Id.*; Zoghlin, *supra* note 6, at 21.

122. Zoghlin, *supra* note 6, at 21.

123. *See Secure Communities*, ICE, *supra* note 114 (emphasizing that if the fingerprint checks reveal that the individual is either illegally present in the United States or removable for any other reason, ICE will take enforcement action).

124. *See id.*

125. *Id.*

126. *See id.* (indicating that ICE decides whether the detained individual is removable only after interviewing that individual).

127. ACTIVATED JURISDICTIONS, *supra* note 11.

128. *Id.*

129. Chacón, *supra* note 2, at 1596.

130. *Frequently Asked Questions*, *Secure Communities*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, http://www.ice.gov/secure_communities/faq.htm (last visited Nov. 5, 2012) [hereinafter *Frequently Asked Questions*].

131. *Id.* Cancellation of MOAs is logical because Secure Communities has become mandatory, and, therefore, there is no need for such contractual agreements between the states and ICE.

3. Criticism and the Identified Problems

Secure Communities, even though not yet implemented nationwide, has already generated much criticism from human rights and immigration law advocates.[132] One of the problems is that the majority of the persons identified and detained through Secure Communities do not have any criminal record at all.[133] Critics point out that the process implemented by Secure Communities generates too many matches and that not all of the identified individuals are necessarily removable.[134] Another criticism is that it results in racial profiling by the LEAs because they may execute a pretextual arrest just based on the individual's race.[135] Once a person's fingerprints are submitted to the FBI and DHS databases, ICE will be notified, and it does not matter whether the criminal charges are actually pursued against the individual for the removal to be initiated.[136]

It has also been noted that Secure Communities lacks oversight and accountability.[137] Critics have argued that one of the main reasons for this deficiency is that ICE does not train LEAs under Secure Communities, and therefore, they use their increased power without any supervision or guidance.[138] It has also been noted that Secure Communities causes tensions in the community.[139] Arguably, instead of making the communities safer, it has negative effects on Latino communities in particular because its members are more reluctant to report crime, which enables criminal activity to continue.[140]

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132. *See, e.g.*, Zoghlin, *supra* note 6, at 22-24 (identifying prevailing criticisms of the Secure Communities).

133. *Id.* (noting that of the 111,000 aliens identified though Secure Communities in 2009, only ten percent were charged with the first priority crimes, and nearly half of the detainees have no criminal convictions at all). *But see Secure Communities*, ICE, *supra* note 114 (stating that as a result of the implementation of the three-tiered priority system, the number of convicted individuals removed through Secure Communities between October 2008 and October 2011 increased by eighty-nine percent and the number of removed aliens without criminal convictions dropped by twenty-nine percent).

134. *See, e.g.*, Chacón, *supra* note 2, at 1596 ("For example, lawful permanent residents who commit . . . misdemeanors are not removable, but they would come up as a match in [the DHS] system. Similarly, individuals who have been erroneously arrested but are in the DHS system would come up as a match.").

135. Zoghlin, *supra* note 6, at 22 (arguing that the LEAs will be targeting specifically the Latino community).

136. *See id.*

137. *Id.*

138. *Id. But see Secure Communities*, ICE, *supra* note 114 (indicating that "ICE and the DHS Office for Civil Rights and Civil Liberties . . . have developed a new training program for [LEAs] . . . on how Secure Communities . . . relates to . . . civil rights").

139. Zoghlin, *supra* note 6, at 23.

140. *Id.*

IV. WHEN DOES A FEDERAL LAW OR REGULATION VIOLATE THE ANTI-COMMANDEERING DOCTRINE?

The Constitution creates a government based on dual sovereignty,[141] and when the federal government commandeers the states to implement a federal regulatory scheme, it violates the Tenth Amendment and state sovereignty.[142] The Tenth Amendment provides that, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[143] This provision, therefore, provides for state sovereignty, and as such, the federal government may not treat the states merely as its political subdivisions.[144] Instead, the federal and state governments are two independent sovereigns.[145] The Supreme Court case law on the anti-commandeering principle establishes a comprehensive framework addressing the types of federal regulations that may infringe on state sovereignty and, therefore, violate the Tenth Amendment.[146]

The anti-commandeering principle was recognized and developed by the Supreme Court in three landmark cases.[147] These cases establish a general framework for the analysis of the issue whether a certain federal statute or regulation violates the anti-commandeering doctrine. Federal statutes or regulations that go against this doctrine will be held

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141. Gregory v. Ashcroft, 501 U.S. 452, 457 (1991).

142. *See* Printz v. United States, 521 U.S. 898, 919, 935 (1997).

143. U.S. CONST. amend. X.

144. *See* New York v. United States, 505 U.S. 144, 188 (1992). The Supreme Court in *New York v. United States* stated:

> States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government. The positions occupied by state officials appear nowhere on the Federal Government's most detailed organizational chart. The Constitution instead leaves to the several States a residuary and inviolable sovereignty.

Id. (internal quotation marks omitted).

145. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 549 (1985) ("The States unquestionably do retai[n] a significant measure of sovereign authority . . . to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government." (alteration in original) (internal quotation marks omitted)); *see also* Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373, 1405 (2006).

146. *See* Pham, *supra* note 17, at 975-76 (explaining that after *Printz v. United States*, requiring local authorities to enforce federal immigration law would violate the anti-commandeering doctrine).

147. *See, e.g.*, Orde F. Kittrie, *Federalism, Deportation, and Crime Victims Afraid to Call the Police*, 91 IOWA L. REV. 1449, 1487-89 (2006).

unconstitutional because they will be in violation of the Tenth Amendment.[148]

A. New York v. United States

In *New York v. United States*, the disputed section of the federal Low-Level Radioactive Waste Policy Act required New York to either regulate low-level radioactive waste produced within its borders, or to be liable for damages that the waste generators would suffer as a result of the State's failure to do so.[149] The main problem with this provision was that it gave New York the choice of either taking title to low-level radioactive waste—and being potentially liable to waste generators—or regulating it according to congressional instructions.[150] The Supreme Court reasoned that even though the Constitution gives Congress the power to regulate individuals, not the states, it still leaves the possibility for Congress "to encourage a state to regulate in a particular" way using various incentives.[151] However, the disputed provision resulted in coercion rather than encouragement of state action.[152] As such, the Court struck down this provision, holding that Congress may not simply "commandeer[] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program."[153]

B. Printz v. United States

Printz was a landmark case for the anti-commandeering doctrine because it expanded the rule articulated in *New York v. United States*.[154] The petitioners disputed the constitutionality of the Brady Handgun Violence Prevention Act (the "Brady Act").[155] Pursuant to these provisions, a chief law enforcement officer ("CLEO") had to make a

148. Pham, *supra* note 17, at 975.

149. *See* New York v. United States, 505 U.S. at 149, 153-54.

150. *Id.* at 174-75.

151. *Id.* at 166-67; *see, e.g.*, South Dakota v. Dole, 483 U.S. 203, 206 (1987) (concluding that the Congress may regulate states by attaching conditions to the receipt of federal funds); Hodel v. Va. Surface Mining & Reclamation Ass'n., 452 U.S. 264, 290 (1981) (noting that Supreme Court precedent supports the idea that Congress can constitutionally preempt state laws that conflict with federal law).

152. New York v. United States, 505 U.S. at 176 ("[T]he take title incentive does not represent the conditional exercise of any congressional power enumerated in the Constitution.").

153. *Id.* at 176-77 (internal quotation marks omitted) (reasoning that the Constitution permits Congress to preempt state regulation contrary to federal interests and also to use incentives to encourage adoption of federal regulatory schemes; however, there is no similar authorization to direct the states to provide for disposal of radioactive waste within their borders).

154. *See* Ann Althouse, *The Vigor of Anti-Commandeering Doctrine in the Times of Terror*, 69 BROOK. L. REV. 1231, 1235 (2004).

155. Printz v. United States, 521 U.S. 898, 902 (1997).

reasonable effort to determine within five business days whether a particular arms dealer should consummate a transaction for the sale of a handgun with a specific purchaser.[156] The statute did not require the CLEO to notify the dealer if he or she determined that the transaction would be illegal.[157] However, if the CLEO *did* notify the dealer, he or she also had to provide the would-be purchaser with a written explanation of the determination.[158] Furthermore, if the CLEO determined that the transaction would be legal, he or she had to destroy any records in his possession regarding the transfer.[159] Holding these interim provisions of the Brady Act unconstitutional, the Court extended the prohibition in *New York v. United States* from the state legislative process to any federal regulatory system requiring the states or the states' officers to administer or enforce such a program.[160] The Court reasoned that because the Brady Act directed the state officers to participate in the administration of a federally enacted regulatory system, it unconstitutionally infringed on state sovereignty.[161] Even though there is no specific textual support for the anti-commandeering principle in the Constitution, the majority premised its holding on the Tenth Amendment and the constitutional protection of dual sovereignty between states and the federal government.[162] It ruled that "Congress cannot circumvent [the] prohibition by conscripting the States' officers directly. The Federal government may neither issue directives requiring the States to address particular problems, nor command the States' officers . . . to administer or enforce a federal regulatory program."[163]

C. Reno v. Condon

In *Reno v. Condon*, the Court, unlike in the two previous cases, upheld the Driver's Privacy Protection Act of 1994 (the "DPPA") holding that the anti-commandeering principle was not violated.[164] Here, the Court relied on the framework established in *New York v. United*

156. *Id.* at 903.

157. *Id.*

158. *Id.*

159. *Id.* at 903-04.

160. *See id.* at 933, 935 (discussing the interim provision of the Brady Act and concluding that the federal government cannot conscript state officers directly).

161. *See id.* at 904, 933 (explaining that the firearm dealers, instead of having to forward the Brady forms to federal employees, must transfer them to CLEOs, and thereafter, CLEOs have the duty to make a reasonable determination whether the sale would be legal based on the information provided on the Federal Brady form).

162. *Id.* at 905, 932.

163. *Id.* at 935.

164. *See* Reno v. Condon, 528 U.S. 141, 143 (2000).

States and *Printz* to conclude that the DPPA was constitutional because it did not require the South Carolina legislature to enact any laws or regulations, or the state officials to enforce certain federal statutes.[165] The DPPA sought to regulate the disclosure of drivers' personal information from state motor vehicle departments ("DMVs") to various individuals and businesses.[166] The DPPA established a regulatory scheme that prevented DMVs from disclosing a driver's personal information without that driver's consent.[167] The Court based its decision on the fact that, by selling drivers' information to various parties, the states engaged in interstate commerce, and that the regulation of such commerce was within Congress's enumerated constitutional powers.[168] Therefore, DPPA regulation of the states as the owners of databases was upheld.[169]

In the three landmark cases, *New York v. United States*, *Printz*, and *Reno v. Condon*, the Supreme Court has articulated the anti-commandeering principle and defined its scope.[170] Additionally, these cases establish a general framework for the analysis of whether a particular federal statute or regulation violates the Tenth Amendment.[171] Secure Communities, a federal administrative agency program, should also be analyzed within this framework.

V. DOES THE SECURE COMMUNITIES PROGRAM VIOLATE THE ANTI-COMMANDEERING DOCTRINE?

The last three decades have witnessed a shift from exclusive reliance on the plenary power doctrine by the federal government to localization of immigration law enforcement.[172] Increasingly large numbers of states and localities have become actively involved in immigration regulation within their jurisdictions.[173] This trend has led to much debate over whether states possess inherent authority to regulate immigration, and if they do not, how much regulatory and enforcement powers the federal government can delegate to them.[174]

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165. *Id.* at 151.

166. *Id.* at 143.

167. *Id.* at 144.

168. *Id.* at 148.

169. *See id.* at 151.

170. *See* Kittrie, *supra* note 147, at 1487-88.

171. *See id.*

172. *See, e.g.*, Chandler, *supra* note 18, at 213 (indicating that over the past decade, the federal government has started to "enlist[] the aid of states and localities in immigration law enforcement").

173. Chacón, *supra* note 2, at 1579.

174. *Compare* Michaud, *supra* note 8, at 1088 (claiming that state and local law enforcement agencies have always had "inherent . . . authority to arrest and detain for criminal violations of

A. States' Inherent Power to Enact and Enforce Immigration Law

In perpetrating the 9/11 terrorist attacks, the terrorists had exploited gaps in the enforcement of U.S. immigration law.[175] Nineteen terrorists were able to enter the United States as non-immigrants, overstay their visas, and remain undetected.[176] Furthermore, four of the nineteen terrorists had come into contact with state law enforcement officials at some point before the attacks took place.[177] Federal immigration agents, however, did not have any such contact.[178] This gap in the immigration enforcement system demonstrated the need for cooperation between federal and state law enforcement agencies.[179] The main issue is whether states have the inherent power to legislate and implement immigration laws, or whether Congress has to expressly delegate that power to the states.[180]

1. Constitutional Framework: The Preemption Doctrine

It has long been recognized under the plenary power doctrine that the entry and removal of aliens is an exclusively federal power.[181] Therefore, initiatives by state and local law enforcement agencies to regulate the presence of undocumented aliens in their communities are limited by the preemption doctrine.[182] Under the Supremacy Clause of the Constitution, laws and treaties made by the federal government "shall be the supreme law of the land; . . . anything in the Constitution of the laws of any State to the contrary notwithstanding."[183] The federal statutes or regulations enacted in the framework of the Constitution will therefore preempt otherwise permissible state action or law in the same field.[184] Generally, there are three types of preemption.[185] Express

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federal immigration law"), *with* Pham, *supra* note 17, at 987, 995-96 (arguing that immigration laws are "an exclusively federal power").

175. Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179, 179-80 (2005).

176. *Id.*

177. *Id.* at 183.

178. Sessions & Hayden, *supra* note 58, at 327.

179. *Id.* (noting that due to the large number of illegal aliens presently living in the United States, a small number of federal immigration agents is not sufficient for identifying and deporting those aliens).

180. *Compare* Pham, *supra* note 17, at 1003 (arguing that the states do not possess the inherent authority to enforce immigration law because of the need for uniform enforcement), *with* Kobach, *supra* note 175, at 183 (arguing that the states possess inherent authority to enforce immigration law and they have exercised this power "since the earliest days of federal immigration law").

181. *See* Kim, *supra* note 90, at 244.

182. *Id.*

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

184. Kim, *supra* note 90, at 244.

185. *Id.*; *see also* Medina, *supra* note 23, at 267 (describing and distinguishing the three types

preemption occurs when Congress enacts a statute which prevents state regulation of the same field.[186] When Congress implements a comprehensive regulatory scheme, showing that it intends to solely regulate that field, field preemption takes place.[187] Finally, conflict preemption is triggered when a federal law conflicts with a state or local law.[188] As discussed in Part II, *supra*, the INA creates a pervasive federal scheme to regulate not only the entry and removal of aliens in the United States, but also imposes extensive conditions on their presence within the country.[189] Even though the INA creates an extensive federal regulatory scheme in the field of immigration, the Supreme Court "has never held that every state [and local] enactment" regarding immigration regulation within their localities is "*per se* pre-empted."[190] Therefore, the states' and localities' ability to regulate aliens present in their communities depends on whether Congress has preempted such regulation. Additionally, there has been much debate on whether, in the absence of preemption, states should be able to enforce violations of civil and criminal immigration law to an equal degree.[191] *Gonzalez v. City of Peoria*[192] was the first case to address this issue.[193]

2. *Gonzales v. City of Peoria*

In *Gonzalez*, the plaintiffs were eleven individuals of Mexican ancestry, only one of whom was a U.S. citizen and two of whom were legal residents.[194] The plaintiffs alleged that the Peoria police officers violated the Fourth and Fourteenth Amendments "by stopping and arresting persons of Mexican descent without reasonable suspicion or

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of preemption doctrines).

186. Kim, *supra* note 90, at 244.

187. *Id.*

188. *Id.*

189. *Id.* at 245.

190. De Canas v. Bica, 424 U.S. 351, 355 (1976); Kim, *supra* note 90, at 245.

191. *Compare* Kim, *supra* note 90, at 246-47 (supporting the argument that states and localities may have a greater leeway in arresting and detaining aliens for criminal, rather than civil, violations of federal immigration law), *with* Kobach, *supra* note 175, at 208 (arguing that the congressional actions and statements do not support the idea that state enforcement powers depend on whether the violation implicates criminal or civil aspect of federal immigration law).

192. 722 F.2d 468 (9th Cir. 1983), *overruled in part by* Hodgers-Durgin v. De La Vina, 199 F.3d 1037 (9th Cir. 1999).

193. *See* Kobach, *supra* note 175, at 208.

194. *Gonzales*, 722 F.2d at 472, 481. *Gonzalez* still stands for its holding that the states have inherent authority to enforce criminal violations of federal immigration law because *Hodgers-Durgin* merely overruled *Gonzalez* on the issue of standing for the purpose of requesting injunctive relief. *See Hodgers-Durgin*, 199 F.3d at 1040 n.1 (holding that it is no longer sufficient for the plaintiff who has standing for damages to also request injunctive relief, thereby overruling *Gonzales* on that point of law).

probable cause and based only on their race and appearance."[195] They also alleged police officers required those persons who were stopped to provide documentation to show that they were legally in the United States.[196] Furthermore, the individuals who were unable to provide such identification were detained and then released to immigration authorities.[197]

The main issue in this case was whether state and federal statutes allowed the Peoria Police Department to arrest individuals for violations of immigration law.[198] The court disagreed with the plaintiffs' argument that since immigration enforcement is exclusively a federal power, the state police are preempted from enforcing it.[199] The court concluded that civil provisions of the INA were "so pervasive that no opportunity for state activity remain[ed]."[200] Issues such as authorized entry, length of stay, residency status, and deportation constituted part of this pervasive regulatory scheme justifying exclusive federal power.[201] However, statutes relating to criminal violations of federal immigration law were "few in number" and were not "supported by a complex administrative structure."[202] Consequently, exclusive federal regulation would not be justified.[203] The court in *Gonzalez* eventually held that unless otherwise preempted, states have inherent power to enforce criminal violations of federal immigration law.[204] The holding in *Gonzalez* is limited to criminal federal immigration violations.[205] It is still unclear whether state law enforcement agents also have an authority to make arrests for civil violations of immigration law.[206]

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195. *Gonzales*, 722 F.2d at 472.
196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.* at 474.
200. *Id.*
201. *Id.* at 474-75.
202. *Id.*
203. *See id.*
204. *See id.* at 476-77.
205. *Id.* at 476; *see also* Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819, 1819-20 (2011) [hereinafter Motomura, *Discretion*]. The author notes that the *Gonzalez* decision is most often cited for the following proposition:

> State and local law enforcement officers may make arrests for violations of the criminal provisions of federal immigration law without express federal authorization, as long as state and local law authorizes the arrest and probable cause exists. Put more plainly, federal law does not preempt state and local arrests for federal immigration crimes.

Id.

206. *See, e.g.*, United States v. Salinas-Calderon, 728 F.2d 1298, 1301 n.3 (10th Cir. 1984) ("A state trooper has general investigatory authority to inquire into possible immigration violations."); Keblawi, *supra* note 23, at 833 (discussing the case law in two different circuits, and concluding

B. *Express Authorization of States by the Federal Government to Enforce Federal Immigration Law*

Since the issue of inherent authority of the states to enact and enforce immigration law is still undecided, we need to turn to instances where Congress and DHS have enacted legislation and regulation engaging the states in the enforcement of federal immigration law. Secure Communities and the 287(g) Program belong in this class of federal statutes and regulations.[207] As a general matter, Congress may authorize the states to detain, hold, or transport unauthorized aliens, and it has exercised this power by enacting the 287(g) Program.[208] However, it "may neither issue directives requiring the States to address" immigration enforcement, "nor command the States' officers to do so."[209] The 287(g) Program, rather than achieving a "blanket deputization" of state and local law enforcement agencies, authorizes local LEAs "to carry out specified immigration enforcement functions" pursuant to the MOAs.[210] It further provides for training and federal supervision of these LEAs.[211] Secure Communities, on the other hand, unlike the 287(g) Program, has much broader coverage because it provides for a fingerprint-sharing scheme with the "FBI criminal history database and the DHS biometric databases."[212] Overall, these two programs have a much broader enforcement implication for undocumented aliens than the *Gonzalez* decision.[213]

The holding in *Gonzalez* makes the existence of a federal immigration crime a necessary trigger for local LEAs' immigration enforcement authority.[214] The 287(g) Program and Secure Communities,

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that federal immigration law does not presently give states clear authority to enforce civil violations of immigration law). *But see* Kobach, *supra* note 175, at 199 (arguing that states possess authority to make arrests for violations of federal law, and that this authority flows from their status as a sovereign power under the Constitution).

207. *See* Motomura, *Discretion*, *supra* note 205, at 1850 (noting that Secure Communities and 287(g) Program agreements expressly involve state and local governments in federal immigration law enforcement); *see also* Zoghlin, *supra* note 6, at 21 (arguing that even though local law enforcement officers had already been assisting ICE in identifying and removing illegal aliens, "Secure Communities takes the localization of immigration enforcement even to a new level"); *supra* Part III.

208. Kim, *supra* note 90, at 251.

209. Printz v. United States, 521 U.S. 898, 935 (1997) (holding that the federal government may not commandeer the states to enforce and implement a federal regulatory scheme); *see also* Kim, *supra* note 90, at 251.

210. Motomura, *Discretion*, *supra* note 205, at 1850.

211. *Id.*

212. *Id.*

213. *Id.* at 1851.

214. *Id.*

on the other hand, do not have a similar limitation.[215] Because the realm of state and local crimes—the presence of which may activate any of the two programs—is vast compared to federal immigration crimes, the chance of undocumented aliens being exposed to immigration enforcement is much higher with these two programs in place.[216] Since activation of the 287(g) Program depends on signing of voluntary MOAs by the state, its constitutionality is not contested.[217] The federal government can expressly delegate immigration enforcement authority to the states if they voluntarily agree to such cooperation.[218] Secure Communities, however, is different in that rather than being based on MOAs, it is mandatory for all states.[219] Due to this crucial difference, unlike the 287(g) Program, Secure Communities raises significant Tenth Amendment concerns and must be analyzed in light of the three fundamental cases on the anti-commandeering doctrine.[220]

1. General Framework

The three cases that have established the anti-commandeering doctrine (*New York v. United States*, *Printz*, and *Reno v. Condon*) have created six specific conditions, which determine whether a federal statute or regulation violates the doctrine.[221] The issue in *New York v. United States* was whether Congress had power to compel the states to provide for disposal of radioactive waste generated within their borders.[222] The Court held that "Congress may not simply commandee[r] the legislative processes of the States by directly compelling them to enact enforce a federal regulatory program."[223] Therefore, the take-title provision of the Radioactive Waste Act was declared unconstitutional.[224]

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215. *Id.*

216. *Id.* The author also suggests that as these two programs continue to expose increasingly large numbers of aliens to federal immigration enforcement, ICE may be unable to effectively and efficiently handle these cases. *See id.* This rising pressure may actually be one of the reasons for the removal of aliens through Secure Communities who do not have any past criminal records at all.

217. *See* Motomura, *Discretion*, *supra* note 205, at 1850 (noting that delegation of enforcement authority to states by the federal government pursuant to the 287(g) Program is "[a] noteworthy example" of the express delegation of such authority).

218. *See* Gallini & Young, *supra* note 88, at 730-31 (describing the 287(g) Program as the extensive partnership between the federal government and the states, which is based on written agreements with DHS).

219. *Frequently Asked Questions*, *supra* note 130 (noting that the states cannot opt out of Secure Communities and that a MOA is not required to activate Secure Communities for a state).

220. *See infra* Part V.B.1.

221. Kittrie, *supra* note 147, at 1487-89 (summarizing the six conditions created by *New York v. United States*, *Printz*, and *Reno v. Condon*).

222. New York v. United States, 505 U.S. 144, 149, 153-54 (1992).

223. *Id.* at 161 (alteration in original) (internal quotation marks omitted).

224. *Id.* at 149, 175.

The Court reasoned that the challenged statutory provision was "inconsistent with the Constitution's division of authority between federal and state governments."[225] The Court recognized, however, that Congress could use various other means to solicit state cooperation with federal programs, such as attaching conditions on receipt of federal funds.[226]

The prohibition established by *New York v. United States* was later affirmed by *Printz*.[227] Here, the Court disagreed with the government's argument that *New York v. United States* prohibited federal regulation that forced the states to enact laws but not those regulations that required the states to implement and enforce them.[228] The government tried to distinguish the Brady Act at issue from the Radioactive Waste Act in *New York v. United States* by arguing that while the former forced the states to enact the policy, the latter merely commanded state officials to assist in implementing federal law.[229] The Court did not find this argument persuasive and "fail[ed] to see how that improves rather than worsens the intrusion upon state sovereignty."[230] Since the Tenth Amendment consequences would have been the same for both scenarios articulated by the government, *Printz* extended *New York v. United States*'s prohibition to federal regulatory schemes that would require the state officials to administer or enforce these programs.[231]

Reno v. Condon affirmed the principles enunciated in *New York v. United States* and *Printz*, and upheld the constitutionality of the DPPA, holding that it did not require the state to enact laws nor require state officials to enforce a federal regulatory scheme.[232] The Court further emphasized that the "DPPA's provisions d[id] not apply solely to States," but rather "also regulate[d] the resale . . . of personal information by private persons."[233] Furthermore, insurers and manufacturers who are directly engaged in interstate commerce use the information sold by the State.[234] Therefore, since a driver's personal information was an article of commerce, Congress could legitimately regulate its sale under the Commerce Clause.[235] Additionally, the Court

225. *Id.* at 175.
226. *See id.* at 167.
227. *See* Printz v. United States, 521 U.S. 898, 935 (1997).
228. *Id.* at 926-27.
229. *Id.*
230. *Id.* at 928.
231. *Id.* at 935. See *supra* Part IV.B for a further discussion of *Printz*.
232. Reno v. Condon, 528 U.S. 141, 151 (2000).
233. *Id.* at 146.
234. *Id.* at 148.
235. *See id.*

noted that the DPPA did not require the states, in their sovereign capacity, to regulate their own citizens.[236] Rather, it regulated states as owners of databases, and therefore, the federal statute did not violate the anti-commandeering principle established in *New York v. United States* and *Printz*.[237]

These three cases, taken together, create a framework for the analysis of whether a particular federal statute or regulation violates the anti-commandeering doctrine.[238] First, the federal statute or regulation cannot directly compel state officers to act in a specific way as opposed to merely conditioning receipt of federal funds on such action.[239] Second, it cannot commandeer the state to enact specific legislation or enforce federal regulation.[240] Third, it should not impose a requirement of affirmative action rather than inaction.[241] Fourth, it cannot place a requirement exclusively on state or local officials, as opposed to being generally applicable to the public.[242] Fifth, it cannot "seek[] to . . . influence the manner in which States regulate private parties."[243] Sixth, it should go beyond merely regulating states as owners of databases.[244]

The six characteristics that were identified by these cases are more than general guidelines.[245] The Court in each of the cases has upheld or rejected a challenged statute due to the presence or absence of one of the six characteristics.[246] Therefore, it follows that if the enforcement of Secure Communities by LEAs violates any of the six identified factors, it will also contravene the anti-commandeering doctrine and the Tenth Amendment.

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236. *See id.* at 151.

237. *See id.*

238. Kittrie, *supra* note 147, at 1487-89 (discussing the anti-commandeering framework in the context of *New York v. United States*, *Printz*, and *Reno v. Condon*).

239. *See, e.g.*, Printz v. United States, 521 U.S. 898, 917-18, 935 (1997); New York v. United States, 505 U.S. 144, 167 (1992) (quoting South Dakota v. Dole, 483 U.S. 203, 206 (1987)).

240. *Printz*, 521 U.S. at 935.

241. *See id.* at 904 (noting that the Brady Act required the state law enforcement officers to act by participating in its enforcement); *see also* New York v. United States, 505 U.S. at 188 (indicating that the Radioactive Waste Act required the state to regulate the disposal of radioactive waste).

242. *See* Reno v. Condon, 528 U.S. at 151 (indicating that the challenged statute did not violate the anti-commandeering doctrine because it was generally applicable as it applied to individuals as well as the states).

243. *See id.* at 150 (internal quotation marks omitted).

244. *See id.* at 151 (declaring that the challenged statute did not violate the principles established in *New York v. United States* and *Printz* because unlike in those cases, the federal regulation controlled the states as "owners of data bases").

245. *See* Kittrie, *supra* note 147, at 1488-89.

246. See *infra* Part IV.A–C for detailed discussion of the three cases.

C. The Secure Communities Program Violates the Anti-Commandeering Doctrine and Is Unconstitutional

Secure Communities, even though merely an ICE regulation at the moment, will violate the anti-commandeering doctrine once it becomes mandatory nationwide in 2013.[247] This is the case because the six prohibited characteristics established by the three anti-commandeering cases are all met. The first characteristic, which prohibits the federal government from directly compelling state officers to act in a certain way, rather than simply conditioning such action on the receipt of federal funds, stems from *Printz*.[248] There, the Court indicated that those federal statutes that condition states' receipt of federal funds on participation of state officials in implementing federal regulatory schemes did not infringe on state sovereignty.[249] Federal statutes and regulations of this kind, therefore, were not mandates to the states.[250] Secure Communities violates this first principle articulated in *Printz*. Even though it requires state and local LEAs to act in a specific way, it does not condition receipt of federal funds on that action.[251] Instead, Secure Communities depends on local and state funding.[252] One of the biggest components of this program is to detain the arrested individuals in local police custody until ICE takes further action.[253] Usually, local and state LEAs have the discretion to release the detained individuals; however, that is not the case with Secure Communities.[254] Under this

247. U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, U.S. DEP'T OF HOMELAND SEC., SECURE COMMUNITIES: QUARTERLY REPORT 2 (Dec. 1, 2011), *available at* http://www.ice.gov.gov/doclib/foia/secure_communities/congressionalstatusreportfy113rdquarter.pdf (reporting that, in response to the congressional appropriation to "improve and modernize efforts to identify aliens convicted of a crime, sentenced to imprisonment, and who may be deportable, and remove them from the United States, once they are judged deportable," ICE implemented Secure Communities (internal quotation marks omitted)); *see* Kang, *supra* note 1, at 100-01 (concluding that for Secure Communities not to violate the anti-commandeering doctrine, the states should be allowed to opt out of it).

248. *See* Printz v. United States, 521 U.S. 898, 917-18, 935 (1997).

249. *See id.* at 917-18.

250. *Id.*

251. *See* Kang, *supra* note 1, at 100 (indicating that the implementation of Secure Communities relies on state and local funding).

252. *Id.*; *see* April Castro, *Perry Bills Feds $349 Million for Illegal Immigrants*, WASH. TIMES (Aug. 27, 2011), http://www.washingtontimes.com/news/2011/aug/27/perry-bills-feds-349m-illegal-immigrants/ (discussing Texas Governor Rick Perry's request to DHS to reimburse nearly $350 million that Texas has incurred in incarcerating illegal immigrants in state prisons and county jails).

253. Kang, *supra* note 1, at 100; *see Backgrounder: Quick Information on Immigration Detainers*, NAT'L IMMIGR. F. (last updated Mar. 2011) http://www.immigrationforum.org/images/uploads/2010/DetainersBackgrounder.pdf [hereinafter *Backgrounder*] (emphasizing that through the detainers, ICE apprehends noncitizens from state or local criminal custody).

254. Kang, *supra* note 1, at 100.

program, once arrested individuals' fingerprints are matched with the ICE database, they have to wait for ICE to decide whether or not to take custody.[255] As such, local and state governments incur the additional costs of prolonged detainment.[256] It follows that rather than conditioning receipt of federal funds on the administration of Secure Communities, its costs are squarely borne by local and state governments. Therefore, the program violates the first anti-commandeering characteristic.

The second condition prohibits federal statutes or regulations that requires enactment of a state legislation or enforcement by a state executive branch. *New York v. United States* recognizes the requirement that the federal government cannot command a state to enact state legislation.[257] *Printz* extended this prohibition to a federal requirement that the state officers administer and enforce federal regulatory programs.[258] Secure Communities is unlike the Radioactive Waste Act at issue in *New York v. United States* because it does not require the states to enact legislation to implement the federal regulatory program.[259] However, it is similar to the Brady Act, the disputed federal statute in *Printz*, which required CLEOs to conduct background checks on prospective handgun buyers.[260] The Court found that the Act coerced states into enforcing federal regulations, which violated the Tenth Amendment.[261] Secure Communities is similar to the Brady Act because it attempts to coerce the state and local LEAs to enforce a federal regulatory program. Secure Communities, like the Brady Act, requires state and local LEAs to send fingerprints of apprehended individuals to the FBI and DHS databases.[262] Furthermore, they are required to detain these individuals in local jails until ICE takes them into custody.[263] Both of these requirements are similar to the Brady Act's obligation for the CLEOs to conduct background searches. Furthermore, neither of the regulations provide for funding or training of the LEAs.[264] Therefore, the

255. *Id.*

256. *Id.*; *see* Castro, *supra* note 252.

257. New York v. United States, 505 U.S. 144, 178, 188 (1992) ("No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate.").

258. Printz v. United States, 521 U.S. 898, 935 (1997).

259. *See* Zoghlin, *supra* note 6, at 21 (indicating that under Secure Communities, local law enforcement officers are authorized to send fingerprints of apprehended but not yet convicted individuals to DHS).

260. *Printz*, 521 U.S. at 904-05.

261. *See id.* at 919, 933.

262. *See Secure Communities*, ICE, *supra* note 114.

263. Zoghlin, *supra* note 6, at 21.

264. *See* Kang, *supra* note 1, at 100; Zoghlin, *supra* note 6, at 21 (indicating that local and state LEAs who participate in enforcing Secure Communities are not trained by the federal government).

reasoning in *Printz* regarding the prohibition of commandeering state executive branches to enforce federal regulatory program applies to Secure Communities as well.

The third identified characteristic is also violated because it requires that the federal statute or regulation impose a requirement of action rather than inaction on the states. In all three landmark anti-commandeering doctrine cases, the challenged federal statute required the states to act in a certain way.[265] Secure Communities also requires that state and local LEAs act in a specific way: that they collect and submit fingerprints of apprehended individuals and detain them until ICE takes them into custody.[266]

The fourth characteristic prohibits federal statutes and regulations that burden states exclusively rather then being generally applicable. The Court in *Reno v. Condon* addressed this issue.[267] There, South Carolina argued that the DPPA was unconstitutional since it only regulated states.[268] The Court rejected this argument by finding that the DPPA was generally applicable because it regulated "the universe of entities" participating in the market for motor vehicle information, including the states as suppliers of this information and private resellers in interstate commerce.[269] In terms of its scope, Secure Communities differs from the DPPA. Unlike the DPPA, Secure Communities is not generally applicable to the public but rather burdens exclusively state and local LEAs.[270] It is exactly these state officials who have to administer the regulatory scheme of Secure Communities by collecting and submitting the fingerprints, and detaining potentially removable individuals.[271] Under the Court's reasoning in *Reno v. Condon*, the fact that Secure Communities is not generally applicable and does not regulate "the universe of entities" should raise significant constitutionality concerns.[272]

265. *See supra* text accompanying note 247.

266. Zoghlin, *supra* note 6, at 21.

267. *See* Reno v. Condon, 528 U.S. 141, 151 (2000).

268. *Id.*

269. *Id.*

270. *See* Zoghlin, *supra* note 6, at 21 (describing Secure Communities and showing that state and local LEAs are the ones responsible for implementing the Program by submitting the fingerprints of the detained individuals, as well as detaining them in case there is a match with the ICE database).

271. *Id.*

272. *See* Reno v. Condon, 528 U.S. at 151.

The fifth characteristic, as established by *Reno v. Condon*, prohibits federal statutes that seek to influence or control the manner in which states regulate private parties.[273] The Court determined that the DPPA did not seek to control the way South Carolina regulated private parties.[274] It is true that Secure Communities, unlike the DPPA, is predominantly focused on forcing state and local LEAs to enforce a federal regulatory scheme. However, an argument can be made that it also seeks to influence the way states regulate private individuals because it requires the apprehended individuals to be detained possibly longer than they otherwise would have been.[275] Secure Communities controls the way state law enforcement agencies choose to apprehend private individuals and the duration of their preliminary incarceration.[276] Thus, this aspect of the program falls within the *Reno v. Condon* prohibition.

The sixth and final characteristic, as identified by *Reno v. Condon*, requires the federal statute to go beyond regulating the states merely as owners of databases.[277] The Court in *Reno v. Condon* upheld the DPPA because it regulated disclosure of the drivers' information contained in state DMV records to various businesses and individuals.[278] The Court explicitly distinguished the statutes that regulate states as owners of databases from the ones that required state legislatures to enact particular kinds of law (prohibited by *New York v. United States*) or force state executive branches to enforce a federal regulatory program (prohibited by *Printz*).[279] Arguably, Secure Communities is similar to the DPPA in that it regulates states sharing fingerprint databases of individuals apprehended by state and local LEAs with the FBI and DHS.[280] However, Secure Communities also regulates states beyond merely as owners of databases because it requires state LEAs to detain apprehended individuals until ICE takes them into federal custody.[281]

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273. *See id.* at 150.

274. *See id.*

275. *See* Kang, *supra* note 1, at 100.

276. *See id.* (emphasizing that in jurisdictions where Secure Communities is implemented, local and state LEAs do not have the discretion to cite and let the arrested noncitizens go—discretion that they otherwise would have had).

277. *Reno v. Condon*, 528 U.S. at 151 (upholding the DPPA because it merely regulated states as owners of databases).

278. *Id.* at 144, 151.

279. *Id.* at 149-50.

280. *See Secure Communities*, ICE, *supra* note 114.

281. *Backgrounder*, *supra* note 253 (informing that the detainers are utilized in jurisdictions that have activated the Secure Communities Program, and that the detainers allow local and state LEAs to detain the apprehended noncitizens for up to forty-eight hours until ICE takes enforcement action).

Therefore, under the *Reno v. Condon* analysis, Secure Communities, rather then being similar to the DPPA, falls under the *Printz* prohibition, as it requires states and localities to directly engage in enforcing federal regulatory schemes.

This analysis has demonstrated that Secure Communities, once enforced nationwide as a mandatory federal program, possesses each of the six characteristics identified by Supreme Court case law as a prerequisite that will violate the anti-commandeering doctrine. It directs the state executive branch to act in a certain way and to enforce a federal regulatory scheme while not simultaneously conditioning such action on the receipt of federal funds. It also burdens states exclusively by requiring enforcement of the program and influencing the way in which states choose to regulate private individuals. Lastly, Secure Communities goes beyond the regulation of states as owners of databases. It requires the states to act in a specific way by detaining apprehended individuals. For these reasons, Secure Communities clearly falls within the six prohibited characteristics, violates the anti-commandeering doctrine and the Tenth Amendment, and, therefore, is unconstitutional.[282]

VI. SOLUTIONS AND RECOMMENDATIONS

Secure Communities violates the anti-commandeering doctrine and therefore, it should not be enforced in its current form. Furthermore, in addition to being unconstitutional, it also has been criticized for a plethora of problems, such as extending beyond its identified goal of removal of the most dangerous undocumented criminals.[283] Even though Secure Communities violates the anti-commandeering doctrine, the obvious gaps in interior immigration enforcement have demonstrated the need for local and state participation in immigration enforcement.[284]

282. For those commentators who believe that the states possess inherent authority to enforce immigration law, including criminal as wells as civil violations, Secure Communities may not pose the constitutionality problem. *See, e.g.*, Kobach, *supra* note 175, at 227 (arguing that any assistance state or local police provide to the federal government in the enforcement of federal immigration law is entirely voluntary because states possess inherent authority for such enforcement, and, therefore, the federal government has not mandated the state to cooperate).

283. Zoghlin, *supra* note 6, at 20 (indicating that by June 2010, nearly 47,000 fingerprints collected through Secure Communities belonged to undocumented aliens against whom deportation proceedings were initiated, and almost half of those individuals removed through the Program have never been convicted of a crime).

284. *See* Kobach, *supra* note 175, at 180.

Furthermore, Secure Communities is a valuable program that seeks to remove the most dangerous criminal aliens and make the communities in the United States safe.[285] Therefore, it should be maintained but only in a form that will further the goals of the program.

Instead of the federal government inadvertently commandeering local and state law enforcement agencies, or states enacting local immigration legislation, the INA should be amended to incorporate essential aspects of Secure Communities into the 287(g) Program. Currently, the 287(g) Program allows the federal government to deputize state and local LEAs to enforce certain aspects of federal immigration law by signing voluntary MOAs.[286] The 287(g) Program, because of the voluntary nature of MOAs, results in express delegation of immigration enforcement power to the states and does not violate the anti-commandeering doctrine. As such, Secure Communities should be fused with the 287(g) Program. Usually, the 287(g) Program MOAs specifically list immigration enforcement powers that are delegated to state and local LEAs.[287] After the proposed INA amendment, the MOAs will include Secure Communities's enforcement requirements as well. This means that the states and localities will have to expressly agree in the MOAs to the fingerprint-sharing scheme as well as mandatory detention of the apprehended individuals. This will address the Tenth Amendment violation of Secure Communities because it will not be mandatory anymore.[288] However, taking into account the utmost importance of this program, the federal government, before negotiating an MOA with a locality, should emphasize the importance of Secure Communities to encourage the states to agree to its enforcement and implementation. Furthermore, the federal government should reimburse the states and localities for additional costs incurred as a result of the administration of Secure Communities after agreeing to it in an MOA.

The proposed INA amendment will also remedy other problems associated with Secure Communities. For example, the 287(g) Program provides for the training of state and local LEAs in federal immigration law[289] and after the amendment, those localities that agree to implement Secure Communities will have essential training not only in relevant substantive law, but also in civil rights law to avoid prominent racial profiling. Another aspect of the amendment should be the requirement

285. *See* Kang, *supra* note 1, at 107.

286. Michaud, *supra* note 8, at 1093.

287. *See id.* at 1093.

288. *See* Kang, *supra* note 1, at 100-01 (suggesting that the current lack of opt-out procedure from Secure Communities implicates Tenth Amendment concerns).

289. 8 U.S.C. § 1357(g)(2) (2006).

that the state and local LEAs send fingerprints to ICE only after the apprehended individual has been convicted. This change will limit the scope of Secure Communities to its target population—the most dangerous criminal aliens—instead of placing individuals with no criminal convictions into removal proceedings.[290]

In sum, this proposed amendment provides for a much-needed comprehensive solution addressing the violation of the anti-commandeering doctrine, while at the same time still focusing on the program's primary goal of detaining and deporting the most dangerous criminal aliens.[291]

VII. CONCLUSION

Immigration law regulation and enforcement has been a federal prerogative since the late 1800s.[292] The Supreme Court has repeatedly reiterated that the federal government has plenary power over immigration law.[293] However, even such extensive power is subject to constitutional limitations.[294] Even though the federal government can regulate immigration law, it may not commandeer the states into enforcing federal regulatory schemes in violation of the Tenth Amendment.[295] Secure Communities falls within this category of federal regulation. ICE's new policy is that the localities are not able to opt-out of Secure Communities, which effectively means that it is mandatory.[296] It is exactly this compulsory nature that places the program in violation of the anti-commandeering doctrine.[297]

In addition to the constitutionality issue, Secure Communities has been criticized as being overly broad.[298] While the purpose of the program is to detain and remove the most dangerous criminal aliens from local communities, the data shows that more than half of the removed individuals have never been convicted of a crime or of only

290. *See* Kang, *supra* note 1, at 107-08 (indicating that "more than fifty-six percent of individuals removed under the Secure Communities were identified as non-criminals or Level 3 offenders").

291. *See Secure Communities*, ICE, *supra* note 114 (emphasizing that the main goal of Secure Communities is to remove those criminal aliens that pose the most danger to the society).

292. *See supra* Part II.A.

293. *See supra* Part II.A.

294. *See supra* Part V.B.1.

295. *See supra* Part V.B.1.

296. *Frequently Asked Questions*, *supra* note 130.

297. *See* Kang, *supra* note 1, at 100-01.

298. *See, e.g.*, Zoghlin, *supra* note 6, at 22 (noting that the program falls short of its projected goals).

petty offenses.[299] Despite these problems, however, Secure Communities is an important federal program that seeks to at least partially resolve the "crimmigration" problem facing the United States. In August 2011, President Barack Obama announced a new immigration enforcement policy, which requires case-by-case consideration of all removal cases.[300] Furthermore, it was also announced that the administration would review all pending removal cases and close low-priority cases to focus on the most important ones.[301] This new immigration policy could potentially eradicate some of the problems associated with Secure Communities. However, it will not remedy the fact that Secure Communities, in its current form, is in violation of the Tenth Amendment.

*Ana Getiashvili**

299. Kang, *supra* note 1, at 107-08.

300. Elise Foley, *New Policy on Deportations Allows Some Non-Criminal Undocumented Immigrants to Stay*, HUFFINGTON POST (Aug. 18, 2011, 6:12 AM), http://www.huffingtonpost.com/2011/08/18/officials-change-deportation-policy_n_930688.html#s332934&title=DREAM_Act_Students.

301. *Id.*

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