Local and State Enforcement of Immigration Law: An Equal Protection Analysis

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LOCAL AND STATE ENFORCEMENT OF IMMIGRATION LAW: AN EQUAL PROTECTION ANALYSIS

INTRODUCTION

Effective immigration enforcement has been an elusive goal in the United States. Numerous techniques have been employed to achieve an effective enforcement strategy. Some initiatives have focused on increasing control over the border.¹ Congress’s efforts include criminalizing the harboring and smuggling of illegal aliens and sanctioning employers who hire the undocumented.² In addition, legislative measures adopted in 1929 and 1986 have attempted to address the problem by legalizing the long-term undocumented population already present in the United States.³ For example, in the 1986 amnesty, individuals received legalized status based on employment in certain industries and on time spent working in the United States.⁴ Although 2.8 million individuals legalized their status through the 1986 Immigration and Reform Control Act,⁵ the population of individuals in the United States without legal status remains high.⁶ Estimates vary from eight million to ten million.⁷

Long-time concern over the number of undocumented immigrants has escalated following the September 11, 2001 terrorist attacks. The Bush administration reorganized the enforcement wing of the Immigration and Naturalization Service, creating the Bureau of Immigration and Customs Enforcement under the Department of Homeland Security.⁸ The Administration initiated new measures to track indi-

². Id.
³. Id. at 211.
⁵. Id., supra note 1, at 200.
⁷. Id.

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individuals once they enter the country. Yet the number of agents patrolling the border has increased substantially. Yet this has not made a dent in the huge undocumented population. Consequently, the Clear Law Enforcement for Criminal Alien Removal Act (CLEAR Act) and its House counterpart, the Homeland Security Enhancement Act (HSEA), grew out of the increasing frustration of both the government and the public with the inability of enforcement action to control the presence of millions of undocumented immigrants. These bills would empower and strongly encourage states to have state and local law enforcement officers enforce civil immigration law. The theory behind these proposals is that by increasing the number of enforcement agents in the field, the efficiency of enforcement action will also increase.

Enforcement efficiency, however, cannot be considered in a vacuum. The Supreme Court has held that equal protection applies to those individuals present in the United States without permission. By deputizing local and state officers to enforce federal immigration law, the CLEAR Act creates conflicting goals for local police officers. Police officers have the duty to provide protection equally to all residents in their locality. But, under the CLEAR Act, they must also enforce immigration law whenever they encounter someone that they have probable cause to believe is present in the United States without authorization. Police officers will have to navigate between these conflicting mandates when an undocumented immigrant is in need of essential police services. Under a scheme of local enforcement of immigration law, undocumented immigrants would risk deportation in every encounter with the police. Because of this incredible risk, whole communities would avoid interactions with the police. As a result, the individuals in those communities would have limited access to po-

14. See infra notes 100-105 and accompanying text.
15. See infra notes 110-118 and accompanying text.
16. See infra notes 129-147 and accompanying text.
lence protection, despite the constitutional guarantee of equal protection under the law. In addition, the reduced amount of contact with local residents would limit the efficiency of police services because of a lack of community cooperation, resulting in more dangerous neighborhoods.

Part II of this Comment looks at the traditional separation of duties between local and state officials and federal immigration officials and the current trend of relying on local and state enforcement as a solution to remedy ineffective enforcement. Part II also details equal protection case law that applies to aliens and the degree of scrutiny applied by the courts. The equal protection analysis of denials or failures to provide police protection will be addressed. Part III analyzes the CLEAR Act, and the resulting state policies of enforcement, under an equal protection framework. Finally, Part IV addresses the far-reaching impact this shift to local enforcement will have on our communities and on our security and concludes that local enforcement of civil immigration law is not only unconstitutional, but has numerous negative policy implications.

II. Background

To provide context for the discussion of the CLEAR Act, this section will discuss the distinction between civil and criminal immigration law and the traditional position that local authorities only have authority to enforce criminal law. It will discuss recent changes in immigration enforcement, including numerous movements toward expanding the role of local authorities. This section will present an overview of equal protection case law that analyzes laws that discriminate based on alienage. Finally, this section will consider the constitutional protection provided against a denial of police protection.

17. See infra notes 129–147 and accompanying text.
18. See infra notes 210–214 and accompanying text.
19. See infra notes 28–60 and accompanying text.
20. See infra notes 61–99 and accompanying text.
21. See infra notes 100–105 and accompanying text.
22. See infra notes 110–190 and accompanying text.
23. See infra notes 197–238 and accompanying text.
24. See infra notes 28–36 and accompanying text.
25. See infra notes 37–60 and accompanying text.
26. See infra notes 61–99 and accompanying text.
27. See infra notes 100–105 and accompanying text.
A. Recent History of Immigration Enforcement

Prior to any discussion on the enforcement of immigration law, it is important to first distinguish between the types of immigration violations. Immigration violations are divided into civil and criminal violations. Being present in the United States without authorization is a civil violation. Criminal violations include crossing the border without inspection and trafficking immigrants. This distinction between criminal and civil violations has long been determinative of the appropriate authority to take enforcement action.

The traditional position regarding the enforcement authority of local and state police limited the scope of their authority to criminal immigration law. In Gonzalez v. City of Peoria, a group of citizens brought suit alleging a violation of their Fourth and Fourteenth Amendment rights after local police stopped them to inquire into their immigration status. The court recognized the authority of the local police to enforce any criminal immigration violation but found that their authority did not extend to arrests for civil immigration violations.

This distinction separating the authority of local officers from federal officials was reiterated in a February 5, 1996 memorandum from the Department of Justice Office of Legal Council entitled "Assistance by State and Local Police in Apprehending Illegal Aliens.”

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28. See infra notes 29–30 and accompanying text.
30. Id. § 1253 (failing to depart pursuant to a final order of removal); id. § 1306 (criminalizing willful failure to register, failure to notify authorities of a change of address, making fraudulent statements, counterfeiting documentation); id. § 1324 (“[br]ing[ing in and harboring certain aliens”); id. § 1325(c)–(d) (prohibiting marriage or immigration entrepreneurship fraud); id. § 1326 (“reentry of removed aliens”); 8 U.S.C. § 1327 (“aiding or assisting certain aliens to enter”); id. § 1328 (“importation of alien for immoral purpose”).
32. Gonzales v. City of Peoria, 722 F.2d 468 (9th Cir. 1983).
33. Id.
34. Id. at 476 (“We therefore conclude that state law authorizes Peoria police to enforce the criminal provisions of the Immigration and Naturalization Act. We firmly emphasize, however, that this authorization is limited to criminal violations.”).
this memo, the Department, in keeping with precedent, stated, "State and local police lack recognized legal authority to stop and detain an alien solely on suspicion of civil deportability . . . ."36

An intention to move away from the traditional distinctive and separate roles of state and local police became apparent in 2002. In the aftermath of the 2001 terrorist attacks, the Department of Justice began to focus on reforming the immigration system.37 One of these reforms was a new registration system, the National Security Entry-Exit Registration System (NSEERS), which was designed to track all noncitizens entering and exiting the country.38 Attorney General John Ashcroft introduced NSEERS on June 6, 2002.39 Individuals who do not comply with NSEERS are entered in the National Crime Information Center (NCIC) system, a system checked by police officers "regularly in the course of traffic stops and routine encounters."40 If an individual's name appears in the NCIC system, the police officer will arrest the individual and transfer him or her to immigration officials.41 Although former Attorney General Ashcroft described the mission of local law enforcement as "arresting aliens who have violated criminal provisions of Immigration and Nationality Act or civil provisions that render an alien deportable, and who are listing on the NCIC," he also noted that this mission was voluntary and requested that local authorities accept this mission.42 The Attorney General's remarks failed to clarify the extent to which local authorities would be engaged in immigration enforcement by referring to the arrest of aliens who have violated "civil provisions that render an alien deportable" while stating "[t]he Department of Justice has no plans to seek additional support from state and local law enforcement in enforcing our nation's immigration laws, beyond our narrow anti-terrorism mission."43 In response to concerns regarding the lack of clarity, Alberto Gonzales, then White House Counsel (and current

36. Id.
38. See Ashcroft, supra note 9. NSEERS would require the fingerprinting and photographing of those entering at the border. Id. Aliens would be required to register periodically if they stay in the United States for more than thirty days. Id. Finally, NSEERS would establish exit controls, so officials will know whether an individual is complying with the terms of his or her visa. Id.
39. Id.
40. Id. But see Wishnie, supra note 31, at 1095-1101, for an argument that this is an illegal use of the NCIC because it is not included in the statutorily authorized uses of the NCIC system.
41. Ashcroft, supra note 9.
42. Id.
43. Id.
Attorney General), wrote a letter clarifying that “[o]nly high-risk aliens who fit a terrorist profile will be placed in NCIC.” The Gonzales letter suggests that the current policy continues to limit local authorities to immigration enforcement in connection with aliens engaged in or with the propensity to commit criminal activity.

Following this announcement, Florida entered into a Memorandum of Understanding with the Department of Justice, agreeing to enforce immigration law in connection with terrorism. Other localities responded even more warmly to the Attorney General’s invitation for local enforcement. The police in Northampton, Pennsylvania, and Washington County, Utah, currently both investigate and arrest people for immigration violations.

This broadening of the scope of local and state police power was reflected in a 1999 Tenth Circuit decision. In United States v. Vasquez-Alvarez, the court held that local police did have the authority to enforce immigration law broadly. The court found that 8 U.S.C. § 1252, which authorizes local police to arrest illegal aliens with criminal backgrounds, provided an additional ground for police action, but in no way restricted the local police’s authority to enforce federal law, including civil immigration law.

Although the interest in local enforcement of immigration law has increased, it still raises several legal questions. One major barrier to local enforcement of immigration law is the federal plenary power

45. Id.; see Keblawi, supra note 31, at 839.
49. Id. at 1295.
50. Section 1252c(a) provides:
   Notwithstanding any other provision of law, to the extent permitted by relevant State and local law, State and local law enforcement officials are authorized to arrest and detain an individual who—
   (1) is an alien illegally present in the United States; and
   (2) has previously been convicted of a felony in the United States and deported or left the United States after such conviction,
   but only after the State or local law enforcement Officials obtain appropriate confirmation from the [INS] of the status of such individual and only for such period of time as may be required for the [INS] to take the individual into Federal custody for purposes of deporting or removing the alien from the United States.
51. Vasquez-Alvarez, 176 F.3d at 1297.
over immigration that preempts any action taken by local and state authorities. To determine whether the action is preempted, courts look to the intent of Congress. In analyzing immigration statutes, the courts have found that from the complexity of immigration law, they can infer a congressional intent to preclude local authorities from enforcing federal immigration law.

The most recent and most complete movement toward local enforcement of immigration law removes even this barrier. The CLEAR Act was introduced on June 30, 2005 by Representative Charlie Norwood of Georgia. Currently, it has ninety-seven co-sponsors. The CLEAR Act denies states or cities federal funding under § 241(i) of the Immigration and Nationality Act if they have a "statute, policy, or practice that prohibits law enforcement officers of the State ... from assisting or cooperating with Federal immigration law enforcement in the course of carrying out the officers' routine law enforcement duties ...." Because the CLEAR Act makes absolutely plain the congressional intent regarding local enforcement of

53. See, e.g., Gonzales v. City of Peoria, 722 F.2d 468, 474 (9th Cir. 1983) (citing DeCanas v. Bica, 424 U.S. 351, 357 (1976)) (noting that "[t]o conclude [that] preclusion [of local enforcement] was the legislative intent, we would have to find that 'complete ouster of state power ... was the clear and manifest purpose of Congress'") (internal quotation marks omitted).
54. The court found that:

an intent to preclude local enforcement may be inferred where the system of federal regulation is so pervasive that no opportunity for state activity remains. We assume that the civil provisions of the Act regulating authorized entry, length of stay, residence status, and deportation, constitute such a pervasive regulatory scheme, as would be consistent with the exclusive federal power over immigration.

Id. at 474–75 (internal citations omitted).

In addition, the view that Congress intends to preempt local enforcement finds additional support in the legislative history, which specifically authorizes local enforcement of specific immigration violations. Wishnie, supra note 31, at 1092–94.
57. H.R. 3137 § 3(a). The HSEA takes a different approach, making any "statute, policy, or practice that prohibits a law enforcement officer of a State ... from enforcing Federal immigration laws ... [a] violation of section 642(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 [IIRIRA] ... and section 434 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 [PRWORA] ... S. 1362, 109th Cong. § 4(a) (2005) (internal citation omitted). Section 642(a) of IIRIRA and § 434 of PRWORA prohibit any restrictions on a state or local entity that would prevent the entity from "sending to, or receiving from, the Immigration and Naturalization Service information regarding ... immigration status ... " 8 U.S.C. § 1373(a) (2000). The 2003 versions of the CLEAR Act and the HSEA were virtually identical, denying states funds under § 241(i) to any state that failed to affirmatively enact a law authorizing their state and local police to enforce federal immigration law. CLEAR Act, H.R. 2671, 108th Cong. (2003); HSEA, S. 1906 (2003).
federal immigration law, the concern regarding preemption is no longer relevant. Additionally, the CLEAR Act criminalizes presence in the United States without authorization, which historically has been a civil violation. This change would moot any argument regarding the distinction between criminal and civil violations because all immigration violations would be criminal. Because the CLEAR Act effectively eliminates all prior barriers to local enforcement of immigration law, the next question is whether the local enforcement that the CLEAR Act and the HSEA require is constitutional.

B. Equal Protection and Aliens

The protection of the Fourteenth Amendment has long been interpreted broadly to cover all persons in the United States. As early as 1886, courts have affirmed that resident aliens also enjoy equal protection under the laws. In Yick Wo v. Hopkins, the U.S. Supreme Court considered a California law that required owners of laundries in certain types of buildings to apply for permits in order to operate. But officials enforcing this law regularly denied permits requested by Chinese individuals, while granting requests by non-Chinese individuals. Thus, the court struck down the permit system, which it found to be discriminatory in practice towards Chinese applicants based on the constitutional requirement that no person be denied equal protection under the laws. Despite the Supreme Court's early protection of individuals from alienage discrimination, the Court deferred greatly to the states on subsequent alienage classifications as long as the states could show that the classification was related to special public interest

58. Kanstroom, supra note 37, at 657.
59. H.R. 3137 § 4(a). The CLEAR Act makes unlawful presence a felony. Id. The HSEA also criminalizes unlawful presence, making it a misdemeanor. S. 1362 § 5(a).
60. Kanstroom, supra note 37, at 657.
62. Id. at 368-69.
63. Id.
64. Id. at 374. The opinion does not refer to the status of these individuals as legal or illegal, presumably because it was not until the 1880s that restrictions of any sort were placed on immigrants.
65. The Court described the equal protection rights of aliens, stating:

The fourteenth amendment to the constitution is not confined to the protection of citizens. It says: "Nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality.

Id. at 369.
and did not intrude on the federal power over immigration by directly regulating immigration.\textsuperscript{66}

The Supreme Court reversed its deference in \textit{Takahashi v. Fish and Game Commission}.\textsuperscript{67} California had prohibited the issuance of fishing licenses to anyone ineligible to become a United States citizen under the rationale that it was conserving its resources for use by its citizens.\textsuperscript{68} Under federal law at the time, Japanese and other non-white racial groups were ineligible for citizenship. The Supreme Court rejected this rationale as insufficient to justify a classification based on alienage and held that the law violated the Fourteenth Amendment.\textsuperscript{69}

The Supreme Court eventually adopted the demanding standard of strict scrutiny for any legislation that classified on the basis of alienage.\textsuperscript{70} In \textit{Graham v. Richardson},\textsuperscript{71} the Court used strict scrutiny to

\textsuperscript{66.} Manheim, \textit{supra} note 52, at 965–67.
\textsuperscript{67.} Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948).
\textsuperscript{68.} \textit{Id.} at 413–14.
\textsuperscript{69.} The Court held that
to whatever extent the fish in the three-mile belt off California may be "capable of ownership" by California, we think that "ownership" is inadequate to justify California in excluding any or all aliens who are lawful residents of the State from making a living by fishing in the ocean off its shores while permitting all others to do so.
\textsuperscript{70.} Graham v. Richardson, 403 U.S. 365, 372 (1971). The Supreme Court has adopted a three-tiered equal protection framework in which the level of scrutiny is based on the type of classification made by the law. Strict scrutiny requires the government to show that the classification is narrowly tailored to a compelling government interest. Classifications based on race or national origin (with some exceptions, see infra notes 77–78 and accompanying text) merit strict scrutiny. Korematsu v. United States, 323 U.S. 214, 216 (1944); see also Graham, 403 U.S. at 372. Rarely will a law be upheld after strict scrutiny is applied. Intermediate scrutiny requires that the classification be substantially related to an important government interest. Classifications based on gender and status as an illegitimate child are evaluated under intermediate scrutiny. Craig v. Boren, 429 U.S. 190, 197 (1976); see also Clark v. Jeter, 486 U.S. 456, 461 (1988). Rational basis review is the third tier. If the law does not classify on a basis that merits strict or intermediate scrutiny, rational basis review applies. To pass rational basis review, the law must simply be rationally related to a legitimate government interest. McGowan v. Maryland, 366 U.S. 420, 425 (1961). Rarely will a law fail under this standard. The Supreme Court has been moving toward what some have been calling rational basis review with bite. This is a more searching review of laws that would generally receive only rational basis review. Using this heightened standard, the Supreme Court has overturned laws where there appears to be no other purpose other than bare animus. Romer v. Evans, 517 U.S. 620, 635 (1996) (holding that a voter initiative revoking protection from discrimination based on homosexuality and preventing any future protective measures from being enacted violated equal protection); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 450 (1985) (holding that the city ordinance requiring a special permit for group homes for the mentally disabled violated equal protection because it was based on irrational prejudice). The Court has also applied a tougher version of rational basis to irrational administrative decisions. Allegheny Pittsburgh Coal Co. v. Country Comm'n, 488 U.S. 336, 343 (1989) (holding that a practice of the county tax assessor that involved valuing property at fifty percent of its last sale price violated equal protection because the taxes an individual paid varied
strike down an Arizona law that made noncitizens ineligible for disability benefits unless they had been a resident of the United States for fifteen years. The Court adopted the strict scrutiny standard to protect aliens who the Court deemed a discrete and insular minority. Again, the Court found that the justification of preserving benefits for citizens to be insufficient to satisfy the compelling government interest standard. A series of cases followed Graham v. Richardson, with the Court striking down laws that denied aliens certain jobs, licenses, or financial aid for education. But the Court did recognize a political process exception. The Court ruled that a law need only meet the rational basis test if the statute excludes an alien from a position that involves the formulation of public policy. These positions included police officers, teachers, and probation officers.

The Supreme Court has dealt directly with the equal protection rights of undocumented immigrants only in Plyler v. Doe, in which undocumented children challenged a Texas law that denied them access to the public education system. The Court specifically held that the Equal Protection Clause protects illegal aliens, but that illegal aliens are not a suspect class because their status is the result of voluntary action. In reaching its decision, the Court focused on the im-

71. Graham, 403 U.S. at 365.
72. Id.
73. Id. at 372 ("[C]lassifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a ‘discrete and insular’ minority for whom such heightened judicial solicitude is appropriate.").
74. Id. at 374–75.
75. See Nyquist v. Mauclet, 432 U.S. 1, 12 (1977) (holding that a New York law limiting state financial aid for higher education to citizens, those who intended to become citizens, and refugees was a violation of equal protection); Examining Bd. of Engineers, Architects and Surveyors v. Flores de Otero, 426 U.S. 572, 603–06 (1976) (striking down Puerto Rico statute denying noncitizens engineering licenses as a violation of equal protection); Sugarman v. Dougall, 413 U.S. 634, 642–43 (1973) (finding a New York law preventing noncitizens from holding certain state civil service positions a violation of equal protection); In re Griffiths, 413 U.S. 717, 727–29 (1973) (holding that a Connecticut court rule denying admission to the state bar to noncitizens was a violation of equal protection).
76. Manheim, supra note 52, at 1011.
77. Id.
80. Id.
81. The Court explained its classification of illegal aliens, stating:
portance of education and the children's lack of responsibility for their immigration status. Because of these two factors, the Court required a substantial governmental interest to justify the denial of public education to undocumented children. The Court did not recognize education as a fundamental right, but it did allow the importance of education to influence the degree of scrutiny it applied.

Since the Supreme Court's 1982 ruling in *Plyler v. Doe*, there have been few cases involving equal protection claims by undocumented immigrants. The claims that have been brought have been wholly unsuccessful. A few years after *Plyler*, a California appellate court decided an equal protection case involving the denial of access to a drug treatment program to an undocumented immigrant because he lacked valid immigrant or nonimmigrant status. The court did not reach the equal protection question; after a discussion of *Plyler*, however, it did note that "[i]t is questionable . . . whether strict scrutiny would be applied in this case even if the patient-inmates were rejected solely because of their illegal alien status." Additionally, in 1993, Alaska's Supreme Court, applying rational basis review, found that a denial of Permanent Fund dividends to illegal aliens was not an equal protection violation because the plaintiffs were adults responsible for their status, and a denial of a dividend has none of the stigmatization of a

We reject the claim that "illegal aliens" are a "suspect class." No case in which we have attempted to define a suspect class . . . has addressed the status of persons unlawfully in our country. Unlike most of the classifications that we have recognized as suspect, entry into this class, by virtue of entry into this country, is the product of voluntary action. Indeed, entry into the class is itself a crime. In addition, it could hardly be suggested that undocumented status is a "constitutional irrelevancy."

82. *Id.* at 219 n.19 (internal citations omitted).
83. *Id.* at 223–24 (noting that “[i]n determining the rationality of § 21.031, we may appropriately take into account its costs to the Nation and to the innocent children who are its victims”).
84. Some have described this approach as intermediate scrutiny. Dep’t of Revenue v. *Cosio*, 858 P.2d 621, 626–27 (Alaska 1993). Professor Manheim, on the other hand, calls this new standard of review “rational basis with bite.” Manheim, *supra* note 52, at 1011. Manheim argues that this is not the only case where the interests involved affect the level of scrutiny. He notes that “where the discrimination relates to jobs implicating the state’s sovereign identity, e.g., public officials and school teachers, rather than its pecuniary interest in the public fisc or its parens patriae interest in the general welfare, the degree of scrutiny drops precipitously to rational basis.” *Id.*
86. *Id.* at 618.
87. *Cosio*, 858 P.2d at 623. The court noted that eligibility for Permanent Fund dividends is determined by statute, stating, “Under AS 43.23.005(a)(1) a ‘state resident’ is entitled to receive a permanent fund dividend. Alaska Statute 43.23.095(8) defines ‘state resident’ as ‘an individual who is physically present in the state with the intent to remain permanently in the state . . . .’” *Id.*
denial of basic education. Finally, a district court in Georgia recently decided a case challenging the denial of driver's licenses to illegal aliens. The court applied rational basis review and found that there was a legitimate governmental interest in denying illegal aliens driver's licenses.

Although courts in the above cases analyzed state laws that discriminated against undocumented immigrants under rational basis review, state laws that discriminate based on alienage are subject to strict scrutiny. Courts subject federal laws, however, to a much less exacting standard. Because the federal government has plenary power over immigration, federal regulations enjoy great deference and must withstand only rational basis review. State regulations, however, enjoy no such deference. In Matthews v. Diaz, a federal law restricting Medicare eligibility to citizens and legal permanent residents with five years of residence was upheld because it was not "wholly irrational." But a similar state law was struck down in Graham v. Richardson as a violation of equal protection. Thus, classifications based on alienage must survive strict scrutiny, while classifications based on undocumented status receive an ambiguous, though lesser degree of scrutiny.

C. Constitutional Protection for Denials of Police Protection

If Congress enacts the CLEAR Act or the HSEA, the result would be an effective denial of police protection to undocumented immigrants. By contacting the police, an undocumented immigrant would risk arrest and deportation. Because of this, there is a de facto denial of police protection.
of police services. A fundamental right to police protection has never been recognized. The Supreme Court found in *DeShaney v. Winnebago County Dept. of Social Services* that the state had no liability when its local officials knew that a child was being abused by his father but failed to intervene, resulting in continued abuse that left the child profoundly retarded. The Court held that states have no obligation to protect their citizens' lives, liberty, or property, but once it undertakes the provision of such services, "The State may not, of course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause." 

### III. Analysis

When looked at through an equal protection lens, the local enforcement of federal immigration law raises considerable constitutional questions. This section compares the level of deference accorded to federal laws that discriminate on the basis of alienage with state laws that discriminate on the same basis. Next, it considers the discriminatory impact of police enforcement of federal immigration law.


101. Attorney Lawrence Rosenthal argues that the right to police protection should be regarded as fundamental. He notes:

Under the Equal Protection Clause, accordingly, the government is obligated to provide effectively equal protection against all threats to public peace and safety . . . . [I]t would even be appropriate to characterize the right to protection against lawbreakers as "fundamental"; it is expressly protected by the Constitution, and under the case law, when a right that enjoys express or implicit constitutional protection is at issue, strict judicial scrutiny is ordinarily required. Lawrence Rosenthal, *Policing and Equal Protection*, 21 YALE L. & POL'Y REV. 53, 73 (2003).


103. *Id.* at 192–93.

104. *Id.* at 197. The Supreme Court reaffirmed this position recently in *Town of Castle Rock v. Gonzales*, 125 S. Ct. 2796 (2005), holding that the plaintiff had no "property interest in police enforcement of her restraining order" where police failed to respond to her notification that her husband had taken their children in violation of a restraining order, resulting in the murder of her three children. *Id.* at 2810.

105. *DeShaney*, 487 U.S. at 197 n.3. For example, an equal protection claim for a denial of police protection was brought in *Soto v. Flores*, 103 F.3d 1056 (1st Cir. 1997), where police failed to protect a domestic violence victim. The court held that in order to succeed on her claim the plaintiff "must show that there is a policy or custom of [the police] providing less protection to victims of domestic violence than to other victims of crimes, that gender discrimination is a motivating factor, and that [the plaintiff] was injured by the" policy or custom. *Id.* at 1066. In that case, the plaintiff did not succeed in her claim because she failed to prove a policy of providing less protection, even though the police officer informed her abuser of the complaint, resulting in the murder of the plaintiff's two children. *Id.* at 1072.

106. See infra notes 110–128 and accompanying text.

107. See infra notes 129–147 and accompanying text.
This section also considers the appropriate level of scrutiny for state policies that permit such enforcement under the equal protection framework. Finally, this section analyzes the importance of the state interests that justify these new policies authorizing local officials to enforce immigration law, concluding that because the state interests may not be compelling enough to justify the decline in access to police services, these laws would stand on a shaky constitutional footing.

A. Lack of Deference to State Policies Required by the CLEAR Act and HSEA

In determining the constitutionality of the CLEAR Act and the HSEA under the Equal Protection Clause, the nature of the legislation itself must first be considered. Both bills authorize state or local law enforcement personnel to "investigate, identify, apprehend, arrest, detain, or transfer to Federal custody aliens in the United States . . . for the purposes of assisting in the enforcement of the immigration laws of the United States in the course of carrying out routine duties." The CLEAR Act and the HSEA also make unlawful presence a criminal violation. The HSEA increases criminal penalties.

108. See infra notes 148–174 and accompanying text.
109. See infra notes 175–190 and accompanying text.
111. H.R. 3137 § 3(a); S. 1362 § 4(a). The CLEAR Act's definition of illegal alien includes:

[A]n alien who—

(A) is apprehended while entering (or attempting to enter) the United States at a time or place other than as designated by immigration officers;
(B) enters the United States without inspection;
(C) fails to depart the United States within 30 days after the expiration date of a nonimmigrant visa or a voluntary departure agreement and is not in other lawful status; or
(D) fails to depart the United States within 30 days after the date of a final order of removal and is not in other lawful status.

H.R. 3137 § 4(c)(3). The HSEA's definition is somewhat different. The HSEA also includes an individual who was "admitted as a nonimmigrant and who . . . had failed to—(A) maintain the nonimmigrant status in which the alien was admitted . . . or (B) comply with the conditions of any such status" and immigrants who have "subsequently failed to comply with the requirements of that status." S. 1362 § 8(e). The HSEA does not provide the thirty-day window for departure that the CLEAR Act provides. Both the HSEA and the CLEAR Act provide an affirmative defense to unlawful presence if the individual can show that he or she "overstayed the time allotted under a visa due to an exceptional and extremely unusual hardship or physical illness that prevented the alien from leaving the United States by the required date." H.R. 3137 § 4(b); see also S. 1362 § 5(b).

The HSEA, which criminalizes a failure to maintain documented status in addition to a failure to depart, is significantly more stringent. It should be noted that due to the complexity of immigration law and the lengthy waits for service, unintentional lapses into undocumented status are not uncommon. For example, recent research has found that California Governor Arnold Schwarzenegger may have been undocumented during two periods in the 1970s when he violated...
for illegal entry and provides for forfeiture of assets by those unlawfully present.\textsuperscript{112} In comparison, the CLEAR Act increases both criminal and civil penalties, but does not provide for forfeiture of assets.\textsuperscript{113} The Department of Justice is responsible for including any information it has on immigration-law violators in the NCIC.\textsuperscript{114} The HSEA states that local and state police should report any immigration violators they apprehend within ten days.\textsuperscript{115} Similarly, the CLEAR Act encourages state and local police, "[i]n compliance with section 642(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 . . . and section 434 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996" to report violators "in a timely manner . . . ."\textsuperscript{116} Local and state police are not required to receive any training prior to enforcing immigration law, although training and resources must be developed and made available to them.\textsuperscript{117} Finally, the Act provides total immunity to law enforcement personnel and agencies that are involved in the enforcement of immigration laws "[n]otwithstanding any other provision of law."\textsuperscript{118}

Because this is a federal law dealing with immigration over which the federal government has plenary power, the statute would receive great deference when reviewed by the courts.\textsuperscript{119} For example, in \textit{Matthews v. Diaz}, the Court upheld federal restrictions on Medicare eligibility that allowed only citizens and legal permanent residents that had been residing in the United State for five years to participate in the program.\textsuperscript{120} Although similar state programs limiting welfare benefits to aliens had been struck down,\textsuperscript{121} the Court commented that

\begin{itemize}
  \item the terms of his visa by taking a weekly salary for consulting work and by starting a bricklaying business while on a temporary work visa. Frank del Olmo, \textit{An Illegal-Immigration Irony: Schwarzenegger May Have Been in Technical Violation of His U.S. Visa Not Once But Twice}, \textit{L.A. Times}, Sept. 28, 2003, at M5.
  \item Id. \textsection 5.
  \item H.R. 3137 \textsection 4.
  \item Id. \textsection 5; S. 1362 \textsection 6.
  \item S. 1362 \textsection 4(b).
  \item H.R. 3137 \textsection 6(a) (internal citations omitted). The bills state, respectively, that the local police “should” and are “encouraged” to report immigration violators, in compliance with current law. \textit{Id.} It is unclear why the bills use discretionary language to describe a duty that they describe as required by law. \textit{See id.}; S. 1362 \textsection 4(b). The HSEA explicitly states it should not be construed to require local authorities to “enforce the immigration laws of the United States.” S. 1362 \textsection 13. Both bills also explicitly state that they do not require local authorities to arrest or report victims or witnesses of crimes. \textit{See} H.R. 3137 \textsection 3(b); S. 1362 \textsection 13.
  \item S. 1362 \textsection 9; H.R. 3137 \textsection 10.
  \item S. 1362 \textsection 10; H.R. 3137 \textsection 11.
  \item \textit{See} Manheim, \textit{supra} note 52, at 1012 (citing Mathews v. Diaz, 426 U.S. 67 (1976)).
  \item Mathews, 426 U.S. 67.
  \item Graham v. Richardson, 403 U.S. 365, 374 (1971) (holding that Arizona and Pennsylvania state statutes that denied welfare benefits to aliens were equal protection violations).
\end{itemize}
"[t]he equal protection analysis also involves significantly different considerations because it concerns the relationship between aliens and the States rather than between aliens and the Federal Government." Instead, the Court considered whether a federal limitation on noncitizens' access to Medicare benefits was "wholly irrational." Because the CLEAR Act and the HSEA are federal legislation, courts will apply the standard articulated in Matthews and uphold the law if the distinctions it makes between aliens and citizens are not "wholly irrational." Under the CLEAR Act and the HSEA, only aliens that lack legal immigration status receive different treatment than citizens receive by local authorities. A difference in treatment due to an individual's violation of immigration law is not "wholly irrational," but is based on an established legal distinction. Because a statute that empowers local law enforcement to enforce federal immigration law is not wholly irrational, it will be upheld as a legitimate exercise of legislative authority.

The CLEAR Act denies §241(i) funding to any state or locality that has a "statute, policy or practice" of prohibiting local authorities from enforcing federal immigration law two years after the date of enactment. The HSEA goes even further and finds that these local statutes or policies are illegal under current law. While these statutes may not technically require the states to enforce federal immigration law, they put significant pressure on states to do so. Although the CLEAR Act and HSEA are likely to withstand a constitutional challenge, the state laws and policies that will stem from compliance with the CLEAR Act and HSEA will not receive the lenient deferential standard accorded to federal statutes. Instead, these state laws and policies will be subject to challenge under the Equal Protection Clause of the Fourteenth Amendment.

122. Matthews, 426 U.S. at 84–85.
123. Id. at 83 (finding "neither requirement is wholly irrational").
124. Id.
125. CLEAR Act, H.R. 3137, 109th Cong. § 3(a) (2005). INA §241(i) currently provides for the Attorney General to enter into a contractual arrangement to provide compensation to the State for the detention of undocumented criminal aliens. This is administered through the State Criminal Alien Assistance Program (SCAAP). In 2004, a nationwide total of $281,605,292 was awarded; California received $111,899,215; Texas received $24,740,836; and New York received $56,995,435. For a listing of awards by county and state, see Bureau of Justice Assistance, SCAAP FY04 Awards, http://www.ojp.usdoj.gov/BJA/grant/04SCAAP.pdf (last visited Feb. 23 2006) [hereinafter 2004 SCAAP Awards].
127. Manheim, supra note 52, at 1011–12.
128. Id.
The first step in analyzing the state policies that require local and state police to enforce immigration law under the Fourteenth Amendment will be to consider whether the policies classify on the basis of alienage. These policies will authorize local police to enforce federal immigration law and arrest undocumented individuals. In a sense, these laws will identify a class of individuals subject to police action. But this police action is directly linked to the individuals' violations of immigration law. The concern is not so much over the authorization of the police to enforce the law, but the discriminatory effect that this policy will have on undocumented immigrants' ability to access police services. Equal protection claims are not limited to statutes or policies that classify on their face. Statutes and policies can also be found to classify on the basis of alienage when they have a disparate impact on aliens. For example, in Yick Wo, the Court found that a neutral law requiring any laundry that operated in a wooden building to apply for permission to continue operating to be discriminatory because permission was never granted to Chinese individuals, but was granted to Caucasian individuals. There the Court stated:

Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution.

The Supreme Court later narrowed the application of the disparate impact theory requiring that plaintiffs not only show that the legislation affected only a suspect class, but also requiring plaintiffs to make a prima facie case that the government action was motivated by a discriminatory purpose.

Here, the impact of the new statutes will be felt exclusively by aliens. Undocumented aliens, as violators of immigration law, are subject to the consequences of those violations. There is, of course, nothing unconstitutional about immigration enforcement itself. In any enforcement action, aliens alone will be the target. Proponents of this legislation see the CLEAR Act and HSEA as simply putting more

130. Id.
131. Id. at 373.
132. Id. at 373–74.
resources behind the enforcement of immigration law. Because this is clearly a legitimate purpose and a legitimate means of accomplishing it, this legislation raises no equal protection questions from the perspective of its proponents. But by forcing local and state authorities to enforce immigration law, the ability of law enforcement officials to provide police services to undocumented individuals will be threatened. How the dual roles of police as protector and immigration agent will play out in practice is unclear. The feared effect will be that undocumented immigrants will be forced to access police services only upon "pain of deportation." For example, battered spouses or crime victims would be taking quite a gamble in coming forward with information. An entire community would fear and avoid any interaction with the police because of the omnipresent risk of deportation inherent in any interaction. The discriminatory impact goes far beyond

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135. HSEA Hearing, supra note 6, at 15-17 (statement of David Harris, Balk Professor of Law and Values, University of Toledo College of Law).

136. See Maya, supra note 100, at 1637.

137. The NOW Legal Defense Fund reports that fear of deportation is the most significant barrier in the reporting of domestic abuse by battered women. CLEAR Act Hearing, supra note 134, at 111 (statement of Katherine Culliton, Legislative Staff Attorney, Mexican American Legal Defense and Education Fund (MALDEF)).

138. Fear of deportation already plays a significant role in reducing the number of crimes reported. MALDEF listed a number of situations where police have taken action to deport crime victims or witnesses, despite the protection currently available. One example that MALDEF cites is as follows:

"Jorge" is a sixteen-year-old boy who went to the police after escaping a kidnapping situation, in which he was held captive and tortured by a gang of boys for days. Instead of helping Jorge, the police turned him over to immigration and although he was a crime victim with no criminal record himself, he was sent to a maximum-security juvenile facility in Spokane, Washington.

CLEAR Act Hearing, supra note 134, at 111 (statement of Mexican American Legal Defense and Education Fund).

The 2005 versions of the CLEAR Act and HSEA explicitly state that local authorities are not required to arrest or report crime victims or witnesses. But local authorities are still fully capable of arresting or reporting these vulnerable individuals. Without a policy prohibiting the arrest or the reporting of crime victims or witnesses, these sections of the CLEAR Act and HSEA are likely to do little to alleviate the fear of these individuals, resulting in continued avoidance of police contact.

139. See Maya, supra note 100, at 1637. In Mody v. City of Hoboken, 758 F. Supp. 1027, 1028 (D.N.J. 1991), the plaintiff sued the police department claiming that his equal protection rights were violated by an implied policy not to prosecute individuals who were committing crimes against the Indian community. Id. The court found that
the enforcement action and includes the expanded effect of reduced access to police protection.

Proponents of the legislation claim that "police and prosecutors would retain the discretion . . . not to take action with respect to the witnesses to or the victims of crime; second, immigrant victims of many crimes are eligible for relief, particularly under the U visa program. Battered spouses are eligible for additional relief, including cancellation of removal."\textsuperscript{140} The mitigating effect of this potential relief, however, is questionable.\textsuperscript{141} Although some victims may be able to avail themselves to certain forms of immigration relief, many will be ineligible.\textsuperscript{142} In addition, leaving the prosecution of undocumented immigration to the discretion of the police and prosecutors provides little security and certainty to undocumented victims and witnesses who may want to come to the police but have no idea what consequences they will face for taking such action. The potential availability of relief is too tenuous to address the aversion entire communities will have towards interacting with the police.

In addition, the effect of this new legislation will sweep much more broadly than will the available relief. Although only undocumented immigrants are subject to immigration enforcement, many undocumented immigrants are part of communities and families that consist

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  \item \textsuperscript{[a]}n express or implied policy which permits or condones attacks upon members of a particular minority group is the very evil which the post-Civil War statutes sought to eradicate. If law enforcement turns away from a victim solely because of the victim's race, religion, or national origin, equal protection of the laws is rendered meaningless. \textit{Id.}
  \item \textsuperscript{140} CLEAR Act Hearing, \textit{supra} note 134, at 2 (statement of John N. Hostettler, Chairman of the Subcomm. on Immigration, Border Security, and Claims).
  \item \textsuperscript{141} To qualify for a U visa, the individual must meet four conditions:
    \begin{enumerate}
      \item The alien has suffered substantial physical or mental abuse as a result of having been a victim of the certain criminal activity . . . and
      \item The alien . . . possesses information concerning that certain criminal activity . . .
      \item The alien . . . has been helpful, is being helpful, or is likely to be helpful to a Federal, State, or local law enforcement official; to a Federal, State, or local prosecutor; to a Federal or State judge, to the Service; or to other Federal, State, or local authorities investigating or prosecuting one of the certain criminal activities . . .; and
      \item The criminal activity described violated the laws of the United States or occurred in the United States . . . .
    \end{enumerate}
  \item Memorandum from Michael D. Cronin, Acting Executive Associate Comm'r, Immigration and Naturalization Service to Michael A. Pearson, Executive Associate Comm'r (Aug. 30, 2001), \textit{reprinted in} 78 \textit{INTERPRETER RELEASES} 1751, 1760–61 app. II (2001). The spouses, children, and parents of children under sixteen may also qualify for a U visa. \textit{Id.} No regulations have been issued to date.
  \item \textsuperscript{142} No individual would be guaranteed access to such relief before calling the police. The police or prosecutor must exercise some discretion in determining that the individual has been helpful or is likely to be helpful in the investigation or prosecution. Calling the police would still be a gamble. Memorandum from Michael D. Cronin, \textit{supra} note 141, at 1761.
\end{itemize}
of a combination of undocumented immigrants, legal permanent residents, individuals with various forms of temporary permission to be in the United States, and United States citizens.\textsuperscript{143} All individuals in these mixed families and communities will be hesitant to call for police services when they recognize the severe consequences that this decision could have on their family members and neighbors with undocumented statuses.\textsuperscript{144} As a result, the effects of this new system will sweep broadly and limit access to police services for all aliens and even some United States citizens closely tied to immigrant communities.\textsuperscript{145}

Any plaintiff will still face the significant hurdle of proving a discriminatory purpose.\textsuperscript{146} Although a discriminatory purpose can be inferred from the "totality of the relevant facts,"\textsuperscript{147} this presents the greatest barrier to an equal protection challenge. If a plaintiff can allege sufficient facts to infer a discriminatory purpose, a court could find that a facially neutral law has the impact of denying undocumented aliens and their communities access to police protection and as such is subject to equal protection analysis.

\textbf{C. Standard of Scrutiny}

In order to determine the standard of scrutiny used in an equal protection claim against a local or state policy of enforcing federal immigration law, it is necessary to determine whether the class affected is a suspect class. The class that is being denied equal protection through a denial of police protection could be defined broadly or narrowly. A broad definition would recognize that immigrant communities as a whole will be denied access to police protection as a result of these

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  \item \textsuperscript{144} This effect has been seen in other situations where individuals do not feel comfortable interacting with the police. Communities must develop creative ways of providing for their own protection. In one instance, in Chicago public housing, police responded to a drug call but found only one individual outside the building. They took the man to a local basketball court and started to beat him. A gang member wanted to intervene but feared the consequences of calling the police. Instead, he called an ambulance directly from a neighbor's house in the hope that the arrival of the paramedics would end the beating. Upon the approach of the ambulance, the police left the scene, leaving the man on the basketball court. Interview with David Eads, Technology Coordinator, Invisible Institute, in Chicago, Ill. (Nov. 15, 2004).
  \item \textsuperscript{145} On average one out of ten United States families with children is a mixed family—with at least one citizen and one undocumented member. FIX \& ZIMMERMAN, supra note 143, at 1. This chilling effect is already seen in other areas. Children with U.S. citizenship and undocumented parents are much less likely to receive the benefits for which they qualify. \textit{Id.}
  \item \textsuperscript{146} Washington v. Davis, 426 U.S. 229, 239–42 (1976).
  \item \textsuperscript{147} \textit{Id.} at 242.
\end{itemize}
\end{footnotesize}
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laws. Access to police services would be denied to aliens in general, not just undocumented aliens. Aliens have been clearly recognized as a suspect class deserving of strict scrutiny.\textsuperscript{148} If strict scrutiny is required of these laws, they will likely be held unconstitutional.

But state and local enforcement of federal immigration law can be considered narrowly in that only the undocumented actually risk deportation when they call the police. \textit{Plyler} explicitly refused to recognize illegal aliens as a suspect class because their status is the result of a voluntary violation of immigration law.\textsuperscript{149} Nonsuspect classes usually receive mere rational basis scrutiny.\textsuperscript{150} But \textit{Plyler} did not go on to apply rational basis scrutiny.\textsuperscript{151} Instead, the Court was concerned about the importance of the interest involved (public education)\textsuperscript{152} and the innocence of the children affected.\textsuperscript{153} Although these children were undocumented immigrants, their status was not the result of a decision that they made and for which they could be held responsible.\textsuperscript{154} The Court went on to require that the denial of public education to undocumented children be justified by a substantial state interest.\textsuperscript{155}

Some of the same concerns that caused the Court in \textit{Plyler} to increase the level of scrutiny are present in the denial of police protection to undocumented immigrants. The effect of state law authorizing local police enforcement of federal immigration laws will undoubtedly affect a significant number of individuals that did not make a volitional choice to violate immigration laws.\textsuperscript{156} But the scope of the effects will sweep far beyond that. Whole communities will be affected by the attempt to minimize contact with the police.\textsuperscript{157} This lack of police protection will affect everyone regardless of their immigration status.

In addition, the interest involved is extremely important, if not fundamental.\textsuperscript{158} Police services are central to the orderly functioning of our society. Lawrence Rosenthal, Deputy Corporation Counsel in the City of Chicago Department of Law, has argued that police protection

\textsuperscript{148} Graham v. Richardson, 403 U.S. 365, 372 (1971); Manheim, \textit{supra} note 52, at 1010.
\textsuperscript{150} Manheim, \textit{supra} note 52, at 1010-11.
\textsuperscript{151} Plyler, 457 U.S. at 224.
\textsuperscript{152} \textit{Id.} at 221-23; Maya, \textit{supra} note 100, at 1635.
\textsuperscript{153} Plyler, 457 U.S. at 219-20.
\textsuperscript{154} \textit{Id.}
\textsuperscript{155} \textit{Id.} at 230.
\textsuperscript{156} For example, undocumented children, whose violation of immigration laws must be attributed to their parents' decision, would be affected by local police enforcement.
\textsuperscript{157} \textit{See infra} notes 210-214 and accompanying text.
\textsuperscript{158} Rosenthal, \textit{supra} note 101, at 71-74.
is a fundamental right that the Constitution expressly recognizes in guaranteeing individuals "equal protection under the laws." In addition, one of the major problems that the Fourteenth Amendment was intended to address was the lack of police protection for African Americans who were subject to extensive violence. At the time, legal commentators believed that "one of the basic obligations that the government owed its people was to protect their persons and property." But this right is judicially underenforced due to the potentially large number of claims that could be filed by individuals who do not feel that they received adequate police protection. Nonvictims who attempt to bring claims face problems with standing. Instead, the political branches of government give substance to this right, with guidance from the public's expectation of equal protection in policing. Because it would be politically inappropriate to provide unequal and imbalanced services, law enforcement policy focuses on policing different neighborhoods equally.

Prior cases by undocumented aliens challenging laws on the basis of equal protection have been unsuccessful in receiving a heightened level of scrutiny used in Plyler. But the importance of the interest involved has never reached the level of public education for children. The interests involved included access to a drug treatment program, eligibility for Permafund dividend payments, and eligibility for a driver's license. While these interests are important, the effect of the denial of these interests cannot be compared to the effect of denying children access to education. But the interest of access to police

159. Id. at 66 (quoting U.S. Const. amend. XIV, § 1).
160. Rosenthal quoted Representative John Bingham, who proposed the language for the Fourteenth Amendment that was eventually adopted, during the debate over the Fourteenth Amendment: "No State ever had the right... to deny to any freeman the equal protection of the laws or to abridge the privileges or immunities of any citizen of the Republic, although many of them have assumed and exercised the power, and that without remedy." Id.
161. Id. at 68.
162. A community resident concerned about inadequate policing in the area would have trouble establishing that, because of the lack of police protection, he or she was likely to be victimized in the future as this is rather speculative. A crime victim who brought a claim would have difficulty establishing that the lack of police protection, and not the criminal act, was the proximate cause of his injuries. Id. at 75–76.
163. Id. at 78.
164. Rosenthal, supra note 101, at 78.
166. Dep't of Revenue v. Cosio, 858 P.2d 621 (Alaska 1993).
168. The Court in Plyler noted: The inestimable toll of that deprivation on the social economic, intellectual, and psychological well-being of the individual, and the obstacle it poses to individual achievement, make it most difficult to reconcile the cost or the principle of a status-based
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protection may reach a level of importance that is on par with education.\(^\text{169}\) Police protection is essential to protect the lives, safety, and property of residents. It prevents individuals from being victimized. When individuals are victimized, police provide justice and security. There is a long tradition in our nation's history of the public's expectation of police protection,\(^\text{170}\) even if current case law refuses to recognize any right to this protection.\(^\text{171}\) The importance of police protection should be sufficient to invoke a heightened Plyler-style scrutiny.\(^\text{172}\)

The importance of the interest in police protection and the broad effect that these statutes will have on innocent populations may be sufficient to invoke a Plyler-style level of heightened scrutiny. The Plyler level of scrutiny does not fit neatly into an equal protection framework. Some have identified it as a form of intermediate scrutiny.\(^\text{173}\) Others consider it "rational basis with a bite."\(^\text{174}\) In either case, courts would be looking at whether the state can assert a substantial state interest.

**D. What Is the Importance of the State Interest Involved?**

The stated purpose of both the CLEAR Act and the HSEA is "[T]o provide for enhanced Federal, State, and local assistance in the enforcement of the immigrations laws . . . ."\(^\text{175}\) The CLEAR Act requires states to engage in immigration enforcement to avoid a halt to one source of funding for their law enforcement agencies.\(^\text{176}\) The HSEA establishes that a policy against enforcing immigration law is a violation of federal law.\(^\text{177}\) Presumably many states would not be motivated by the same purpose as the proposed legislation. Their primary purpose would be preventing the loss of federal funding for the detention of criminal aliens\(^\text{178}\) or avoiding a violation of federal law.

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\(^{169}\) Maya, supra note 100, at 1635.

\(^{170}\) Rosenthal, supra note 101, at 68.


\(^{172}\) Mayra, supra note 100, at 1635.

\(^{173}\) Id.; see also Dep't of Revenue v. Cosio, 858 P.2d 621, 627 (Alaska 1993).

\(^{174}\) Manheim, supra note 52, at 1011.

\(^{175}\) CLEAR Act, H.R. 3137, 109th Cong. (2005); see also HSEA, S. 1362, 109th Cong. (2005).

\(^{176}\) H.R. 3137 § 3(a).

\(^{177}\) S. 1362 § 4(a).

\(^{178}\) Some states such as Montana, which received $2,792 in 2004, have little to lose in the way of SCAAP funding. Other states, such as California, stand to lose well over one hundred million dollars per year, giving them little choice but to participate in immigration enforcement. 2004 SCAAP Awards, supra note 125.
States have not taken it upon themselves to adopt these policies voluntarily. In fact, a large number of local police departments have explicit policies prohibiting the enforcement of immigration law. Numerous officials have expressed concern regarding the proposed CLEAR Act and HSEA and the effects they would have in their communities. Gordon Quan, Mayor Pro Tem of Houston and representative of the National Leagues of Cities, expressed his concern that the CLEAR Act would threaten community policing and the "commitment to assure that justice is dispensed equally and not based on race, gender, religion, national origin, sexual orientation, disabilities, education, or economic status of the victims or perpetrators." But states may be motivated by their own legitimate interests in addition to the loss of funding. States have an interest in the enforcement of all laws, federal or state. Furthermore, states have an interest in preserving their resources and job opportunities for those who are lawfully present. In addition, states often pay the bills for medical costs due to emergency care for undocumented individuals.

Proponents of this legislation have also argued that it serves the legitimate state interests in preventing crime and addressing national security concerns. But the actual relation of the CLEAR Act and the HSEA to these concerns is questionable. Local and state police are fully authorized and able to take action against criminal aliens. The CLEAR Act adds nothing to their authority to deal with individuals with criminal histories or who are accused of committing a crime. While having an undocumented population does raise national security concerns because of the inability to track this group of people, aggressive police action in these communities is likely to undermine police relationships and result in a reduction of information available.

179. Although no state has enacted a CLEAR-style statute, some individual cities have relied on the Attorney General’s theory of inherent authority to begin enforcing immigration laws. See Pham, supra note 47, at 970.


181. CLEAR Act Hearing, supra note 134, at 35–37 (statement of Gordon Quan, Mayor Pro Tem, Houston, Texas); HSEA Hearing, supra note 6, at 15–17 (statement of David A. Harris, Balk Professor of Law and Values, University of Toledo College of Law).

182. CLEAR Act Hearing, supra note 134, at 40 (statement of Gordon Quan, Mayor Pro Tem, Houston, Texas, quoting the National League of Cities policy).

183. Id. at 13–16 (statement of John M. Morganelli, District Attorney, Northampton County, Pennsylvania).

184. Id. at 52.

185. Id.; HSEA Hearing, supra note 6, at 12–15 (statement of Michelle Malkin, Investigative Journalist and Author, Bethesda, MD).

186. See supra note 31 and accompanying text.
to the police from these communities. Arguably, the police have the tools necessary to address these state concerns—local enforcement of immigration law under the HSEA and the CLEAR Act would be unlikely to further these aims.

Despite the argument that the state law is not unrelated to the state interests, these laws are likely to survive rational basis review. To survive this lenient review, the state only needs to demonstrate that its purposes behind the law are legitimate. None of the purposes discussed above involve any illegitimate purpose, such as a bare animus toward a minority group. Although one can argue that the state laws' relationship to the asserted purposes is tenuous, rational basis review is not a searching review. The asserted relationship will most likely be sufficient, and the state laws will likely survive rational basis review.

The real question will arise if the courts apply a heightened level of scrutiny and require that the state assert a substantial state interest. States' interest in preserving their resources is clearly a legitimate state interest. But it did not suffice to satisfy the substantial state interest standard when presented in Plyler. Similarly, preserving job opportunities has been upheld as a legitimate state interest, but it seems no more likely to be a substantial state interest than preserving state resources. The purposes of providing for national security and reducing crime may not be sufficiently related to this piece of legislation to survive a court's review because this legislation has no effect whatsoever on the authority of local police to respond to criminal activity. If a court applies a heightened level of scrutiny, these statutes will not be able to withstand Fourteenth Amendment challenges.

IV. IMPACT

A new scheme of state and local enforcement raises many concerns in addition to questions of constitutionality. Will these new measures be effective means of enforcing immigration law? Will they hamper police forces in their law enforcement mission? Will they subject police to increased liability for civil rights violations? What effect

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189. DeCanas v. Bica, 424 U.S. 351, 365 (1976) (holding that a California law prohibiting the knowing employment of an alien without work authorization was a valid exercise of state power).
190. See supra note 31 and accompanying text.
191. See infra notes 197–209 and accompanying text.
192. See infra notes 210–214 and accompanying text.
193. See infra notes 215–215 and accompanying text.
will they have on foreign policy? Will they result in an unconstitutional lack of uniformity in immigration enforcement? Will they infringe on the delicate balance between states and the federal government inherent in our system of federalism? This section addresses the impact of the CLEAR Act and the HSEA.

A. *The CLEAR Act and HSEA Are Ineffective Responses to Undocumented Immigration and the Terrorist Threat*

The CLEAR Act and HSEA are responses to an increasing concern over ineffective immigration enforcement. As the large undocumented population demonstrates, the United States has been unable to control its borders. Despite past efforts, which have included increased border patrols, earned legalization, and sanctioned employers who hire undocumented immigrants, the undocumented population is higher than ever. Concern over this failure has been justifiably heightened by the increased threat of terrorism. In congressional hearings regarding the 2003 HSEA, committee members pointed out several mundane encounters the September 11th hijackers had with police involving traffic stops that could have served as opportunities for immigration enforcement action. For example, police ticketed Mohammed Atta in Florida for driving without a license while he was undocumented, but did not detain him. The number of immigration enforcement personnel is simply not sufficient to support large scale enforcement actions given the number of undocumented individuals. Engaging local police departments is a logical way to increase

194. See infra notes 224–228 and accompanying text.
195. See infra notes 229–232 and accompanying text.
196. See infra notes 233–238 and accompanying text.
198. Espenshade, supra note 1, at 200–01, 211–12.
199. HSEA Hearing, supra note 6, at 2 (statement of Sen. Saxby Chambliss, Chairman, Immigration, Border Security and Citizenship Subcomm.).
200. Graham, supra note 180, at 288–89.
201. Although numbers remain insufficient, the federal government has taken action to increase the number of enforcement personnel. The Congressional Research Service noted: Prior to the September 11, 2001 terrorist attacks, the INS had fewer than 2,000 immigration agents to enforce immigration laws within the United States. Although that number has not changed since the terrorist attacks, the merger of the interior enforcement function of the former INS with the investigative arm of the U.S. Customs Service (Customs) into the Bureau of Immigration and Customs Enforcement (ICE), which is located in DHS [Department of Homeland Security], has doubled the number of interior agents potentially available to enforce immigration laws. See Document for Congress, Enforcing Immigration Law: The Role of State and Local Law Enforcement (2004), http://www.taasa.org/trafficking/Law Enfrole.pdf.
personnel and take advantage of contacts with undocumented individuals that would ordinarily occur in the process of routine police work.\textsuperscript{202} In addition, immigration enforcement actions are favored as alternatives to terrorism prosecution for certain terrorism suspects because they are simpler and cheaper.\textsuperscript{203}

Presumably, deputizing local police to enforce immigration violations would increase the number of individuals apprehended for violating immigration law, including individuals with criminal records and terrorist ties.\textsuperscript{204} But the statistics offered by the proponents of the legislation show these criminal or terrorist aliens make up less than one percent of the number of individuals who would be affected by this new legislation.\textsuperscript{205} Even if these aliens were more extensively targeted for enforcement, it is likely that the vast majority of individuals apprehended through the local and state enforcement action would be individuals whose only violations would be unlawful presence in the United States.\textsuperscript{206} Those individuals apprehended even through enhanced enforcement action would only constitute a tiny percentage of the millions of undocumented residing in the United States.\textsuperscript{207} The objective of effective control over those who enter and reside in the United States is not obtainable through enforcement action alone. Relying on enforcement is ineffective and will create significant economic and social disruptions as employers lose their employees and as families lose their fathers, mothers, and other relatives. Some form of legalization will be necessary to prevent these disruptions and to recognize the infeasibility of deporting ten million individuals. Enforcement alone fails to address the primary motivations that induce

\begin{itemize}
  \item \textsuperscript{202} According to one proponent:
    A law such as the CLEAR Act would provide the manpower and information-sharing capabilities necessary to shore up the long-standing weakness of interior enforcement. It would also produce a deterrent effect, because potential terrorists would not only have to enter the United States, but would also be faced with the difficulty of remaining undetected.
    Graham, \textit{supra} note 180, at 307.
  \item \textsuperscript{203} \textit{Id.} Although simpler and cheaper, removal proceedings appear to be significantly less effective in neutralizing the threat presented by individuals that the United States truly believes are engaged in terrorist activity. Nora V. Demleitner, \textit{Misguided Prevention: The War on Terrorism as a War on Immigrant Offenders and Immigration Violators}, \textit{40 CRIM. L. BULL.} 2 (2004). Removal actions simply return individuals to their country of citizenship, leaving them unrestricted in their course of action and unsupervised by the United States government. \textit{Id.} There is a persuasive argument that removal increases the danger of terrorist activity when compared to the alternative of ongoing surveillance within the United States. \textit{Id.}
  \item \textsuperscript{204} CLEAR Act Hearing, \textit{supra} note 134, at 87 (statement of Gordon Quan, Mayor Pro Tem, Houston, Texas).
  \item \textsuperscript{205} \textit{Id.}
  \item \textsuperscript{206} \textit{See id.}
  \item \textsuperscript{207} \textit{Id.}
\end{itemize}
individuals to take the risk of immigrating illegally: economic opportunities and family reunification. Any effective solution must attempt to provide reasonable legal alternatives to address these needs. The CLEAR Act and HSEA are inadequate to achieve the goals that motivated their creation.

B. The CLEAR Act and HSEA’s Negative Impact on Law Enforcement Goals

The CLEAR Act and HSEA are not only inefficient methods of dealing with undocumented immigration, but they also raise signifi-

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208. For many individuals, no legal means of immigrating exists. Employment visas are restricted primarily to individuals with significant education and skills. See Craig Miley, Employment-Based Immigration: The First Three Preferences, in Selected Fundamentals of Immigration Law 67 (2005). Family-based immigration requires that the family member in the United States be a citizen or legal permanent resident. See Susan Fortino-Brown, Family Sponsored Immigration, in Selected Fundamentals of Immigration Law, supra, at 239. For those who do qualify for an immigrant visa, the wait is significant. According to the November 2005 visa bulletin, the spouse of a legal permanent resident must wait four years after his or her petition is approved for an immigrant visa. For individuals from Mexico, the wait is seven years. U.S. Dep’t of State, Visa Bulletin for March 2006, http://travel.state.gov/visa/frvi/bulletinlbulletin_2805.html (Feb. 23, 2006).

209. Various options for immigration reform have been proposed. President George W. Bush proposed a temporary worker program on January 7, 2004. His plan would allow undocumented workers, along with individuals overseas, to apply for temporary status that would allow them to continue to work in the United States for three years. The status could be renewed. When the status expired, temporary workers would be required to return to their home country. The plan provides workers with credit in their national retirement systems for the work they did in the United States. Temporary status would not lead to permanent resident status or citizenship. The White House, Fact Sheet: Fair and Secure Immigration Reform (Jan. 7, 2004), http://www.whitehouse.gov/news/releases/2004/01/20040107-1.html. The Democratic proposal in the 108th Congress was the Safe, Orderly Legal Visas and Enforcement Act of 2004 (SOLVE Act), S. 2381, 108th Cong. (2004); H.R. 4262, 108th Cong. (2004). This bill includes an earned adjustment for individuals who can show twenty-four months of employment in the United States. American Immigration Lawyers Association, Comprehensive Immigration Reform: Major Legislation to Be Introduced, at 2, http://www.aila.org/fileViewer.aspx?docID=9840 (last visited Feb. 19, 2005). The SOLVE Act also includes provisions to reduce the backlog in family-based immigration applications and worker visa reforms that target temporary low- and semi-skilled workers. Id. Finally, the SOLVE Act requires a more strenuous process through which employers would have to show that U.S. workers are unavailable for the position and provides increased protection for temporary workers. Id. Many of the SOLVE Act provisions are included in the bipartisan Immigration Reform Act of 2004, S. 2010, 108th Cong. (2004). Section 2010 includes an earned adjustment, a new worker visa, work protection provisions, and backlog reductions for family reunification, but varies from the SOLVE Act in the specifics of these provisions. American Immigration Lawyers Association, supra, at 3. The Border Security and Immigration Improvement Act, S. 1461, 108th Cong. (2003), H.R. 2899, 108th Cong. (2003), includes an opportunity for undocumented individuals to apply for temporary status and creates new worker visas. American Immigration Lawyers Association, supra, at 4. Finally, the Border Security and Immigration Reform Act, S. 1387, 108th Cong. (2003), creates a guestworker program, which allows individuals to eventually apply for permanent residence. American Immigration Lawyers Association, supra, at 4–5.
cant policy concerns. In response to the threat of increased enforcement, immigrant communities would avoid interaction with the police.\textsuperscript{210} Victims and witnesses would have to risk deportation in order to approach the police. Whole communities with individuals of mixed immigration status would shun police interactions.\textsuperscript{211} Additionally, immigrants would more likely be targeted for abuse because their abusers would know that they could not turn to the police.\textsuperscript{212} The undocumented community’s status as an underclass, as recognized by the Court in \textit{Plyler},\textsuperscript{213} would be reinforced by their intensified isolation. As a result of these deteriorating relationships, the police would likely lose the assistance of the immigrant community in the war on terror.\textsuperscript{214} A prime source for intelligence information, immigrants would feel unsafe providing tips to law enforcement.

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  \item \textsuperscript{210} CLEAR Act Hearing, \textit{supra} note 134, at 37 (statement of Gordon Quan, Mayor Pro Tem, Houston, Texas).
  \item \textsuperscript{211} Similar concerns regarding limited accessibility of an essential service were raised by the Undocumented Alien Emergency Medical Assistance Amendments of 2004, H.R. 3722, 108th Cong. (2004). This legislation would require hospital emergency rooms to report the immigration status of anyone they treat in order to receive federal reimbursements. For individuals who were not able to demonstrate their immigration status, the hospital would be required to fingerprint. \textit{Id.} The fear is that such legislation would cause individuals to avoid life-saving emergency medical services, endangering the individuals’ health as well as public health in general. Lack of emergency police service in severe circumstances can have the same life threatening effect. H.R. 3722 was defeated on May 18, 2004 by a vote of 331 to 88. H.R 3722, Bill Summary and Status, http://thomas.loc.gov/cgi-bin/bdquery/z?d09:h.r.03722: (last visited Mar. 16, 2006).
  \item \textsuperscript{212} One scholar believes that “[b]y requiring local police to investigate and enforce federal immigration law, the CLEAR Act would undercut the central message of laws like VAWA [Violence Against Women Act], which encourage victims of violence to turn to their local police for protection rather than enduring abuse out of fear of detection and deportation.” Margot Mendelson, \textit{The Legal Production of Identities: A Narrative Analysis of Conversations with Battered Undocumented Women}, 19 BERKELEY WOMEN’S L.J. 138, 211 (2004). Discussing the effect of the CLEAR Act on battered immigrant women, Commentator Janet Calvo said:
  
  One of the main purposes behind the Violence Against Women Acts in 1994 and 2000 was to make it possible for women and children who were victims of crimes to be able to report these crimes to law enforcement. Abusers often told their victims they would be deported and never see their children again if they reported the abuse to the police. Studies showed that the fear of deportation prevented high percentages of battered immigrants from contacting law enforcement about the abuse.

  In the current climate, there is no mention in the proposed legislation [referring to the CLEAR Act] or the statements in support of the proposals of the relatively recently passed provisions of Violence Against Women Act. There is not even a sense that legislators have considered the recent laws that had the purpose of promoting reporting and prosecution of crimes, and after consideration determined that these goals had to be sacrificed for other more important public objectives. The arrest and prosecution objectives in the context of spouse abuse are completely ignored.

  \item \textsuperscript{213} Plyler v. Doe, 457 U.S. 202, 219 (1982).
  \item \textsuperscript{214} CLEAR Act Hearing, \textit{supra} note 134, at 37 (statement of Gordon Quan, Mayor Pro Tem, Houston, Texas).
\end{itemize}
C. Increased Civil Rights Liability for Local Police

Local and state police may face increased liability for civil rights violations. The CLEAR Act and HSEA provide civil immunity for police officers and law enforcement agencies involved in enforcing immigration law "[n]otwithstanding any other provision of law . . . ."215 Presumptively, police officers and agencies may still be liable under § 1981 for racial discrimination.216 Especially with no training requirement,217 it seems likely that officers may resort to using a foreign appearance as a proxy for probable cause of an immigration violation.218 For example, in 1997, the police department of Chandler, Arizona, in conjunction with the INS, undertook an enforcement action aimed at apprehending undocumented immigrants in the town.219 Although 432 individuals were deported, many citizens and permanent residents were stopped multiple times based on their appearance or their use of the Spanish language.220 In addition, police officers entered schools, residences, and businesses in search of undocumented individuals.221 As a result, the city faced two lawsuits and paid more than half a million dollars to settle the claims.222 It is likely that potential liability for civil rights violations committed by an untrained police force will greatly increase the costs that cities and states will have to bear in the enforcement of federal immigration law.

218. Keblawi, supra note 31, at 848. In United States v. Brignoni-Ponce, 422 U.S. 873, 885 (1975), the Court held that the Mexican ancestry of the occupants of a car was not sufficient to provide reasonable suspicion to stop the car under the Fourth Amendment, but noted that the officer can "assess the facts in light of his experience in detecting illegal entry and smuggling" including "the characteristic appearance of persons who live in Mexico, relying on such factors as the mode of dress and haircut." Id. But reasonable suspicion is a lower standard than probable cause. See Terry v. Ohio, 392 U.S. 1, 27 (1968); Wishnie, supra note 31, at 1107 (discussing the role ethnicity currently plays in federal immigration enforcement). Wishnie analyzed data collected by the Department of Homeland Security and showed that ethnicity currently is a significant factor in the level of scrutiny an individual receives through the inspection process. Wishnie, supra note 31, at 1107. In looking at data from John F. Kennedy Airport in New York, Hispanics received 1.42 times as many discretionary referrals to secondary inspections or adverse actions as did non-Hispanics. Id. at 1108.
219. Pham, supra note 47, at 985.
220. Id.
221. Id.
222. Id. ("Perhaps more damaging was the distrust that the local enforcement caused with the local immigrant community, creating, in the words of the Arizona Attorney General, 'an atmosphere of fear and uncertainty in the particular targeted zone and beyond.'").
D. Local Enforcement and Foreign Policy

The CLEAR Act and HSEA will presumably strain foreign policy with our allies. Traditionally, immigration enforcement has remained exclusively within the federal domain for several policy reasons.\(^\text{223}\) Immigration enforcement is a component of foreign policy.\(^\text{224}\) A number of our allies have significant immigrant populations in the United States.\(^\text{225}\) A perception of significant maltreatment through the lack of police protection could threaten our relationship with our allies. For example, several Mexican citizens were arrested for immigration violations directly outside of their consulate in San Diego.\(^\text{226}\) Mexico criticized this action, perceiving it as an attack of its ability to provide consular services for its citizens here in the United States.\(^\text{227}\) Incidents like this one will likely become more common when myriad local communities shape their own enforcement actions in their respective communities. The federal authorities will be unable to superimpose their unique foreign policy objectives and concerns on local police departments across the nation. A decentralized enforcement plan makes it more difficult to control the effect of immigration enforcement on foreign policy. Because the assistance of foreign nations is essential in detecting known terrorists, damage to foreign relations could carry a high price.\(^\text{228}\)

\(^\text{223. See supra notes 31–36 and accompanying text.}\)
\(^\text{224. See Pham, supra note 47, at 998.}\)
\(^\text{225. According to the 2000 Census, 31.1 million, or 11.1% of the U.S. population, is foreign born. Of those individuals, 9.2 million are from Mexico, 1.5 million are from China, and 1.4 million are from the Philippines. Nolan Malone et al., The Foreign Born Population: 2000 (2003), http://www.census.gov/prod/2003pubs/c2kbr-34.pdf.}\)
\(^\text{226. Pham, supra note 47, at 1001.}\)
\(^\text{227. Id.}\)
\(^\text{228. Graham, supra note 180, at 295. In addition, the diminished access to police protection by immigrants as a result of local enforcement of immigration law carries with it implications under international law. Explaining the duty a state owes aliens within its borders, one commentator noted:}\)

\begin{quote}
In consequence of the right of protection over its subjects abroad which every State enjoys, and the corresponding duty of every State to treat aliens on its territory with a certain consideration, an alien . . . must be afforded protection for his person and property. . . . [E]very State is by the Law of Nations compelled to grant to aliens at least equality before the law with its citizens, as far as safety of person and property is concerned.
\end{quote}

E. Local Enforcement and the Constitutional Mandate of Uniformity

Local and state police enforcement is likely to create constitutional problems beyond the scope of equal protection. Issues concerning the uniformity of immigration enforcement will also be raised. Each locality, especially in the absence of training, is likely to structure its enforcement actions differently. The Constitution, however, mandates that federal immigration law be uniform. In order for immigration law to be uniform, it must be enforced in the same way across the country. Enforcement actions that are shaped by local resources, policy, and priority will effectively create different immigration laws. If a person with undocumented status has an entirely different enforcement experience in California than in Montana, this would violate the constitutional mandate.

Because local police forces will be left to their own devices to determine how to enforce federal civil immigration law, an unconstitutional lack of uniformity in immigration law is virtually guaranteed.

F. Local Enforcement and Federalism

This new delegation of responsibility to local law enforcement personnel also damages our system of federalism. Immigration is an area exclusively controlled by the federal government. The CLEAR Act and HSEA would enroll local and state police in the mission of immigration enforcement. Because the acceptance of these new duties is

229. Pham, supra note 47, at 995.

230. The Constitution gives Congress the power "[t]o establish a uniform Rule of Naturalization . . . ." U.S. Const. art. I, § 8, cl. 4. Enforcement action by federal officers in different jurisdictions still "reflects a unitary federal policy about how many resources to devote to immigration enforcement, where to concentrate enforcement, and even when to refrain from enforcement. Local enforcement, even at the invitation of the federal government, could never be similarly unitary." Pham, supra note 47, at 996–97.

231. One scholar described the effect of decentralized enforcement: "[L]ocal enforcement will result in a ‘thousand borders’ problem, violating the constitutional mandate for uniform immigration laws as local authorities will enforce federal immigration laws differently, creating, in effect, different immigration laws." Pham, supra note 47, at 995.

232. Prior attempts at state and local immigration enforcement actions have also raised constitutional concerns under the preemption doctrine because the federal government has plenary power over immigration and because "Congress fully occupies the field, supplemental (even harmonious) state law is forbidden." Manheim, supra note 52, at 959. The HSEA and the CLEAR Act would expressly delegate the power to enforce immigration law to the states. But see Michael J. Wishnie, Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism, 76 N.Y.U. L. Rev. 493 (2001), for an argument that when the federal government does devolve immigration powers to the states by statute, the federal statute should no longer receive deference due to the plenary power and should instead be scrutinized under the Equal Protection Clause for discrimination.

233. See supra notes 52–54 and accompanying text.
not mandatory, but rather conditioned on the receipt of federal funding, concerns regarding the conscription of state officials to complete federal duties in violation of the Tenth Amendment probably will not prevail because the action is justified by Congress’s spending power.²³⁴

Although a finding of a Tenth Amendment violation is unlikely, both the CLEAR Act and the HSEA raise concerns regarding an infringement on our system of federalism. The separate state and federal systems create a balance of power that protects individual rights.²³⁵ The CLEAR Act and the HSEA blur the line between federal and state enforcement mechanisms, giving states power historically retained exclusively by the federal government. Many large cities have enacted policies that prevent police officers from having any role in immigration enforcement.²³⁶ By prohibiting these policies and encouraging all states and localities to adopt federal procedures, the federal government prevents the states from acting as laboratories of ideas.²³⁷ This is unfortunate because states and localities are closer to the people and can be more responsive to the practical concerns of such policies.²³⁸ The CLEAR Act and HSEA undercut the benefits of our federalist system.

V. Conclusion

Federal authorities have long held sole responsibility for the enforcement of civil immigration law.²³⁹ This division of labor ensured complex immigration law was correctly and fairly enforced. In addition, local and state police did not have to expend their limited resources by taking on responsibility for an enormous number of violations. As a result of the United States’s recent experience with

²³⁴ In South Dakota v. Dole, 483 U.S. 203 (1987), the Court found that the conditioning of highway money on the establishment of twenty-one as the age for legal drinking did not violate the Tenth Amendment. But Dole did not involve the conscription of state or local officials to implement a federal regulatory scheme. The Supreme Court has yet to decide a case in which Congress used its Spending Clause authority to conscript state officers into federal service, as it does in the CLEAR Act. Erwin Chemerinsky, The Federalism Revolution, 31 N.M. L. REV. 7, 17 (2001). In Kansas v. United States, 214 F.3d 1196, 1197 (10th Cir. 2000), the Tenth Circuit considered a statute in which Congress had conditioned the receipt of federal Temporary Assistance to Needy Families funds on the state taking into account certain conduct, like child support enforcement. The court found this to be a legitimate exercise of the spending power. Id. at 1204. The Supreme Court denied certiorari. Kansas v. U.S., 531 U.S. 1035 (2000).


²³⁶ Graham, supra note 180, at 307.

²³⁷ See Chemerinsky, supra note 235, at 1324–25.

²³⁸ Id. at 1324.

²³⁹ See supra notes 52–54 and accompanying text.
terrorism, there has been an enhanced focus on immigration enforcement. Faced with an undocumented population approaching ten million, state interest in an expansion of local and state enforcement of immigration law has grown.\footnote{HSEA Hearing, supra note 6, at 5 (statement of Sen. Jeff Sessions, Member, Subcomm. on Immigration, Border Security and Citizenship).}

The current trend toward empowering or requiring state and local police to enforce immigration law raises a number of concerns involving policy, efficacy, and constitutionality. Broad enforcement activity by local and state police creates a real danger of effectively cutting off entire immigrant communities from police protection service. The potential discriminatory impact of the denial of police protection raises the question of whether this enforcement activity will violate the Equal Protection Clause. Undocumented and documented aliens are protected by the Equal Protection Clause. Although the exact level of protection is ambiguous, the Court will likely apply some level of heightened scrutiny. An enforcement policy that has a strong limiting effect on access to government services as fundamental as police protection on the basis of alienage would violate the Equal Protection Clause.

In addition, the CLEAR Act and the HSEA raise significant policy concerns and will likely isolate and alienate entire communities. The legislation may strain foreign relations and raise international law concerns. The legislation also raises constitutional concerns of uniformity of enforcement and moves away from our tradition of federalism. Experience has shown that enforcement measures alone are wholly unsuccessful at controlling who enters and remains in the United States. Congress should refrain from enacting such damaging legislation and focus on creating broader immigration reform that will allow the United States to control its borders, provide for its security, and protect the constitutional rights of all its residents, both citizens and noncitizens.

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