DILLON'S RULE: A CHECK ON SHERIFFS' AUTHORITY TO ENTER 287(g) AGREEMENTS

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Authority to enforce federal immigration policy in the United States is a power traditionally left exclusively to federal government agents. However, § 287(g) of the Immigration and Nationality Act provides a legal framework for state and local law enforcement to carry out federal immigration policy by entering a written agreement with the federal government. These partnerships, widely known as "287(g) agreements," are currently in place in seventy-eight jurisdictions nationwide, of which seventy-one are between a local sheriff's office and the Department of Homeland Security.

This Comment argues that Dillon's Rule, a doctrine which limits the authority of cities, towns, and other localities to act unilaterally without authorization from the state legislature, creates a barrier to the enforcement of the 287(g) agreements currently in place between sheriffs' offices and the federal government. Specifically, Dillon's Rule precludes sheriffs from entering 287(g) agreements without authorization from the state legislature, rendering these agreements invalid in most cases. Accordingly, when an individual is detained or otherwise deprived of liberty or due process under an invalid 287(g) agreement, constitutional protections should apply.

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TABLE OF CONTENTS

Introduction 1055
I. Background 1056
A. U.S. Immigration in the Context of § 287(g) 1056
B. A Brief History of Dillon's Rule and Home Rule .. 1060
II. Section 287(g), Dillon's Rule, and Common Duties of the Sheriff 1064
A. Contract Law and 287(g) Agreements 1064
1. Agency law 1064
2. Agency law applied to government entities 1065
B. Section 287(g) in Practice 1066
1. A standard 287(g) agreement 1067
2. Local law enforcement authority under § 287(g) 1067
C. Dillon's Rule 1069
1. Express authority 1069
2. Implied authority 1070
3. Essential authority 1071
4. Distinguishing between implied and essential authority 1072
D. Home Rule 1073
1. *Imperio* Home Rule constructions 1073
2. Express preemption Home Rule constructions 1074
3. Home Rule charters 1076
E. Sheriffs and Local Contracting Authority 1077
1. The office of the sheriff 1078
2. Contracting authority at the local level 1079
F. Federal Preemption 1080
III. Application of Dillon's Rule to Sheriffs' Ability to Enter 287(g) Agreements 1081
A. 287(g) Agreements are Contracts 1081
B. The Extent of Sheriffs' Authority to Enter 287(g) Agreements in a Dillon's Rule State 1081
1. Express authority for a sheriff to enter a 287(g) agreement 1082
2. Implied authority for a sheriff to enter a 287(g) agreement 1083
3. Essential authority for a sheriff to enter a 287(g) agreement 1085
C. Reconciling Dillon's Rule and Home Rule 1087
1. Intrastate preemption analysis: *Imperio*

Home Rule constructions 1088
2. Intrastate preemption analysis: Express preemption Home Rule constructions 1089
D. Sheriffs' Agency to Enter 287(g) Agreements 1090
E. Sheriffs' Lack of Legal Privilege to Detain Individuals Under Invalid 287(g) Agreements 1092
F. Federal Preemption in the Context of § 287(g) and Dillon's Rule 1092
Conclusion 1094

INTRODUCTION

When the Founding Fathers designed our government, it is unlikely they could have anticipated the strain today's immigration enforcement puts on our federalist system. The intersection between law enforcement and the justice sector across state and federal levels involves many different individuals and entities in immigration enforcement, creating tension and confusion when it comes to the delegation of authority and separation of powers. This tension can be illustrated by an issue that courts have yet to consider: the extent of a sheriff's authority to unilaterally enter into a 287(g) agreement with the U.S. Department of Homeland Security Immigration and Customs Enforcement (ICE) in states where Dillon's Rule[1] applies and sheriffs are not authorized by state law to enter into agreements with the federal government.

287(g) agreements are contractual partnerships between ICE and state-level law enforcement. These agreements derive from § 287(g) of the Immigration and Nationality Act (INA),[2] which grants the U.S. Attorney General authority to delegate federal immigration enforcement power to local law enforcement agencies (LEAs) through the execution of a written memorandum of agreement (MOA).[3] The collaboration necessary for the successful implementation of a 287(g) agreement epitomizes the legal complexity that can arise from intergovernmental cooperation in immigration enforcement, and Dillon's Rule adds to this already complex topic by limiting local law enforcement authority in some jurisdictions.

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1. *See infra* Section II.C.

2. Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101–1537 (2012)). This Comment will refer to the statutory provision enabling these agreements as "§ 287(g)," and will refer to the agreements themselves as "287(g) agreements" or "287(g) MOAs."

3. *See* 8 U.S.C. § 1357(g) (codifying § 287(g) of the INA). For more detail on § 287(g) and § 287(g) MOAs, see *infra* Section II.B.1.

This Comment argues that, in most cases, sheriffs are precluded from entering into 287(g) agreements in states where Dillon's Rule applies. Furthermore, the limitation that Dillon's Rule creates in this context invalidates existing 287(g) agreements signed unilaterally by sheriffs, and constitutional protections should apply where individuals are detained under these invalid MOAs. Part I provides general background on U.S. immigration in the context of § 287(g), a brief history of the development of Dillon's Rule, and sets the foundation for an analysis of sheriffs' authority to enter 287(g) agreements.[4] Part II explains how 287(g) agreements function in practice and discusses how Dillon's Rule can be applied. Part II also addresses pertinent ancillary issues, such as common responsibilities of sheriffs and contract law issues that impact the enforceability of a 287(g) agreement.[5] Part III then applies Dillon's Rule to a sheriff's authority to enter a 287(g) agreement, taking into consideration counterarguments and peripheral issues that could affect a Dillon analysis in this context.[6]

I. BACKGROUND

A. U.S. Immigration in the Context of § 287(g)

George Washington once wrote in a private letter that "[he] had always hoped, that this land might become a safe and agreeable asylum to the virtuous and persecuted part of mankind, to whatever nation they might belong."[7] Despite the first President's aspirations for the country, immigration has proven to be a historically contentious topic in the United States, which is amplified when the immigration rate rises.[8] The 1990s, for example, saw a particularly acute spike in immigration rates,[9]

4. *See infra* Part I.

5. *See infra* Part II.

6. *See infra* Part III.

7. Letter from George Washington to Francis Adrian Van der Kemp, 28 May 1788, FOUNDERS ONLINE, https://founders.archives.gov/documents/Washington/04-06-02-0266 (last visited Feb. 5, 2019).

8. *See* Becky Little, *The Birth of 'Illegal' Immigration*, HISTORY.COM (Sep. 7, 2017), https://www.history.com/news/the-birth-of-illegal-immigration (noting the anti-immigrant rhetoric of the mid-19th century and describing immigration waves from countries such as Ireland, China, Italy, and Mexico).

9. *See* Jeffrey S. Passel & Roberto Suro, *Rise, Peak and Decline: Trends in U.S. Immigration 1992–2004*, PEW RES. CTR.: PEW HISPANIC CTR. (2005), http://www.pewresearch.org/wp-content/uploads/sites/5/reports/53.pdf (providing statistical trends in immigration to the United States).

compelling Congress to amend § 287 of the INA in an attempt to strengthen immigration enforcement by expanding ICE's powers.[10]

Among other things, the 1996 expansion of § 287 allows ICE to collaborate with state-level LEAs to enforce federal immigration policy. In relevant part, § 287(g)(1) provides that

> the Attorney General may enter into a written agreement with a State, or any political subdivision of a State . . . to perform a function of an immigration officer . . . [and] may carry out such function at the expense of the State or political subdivision and to the extent consistent with State and local law.[11]

Despite this expansion of § 287, immigration rates continued to rise at a record-setting pace into the 2000s, hitting unprecedented highs in 2014.[12] To accommodate this immigration influx, the U.S. immigration system has evolved to include an array of enforcement mechanisms

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10. *See* Pub. L. No. 104-208, § 133, 110 Stat. 3009, 3009-563 (codified at 8 U.S.C. § 1357(g) (2012)) (adding subsection (g) to § 287 of the INA). For the sake of simplicity, this Comment will use "§ 287" when referencing the text of this statute.

11. 8 U.S.C. § 1357(g). Section 287(g) includes ten subsections. Subsection 2, for example, requires participating local law enforcement officers to comply with federal law. *See* § 1357(g)(2). Subsection 3 places participating local law enforcement officers under the U.S. Attorney General's supervision. *See* § 1357(g)(3). Subsection 5 stipulates that the specific powers of "each officer or employee of a state or political subdivision who is authorized to perform a function . . . ," under § 287(g) must be laid out in a written MOA. § 1357(g)(5). Subsection 9 clarifies that local entities cannot be required to enter a 287(g) agreement. *See* § 1357(g)(9). Finally, subsection 10 acknowledges that a written agreement is not required for local law enforcement to communicate or cooperate with federal immigration authorities. *See* § 1357(g)(10).

12. *See, e.g.*, Steven A. Camarota, *A Record-Setting Decade of Immigration: 2000–2010*, CTR. IMMIGR. STUD. (Oct. 5, 2011), https://cis.org/Report/RecordSetting-Decade-Immigration-20002010 (summarizing data from the Census Bureau showing that almost 14 million immigrants entered the U.S. between 2000 and 2010); MARC R. ROSENBLUM, UNACCOMPANIED CHILD MIGRATION TO THE UNITED STATES THE TENSION BETWEEN PROTECTION AND PREVENTION 1–2 (2015), https://www.migrationpolicy.org/sites/default/files/publications/TCM-Protection-UAC.pdf (describing the surge of Central American women and children entering the United States in 2014). The sudden spike in 2014 is widely attributed to instability in Guatemala, Honduras, and El Salvador, known collectively as the "northern triangle." *See* Steven A. Camarota, *New Data: Immigration Surged in 2014 and 2015*, CTR. IMMIGR. STUD. (Jun. 1, 2016), https://cis.org/Report/New-Data-Immigration-Surged-2014-and-2015 (noting a 39 percent increase in immigration rates between 2014 and 2015 from the previous two years, primarily from Central Americans). Rampant violence and poverty in those countries, coupled with the desire to reunite with family members, spurred the immigration increase of recent years, and these root causes continue to motivate Central Americans to risk the journey to the United States. ROSENBLUM, *supra* note 12, at 10–15.

policing the border.[13] For example, recent years have seen the proliferation of intergovernmental service agreements, which are similar to 287(g) agreements except that they allow ICE to pay directly for the cost of detaining undocumented immigrants in local facilities.[14] Local and state governments have also taken action on their own to fill the vacuum where Congress has failed to pass effective immigration enforcement policy, creating yet another layer of legal and political complications for immigrants and legal practitioners to consider.[15]

It is against this backdrop that § 287(g) becomes relevant to the immigration debate today. In 2002, Florida became the first state to enter a 287(g) agreement, largely motivated by lingering security concerns stemming from the September 11, 2001 terrorist attacks.[16] Following Florida's example, 287(g) agreements quickly became a widespread mechanism for federal immigration enforcement, peaking in use during the mid-2000s and tapering off in popularity as President Obama ended his second term.[17] By 2016, the number of 287(g) agreements nationwide had been reduced from seventy in 2010 to just

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13. *See* ROSENBLUM, *supra* note 12, at 6–11 (outlining the immigration enforcement process from intake to removal for undocumented migrants arriving in the U.S.). *See generally* U.S. CUSTOMS & BORDER PROTECTION, 2012–2016 BORDER PATROL STRATEGIC PLAN (2014), https://www.cbp.gov/sites/default/files/documents/bp_strategic_plan.pdf (describing the goals, objections, strategies, programs, and initiatives the Border Patrol has developed and adopted to protect the border).

14. *See* Rachel Frazin, *ICE Lets Sheriffs Arrest Immigrants, then Pays to Keep them Locked up*, DAILY BEAST (Sep. 6, 2018, 4:54 AM), https://www.thedailybeast.com/ice-lets-sheriffs-arrest-immigrants-then-pays-to-keep-them-locked-up (describing an intergovernmental service agreement between ICE and the Tulsa, Oklahoma, sheriff's department).

15. *See generally* Kristina M. Campbell, *Imagining a More Humane Immigration Policy in the Age of Obama: The Use of Plenary Power to Halt the State Balkanization of Immigration Regulation*, 29 ST. LOUIS. U. PUB. L. REV. 415, 417–34 (2010) (examining a series of state and local laws attempting to regulate undocumented immigrants, ranging from housing and employment regulations to full out bans prohibiting undocumented immigrants from living or working in certain cities). The extent of state authority to enforce immigration policy at the local level is not an entirely settled question, other than to say that state law cannot conflict with federal immigration policy. *Id.* at 434; *see also infra* Sections II.F, III.F (providing a discussion of preemption in the context of § 287(g)).

16. Carrie L. Arnold, Note, *Racial Profiling in Immigration Enforcement: State and Local Agreements to Enforce Federal Immigration Law*, 49 ARIZ. L. REV. 113, 124–25 (2007).

17. Kanyakrit Vongkiatkajorn, *How the Trump Administration Is Using Local Cops to Widen Its Immigration Dragnet*, MOTHER JONES (Dec. 4, 2017, 6:00 AM), https://www.motherjones.com/politics/2017/12/how-the-trump-administration-is-using-local-cops-to-widen-its-immigration-dragnet (outlining statistical trends associated with the 287(g) program between 2006 and 2016 such as number of arrests and allocation of funding).

thirty-two.[18] However, the transition to the Trump administration has seen a resurgence of the 287(g) program, and 287(g) agreements are now in effect with seventy-eight law enforcement entities across twenty states.[19]

Reactions to § 287(g) have been mixed, and courts have recently had to consider a range of cases related to the 287(g) program.[20] The law has drawn criticism from immigration rights advocates,[21] while at the same time it has been lauded by those in favor of strict immigration enforcement.[22] The controversy surrounding the statute and the

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18. *Id.*

19. *See Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, https://www.ice.gov/287g (last updated Aug. 10, 2018) [hereinafter *ICE Section 287(g)*] (providing a list of all 287(g) agreements nationwide); Mica Rosenberg & Reade Levinson, *Police in Trump-Supporting Towns Aid Immigration Officials in Crackdown*, REUTERS (Nov. 27, 2017, 6:16 AM), https://www.reuters.com/article/us-trump-effect-immigration-police/police-in-trum p-supporting-towns-aid-immigration-officials-in-crackdown-idUSKBN1DR169 (describing how the number of jurisdictions participating in the 287(g) program doubled within the first ten months of the Trump Administration); *see also* Enhancing Public Safety in the Interior of the United States, Exec. Order No. 13,768, 82 Fed. Reg. 8,799 (Jan. 25, 2017) (instructing the Secretary of Homeland Security to "immediately take appropriate action to engage with Governors of the States, as well as local officials," to enter into 287(g) agreements).

20. *See infra* Section II.B.2 (discussing several cases considering the extent of state-level law enforcement authority to carry out federal immigration policy, including Santos v. Frederick Cty Bd. Of Comm'rs, 725 F.3d 451 (4th Cir. 2013), and Ochoa v. Campbell, 266 F. Supp. 3d 1237 (E.D. Wash 2017)).

21. *See, e.g.*, Letter to Secretary Napolitano and Director Morton: End the 287(g) Immigration Enforcement Program (Dec. 11, 2012), https://www.aclu.org/other/ letter-secretary-napolitano-and-director-morton-end-287g-immigration-enforcement-program (signed by 162 non-governmental organizations opposing the 287(g) program). Section 287(g) has drawn criticism for enabling racial profiling in particular, as well as for legalizing arguably unconstitutional policing practices. *See* Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563, 1616–17 (2010); *see also* Arnold, *supra* note 16, at 139–42 (2007) (concluding that the training provided by ICE for LEAs under the 287(g) program does not sufficiently mitigate racial profiling).

22. *See, e.g.*, *Examining 287(g): The Role of State and Local Law Enforcement in Immigration Law: Hearing Before the H. Comm. on Homeland Security*, 111th Cong. 5–6 (2009) (statement of Rep. Smith) ("Those who are serious about public safety should not only support the [287(g)] program, but also call for its expansion."); U.S. Sen. Jeff Sessions & Cynthia Hayden, *The Growing Role for State & Local Law Enforcement in the Realm of Immigration Law*, 16 STAN. L. & POL'Y REV. 323, 346 (2005) (illustrating then Senator Sessions's support for the 287(g) program); *see also* Emily Wood, *Sheriff Jones: 'If You Commit Crime . . . You Should be Deported*,' WLWT5 NEWS (Feb. 7, 2017, 11:38 PM), http://www.wlwt.com/article/sheriff-jones-if-you-commit-crimeyou-should-be-deport ed/8690722 (providing the perspective of a local sheriff supporting the 287(g) program for the autonomy it gives localities to enforce laws they feel are important). Other provisions of § 287 are also controversial. For example, § 287(d) has been

renewed proliferation of 287(g) agreements calls for greater clarity surrounding a grey area in the law: the extent of local government authority to unilaterally participate in the 287(g) program.

B. A Brief History of Dillon's Rule and Home Rule

Arising during the urban boom of the mid-1800s, Dillon's Rule is a common principle of law that aids courts in determining the extent of local government authority.[23] Specifically, Dillon's Rule provides that only the state government has the authority to empower local government officials, and local governments cannot act outside the scope of the authority granted by the state legislature.[24]

Dillon's Rule was first established by the Iowa Supreme Court in *Clinton v. Cedar Rapids & Missouri River Railroad Co.*,[25] a decision which limited local government authority and addressed systemic problems facing the contemporary American municipal system.[26] In *Clinton*, the

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criticized for enabling the federal government to issue immigration detainers. Christopher N. Lasch, *Federal Immigration Detainers After* Arizona v. United States, 46 LOY. L.A. L. REV. 629, 690–94 (2013) (discussing some of the legal obstacles posed by § 287(d)). Section 287(g)(10) has also generated controversy as a nebulous component of the statute arguably allowing local law enforcement to circumvent subsection (1), which requires a written MOA. *Compare* City of El Cenizo v. Texas, 264 F. Supp. 3d 744, 771–75 (W.D. Tex. 2017) (rejecting Texas's argument that § 287(g)(10) provided a way for LEAs to routinely enforce immigration law without a written MOA), *with* City of El Cenizo v. Texas, 890 F.3d 164, 177 (5th Cir. 2018) (finding that § 287(g)(10) "expressly allows cooperation in immigration enforcement outside" written MOAs).

23. *See* SANDRA M. STEVENSON, ANTIEAU ON LOCAL GOVERNMENT LAW § 21.01 (Matthew Bender & Co. ed, 2d ed. 2009) (explaining how Dillon's Rule limits local government authority); Diane Lang, *Dillon's Rule . . . and the Birth of Home Rule*, N.M. MUN. LEAGUE (Dec. 1991), https://nmml.org/wp-content/uploads/dillon.pdf (summarizing the historical circumstances that preceded Dillion's Rule).

24. STEVENSON, *supra* note 23, § 21.01.

25. 24 Iowa 455 (1868).

26. *See* A.E.S., Note, *Dillon's Rule: The Case for Reform*, 68 VA. L. REV. 693, 694 (1982) (according to Justice Dillon, the authority vested in local government "ought to be more carefully defined and limited, and should embrace such objects only as are necessary for the health, welfare, safety, and convenience of the inhabitants" (quoting J. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 237 (5th ed. 1911))). By the 1800s, widespread corruption had taken over much of the American municipal system, and American cities had become a "conspicuous failure of the United States." Jon D. Russell & Aaron Bostrom, *Federalism, Dillon Rule and Home Rule* 4 (2016), https://www.alec.org/app/uploads/2016/01/2016-ACCE-White-Paper-Dillon-House-Rule-Final.pdf (quoting a British Lord's critique of the American municipal system). Justice Dillon himself was a known critic of the American municipal system, with one commentator noting that Justice Dillon embodied a

Iowa Supreme Court ruled that the power of local government is derived entirely from the state legislature.[27] Writing for the majority, Justice Dillon explained his rationale for what has become known as Dillon's Rule: "Municipal corporations owe their origin to, and derive their powers and rights wholly from, the legislature. It breathes into them the breath of life, without which they cannot exist."[28]

Since *Clinton*, Dillon's Rule has been approved by the United States Supreme Court in multiple decisions. In *Merrill v. Town of Monticello*,[29] for example, the Court held that an Indiana town was precluded from issuing bonds for sale in the open market because the town did not have express or implied authorization from the state legislature to sell bonds.[30] About fifteen years later, the Court further reinforced Dillon's Rule in *Hunter v. City of Pittsburgh*,[31] where Justice Moody stated the Court's position emphatically: "Municipal corporations are . . . created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted [sic] to them . . . . [T]he state is supreme, and its legislative body . . . may do as it will."[32] Since these seminal cases, Dillon's Rule has become established jurisprudence throughout the country, and the doctrine is recognized by a majority of the states.[33]

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common view of local government during the 19th century through his skepticism of the ability of localities to effectively govern themselves. *Id.*

27. *Id.* at 475.

28. *Id.* A municipal corporation is a "city, town, or other local political entity formed by charter from the state and having the autonomous authority to administer the state's local affair . . . [a]lso termed *municipality*." *Municipal Corporation*, BLACK'S LAW DICTIONARY (10th ed. 2014).

29. 138 U.S. 673 (1891).

30. *Id.* at 686–88, 691–93. The Court in *Town of Monticello* even went as far as to quote directly from Justice Dillon's treatise on municipal corporations, explicitly ingraining Dillon's Rule in Supreme Court precedent. *See id.* at 681.

31. 207 U.S. 161 (1907).

32. *Id.* at 178–79.

33. *See* Russell & Bostrom, *supra* note 26, at 8 (stating that "[t]hirty-one states apply the Dillon Rule or a combination of Dillon's Rule and Home Rule to local jurisdictions"). Dillon's Rule has been invoked in recent years in the context of issues creating tension between local and state government such as the removal of confederate monuments, fracking, and marijuana regulation. *See* April McCullum, *Vermont Towns Have Limited Options to Regulate Marijuana, for Now*, BURLINGTON FREE PRESS (Jul. 11, 2018, 8:06 AM), https://www.burlingtonfreepress.com/story/news/politics/government/2018/07/11/vermont-marijuana-towns-and-cities-have-limited-options/761412002 (stating that "Vermont towns have no authority [to regulate marijuana] that is not explicitly granted by the Legislature"); Daniel C. Vock, *The End of Local Laws? War on Cities Intensifies in Texas*, GOVERNING (Apr. 5, 2017), http://www.governing.com/topics/politics/gov-

Dillon's Rule was not without its opponents in the U.S. legal context when it was first created, and there are commentators who still criticize the doctrine today.[34] Shortly after the establishment of Dillon's Rule, certain states adopted what became known as "Home Rule" to counter the limitation of Dillon's Rule.[35] Unlike Dillon's Rule, Home Rule explicitly confers authority from the state legislature to local governments to determine and enforce their own powers without interference from the state government.[36] The first Home Rule law, set forth by Missouri as an amendment to the state constitution in 1875, provided that any Missouri city exceeding 100,000 in population could "frame a charter for its own government, consistent with and subject to the Constitution and the laws of the State."[37] The United States Supreme Court affirmed the legitimacy of Home Rule in *City of St. Louis v. Western Union Telephone Co.*,[38] interpreting the original Home Rule law to allow the city of St. Louis authority to regulate its own streets.[39] In denying a subsequent petition for rehearing, the Court explained that the city derived its power from its charter pursuant to the Missouri 1875

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texas-abbott-preemption.html (describing a proposal by Texas Governor Greg Abbott to strip 352 Home Rule cities in Texas of their ability to enact regulations that do not conflict with state law and treat them as general-rule cities, permitting local regulations in areas specifically permitted by the state); Rich Schragger, *Is Charlottesville's Robert E. Lee Statue Illegal?*, RICHMOND TIMES-DISPATCH (Aug. 30, 2017), https://www.richmond.com/opinion/their-opinion/guest-columnists/rich-schragger-column-is-charlottesville-s-robert-e-lee-statue/article_888d6495-6176-5cea-9278-71018d2 93f2a.html (reporting on the authority of Charlottesville to remove a statue of confederate general, Robert E. Lee, under Virginia law, which still adheres to the Dillon's Rule).

34. A.E.S, *supra* note 26, at 702 (arguing that Dillon's Rule, in its current form, "fails to bring local government under state control, but succeeds in hampering its effective administration"); Peter F. Nascenzi, Note, FTC v. Phoebe Putney *and Municipalities as Nongovernments*, 110 NW. U. L. REV. 363, 383–84 (2016).

35. *See* David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2294 (2003) ("[T]he home rule movement overcame the shackles that Dillon's Rule placed on local government initiative.").

36. STEVENSON, *supra* note 23, § 21.01. In the late nineteenth century, the early Home Rule supporters coined the term "home rule" to convey a sentiment of local autonomy. *See* Barron, *supra* note 35, at 2279–80. Compared to the critics of the American municipal system who supported the creation of Dillon's Rule, the early Home Rule proponents believed in the independence of strong local government. *See id.* at 2292–94.

37. MO. CONST. art. IX, § 16 (1875); *see also* Russell & Bostrom, *supra* note 26, at 6 (noting that most states apply Home Rule only to certain municipalities, often based on population size). In the Home Rule context, a charter is a document formalizing the establishment of a local political body and defining the way a locality will govern itself. *Charter*, BLACK'S LAW DICTIONARY (10th ed. 2014).

38. 148 U.S. 92 (1983).

39. *Id.* at 103–04.

Home Rule law.[40] By enabling certain localities to craft a charter defining the scope of their own authority,[41] the original Home Rule statute strengthened the autonomy of city governments in Missouri, setting an example for other states to follow.[42]

Whereas Dillon's Rule limits local government authority by reinforcing state legislatures' oversight, Home Rule empowers localities to exercise their independence by determining their own laws.[43] In her treatise on local government law, professor Sandra M. Stevenson provides a helpful illustration of the contrast between Dillon's Rule and Home Rule as existing along a spectrum.[44] At one end of the spectrum, local governments have limited autonomy and are prohibited from taking action without "express[] and unambiguous[]" authorization from the state legislature or constitution.[45] At the other end of the spectrum, local governments have substantial autonomy with full authority to take any action the state legislature would otherwise be able to do "that has not been explicitly forbidden by state law."[46] This balance between Dillon's Rule and Home Rule creates a natural tension between state and local governments inherent to our system of federalism, and when the doctrines conflict, each state has its own method of determining which rule governs.[47] However, the United States is generally considered to lean towards the limited autonomy end of the spectrum because of the limiting force that Dillon's Rule provides.[48]

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40. *See* City of St. Louis v. Western Union Tel. Co., 149 U.S. 465, 467–68 (1893) ("As the legislative power of a state is vested in the legislature, generally that body has the supreme control, and it delegates to municipal corporations such measure thereof as it deems best.").

41. A charter is not the only method states use to implement Home Rule. For more on charters, see *infra* Section II.D.3. Some states have Home Rule constructions allowing localities to simply make their own laws without requiring the adoption of a charter. *Id.*

42. *See infra* Section II.D (discussing Home Rule constructions in a range of states).

43. *See* Barron, *supra* note 35, at 2259–61 (discussing how Home Rule allows local government with greater independence).

44. STEVENSON, *supra* note 23, § 21.01.

45. *Id.*

46. *Id.*

47. For a discussion of how Dillon's Rule and Home Rule conflict in the context of § 287(g), see *infra* Sections III.B, III.C.

48. STEVENSON, *supra* note 23, § 21.01.

II. SECTION 287(g), DILLON'S RULE, AND COMMON DUTIES OF THE SHERIFF

A. Contract Law and 287(g) Agreements

A 287(g) MOA is a type of contract, and thus governed by contract law principles. In fact, the Supreme Court has applied contract law principles to MOAs dating as far back as 1809. In *Violett v. Patton*,[49] the Court considered whether the contemporary Virginia statute of frauds applied to the endorsement of a promissory note, holding that the "memorandum of agreement" was not in writing, and the statute of frauds thus did not apply.[50] Similarly, lower courts have more recently applied contract law principles to MOAs. For example, in *APMD Holdings, Inc. v. Praesidium Medical Professional Liability Insurance Co.*,[51] two parties entered a MOA to combine resources for the creation of a joint business venture.[52] The MOA included terms defining how the parties would collaborate, the distribution of company stock, and the governing structure of the corporation the parties sought to create.[53] The Texas Court of Appeals held that the MOA constituted "a binding and enforceable contract" because it set forth consideration owed by both parties and the terms were clear and definite.[54]

1. Agency law

Agency law dictates that a contract between entities is only valid and enforceable when all signatories to the agreement are authorized to bind their respective entities in contract.[55] In this context, a dispute

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49. 9 U.S. (5 Cranch) 142 (1809).

50. *Id.* at 149–51, 154.

51. 555 S.W.3d 697 (Tex. App. 2018).

52. *Id.* at 701–02.

53. *Id.* at 702–03, 708–09.

54. *Id.* at 711. The holding in *Praesidium Medical* is consistent with other court decisions insofar as it applies contract law to MOAs. *See, e.g.*, Kim v. Baik, No. 2014-SCC-0014-CIV, 2016 WL 3034068, at *5 (N. Mar. I. May 27, 2016) (determining a MOA to be a "final written contract" constituting a binding lease for property); Strategic Staff Mgmt., Inc. v. Roseland, 619 N.W.2d 230, 234 (Neb. 2000) (finding a MOA to settle a case "subject to the general principles of contract law" (citing Woodmen of the World Life Ins. Soc'y v. Kight, 522 N.W.2d 155 (Neb. 1994)); Canal Ins. Co. v. Liberty Mut. Ins., 395 F. Supp. 962, 974 (N.D. Ga. 1975) (concluding that a MOA constituted a binding service contract between two parties).

55. RESTATEMENT (THIRD) OF AGENCY, § 1.01 (AM. L. INST. 2006) (defining "agency" as the "fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act").

can occur, for example, when an employee signs a contract with a third party on behalf of his employer without the employer granting authority to the employee to enter binding contracts.[56]

The Third Restatement of Agency recognizes two primary types of authority: "actual authority" and "apparent authority."[57] Actual authority is created when the principal—a person or entity entering a contract—overtly manifests to the agent an intention for the agent to have the authority to act on the principal's behalf.[58] To determine the extent of an agent's authority, courts examine whether the principal has made explicit or implicit manifestations towards the agent that cause the agent to reasonably believe that he has authority to act on behalf of the principal.[59] In contrast, apparent authority is created when the principal overtly manifests to a third party that the agent is acting on the principal's behalf.[60] For an agent to have apparent authority, the principal must make direct or indirect manifestations towards a third party, causing the third party to actually and reasonably believe that the agent has authority to bind the principal.[61]

2. Agency law applied to government entities

Agency law is applicable to government entities, as it is to private corporations.[62] In *Federal Crop Insurance Corp. v. Merrill*,[63] the Supreme Court explained that express authorization is required from Congress for a government agent to bind the government in contract, regardless of whether the agent has actual knowledge of the extent of his

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56. *See* Alan I. Saltman, *The Government's Liability for Actions of its Agents that are Not Specifically Authorized: The Continuing Influence of* Merrill *and* Richmond, 32 PUB. CONT. L.J. 775, 778 (2003) (noting that contractual conflicts arise when an unauthorized agent enters a contract on behalf of its principal); Yedia Z. Stern, *Corporate Liability for Unauthorized Contracts—Unification of the Rules of Corporate Representation*, 9 U. PENN. J. INT'L BUS. L. 649, 650 (1987) (acknowledging that when the representative of an organization exceeds his authority in entering a contract, an "unauthorized contract . . . results").

57. RESTATEMENT (THIRD) OF AGENCY §§ 2.01, 2.03.

58. §§ 2.01–2.02.

59. *See* Kirkpatrick v. Boston Mut. Life Ins. Co., 473 N.E.2d 173, 176–77 (Mass. 1985); A. Gay Jenson Farms Co. v. Cargill, Inc., 309 N.W. 2d 285 (Minn. 1981); *see also* Chad P. Wade, Note, *The Double Doctrine Agent: Streamlining the Restatement (Third) of Agency by Eliminating the Apparent Agency Doctrine*, 42 VAL. U. L. REV. 341, 352–55 (2007) (reviewing actual authority as laid out by the RESTATEMENT (THIRD) OF AGENCY).

60. RESTATEMENT (THIRD) OF AGENCY § 2.03.

61. *See* Wade, *supra* note 59, at 355–58.

62. *See* Saltman, *supra* note 56, at 776–77 (highlighting that agency theory applies to government agencies).

63. 332 U.S. 380 (1947).

authority.[64] In *Merrill*, Idaho farmers purchased insurance from an agent of a federally-owned insurance corporation who sold the insurance even though a federal regulation precluded the farmers from being able to collect insurance when their crops were destroyed.[65] The Court decided that the farmers could not collect insurance payments, holding that the agent did not have authority to bind the federal government in contract regardless of the agent's lack of actual knowledge of the existence of the conflicting regulation.[66]

Later, in *Office of Personnel Management v. Richmond*,[67] the Court reaffirmed its position that government employees cannot bind the federal government where they are not authorized to do so.[68] The *Richmond* Court held that a government employee's mistake in providing information regarding a disability benefits application did not bind the government to cover the cost of the plaintiff's relief because federal statute precluded the specific type of benefit the plaintiff was initially seeking.[69] Thus, "the Government could not be bound by the mistaken representations of an agent unless it were clear that the representations were within the scope of the agent's authority."[70] Cases like *Merrill* and *Richmond* are consistent in defining the agency of a government representative even more narrowly than in cases of private corporations.[71]

B. Section 287(g) in Practice

As explained in Part I, 287(g) agreements endow LEAs with the authority to carry out certain functions of federal immigration enforcement. Over the years, ICE has used two different types of 287(g) MOAs: the "Task Force Officer Model" and the "Detention

64. *Id.* at 384.
65. *Id.* at 381–82.
66. *Id.* at 384–86.
67. 496 U.S. 414 (1990).
68. *See id.* at 419–20.
69. *See id.* at 416–20, 431–32.
70. *Id.* at 419–20 (citing Lee v. Munroe & Thornton, 11 U.S. (7 Cranch) 366 (1813)).
71. *See* Saltman, *supra* note 56, at 783–85 (addressing agency theory in the context of government contracts); *see also* Jeffrey F. Ghent, Annotation, *Doctrine of Apparent Authority as Applied to Agent of Municipality*, 77 A.L.R.3d 925 § 3 (1977) (noting the confusion and lack of consistency among courts in construing the agency of government representatives).

Model."[72] However, the Detention Model, which provides local law enforcement with the ability to administer detention facilities for the purpose of immigration enforcement,[73] is the only model currently in use.[74] Like any contract, 287(g) agreements govern the cooperation between the federal government and participating LEA, and courts have interpreted § 287(g) as requiring the execution of a 287(g) agreement for state or local officials to carry out immigration policy in most circumstances where the issue has come up.[75]

1. A standard 287(g) agreement

MOAs under § 287(g) set forth the terms and conditions governing the collaboration between ICE and the state-level LEA entering a 287(g) agreement.[76] LEAs typically agree to nominate qualified law enforcement officials to participate in a training program, compensate the officials while they are trained, and provide local facilities to detain suspected undocumented immigrants.[77] In exchange for participation in the 287(g) program, ICE agrees to provide technical training to qualified participants, reimburse costs associated with the implementation of the MOA (such as transportation of inmates), and delegate authority to enforce federal immigration policy.[78]

2. Local law enforcement authority under § 287(g)

A 287(g) MOA is typically required for state-level law enforcement to arrest or detain individuals under federal immigration law in the

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72. Nicholas D. Michaud, Comment, *From 287(g) to SB 1070: The Decline of the Federal Immigration Partnership and the Rise of State-Level Immigration Enforcement*, 52 ARIZ. L. REV. 1083, 1093 (2010).

73. *Id.* As compared to the Detention Model, the Task Force Officer Model equips local law enforcement to investigate suspected undocumented immigrants. *Id.*

74. *See* 287(g) RESULTS AND PARTICIPATING ENTITIES, https://www.ice.gov/287g (last visited Feb. 5, 2019) (outlining all of the 287(g) MOAs currently in place nationwide). The Task Force model has faced substantial criticism from immigrants' rights groups because it arguably serves as a license for racial profiling. Campbell, *supra* note 15, at 437–43 (2010).

75. *See, e.g.*, Santos v. Frederick Cty. Bd. Of Comm'rs, 725 F.3d 451 (4th Cir. 2013); Ochoa v. Campbell, 266 F. Supp. 3d 127 (E.D. Wash. 2017), *vacated as moot*, 716 Fed App'x 741 (9th Cir. 2018) (mem.); Lunn v. Commonwealth, 78 N.E.3d 1143 (Mass. 2017).

76. *See generally Memorandum of Agreement Template*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, https://www.ice.gov/doclib/detention-reform/pdf/287g_moa.pdf (last visited Feb. 5, 2019) (providing a publicly available template for 287(g) agreements).

77. *See id.* at 2–4.

78. *See id.* at 1–4.

absence of other authority. For example, in *Ochoa v. Campbell*,[79] the District Court for the Eastern District of Washington determined that Fourth Amendment protections apply when local authorities execute immigration detainers because state and local law enforcement can only enforce federal immigration policy under the auspices of a "formal, written [287(g)] agreement[]."[80] Similarly, in *Santos v. Frederick County Board of Commissioners*,[81] the Fourth Circuit held that local law enforcement violated the Fourth Amendment by detaining a Salvadoran woman under a civil ICE warrant because there was no 287(g) agreement in place.[82] The court specified that the officers' conduct was unlawful because they were not authorized by a 287(g) agreement to carry out federal immigration policy.[83] However, the court left the door open to the possibility that "express direction . . . by federal statute or federal officials" might, by itself, empower local law officials to enforce ICE policy.[84] The Supreme Judicial Court of Massachusetts examined this same issue in *Lunn v. Commonwealth*.[85] In *Lunn,* state police, without a 287(g) agreement, held a suspect under an immigration detainer in a municipal jail at the request of federal immigration officials.[86] The Massachusetts court held that the plaintiff's detention was impermissible because the state police had no authority to enforce federal immigration policy in the absence of a 287(g) agreement.[87]

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79. 266 F. Supp. 3d 1237 (E.D. Wash. 2017), *vacated as moot*, 716 Fed. App'x 741 (9th Cir. 2018) (mem.).

80. *Id.* at 1254–55, 1258–59. In *Ochoa*, local authorities detained a man on an immigration hold without a 287(g) agreement in place and, in doing so, prohibited him from posting bail for his release. *Id.* at 1242. Ochoa brought suit against the state Department of Corrections, seeking a temporary restraining order to remove the immigration hold. *Id.* The District Court granted his requesting, finding that he was likely to succeed on the merits of his Fourth Amendment claims. *Id.* at 1258–59. The defendants appealed, but the Ninth Circuit Court of Appeals dismissed the case as moot since ICE took Ochoa into custody after he was released from jail. *See Ochoa*, 716 Fed. App'x at 742.

81. 725 F.3d 451 (4th Cir. 2013).

82. *Id.* at 457–58, 463–65.

83. *Id.* at 463–65.

84. *Id.* at 465. While a 287(g) agreement is needed for local law enforcement officials to detain individuals suspected of violating federal immigration policy, state-level law enforcement is not always precluded from cooperating with ICE for immigration enforcement. *See* United States v. Ovando-Garzo, 752 F.3d 1161, 1164 (8th Cir. 2014) (holding that cooperation between a state trooper conducting a traffic stop and Border Patrol was appropriate under § 287(g), even in the absence of a 287(g) agreement).

85. 78 N.E.3d 1143 (Mass. 2017).

86. *Id.* at 1146.

87. *See id.* at 1160 (ruling that "Massachusetts law provides no authority for Massachusetts court officers to arrest and hold an individual solely on the basis of a

C. Dillon's Rule

Dillon's Rule has developed to include three criteria to determine the extent of local government authority: local governments only have those powers that are (1) expressly granted by state legislation, (2) necessarily implied from those powers expressly granted, or (3) essential to the functioning of the local municipal body.[88] As of 2016, Dillon's Rule was considered good law in at least thirty-one states, though courts in different jurisdictions have been known to apply the three Dillon factors in varying ways.[89] For example, some jurisdictions rely heavily on the first factor, while others give weight to all three.[90] Many courts have also interpreted the doctrine to weigh the factors more evenly, requiring only one of them to be met for authority to extend to local government.[91] Ultimately, every jurisdiction has a different construction of Dillon's Rule, meaning that a Dillon analysis must be adapted to the case law in each jurisdiction where the doctrine applies and cannot be uniformly applied across multiple states.[92]

1. Express authority

The first criterion of Dillon's Rule examines whether the state legislature has expressly granted local government with the authority in

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Federal civil immigration detainer, beyond the time that the individual would otherwise be entitled to be released from State custody").

88. *See, e.g.*, Homebuilders Ass'n of Charlotte, Inc. v. City of Charlotte, 442 S.E.2d 45, 49 (N.C. 1994) (maintaining that local government has authority "granted in *express words* . . . *necessarily or fairly implied* in or *incident* to the powers expressly granted . . . [and that which is] *essential*" (quoting DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 237 (5th ed. 1911))); Bd. of Supervisors v. Countryside Inv. Co., 522 S.E.2d 610, 612–13 (Va. 1999) (stating that Dillon's Rule "provides that municipal corporations have only those powers that are expressly granted, those necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable" (quoting City of Chesapeake v. Gardner Enters., 482 S.E.2d 812, 814 (Va. 1997))).

89. *See* Russell & Bostrom, *supra* note 26, at 8; *see also* STEVENSON, *supra* note 23, § 24.01 n.18 (providing examples of cases from a variety of states applying Dillon's Rule).

90. *Compare* State *ex rel.* Cole v. Keller, 176 So. 176, 180 (Fla. 1937) (mem.) (noting definitively that if "any reasonable doubt" exists as to whether a municipal corporation has been granted the express power to exercise authority then it "will be resolved against the municipality") *with* Town of McIntyre v. Baldwin, 6 S.E.2d 372, 373 (Ga. Ct. App. 1939) (examining whether "a grant of power . . . may necessarily be implied" from legislative text).

91. *See* STEVENSON, *supra* note 23, § 24.03 (noting several states that take a liberal approach to Dillon's Rule where the factors are construed in municipalities' favor).

92. *See id.* (noting various states' interpretation of Dillon's Rule).

question.[93] For example, in *Board of Supervisors v. Countryside Investment Co.*,[94] the Supreme Court of Virginia held that the powers of the Augusta County Board of Supervisors did not empower it to enact a local ordinance because there was not express authority from the state legislature for the Board to do so.[95] Decisions similar to *Countryside Investment Co.* indicate that an application of the first Dillon factor can, by itself, determine the outcome of a case,[96] but courts oftentimes proceed to consider all three factors as part of their analysis.[97]

2. Implied authority

Courts may also extend the authority of local government to those powers necessarily implied from expressly granted powers.[98] For example, in *Perretta v. City of New Britain*,[99] the Connecticut Supreme Court held that the authority of a city's mayor to fire city employees was within the mayor's powers because such powers could be implied from the mayor's expressly granted authority as the city's chief executive officer.[100] The *Perretta* court reasoned that, as chief executive, the mayor

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93. § 21.01.

94. 522 S.E.2d 610 (Va. 1999).

95. *Id.* at 613.

96. *See* Bowie Inn, Inc. v. City of Bowie, 335 A.2d 679, 689 (Md. 1975) (holding that a city ordinance to regulate garbage was expressly authorized by state statute and thus within the powers of the city); Novak v. Town of Poughkeepsie, 311 N.Y.S.2d 393, 396–97 (N.Y. Sup. Ct. 1970) (concluding that a city ordinance was invalid because it "deviate[d] from the strict letter of the enabling statutes"); Reese v. Charlotte-Mecklenburg Bd. of Educ., 676 S.E.2d 481, 491 (N.C. Ct. App. 2009) (superseded by statute on other grounds) (determining that a county had authority to sell real property because such authority was expressly vested in the county by state statute).

97. *See* Vill. of N. Fargo v. City of Fargo, 192 N.W. 977, 981 (N.D. 1923) (inquiring into all three Dillon's Rule factors in examining whether a municipality had the power to annex the territory of another municipality).

98. *See* Girves v. Kenai Peninsula Borough, 536 P.2d 1221, 1224 (Alaska 1975) (determining that a borough had authority to build a school access road on private property because the power to do so was implied from express authority to manage local schools); O'Bryan v. City of Louisville, 382 S.W.2d 386, 388 (Ky. Ct. App. 1964) (holding that a statute granting a city authority to establish parks and recreational areas impliedly granted authority to establish a zoo); Homebuilders Ass'n of Charlotte, Inc. v. City of Charlotte, 442 S.E.2d 45, 49 (N.C. 1994) ("[T]he municipal power to regulate an activity implies the power to impose a fee in an amount sufficient to cover the cost of regulation."); Town of Clearfield v. Cushman, 440 N.W.2d 777, 781 (Wis. 1989) (holding that a town has the authority to enforce building permits even though such authority is not expressly granted by the legislature because such power is necessarily implied).

99. 440 A.2d 823 (Conn. 1981).

100. *Id.* at 829–30.

is charged with ensuring the city's fiscal sovereignty, and the ability to dismiss personnel is necessarily implied from that responsibility.[101] However, the interpretation of local governments' implied powers under Dillon's Rule is oftentimes narrowly construed,[102] as the North Carolina Supreme Court determined in *Porsh Builders, Inc. v. City of Winston-Salem*.[103] There, the court held that the authority for a city to reject the highest bidder for a government contract was not implied from the city's express power to reject lower bids.[104] In its decision, the court acknowledged that "statutory delegations of power to municipalities should be strictly construed, resolving any ambiguity against the [city's] authority to exercise the power."[105]

3. Essential authority

The third, and most narrowly applied,[106] Dillon factor is that local governments can exercise those powers that are "essential"[107] to the locality, even in the absence of express or implied authority.[108] This aspect of a Dillon analysis can come into play when localities are forced to react to emergencies. In *Willson v. Boise City*,[109] the Idaho Supreme Court held

101. *Id.*

102. *See* STEVENSON, *supra* note 23, § 24.03 (explaining the strict construction of implied powers and detailing cases from numerous jurisdictions accordingly).

103. 276 S.E.2d 443 (N.C. 1981).

104. *Id.* at 445–46.

105. *Id.* at 445.

106. *See* STEVENSON, *supra* note 23, § 24.02 (noting that some states do not recognize inherent essential local government powers, and that for those states that do, "they are admittedly not many in number").

107. Homebuilders Ass'n of Charlotte, Inc. v. City of Charlotte, 442 S.E.2d 45, 49 (N.C. 1994) (quoting DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 237 (5th ed. 1911)).

108. *See* City of Bessemer v. Birmingham Elec. Co., 27 So. 2d 565, 573 (Ala. 1945) (acknowledging that a municipal corporation's ability to grant franchises "is one of the incidental powers of a municipal corporation"); State *ex rel.* Radcliff v. City of Mobile, 155 So. 872, 874 (Ala. 1934) (providing that local government authority includes those powers "which are indispensably necessary to the declared objects and germane to the governmental purpose for which such corporations may be organized"); Willson v. Boise City, 55 P. 887, 889 (Idaho 1899) (holding that a town has the power to divert stream water outside the city to protect its residents' properties because such authority is "necessary"). Justice Dillon defined the third factor as powers "*essential* to the accomplishment of the declared objects and purposes of the corporation,— [sic] not simply convenient, but indispensable." *Homebuilders Ass'n*, 442 S.E.2d at 49 (quoting DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 237 (5th ed. 1911)).

109. 55 P. 887 (Idaho 1899).

that a municipality had the authority to divert stream water by building a ditch extending outside the city even in the absence of express authority to construct outside the city limits.[110] The court determined that the authority to divert stream water was "necessary" for the city to protect its citizens and thus within the scope of the locality's powers.[111]

The third criterion in a Dillon analysis can also include situations where effective municipal administration requires that certain powers be conferred to local governments even if the powers are not expressly or impliedly authorized by state law. For example, in *State ex rel. Ennis v. Superior Court*,[112] the Supreme Court of Washington held that a municipal governing body had authority to remove an employee from office despite the fact that the city's charter did not provide the governing body with that power because authority to dismiss the employee was necessary for the city's administration.[113]

4. Distinguishing between implied and essential authority

While the second and third Dillon factors are distinct from each other, the concepts of implied authority and essential authority can also run together in court decisions. The difference in the holdings of *Perretta* and *Ennis* illustrates this ambiguity in the doctrine. In both cases, the courts held that local government had the ability to dismiss an employee, and both decisions provide similar rationale for their conclusions.[114] However, the court in *Perretta* determined that it was the mayor's implied authority to dismiss a city employee,[115] while the court in *Ennis* held the authority was simply necessary, and did not comment on the possibility of implied authority.[116] This dynamic suggests that the distinction between essential and implied authority is influenced by the ability for courts to support their conclusions. Implied authority can derive from existing policy (i.e., a charter or statute) while essential authority is more of a policy position unsubstantiated by black letter law.

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110. *Id.* at 889–91.
111. *Id.* at 889.
112. 279 P. 601 (Wash. 1929).
113. *Id.* at 606.
114. Perretta v. City of New Britain, 440 A.2d 823, 829 (Conn. 1981); *Ennis*, 279 P. at 606.
115. *See Perretta*, 440 A.2d at 829 (justifying dismissal of employees "for reasons of economy" as falling within the city's express and implied powers).
116. *Ennis*, 279 P. at 606.

D. Home Rule

Each state where Home Rule applies extends varying breadths of authority to local governments, and courts' interpretation of respective state Home Rule constructions has developed accordingly. However, when a local rule or law created under Home Rule is determined to conflict with state law, the state law governs.

1. Imperio *Home Rule constructions*

Some Home Rule constructions allow local governments wide discretion to determine their own rules and laws without any express limitation. Broad Home Rules of this type are known as "*imperio*" provisions for the colorful language Justice Brewer used in writing *St. Louis*.[117] For example, the California state constitution provides that "[i]t shall be competent in any city charter to provide that the city governed thereunder may make and enforce *all* ordinances and regulations in respect to municipal affairs."[118] Similarly, Wisconsin has left its Home Rule language succinctly open-ended, with its state constitution allowing for "[c]ities and villages . . . [to] determine their local affairs and government."[119]

Localities in states with Home Rule constructions granting broad, unlimited power to local government are free to exercise their own self-governance without interference from the state legislature unless local law conflicts with a matter of "statewide concern."[120] Each jurisdiction has its own test for determining when a local law created under Home Rule conflicts with state law, but courts typically look to at least three factors: whether the law affects a matter of (1) "local concern," (2) "statewide concern," or (3) mixed matters of local and

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117. *See* 149 U.S. 465, 468 ("The city is in a very just sense an '*imperium in imperio*.'"); *see also* STEVENSON, *supra* note 23, § 21.02 (explaining that *imperio* provisions "grant broad independent powers" that local governments can exercise within their defined sphere).

118. CAL. CONST. art. XI, § 5(a) (emphasis added).

119. WIS. CONST. art. XI, § 3(1).

120. City of Santa Clara v. Von Raesfeld, 474 P.2d 976, 979 (Cal. 1970) (en banc) ("When it appears that a municipal regulation and a general state law are in conflict, the controlling law will depend on whether the subject matter is a municipal affair or whether it is of statewide concern."); *see also* City of Denver v. Sweet, 329 P.2d 441, 446 (Colo. 1958) (en banc) (acknowledging that a Home Rule city's ability to implement an income tax can only be limited if it conflicts with either a constitutional amendment or a matter of statewide concern); Adler v. Deegan, 167 N.E. 705, 714 (N.Y. 1929) (Cardozo, J., concurring) ("The power of the city is subordinate at such times to the power of the state, but may be exerted without restraint to the extent that the two can work in harmony together.").

statewide concern.[121] In *City of Longmont v. Colorado Oil & Gas Ass'n*,[122] the Supreme Court of Colorado considered whether a local ban on fracking, enacted under the flag of Colorado Home Rule, was preempted by state law.[123] The court held that fracking is a statewide concern because of both the need for statewide uniformity in regulating the industry and fracking's impact on areas outside local control.[124] The *Longmont* court also acknowledged that factors such as whether the matter at issue is explicitly addressed by the state's constitution and the extent of traditional regulatory practices can also guide the preemption inquiry inherent to Home Rule.[125] Ultimately, each state's Home Rule analysis is unique, but even where a Home Rule statute confers extremely broad authority to local government, local authority is not entirely unchecked.

2. Express preemption Home Rule constructions

As compared to *imperio* Home Rule provisions, many statutory constructions of Home Rule explicitly acknowledge that state law preempts Home Rule.[126] New York, for example, grants "every local government . . . [the] power to adopt and amend local laws *not inconsistent with the* . . . [*state*] *constitution or any general law* . . . ."[127] Alaska's Home Rule construction is similar to New York's, in granting

121. *See* City of Longmont v. Colo. Oil & Gas Ass'n, 369 P.3d 573, 580 (Colo. 2016) (en banc) (considering whether a local ordinance related to municipal affairs, statewide concern, or a mixed matter of local and statewide concern in determining whether it was preempted by state law); Madison Teachers, Inc. v. Walker, 851 N.W.2d 337, 368 (Wis. 2014) (acknowledging that a Home Rule analysis contemplates whether a local law is a matter of statewide concern, local concern, or a "mixed bag" (quoting Adams v. State Livestock Facilities Siting Review Bd., 820 N.W.2d 404, 463 (Wis. 2012))). Some states have more nuanced Home Rule analyses. For example, California employs a multi-step test to determine whether a local law enacted under California's *imperio* provision is preempted by state law. *See* State Bldg. & Constr. Trades Council v. City of Vista, 279 P.3d 1022, 1027 (Cal. 2012). California courts must (1) determine whether the local law impacts a local matter, (2) find that a conflict exists between local and state law, (3) examine whether the conflicting state law addresses a matter of state-wide concern, and (4) analyze whether the state law is related to the statewide concern and whether the state law is "narrowly tailored" to avoid meddling in matters of local importance. *Id.*

122. 369 P.3d 573 (Col. 2016) (en banc).

123. *Id.* at 577.

124. *Id.* at 580.

125. *Id.*

126. STEVENSON, *supra* note 23, § 21.02.

127. N.Y. CONST. art IX, § 2(c)(i) (emphasis added).

that "[a] home rule borough or city may exercise all legislative powers *not prohibited by law or by charter*."[128]

When state law preempts local law created under Home Rule, the local law is typically invalidated. However, when there is no state legislation in conflict with the local law, the local law applies.[129] In the context of a Home Rule construction similar to New York or Alaska, including an explicit preemption provision, a local law can be preempted in one of three ways: (1) when the local law is expressly prohibited by state law, (2) when the local law is in direct conflict with state law, or (3) when state law occupies the field.[130] Performing a preemption analysis in this context, courts may determine that state law preempts local law if any of these three factors are met. In *City of Baltimore v. Sitnick*,[131] for example, the Maryland Court of Appeals considered the validity of a Baltimore ordinance enacted pursuant to the state's Home Rule construction allowing cities to craft their own laws consistent with state statute.[132] The court in *Sitnick* looked to

128. ALASKA CONST. art. X, § 11 (emphasis added).

129. *See* Palm v. 2800 Lake Shore Drive Condo. Ass'n, 988 N.E.2d 75, 81 (Ill. 2013) ("If the legislature intends to limit or deny the exercise of home rule powers, the statute must contain an express statement to that effect."); Tri-Nel Mgmt., Inc. v. Bd. of Health, 741 N.E.2d 37, 43 (Mass. 2001) (acknowledging that a local law is only invalidated where it is in "sharp conflict" with state statute (quoting Take Five Vending, Ltd. v. Town of Provincetown, 615 N.E.2d 576, 578 (Mass. 1993))); Am. Cancer Soc'y v. State, 103 P.3d 1085, 1090 (Mont. 2004) (holding that a local no-smoking ordinance did not conflict with the state constitution because it was not expressly preempted); New Mexicans for Free Enter. v. City of Santa Fe, 126 P.3d 1149, 1159 (N.M. Ct. App. 2005) (considering whether a local ordinance increasing the municipal minimum wage requirement was in express conflict with the New Mexico state minimum wage statute); Wholesale Laundry Bd. of Trade, Inc. v. City of New York, 234 N.Y.S.2d 862, 864–65 (N.Y. App. Div. 1962) (invalidating a city's minimum wage law prohibiting employment because it was inconsistent with state law), *aff'd*, 189 N.E.2d 623 (N.Y. 1963); Fross v. County of Allegheny, 20 A.3d 1193, 1203 (Pa. 2011) ("[L]ocal legislation cannot permit what a state statute or regulation forbids or prohibit what state enactments allow." (quoting Huntley & Huntley, Inc. v. Borough Council, 964 A.2d 855, 862 (Pa. 2009))). There are also instances where states have included "express anti-preemption" provisions in Home Rule statutes, which "expressly disclaim any intent on the part of the State legislature to preempt local regulation." STEVENSON, *supra* note 23, § 22.02; *see also* City of San Jose v. Dep't of Health Servs., 77 Cal. Rptr. 2d 609, 612 (Cal. Ct. App. 1998) (considering whether a city smoking ordinance was preempted in light of California code stipulating the legislative intent of a statute was "not to preempt the field of regulation of the smoking of tobacco" (quoting CAL. HEALTH & SAFETY CODE § 118910(a) (West 2016))).

130. STEVENSON, *supra* note 23, § 22.02.

131. 255 A.2d. 376 (1969).

132. *Id.* at 377–79.

whether the ordinance was explicitly preempted by state law, ultimately holding that it was not.[133] The court also examined the degree of potential conflict between the ordinance and state law, determining that there was no conflict because "the ordinance s[ought] to accomplish precisely the same purpose as . . . the state law."[134] The *Sitnick* court concluded its preemption analysis by examining previous iterations of the state minimum wage law, as well as other related laws that might have indicated the legislature's intent to limit local authority in some way, deciding that there was no evidence of legislative intent to preempt the field of wage regulation.[135] Since all three prongs of the preemption analysis failed in *Sitnick*, the court concluded that the local ordinance was legitimate because it was not in conflict with state law.[136]

3. Home Rule charters

In states that employ charters to define the scope of local government authority, charters themselves can serve to both limit and expand the authority of local government officials.[137] For example, the Michigan Home Rule construction requires certain provisions to be included in city charters, but it explicitly allows localities some discretion to include other provisions.[138] Michigan Home Rule is particularly interesting because it requires that all city charters provide a mechanism for local government to enter intergovernmental contracts to the extent allowable by law.[139] The California charter system, by comparison, is specifically established for the citizens of a county to adopt a charter whereby they can define their own laws.[140] Given the ability to enact laws through charters, localities are able to craft policy as narrowly or broadly as they see fit, as long as they account for any relevant preemption considerations. In other words, a charter can limit the power of local officials in the same way it can expand local authority, depending on how the charter itself is written.

133. *Id.* at 379, 385.
134. *Id.* at 384.
135. *Id.* at 377–79.
136. *Id.* at 385.
137. STEVENSON, *supra* note 23, § 23.03 ("Charters are . . . limitations upon the power of local governments in practically all home rule states.").
138. MICH. COMP. LAWS ANN. § 45.514–45.515 (West 2017).
139. § 45.514(j).
140. *See* Bank v. Bell, 217 P. 538, 542 (Cal. Dist. Ct. App. 1923) (explaining how the California charter system is established to give "freeholders" the power to define their own government).

Furthermore, with varying degrees of discretion to define the terms of a charter can come varying content within charters themselves.[141]

E. Sheriffs and Local Contracting Authority

The function of the sheriff in the United States derives from the English feudal system, and the office can be traced as far back as the ninth century.[142] The sheriff became a particularly prevalent figure in American law enforcement on the western frontier during the 1800s as an important law enforcement figure in remote areas of the contemporary United States, and Hollywood has reinforced the image of the sheriff as an icon of the old west.[143] The sheriff remains an important law enforcement officer in many jurisdictions in the United States today,[144] and seventy-one sheriffs' offices have entered 287(g) agreements with ICE, which constitutes the vast majority of 287(g) agreements nationwide.[145]

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141. STEVENSON, *supra* note 23, § 21.02.

142. Roger Scott, *"Roots" a Historical Perspective of the Office of Sheriff*, NAT'L SHERIFFS' ASS'N, https://www.sheriffs.org/publications-resources/resources/office-of-sheriff (last visited Feb. 5, 2019) ("The duties of the sheriff included keeping the peace, collecting taxes, maintaining jails, arresting fugitives, maintaining a list of wanted criminals, and serving orders and writs for the Kings Court.").

143. *Why Is the American Sheriff Such a Polarising Figure?*, THE ECONOMIST (Apr. 11, 2018), https://www.economist.com/the-economist-explains/2018/04/11/why-is-the-american-sheriff-such-a-polarising-figure; *see also* Soraya K. Kawucha, Sheriffs—The *Other* Police 99–100, 108–11 (Dec. 2014) (unpublished Ph.D. dissertation, Sam Houston State University) (describing the role of the sheriff in the wild west and providing an overview of famous sheriffs and the outlaws they pursued).

144. *History of the Sheriff*, N.C. SHERIFFS' ASS'N, https://ncsheriffs.org/about/history-of-the-sheriff (last visited Feb. 5, 2019) (describing the "proud history" of the sheriff). President Ronald Reagan once addressed the National Sheriffs' Association, saying:

> Thank you for standing up for this nation's dream of personal freedom under the rule of law. Thank you for standing against those who would transform that dream into a nightmare of wrongdoing and lawlessness. And thank you for your service to your communities, to your country, and to the cause of law and justice.

PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: RONALD REAGAN 1984 884 (1986). The Virginia Supreme Court has acknowledged that "[t]he office of sheriff is a most important one . . . the advent of that functionary known as the sheriff . . . occurred when William the Conqueror found himself military master of Britain." Narrows Grocery Co. v. Bailey, 170 S.E. 730, 732 (Va. 1933).

145. *See ICE Section 287(g)*, *supra* note 19 (detailing the seventy-one 287(g) agreements with sheriff's offices out of the seventy-eight total 287(g) agreements nationwide).

1. The office of the sheriff

Sheriffs today are typically elected local government officials charged with some type of law enforcement function.[146] North Carolina sheriffs, for example, are officers empowered by the state constitution and elected by county constituents to serve four-year terms.[147] Similarly, a sheriff in Virginia has "duties . . . [which] shall be prescribed by general law or special act."[148] The powers of the Texas sheriff are similar to those of the Virginia sheriff in that they are defined by the state constitution and "shall be prescribed by the Legislature."[149] Colorado sheriffs are considered "peace officers" charged with enforcing all laws of the state,[150] while New Jersey sheriffs attend to security functions of the judiciary, serve court process, and investigate and apprehend criminals.[151] Each state has its own specific mandate for the office of the sheriff, but there is substantial overlap in general duties and responsibilities across jurisdictions.

State legislatures often assign sheriffs specific duties and responsibilities through state law. For example, a sheriff might be tasked with managerial responsibilities allowing him to effectively supervise his deputies.[152] Some states, such as North Carolina, Oklahoma, and Virginia, also empower sheriffs to oversee the local jail or county prisoners.[153] In some instances, sheriffs can be assigned narrow, miscellaneous duties that the state legislature deems particularly important or necessary to the sheriff's role.[154] In Oklahoma, for instance, sheriffs are expressly granted authority to charge five dollars as a finger-printing fee,[155] and North Carolina

146. THE ECONOMIST, *supra* note 143.
147. N.C. CONST. art. VII, § 2.
148. VA. CONST. art. VII, § 4.
149. TEX. CONST. art. V, § 23.
150. COLO. REV. STAT. 16-2.5-103 (2018).
151. N.J. STAT. ANN. § 40A:9-117.6 (West 1984).
152. *See* David N. Falcone & L. Edward Wells, *The County Sheriff as a Distinctive Policing Modality*, 14 AM. J. POLICE 123, 130–33 (1995). Nebraska explicitly confers authority to sheriffs to hire deputies and delegate responsibility, and Oregon provides sheriffs with statutory power to administer their office. NEB. REV. STAT. ANN. § 23-1704.02 (West 2018); OR. REV. STAT. ANN. § 206.210 (West 2018).
153. N.C. GEN. STAT. ANN. § 162-22 (West 2018); OKLA. ST. ANN. tit. 19, § 513 (West 2018); VA. CODE ANN. § 53.1-116.2 (West 1994).
154. Sheriffs' associations often provide a repository of state laws and regulations applicable to sheriffs. *E.g.*, *Frequently Used Code Sections*, VA. SHERIFFS' ASS'N, https://vasheriff.org/laws-and-legislation/frequently-used-code-sections (last visited Feb. 5, 2019).
155. OKLA. ST. ANN. tit. 19, § 514.3.

provides sheriffs with the ability to establish a volunteer school resource officer program for school safety.[156] Ultimately, the specific responsibilities of the sheriff can differ from state to state, but the commonality across the country is that sheriffs are typically empowered with their authority through specific provisions of state legislation.

2. Contracting authority at the local level

States typically provide express authority for local government to enter contracts with outside entities, but that power is often vested in a local official other than the sheriff. County judges in Arkansas are delegated signing authority to enter contracts involving the allocation of local funds,[157] and the Texas Supreme Court has recognized the County Commissioners' Court as the authorized signatory for external contracts at the local level.[158] Comparatively, the express authority to enter contracts on behalf of a Montana county is reserved for the "board of county commissioners or by agents and officers acting under their authority or authority of law."[159] California authorizes the "legislative body" of local agencies to contract with other local government entities,[160] meaning "the board of supervisors . . . the city council or board of trustees . . . and the board of directors or other governing body . . . ."[161] Similarly, authority to enter agreements with the federal government to furnish law enforcement services in Virginia is explicitly assigned to "localities,"[162] and Virginia code is clear that localities "shall be construed to mean a county, city, or town as the context may require."[163] Furthermore, the legal governing body of each Virginia locality is granted all powers endowed upon localities by Virginia code.[164] In the same way states ascribe specific powers to sheriffs, states typically authorize specific local officials to contract on behalf of their locality.

156. N.C. GEN. STAT. ANN. § 162-26.
157. ARK. CODE ANN. § 14-14-1102(b)(2)(c)(ii) (West 2018).
158. Anderson v. Wood, 152 S.W.2d 1084, 1085 (Tex. 1941).
159. MONT. CODE ANN. § 7-1-2104 (West 2017).
160. CAL. GOV'T CODE § 54981 (West 2018).
161. § 53000.
162. VA. CODE ANN. § 15.2-1726 (West 1997).
163. § 15.2-102.
164. § 15.2-1401.

F. Federal Preemption

The issue of federal preemption of state law is a complex and prevalent topic in the immigration debate today,[165] and the issue is relevant to Dillon's Rule because it could be argued that § 287(g) preempts the outcome of a Dillon analysis in this context. Furthermore, the issue of preemption is particularly tricky here because Dillon's Rule deals with what the law does not say,[166] rather than an express provision of state law in conflict with federal law.[167]

Under preemption principles, where state and federal law conflict, federal law governs.[168] However, where there is no conflict, state law applies.[169] In the immigration context, *Arizona v. United States*[170] serves as modern guidance for courts in deciding preemption issues. In 2010, Arizona enacted the Support Our Law Enforcement and Safe Neighborhoods Act (SB 1070), making certain activity by undocumented immigrants a misdemeanor and expanding the legal authority of state law enforcement to detain suspected undocumented immigrants.[171] The United States brought suit to enjoin Arizona from implementing SB 1070, arguing that the law was preempted by federal statute.[172] Writing for the majority, Justice Kennedy explained federalism principles to fundamentally stipulate that states and the

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165. *E.g.*, Arizona v. United States, 567 U.S. 387, 416 (2012) (finding preemption of an Arizona statute (S.B. 1070) creating criminal penalties for unlawful entry); City of New York v. United States, 179 F.3d 29, 31 (2d Cir. 1999) (finding that federal law preempted a mayoral executive order establishing a sanctuary city).

166. *See supra* Section II.C (describing how Dillon's Rule precludes local government from having authority not provided by state legislation).

167. *E.g.*, *Arizona*, 567 U.S. at 407–10 (invalidating an Arizona law that granted state law enforcement the authority to make warrantless arrests based on a belief that the individual was in the country illegally because it conflicted with federal immigration law and was thus unconstitutional).

168. *See, e.g.*, Gibbons v. Ogden, 22 U.S. (9 Wheat) 1, 210 (1824) ("States may sometimes enact laws, the validity of which depends on their interfering with, and being contrary to, an act of Congress passed in pursuance of the constitution . . . . Should [a] collision exist . . . the acts of [a state] must yield to the law of Congress . . . ."); Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372 (2000) ("A fundamental principle of the Constitution is that Congress has the power to preempt state law.").

169. *See Arizona*, 567 U.S. at 414 (citing United States v. Di Re, 332 U. S. 581, 589 (1948)) (noting that where state law is not adverse to federal law, it survives preemption); *Crosby*, 530 U.S. at 372 (describing how federal law only preempts state law when state law conflicts with federal law).

170. 567 U.S. 387 (2012).

171. *Id.* at 393–94.

172. *Id.* at 393.

federal government are separate sovereigns with the potential to have competing legal interests.[173] Justice Kennedy laid out the following principle to determine the preemption issue in the case: "state laws are pre-empted when they conflict with federal law," but the police powers of the states are presumed to be governing authority unless Congress clearly intended to supersede them.[174] The Court went on to hold that provisions of SB 1070 in conflict with federal law were unconstitutional while those provisions not in conflict with federal law could remain legitimate legal authority.[175]

III. APPLICATION OF DILLON'S RULE TO SHERIFFS' ABILITY TO ENTER 287(g) AGREEMENTS

A. 287(g) Agreements are Contracts

287(g) agreements constitute contracts between federal and local governments because they include consideration and the terms are clearly defined.[176] In the case of a 287(g) MOA, the federal government agrees to provide training, cover certain costs of 287(g) program implementation, and delegate federal immigration enforcement authority to the LEA.[177] The LEA, by contrast, agrees to provide the human resources and facilities necessary to implement the agreement and entrust their officers to the supervision of the U.S. Attorney General.[178] In this regard, 287(g) agreements are similar to the MOA in *Praesidium Medical* in that they define the terms of collaboration, how each party will benefit, and what the coordinated effort will look like in practice.[179]

B. The Extent of Sheriffs' Authority to Enter 287(g) Agreements in a Dillon's Rule State

Under Dillon's Rule, a sheriff must have express or implied authority to enter a 287(g) agreement, or such authority must be essential to the locality in question. Sheriffs in different jurisdictions have different

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173. *Id.* at 398.
174. *Id.* at 399–400.
175. *Id.* at 400–16.
176. *See supra* notes 51–54 and accompanying text (discussing court decisions applying contract law principles to MOAs).
177. *See supra* notes 71–73 and accompanying text (explaining the contents of a typical 287(g) MOA).
178. *See supra* notes 71–73 and accompanying text.
179. *See supra* notes 51–54 and accompanying text (providing a discussion of *Praesidium Medical*).

degrees of authority, and states tailor the mandate of their sheriffs in a way they feel best suits local needs. However, Dillon's Rule precludes sheriffs from entering 287(g) agreements in most instances.

1. Express authority for a sheriff to enter a 287(g) agreement

Under certain strict Dillon's Rule constructions, a sheriff's authority might be limited by the absence of express authority (i.e. implied or essential authority would not be enough).[180] This strict application of a Dillon analysis would bar sheriffs from entering 287(g) agreements in states where they do not have any express authority to enter a contract with external law enforcement entities.[181] For example, in Virginia, county governing bodies are endowed with the power to enter reciprocal agreements with the federal government, but there are no Virginia statutory provisions giving sheriffs any sort of explicit authority to contract with outside entities.[182] Similarly, North Carolina does not provide sheriffs with any express statutory authority to enter agreements with the federal government.[183] The Texas Supreme Court has even held that "a sheriff has no authority to make contracts that are binding on the county, except where he is specially so authorized to do by statute."[184] Several opinions issued by various Texas Attorneys General also assert that Texas sheriffs cannot enter reciprocal agreements with federal agencies, including agreements to house inmates (though none of these opinions directly address § 287(g)).[185] Accordingly, in states

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180. *See* Bowie Inn, Inc. v. City of Bowie, 335 A.2d 679, 689–90 (Md. 1975) (holding that a city ordinance to regulate garbage was expressly authorized by state statute and thus within the powers of the city); Novak v. Town of Poughkeepsie, 311 N.Y.S.2d 393, 396 (N.Y. Sup. Ct. 1970) (concluding that a city ordinance was invalid because it "deviate[d] from the strict letter of the enabling statutes"); Reese v. Charlotte-Mecklenburg Bd. of Educ., 676 S.E.2d 481, 491 (N.C. Ct. App. 2009) (determining that a county had authority to sell real property because such authority was expressly vested in the county by state statute).

181. *See supra* notes 146–56 and accompanying text (outlining common duties of American sheriffs).

182. VA. CODE ANN. § 15.2-1729 (West 1997) ("The governing body of any county may enter into an agreement with the United States government or a department or agency thereof . . . ."). Virginia code also provides that "the governing body of any contiguous locality . . . may enter into a mutual aid agreement with the appropriate federal authorities to authorize police cooperation and assistance." § 15.2-1728.

183. *See generally* N.C. GEN. STAT. ANN. §§ 162-13–162-26 (2017) (codifying the duties of the sheriff in North Carolina).

184. Anderson v. Wood, 152 S.W.2d 1084, 1085 (Tex. 1941).

185. *See* Gregg Abbott, Attorney General of Texas, Opinion No. GA-0229 1, 7 (Aug. 9, 2004) https://www.texasattorneygeneral.gov/opinions/opinions/50abbott/op/20

recognizing this strict interpretation of Dillon's Rule, where sheriffs do not have express authority to contract with the federal government, they may not be authorized to enter 287(g) agreements.

2. Implied authority for a sheriff to enter a 287(g) agreement

In a jurisdiction where a court would look beyond the first Dillon factor, sheriffs may have implied authority to enter 287(g) agreements, even in the absence of express authority to do so.[186] For example, Virginia code allows a locality to enter a reciprocal agreement with the federal government.[187] It could be argued that a sheriff, as a ranking law enforcement officer of a Virginia locality, has implied authority deriving from this state statutory provision to enter a 287(g) agreement on behalf of his locality. However, Virginia code specifies that the governing body of a locality has all statutory powers conferred to localities,[188] meaning that the board of supervisors or city council is authorized to enter 287(g) agreements, not the sheriff.[189] Furthermore,

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04/pdf/ga0229.pdf (concluding that a sheriff does not have the authority to enter a contract to house federal prisoners); Jim Mattox, Attorney General of Texas, Letter Opinion No. 90-95 1, 4 (Nov. 27, 1990) https://www.texasattorneygeneral.gov/opinions/opinions/47mattox/lo/1990/htm/lo1990095.htm (interpreting Texas code to preclude sheriffs from entering contracts to house federal prisoners); *see also* Greg Abbott, Attorney General of Texas, Opinion No. GA-0424 1, 4 (May 1, 2006) https://www.texasattorneygeneral.gov/opinions/opinions/50abbott/op/2006/pdf/ga0424.pdf (advising that sheriffs "may exercise only those powers that the state constitution and statutes confer, either explicitly or implicitly"); Dan Morales, Attorney General of Texas, Letter Opinion No. 98-072 1 (Aug. 25, 1998) https://www.texasattorneygeneral.gov/opinions/opinions/48morales/lo/1998/pdf/lo1998072.pdf (opining that the commissioners court, not the sheriff, has authority to contract with external entities).

186. *See supra* notes 98–101 and accompanying text (explaining the second Dillon factor). While the court in *Countryside Investment Co.* determined that lack of express authority was sufficient to limit the power of local government, the opinion also acknowledged that local government authority can be implied. *See* 522 S.E.2d. at 613. Thus, it stands to reason that a Virginia court might look beyond the first Dillon factor in its analysis. Perhaps because Virginia is considered a quintessential Dillon's Rule state, Virginia courts weigh the first factor more heavily than in other jurisdictions, further illustrating the lack of uniformity in how the doctrine can be applied. *See* STEVENSON, *supra* note 23, § 24.03 (using Virginia as an example of strict interpretation of Dillon's Rule).

187. VA. CODE ANN. § 15.2-1726 (West 2017).

188. § 15.2-1401.

189. § 15.2-102.

Virginia precedent is clear that the sheriff is considered a separate legal entity from the locality he represents.[190]

Comparatively, in North Carolina, sheriffs have statutory power to receive and house prisoners delivered to county jails under the authority of the federal government.[191] It could be argued that, by applying *Perretta*, this state law implies that sheriffs have authority to enter a 287(g) agreement because participation in the 287(g) program is a necessary means of performing this statutory responsibility. However, *Perretta* is distinguished from this scenario. The court in *Perretta* held that a mayor's ability to dismiss employees is implied from the mayor's function as chief executive of the city because the express responsibility to manage the city's finances implies authority to dismiss employees.[192] Human resources have a direct financial value, and the inability to manage them would make financial management impossible. But in North Carolina, the local governing body is charged with entering and ratifying contracts on behalf of the municipality.[193] The local governing body could still enter and ratify a 287(g) agreement on behalf of the sheriff and locality, and the sheriff would retain the powers necessary to detain federal prisoners under both § 287(g) and North Carolina code. Furthermore, the *Perretta* court considered the mayor's power as chief executive to be quite broad,[194] which stands in contrast to sheriffs' explicitly narrow mandate in many jurisdictions, including North Carolina.[195] State legislatures assign certain local officials with express authority to contract on behalf of their locality for a reason, and sheriffs should not have implied authority deriving from the express authority of a different local official where sheriffs have their own specific statutory mandate. Thus, in states where a sheriff's scope of authority is similar to Virginia or

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190. *See* Keathley v. Vitale, 866 F. Supp. 272, 275 (E.D. Va. 1994) (determining that just because a sheriff has discretion to make decisions impacting his municipality does not make those decisions municipal policy); *see also* Narrows Grocery Co. v. Bailey, 170 S.E. 730, 733 (1933) (holding a sheriff personally liable for failure to perform a responsibility expressly assigned by the state legislature).

191. N.C. GEN. STAT. ANN. § 162-34 (West 2017).

192. *See* 440 A.2d 823, 829–30 (N.C. 1981).

193. *See* N.C. GEN. STAT. ANN. § 160A-12 (entering contracts); § 160A-16 (2017) (ratifying contracts).

194. *See Perretta*, 440 A.2d at 830 (holding that the city's charter provides broad powers to the executive).

195. *See supra* notes 146–56 and accompanying text (detailing how state constitutions and legislation typically provide specific, narrow duties of sheriffs).

North Carolina, a sheriff's ability to enter a 287(g) agreement cannot reasonably be implied from existing express statutory authority.

3. Essential authority for a sheriff to enter a 287(g) agreement

The final Dillon factor a court might consider in determining the extent of a sheriff's authority to enter a 287(g) agreement concerns whether such power is essential to the locality the sheriff represents.[196] Entering a 287(g) agreement could be considered essential to effectively administer the office of the sheriff, similar to how the mayor's authority to dismiss employees was deemed essential in *Ennis*.[197] However, this argument is merely a weaker version of the contention that a sheriff's ability to enter a 287(g) agreement is an implied power.[198] As discussed above, there are typically other local officials empowered to contract with outside entities who could do so within the legal framework of state legislation, and many sheriffs throughout the country manage to perform their duties adequately without the added benefit of a 287(g) agreement. It might be "convenient" for a sheriff to have a 287(g) agreement in place where it furthers local policy interests, but to say it is "essential" goes too far.[199] Moreover, the local oversight mechanism provided in states where a specific county representative is empowered to contract on behalf of his locality should be considered integral to maintaining the balance of power between state and local governments. If sheriffs were meant to have such authority, state legislatures would provide it. To simply disregard this important accountability function would be a slight against a fundamental check on government authority at the municipal level.

By comparison, an argument applying *Willson* would have to adopt the position that it is essential for a sheriff to be able to enter a 287(g) agreement to protect a locality's citizens.[200] The logic would have to be similar to that of a public official diverting stream water to prevent emergency flooding, which is the issue the court considered

196. *See supra* notes 106–13 and accompanying text (outlining the third factor of Dillon's Rule).

197. *See* State *ex rel.* Ennis v. Superior Court, 279 P. 601, 606 (Wash. 1929).

198. *See supra* notes 114–16 and accompanying text (discussing the ambiguity between the second and third Dillon factors).

199. Homebuilders Ass'n of Charlotte, Inc. v. City of Charlotte, 442 S.E.2d 45, 49 (N.C. 1994) (quoting J. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS, § 237 (5th ed. 1911)) (delineating the powers of municipal corporations as those that are expressly granted, fairly implied, or essential to the accomplishment of the purposes of the corporation).

200. *See supra* notes 109–11 and accompanying text (discussing *Willson*).

in *Willson*.[201] Proponents of strict immigration policy would likely make an argument comparing an uncontrolled river to the danger supposedly created by undocumented immigration. While this position makes for a powerful metaphor, the argument is easily countered. Empirical data suggests that undocumented immigrants are actually less likely to commit crimes in the United States than native-born Americans.[202] One report even goes as far as to suggest that there could be a correlation between the increased immigration rate in recent years and a drop in crime.[203]

While there are policy arguments to be made on both sides of the political spectrum, one thing is clear: a loose application of the third Dillon factor should not be allowed to run afoul of the U.S. system of federalism. In particular, state officials should not be able to circumvent well-established legal principles to further their own political or personal interests. By its very nature, Dillon's Rule exists to prevent exactly that from happening. Allowing sheriffs to continue to unilaterally enter 287(g) agreements sets precedent that could allow ICE and local law enforcement to establish local bastions of federal authority irrespective of state governments' intent simply because they believe it to be good public policy. The same thing could conceivably happen with any issue creating tension between state and federal law.[204] Because sheriffs are elected officials, and the Attorney General

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201. *See* Willson v. Boise City, 55 P. 887, 889 (Idaho 1899).

202. *See, e.g.*, Nazgol Ghandnoosh & Josh Rovner, *Immigration and Public Safety*, SENT'G PROJECT 6–7 (2017), http://www.sentencingproject.org/wp-content/uploads/2017/03/Immigration-and-Public-Safety.pdf (reporting that immigrants as a group have lower rates of arrests than native born Americans); Michelangelo Landgrave & Alex Nowrasteh, *"Criminal Immigrants Their Numbers, Demographics, and Countries of Origin,"* CATO INSTIT. 1 (Mar. 15, 2017), https://object.cato.org/sites/cato.org/files/pubs/pdf/immigration_brief-1.pdf (finding that native-born Americans are more likely to be incarcerated and that crime rates decrease in areas with high immigrant settlements).

203. Ghandnoosh & Rovner, *supra* note 202, at 89. Any argument that undocumented immigrants may negatively affect the U.S. economy is also easily refuted. *See* Brennan Hoban, *Do Immigrants "Steal" Jobs from American Workers?*, BROOKINGS (Aug. 24, 2017), https://www.brookings.edu/blog/brookings-now/2017/08/24/do-immigrants-steal-jobs-from-american-workers (noting that immigration positively impacts the American economy); *see also* NAT'L ACAD. SCIS. ENG'G, MED., THE ECONOMIC AND FISCAL CONSEQUENCES OF IMMIGRATION 197–200 (2017) (discussing how immigration can positively and negatively impact the American economy).

204. *See, e.g.*, Willis v. Winters, 253 P.3d 1058, 1068 (Or. 2011) (rejecting sheriffs' arguments that a federal law making marijuana consumption illegal did not entitle them to deny a concealed handgun license under state law); *c.f.*, Barr v. Snohomish Cty. Sheriff, 419 P.3d 867, 869 (Wash. Ct. App. 2018) (finding that a sheriff, who attempted

is a political appointee, incentives exist for sheriffs to partner with the federal government to enforce policy impacting any popular political issue, be it immigration, gun control, marijuana enforcement, or other similarly divisive policy matters.[205] However, the federal government cannot be allowed to enlist the assistance of local law enforcement where it would infringe on states' sovereignty.[206] Accordingly, any judicial decision turning on the third Dillon factor should not include an outcome conflicting with the dual sovereignty of states and the federal government because such a holding would have unconstitutional implications. This argument is reinforced in the context of 287(g) agreements by the express anti-preemption provision in § 287(g),[207] indicating Congress' intent to defer to state law. Furthermore, the third Dillon factor should be applied narrowly,[208] especially when its implications could adversely affect the constitutional rights of either states or individuals.[209]

C. Reconciling Dillon's Rule and Home Rule

While it is likely Dillon's Rule would limit a sheriff's authority to enter a 287(g) agreement, it is possible that a local law enacted under a Home Rule statute might offset Dillon's Rule and serve to empower sheriffs to enter 287(g) agreements.[210] For example, a local law or charter in a Home Rule state might explicitly authorize a sheriff to enter an intergovernmental agreement with ICE. After all, Michigan charters are

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to enforce both state and federal law with his actions, was prohibited from denying a concealed pistol license to an individual with two sealed juvenile felony adjudications).

205. *See* Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1281–84 (noting examples of tension in law when it comes to cooperation between states and the federal government).

206. *See* Printz v. United States, 521 U.S. 898, 933 (1997) (holding that a provision of the Brady Act requiring state law enforcement to participate in federal gun regulation was unconstitutional because it violated state sovereignty); *see also* Arizona v. United States, 567 U.S. 387, 398 (2012) ("Federalism, central to the constitutional design, adopts the principle that both the National and State Governments have elements of sovereignty the other is bound to respect." (citing Gregory v. Ashcroft, 501 U.S. 452, 457 (1995) (Kennedy, J., concurring))).

207. 8 U.S.C. § 1357(g)(1) (2012) (requiring that 287(g) MOAs are entered "to the extent consistent with State and local law").

208. *See supra* notes 106–13 and accompanying text (acknowledging that there are few examples where the third Dillon factor has been applied by courts).

209. *See supra* notes 79–87 and accompanying text (explaining how detention of undocumented immigrants by state level law enforcement in the absence of at 287(g) agreement infringes on constitutional rights).

210. *See supra* note 33 and accompanying text.

expressly required under the Michigan Home Rule to provide a mechanism for intergovernmental contracts,[211] so it is feasible that a Michigan locality's charter could authorize a sheriff to fulfill that function. However, any charter or local law enacted under Home Rule providing such authority would still have to withstand a preemption analysis because there would be no limitation on the outcome of a Dillon analysis if Home Rule is preempted.[212] Where a local law or charter is preempted by state law, it is invalidated,[213] and Dillon's Rule would thus serve to limit a sheriff's authority in states recognizing the doctrine.

1. Intrastate preemption analysis: Imperio *Home Rule constructions*

In an *imperio* Home Rule state,[214] it is likely a sheriff's authority would be considered an issue of "statewide concern"[215] because sheriffs oftentimes derive their powers explicitly from the state legislature.[216] As the *Longmont* court acknowledged, mentioning an issue explicitly in a state constitution indicates an area of "statewide concern."[217] The same goes for an issue within a category of traditional regulatory

211. MICH. COMP. LAWS ANN. § 45.514(j)-(k) (West 2017).

212. *See supra* Sections II.C, II.D.

213. *See, e.g.*, Palm v. 2800 Lake Shore Drive Condo. Ass'n, 988 N.E.2d 75, 81 (Ill. 2013) ("If the legislature intends to limit or deny the exercise of home rule powers, the statute must contain an express statement to that effect."); Tri-Nel Mgmt. v. Bd. of Health, 741 N.E.2d 37, 43 (Mass. 2001) (acknowledging that a local law is only invalidated where it is in "sharp conflict" with state statute (quoting Take Five Vending, Ltd. v. Town of Provincetown, 415 Mass. 741, 744 (1993))); Am. Cancer Soc'y v. State, 103 P.3d 1085, 1090 (Mont. 2004) (holding that a local no-smoking ordinance was not in violation of the Montana state constitution because it was not expressly preempted by the constitution); New Mexicans for Free Enter. v. City of Santa Fe, 126 P.3d 1149, 1155 (N.M. Ct. App. 2005) (considering whether a local ordinance increasing the municipal minimum wage requirement was in express conflict with the New Mexico state minimum wage statute); Wholesale Laundry Bd. of Trade, Inc. v. City of New York, 234 N.Y.S.2d 862, 865 (N.Y. App. Div. 1962) (holding that a city minimum wage law prohibiting employment at a salary which state law permitted was inconsistent with state law and thus invalid); Fross v. County of Allegheny, 20 A.3d 1193, 1203 (Pa. 2011) ("[L]ocal legislation cannot permit what a state statute or regulation forbids or prohibit what state enactments allow." (quoting Huntley & Huntley, Inc. v. Borough Council, 964 A.2d 855, 862 (Pa. 2009))).

214. The *imperio* Home Rule construction allows local governments wide discretion to determine their own rules and laws without any express limitation. *See supra* Section II.D.1.

215. City of Longmont v. Colo. Oil & Gas Ass'n, 369 P.3d 573, 580 (Colo. 2016).

216. *See supra* notes 146–56 and accompanying text (providing examples of statutory power explicitly vested in sheriffs in various states).

217. *City of Longmont*, 369 P.3d at 581.

practice.[218] Sheriffs are frequently endowed with their authority from state constitutions, and defining the scope of law enforcement authority falls within a traditional state-level regulatory practice,[219] indicating that a Home Rule provision empowering a sheriff with authority to enter a 287(g) agreement would thus conflict with an area of "statewide concern."[220] Furthermore, due process considerations dictate that there is a clear need for statewide uniformity in law enforcement, especially when constitutional rights are at risk, which is likely the reason sheriffs are so often empowered through state code or constitution and not local laws or charters. Accordingly, a local law or charter granting a sheriff with additional powers under an *imperio* Home Rule construction would be preempted in this scenario.

2. Intrastate preemption analysis: Express preemption Home Rule constructions

In states where the Home Rule statute includes an explicit preemption provision, it is even more likely that state law would preempt a local charter granting sheriffs with authority to enter 287(g) agreements. Including an express preemption provision as part of a Home Rule statute makes clear the legislature's intent to retain supremacy over local laws. In states where the sheriff's mandate is expressly established by the state legislature alone,[221] a charter granting a sheriff additional authority could be construed as expressly prohibited by state law using the Maryland Court of Appeals' preemption test set forth in *Sitnick*.[222] It is unlikely a given state's code would include a provision explicitly stating that, for example, "local government shall not dictate the sheriff's responsibilities." However, reserving the exclusive power for the legislature to define a sheriff's scope of authority arguably serves the same purpose.

Even if a sheriff's statutory mandate was not considered to be expressly prohibited by state law in this manner, it is likely a charter empowering a sheriff to enter a 287(g) agreement would still conflict with state law

218. *Id.*

219. *See supra* notes 146–56 and accompanying text (demonstrating how sheriffs derive their authority from state constitutions and state code).

220. *City of Longmont*, 369 P.3d at 580.

221. *E.g.*, TEX. CONST. art. V, § 23 (defining the scope of sheriffs' authority to be "prescribed by the Legislature").

222. *See* City of Baltimore v. Sitnick, 255 A.2d 376, 377 (Md. 1969) (considering whether a local law was expressly prohibited by state legislation).

under the *Sitnick* test.[223] If a state legislature lays out specific duties and responsibilities for the sheriff through state code, a local law or charter empowering a sheriff to do something more than he is already authorized to do would expand the scope of the sheriff's authority beyond that which the legislature intended. A local law or charter of this kind would thus not seek to achieve the same end as state legislation, which runs contrary to the outcome of the *Sitnick* preemption analysis.[224]

In the unlikely event that both of the first *Sitnick* factors were to fail a preemption test in this context, a court might still determine that there is legislative intent to preempt the field of regulating law enforcement.[225] As with all *Sitnick* factors, this might vary from state to state depending on the sheriff's statutory or constitutional mandate, but it stands to reason that empowering a sheriff through state legislation implies state legislatures' intent to regulate the duties and responsibilities of the sheriff's office. If state legislatures were unconcerned with regulating sheriffs' authority, they could more explicitly delegate local governments with the ability to define the scope of a sheriff's authority in localities where Home Rule applies.

Regardless of the merits of a Home Rule preemption analysis, it seems unlikely many Home Rule charters or local laws nationwide empower sheriffs to enter 287(g) agreements. It is so common for an official other than the sheriff to have statutory authority to enter contracts with external entities that it would be unnecessary for a local law or charter to address the issue to begin with.[226] Additionally, Home Rule acts as a check on local power insofar as it empowers local citizens to define the scope of local officials' authority.[227] In the same way a local law or charter might explicitly empower a sheriff to enter a 287(g) agreement, it is equally possible for it to prohibit the exercise of such authority.

D. Sheriffs' Agency to Enter 287(g) Agreements

To make a 287(g) agreement binding, a sheriff unilaterally entering into a 287(g) agreement would need actual or apparent authority to

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223. *See supra* notes 131–36 and accompanying text (discussing the *Sitnick* preemption test).

224. *See Sitnick*, 255 A.2d at 384 (holding that a local law was legitimate because it sought to accomplish the same goal as a state statute).

225. *See id.* at 322 (analyzing whether the state legislature intended to regulate the field as the third prong of a preemption analysis).

226. *See supra* notes 157–64 and accompanying text (describing typical officials endowed with authority to contract on behalf of their locality).

227. *See supra* notes 137–41 and accompanying text (laying out Home Rule's limitation on local authority).

contract on behalf of the locality he represents.[228] When it comes to actual authority, a sheriff may only enter a 287(g) agreement if such authority is granted to him by state legislation. Like the insurance salesman in *Merrill* or the government employee in *Richmond*, sheriffs cannot bind the local governmental entities they represent by entering a contract where they are not expressly authorized to do so.[229] Moreover, in the same way the government employee in *Richmond* mistakenly gave faulty information,[230] a sheriff mistakenly believing he has authority to enter a 287(g) agreement still does not justify overstepping the framework of his authority. In that regard, the application of agency principles through the lens of Dillon's Rule indicates sheriffs do not have express authority to enter agreements with the federal government in most instances.[231]

Similarly, county sheriffs would only have apparent authority if the principal (i.e., the locality they represent) overtly manifested to ICE (as the third party) the will or intention for sheriffs to have authority to contract with the federal government.[232] Because the vast majority of 287(g) agreements are signed solely by sheriffs,[233] a court applying agency principles would have to consider evidence to suggest the locality in question had made a manifestation towards ICE that might cause ICE to actually and reasonably believe that sheriffs have authority to enter contracts. While it is possible localities might make such manifestations towards ICE, agency principles would need to be applied on a case-by-case basis, and it seems that ICE relies on § 287(g) itself as the legal justification granting sheriffs authority to enter MOAs.[234] Additionally, § 287(g) is a representation of Congress' intention, not the intention of the localities that sheriffs represent. An apparent authority argument thus does not work in this scenario. Furthermore, the Supreme Court has been clear in narrowly construing the agency of government officials, meaning that an

228. *See supra* Section II.A (providing a basic discussion of agency theory).

229. *See supra* notes 63–70 and accompanying text (discussing *Merrill* and *Richmond*).

230. Office of Personnel Management v. Richmond, 496 U.S. 414, 417–18 (1990).

231. *See supra* Section II.E (detailing common statutory authority of sheriffs).

232. *See supra* notes 55–61 and accompanying text (discussing apparent authority).

233. *See ICE Section 287(g)*, *supra* note 19 (linking to all fully executed 287(g) agreements nationwide).

234. The ICE website incorrectly states that 287(g) agreements can be signed by "the head of the local agency carrying out the designated immigration law enforcement functions." *Id.*

apparent authority argument is likely irrelevant anyways.[235] Ultimately, when sheriffs unilaterally enter 287(g) agreements that they are not authorized to enter, one of the parties to the agreement (i.e. the sheriff) does not have agency to bind the entity they represent, disabling the contractual instrument that a 287(g) MOA provides.[236]

E. Sheriffs' Lack of Legal Privilege to Detain Individuals Under Invalid 287(g) Agreements

Individuals detained under invalid 287(g) agreements deserve constitutional protections. *Ochoa*, *Lunn*, and *Santos* are clear in requiring written 287(g) agreements to be in place in order for local law enforcement to have authority to enforce federal immigration policy.[237] Thus, an application of these cases precludes sheriffs from detaining individuals for federal immigration violations if there is no legitimate 287(g) agreement granting them that authority.[238] Accordingly, where local law enforcement detains suspected undocumented immigrants under federal immigration policy through an invalid 287(g) agreement, it is in violation of at least the Fourth and Fifth Amendments and possibly other laws.[239]

F. Federal Preemption in the Context of § 287(g) and Dillon's Rule

Section 287(g) does not preempt Dillon's Rule and grant sheriffs the authority to enter 287(g) agreements because the plain language of § 287(g) includes an express anti-preemption provision. Specifically, § 287(g) requires that 287(g) MOAs be executed "to the extent

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235. *See supra* notes 63–70 and accompanying text (analyzing *Merrill* and *Richmond* as they determine the extent of agency of government officials).

236. *See supra* notes 55–61 and accompanying text (explaining that a contract where one of the parties does not have agency to bind the principal is unenforceable as a matter of law). North Carolina even goes as far as to explicitly invalidate contracts made on behalf of cities, which are not ratified by the local governing body. N.C. GEN. STAT. ANN. § 160A-16 (West 2017).

237. *See supra* notes 79–87 and accompanying text (discussing *Ochoa*, *Lunn*, and *Santos*).

238. *See* Santos v. Frederick County Bd. of Comm'rs, 725 F.3d 451, 465 (4th Cir. 2013) (reasoning that detention of an undocumented immigrant by state-level law enforcement without a 287(g) agreement is a Fourth Amendment violation); Ochoa v. Campbell, 266 F. Supp. 3d 1237, 1259 (E.D. Wash. 2017) (applying Fourth Amendment protections in the absence of a 287(g) agreement); Lunn v. Commonwealth, 78 N.E.3d 1143, 1159–60 (Mass. 2017) (holding that state-level law enforcement cannot enforce federal immigration policy without a 287(g) agreement in place).

239. *See, e.g.*, *Ochoa*, 226 F. Supp. 3d at 1255.

consistent with State and local law."[240] Dillon's Rule is a doctrine dictated and recognized on a state-by-state basis.[241] Thus, because Dillon's Rule is state law, § 287(g) explicitly requires 287(g) MOAs to comply with limitations posed by Dillon's Rule.[242]

Even notwithstanding this explicit provision in § 287(g), the statute does not preempt the outcome of a Dillon analysis. Section 287(g) does not address the contracting authority of the local official who enters the 287(g) agreement; all it says is that the U.S. Attorney General may delegate federal immigration responsibilities to an official he determines to be qualified.[243] The statute does not specify who may sign a 287(g) MOA on behalf of the LEA,[244] meaning states have the authority to make their own rules regarding 287(g) MOA signing authority because to do so would not conflict with § 287(g).[245] The local government signatory does not necessarily impact who the Attorney General delegates authority to. Accordingly, § 287(g) would apply if an official who is authorized to enter a contract with the federal government, such as the county governing body or county judge, were to sign a 287(g) MOA.[246] The statute does not conflict with the idea that the appropriate county signatory could enter the agreement on behalf of his locality, and the Attorney General would still have discretion to delegate authority to implement the agreement to whichever local official he deems appropriate. However, authorized local signatories would be wise to think twice before binding their municipality to participate in a controversial program with major flaws identified by the Department of Homeland Security itself.[247] Furthermore, in many cases, sheriffs unilaterally enter these

240. 8 U.S.C. § 1357(g)(1) (2012).

241. *See supra* Section II.C (discussing Dillon's Rule).

242. § 1357(g); *see also* Sessions & Hayden, *supra* note 22, at 330 (noting that local law enforcement may make arrests for violations of federal crimes as long as they are not limited by local law from doing so).

243. § 1357(g)(1).

244. *Id.*

245. *See* Arizona v. United States, 567 U.S. 387, 414 (2012) (citing United States v. Di Re., 332 U.S. 581, 589 (1948)) (acknowledging that where state and federal law are not in conflict, state law can govern).

246. *See supra* notes 157–64 and accompanying text (detailing how contracting authority at the local level is often vested in someone other than the sheriff).

247. *See* Eric Katz, *ICE's Expanded Use of Local Law Enforcement Came Without Adequate Planning or Resources*, GOV'T EXECUTIVE (Sep. 24, 2018), https://www.govexec.com/management/2018/09/ices-expanded-use-local-law-enforcement-came-without-adequate-planning-or-resources/151515 (referencing an ICE Inspector General report identifying human resources and IT shortcomings in the 287(g) program).

agreements,[248] which is an abuse of their power as sheriffs where they are not authorized to enter contracts on behalf of their localities. Because § 287(g) does not address the question of signing authority of the LEA representative entering a MOA, but Dillon's Rule limits who can sign agreements with the federal government, the rules do not conflict, and Dillon's Rule applies.

CONCLUSION

The sheriff, as a local government official, is limited by Dillon's Rule to the powers granted to him by state law. Where a sheriff is not authorized by state law to enter a 287(g) agreement with ICE, Dillon's Rule precludes him from having agency to do so. Accordingly, 287(g) agreements entered unilaterally by sheriffs are likely not enforceable in most cases. In this scenario, the formal, written MOA required by § 287(g) for local law enforcement to carry out federal immigration policy cannot legally empower sheriffs to detain suspected undocumented immigrants absent some other legal authority. Thus, the individuals detained under the seventy-one 287(g) agreements across the country signed solely by sheriffs may well deserve Fourth and Fifth Amendment protections, as well as other constitutional protections that are being withheld through their detention.

Dillon's Rule does not preclude all 287(g) agreements, especially those that exist in states where the doctrine does not apply. Furthermore, a Dillon analysis can differ significantly from state-to-state, and there is always the unlikely possibility that Home Rule might serve to offset Dillon's Rule. But the local government oversight function that Dillon's Rule protects must be respected in the jurisdictions that recognize the doctrine, and sheriffs should not be allowed to overstep the legal authority vested in them by the states they serve, especially when constitutional rights are on the line.

248. *See ICE Section 287(g)*, *supra* note 19 (providing access to a copy of all 287(g) agreements in the United States).