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INTERSTATE INSTABILITY: WHY COLORADO'S ALIEN SMUGGLING STATUTE IS PREEMPTED BY FEDERAL IMMIGRATION LAWS

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For more than a century, the federal government has outlawed the smuggling of undocumented aliens. Over that federal statute's long legislative evolution, Congress has developed an increasingly comprehensive scheme for punishing alien smugglers in proportion to their crimes. More recently, the federal government has amended and enforced the alien smuggling statute in ways designed to advance the government's war on domestic terrorism. However, despite the existence of this major federal statute, in 2006 Colorado enacted its own independent ban on alien smuggling. This Comment argues that the federal alien smuggling statute preempts the Colorado alien smuggling statute, both because Congress intended for the federal alien smuggling statute to be preemptive and because the Colorado statute impedes important objectives of the federal alien smuggling statute.

INTRODUCTION

> Is it possible that the framers of our Constitution have committed such an oversight, as to leave it to the discretion of some two or three States to thwart the policy of the Union, and dictate the terms upon which foreigners shall be permitted to gain access to the other States?
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> —*Passenger Cases*, 1849[1]

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In March 2006, both a federal agency and a Colorado agency responded to a storm that was intensifying at the country's center.[2] The Colorado agency predicted the blizzard would hit hardest in Colorado, but the federal agency cautioned that the weather's "instability" could cause the storm to erupt in any number of states.[3] Indeed, when the storm ultimately struck, it not only hit Colorado but also wrought havoc on a number of states to the east.[4]

This multi-state tumult occurred while the Colorado legislature was confronting a multi-state tumult of another sort. The legislature was considering whether to tackle a contentious national issue, illegal immigration, by enacting a state statute that would criminally ban the "smuggling" of undocumented aliens.[5] A federal provision, section 274 of the Immigration and Naturalization Act ("INA"),[6] already made it a federal crime for anyone to transport an undocumented alien into or through any state in furtherance of the alien's immigration violation.[7] The Colorado bill proposed to make this same activity a Colorado crime as well.[8]

On the morning of the blizzard, the principals in the Colorado alien smuggling drama were caught in different parts of the storm.[9] In the relative calm of the state capitol, state legislators considered whether to allow the bill to come out of committee.[10] In the severe blizzard at the state's edge, seventeen immigrants of the type to be regulated by the proposed bill—a

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1. Smith v. Turner (Passenger Cases), 48 U.S. 283, 461 (1849) (Grier, J.).

2. John Aguilar, *Sloppy Snow Falls on Region*, ROCKY MOUNTAIN NEWS, Mar. 20, 2006, at 5A; John Ingold et al., *Storm's Biggest Punch Misses Denver*, DENVER POST, Mar. 21, 2006, at 1A.

3. Aguilar, *supra* note 2.

4. Ingold et al., *supra* note 2.

5. April M. Washington & Tillie Fong, *17 Suspected Illegals in Wreck*, ROCKY MOUNTAIN NEWS, Mar. 21, 2006, at 5A.

6. 8 U.S.C. § 1324 (2000 & Supp. V 2005). As legal scholars have acknowledged, it can be difficult to know how one should cite provisions of the INA. *See, e.g.*, THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY xi (5th ed. 2003). Immigration specialists typically cite directly to provisions in the INA itself, but court decisions typically cite to portions of the U.S. Code where provisions of the INA are codified. *Id.* To resolve this difficulty, this Comment cites to the INA in the body of the article but cites to the U.S. Code in the footnotes.

7. 8 U.S.C. § 1324(a)(1)(A)(i)–(ii).

8. S.B. 206, 65th Gen. Assem., 2nd Reg. Sess. (Colo. 2006) (codified at COLO. REV. STAT. § 18-13-128 (2007)).

9. Washington & Fong, *supra* note 5.

10. *Id.*

group of undocumented aliens who were being "smuggled" across the state—had been in an automobile accident and were stranded on the side of an interstate highway.[11] Meanwhile, the Colorado legislator who had introduced the bill was driving from the capitol toward the aliens' auto accident, hoping to bring the stranded illegal aliens to the attention of local newspaper and television reporters.[12]

So, as the Colorado legislature was considering a state statute mirroring the federal alien smuggling statute, the state lawmaker responsible for the bill was speeding along a perilous interstate, leaving the calm at the state's center and driving into the chaotic uncertainty taking place at and beyond the state's border.[13]

The Colorado legislature ultimately passed the alien smuggling bill and, in so doing, may have unconstitutionally moved beyond its power as a state. Did the Colorado legislature go too far by passing alien smuggling legislation, thrusting itself too deeply into a multi-state issue? Putting the question in legal terms, is Colorado's alien smuggling statute preempted either by the federal government's exclusive power over immigration or by the federal government's existing legislative exercise of that power, the federal alien smuggling statute? This Comment argues that even if Colorado's alien smuggling law is not per se preempted as a regulation of immigration,[14] the federal alien smuggling statute nevertheless statutorily preempts it.

This Comment, after briefly summarizing the sociopolitical issues surrounding alien smuggling, explains the relevant constitutional and statutory law and then applies that law, within the preemption context, to Colorado's alien smuggling statute. Part I presents some of the basic social problems posed by alien

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11. *Id.*; Felisa Cardona, *17 Suspected Mexicans in SUV Rollover*, DENVER POST, Mar. 21, 2006, at 1B.

12. Washington & Fong, *supra* note 5.

13. *Id.* In the aftermath of the storm, the seventeen illegal aliens were placed in custody. *Id.* Ultimately, however, neither the driver of the vehicle nor any passenger of the vehicle was charged with alien smuggling. Howard Pankratz, *No Smuggling Rap for Migrants*, DENVER POST, Mar. 30, 2006, at 5B. Instead, all of them were simply removed from the country. *Id.*

14. *See* De Canas v. Bica, 424 U.S. 351, 354–55 (1976) ("Power to regulate immigration is unquestionably exclusively a federal power. But the Court has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus *per se* pre-empted by this constitutional power, whether latent or exercised.").

smuggling and how those problems affect Colorado, other states, the United States as a whole, and the smuggled aliens themselves. Part II lays out the relevant constitutional law, explaining how federal preemption of state law functions in general, how it functions within criminal law, and how it functions within immigration or alienage law. Part III describes the federal alien smuggling statute, both its legislative history and its current operation. Part IV similarly describes the history and operation of Colorado's alien smuggling statute. Part V examines the preemptory challenges that state statutes similar to the Colorado alien smuggling statute have faced or are facing. Part VI applies constitutional preemption law to Colorado's alien smuggling statute, examining whether either the Constitution or the federal alien smuggling statute preempts the Colorado statute.

I. THE EFFECTS OF ALIEN SMUGGLING

This section briefly describes some of the basic socioeconomic issues surrounding alien smuggling, examining how that smuggling impacts states, the federal government, and the aliens themselves.[15]

Alien smuggling is a problem for the state of Colorado. Since 2000, hundreds of thousands of undocumented aliens have driven across the United States, and many of them drove across Colorado.[16] In 2006, the Colorado State Patrol estimated that they encountered an average of five hundred illegal immigrants per week.[17] In the three days surrounding the March 2006 blizzard described above, more than one hundred suspected illegal aliens were involved in accidents or traffic stops in Colorado.[18] From 2000 to 2006, at least twenty un-

15. Given the relatively limited scope of this Comment, this section does not delve too deeply into all of the complicated social and economic issues surrounding illegal immigration in general. Rather, this section merely provides some of the socioeconomic background of the legal issue addressed in the bulk of this Comment. For a more extensive discussion of the social and economic issues surrounding illegal immigration, see generally Marlin W. Burke, *Reexamining Immigration: Is It a Local or National Issue?*, 84 DENV. U. L. REV. 1075 (2007).

16. Michael Riley & Felisa Cardona, *Illegal Immigration—Dangerous Route to the American Dream*, DENVER POST, Mar. 23, 2006, at 1A.

17. Washington & Fong, *supra* note 5.

18. Charlie Brennan & April M. Washington, *Numbers Flabbergast Legislators; Crashes, Arrests Highlight Illegal Immigration Problem, Lawmakers Say*, ROCKY MOUNTAIN NEWS, Mar. 22, 2006, at 25A.

documented aliens died in auto accidents while they were traveling across this state.[19]

However, even if alien smuggling poses certain problems for Colorado, it poses even greater problems for other states. Most undocumented aliens who are smuggled through Colorado first travel through one of the states bordering Mexico.[20] Additionally, fewer undocumented aliens settle in Colorado than in New York, Arizona, Florida, Illinois, Texas, California, or North Carolina.[21] Even among those undocumented aliens who travel on Colorado's highways, most do not settle in that state.[22] Rather, the majority of the undocumented aliens smuggled across Colorado ultimately settle and work in states farther east.[23]

Alien smuggling is also a national problem of great concern to the federal government. Since the mid-1990s, about 400,000 undocumented aliens from Mexico have entered the United States illegally by crossing the U.S.–Mexico border each year.[24] Many of these aliens crossed into the United States with the help of an alien smuggler.[25] In contrast to the handful of aliens who die on Colorado highways yearly, in recent years as many as 400 immigrants have died each year crossing the U.S.–Mexican border.[26]

Finally, alien smuggling is not only a burden for the government but also a tremendous burden on the aliens being smuggled.[27] In traveling from Mexico to their destination in the United States, smuggled aliens face life-threatening danger on each leg of the journey. They walk through the perilous

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19. *See* Sean Kelly, *Kin of Crash Victims Sought*, DENVER POST, Mar. 14, 2005, at 1B; Sean Kelly, *Smugglers Favor Colo. Routes*, DENVER POST, Mar. 15, 2005, at 5B. More broadly, illegal immigration in general may or may not be an economic problem for the state of Colorado, as the state legislature has had difficulty identifying the precise adverse economic impacts of illegal immigration. *See* Burke, *supra* note 15, at 1083–85, 1086.

20. Riley & Cardona, *supra* note 16.

21. JEFFERY S. PASSEL, PEW HISPANIC CTR., BACKGROUND BRIEFING PREPARED FOR TASK FORCE ON IMMIGRATION AND AMERICA'S FUTURE 13–14 (2005), http://pewhispanic.org/files/reports/46.pdf.

22. *See* Riley & Cardona, *supra* note 16.

23. *See id.*

24. PASSEL, *supra* note 21, at 16.

25. Riley & Cardona, *supra* note 16.

26. Tisha R. Tallman, *Liberty, Justice, and Equality: An Examination of Past, Present, and Proposed Immigration Policy Reform Legislation*, 30 N.C. J. INT'L L. & COM. REG. 869, 875 (2005).

27. *See generally* Riley & Cardona, *supra* note 16.

heat of the desert, are packed into crime-plagued and overcrowded drop-houses in major cities, and then are crammed into vehicles and driven to various points throughout the country.[28] When being driven through the United States, aliens are typically jammed tightly into the vehicles, sometimes stacked on top of one another, and routinely travel for days with no food and little water.[29]

Thus, alien smuggling places burdens on everyone concerned: the states, the federal government, and the aliens themselves. The legal question, however, is what role Colorado law may play in addressing the problem of alien smuggling. Does Colorado's alien smuggling statute overstep the bounds of state power? Because answering that question requires an understanding of the doctrine of preemption, this Comment now turns to an explanation of how constitutional preemption generally operates.

II. THE RELEVANT CONSTITUTIONAL LAW: FEDERAL PREEMPTION OF STATE LAWS

Article VI of the U.S. Constitution states, "This Constitution, and the Laws of the United States . . . shall be the Supreme Law of the Land . . . ."[30] When a state law stands in opposition to a federal exercise of its legal powers, the federal law preempts the state law.[31] This section explains the ways in which federal law can preempt state law, and more specifically, how federal criminal laws can preempt state criminal laws and how federal immigration or alienage laws can preempt state immigration or alienage laws.

A. The Basics of Federal Preemption

There are two basic variables that are most important in determining whether a particular state law is preempted by federal law. The first variable concerns the type of power being exercised by the state: Is the state exercising a power that the Constitution grants exclusively to the federal government, ex-

28. *See generally id.*
29. *See id.*
30. U.S. CONST. art. VI.
31. *Id.* ("[T]he Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

clusively to the states, or jointly in some fashion to both the federal government and the states? The second variable concerns the existence of federal legislation touching upon the same subject matter as the state law: Is there federal legislation permitting states to legislate on the subject, disallowing states from legislating on the subject, or conflicting with the state law on the subject? From the interplay of these two basic variables come three types of federal preemption: structural preemption, dormant preemption, and statutory preemption.[32]

Structural preemption requires analysis only of the first variable and renders the second variable irrelevant.[33] Structural preemption takes place when states try to exercise legislative powers that, by the very structure of the Constitution, are vested solely in the federal government.[34] Such state laws are preempted by the Constitution itself.[35] It does not matter whether there is a federal statute regulating the same subject as the state statute: If the Constitution gives a power solely to the federal government, the government may not legislatively delegate that power to the states.[36]

Dormant preemption is similar to structural preemption in that the Constitution itself preempts the state statute.[37] Unlike structural preemption, though, dormant preemption can be prevented where the federal legislature has specifically

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32. *See, e.g.*, Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. (forthcoming 2008), *available at* http://ssrn.com/abstract=968716, at 15.

33. *See, e.g., id.* at 15–16.

34. Examples of such powers vested solely in the federal government by virtue of the Constitution's structure include the power over bankruptcy, *see* U.S. CONST., art. I, § 8, cl. 4, and the power over patents and copyrights, *see* U.S. CONST., art. I, § 8, cl. 8. Another example is the foreign affairs power. *See, e.g.*, United States v. Pink, 315 U.S. 203, 233 (1942) ("Power over external affairs is not shared by the States; it is vested in the national government exclusively.").

35. *See, e.g.*, Pink, 315 U.S. at 233–34 ("Such power is not accorded a State in our constitutional system. To permit it would be to sanction a dangerous invasion of Federal authority."). Not only can state laws suffer structural preemption, but federal laws can as well: If the federal government legislatively exercises a power which the Constitution has vested solely in state governments, then that federal legislation is preempted by the Constitution itself. *See, e.g.*, United States v. Morrison, 529 U.S. 598, 619 (2000) (holding that neither the Commerce Clause nor the Fourteenth Amendment gave the federal government the power "[to] intrud[e] into 'legislative spheres of autonomy previously reserved for the states.'" (alterations in original) (citations omitted)).

36. *See, e.g.*, Huntington, *supra* note 32, at 15–16.

37. *See, e.g., id.* at 16–17.

given states the power to act.[38] That is, when dormant preemption applies, the federal government may statutorily permit the states to exercise portions of an otherwise exclusively federal power.[39] The Commerce Clause provides an example of dormant preemption: States may not interfere with or discriminate against interstate commerce unless the federal government has legislatively allowed the states to do so.[40]

The way statutory preemption works is almost opposite from the way dormant preemption operates. Statutory preemption concerns those powers which the Constitution has granted both the states and the federal government.[41] States may exercise such powers without being preempted by the structure of the Constitution, unless the federal government has legislatively disallowed the states from doing so.[42] That is, where the Constitution grants power jointly to both the federal government and state governments, the federal government may statutorily disallow the states from exercising portions of an otherwise-shared power.[43]

Statutory preemption is further divided into three subcategories of preemption: express preemption, field preemption, and conflict preemption.[44] Express preemption is relatively simple: When a federal statute expressly asserts Congress's intent to preempt certain state laws, those state laws are preempted by the federal statute.[45] Field preemption and conflict preemption, however, are more nuanced and complicated.

Field preemption works to preempt state statutes when a federal statute implicitly, rather than explicitly, shows a congressional intent to preempt such state law.[46] A federal stat-

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38. *See, e.g.*, *id.*

39. *See, e.g.*, *id.*

40. *See, e.g.*, Am. Trucking Ass'ns, Inc. v. Mich. Pub. Serv. Comm'n, 545 U.S. 429, 433 (2005).

41. *See, e.g.*, Huntington, *supra* note 32, at 17.

42. *See, e.g.*, *id.*

43. *See, e.g.*, *id.*

44. *See, e.g.*, Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 540–53 (2001) (express preemption); Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 141–52 (1963) (conflict preemption); Hines v. Davidowitz, 312 U.S. 52, 62–69 (1941) (field preemption). Field preemption and conflict preemption are both distinct forms of implicit preemption. Freightliner Corp. v. Myrick, 514 U.S. 280, 287 (1995).

45. *See, e.g.*, *Reilly*, 533 U.S. at 541 ("State action may be foreclosed by express language in a congressional enactment . . . ." (citation omitted)).

46. *See generally Hines*, 312 U.S. at 62.

ute typically shows Congress's preemptive intent through the scope and detail of the federal statute itself, through the legislative history of that statute, or both.[47] If a federal statute is particularly detailed or thorough within a particular legislative area, Congress's occupation of that field of legislation suggests an intention to oust the states from that field.[48] Congressional statements of preemptive intent in a federal statute's legislative history are also strong evidence of Congress's preemptive intent.[49]

Conflict preemption, unlike explicit or field preemption, hinges less on the preemptive intent lurking behind a federal statute and more on the congressional purpose driving a federal statute.[50] Under conflict preemption, state legislation is preempted if it impedes a core purpose of federal legislation. A state statute could impede Congress's purpose in two ways: Either the state statute could directly contradict express terms of the federal statute,[51] or the state statute could have an effect which would stand as an obstacle to the accomplishment of the federal statute's various objectives.[52]

Returning again to the two variables which introduced this section, remember that the type of legislative power being exercised by the state and by the federal government will largely determine what type of preemption analysis to apply. Thus, to understand whether Colorado's criminal alien smuggling law is preempted, one should understand how federal preemption works when a state legislates crime and also understand how federal preemption works when a state legislates immigration or aliens.

B. Federal Preemption of State Criminal Laws

Generally, the states have greater authority than the federal government to legislate criminal behavior. In *United States v. Lopez*, the Supreme Court reiterated this doctrine: "Under our federal system, the States possess primary author-

47. *Id.* at 74–75.
48. *Id.*
49. *Id.*
50. *See generally* Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190 (1983); Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963).
51. *Florida Lime & Avocado Growers*, 373 U.S. at 143–44.
52. *Pac. Gas & Elec.*, 461 U.S. at 204–05.

ity for defining and enforcing the criminal law. . . . When Congress criminalizes conduct already denounced as criminal by the states, it effects a change in the sensitive relation between federal and state criminal jurisdiction."[53] Even though *Lopez* was not a preemption case, [54] this language touches upon the general principle that federal criminal laws rarely preempt state criminal laws.[55]

Although criminal law is generally the province of the states, criminal laws that regulate exclusively federal issues are solely the province of the federal government. This doctrine was first made clear in 1956 by *Pennsylvania v. Nelson*,[56] and the doctrine is still applied by courts to this day.[57] In *Nelson*, Pennsylvania had made it a state crime for a citizen to knowingly encourage the forceful or violent overthrow of the U.S. government.[58] A federal statute already criminalized this same citizen conduct.[59] Ultimately, applying field preemption and conflict preemption, the court held that the Pennsylvania sedition law was preempted.[60]

The *Nelson* Court made clear that, although states could criminally regulate sedition absent federal regulations on the subject, the states could not supplement federal criminal regulation of such sedition because sedition is an area of dominant

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53. 514 U.S. 549, 561 n.3 (1995) (citations and quotations omitted).

54. Although *Lopez* was a Commerce Clause decision, at least one commentator has used *Lopez* as a point of entry for discussing the overlap of federal criminal jurisdiction and state criminal jurisdiction. *See* Adam H. Kurland, *First Principles of American Federalism and the Nature of Federal Criminal Jurisdiction*, 45 EMORY L. J. 1, 21 (1996) ("*Lopez* can . . . serve as an impetus to explore several provocative aspects of the origins and development of federal criminal law jurisdiction and the consequences of the jurisdictional overlap when state and federal law criminalize the same conduct.").

55. *See* NORMAN ABRAMS & SARA SUN BEALE, FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT 834 (4th ed. 2006) ("In the criminal context there is a clear understanding that Congress ordinarily intends to supplement state law, rather than to regulate comprehensively and occupy the field."); *see also* Susan R. Klein, *Independent-Norm Federalism in Criminal Law*, 90 CAL. L. REV. 1541, 1553–54 (2002).

56. 350 U.S. 497 (1956).

57. *See* ABRAMS & BEALE, *supra* note 55, at 833 ("Although nearly a half century has passed since the decision in *Nelson*, the Supreme Court has not returned to the subject of preemption in the context of criminal prosecutions. *Nelson* is still good law[.]"); *see also* Kurland, *supra* note 54, at 88 ("Modern criminal law preemption doctrine is set forth in *Pennsylvania v. Nelson*[.]").

58. *Nelson*, 350 U.S. at 498, 510.

59. *Id.* at 499.

60. *Id.* at 509.

federal interest.[61] The Court did not find structural preemption of Pennsylvania's sedition law: the Court noted that states could theoretically impose sedition laws "at times when the Federal Government has not occupied the field and is not protecting the entire country from seditious conduct."[62] The Court instead found field preemption and conflict preemption of the Pennsylvania law. The Court reasoned that sedition was an area where "the federal interest is so dominant that the federal system (must) be assumed to preclude enforcement of state laws on the same subject."[63]

In determining that sedition was an area of dominant federal interest, the Court frequently alluded to the national security concerns behind the enactment and enforcement of the federal sedition statute.[64] The Court noted that, as part of Congress's detailed program to combat "totalitarian aggression," Congress had strengthened the nation's external defenses and had created a plan to protect the nation against "internal subversion."[65] The Court further noted that Congress had delegated to specific federal agencies, namely the FBI and the CIA, the task of gathering intelligence on sedition.[66] On this basis, the Court ultimately concluded that, "Congress having thus treated seditious conduct as a matter of vital national concern, it is in no sense a local enforcement problem."[67]

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61. *Id.* at 500, 504.

62. *Id.* at 500.

63. *Id.* at 504 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)). Because *Nelson* was decided before preemption doctrine was crystallized in *De Canas* and subsequent cases, the *Nelson* decision does not explicitly use the terms "field preemption" or "conflict preemption." Nonetheless, the *Nelson* test for preemption of criminal statutes is still best understood as field preemption and conflict preemption with an added inquiry into whether the state statute touches on a dominant federal interest. *See* ABRAMS & BEALE, supra note 55, at 833:

> The [*Nelson*] Court applied three tests . . . : (1) whether the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it [i.e., field preemption]; (2) whether the federal statute touches a[n area] in which the federal interest is so dominant that the federal system must be assumed to preclude enforcement of state laws on the same subject; and (3) whether the enforcement of state laws presents a serious danger of conflict with the administration of the federal program [i.e., conflict preemption].

64. *See Nelson*, 350 U.S. at 504–05.

65. *Id.*

66. *Id.* at 505.

67. *Id.*

The *Nelson* Court's conflict preemption analysis is relevant to the present issue for three reasons. First, the state statute was conflict preempted despite the fact that there was no direct incompatibility between that statute and the federal statute. That is, a citizen's ability to comply with the federal sedition law was not impaired by his compliance with the state sedition law.[68] Second, the state statute was preempted because it was less precise than the federal statute in policing seditious conduct. The state statute allowed sedition charges to be initiated based on a private individual's report of information, while the federal statute did not.[69] Finally, the Court noted that difference in "criteria of substantive offenses" contributed to the conflict between the federal statute and the state statute.[70]

Accordingly, although states have greater power than the federal government to pass criminal laws, such state power does not trump the federal government's power to regulate within areas of national interest. Thus, a state law regulating criminal activity and regulating aliens should be subjected not only to this preemption analysis within the area of criminal law, but also to preemption analysis within the area of immigration or alienage law.

C. Federal Preemption of State Immigration and Alienage Laws

Preemption in immigration and alienage law is complicated by the fact that the immigration power is never expressly mentioned in the Constitution. Thus, the Constitution's facial text does not immediately resolve the issue of whether the immigration power is vested solely in the federal government, vested solely in the states, or shared in some way by both the states and the federal government. Even now, after a century's worth of Supreme Court opinions on the matter, it is not entirely clear which powers concerning the regulation of noncitizen aliens are vested solely in the federal government, and

68. Instead of saying that citizens were unable to *comply* with both the federal and state statutes, the Court merely saw conflict in that a citizen who *violated* such statutes would encounter "different rules of substantive law." *Id.* at 509 (citation omitted).

69. *Id.* at 507–08.

70. *Id.* at 508–09.

which are shared between the federal government and the states.

However, there are at least five key principles concerning federal immigration preemption which are generally accepted based upon longstanding Supreme Court precedent. First, the federal government has plenary power over immigration, and has this power by virtue of this nation's sovereignty.[71] That is, the federal power to exclude aliens "is part of [the United States's] independence. If [the federal government] could not exclude aliens it would be to that extent subject to the control of another [nation's] power."[72]

Second, the federal government's plenary power over immigration includes both the power to admit or exclude non-citizen aliens who are outside of the nation's borders, as well as the power to remove non-citizen aliens who are already within the nation's borders.[73] "The right of a nation to expel or deport foreigners, who have not been naturalized . . . , rests upon the same grounds . . . as the right to prohibit and prevent their entrance into the country."[74]

Third, the federal government's plenary power over immigration is exclusive, and cannot be exercised by the states.[75] As the Supreme Court noted in *Chy Lung v. Freeman*, "[t]he passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the States."[76] Accordingly, it would be unconstitutional for a state to independently legislate the terms by which aliens may or may not enter into or reside within the state.[77]

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71. Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 609 (1889) ("The power of exclusion of foreigners [is] an incident of sovereignty belonging to the government of the United States . . . .").

72. *Id.* at 603–604.

73. Fong Yue Ting v. United States, 149 U.S. 698, 707 (1893), *abrogated in part by* Yamataya v. Fisher, 189 U.S. 86 (1903).

74. *Fong Yue Ting*, 140 U.S. at 707.

75. Chy Lung v. Freeman, 92 U.S. 275, 280 (1876). However, one modern scholar has recently argued that the precedent set by *Chy Lung* and subsequent Supreme Court cases does not foreclose the possibility that the power to admit and exclude aliens could be shared between the federal government and the states. Huntington, *supra* note 32, at 24–27.

76. 92 U.S. at 280. However, prior to 1876 the full potency of federal control over immigration had not yet been fully realized by the Court. For analysis of the pre-1870s Supreme Court cases concerning federal immigration preemption, see GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 44–51 (1996).

77. *See Chy Lung*, 92 U.S. at 280.

If a state were to legislatively exercise the power to admit, exclude, or remove aliens, that state statute would be preempted by the structure of the Constitution itself.[78]

Fourth, there are strong national security rationales for vesting the immigration power solely in the federal government and not in the various state governments.[79] As the Court recognized in *Chy Lung*, if each individual state had the power to mistreat lawfully admitted immigrants, then each individual state would also have the power to provoke the hostilities of those immigrants' home countries.[80] Thus, if each individual state had power over immigration, then each individual state would also have the power to lead the nation to war.[81] Therefore, because no individual state should have the power to provoke "the enmity of a powerful [foreign] nation,"[82] no individual state has power over the field of immigration. As the Court recognized, "If it [were] otherwise, a single State [could], at her pleasure, embroil us in disastrous quarrels with other nations."[83]

Finally, although the federal government has exclusive power over immigration, that does not mean that all state regulations affecting aliens are necessarily unconstitutional. So long as a state statute does not regulate the admission or expulsion of aliens, that state statute may be able to regulate aliens in other ways without automatically being preempted by the Constitution. Since the late nineteenth century, the Supreme Court has often upheld such state statutes.[84] Typically, state "alienage" statutes[85] were challenged not on federal pre-

78. *See id.*
79. *See id.* at 279–80.
80. *See id.*
81. *See id.*
82. *Id.* at 279.
83. *Id.* at 280.
84. *See* Ambach v. Norwick, 441 U.S. 68, 72–75 (1979) (examining the long Court history of upholding some statutory classifications involving aliens).
85. Many scholars use the term "immigration laws" for those laws that concern the admission or removal of aliens and use the term "alienage laws" for all other laws affecting aliens. *See, e.g.*, Hiroshi Motomura, *Federalism, International Human Rights, and Immigration Exceptionalism*, 70 U. COLO. L. REV. 1361, 1361 (1999). While some scholars argue that the federal government has greater power (and thus greater preemptive power) when exercising "immigration law" than when exercising "alienage law," other scholars have pointed out that the Supreme Court has rejected this analytical approach. *See* Michael J. Wishnie, *Laboratories of Bigotry?: Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493, 523–24 (2001).

emption grounds, but on equal protection grounds.[86] Nonetheless, as the Supreme Court has recently stated, these cases "remain authority that, standing alone, the fact that aliens are the subject of a state statute does not render it a [per se preempted] regulation of immigration."[87]

These five principles alone raise some difficult questions concerning preemption. One such question is whether a state statute can place such an onerous burden on aliens that the state statute effectively, if not expressly, denies aliens entrance to the state or forces aliens to leave the state. The Supreme Court has suggested that such state action may indeed unconstitutionally infringe upon the federal government's exclusive power over immigration. In *Traux v. Raich*, the Court noted that an Arizona statute requiring employers to hire eighty percent "native born citizens" could have been preempted by the Constitution itself as a regulation of immigration, because the Arizona statute, by denying aliens employment, was effectively denying aliens entrance and abode.[88]

More importantly for our purposes, the Supreme Court's early immigration/alienage preemption cases left many statutory preemption issues unresolved. The Supreme Court primarily began addressing statutory preemption in the middle of the twentieth century.[89] Two of these cases are most relevant to this Comment. The first, *Hines v. Davidowitz*,[90] demonstrates

86. *See* De Canas v. Bica, 424 U.S. 351, 355 (1976) (noting that these early cases "generally arose under the Equal Protection Clause").

87. *Id.*

88. 239 U.S. 33, 40–42 (1915). A second such question arising from the five well-established immigration preemption principles is the following: can a state statute qualify as a regulation of immigration (thus preempted by the Constitution itself) even without regulating the admission, exclusion, or removal of aliens? Recent Supreme Court precedent has left the door open to such arguments by stating that "a regulation of immigration" is only "*essentially* a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." *De Canas*, 424 U.S. at 355 (emphasis added). Furthermore, an argument somewhat along these lines has been made in recent litigation. *See* Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Injunction and Temporary Restraining Order at 15, Lozano v. City of Hazleton, 496 F. Supp. 2d 477 (M.D. Pa. 2007) (No. 06-cv-1586-JMM), 2006 WL 4286239 [hereinafter Lozano Injunction Memo] (arguing that a city ordinance is a per se preempted regulation of immigration, not only because a city statute effectively performs removal and exclusion of aliens but also because an ordinance "constitute[s] a broad and integrated scheme that combines multiple provisions addressing different discrete areas [affecting aliens]").

89. *See, e.g.*, *De Canas*, 424 U.S. 351; Hines v. Davidowitz, 312 U.S. 52 (1941).

90. *Hines*, 312 U.S. 52.

how a state statute regulating aliens in the same manner as a federal statute is likely to be preempted. The second, *De Canas v. Bica*,[91] lays out a three-pronged test for analyzing federal preemption of state laws regulating illegal aliens.

1. The Preemptive Force of Federal Immigration Statutes: *Hines v. Davidowitz*

The strong preemptive force of federal immigration statutes became clear in 1941, when the Supreme Court decided *Hines v. Davidowitz*.[92] That case involved an alien registration statute passed in the state of Pennsylvania one year before Congress passed a similar alien registration statute.[93] Although the state statute imposed some duties on aliens beyond those imposed by the federal statute,[94] the state statute did not impede aliens' abilities to comply with the federal statute.[95] Nonetheless, the Court held that the Pennsylvania statute was preempted by the federal statute.[96]

In three ways, *Hines* shows how federal statutes regulating aliens are likely to preempt similar state statutes. First, the Court in *Hines* emphatically reiterated that concern for both international relations and national security justify exclusive federal power over immigration.[97] As the Court stated:

> Experience has shown that international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted, or permitted, by a government. . . .
>
> Legal imposition of distinct, unusual and extraordinary burdens and obligations upon aliens . . . thus bears an inseparable relationship to the welfare and tranquility of all

91. *De Canas*, 424 U.S. 351.
92. *Hines*, 312 U.S. 52.
93. *Id.* at 59–61.
94. *Id.* at 59–60.
95. *Id.* at 78 (Stone, J., dissenting) ("It is conceded that the federal act in operation does not at any point conflict with the state statute, and it does not by its terms purport to control or restrict state authority in any particular.").
96. *Id.* at 73–74.
97. *Id.* at 63–64.

> the states, and not merely to the welfare and tranquility of one.[98]

Therefore, because state exercise of power over aliens has the potential to threaten the "welfare and tranquility" of the nation, state exercises of that power are "restricted to the narrowest of limits."[99]

Second, the Court held that Pennsylvania's alien registration statute was preempted by federal law despite the state statute's apparent compatibility with the federal alien registration statute.[100] Compliance with the state statute did not render compliance with the federal statute impossible: aliens could comply with both statutes simply by registering with both the state agency and the federal agency.[101] Nonetheless, the Court found that the state statute was preempted by the federal statute because the state's power in the field of immigration was not a "continuously existing concurrent power," but instead was "subordinate to supreme national law."[102] Thus, the Court held the following:

> [W]here the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail *or complement*, the federal law, *or enforce additional or auxiliary regulations*.[103]

Finally, in addressing whether Pennsylvania's statute was "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,"[104] the Court determined, based only on the federal statute's short legislative history and on the Constitution's Naturalization Clause, that Congress had enacted the federal statute with the purpose of creating "one uniform national system" of alien registration.[105] In this portion of its analysis, the Court first decided, solely on the basis

98. *Id.* at 64–66.
99. *Id.* at 68.
100. *Id.* at 78 (Stone, J., dissenting).
101. *Id.* at 59–61 (majority opinion).
102. *Id.* at 68.
103. *Id.* at 66–67 (emphasis added).
104. *Id.* at 67.
105. *Id.* at 71–73.

of some congressional floor debates and some rejected congressional bills, that Congress had intended to create a comprehensive scheme of alien registration:

> For many years bills have been regularly presented to every Congress providing for registration of aliens. . . .
>
> When Congress passed the Alien Registration Act of 1940, many of the provisions which had been so severely criticized were not included. The Congressional purpose, as announced by the chairman of the Senate sub-committee which drafted the final bill, was to "work . . . the new provisions into the existing [immigration and naturalization] laws, so as to make a harmonious whole." [106]

The Court further noted that uniformity is often central to federal immigration laws because Congress is empowered by the Constitution to create a "Uniform Rule of Naturalization."[107] On these two bases, the Court concluded that Congress had intended to pass a single "uniform national system" for alien registration and held that, because Pennsylvania's statute disrupted this uniformity, the Pennsylvania statute was preempted.[108] From this, the Court concluded that because of the minor differences between Pennsylvania's statute and the federal statute, the Pennsylvania statute impeded the congressional purpose of creating a single uniform national system of alien registration.[109]

To summarize, *Hines* makes clear that because regulating aliens implicates national security, a state statute that regulates aliens may be preempted by a similar federal statute even if the two statutes are not directly incompatible and even if the federal statute's legislative history contains only slight evidence of Congress's preemptive intent.

106. *Id.* at 71–72.
107. *Id.* at 72–73 (alteration in original) (footnote omitted).
108. *Id.* at 73–74.
109. *Id.*

2. The Modern Three-Prong Test for Preemption of State Immigration and/or Alienage Laws: *De Canas v. Bica*

In the 1970s, the Court considered, for the first time, how federal preemption works when a state statute restricts the rights of immigrants residing in the United States in violation of federal law.[110] The case of *De Canas v. Bica* concerned a California statute which provided that "[n]o employer shall knowingly employ an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers."[111] The California courts had invalidated the statute as an impermissible state interference in the federal government's exclusive power over immigration.[112] The Supreme Court disagreed with the reasoning of the California court but found the record insufficient to reach all of the preemptory challenges to the statute.[113] Accordingly, the Court remanded the case for further proceedings.[114]

In *De Canas*, the Court developed a three-pronged test for examining whether a state law affecting illegal aliens is preempted by federal immigration law.[115] The first prong is essentially structural preemption: If the state law qualifies as a "regulation of immigration," then it is "*per se* preempted" by the federal government's exclusive control over the field of immigration, even absent any federal statute.[116] The second prong encompasses both express preemption and field preemption: A state law regulating illegal aliens is preempted if "the clear and manifest purpose of Congress" was to "complete[ly] oust[] . . . state power" from a field related to immigration.[117] The third prong is conflict preemption: A state law regulating illegal aliens is preempted if it "stands as an obstacle to the ac-

110. De Canas v. Bica, 424 U.S. 351, 352–53 (1976).
111. *Id.* at 352 (alteration in original) (quoting CAL. LAB. CODE § 2805 (repealed 1988)).
112. *Id.* at 353–54.
113. *Id.* at 363–65.
114. *Id.* at 365.
115. *Id.* at 354–65.
116. *Id.* at 354–56.
117. *Id.* at 356–63.

complishment and execution of the full purposes and objectives of Congress" in pursuit of its immigration policy.[118]

Applying the first prong, the Court held the California law was not per se preempted as a "regulation of immigration."[119] The Court reasoned as follows:

> California has sought to strengthen its economy by adopting federal standards in imposing criminal sanctions against state employers who knowingly employ aliens who have no federal right to employment within the country; even if such local regulation has some purely speculative and indirect impact on immigration, it does not thereby become a constitutionally proscribed regulation of immigration that Congress itself would be powerless to authorize or approve.[120]

Accordingly, the Court ruled that, under the first prong of the analysis, the state statute was not preempted.[121]

Applying the second prong, the Court held that the California law was not preempted by a "clear and manifest purpose" of Congress to "complete[ly] oust[] . . . state power" in the subject field of alien employment.[122] The Court noted that there was no specific indication "in either the wording or the legislative history of the INA that Congress intended to preclude even harmonious state regulation touching on aliens in general, or the employment of illegal aliens in particular."[123] The Court further noted that the scope and detail of the INA was not sufficient evidence of Congressional preemptive intent because such "comprehensiveness" was to be expected in light of the "complexity of the subject" of immigration.[124] Finally, the court pointed out that a portion of the United States Code regulating the employment of aliens explicitly stated that that provision was "*intended to supplement State action.*"[125] The Court relied on all this evidence in concluding that Congress had not clearly manifested a purpose of ousting state power from the field of alien employment.

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118. *Id.* at 363–65 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).
119. *Id.* at 354–56.
120. *Id.* at 355–56.
121. *Id.* at 356.
122. *Id.* at 357.
123. *Id.* at 358.
124. *Id.* at 359-60.
125. *Id.* at 361–62 (1976) (quoting 7 U.S.C. § 2051).

One problem with the second *De Canas* prong, which the Court itself implicitly identified, is that it can be difficult to determine the size and scope of the subject field.[126] As the Court stated:

> Little aid can be derived from the vague and illusory but often repeated formula that Congress "by occupying the field" has excluded from it all state legislation. Every Act of Congress occupies some field, but we must know the boundaries of that field before we can say that it has precluded a state from the exercise of any power reserved to it by the Constitution.[127]

While the Court recognized that one must know the boundaries of the field before one can apply the test, the Court provided little guidance on how one should determine those boundaries.[128]

When applying the second prong, the *De Canas* Court distinguished that case from *Hines* in two ways.[129] First, unlike in *De Canas* where there was no comprehensive federal legislation in the subject field of alien employment, in *Hines* there was comprehensive legislation in the field of alien registration.[130] Second, unlike in *De Canas*, in *Hines* there was nothing in either the federal statute's legislative history or its language to indicate that Congress had "sanctioned concurrent state legislation on the subject covered by the challenged state law."[131] Because the Court could distinguish *Hines*, it held that the state law survived this second prong of the analysis.

Applying the third prong, the *De Canas* Court could not determine, on the basis of the appellate record that existed at that time, whether the California statute stood "'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress' in enacting the INA."[132] That statute

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126. *See id.* at 360 n.8 (citation omitted).

127. *Id.*

128. As two scholars have characterized the problem, the second prong of the *De Canas* test is vulnerable to a certain "label logic": "A court seems able to determine the result under this test merely in its characterization of the [subject field] as narrow or broad." Bert C. Buzan & George M. Dery III, *California's Resurrection of the Poor Laws: Proposition 187, Preemption, and the Peeling Back of the Hollow Onion of Immigration Law*, 10 GEO. IMMIGR. L. J. 141, 164 (1996).

129. *De Canas*, 424 U.S. at 362–63.

130. *Id.*

131. *Id.* at 363.

132. *Id.* at 363 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

needed to be interpreted by California courts before the Supreme Court could reach that question.[133] To illustrate, the Court identified a construction of the California statute which, if applied, could directly conflict with federal law: If "the statute prevent[ed] employment of aliens who, although 'not entitled to lawful residence in the United States,' [could work] under federal law," the California law would be preempted.[134]

Because the *De Canas* Court took this third prong directly from *Hines*,[135] the third prong not only invalidates those state laws which directly contradict the facial language of federal statutes but also invalidates those state laws which impede congressional purposes discernable from the legislative history of a federal statute.[136] As was recognized in *Hines*, Congress often has the purpose of creating uniformity among laws that regulate aliens.[137] Further, as was also recognized in *Hines*, if the federal purpose involves international relations or national security, then state laws impeding that purpose are very likely to be preempted by the federal law.[138]

In summary, the *De Canas* court clarified the rules of preemption as they pertain to state immigration or alienage laws, but did not alter those rules. The *De Canas* court laid out a three-pronged test for determining whether a state law is preempted by the federal government's exclusive control over immigration. However, the *De Canas* court relied on *Hines* in creating this test, and thus continued the precedent that federal immigration power retains its strong preemptive force over state laws affecting aliens.

III. THE FEDERAL ALIEN SMUGGLING STATUTE

Both the legislative history and the present text of the federal alien smuggling statute are relevant to statutory preemption analysis. Accordingly, in order to later address the pre-

133. *Id.* at 364.

134. *Id.*

135. *Id.* at 363 ("There remains the question whether, although the INA contemplates some room for state legislation, [the California statute] is nevertheless unconstitutional because it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in enacting the INA." (internal quotations omitted)).

136. Hines v. Davidowitz, 312 U.S. 52, 71–73 (1941).

137. *Id.* at 72–73.

138. *Id.* at 66.

emption issue presented by the Colorado alien smuggling statute, this section examines both the legislative history and the current text of INA section 274, the federal alien smuggling statute.[139]

A. Legislative History of the Federal Alien Smuggling Statute

There are two features of the federal alien smuggling statute's legislative history which are important for the purposes of this Comment. First, the federal alien smuggling statute has a century-long history, over which time the statute has grown both lengthier and more detailed. Second, the federal alien smuggling statute was recently amended in order to better address post-9/11 national security concerns.

1. The Evolution of the Federal Alien Smuggling Statute Throughout the Twentieth Century

For more than a century, the federal government has imposed criminal sanctions against alien smugglers.[140] Throughout that long history of federal regulation, one feature has remained consistent: the federal laws prohibiting alien smuggling have become increasingly detailed as the years have gone by. That is, over time the federal government has identified various forms of alien smuggling and has imposed penalties of differing magnitudes depending upon what type of alien smuggling has taken place. Ultimately, this statutory evolution has resulted in comprehensive federal legislation within the field of alien smuggling.

At the beginning of the twentieth century, Congress passed legislation that would ultimately evolve into our current federal alien smuggling law.[141] That law, enacted in 1907, punished those who "landed" undocumented aliens—that is, who brought undocumented aliens into the United States—with two years imprisonment for each alien.[142] A decade later, Congress expanded the scope of the crime and increased the severity of

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139. 8 U.S.C. § 1324 (2000 & Supp. V 2005).

140. *See infra* notes 141–51 and accompanying text.

141. Immigration of Aliens to the United States, ch. 1134, § 9, 34 Stat. 898, 900–01 (1907) (current version at 8 U.S.C. § 1324 (2000 & Supp. V 2005)).

142. *Id.*

the punishment.[143] The 1917 amendment made it illegal not only to bring undocumented aliens into the United States, but also to conceal or harbor such aliens who are already living within the United States.[144] The amendment also increased the punishment for alien smuggling from two years per alien to five years per alien.[145]

Congress next amended the alien smuggling statute in the mid-twentieth century, adding additional alien smuggling offenses while still applying the same punishment to all such offenses.[146] With the 1952 amendment, Congress made it criminal not only to land or conceal illegal aliens but also to transport illegal aliens within the country or to induce illegal aliens to enter the country. The federal government continued to make each of these crimes punishable with up to five years in prison for each alien smuggled.[147] Congress also amended the statute to say that all law enforcement officers can enforce the federal alien smuggling statute.[148]

In the second half of the twentieth century, Congress not only recognized a greater variety of alien smuggling offenses but also began imposing differing punishments for differing types of alien smuggling offenses. In 1986, Congress created a core distinction between smugglers who brought undocumented aliens into the country at a designated port of entry and those who brought aliens into the country elsewhere. The former could not be punished with any more than a year of imprisonment, while the latter could be punished with up to five years

143. Immigration of Aliens to, and the Residence of Aliens in, the United States, ch. 29, § 8, 39 Stat. 874, 880 (1917) (current version at 8 U.S.C. § 1324 (2000 & Supp. V 2005)).

144. *Id.*

145. *Id.* This amendment had a core ambiguity, however. After the 1917 amendment, the alien smuggling statute clearly stated what the punishment was for *landing* illegal aliens but did not clearly state what the punishment was for *concealing or harboring* illegal aliens. *Id.* Accordingly, the Supreme Court ultimately held that, because of this ambiguity, the government could not impose any punishment against those who only harbored or concealed aliens. United States v. Evans, 333 U.S. 483 (1948). In order to fix this ambiguity, the legislature amended the statute within the following decade. *See* McCarran-Walter Act, ch. 8, § 274, 66 Stat. 163, 228–29 (1952) (codified as amended at 8 U.S.C. § 1324 (2000 & Supp. V 2005)).

146. McCarran-Walter Act, ch. 8, § 274, 66 Stat. at 228–29.

147. *Id.*

148. *Id.* For additional discussion of this added statutory provision, see *infra* notes 188–90 and accompanying text.

imprisonment.[149] In 1994, Congress further distinguished smugglers who endangered peoples' lives from those who did not. While most smugglers were subject to only five years imprisonment, a smuggler who jeopardized lives and whose smuggling activities resulted in death could face life imprisonment or the death penalty.[150] Finally, in 1996 Congress created many new categories of smuggling crimes and proportionate penalties: Congress created lesser penalties for those who merely aided or abetted alien smuggling and those who merely conspired to smuggle aliens, while also creating harsher penalties for those who were repeat alien smuggling offenders and those who smuggled aliens despite knowing that the aliens would commit a serious crime inside the United States.[151]

Thus, by the end of the twentieth century, the federal alien smuggling statute had evolved into a comprehensive regulatory scheme that distinguished different types of alien smugglers and imposed criminal penalties of various magnitudes depending upon the type of alien smuggling involved.

2. A Recent Major Amendment to the Federal Alien Smuggling Statute: The Intelligence Reform and Terrorism Prevention Act of 2004

In response to the September 11, 2001, attack on the World Trade Center and the Pentagon, Congress again amended the federal alien smuggling statute, this time as part of a comprehensive legislation package intended to curb domestic terrorism.[152] That piece of legislation, the Intelligence Reform and Terrorism Prevention Act of 2004 (the "Terrorism

149. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 112, 100 Stat. 3359, 3381–82 (1986) (codified as amended at 8 U.S.C. § 1324 (2000 & Supp. V 2005)). As one practice manual describes the 1986 amendment to the federal alien smuggling statute, that amendment was "designed to . . . make [the statute's] sentencing provisions consistent with the federal criminal code." 8 CHARLES GORDON, STANLEY MAILMAN & STEPHEN YALE-LOEHR, IMMIGRATION LAW AND PROCEDURE 111–01 (1998).

150. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 60024, 108 Stat. 1796, 1981 (1994) (codified as amended at 8 U.S.C. § 1324 (2000 & Supp. V 2005)).

151. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 203, 110 Stat. 3009-546, 565–67 (1996) (codified as amended at 8 U.S.C. § 1324 (2000 & Supp. V 2005)).

152. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (2004) [hereinafter "Terrorism Prevention Act"].

Prevention Act"), was a swift congressional response to the 9/11 Commission Report. The Report was issued in July of 2004, the congressional bill was introduced that September, and President Bush ultimately signed the bill into law that December.[153] The bill was tremendously popular in Congress: it sailed through the House with more than eighty percent of the vote,[154] and it passed with a near-unanimous vote in the Senate.[155] This detailed piece of legislation was nearly 250 pages long, with whole titles expressly devoted to "Transportation Security" and "Border Protection, Immigration, and Visa Matters."[156]

Although the Terrorism Prevention Act changed federal immigration law in numerous ways,[157] four features of the act are important for this Comment. First, the Terrorism Prevention Act explicitly amended the federal immigration statutes to state those factual findings that led Congress to enact it.[158] These explicit findings centered on Congress's national security concerns.[159] One of these findings was the fact that "[t]errorists use evasive, but detectable, methods to travel, such as . . . human smuggling networks."[160] Another finding was as follows:

> Before September 11, 2001, no Federal agency systematically analyzed terrorist travel strategies. If an agency had done so, the agency could have discovered the ways in which the terrorist predecessors to al Qaeda had been systematically, but detectably, exploiting weaknesses in our border security since the early 1990s.[161]

153. RICHARD A. POSNER, PREVENTING SURPRISE ATTACKS: INTELLIGENCE REFORM IN THE WAKE OF 9/11, at vii, 52–53 (2005).

154. 150 CONG. REC. H11, 028–29 (daily ed. Dec. 7, 2004) (House Roll No. 544).

155. 150 CONG. REC. S12, 010 (daily ed. Dec. 8, 2004) (Senate Vote No. 216).

156. Terrorism Prevention Act, *supra* note 152. For a detailed examination of the legislative history of the Terrorism Prevention Act, see POSNER, *supra* note 153, at 19–69.

157. For a summary of how the Terrorism Prevention Act changed federal immigrations laws, see MICHAEL C. LEMAY, GUARDING THE GATES: IMMIGRATION AND NATIONAL SECURITY 230–34 (2006).

158. Terrorism Prevention Act, *supra* note 152, § 7201 (codified at 8 U.S.C. § 1776 (Supp. V 2005)).

159. *Id.*

160. *Id.* § 7201(a)(3).

161. *Id.* § 7201(a)(4).

Thus, according to the Act's enacted language, the Terrorism Prevention Act was passed in order for the federal government to systematically analyze and detect terrorist travel strategies, including their strategy of using alien smuggling networks.

Second, the Terrorism Prevention Act expressly amended the existing alien smuggling statute, creating federal penalties for anyone engaging in mass alien smuggling for profit.[162] Under the amended alien smuggling laws, a smuggler's sentence could be increased by up to ten years if her offense was part of an ongoing commercial enterprise, if she transported aliens in groups of ten or more, or if her smuggling activities either threatened the lives of the aliens being transported or endangered the health of people living within the United States.[163]

Third, the Terrorism Prevention Act established a "Human Smuggling and Trafficking Center."[164] As part of its duties pursuant to the statute, the Center is instructed to "serve as a clearinghouse with respect to all relevant information from all Federal Government agencies" on issues of "facilitation of migrant smuggling."[165] In addition, the Center also has the following duty:

> [To] ensure cooperation among all relevant policy, law enforcement, diplomatic, and intelligence agencies *of the Federal Government* to improve effectiveness and to convert all information available *to the Federal Government* relating to clandestine terrorist travel and facilitation, migrant smuggling, and trafficking of persons into tactical, operational, and strategic intelligence that can be used to combat such illegal activities.[166]

Thus, not only did the Terrorism Prevention Act amend the existing federal alien smuggling law, but it also created a federal agency designed to coordinate all of the federal government's efforts to combat alien smuggling.

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162. *Id.* § 5401 (codified as amended at 8 U.S.C. § 1324(a)(4) (Supp. V 2005)).

163. *Id.* The Terrorism Prevention Act added another amendment to the federal alien smuggling statute. That amendment required the Secretary of Homeland Security to "implement an outreach program to educate the public in the United States and abroad about the [federal] penalties [for alien smuggling]." *Id.*

164. *Id.* § 7202 (codified as amended at 8 U.S.C. § 1777 (Supp. V 2005)).

165. *Id.* § 7202(c)(2).

166. *Id.* § 7202(c)(3) (emphasis added).

Fourth, when coordinating federal agencies' efforts to gather alien smuggling intelligence, the Terrorism Prevention Act only gave the states a minor secondary role in such intelligence gathering.[167] The Terrorism Prevention Act detailed how federal agencies should gather "Counterterrorist Travel Intelligence," providing a four-page outline of how such intelligence should be gathered by the National Counterterrorism Center, the Human Smuggling and Trafficking Center, the Department of Homeland Security, the Department of State, and other federal agencies.[168] The only role for the states in such intelligence gathering was as follows: "The Secretary of Homeland Security may assist States, Indian tribes, local governments, and private organizations to establish training programs related to terrorist travel intelligence."[169]

In summary, the Terrorism Prevention Act was an important amendment to the federal alien smuggling laws in four ways. First, the Terrorism Prevention Act, by its express terms, was a comprehensive federal attempt to preserve national security after the 9/11 terrorist attack. Second, the Terrorism Prevention Act expressly amended the longstanding federal alien smuggling statute. Third, the Terrorism Prevention Act created a federal agency devoted exclusively to coordinating federal agencies' efforts to combat alien smuggling. Fourth, the Terrorism Prevention Act provided a small, subordinate role for state governments in the field of alien smuggling.

B. The Current Federal Alien Smuggling Statute

There are two features of the current federal alien smuggling statute, INA section 274,[170] which are most important for this Comment. First, by its facial text, INA section 274 imposes a variety of penalties that correspond to various alien smuggling offenses, but rarely does it impose a maximum penalty exceeding ten years of imprisonment per alien smuggled, and rarely does it provide any type of minimum penalty for

167. *Id.* § 7201(d)(4) (codified at 8 U.S.C. § 1776(4) (Supp. V 2005)).
168. *Id.* § 7201.
169. *Id.* § 7201(d)(4). There are also other portions of the act which describe federal coordination with states on matters other than alien smuggling. *See id.* § 1016 (codified at 6 U.S.C. § 485 (Supp. V 2005)).
170. 8 U.S.C. § 1324 (2000 & Supp. V 2005).

alien smugglers.[171] Second, in operation, INA section 274 functions best when enforcers coordinate their efforts with one another and when state enforcers focus their efforts on their own local regions.[172]

1. The Facial Text of the Federal Alien Smuggling Statute, INA Section 274

INA section 274[173] is a lengthy and detailed federal scheme for regulating alien smuggling. That statute, entitled "Bringing In and Harboring Certain Aliens," is often referred to as the "federal alien smuggling statute," even within the INA itself.[174] The statute uses more than a thousand words and more than twenty subsections to describe which punishments of what magnitudes apply to various types of alien smuggling offenses.[175] The statute punishes those who transport aliens into the United States, those who transport undocumented aliens across the United States "in furtherance of" the alien's immigration violation, those who harbor undocumented aliens within the United States, and those who induce undocumented aliens to enter the United States.[176]

Absent certain aggravating factors, under INA section 274 most alien transporters cannot face more than ten years' imprisonment for each alien transported, whether they are convicted of bringing aliens *into* the United States or of transporting aliens *across* the United States for financial gain.[177] Harsher penalties may only be imposed against those alien transporters who are repeat offenders, who endanger people's lives, or who cause people's deaths.[178]

INA section 274 rarely imposes any minimum sentences against alien smugglers, and when it does, that minimum sentence is typically only three years' imprisonment for each alien smuggled. A smuggler who merely transports aliens across the country, rather than bringing an alien into the country, does

171. *See generally id.*
172. *See infra* notes 191–206 and accompanying text.
173. 8 U.S.C. § 1324 (2000 & Supp V 2005).
174. *See* INA § 101(a)(43)(N) (codified at 8 U.S.C. § 1101(a)(43)(N) (Supp. V 2005)).
175. 8 U.S.C. § 1324(a) (2000 & Supp. V 2005).
176. *Id.* § 1324(a)(1)(A)(i)–(iv).
177. *Id.* § 1324(a)(1)(B), (2), (4).
178. *Id.* § 1324(a)(1)(B)(iii), (1)(B)(iv), (2), (4)(C).

not face any minimum sentence.[179] A smuggler who brings aliens into the country can face a minimum sentence, but only if certain aggravating factors are present.[180] If a smuggler brings an alien into the country in exchange for money, then that smuggler will typically face a minimum sentence of only three years' imprisonment per alien smuggled.[181] That alien smuggler could face a higher penalty of five years' imprisonment per alien smuggled, but only if that smuggler has been convicted at least twice before of that exact same alien smuggling offense.[182]

When INA section 274 departs from the usual maximum and minimum sentences, that statute penalizes different offenses in different ways. In general, the statute punishes those who bring aliens into the United States more severely than those who merely carry aliens across the United States.[183] Also, the statute typically punishes those smugglers who jeopardize lives more severely than it punishes those who do not jeopardize lives.[184] Finally, the federal statute often punishes repeat alien smuggling offenders more severely than it punishes first-time alien smuggling offenders.[185] In this way, INA section 274 provides proportional penalties depending upon what type of alien smuggling is being punished.

Some alien transporters who would otherwise be subject to imprisonment are completely exempt from all punishment by the federal alien smuggling statute.[186] If the agent of a religious nonprofit provides transportation to an alien minister in order to allow that minister to perform unpaid services for the nonprofit, then that transporter is excused from any punishment that otherwise would be imposed for such transportation of aliens.[187]

INA section 274 also specifies that its alien smuggling regulations can be implemented by "all . . . officers whose duty it is to enforce criminal laws."[188] This provision, as construed

179. *Id.* § 1324(a)(1)(B).
180. *Id.* § 1324(a)(2)(B).
181. *Id.*
182. *Id.*
183. *Compare id.* § 1324(a)(1)(B)(i) *with id.* § 1324(a)(1)(B)(ii).
184. *See id.* § 1324(a)(1)(B)(iii), (a)(1)(B)(iv), (a)(4)(C).
185. *See id.* § 1324(a)(2)(B).
186. *Id.* § 1324(a)(1)(C).
187. *Id.*
188. *Id.* § 1324(c).

by courts and commentators, seems to grant state and local law enforcement officers the power to enforce the federal alien smuggling statute.[189] Of course, even if this provision allows state police to apprehend suspected alien smugglers, only federal prosecutors can charge those suspects with the alien smuggling crime.[190]

In summary, INA section 274 provides lengthy and detailed regulation of alien smugglers, a regulation which typically punishes alien smugglers with no minimum penalty and with a maximum penalty of ten years' imprisonment per alien smuggled.

2. Federal Agencies' Implementation of the Alien Smuggling Statute

Since September 11, 2001, the federal government has focused its police efforts on the immigration offenses of persons with possible ties to domestic terrorism, rather than simply policing all immigration offenders indiscriminately.[191] One month after the 9/11 attack, Attorney General John Ashcroft announced that federal immigration agencies would focus their energies on terrorism-related alien activities, prosecuting suspected terrorists for minor immigration-related offenses.[192]

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189. *See* Gonzales v. City of Peoria, 722 F.2d 468, 475 (9th Cir. 1983) ("[S]ection 1324(c) . . . expressly authorizes local police to enforce the prohibitions against transporting and harboring certain aliens . . . ."); Farm Labor Org. Comm. v. Ohio State Highway Patrol, 991 F. Supp. 895, 903 (N.D. Ohio 1997); *see also* BLAS NUÑEZ-NETO ET AL., CRS REPORT FOR CONGRESS, ENFORCING IMMIGRATION LAW: THE ROLE OF STATE AND LOCAL LAW ENFORCEMENT 16–17 (Updated August 30, 2007). Even the ACLU, an organization that typically opposes state enforcement of federal immigration laws, seems to concede that this particular statutory subsection was "specifically designed to provide state and local police with the authority to enforce" the federal alien smuggling statute. Press Release, Am. Civil Liberties Union, Refutation of Dep't of Justice Immigration Memo 2 (Sept. 6, 2005), *available at* http://www.aclu.org/FilesPDFs/ACF3189.pdf.

190. 28 U.S.C. § 547 (2000) (federal crimes to be prosecuted by United States attorneys); *see also* 18 U.S.C. § 3231 (2000) (federal court has exclusive jurisdiction of federal crimes).

191. *See* HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 174–80, 186–87 (2006).

192. John Ashcroft, U.S. Att'y Gen., Remarks Outlining Foreign Terrorist Tracking Task Force (Oct. 31, 2001) (stating that, as part of the department's strategy to "tak[e] suspected terrorists off the street," departments would be so aggressive as to prosecute terrorists for "spitting on the sidewalk") (transcript available at http://www.usdoj.gov/archive/ag/speeches/2001/agcrisisremarks10_31.htm).

Shortly thereafter, the federal government detained more than one thousand non-citizens, mostly for immigration law violations.[193]

Thus, at the prompting of other federal agencies, Immigration and Customs Enforcement ("ICE"), the agency primarily responsible for interior enforcement of the federal alien smuggling law,[194] continues to focus its energies on policing those alien smugglers who may have ties to domestic terrorism.[195] From 2002 until at least 2005, ICE was the lead participant in a targeted federal interagency subgroup devoted exclusively to investigating those alien smuggling networks which posed the greatest threat to national security.[196] Additionally, in 2004 ICE informed all its field offices that they should target their resources on three major national priorities, one of which was national security.[197] As recently as March 28, 2006, the U.S. Government Accountability Office ("GAO") recognized that national security was a major focus of ICE's investigations,[198] but the GAO nonetheless recommended that ICE make national

193. MOTOMURA, *supra* note 191, at 174.

194. While ICE is primarily responsible for policing alien smuggling inside the United States, Customs and Border Protection ("CBP") is primarily responsible for policing alien smuggling at the U.S. border. *See, e.g.*, ALISON SISKIN ET AL., IMMIGRATION ENFORCEMENT WITHIN THE UNITED STATES 29 (Cong. Research Serv., CRS Report for Congress Order Code RL33351, Apr. 6, 2006) *available at* http://stinet.dtic.mil/cgi-bin/GetTRDoc?AD=ADA462178. Other federal agencies charged with enforcing the federal alien smuggling law include the Border Patrol, the U.S. Coast Guard, components of the Department of Justice (including the Criminal Division and the Federal Bureau of Investigation), components of the Department of the Treasury (including the Internal Revenue Service and the Financial Crimes Enforcement Network), and components of the Department of State (including the Bureau of Diplomatic Security). *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-305, COMBATING ALIEN SMUGGLING: OPPORTUNITIES EXIST TO IMPROVE THE FEDERAL RESPONSE 6, 44–62 (2005), http://www.gao.gov/new.items/d05305.pdf [hereinafter COMBATING ALIEN SMUGGLING].

195. *See, e.g.*, SISKIN ET AL., *supra* note 194, at 28 ("ICE places a significant emphasis on targeting alien smuggling organizations that present threats to national security, recognizing that terrorists are likely to align themselves with alien smuggling networks to obtain undetected entry into the United States.").

196. *See* COMBATING ALIEN SMUGGLING, *supra* note 194, at 58.

197. *Id.* at 12. ICE's internal memo stated, "We should be focusing our resources on efforts that determine systemic vulnerabilities that can be exploited by criminal organizations and terrorists." *Id.*

198. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-462T, BETTER MANAGEMENT PRACTICES COULD ENHANCE DHS'S ABILITY TO ALLOCATE INVESTIGATIVE RESOURCES 7 (2006), http://www.gao.gov/new.items/d06462t.pdf ("ICE's interim strategic goals and objectives place a strong emphasis on national security-related activities.").

security an even greater focus.[199] Accordingly, in June of 2006, ICE officials specifically noted the agency was focusing its investigative resources on those immigration issues that may involve threats to national security.[200]

Increasingly, ICE coordinates its anti-smuggling efforts with the collateral efforts of other federal agencies in order to prevent the inefficiencies and hazards that can result from agency overlap.[201] For example, at the recommendation of the GAO, in 2004 ICE and Customs and Border Protection ("CBP") signed a Memorandum of Understanding in order to clarify their respective roles in policing alien smuggling.[202] Such role-clarification is necessary because overlapping enforcement efforts are often counterproductive.[203] For example, as recently as 2005, "a[n ICE] sting was compromised because of lack of coordination between ICE and CBP when ICE agents were trying to cross the border with money and drugs to uncover the entire smuggling operation."[204]

Like ICE and CBP's collaborative enforcement, federal and state collaborative enforcement of the federal alien smuggling statute is most effective when each party adheres to its core role. That is, state enforcement of the federal alien smuggling statute is most helpful when that enforcement is local, not national. Proponents of state immigration enforcement argue that state officers are effective because they "know the[ir] communities."[205] Also, as a director in the Homeland Security office has intimated, state enforcement of the federal alien

199. *Id.* at 9–10 ("Although [the GAO] found no evidence that [ICE] has failed to investigate any national security-related lead that came to its attention, applying a risk management approach to proactively determine what types of customs and immigration violations represent the greatest risks for exploitation by terrorists and other criminals could provide [ICE] with greater assurance that it is focusing most intensely on preventing those violations with the greatest potential for harm . . . .").

200. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-751R, INFORMATION ON IMMIGRATION ENFORCEMENT AND SUPERVISORY PROMOTIONS IN THE DEPARTMENT OF HOMELAND SECURITY'S IMMIGRATION AND CUSTOMS ENFORCEMENT AND CUSTOMS AND BORDER PROTECTION 4 (2006), http://www.gao.gov/new.items/d06751r.pdf. Other factors influencing ICE's allocation of resources includes special programs to target specific domestic crimes, such as violent street crime and narcotics crimes. *Id.*

201. SISKIN ET AL., *supra* note 194, at 27, 29–30.

202. *Id.* at 29.

203. *Id.* at 27.

204. *Id.*

205. NUÑEZ-NETO ET AL., *supra* note 189, at 27.

smuggling statute best informs national enforcement strategies when those state efforts are targeted only on narrow local regions.[206]

In summary, recent efforts to combat alien smuggling have tried to target terrorist activity, and state officers' contributions to that effort have been most effective when their enforcement has remained local.

IV. THE COLORADO ALIEN SMUGGLING STATUTE

Despite the extensive federal regulatory scheme, the Colorado legislature decided in 2006 to enact its own legislation regulating alien smuggling. This section considers the legislative history and statutory function of the Colorado statute.

A. The Legislative History of the Colorado Alien Smuggling Statute

In the months that preceded the ultimate enactment of Colorado's alien smuggling statute, both Colorado citizens and Colorado lawmakers expressed growing concern over how illegal immigration was affecting the state.[207] Media attention concerning alien smuggling exploded in late 2005.[208] At the

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206. In "Operation ICE Storm" of 2003, ICE collaborated with state and local governments in Arizona to dismantle organized crime associated with alien smuggling. COMBATING ALIEN SMUGGLING, *supra* note 194, at 39–43. At the time of the operation, the director described the effort thusly:

> While Operation ICE Storm focuses on the Phoenix metropolitan area, the initiative is designed as a strategic model for similar anti-smuggling operations in other parts of the nation. This narrowed focus on the southwest border will allow ICE to review best practices and evaluate lessons learned before an expanded nationwide strategy is finalized.

Letter from Steven Pecinovsky, Director, Departmental GAO/OIG Liaison Office, Department of Homeland Security, to Richard Stana, Director, Homeland Security and Justice (May 17, 2005), *reprinted in id.* at 87; *see also* COMBATING ALIEN SMUGGLING, *supra* note 194, at 43 ("[ICE] officials noted that although there is no one law enforcement strategy totally effective in all areas of the nation, the methodologies applied in . . . Operation ICE Storm . . . were being evaluated and tailored for use in other parts of the country.").

207. *See generally* Fred Brown, Editorial, *The Immigration Wedge*, DENVER POST, April 23, 2006, at E4.

208. For example, a local TV news story spotlighted how alien smuggling was taking place on Colorado's interstate highways. *See CBS4 Investigates Human Smuggling and Illegal Immigration* (CBS4 Colorado television broadcast Nov. 18, 2005), *available at* http://www.cbs4denver.com/video/?id=10105. That story was

January opening of the 2006 Colorado legislative session, the Democratic Speaker of the Colorado House of Representatives remarked that the state legislature would "take action" on illegal immigration that year, and that "[t]hose who engage in human smuggling . . . should have nowhere to hide."[209] By February of that year, thirteen bills concerning immigration were being debated in both chambers of Colorado's state legislature.[210] On March 7, 2006, only weeks after most of those Republican-proposed immigration bills were defeated, Democratic Senator Peter Groff introduced an alien smuggling bill.[211] That bill, Colorado Senate Bill 206,[212] was tremendously popular among the Colorado legislators. On April 6, 2006, it was unanimously passed in the state senate[213]; on May 2, 2006, it passed fifty-six to nine in the state house of representatives[214]; and on May 30, 2006, Governor Bill Owens signed Senate Bill 206 into law.[215]

As that bill worked its way through the legislature, it also grew to criminalize more and more alien transport activities.[216] As originally introduced, the bill targeted only those alien

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covered by one of the state's major newspapers. *See* Stuart Steers, *Tancredo, Mayor in War of Words*, ROCKY MOUNTAIN NEWS, Nov. 19, 2005, at A22. It was also picked up by a national television network. *See Lou Dobbs Tonight* (CNN television broadcast Nov. 23, 2005) (transcript available at http://transcripts.cnn.com/TRANSCRIPTS/0511/23/ldt.01.html).

209. Andrew Romanoff, Speaker, Colorado House of Representatives, Address at the Opening of the 2006 Legislative Session (Jan. 12, 2006) (transcript available at http://andrewromanoff.blogspot.com/2006_01_01_archive.html).

210. Kyle Henley, *Few Answers for Immigration*, COLO. SPRINGS GAZETTE, Feb. 21, 2006, *available at* http://www.findarticles.com/p/articles/mi_qn4191/is_20060221/ai_n16177405; *see also* Burke, *supra* note 15, at 1081 ("In 2006, Colorado passed seventeen separate pieces of legislation intended to identify undocumented migrants, to limit publicly-funded services and benefits to them, and to require all persons regardless of citizenship or immigration status to provide specified identification documents to obtain drivers licenses and professional and business licenses.").

211. Kyle Henley, *Two House Bills Intended to Stop Human Smuggling*, COLO. SPRINGS GAZETTE, Mar. 8, 2006, *available at* http://www.findarticles.com/p/articles/mi_qn4191/is_20060308/ai_n16146522.

212. S.B. 206, 65th Gen. Assem., 2nd Reg. Sess. (Colo. 2006).

213. Colorado Senate Journal, Apr. 6, 2006, at 784, *available at* http://www.leg.state.co.us/Clics2006a/csl.nsf/ (search "go directly to bill number" for "206," then follow "S-4/6/2006" hyperlink).

214. Colorado House Journal, May 2, 2006, at 1659, *available at* http://www.leg.state.co.us/Clics2006a/csl.nsf/ (search "go directly to bill number" for "206," then follow "H-5/2/2006" hyperlink).

215. S.B. 206, 65th Gen. Assem., 2nd Reg. Sess. (Colo. 2006).

216. *Id.*

transporters who brought undocumented aliens into the state.[217] After being amended in the house of representatives, the bill targeted not only those who brought undocumented aliens *into* the state but also anyone who transported undocumented aliens *within* the state.[218] Then, after passing through the conference committee, the bill targeted anyone who assisted an undocumented alien to "enter, remain in, or travel through the United States or the state of Colorado" who was also compensated for the transportation.[219] It was this final version of the bill which was ultimately enacted as section 18-13-128 of the Colorado Revised Statutes.

B. The Current Colorado Alien Smuggling Statute, Colorado Revised Statute 18-13-128

Section 18-13-128 of the Colorado Revised Statutes, entitled "Smuggling of Humans," defines the substantive crime in a single sentence, reading as follows:

> A person commits smuggling of humans if, for the purpose of assisting another person to enter, remain in, or travel through the United States or the state of Colorado in violation of immigration laws, he or she provides or agrees to provide transportation to that person in exchange for money or any other thing of value.[220]

Thus, the statute not only imposes penalties against those who transport aliens into or across the state of Colorado, but it also imposes penalties against those who bring aliens into the United States. Because Colorado only borders other U.S. states and does not border any other countries, the Colorado statute facially appears to regulate conduct occurring outside of the state.

This expansive reach of the substantive alien smuggling crime is further exacerbated by the jurisdictional provision of that statute and by Colorado's jurisdictional law in general. Colorado's criminal jurisdiction generally expands beyond common law territorial jurisdiction, allowing Colorado to prose-

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217. *Id.* (as introduced by Colo. S., March 7, 2006).
218. *Id.* (as passed by Colo. S., Apr. 6, 2006).
219. *Id.* (as passed by Colo. H.R. May 2, 2006) (codified at COLO. REV. STAT. § 18-13-128 (2007)).
220. COLO. REV. STAT. § 18-13-128(1) (2007).

cute crimes that are committed only partly in the state or that only qualify as attempt crimes in the state.[221] This expansive jurisdiction is made even wider by the Colorado alien smuggling statute: The statute claims that, regardless of whether a Colorado county would have jurisdiction otherwise, that county has jurisdiction if the alien is found within the state.[222] Thus, Colorado's alien smuggling statute facially regulates conduct taking place well beyond Colorado's borders.

The Colorado alien smuggling statute also imposes a single penalty against all who are convicted of alien smuggling.[223] The penalty is the same regardless of whether the smuggler brought the alien into the country or merely carried the alien across the state; regardless of whether the smuggler ensured the safety of his passengers or endangered people's lives by engaging in the smuggling; and regardless of smuggler's motive for transporting the alien.[224]

This single penalty which is imposed against all alien smugglers has both a substantial maximum penalty and a substantial minimum penalty.[225] Under the Colorado statute, a convicted alien smuggler can serve as many as twelve years' imprisonment for each alien smuggled.[226] Furthermore, a convicted alien smuggler must serve at least four years' imprisonment for every alien smuggled.[227] Convicted alien smugglers are eligible for parole only after five years' imprisonment for each alien smuggled.[228]

To summarize, the Colorado alien smuggling statute reaches beyond Colorado to punish all alien smugglers the same way, with a single harsh maximum and minimum prison sentence.

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221. *See* People v. Cullen, 695 P.2d 750, 751 (Colo. App. 1984); *see also* COLO. REV. STAT. § 18-1-201 (2007).

222. COLO. REV. STAT. § 18-13-128(4) (2007).

223. *Id.* § 18-13-128(2).

224. *Id.*

225. *Id.* §§ 18-1.3-401(1)(a) (the sentencing guidelines for class 3 felonies in Colorado), 18-13-125(2)–(3).

226. *Id.*

227. *Id.*

228. *Id.*

V. RECENT LITIGATION IN OTHER STATES ADDRESSING SIMILAR PREEMPTION ISSUES

As of this writing, recent or ongoing litigation in two other states addresses preemption issues that are similar, but not identical, to the issue presented by Colorado's alien smuggling statute. This section examines the preemption challenges against an Arizona alien smuggling statute and against a Pennsylvania city's alien harboring ordinance.

A. The Challenge to the Arizona Alien Smuggling Statute

Colorado is not alone in outlawing alien smuggling at the state level. On March 14, 2005, more than a year before Colorado passed its alien smuggling law, Arizona passed its own law criminalizing the "smuggling of human beings."[229] That law, section 13-2319 of the Arizona Revised Statutes, defines such human smuggling as follows:

> [T]he transportation or procurement of transportation by a person or an entity that knows or has reason to know that the person or persons transported or to be transported are not United States citizens, permanent resident aliens or persons otherwise lawfully in this state.[230]

Like the Colorado statute, the Arizona statute only outlaws alien smuggling when it is done in exchange for money.[231]

In at least one way, the Arizona statute appears to have a narrower scope than the Colorado statute. The Arizona statute only criminalizes the transportation of aliens who are unlawfully within Arizona.[232] In contrast, the Colorado statute criminalizes those who knowingly transport illegal aliens into or through either "*the United States or* the state of Colorado."[233] Thus, the Arizona statute only penalizes conduct that

229. *See* S.B. 1372, 47th Leg., 1st Reg. Sess. (Ariz. 2005) (codified with amendments at ARIZ. REV. STAT. ANN. § 13-2319 (2006)).

230. ARIZ. REV. STAT. ANN. § 13-2319(D)(2) (2006).

231. *Id.* § 13-2319(A).

232. *Id.* § 13-2319(D)(2).

233. COLO. REV. STAT. § 18-13-128(1) (2007) (emphasis added).

occurs within Arizona, whereas the Colorado statute has the potential to reach conduct that occurs outside of Colorado.[234]

However, in at least one other way the Arizona statute appears to be broader than both the Colorado statute and the federal statute. The federal statute only punishes those who either illegally bring aliens into the United States or provide transportation that is "in furtherance of" an illegal alien's immigration violation.[235] Likewise, the Colorado statute only penalizes transportation given "for the purpose of assisting another person to" violate federal immigration laws.[236] The Arizona statute, however, facially seems to apply to anyone who knowingly transports an illegal alien within the state, regardless of whether that transportation is done in furtherance of the alien's immigration violation.[237] Thus, unlike the federal and Colorado statutes, the Arizona statute could penalize anyone who knowingly gives transportation to an illegal alien regardless of whether the transportation was given as part of a federal immigration violation.

Also, in at least one Arizona district, that state's alien smuggling law has acquired a particularly broad reach through judicial interpretation. In Arizona's Maricopa County, the state's alien smuggling statute not only imposes criminal penalties on the people transporting the illegal aliens, but also imposes such penalties on the aliens being transported.[238] In the view of the Maricopa County District Attorney and the Maricopa County Court, Arizona's alien smuggling statute combines with Arizona's conspiracy statute to make smuggled aliens

234. *Compare* ARIZ. REV. STAT. ANN. § 13-2319(D)(2) (2006) *with* COLO. REV. STAT. 18-13-128(1) (2007); *see also supra* notes 220–22 and accompanying text.

235. 8 U.S.C. § 1324(a)(1)(A)(ii) (2005). The federal circuits have interpreted this "in furtherance of" language in a number of different ways: Some circuits have read it as a specific intent requirement, others have read it as a substantial relationship requirement, and still others have read it as a "more than incidental connection" requirement. *See* William G. Phelps, Annotation, *Validity, Construction, and Application of § 274(a)(1)(A)(ii) of Immigration and Nationality Act (8 U.S.C.A. § 1324(a)(1)(A)(ii)), Making It Unlawful to Transport Alien Who Has Entered United States in Violation of Law,* 133 A.L.R. FED. 139. § IV (1996 & Supp. 2007) (cases cited).

236. COLO. REV. STAT. 18-13-128(1).

237. ARIZ. REV. STAT. ANN. § 13-2319(D)(2).

238. Arizona v. Salazar, No. CR 2006-005932-003 DT, slip op. at 3–6 (Ariz. Super. Ct., June 9, 2006), *available at* http://hz1.ipress.info/hzcase.html (follow "61.4 Brief in Opposition" hyperlink).

criminally liable for "conspiring" to have themselves transported by the alien smugglers.[239]

Maricopa County's interpretation of the Arizona alien smuggling statute has been tremendously controversial in the state. Many of the Arizona legislators who signed the state alien smuggling bill have stated that they never intended for the bill to have so broad a reach.[240] Many of those legislators attempted to overrule Maricopa County's interpretation by amending the statute, but such legislative proposals have not made it out of committee.[241]

Maricopa County's controversial interpretation of the Arizona alien smuggling statute has prompted various federal preemption challenges against that statute.[242] One such challenge took place in an Arizona criminal trial, in the case of *Arizona v. Salazar*.[243] Although the Arizona trial court held that the state statute was not preempted, that court's reasoning was relatively terse and somewhat strange.[244] When seeking to determine whether Congress had intended to oust state power from the field of alien smuggling under the second *De Canas* prong, the court failed to examine the legislative history of the federal statute and instead only examined the legislative history of the Arizona statute.[245] Furthermore, the court used the questionable reasoning that, because states are constitutionally

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239. *See* Complaint for Injunctive and Declaratory Relief at ¶ 40, We Are America/Somos America Coal. of Ariz. v. Maricopa County Bd. of Supervisors, No. 06CV02816, 2006 WL 4028243 (D. Ariz. Nov. 21, 2006) [hereinafter WAA/SAC Complaint] (stating the view of the Maricopa County Attorney by quoting his Sept. 29, 2005 statement); *Salazar*, slip op. at 3–6 (stating the view of the Maricopa County Court).

240. *See* WAA/SAC Complaint, *supra* note 239, at ¶ 43.

241. *See* H.B. 2270 & 2271, 48th Leg., 1st Reg. Sess. (Ariz. 2007), *available at* http://www.azleg.gov/FormatDocument.asp?inDoc=/legtext/48leg/1r/bills/hb2270o.asp *and* http://www.azleg.gov/FormatDocument.asp?inDoc=/legtext/48leg/1r/bills/hb2271o.asp.

242. *See Salazar*, slip op. at 6–9; WAA/SAC Complaint, *supra* note 239, at ¶¶ 1, 49–52, 56–58.

243. *See Salazar*, slip op. at 6–9.

244. *Id.*

245. *Id.* at 8 ("Applying *De Canas* and other relevant preemption cases, it is clear that Arizona['s alien smuggling statute] has not been preempted. . . . As is evident from the legislative history leading up to [the] passage [of the Arizona statute], it was determined that the problem of smuggling and transporting illegal aliens for profit in Arizona directly impacted the safety and welfare of the citizens of the state.").

permitted to enforce the federal alien smuggling statute,[246] states are also constitutionally permitted to supplement the federal alien smuggling statute legislatively.[247] The soundest part of the court's reasoning was its application of the third *De Canas* prong, where it held that there was no conflict between the federal and Arizona statutes, because Arizona's "concurrent enforcement enhances rather than impairs federal enforcement objectives."[248]

The Arizona statute, or at least Maricopa County's interpretation of that statute, now faces another preemption challenge, this time as part of a major class action brought in federal court.[249] The class is composed of immigrants who faced felony charges for "conspiring" to have themselves transported in violation of the Arizona alien smuggling law.[250] This class argues not only that federal law preempts Maricopa County's interpretation of the Arizona statute but also that Arizona's enforcement of the statute used racial profiling and therefore violated the Constitution's Equal Protection clause.[251] As of this writing, the plaintiffs and the defendant have filed motions on the field preemption issue,[252] but the court has not yet ruled on that issue.

Much of the plaintiffs' and defendants' preemption arguments dovetail with the preemption analysis that follows, but there are also some points where the parties' arguments diverge from that analysis. For example, the defendants, who in-

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246. *See, e.g.*, U.S. v. Santana-Garcia, 264 F.3d 1188, 1193–94 (10th Cir. 2001); Gonzales v. City of Peoria, 722 F.2d 468, 474 (9th Cir. 1983); *see also* 8 U.S.C. § 1252c (2000) (authorizing state and local law enforcement to arrest illegal aliens in certain situations).

247. *See Salazar*, slip op. at 7–9. The court's reasoning here seems particularly weak when one considers that the federal alien smuggling statute expressly gives states the authority to *enforce* that statute but does not expressly give states the authority to *legislatively supplement* that statute. *See* INA § 274(c), 8 U.S.C. § 1324(c) (Supp. V 2005); *see also supra* notes 188–90 and accompanying text.

248. *Id.* at 8–9.

249. *See generally* WAA/SAC Complaint, *supra* note 239.

250. *Id.* at ¶ 25.

251. *Id.* at ¶ 1.

252. Defendant's Supplemental Brief Regarding the Absence of Field Preemption, We Are America/Somos America Coal. of Ariz. v. Maricopa County Bd. of Supervisors, No. 06CV02816 (D. Ariz. Oct. 24, 2007) [hereinafter "WAA/SAC Defendant's Field Preemption Brief"]; Plaintiff's Supplemental Briefing on Field Preemption, We Are America/Somos America Coal. of Ariz. v. Maricopa County Bd. of Supervisors, 06CV02816 (D. Ariz. Oct. 9, 2007) [hereinafter "WAA/SAC Plaintiff's Field Preemption Brief"].

cluded Maricopa County, made much of the fact that state statutes are ordinarily presumed to be constitutional, but perhaps misinterpreted this law as placing a burden of *proof* on the statute's challenger.[253] The defendants also confused some of the various types of preemption, arguing that the statute was not preempted under the second *De Canas* prong[254] because there was no conflict preemption,[255] even though conflict preemption is solely relevant to the third *De Canas* prong.[256] Despite these gaffes in the government's argument, the government's field preemption analysis was for the most part more detailed than the plaintiffs'. Thus, it will be interesting to see how the court rules on the field preemption issue.

B. The Challenge to the Pennsylvania City of Hazleton's Alien Harboring Statute

In late 2006, after the passage of both the Arizona and Colorado alien smuggling laws, the Pennsylvania city of Hazleton passed ordinances that prohibited local employers from hiring illegal aliens, designated English as the city's official language, and, most importantly, prohibited local property owners

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253. Maricopa County argued,

> In order to prove [implied preemption] under the second test of *De Canas*, the plaintiffs must prove with decisional law and citation to the applicable federal statute and its legislative history that Congress intended to exclusively occupy the field of [alien smuggling]. 424 U.S. at 357 (the party challenging state law or policy also has the burden of proving implied federal preemption).

WAA/SAC Defendant's Field Preemption Brief, *supra* note 252, at 4; *see also id.* at 4 ("It is the plaintiffs' burden to *prove* that the Congress impliedly preempted Arizona law and defendants' policies."). In fact, *De Canas v. Bica* does not discuss the "burden of proof" for preemption challenges and instead seems to encourage courts to perform their own independent review of potentially preemptive federal statutes. 424 U.S. 351, 358 (1976) ("[Respondents] fail to point out, *and an independent review does not reveal*, any specific indication in either the wording or the legislative history of the INA that Congress intended to preclude even harmonious state regulation touching on aliens in general, or the employment of illegal aliens in particular." (emphasis added)).

254. WAA/SAC Defendant's Field Preemption Brief, *supra* note 252, at 2 (heading the main argument thusly: "Under the Second *De Canas* Test, Plaintiffs Have Failed to Prove That Congress Clearly and Manifestly Intended to Bar Arizona From Regulating Criminal Activities Involving the Smuggling of Aliens").

255. *Id.* at 5 (creating a subheading under the main argument which reads, "Only State Regulations that Conflict with, Impair, or Burden the Federal Scheme are Impliedly Preempted").

256. *De Canas*, 424 U.S. at 363–64.

from "harboring" illegal aliens.[257] The anti-harboring provision created the following city-wide prohibition:

> It is unlawful for any person or business entity that owns a dwelling unit in the City to harbor an illegal alien in the dwelling unit, knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, unless such harboring is otherwise expressly permitted by federal law.[258]

The penalty for harboring an alien in violation of this provision is denial or suspension of the property owner's rental license for the dwelling space in which the alien resided.[259] Subsequent violations after the first violation each carry a two-hundred fifty dollar fine.[260]

While the Hazleton anti-harboring ordinance differs in many ways from the Colorado alien smuggling statute, the Hazleton ordinance and the Colorado statute share a key feature: both of these non-federal statutes regulate conduct that, at least in part, is already regulated by the federal alien smuggling statute, INA section 274. The federal statute imposes criminal sanctions on both those who transport illegal aliens and those who house, or "harbor," illegal aliens. Thus, although the Hazleton ordinance criminalizes the act of housing illegal aliens while the Colorado statute criminalizes the act of transporting illegal aliens, both statutes touch upon the general field regulated by INA section 274.

All of the Hazleton City immigration ordinances, including the anti-harboring provision, faced a major constitutional challenge within months of being enacted.[261] One of the grounds for the challenge was the argument that the city immigration ordinances are preempted by federal immigration law.[262] The

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257. Hazleton, Pa., Ordinance 2006-13 (Aug. 15, 2006); Hazleton, Pa., Ordinance 2006-18, Illegal Immigration Relief Act Ordinance (Sept. 21, 2006), *available at* http://www.aclu.org/pdfs/immigrants/hazleton_secondordinance.pdf [hereinafter Hazleton Immigration Ordinance]; Hazleton, Pa., Ordinance 2006-19, Official English Ordinance (Sept. 21, 2006).

258. Hazleton Immigration Ordinance, *supra* note 257, at § 5(A).

259. *Id.* at § 5(B)(4).

260. *Id.* at § 5(B)(8).

261. *See, e.g.*, Lozano Injunction Memo, *supra* note 88.

262. *Id.* at 13–26. In addition to arguing for federal preemption, the injunction also argued that the city ordinance violated Due Process by depriving the plaintiffs of fundamental liberty and property interests, violated the Equal Protection

parties in their briefs,[263] and ultimately the court in its decision,[264] addressed the preemption issue at some length.

While many of the parties' preemption arguments addressed either the city ordinance as a whole or the employment provisions of the ordinance, there were some arguments concerning only the harboring provision. Under the second *De Canas* prong, the plaintiffs argued that the anti-harboring provisions of the federal aliens smuggling statute, INA section 274, were so detailed as to show a congressional intent to oust state authority from the field of alien harboring.[265] The defendant countered by arguing that the anti-harboring provision of the INA is insufficiently detailed to show congressional intent to preempt state alien harboring statutes.[266] The defendant bolstered this counterargument by reiterating that, as the Supreme Court reasoned in *De Canas*, the INA is likely to be detailed simply because it deals with the complicated subject of immigration and not because Congress intended to oust state authority from the field.[267]

Under the third *De Canas* prong, the plaintiffs argued that the harboring provision of the ordinance interferes with the federal scheme because the ordinance disrupts the balance struck by Congress through decades of amendment to the federal alien smuggling statute.[268] The defendant responded that the city ordinance shares the federal objective of policing alien harboring, and that the city ordinance thus furthers rather than hinders the federal objective.[269] The defendant also noted that various INA provisions allow the federal government to coordinate its anti-harboring enforcement with state and local governments, and therefore states should be allowed to sup-

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Clause by encouraging discrimination on the basis of race, and violated the right to privacy by requiring suspected illegal aliens to register with the city when they are obtaining housing. *Id.* at 26–50.

263. *See, e.g.*, *id.*; Memorandum of Law in Opposition to Plaintiffs' Cross Motion for Summary Judgment, Lozano v. City of Hazleton, 496 F. Supp. 2d 477 (M.D. Pa. 2007) (No. 06-cv-1586-JMM), 2007 WL 835029 [hereinafter Lozano Opposition Memo].

264. Lozano v. City of Hazleton, 496 F. Supp. 2d 477 (M.D. Pa. 2007).

265. Lozano Injunction Memo, *supra* note 88, at 18–19.

266. Lozano Opposition Memo, *supra* note 263, at 35.

267. *Id.* at 32–33.

268. Lozano Injunction Memo, *supra* note 88, at 25.

269. Lozano Opposition Memo, *supra* note 263, at 42–46.

plement federal immigration law enforcement in this additional legislative way.[270]

The court ultimately held that Hazleton's anti-harboring ordinance was preempted under the third *De Canas* prong.[271] That is, the court held that Hazleton's anti-harboring ordinance unconstitutionally conflicted with various provisions in the INA. However, when listing the various conflicts between the ordinance and the INA, the court never mentioned the federal anti-harboring provision at INA section 274.

Thus, although the case is somewhat helpful in understanding how a recent state regulation of "harboring" illegal aliens can be preempted by federal law, the court's reasoning is so specific to the Hazleton ordinance that it leaves unresolved the preemption issue presented by the Colorado alien smuggling statute.

VI. APPLYING FEDERAL PREEMPTION LAW TO COLORADO'S ALIEN SMUGGLING STATUTE

The existing Supreme Court precedent and the recent Arizona and Pennsylvania cases all serve as helpful guideposts for analyzing whether the Colorado alien smuggling law will, or should, be preempted by federal law. This Comment now turns to that analysis.

De Canas and *Nelson* together provide a framework for analyzing whether, absent explicit preemption language from Congress, a state statute criminally regulating aliens is nonetheless preempted by federal law. *Nelson* provides a threshold preemption inquiry when both a federal statute and a state statute regulate criminal law: The federal statute will preempt the state statute only if the two statutes regulate an area where the federal interest is dominant.[272] Next, *De Canas* provides the three-prong preemption test applied when both the federal statute and the state statute regulate immigration and/or alienage.[273] Under the first prong, a state statute that qualifies as a "regulation of immigration" will be "*per se* pre-

270. *Id.* at 46–53.

271. Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 529–533 (M.D. Pa. 2007) (holding that the ordinance was conflict preempted, although not mentioning *De Canas* explicitly).

272. 350 U.S. 497, 504 (1956).

273. De Canas v. Bica, 424 U.S. 351, 354–65 (1976).

empted" by the Constitution itself, rather than by any federal immigration legislation.[274] Under the second prong, state regulation of a subject field will be preempted if Congress has legislatively expressed "the clear and manifest purpose" of completely ousting state power from that field.[275] Finally, under the third prong, a state statute that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" will be preempted.[276] This Comment will now apply the *Nelson* and *De Canas* doctrines to the Colorado alien smuggling statute to determine whether the Colorado statute should be preempted.

A. *Threshold* Nelson *Inquiry: The Colorado Statute Regulates an Area of Dominant Federal Interest*

Colorado's alien smuggling statute is not invulnerable to preemption merely because it is a criminal statute rather than a civil statute. Rather, Colorado's alien smuggling statute, like Pennsylvania's sedition statute in *Nelson*,[277] regulates an area where the federal interest is so dominant that federal criminal laws may preempt state criminal laws.

Based on *Hines*, the federal government may have a dominant federal interest over any regulation of aliens. As the *Hines* court noted,

> [T]he regulation of aliens is so intimately blended and intertwined with responsibilities of the national government that where it acts, and the state also acts on the same subject, the act of Congress, or the treaty, is supreme; and the law of the state, though enacted in the exercise of powers not controverted, must yield to it.[278]

This dominant federal interest in the "regulation of aliens" may, alone, trump states' police power interest in passing and enforcing criminal laws.

Even if the federal government did not have a dominant interest in every regulation of aliens, the federal government

274. *Id.* at 355.
275. *Id.* at 356–57 (quoting Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 146 (1963)).
276. *Id.* at 363 (citing Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).
277. 350 U.S. 497.
278. 312 U.S. at 66 (internal quotations omitted).

has a dominant interest in regulating alien smuggling, for the same reasons that the federal government had a dominant interest in regulating sedition in *Nelson*.[279] Alien smuggling, like sedition, raises national security concerns. Just as the federal legislature in *Nelson* had passed its sedition statute to better protect our nation against "internal subversion,"[280] Congress recently amended the alien smuggling statute in order to better protect our nation against domestic terrorism.[281] In addition, Congress has responded to alien smuggling in much the same way that it responded to sedition at the time when *Nelson* was decided: Congress has given federal agencies primary responsibility for policing and gathering intelligence on alien smuggling and has given the states a mere subordinate role in such agency activity.[282] Thus, to borrow a phrase used by the *Nelson* Court, "Congress having thus treated [alien smuggling] as a matter of vital national concern, it is in no sense a local enforcement problem."[283]

Because alien smuggling is an area of national concern under the *Nelson* inquiry, one must turn to the three prong test of *De Canas* to determine whether Colorado's alien smuggling statute is preempted.

B. First De Canas *Prong: The Colorado Statute Is Not a Direct Regulation of Immigration*

Under the first prong of *De Canas*, the Colorado alien smuggling statute is probably not "per se preempted," because it is not a direct regulation of immigration.[284] Under the first *De Canas* prong, "the fact that aliens are the subject of a state statute does not render it a regulation of immigration, which is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain."[285]

The Colorado alien smuggling law is not a direct regulation of immigration for two reasons. First, the Colorado law does

279. *See* 350 U.S. at 504–05.
280. *Id.* at 505.
281. *See supra* notes 158–61 and accompanying text.
282. *See Nelson*, 350 U.S. at 505; *supra* notes 167–69 and accompanying text.
283. 350 U.S. at 505.
284. 424 U.S. 351, 355 (1976).
285. *Id.*

not determine "who should or should not be admitted into the country,"[286] but instead adopts the federal standard for making this determination. In *De Canas*, the California statute regulated the employment of those aliens "who [were] not entitled to lawful residence in the United States."[287] Likewise, the Colorado statute regulates the transportation of those aliens who "enter, remain in, or travel through the United States . . . in violation of [federal] immigration laws."[288] The *De Canas* Court held that California was allowed to "adopt[] federal standards in imposing criminal sanctions against state employers who knowingly employ aliens who have no federal right to employment within the country[.]"[289] Similarly, a court would likely hold that Colorado is allowed to adopt federal standards in imposing criminal sanctions against state transporters who knowingly transport aliens who have no federal right to transportation within the country.

The second reason the Colorado law would probably survive the first *De Canas* prong is more pragmatic: If the Colorado law were a direct regulation of immigration and thus were per se preempted, then the federal government might be hindered in its fight against terrorism-related illegal immigration. As the Court noted in *De Canas*, if a state statute regulates immigration and thus is per se preempted, then "Congress itself would be powerless to authorize or approve" the state statute.[290] Congress has, thus far, authorized and approved only state enforcement of the federal alien smuggling statute.[291] Congress has not authorized or approved independent state regulation of alien smugglers. However, as Congress continues to combat alien smuggling—and continues to focus its resources on terrorism-related alien smuggling—Congress may want to allow states to independently prosecute certain types of alien smugglers. If Colorado's alien smuggling law is per se preempted as a regulation of immigration, Congress would not be able to expand the role of the states with respect to alien smuggling.

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286. *Id.*
287. *Id.* at 352 (quoting CAL. LAB. CODE § 2805 (repealed 1988)).
288. COLO. REV. STAT. § 18-13-128(1) (2007).
289. 424 U.S. at 355.
290. *Id.* at 356.
291. *See* INA § 274(c), 8 U.S.C. § 1324(c) (Supp. V 2005); *see also supra* notes 188–89 and accompanying text.

Thus, the Colorado alien smuggling statute should not be preempted under the first prong of *De Canas* for both formalistic and pragmatic legal reasons.

C. *Second* De Canas *Prong: Congress has Articulated a Clear and Manifest Purpose of Ousting State Authority from the Field of Alien Smuggling*

The Colorado alien smuggling statute should, however, be preempted under the second *De Canas* prong, because Congress has articulated a clear and manifest purpose of ousting state authority from the field of alien smuggling. Under the second *De Canas* prong, a state statute may be preempted by a federal immigration statute if there is "specific indication in either the wording or the legislative history of the INA that Congress intended to preclude *even harmonious state regulation* touching on aliens in general, or [the subject field involving] aliens in particular."[292]

Under this second prong, the Colorado alien smuggling statute should be preempted by the federal statute for three reasons. First, regardless of how broadly or narrowly one defines the subject field, the Colorado statute regulates the same field that is occupied by the federal statute. Section 18-13-128 of the Colorado Revised Statutes, entitled "Smuggling of humans," regulates the transport of illegal aliens into or through the United States when done in exchange for payment. Likewise, INA section 274 regulates "alien smuggling,"[293] including transporting aliens either into or through the United States, and imposes harsher penalties upon those transporters who smuggle "for commercial advantage or private financial gain."[294] Thus, at its broadest definition, the field regulated by the Colorado statute is simply alien smuggling, a field which is occupied by the federal statute. At its narrowest definition, the field regulated by the Colorado statute is alien smuggling involving the transport of aliens which is done for financial gain, an area of legislation that is also occupied by the federal statute. Therefore, without question, the Colorado statute seeks to

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292. *De Canas*, 424 U.S. at 358 (emphasis added).

293. INA § 101(a)(43)(N), 8 U.S.C. § 1101(a)(43)(N) (2005) (stating that the transportation offenses of INA § 274 "relate[ ] to alien smuggling").

294. INA § 274(a)(1)(B)(i), (2)(B)(ii), 8 U.S.C. § 1324(a)(1)(B)(i), (2)(B)(ii) (Supp. V 2005).

regulate a field which is already occupied by the federal alien smuggling statute.

Because the field regulated by the Colorado statute is indistinguishable from the field occupied by the federal statute, the preemption issue here is more akin to the issue resolved in *Hines*[295] than the issue resolved in *De Canas*.[296] In *Hines*, both a Pennsylvania statute and a federal statute regulated alien registration, and therefore the Pennsylvania statute was preempted.[297] In *De Canas*, the California statute regulated alien employment, but no federal statute regulated alien employment; on this basis, the *De Canas* Court explicitly distinguished *Hines* and held that the California statute was not preempted.[298] Here, both the Colorado statute and a federal statute regulate alien smuggling. Therefore, unlike the issue resolved in *De Canas*, the preemption issue presented by the Colorado statute is indistinguishable from the preemption issue resolved in *Hines*. Thus, as in *Hines*, the state statute should be preempted because both the state statute and the federal statute regulate the same field involving aliens.

The second reason the Colorado statute should be preempted under this prong is that the century-long evolution of INA section 274 shows that Congress had the clear and manifest purpose of occupying the field of alien smuggling. In *Hines* the Court reasoned that, because a federal alien registration statute had evolved over some years and because that statute ultimately included only a handful of the statutory provisions that had been proposed in numerous unenacted bills, Congress had intended for that statute to be comprehensive and exclusive.[299] INA section 274 has evolved, not over mere years, but over a full century.[300] The evolution of INA section 274 has involved not only the rejection of proposed congressional bills but also the enactment of numerous congressional amendments.[301] Because INA section 274 has grown over the course of a century from a paragraph-long provision into a thousand-word statute, there is a presumption that Congress intended for that

295. Hines v. Davidowitz, 312 U.S. 52 (1941).
296. *De Canas*, 424 U.S. 351.
297. *Hines*, 312 U.S. at 73–74.
298. *De Canas*, 424 U.S. at 362–63.
299. *Hines*, 312 U.S. at 69–73; *see also supra* notes 104–09 and accompanying text.
300. *See supra* notes 141–51 and accompanying text.
301. *See supra* notes 141–51 and accompanying text; *see also infra* note 328.

statute to be a comprehensive and exclusive regulation of alien smuggling.

The final reason the Colorado statute should be preempted under this prong is that in the most recent amendment to INA section 274, the Terrorism Prevention Act, Congress articulated a clear and manifest purpose of ousting state authority from the field of alien smuggling. In amending INA section 274, the Terrorism Prevention Act created a "Human Smuggling and Trafficking Center" and instructed that center to coordinate the "agencies of the Federal Government" to gather "information available to the Federal government."[302] The Terrorism Prevention Act did not instruct the Human Smuggling and Trafficking Center to coordinate its efforts with state governments. The Act instead only said that the Secretary of Homeland Security could, at its discretion, choose to instruct states on how to gather terrorist travel intelligence.[303] Thus, by the express terms of this most recent act amending the federal alien smuggling statute, state governments are subordinate to the federal government within the field of alien smuggling.

Furthermore, the Terrorism Prevention Act has particularly strong preemptive force because it was part of a congressional effort to bolster national security.[304] As the Supreme Court has long recognized, the federal power over immigration is at its height when national security is at risk. It is the "highest duty of every nation," the Court has stated, to "give security against foreign aggression and encroachment."[305] The Terrorism Prevention Act was not only passed in direct response to the 9/11 terrorist attacks but also explicitly states that it was passed to allow "[f]ederal agenc[ies to] systematically analyze[] terrorist travel strategies" in order to prevent future such attacks.[306] In light of this preoccupation with national security, the Terrorism Prevention Act has particularly strong preemptive force.

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302. Terrorism Prevention Act § 7202, 8 U.S.C. § 1777(c)(3) (Supp. V 2005); *see also supra* notes 164–66 and accompanying text.

303. *See id.* § 7201(d)(4); *see also supra* notes 167–69 and accompanying text.

304. *See supra* notes 152–161 and accompanying text.

305. Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 606 (1889).

306. Terrorism Prevention Act § 7201(a)(4), 8 U.S.C. § 1776(a)(4) (Supp. V 2005); *see also supra* notes 158–161 and accompanying text.

In summary, because the Colorado alien smuggling law occupies the same field as the federal alien smuggling law and because the legislative history of the federal statute shows that Congress intended to oust state power from the field of alien smuggling, the Colorado statute should be preempted under the second *De Canas* prong.

D. Third De Canas *Prong: The Colorado Statute Is an Obstacle to the Accomplishment of a Federal Purpose*

The Colorado alien smuggling statute should also be preempted under the third prong of *De Canas*. The state law poses an obstacle to the accomplishment of a federal purpose by contradicting the express terms of the federal statute, impeding congressional flexibility to set out alien smuggling rules, and hindering federal agency efforts to coordinate their enforcement with state and local governments. Under the third *De Canas* prong, state regulation of aliens will be preempted if it "can[not] be enforced without impairing the federal superintendence of the field covered by the INA."[307]

The Colorado statute contradicts the express terms of the federal statute in three ways. First, the Colorado statute imposes a penalty which is more severe than the penalty an alien smuggler would typically face under the federal statute. Whenever an alien smugger transports aliens into or through the United States in exchange for payment, the Colorado statute always penalizes that smuggler with a maximum of twelve years' imprisonment and a minimum of four years' imprisonment per alien smuggled.[308] That same smuggler, however, would face a lesser penalty under the federal statute, provided that the smuggler was not a repeat offender[309] and that the smuggling did not endanger anyone's life.[310] Under the federal statute, the smuggler would face a maximum penalty of ten

307. De Canas v. Bica, 424 U.S. 351, 363–64 (1976) (citing Florida Lime & Avocado Growers, 373 U.S. 132, 142 (1963)).

308. COLO. REV. STAT. §§ 18-1.3-401(1)(a), 18-13-128(2) (2007).

309. If the smugger is a three-time offender, the smuggler may face greater charges under INA § 274(a)(2)(B), 8 U.S.C. § 1324(a)(2)(B) (Supp. V 2005).

310. If the smuggler endangers lives, the smuggler may face greater charges under INA §§ 274(a)(1)(B)(iii)–(iv), (a)(4)(C), 8 U.S.C. §§ 1324(a)(1)(B)(iii)–(iv), (a)(4)(C) (2000 & Supp. V 2005).

and a minimum penalty of three years' imprisonment per alien smuggled.[311]

The relative severity of the Colorado statute is particularly important, because if a state imposes undue hardship on aliens residing within that state, then that state may risk jeopardizing the foreign relations of the entire country.[312] As the *Hines* court noted, if a single state inflicts "real or imagined wrongs" upon an alien, then that state risks embroiling the entire country in "international controversies of the gravest moment" and even risks "leading [the entire nation] to war."[313] Therefore, "[l]egal imposition of distinct, unusual and extraordinary burdens and obligations upon aliens . . . bears an inseparable relationship to the welfare and tranquility of all the states, and not merely to the welfare and tranquility of one."[314] Assuming that many alien smugglers will be either legal immigrants or illegal aliens,[315] the Colorado statute imposes a penalty both distinctly different from and more severe than the federal statute. Accordingly, the Colorado statute risks inflaming international controversies and should be preempted.

The second way the Colorado statute contradicts the express terms of the federal statute is by imposing the same pen-

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311. INA § 274(a)(1)(B)(i), 8 U.S.C. § 1324(a)(1)(B)(i) (Supp. V 2005). Not only is the Colorado statute independently more severe than the federal statute, but the Colorado statute can also sharply increase the penalties of an alien who is prosecuted under the federal statute. The Supreme Court has determined that it does not violate double jeopardy for a criminal to be charged under both state and federal law for a single criminal act. Bartkus v. Illinois, 359 U.S. 121, 127 (1959). Thus, an alien smuggler found in Colorado could face both the federal penalty and the state penalty. This would likely more than double the penalty which the smuggler would otherwise face under the federal law.

312. *See* Hines v. Davidowitz, 312 U.S. 52, 63–64 (1941).

313. *Id.*

314. *Id.* at 65–66.

315. Because alien smuggling is done clandestinely, scholars and policymakers have difficulty determining the average ethnographies and national origins of typical alien smugglers. *See, e.g.*, David Spener, *Mexican Migrant-Smuggling: A Cross-Border Cottage Industry*, 5 J. INT'L MIGRATION & INTEGRATION 295, 302 (2004). Nonetheless, many scholars agree that the alien smugglers who bring Mexicans into the United States are typically Mexicans themselves. *See, e.g., id.* at 303–08. Furthermore, government statistics report that, among suspected violators of the federal alien smuggling statute, a high percentage of those smugglers are immigrants. *See* U.S. BUREAU OF JUSTICE STATISTICS, NCJ 191745, IMMIGRATION OFFENDERS IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 2, Table 2 (2002), http://www.ojp.usdoj.gov/bjs/pub/pdf/iofcjs00.pdf (reporting that more than a quarter of all suspected alien smugglers in 2002 did not have United States citizenship).

alty on all alien smugglers, regardless of the precise nature of their offense.[316] Under the Colorado statute, every alien smuggler is punished with no less than four and no more than twelve years' imprisonment per alien smuggled.[317] Under the federal statute, however, a variety of factors influence how mildly or how severely an alien smuggler may be punished.[318] Those factors include whether the smuggler brought the alien into the country or merely carried the alien across the country, whether the smuggler endangered people's lives when carrying out the smuggling, and whether the smuggler has been convicted of alien smuggling in the past.[319] Depending on the existence or absence of these factors, a single conviction can result in a maximum prison sentence that ranges from a single year to an entire lifetime.[320]

The relative imprecision of the Colorado alien smuggling statute is particularly noteworthy when one considers the Court's conflict preemption analysis in *Pennsylvania v. Nelson*.[321] The *Nelson* Court reasoned that, because Pennsylvania's sedition statute allowed prosecution based on information from private individuals, whereas the federal statute did not, the state statute was conflict preempted based on its comparative inexactness and over-inclusiveness.[322] Similarly, Colorado's alien smuggling statute punishes all alien smugglers with the same harsh penalty, and thus should also be conflict preempted based on its inexactness and over-inclusiveness.

The Colorado statute may also contradict the express terms of the federal statute in a third way, namely by not explicitly exempting religious nonprofits from its definition of alien smugglers. The federal statute allows the agent of a religious nonprofit organization to transport an alien across the country so long as the alien will perform religious services for the organization.[323] Under the Colorado statute, however, such a religious nonprofit agent could be punished as an alien

316. COLO. REV. STAT. § 18-13-128(2) (2007).
317. *Id.* § 18-1.3-401(1)(a), 18-13-128(2)–(3).
318. *See supra* notes 183–187 and accompanying text.
319. *See supra* notes 183–187 and accompanying text.
320. *See* INA § 274(a)(1)(B), (a)(2), (a)(4), 8 U.S.C. § 1324(a)(1)(B), (a)(2), (a)(4) (2000 & Supp. V 2005).
321. 350 U.S. 497, 507–08 (1956).
322. *Id.*
323. INA § 274(a)(1)(C), 8 U.S.C. § 1324(a)(1)(C) (Supp. V 2005).

smuggler.[324] Thus, like in *Nelson*, this different "criteri[on] of substantive offenses" contributes to the conflict between the federal statute and the state statute.[325] Furthermore, this difference between the crimes frustrates the Congressional purpose, as recognized in *Hines*, of creating a "uniform national system" of alien regulation.[326]

This third possible statutory contradiction relates to another way in which the Colorado statute may pose an obstacle to a federal purpose: The Colorado statute impedes congressional flexibility in setting out the rules of the federal alien smuggling statute. Only recently did the federal government exempt religious nonprofits from the category of alien smugglers.[327] This highly specific exemption was just one of nine amendments which the statute has undergone in the past thirty years.[328] Thus, Congress now frequently amends the federal alien smuggling statute and sometimes amends that statute to address highly fact-specific scenarios. The Colorado statute, by defining alien smuggling broadly and imposing the same penalty against all such smuggling activity, therefore impedes Congress's ability to refine, tweak, and perfect the uniform alien smuggling laws.

The Colorado statute not only hampers the federal legislature's ability to amend the federal statute but also frustrates federal agencies' abilities to enforce the federal statute. Under the federal statute, a state officer is allowed to arrest a sus-

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324. *See* COLO. REV. STAT. § 18-13-128(1) (2007). There appears to be a saving construction of the Colorado statute, however, under which such a religious agent would not be punished as an alien smuggler. By reasoning that religious nonprofits do not operate for financial gain in the traditional sense, Colorado courts could determine that an agent of the religious nonprofit does not provide transport "in exchange for money or any other thing of value" as is required by the statute. *See id.*

325. Pennsylvania v. Nelson, 350 U.S. 497, 508–09 (1956).

326. Hines v. Davidowitz, 312 U.S. 52 (1941).

327. Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act of 2006, Pub. L. No. 109-97, § 796, 119 Stat. 2120, 2165 (2005) (codified at 8 U.S.C. § 1324(a)(1)(C) (Supp. V 2005)).

328. INA § 274, 8 U.S.C. § 1324 (2000 & Supp. V 2005) (amended by Pub. L. No. 95-582, § 2, 92 Stat. 2479 (Nov. 2, 1978); Pub. L. No. 97-116, § 12, 95 Stat. 1617 (Dec. 29, 1981); Pub. L. No. 99-603, § 112, 100 Stat. 3381 (Nov. 6, 1986); Pub. L. No. 100-525, § 2(d), 102 Stat. 2610 (Oct. 24, 1988); Pub. L. No. 103-322, § 60024, 108 Stat. 1981 (Sept. 13, 1994); Pub. L. No. 104-208, §§ 203(a)–(d), 219, 671(a)(1), 110 Stat. 3009-565, 3009-566, 3009-574, 3009-721 (Sept. 30, 1996); Pub. L. No. 106-185, § 18(a), 114 Stat. 222 (Apr. 25, 2000); Pub. L. No. 108-458, § 5401, 118 Stat. 3737 (Dec. 17, 2004); Pub. L. No. 109-97, § 796, 119 Stat. 2165 (Nov. 10, 2005)).

pected alien smuggler, but only a federal prosecutor can charge that suspect with the alien smuggling crime.[329] Under the federal statute, therefore, state officers collaborate with federal agencies in order to ensure that the federal alien smuggling law is effectively and efficiently enforced.[330] In this collaborative enforcement, state officers are most helpful when they focus their enforcement efforts on their own localities, leaving national enforcement to the federal agencies.[331]

The Colorado alien smuggling statute disturbs this balance between federal and state enforcement. Under the Colorado statute, a state police officer can imprison alien smugglers by teaming solely with local prosecutors, rather than by collaborating with federal agents. Even worse, because the Colorado statute has an expansive jurisdictional reach,[332] that statute allows state law enforcement to police conduct taking place outside of Colorado's borders. Thus, under the Colorado statute, state and federal law enforcers do not efficiently cooperate but instead inefficiently fight over a national role in policing alien smuggling.

This state infringement upon federal agency enforcement power is particularly egregious because national security is at stake. Federal agencies increasingly focus on investigating and prosecuting those alien smugglers who have ties to domestic terrorism.[333] As *Chy Lung*[334] and *Hines*[335] both recognized, the federal power over immigration-related matters has its greatest preemptive force when national security is at risk.[336] Thus, because the Colorado statute gives the state the power to frustrate the national security goals of the federal agencies, there is an even stronger basis for preempting the Colorado alien smuggling statute.

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329. 8 U.S.C. § 1324(c) (the alien smuggling statute can be enforced by "all . . . officers whose duty it is to enforce criminal laws"); 28 U.S.C. § 547 (2000) (federal crimes to be prosecuted by United States attorneys); *see also supra* notes 188–90 and accompanying text.

330. *See supra* notes 201–06 and accompanying text.

331. *See supra* notes 205–06 and accompanying text.

332. *See supra* notes 220–22 and accompanying text. The Colorado alien smuggling statute's expansive reach is evident not only from that statute's facial text but also from its legislative history. *See supra* notes 216–19 and accompanying text.

333. *See supra* notes 194–200 and accompanying text.

334. Chy Lung v. Freeman, 92 U.S. 275, 279–80 (1876).

335. Hines v. Davidowitz, 312 U.S. 52, 63–64 (1941).

336. *See supra* notes 79–83, 97–99 and accompanying text.

In response to all these arguments in favor of conflict preemption, one could make the counterargument that Colorado's alien smuggling statute furthers, rather than impedes, the legislative purpose of the federal alien smuggling statute. That is, if Congress's only goal in passing INA section 274 was to curb alien smuggling at any cost, then state-level alien smuggling statutes could help further that congressional purpose. Under this conception of Congress's purpose, one could agree with the Arizona trial court's conclusion in *Salazar* that "concurrent state and federal enforcement [and legislation] of illegal alien smuggling . . . enhances rather than impairs federal enforcement objectives."[337]

This counterargument should fail, however, because it rests upon too narrow a conception of the purpose behind the federal alien smuggling statute. When Congress creates legislation affecting undocumented aliens or illegal immigration, Congress must balance a number of competing interests.[338] A state statute that legislates illegal aliens in the same way as a federal statute can upset this calculated balance.

The *Lozano* court used similar reasoning when holding that Hazleton's alien employment ordinance was conflict preempted by federal immigration law.[339] The *Lozano* court noted that the federal legislature and federal administrative agencies "must strike a balance between finding and removing undocumented immigrants without accidentally removing immigrants and legal citizens, all without imposing too much of a burden on [others]."[340] The court then concluded that, because the state and federal illegal alien employment statutes "strike a different balance between [these competing interests]," the state statute was conflict preempted.[341]

Thus, Colorado's alien smuggling statute should be conflict preempted because it disrupts the balance set by the federal alien smuggling statute, frustrating numerous federal goals.

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337. Arizona v. Salazar, No. CR 2006-005932-003 DT, slip op. at 9 (Ariz. Super. Ct. June 9, 2006).

338. *See, e.g.*, Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 527–528 (M.D. Pa. 2007) (discussing the competing interests balanced in federal alien employment law); *cf.* De Canas v. Bica, 424 U.S. 351, 359 (1976) ("[C]omprehensiveness of legislation governing entry and stay of aliens [is] to be expected in light of the nature and complexity of the subject.").

339. *Lozano*, 496 F. Supp. 2d at 527–528.

340. *Id.*

341. *Id.* at 527.

The Colorado alien smuggling statute frustrates federal goals that are explicit in the facial language of the federal alien smuggling statute, such as punishing alien smugglers fairly and in proportion to the severity of their crimes. It frustrates a federal goal which is clear from the legislative history of the federal alien smuggling statute, namely the goal of adapting the uniform alien smuggling law over time as circumstances and knowledge changes. Finally, it hinders a federal goal which is clear from the manner in which the federal statute has been enforced, namely the goal of harnessing the federal alien smuggling statute in order to combat domestic terrorism. Because the Colorado statute stands as an obstacle to all three of these federal goals, the Colorado statute should be preempted under the third *De Canas* prong.

CONCLUSION

When the Colorado legislature passed its state alien smuggling law, the Colorado legislature went too far. Like the Colorado legislator who ventured from the calm of the state capitol into the chaos of that March 2006 blizzard, the State of Colorado has unconstitutionally stepped out of its core role as a state and stepped into the chaos of a federal issue. That issue—alien smuggling—is not one which concerns a single state but is instead one which concerns all of the states. The federal government, which speaks not for any one state individually but for the union as a whole, has already passed comprehensive federal legislation on alien smuggling. Accordingly, under the Supremacy Clause of the Constitution, Colorado's alien smuggling law should be preempted by existing federal law.