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Immigration Sanctuary Policies: Constitutional and Representative of Good Policing and Good Public Policy

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I. INTRODUCTION

In late February 2009, Rita Cote, a mother of four, called police in [the] Central Florida town [of Tavares] because her sister was allegedly attacked by her boyfriend. But when police showed up, rather than focus on the actual crime, they turned on Cote, who doesn't speak English.

Tavares is located in Lake County. And the Lake County sheriff . . .

* Professor of Law, University of San Francisco. Many thanks to Maya Manian, Kate Desormeau, and Kristen Holmquist for their suggestions on an early draft of this article. Danielle Johnston, Laurie Furstenfeld, and Emily Gibbs provided excellent research assistance. Special thanks to Amy Wright, the online research services librarian at the University of San Francisco School of Law.

had campaigned on the promise that he would deport illegal immigrants.

The police demanded to see Cote's papers, and when she only offered a bank identification card, they arrested *her*.

The man who had allegedly left marks and bruises on her sister was never even picked up.

As bad as that might be, it gets worse. She was held for eight days without being able to contact family. She was transferred to immigration authorities in Broward County, in South Florida, hours away from her family, before finally being released. By the way, her children and husband are all American citizens. . . . In fact, her husband is an Iraq War veteran.¹

Cote was fortunate to be released from immigration custody. Danny Sigui was not so lucky:

In Providence, Rhode Island, Guatemalan immigrant Danny Sigui helped convict a murderer by providing critical testimony against the accused. During preparation of the case, the state attorney general's office learned that Sigui was an undocumented immigrant, and reported him to the U.S. Department of Homeland Security (DHS). . . . When asked whether he would have come forward again, knowing that doing so would lead to his deportation, Sigui replied: "If I had known they would take my liberty, that they would take my children away from me, that they would put me [in immigration detention], I would not do this."²

Sigui was deported following the trial,³ in spite of an appeal from friends and the state attorney general office to allow him to stay.⁴

As private persons attempting to assist local law enforcement officials apprehend criminals, Cote and Sigui could have been spared the immigration enforcement nightmare had there been sanctuary policies in their communities.⁵ Policies that instruct officers to refrain from asking crime victims or witnesses

1. Ralph De La Cruz, *The Police Took Mommy: How Reporting a Crime Nearly Resulted in Deportation for Florida Woman*, FLA. CTR. FOR INVESTIGATIVE REPORTING (Jan. 31, 2011), <http://fcir.org/2011/01/31/the-police-took-mommy-how-reporting-a-crime-nearly-resulted-in-deportation-for-florida-woman>.

2. LYNN TRAMONTE, IMMIGR. POLICY CTR., DEBUNKING THE MYTH OF "SANCTUARY CITIES" 3 (2009), available at <http://www.immigrationpolicy.org/sites/default/files/docs/CommunityPolicingPaper3-09.pdf>.

3. *Id.*

4. Tatiana Pina, *Guatemalan Immigrant to Be Deported*, PROVIDENCE J., Aug. 6, 2003, at A1.

5. Admittedly, even in San Francisco, California, where there is a sanctuary policy, its application has not always been consistent. In one high profile incident that occurred in 2004, a stabbing victim reached out to San Francisco police officers for help. Philip Hwang, *Call the Cops, Get Deported*, S.F. BAY GUARDIAN, Feb. 8–14, 2006, at 7. She was shocked when police turned her over to Immigration and Customs Enforcement (ICE) agents, while her assailant went unpunished. *Id.* The Office of Citizen Complaints launched an investigation, concluded that the police had violated the Sanctuary Ordinance, and forwarded the case to the Police Department for discipline. *Id.* The primary officer simply was given retraining. *Id.*; see also *infra* note 328.

about their immigration status are in place in more than seventy cities and states,⁶ such as San Francisco and New York, and are also followed by many law enforcement agencies, such as the New Haven and Los Angeles police departments.⁷ Thousands of other police agencies are reluctant to be viewed as partners in federal immigration enforcement.⁸ The motivation behind these laws and policies is simple: to encourage the entire community—including immigrant members—to trust and cooperate with the police to promote public safety for everyone.⁹ If this message is delivered successfully, I also believe that its tone is an important, positive step in encouraging the civic integration of immigrant communities that stands in sharp contrast to the xenophobic undercurrent of measures such as Arizona's S.B. 1070¹⁰ and the billions of dollars spent annually in border and interior enforcement of federal immigration laws.¹¹

Sanctuary ordinances or policies that constrain local authorities from assisting in federal immigration enforcement do not receive the same political and media attention as anti-immigrant laws enacted by states and local governments. In the political struggle over the rights of undocumented immigrants in the United States, the greater media and political focus on anti-immigrant measures, such as Arizona's S.B. 1070 and similar policies in cities like Hazleton, Pennsylvania, and Farmers Branch, Texas, is understandable.¹² The widely publicized proposal and

6. TRAMONTE, *supra* note 2, at 4; Benjamin Wachs, *Sanctuary City: Now Endorsed by 17,945 Law Enforcement Agencies Nationwide*, S.F. WEEKLY, Aug. 26, 2008, http://blogs.sfweekly.com/thesnitch/2008/08/sanctuary_city_now_endorsed_by.php. An anti-immigrant organization, Ohio Jobs and Justice PAC, maintains a constantly updated website that lists dozens of cities and localities that it considers sanctuary cities. Steve Salvi, *The Original List of Sanctuary Cities, USA*, <http://ojjpac.org/sanctuary.asp> (last visited Nov. 3, 2011).

7. See *infra* notes 36–43, 80–82 and accompanying text.

8. Pamela Constable, *Many Officials Reluctant to Help Arrest Immigrants*, WASH. POST, Aug. 23, 2008, at B1.

9. In the words of Police Chief Charlie Dean of Prince William County, Virginia, “I have a responsibility to provide service to the entire community—no matter how they got here. It is in the best interest of our community to trust the police.” DEBRA A. HOFFMASTER ET AL., POLICE EXEC. RESEARCH FORUM, POLICE AND IMMIGRATION: HOW CHIEFS ARE LEADING THEIR COMMUNITIES THROUGH THE CHALLENGES 15–16 (2010), available at <http://policeforum.org/library/immigration/PERFImmigrationReportMarch2011.pdf>.

10. Support Our Law Enforcement and Safe Neighborhoods Act, ARIZ. REV. STAT. ANN. § 11-1051 (2010) (commonly known as S.B. 1070).

11. BILL ONG HING, DEPORTING OUR SOULS 178–82 (2006); BILL ONG HING, ETHICAL BORDERS 29–63 (2010).

12. Arizona's S.B. 1070 included provisions that required police officers to check the immigration status of everyone arrested in the state, made it a state crime to not have lawful status or to work in the state without authorization, and authorized state officers to enforce the civil provisions of the federal Immigration and Nationality Act. See generally *United States v. Arizona*, 641 F.3d 339 (9th Cir. 2011). In 2006, the northeastern Pennsylvania city of Hazleton passed an ordinance that sought to deny business permits to companies that employ undocumented immigrants, fine landlords who rent to them, and require legal tenants to register and pay for a rental permit. *Lozano v. City of Hazleton*, 620 F.3d 170, 176–80 (3d Cir. 2010). The Farmers Branch ordinance similarly would require all adults in the city who live in rental housing to register with the city and provide citizenship and immigration information in order to obtain a so-called “residential occupancy license.” Villas at

enactment of those laws are countered by vociferous opposition from immigrants and their allies. The protests generally are followed by high-profile lawsuits that challenge the propriety and constitutionality of the laws. Supporters of the subfederal anti-immigrant statutes argue that they must act because federal policymakers and enforcement officials have failed at their jobs. Detractors raise serious legal questions about the ability of state and local officials to act in a field that generally has been viewed as an exclusive federal domain.

With much less fanfare, the legality of sanctuary policies also has been challenged. For example, in *City of New York v. United States*,¹³ New York City unsuccessfully argued that a federal statute that appeared to interfere with the city's sanctuary policy violated the Tenth Amendment. The federal Court of Appeals for the Second Circuit reasoned that Congress was not forcing the city to enforce immigration laws, but simply barred any local restrictions that might interfere with voluntary cooperation by state or local officials with federal immigration agents.¹⁴ But in *Sturgeon v. Bratton*,¹⁵ a California court of appeal found no conflict between the same federal statute and the sanctuary policy of the Los Angeles Police Department (LAPD) and dismissed a challenge to the sanctuary policy by a disgruntled taxpayer.¹⁶ Those cases are discussed more fully in Part III.

Understanding why sanctuary policies are constitutional is important to the raging debate over immigration. Seemingly on a daily basis, anti-immigrant measures are proposed or enacted by state and local governments.¹⁷ In contrast, some jurisdictions that regard gaining the trust of immigrant communities as a necessity for public safety or that view themselves as immigrant friendly choose an approach that de-emphasizes the immigration status of those encountered in the course of police work. As *Sturgeon v. Bratton* illustrates, anti-immigrant groups stand ready to challenge those policies.¹⁸ Additionally, the proliferation of litigation challenging the constitutionality of anti-immigrant ordinances raises the question of whether one set of subfederal immigration-related approaches (sanctuary policies) can be constitutional, while a different set (anti-immigrant legislation) is not. To put it bluntly, can those in the immigrant rights community that promote

Parkside Partners v. City of Farmers Branch, 701 F. Supp. 2d 835, 839 (N.D. Tex. 2010), *aff'd*, No. 10-10751, 2012 WL 952252 (5th Cir. Mar. 21, 2012).

13. 179 F.3d 29 (2d Cir. 1999).

14. See *infra* notes 89–111 and accompanying text.

15. 95 Cal. Rptr. 3d 718 (Ct. App. 2009).

16. See *infra* notes 112–44 and accompanying text.

17. In the first quarter of 2010 alone, state legislators in forty-five states introduced 1,180 bills and resolutions relating to immigration; by the end of March, thirty-four state legislatures had passed seventy-one laws and adopted eighty-seven such resolutions. Huma Khan, *Immigration Debate: Number of City, State Bills Relating to Immigration Increase*, ABC NEWS (Aug. 2, 2010), <http://abcnews.go.com/Politics/immigration-debate-number-city-state-bills-relating-immigration/story?id=11220316>.

18. See also *infra* notes 84–88 and accompanying text discussing how San Francisco Mayor Newsom worried publicly about the constitutionality of the city's sanctuary ordinance—a concern that was partly fueled by advice he received from the city attorney's office.

sanctuary ordinances and attack anti-immigrant proposals have it both ways constitutionally?

In this Article I review the case law that specifically has involved the constitutionality of sanctuary polices and the relevant principles of preemption and states' rights. That process necessarily forces some comparison with the legal challenges over local and state anti-immigrant laws. In my view, while the principles of federalism represented in the Supreme Court's approach to the Tenth Amendment and preemption drive a stake in the heart of subfederal anti-immigrant laws, those same principles guide us to the conclusion that sanctuary policies are on safe footing. That conclusion is consistent with notions of giving voice to the disenfranchised and those who are potentially persecuted by a majority voicing a popular view; we must protect the voiceless from being overwhelmed and stand guard against a majoritarian intolerance of minority groups. So in the immigration field, the concept of preemption is an appropriate check on overzealous subfederal enforcement efforts that directly affect immigration regulation, while the Tenth Amendment is a check on federal intrusion on a local jurisdiction's attempt to be more protective of individual rights when the locality has a legitimate nonimmigration-related purpose, such as public safety.

The discussion on the legality of sanctuary policies will reveal that the reserved police powers and local economic decisions under principles of federalism play a major part in the analysis. For that reason, a deeper understanding of the rationale for sanctuary policies is crucial. We will find that in jurisdictions with sanctuary policies, local policy makers and law enforcement officials have made thoughtful and deliberate public safety decisions, taking great pains to do the right thing for the entire community. Those decisions are critical to principles of inclusion in our ever-growing diverse communities. For that reason, the sanctuary framework is good public policy—especially in contrast to the anti-immigrant examples of Arizona's S.B. 1070 or Hazleton, Pennsylvania.

This Article attempts to provide an understanding of the rationale behind sanctuary policies as a necessary step in addressing constitutional and policy concerns. In Part II, I examine the background and descriptions of some of the sanctuary ordinances and policies that can be found across the country. Part III presents an analysis of the constitutionality of sanctuary policies primarily focusing on Tenth Amendment and preemption analysis. In Part IV, I present the record on why sanctuary policies are being advanced as an important ingredient to good policing in communities with immigrant neighborhoods. Part V extends this discussion to why sanctuary policies are good public policy, especially as an instrument to encourage civic integration. In my closing, I also refer to programs, such as state and local partnership agreements with Immigration and Customs Enforcement (ICE) known as 287(g) agreements, the Secure Communities

program, and the National Crime Information Center database, that threaten to destroy public policy gains offered by sanctuary policies.

II. BACKGROUND

Like many cities and jurisdictions across the country in the 1980s, San Francisco declared itself a “city of refuge” or “sanctuary” city in response to the deportation of Central American refugees who had fled to the United States searching for protection from the civil conflicts that were raging in their countries.¹⁹ San Francisco’s 1985 resolution, passed by the city and county’s Board of Supervisors and signed by the mayor, was considered nonbinding, although its language stated that “federal employees, not City employees, should be considered responsible for implementation of immigration and refugee policy” and that city departments should not act in a manner toward Salvadoran and Guatemalan refugees that would “cause their deportation.”²⁰ However, after two 1989 incidents involving San Francisco police officers who cooperated with the Immigration and Naturalization Service (INS) and the Salvadoran consul, the Board of Supervisors adopted an ordinance that specifically prohibited officials from asking about or disseminating an individual’s immigration status “unless required by federal or state law.”²¹ Now, presumably, the ordinance had teeth; San Francisco officials—including law enforcement officers—were not to inquire about individuals’ immigration status.

The exception “unless specifically required” by state or federal law became relevant a few years later and is relevant today under preemption and Tenth Amendment scrutiny.²² In 1993, the San Francisco Board of Supervisors voted to amend the ordinance, permitting an exception for individuals arrested and booked on felonies. In 1990, Congress passed a law that required states receiving federal block grants for crime and drug control, such as California, to provide certified copies of state criminal conviction records to federal immigration authorities within thirty days of conviction.²³ So, in 1992, the California Office of Criminal Justice Planning (OCJP), which was responsible for administering the federal block grant, played it safe and decided to require grant recipients, such as San Francisco, to report individuals to the INS upon arrest—even prior to

19. Ignatius Bau, *City of Refuge: No Federal Preemption of Ordinances Restricting Local Government Cooperation with the INS*, 7 LA RAZA L.J. 50, 50–53 (1994).

20. S.F. Bd. of Supervisors Res. 1087-85 (1985).

21. Bau, *supra* note 19, at 53–54; *see also* S.F., CAL., ADMIN. CODE § 12.H.2 (1989).

22. Language in sanctuary policies that provide exceptions when federal authorities ask for immigration information that local authorities have helps to avoid preemption. *See infra* notes 180–83 and accompanying text.

23. Immigration Act of 1990, Pub. L. No. 101-649, § 507, 104 Stat. 4978 (1990). The next year, Congress amended the law to require simple notice of conviction in lieu of certified records, unless INS requested the certified records. Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, § 306(a)(6), 105 Stat. 1751 (1991).

conviction.²⁴ With some dissent,²⁵ San Francisco complied by amending the sanctuary ordinance and incorporating the exception for individuals arrested.²⁶ Thus, the state and San Francisco went beyond the federal requirement of reporting immigrants with convictions, and the new ordinance language required reporting of individuals simply upon arrest. However, outside of those circumstances, the ordinance required officers to refrain from asking individuals about immigration status. Ironically, the federal requirement that recipients of the block grants provide notice of criminal convictions subsequently was eliminated,²⁷ but San Francisco has never repealed its exception.

The history of San Francisco's ordinance suggests that the ordinance falls into a genre of policies that can be classified as expressions of "solidarity" with the Sanctuary Movement of the 1980s when thousands of refugees from El Salvador and Guatemala fled to the United States seeking refuge from civil strife.²⁸ Most of the asylum seekers were denied relief under narrow interpretations of the asylum laws, so churches and synagogues protested the decisions by offering their places of worship to house and protect the migrants.²⁹ Thus, cities like San Francisco stepped into the fray with their own sympathetic policies to make a statement in opposition to the limited grant of asylum by U.S. officials to the migrants.³⁰

Though it may be tempting to regard the current multitude of sanctuary policies as statements in opposition to federal immigration enforcement decisions, the public justification offered for the vast majority of such policies generally is presented in terms of public safety. The idea is that by seeking to create good relations and trust with immigrant communities, law enforcement is more effective for the entire community. In fact some immigrant rights advocates and law enforcement officials rail against the "sanctuary" terminology, arguing that the misnomer distracts the public from the real purpose of the policies to provide safe communities for all residents.³¹ They prefer "community policing," "confidentiality," or "preventive policing" labels.³² The LAPD policy, issued in

24. See, e.g., Letter from Cal. Office of Criminal Justice Planning 1 (Sept. 29, 1993).

25. The San Francisco Board of Supervisors voted six to four to amend the ordinance to comply with OCJP's directive, in order to avoid the loss of federal funding.

26. Bau, *supra* note 19, at 68–70.

27. Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 1111, 119 Stat. 2960 (2005).

28. Bau, *supra* note 19, at 53–54.

29. TRAMONTE, *supra* note 2, at 4.

30. Bau, *supra* note 19, at 50–53.

31. TRAMONTE, *supra* note 2, at 5.

32. See *Public Safety and Civil Rights Implications of State and Local Enforcement of Fed. Immigration Laws*: J. Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Sec., & Int'l Law and the Subcomm. on the Constitution, Civil Rights, & Civil Liberties of the Comm. on the Judiciary H.R., 111th Cong. 84 (2009) (testimony of George Gascón, Chief, Mesa Police Dep't, Mesa, Ariz.); DAVID A. HARRIS, GOOD COPS: THE CASE FOR PREVENTIVE POLICING 14–25 (2005); NAT'L IMMIGRATION FORUM, IMMIGRATION LAW ENFORCEMENT BY STATE AND LOCAL POLICE 2–3 (2007); TRAMONTE, *supra* note 2, at 1. A Congressional Research Service report defines a "sanctuary city" this way:

1979, is cited as an early example of a community policy approach implemented prior to the influx of Central American refugees and the Sanctuary Movement.³³

The evolution of some relatively recent sanctuary policies makes clear that public safety is their main goal.³⁴ In New Haven, Connecticut, in 2005, the police chief, government officials, and community leaders adopted two initiatives “designed to make New Haven more welcoming and safer for immigrants, and to help police officers during interactions with immigrants.”³⁵ The police issued a general order outlining procedures for police to follow during encounters with immigrants, and the city began issuing identification cards to all city residents regardless of immigration status.³⁶ New Haven’s population was close to a quarter Latino by 2007, and 10,000 to 15,000 residents were undocumented.³⁷ According to New Haven police, immigrants are often the victims, rather than perpetrators, of crime. They are targets of street robberies and home invasions. The crimes committed by undocumented immigrants include disorderly conduct, public intoxication, and motor vehicle violations. Domestic violence was identified as an “ongoing problem” in immigrant communities.³⁸ Under the police department’s general order, no distinction is made between documented and undocumented immigrants because they are all “part of our community.”³⁹ In other words, the department “would rather solve a homicide than worry about” the immigration

Most cities that are considered sanctuary cities have adopted a “don’t ask-don’t tell” policy where they don’t require their employees, including law enforcement officers, to report to federal officials aliens who may be illegally present in the country.

Localities, and in some cases individual police departments, in such areas that are considered “sanctuary cities,” have utilized various mechanisms to ensure that unauthorized aliens who may be present in their jurisdiction illegally are not turned in to federal authorities.

LISA M. SEGHEITI ET AL., CONG. RESEARCH SERV., RL32270, ENFORCING IMMIGRATION LAW: THE ROLE OF STATE AND LOCAL LAW ENFORCEMENT 26 (2006).

33. TRAMONTE, *supra* note 2, at 4.

34. On the other hand, the justification for the sanctuary policy in Cambridge, Massachusetts, first enacted in 1985 and renewed in 2006 suggests that it falls in the genre of statements of solidarity with immigrants who are victims of unjust U.S. immigration enforcement policies as laws:

RESOLVED: That the City of Cambridge reaffirm its commitment as a Sanctuary City, as declared by City Council Order Number 4 of April 8, 1985; and be it further

RESOLVED: That the City of Cambridge endorses the platform of the National Alliance of Latin American and Caribbean Communities’ Keep Our Families Together Campaign:

- Create an opportunity to apply for legal permanent residency status.
- Expedition of family visas.
- Visionary program for future migration flows that respects the rights of immigrants as workers and as human beings.
- The social, political and economic integration of new immigrants into US society

CAMBRIDGE, MASS., CITY COUNCIL ORDER NO. 16 (May 8, 2006), *available at* <http://www.rwinters.com/council/sanctuary2006.htm>.

35. HOFFMASTER ET AL., *supra* note 9, at 2.

36. *Id.*

37. *Id.* at 1.

38. *Id.* at 4.

39. *Id.*

status of a witness or victim.⁴⁰ Officers are prohibited from asking crime victims, witnesses, and anyone who approaches an officer for assistance about immigration status.⁴¹ As a result of the policy and follow-up initiatives, cooperation with police has “increased dramatically” and important strides have been made in getting the community to overcome its “fear of the police.”⁴²

The process of forging what can loosely be labeled a sanctuary policy was quite different in Prince William County, Virginia.⁴³ Between 2000 and 2007, the Latino population increased from just under ten percent to almost twenty percent of the total population.⁴⁴ Violent crimes decreased, but burglary and larceny increased.⁴⁵ Until 2007, as a matter of practice, police officers did not ask individuals about immigration status unless the person was arrested for a serious crime.⁴⁶ During the summer of 2006, a series of robberies occurred in which Latinos—including some undocumented immigrants—were the primary victims.⁴⁷ Counterintuitively, this led to an immigrant backlash and criticism of the police chief, a forty-year veteran, for condoning a “sanctuary” policy for undocumented immigrants.⁴⁸ The Board of County Supervisors (BOCS) reacted by adopting restrictions on social services for undocumented immigrants and ordering the police department to enter into a partnership with ICE to assist in federal immigration enforcement.⁴⁹ These agreements are authorized under 8 U.S.C. § 1357(g) or Immigration and Nationality Act (INA) section 287(g). The police chief cautioned that such a policy would discourage crime victims in immigrant communities from coming forward, harm the department’s relationship of trust with the community, and subject the county to allegations of racial profiling.⁵⁰ Within two months, the BOCS modified the order, partly from fear that racial profiling litigation would ensue, and only required immigration status questions

40. *Id.*

41. *Id.* at 6.

42. *Id.* at 7.

43. The intense debate over the issue of immigration in Prince William County is the subject of a documentary film, 9500 LIBERTY (Interactive Democracy Alliance 2009).

44. HOFFMASTER ET AL., *supra* note 9, at 14.

45. *Id.*

46. *Id.*

47. *Id.* at 14–15.

48. *Id.*

49. *Id.* at 14–18. Under 8 U.S.C. § 1357(g), DHS is authorized to enter into written agreements with state and local law enforcement agencies to delegate immigration enforcement functions to select local law enforcement officers. OFFICE OF INSPECTOR GEN., U.S. DEP’T OF HOMELAND SEC., THE PERFORMANCE OF 287(G) AGREEMENTS: REPORT UPDATE 2 (Sept. 2010), available at http://www.oig.dhs.gov/assets/Mgmt/OIG_10-124_Sep10.pdf. The agreements outline terms and conditions under which participating local personnel will function as immigration officers. *Id.* Pursuant to these agreements, designated officers who receive appropriate training and function under the supervision of sworn ICE officers are permitted to perform immigration law enforcement duties. *Id.*

50. HOFFMASTER ET AL., *supra* note 9, at 15.

for those placed under arrest. So the policy became one of postarrest, rather than prearrest inquiry, and every person taken into custody had to be asked about immigration status.⁵¹

Around the same time and not far from Prince William County, Virginia, police officials in Montgomery County, Maryland also were reassessing their approach to encounters with immigrants. The police chief in Montgomery County was a thirty-year law enforcement veteran in the Washington, D.C. area.⁵² Montgomery County experienced growth in the undocumented immigrant population beginning in 2005 and a simultaneous trend in increased crime in immigrant neighborhoods.⁵³ When the police chief took the helm in 2004, he knew that local political leaders and the community were accepting of the undocumented population; officers generally “did not question individuals about their immigration status.”⁵⁴ However, as the media began linking crime to undocumented immigrants, the police department’s policy was called into question.⁵⁵ In formulating an official policy, the chief wanted an approach that would facilitate the apprehension of undocumented immigrant criminals. However, he also wanted to enable officers to maintain positive relationships with immigrant communities.⁵⁶ After consulting with other law enforcement departments, the community, staff, and other residents, a new policy was adopted that requires the police only to forward to ICE the names of individuals arrested and charged with specified serious crimes.⁵⁷ To prevent racial profiling, the name of every person arrested for those crimes is forwarded to ICE.⁵⁸

Arizona’s enactment of S.B. 1070 and the notoriety of Sheriff Joe Arpaio of Maricopa County (Phoenix metropolitan area) contribute to the state’s image as a hotbed for subfederal immigration enforcement. S.B. 1070 included a series of provisions that, among other things, made immigration enforcement a priority for local police and criminalized undocumented status under state statute. Arpaio’s zealous workplace immigration raids and traffic checkpoint sweeps made the county the largest participant in the 287(g) program, responsible for tens of thousands of deportations of immigrants.⁵⁹ Any attempt to counter the state’s message of hostility and unwelcome toward undocumented immigrants would appear to be futile. However, at least two Arizona police departments have tried.

The mayor of Phoenix has tried to counteract the anti-immigrant image that the state and county have developed. He accused Sheriff Arpaio of racial profiling

51. *Id.* at 18.

52. *Id.* at 20.

53. *Id.* at 21.

54. *Id.* at 20–21.

55. *Id.* at 21.

56. *Id.* at 21–22.

57. *Id.* at 22.

58. *Id.* at 23.

59. *Id.* at 29.

and asked the U.S. Department of Justice (DOJ) to investigate Arpaio for allegedly violating the constitutional rights of immigrants.⁶⁰ Moreover, a local think tank concluded that Arpaio's tactics have actually resulted in increased crime, fewer arrests on criminal matters, and slower 911 responses.⁶¹ In contrast to Arpaio, the Phoenix Police Department prefers to focus on serious, violent crime when it comes to undocumented immigrants, and prior to a 2007 killing of a police officer by an undocumented immigrant, the department's policy prohibited officers from contacting federal immigration officials.⁶² After the shooting, the mayor proposed a revision to the policy, and now every person arrested is asked about citizenship status.⁶³ If an officer suspects that the individual is undocumented and a supervisor approves, federal ICE officials are contacted.⁶⁴ However, officers are prohibited from asking crime victims and witnesses about immigration status.⁶⁵ Traffic stops and other noncriminal encounters can result in a call to ICE if the officer suspects the person is undocumented.⁶⁶ The new policy is credited with contributing to a significant decrease in property and violent crimes.⁶⁷

Another Maricopa County city, Mesa, has experienced a drop in crime because of police department policy changes, even though critics label the changes a "sanctuary policy."⁶⁸ The Mesa police chief and mayor were critical of Sheriff Arpaio's tactics that were viewed as undermining the police department's "relationship with the immigrant community."⁶⁹ Arpaio's sweeps forced residents to stay indoors and discouraged children from attending school, damaging the department's "efforts to build trust."⁷⁰ Police were concerned that undocumented immigrants were preying on other Latinos who were hesitant to report crimes out of fear of deportation.⁷¹ A new police chief, who took over the position in 2006,

60. *Id.* at 30. In March 2009, the DOJ launched a civil rights investigation of the sheriff's enforcement of federal immigration laws to determine whether deputies were engaging in "patterns or practices of discriminatory police practices and unconstitutional searches and seizures." *Id.* at 40. Later, in September 2010, the DOJ filed a lawsuit against the sheriff, his office, and the county for refusing full cooperation with the department's investigation. *Id.* Since 2007, the sheriff's office was responsible for nearly one-fourth of the nationwide total of deportations over a three-year period through its 287(g) program. *Id.* at 29. In October 2009, ICE declined to renew the portion of the county's 287(g) contract that allowed deputies to arrest immigration violators during patrols; however, the sheriff's office retained its authority to check the immigration status of all inmates booked into county jails. *Id.*

61. *Id.* at 31.

62. *Id.* at 31–32.

63. *Id.* at 32.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 31.

68. *Id.* at 38.

69. *Id.* at 39.

70. *Id.* at 39 (quoting a district commander from the Mesa Police Department).

71. *Id.* at 39–40.

sensed suspicion and mistrust between the police and the immigrant community.⁷² By 2009, the chief and the mayor forged a city policy that sought to “build public confidence in the police and trust with the communities served.”⁷³ Under the policy, the immigration status of persons arrested for criminal offenses is assessed. However, officers are not to ask about the immigration status of crime victims and witnesses, nor of anyone involved in minor misdemeanors or civil infractions, including traffic stops.⁷⁴

New York City’s policy evolved on the heels of the sanctuary movement on behalf of Central Americans. While the public trust and confidence argument is certainly advanced to justify the policy today, there is no doubt that New York City mayors—including current mayor Michael Bloomberg—have a very long and consistent proimmigrant worldview. Essentially, the city prohibits its employees from voluntarily providing federal immigration authorities with information concerning the immigration status of any alien. In August 1989, Edward Koch, then New York City’s mayor, issued Executive Order No. 124. The Order prohibited any city officer or employee from transmitting information regarding the immigration status of any individual to federal immigration authorities unless (i) such employee’s agency is required by law to disclose such information, (ii) an alien explicitly authorizes a city agency to verify his or her immigration status, or (iii) an alien is suspected by a city agency of engaging in criminal behavior.⁷⁵

72. *Id.* at 40.

73. *Id.* at 43.

74. *Id.*

75. Executive Order 124 provides in pertinent part:

Section 2. Confidentiality of Information Respecting Aliens.

a. No City officer or employee shall transmit information respecting any alien to federal immigration authorities unless

(1) Such officer’s or employee’s agency is required by law to disclose information respecting such alien, or

(2) such agency has been authorized, in writing signed by such alien, to verify such alien’s immigration status, or

(3) such alien is suspected by such agency of engaging in criminal activity, including an attempt to obtain public assistance benefits through the use of fraudulent documents.

b. Each agency shall designate one or more officers or employees who shall be responsible for receiving reports from such agency’s line workers on aliens suspected of criminal activity and for determining, on a case by case basis, what action, if any, to take on such reports. No such determination shall be made by any line worker, nor shall any line worker transmit information respecting any alien directly to federal immigration authorities.

c. Enforcement agencies, including the Police Department and the Department of Correction, shall continue to cooperate with federal authorities in investigating and apprehending aliens suspected of criminal activity. However, such agencies shall not transmit to federal authorities information respecting any alien who is the victim of a crime.

Section 3. Availability of City Services to Aliens.

Any service provided by a City agency shall be made available to all aliens who are otherwise eligible for such service unless such agency is required by law to deny eligibility for such service to aliens. Every City agency shall encourage aliens to make use of those services provided by such agency for which aliens are not denied eligible by laws.

City Policy Concerning Aliens, New York City Executive Order No. 124 (Aug. 7, 1989).

However, even if a city agency's line workers suspect an alien of criminal activity, the Executive Order prohibits them from transmitting information regarding such alien directly to the federal authorities.⁷⁶ Instead, it requires each agency to designate certain officers or employees to receive reports on suspected criminal activity from line workers and to determine on a case-by-case basis what action, if any, to take on such reports.⁷⁷ Mayor Koch's successors, David Dinkins and Rudolph Giuliani, reissued the Executive Order.

As noted previously, Los Angeles' 1979 police department policy predates the Central American-focused Sanctuary Movement of the 1980s. Special Order 40 (S.O. 40), entitled "Undocumented Aliens," LAPD's sanctuary policy, has been in place since November 27, 1979.⁷⁸ The order restrains police officers from engaging in action when the only purpose is to inquire about immigration status and arresting the person for entering the country illegally. In other words, officers are instructed not to enforce immigration violations that they are not witnessing.⁷⁹ On the other hand, when a person is arrested for more than one misdemeanor offense or something more serious, the arresting officers do have to notify a superior if the arrested person is determined to be undocumented. S.O. 40 was implemented to gain the trust of the immigrant community in an effort to encourage undocumented residents to report crimes without intimidation.⁸⁰

76. *Id.*

77. *Id.*

78. *Sturgeon v. Bratton*, 95 Cal. Rptr. 3d 718, 724 (Ct. App. 2009). Prior to 1979, Special Order No. 68 and its Supplemental Fact Sheet, dated November 24, 1972, embodied LAPD policy regarding arrest for illegal entry into this country.

According to this directive, officers were not to initiate police action with the primary objective of discovering the alien status of a person where no crime-related issues were involved.

Whether or not a suspected undocumented alien was booked on criminal charges, the arresting officer was to contact by phone an immigration agent who would then interview the detainee to "determine the legality of the suspected person's presence in the United States." INS could place a teletype "hold" on the suspect which became effective after adjudication of any state criminal matter.

Where the detained person was not booked on a criminal charge and contact with the INS revealed undocumented status, the LAPD policy required an officer to consult divisional detectives or the watch commander for booking approval. Such approval might be obtained where "there is a likelihood that the release of an illegal alien will create additional police problems. (Example: Family dispute calls, possibility of an assault or ADW occurring, etc.)" If booking approval was denied, the suspect was to be released but the officer was to forward all available information as to the suspect's identity to Detective Headquarters Division (DHD).

With respect to suspected illegal aliens who were neither the object of a police investigation nor subject to booking, an officer "need not notify INS" but instead could merely forward information on the suspect to DHD. However, in urgent situations, such as fires or other disasters in which a suspected illegal alien was a victim or involved, an officer could notify DHD, which, in turn, would notify INS "who will take immediate action to aid this Department in alleviating the problem."

Gates v. Superior Court, 238 Cal. Rptr. 592, 595 (Ct. App. 1987). S.O. 40 was enacted to replace Special Order No. 68.

79. *Sturgeon*, 95 Cal. Rptr. 3d at 725.

80. See Mariel Garza, *Bratton: Special Order 40 Not Going Anywhere*, L.A. DAILY NEWS, Apr. 14,

Even in San Francisco today, public officials who support the city's sanctuary ordinance tout its public safety purpose. In explaining his support, one member of the San Francisco Board of Supervisors explained,

If you are the victim of a crime and an undocumented person was the witness to that crime, you want that undocumented person to come forward and report what they saw to the police. . . . They're not going to come forward if they're afraid the police will report them to immigration.⁸¹

The idea is that the policy shielding immigrants from deportation benefits other San Franciscans as well.⁸² Language in San Francisco's ordinance makes clear that actions of local authorities are not to "be construed or implemented so as to discourage any person, regardless of immigration status, from reporting criminal activity to law enforcement agencies."⁸³

All of these examples reveal that while some local lawmakers and police officials may be motivated by sympathy for undocumented immigrants, the stated rationale behind the sanctuary or "don't ask" policies with respect to witnesses, victims, and low-level criminal arrests is public safety. The idea is that gaining the trust of all parts of the community is important to keeping the entire community safe.

III. CONSTITUTIONALITY

The question of whether sanctuary policies of police departments and local jurisdictions are constitutional has been raised in some interesting circumstances. For example, San Francisco's ordinance received special attention in 2008 following accusations that twenty-two-year-old Edwin Ramos committed a triple homicide. It seems that at the age of thirteen, the Salvadoran-born Ramos had served time in San Francisco Juvenile Hall for two felonies and was never deported. Ramos should have been reported to immigration officials under the policy at the time but he fell through the cracks. In what critics regard as an overreaction, Gavin Newsom, the mayor at the time, ordered juvenile probation authorities to treat arrested juveniles prior to conviction the same as arrested adults under the 1993 amendment.⁸⁴ Prior to Newsom's order, only arrested (but not yet convicted) adults were reported to immigration authorities. The new order

2008, available at <http://www.insidesocal.com/friendlyfire/2008/04/bratton-special-order-40-not-g.html>; *In the Real World: The Myths Surrounding the LAPD's Special Order 40 May Hinder Action on Criminal Deportations*, L.A. TIMES, Apr. 9, 2008, at A16, available at <http://articles.latimes.com/2008/apr/09/opinion/ed-gangs9>.

81. Richard Gonzales, *San Francisco Youth Sanctuary Law Prompts Battle*, NPR ALL THINGS CONSIDERED (Nov. 4, 2009), available at <http://www.wbur.org/npr/120061381/san-francisco-youth-sanctuary-law-prompts-battle> (quoting Supervisor David Campos).

82. *Id.*

83. *See infra* note 85 (text of the ordinance).

84. *See infra* notes 85–88 and accompanying text.

required arrested juveniles to be reported to ICE before conviction as well, even if charges were later dropped. Many members of the San Francisco Board of Supervisors bristled at the policy shift, arguing that reporting juveniles prior to any conviction was a stunning setback to sanctuary principles because juveniles are much different from adults under conventional norms of public policy. Within a year, the Board, over Newsom's veto, passed legislation that permits reporting of juveniles to ICE only upon a finding by the juvenile court that the minor committed a felony or if the juvenile is treated as an adult by the superior court.⁸⁵

85. Maria L. La Ganga, *S.F. Overrides Sanctuary Veto*, L.A. TIMES, Nov. 11, 2009, at A3. San Francisco's ordinance currently reads as follows:

Sec. 12H.2. Use of City Funds Prohibited.

No department, agency, commission, officer or employee of the City and County of San Francisco shall use any City funds or resources to assist in the enforcement of Federal immigration law or to gather or disseminate information regarding the immigration status of individuals in the City and County of San Francisco unless such assistance is required by Federal or State statute, regulation or court decision. The prohibition set forth in this Chapter shall include, but shall not be limited to:

(a) Assisting or cooperating, in one's official capacity, with any investigation, detention, or arrest procedures, public or clandestine, conducted by the Federal agency charged with enforcement of the federal immigration law and relating to alleged violations of the civil provisions of the Federal immigration law.

.....

(c) Requesting information about, or disseminating information regarding, the immigration status of any individual, or conditioning the provision of services or benefits by the City and County of San Francisco upon immigration status, except as required by Federal or State statute or regulation, City and County public assistance criteria, or court decision.

(d) Including on any application, questionnaire or interview form used in relation to benefits, services or opportunities provided by the City and County of San Francisco any question regarding immigration status other than those required by Federal or State statute, regulation or court decision. Any such questions existing or being used by the City and County at the time this Chapter is adopted shall be deleted within sixty days of the adoption of this Chapter.

Sec. 12H.2-1. Chapter Provisions Inapplicable to Persons Convicted of Certain Crimes.

Nothing in this Chapter shall prohibit, or be construed as prohibiting, a Law Enforcement Officer from identifying and reporting any adult pursuant to State or Federal law or regulation who is in custody after being booked for the alleged commission of a felony and is suspected of violating the civil provisions of the immigration laws. In addition, nothing in this Chapter shall prohibit, or be construed as prohibiting, a Law Enforcement Officer from identifying and reporting any juvenile who is suspected of violating the civil provisions of the immigration laws if: (1) . . . (2) the San Francisco Superior Court makes a finding of probable cause after the District Attorney directly files felony criminal charges against the minor in adult criminal court; or (3) the San Francisco Superior Court determines that the minor is unfit to be tried in juvenile court, the minor is certified to adult criminal court, and the Superior Court makes a finding of probable cause in adult criminal court.

Nothing in this Chapter shall preclude any City and County department, agency, commission, officer or employee from (a) reporting information to the Federal agency charged with enforcement of the Federal immigration law regarding an individual who has been booked at any county jail facility, and who has previously been convicted of a felony committed in violation of the laws of the State of California, which is still considered a felony under State law; (b) cooperating with a request from the Federal agency charged with enforcement of Federal immigration law for information regarding an individual who has been convicted of a felony committed in violation of the laws of the State of California, which is still considered a felony under State law; or (c) reporting information as

Interestingly, the controversy placed a spotlight on the general constitutionality of San Francisco's entire sanctuary ordinance. In response to the Board's override of the Mayor's veto, the San Francisco City Attorney's office warned that the action was "likely to result in a federal legal challenge to the [new legislation] and possibly the entire City of Refuge Ordinance."⁸⁶ In his veto message, the Mayor argued that the "sanctuary ordinance as originally conceived . . . was designed to protect those residents . . . who are law abiding. It was never meant to serve as a shield for people accused of committing serious crimes [The] changes [adopted by the Board of Supervisors] threaten the very existence of our sanctuary ordinance."⁸⁷ Newsom's spokesman announced to the press that the supervisors' vote could invite a federal legal challenge to the city's entire sanctuary policy.⁸⁸

Implicit in these expressions of caution that San Francisco's entire sanctuary ordinance may be subject to challenge is a fear that somehow the policy conflicts with or is in violation of federal law. The caution is particularly interesting in today's political environment because state and local anti-immigrant laws, such as those enacted in Arizona, Alabama, Utah, Mississippi, and the cities of Hazleton, Pennsylvania, and Farmers Branch, Texas, have been challenged on the grounds that they conflict with federal immigration laws. The proimmigrant position in the later situations is that only the federal government has the authority to regulate immigrants. The intriguing question is whether that position is consistent with the proimmigrant position that a sanctuary ordinance, such as San Francisco's, is

required by Federal or State statute, regulation or court decision, regarding an individual who has been convicted of a felony committed in violation of the laws of the State of California, which is still considered a felony under State law. For purposes of this Section, an individual has been "convicted" of a felony when: (a) there has been a conviction by a court of competent jurisdiction; and (b) all direct appeal rights have been exhausted or waived; or (c) the appeal period has lapsed.

However, no officer, employee or law enforcement agency of the City and County of San Francisco shall stop, question, arrest or detain any individual solely because of the individual's national origin or immigration status. In addition, in deciding whether to report an individual to the Federal agency charged with enforcement of the Federal immigration law under the circumstances described in this Section, an officer, employee or law enforcement agency of the City and County of San Francisco shall not discriminate among individuals on the basis of their ability to speak English or perceived or actual national origin.

. . . .
Nothing herein shall be construed or implemented so as to discourage any person, regardless of immigration status, from reporting criminal activity to law enforcement agencies.

S.F., CAL., ADMIN. CODE §§ 12.H.2 to 12.H.2-1 (1993).

86. Legal Issues in Connection with Proposed Amendment to Sanctuary Ordinance, Memorandum from Buck Delventhal, Miriam Morley & Wayne Snodgrass, Deputy City Att'ys of S.F., to Mayor Gavin Newsom (Aug. 18, 2009).

87. Letter from Mayor Gavin Newsom to Angela Calvillo, Clerk of the Bd. of Supervisors (Oct. 28, 2009) (on file with author).

88. Jesse McKinley, *San Francisco to Delay Reports on Charges Against Immigrants*, N.Y. TIMES, Oct. 20, 2009, at A19.

constitutional and does not contravene the principle that only the federal government has the authority to regulate immigrants.

In this Section, I analyze these constitutional questions. First, I review the approaches that two courts have used in reviewing sanctuary policies in two different contexts to provide a starting point. One involves New York City's ordinance in which the U.S. Court of Appeals for the Second Circuit denied the city's Tenth Amendment challenge to federal statutes that appeared to disrupt the protections afforded by the ordinance. The other is a California court of appeal decision in favor of the LAPD's special order that had been challenged on preemption grounds. With those cases as a background, I look closer at the federal statutes that set their sights on sanctuary ordinances and conclude that the federal provisions have serious Tenth Amendment problems. Since sanctuary policies primarily are enacted for public safety purposes, federal policies that intrude on those goals face serious problems. Although most cities with such policies do not restrain officers from voluntarily providing information to ICE out of fear that such a restraint would violate the federal law, I believe that fear is unwarranted. If the federal law mandates cooperation, serious commandeering problems arise under the Tenth Amendment. However, assuming that the federal statutes survive Tenth Amendment scrutiny, I then address the question of whether sanctuary laws are preempted under the Supremacy Clause. I conclude that sanctuary policies that bar local officials from asking crime victims and witnesses about immigration status are not susceptible to preemption claims (field, implied, or conflict). Sanctuary laws are about public safety and how to prioritize the spending of public funds, not about regulating immigration.

A. *City of New York v. United States*

The City of New York directly challenged the constitutionality of two federal antisanctuary laws—8 U.S.C. §§ 1373 and 1644—in the context of the city's own sanctuary ordinance in *City of New York v. United States*.⁸⁹ The city argued that the federal laws violated the Tenth Amendment, but the U.S. Court of Appeals for the Second Circuit disagreed.

Sections 1373 and 1644, which have similar language, are from parts of two pieces of legislation enacted by Congress in 1996. The Welfare Reform Act, signed into law by President Clinton in August 1996, contained a provision (section 434), entitled “Communication between State and Local Government Agencies and the Immigration and Naturalization Service,” which became 8 U.S.C. § 1644 and reads,

Notwithstanding any other provision of Federal, State, or local law, no State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from the Immigration and

89. 179 F.3d 29 (2d Cir. 1999).

Naturalization Service information regarding the immigration status, lawful or unlawful, of an alien in the United States.

The Conference Report accompanying the bill made clear that the purpose was to encourage communication from subfederal officials to federal officials:

The conferees intend to give State and local officials the authority to communicate with the INS regarding the presence, whereabouts, or activities of illegal aliens. . . . The conferees believe that immigration law enforcement is as high a priority as other aspects of Federal law enforcement, and that illegal aliens do not have the right to remain in the United States undetected and unapprehended.⁹⁰

Then in September 1996, Clinton signed an immigration reform law that contained a provision (section 642) entitled “Communication between Government Agencies and the Immigration and Naturalization Service,” which essentially expanded on § 1644 and became § 1373:

(a) In General

Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.

(b) Additional Authority of Government Entities

Notwithstanding any other provision of Federal, State, or local law, no person or agency may prohibit, or in any way restrict, a Federal, State, or local government entity from doing any of the following with respect to information regarding the immigration status, lawful or unlawful, of any individual:

- (1) Sending such information to, or requesting or receiving such information from, the Immigration and Naturalization Service.
- (2) Maintaining such information.
- (3) Exchanging such information with any other Federal, State, or local government entity.

(c) Obligation to Respond to Inquiries

The Immigration and Naturalization Service shall respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information.⁹¹

90. H.R. REP. NO. 104-725, at 383 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2649, 2771.

91. 8 U.S.C. § 1373 (2006); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 642, 110 Stat. 3009-707 (1996).

A Senate committee report accompanying this legislation explained that the purpose of the law was to acquire and “exchange . . . immigration-related information by State and local agencies” pertaining to the regulation of immigration.⁹²

After the enactment of these laws, the City of New York became concerned that §§ 1373 and 1644 would jeopardize its sanctuary policy described above.⁹³ Although no city officials claimed that the city had restrained them from communicating with immigration officials, shortly after the laws went into effect, the city sought declaratory and injunctive relief, asserting that the federal laws did not invalidate the city’s Executive Order. The city complained that because §§ 1373 and 1644 were aimed at state and local government entities, the laws violated the Tenth Amendment. In essence, the city argued that Congress could not restrict subfederal entities from controlling any immigration status information they obtained as they saw fit. The city asserted that the federal law was interfering with control of its own employees.⁹⁴

The Second Circuit divided the city’s Tenth Amendment arguments into two parts: (1) a state sovereignty claim that included the power to choose not to participate in federal regulatory programs and to stop local officials from participating even on a voluntary basis; and (2) a claim that the federal government cannot act in a manner that disrupts the actual operation of state and local government, such as by dictating the use of state and local resources or duties of local officials.⁹⁵ The city relied on *Printz v. United States* (federal gun control) and *New York v. United States* (radioactive waste legislation), both Tenth Amendment cases,⁹⁶ to support its claim that states have a choice about participating in federal regulatory programs and that the choice includes the ability to bar voluntary cooperation by local officials.⁹⁷

The Second Circuit did not agree with the city’s interpretation of Tenth Amendment case law. The court was cognizant of the Tenth Amendment’s language that “[t]he powers not delegated to the United States . . . are reserved to the States,” and the court acknowledged that “however plenary Congress’s power to legislate in a particular area may be, the Tenth Amendment prohibits Congress from commanding states to administer a federal regulatory program in that area. Moreover, ‘Congress cannot circumvent that prohibition by conscripting the State’s officers directly.’”⁹⁸ However, the court thought that §§ 1373 and 1644 were different. In *Printz* and *New York*, Congress improperly forced states to enact

92. S. REP. NO. 104-249, at 19–20 (1996).

93. See *supra* notes 75–77 and accompanying text.

94. *City of New York*, 179 F.3d at 33.

95. *Id.* at 34.

96. Both cases are discussed more fully below. See *infra* notes 162–71 and accompanying text.

97. *City of New York*, 179 F.3d at 34.

98. *Id.* at 33–34 (citing *Printz v. United States*, 521 U.S. 898, 935 (1997)).

or administer federal regulatory programs.⁹⁹

The central teaching of these cases is that “even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts.”¹⁰⁰ Congress may not, therefore, directly compel states or localities to enact or to administer policies or programs adopted by the federal government. It may not directly shift to the states enforcement and administrative responsibilities allocated to the federal government by the Constitution.¹⁰¹

However, in the case of §§ 1373 and 1664, Congress was, in the Second Circuit’s view, neither forcing subfederal entities to enact or administer a federal program nor conscripting local officials to do federal work. The federal laws simply prevented subfederal rule makers from “directly restricting the voluntary exchange of immigration information” with the immigration officials.¹⁰²

Based on its reading of the Tenth Amendment jurisprudence, the Second Circuit found the city’s rule problematic. By prohibiting any city officer or employee from transmitting information regarding the immigration status of any individual to federal immigration authorities, the executive order constituted a mandatory noncooperation directive to even those workers who might want to cooperate voluntarily. That directive was sufficient to forfeit the Tenth Amendment protections as outlined in *Printz* and *New York*.¹⁰³

The city also argued that the federal law violated the Tenth Amendment because §§ 1373 and 1644 interfered with the city’s operations by regulating confidential information obtained in the course of official business and seeking to control the actions of city officials. In support of this argument, the city pointed to *Printz*, where the Supreme Court also was critical of Congress for requiring local police officers to report privately obtained “information that belongs to the State and is available to them only in their official capacity,” as part of the Brady bill.¹⁰⁴ The city argued that §§ 1373 and 1644 would improperly take control of its information, and that would violate its power to “determine the duties and responsibilities” of its own employees.¹⁰⁵

Although the Second Circuit acknowledged the federal policy’s interference

99. *Id.* at 34. In *Printz*, local law enforcement had to conduct background checks for gun purchases, while in *New York*, state officials had to enact nuclear waste disposal rules and take title of anything that was not properly disposed of. *See infra* notes 169–71 and accompanying text.

100. *New York v. United States*, 505 U.S. 144, 166 (1992) (citations omitted).

101. *City of New York*, 179 F.3d at 34.

102. *Id.* at 35.

103. *Id.* After the *City of New York* case, the executive order in *New York* was changed to make clear that immigration status is a proper subject of inquiry when required by federal officials, and voluntary cooperation by local officials is not barred if they have that information. *See* City Policy Concerning Immigrant Access to City Services, New York City Executive Order No. 34 (May 13, 2003), available at http://www.nyc.gov/html/om/pdf/co/co_34.pdf.

104. *City of New York*, 179 F.3d at 36 (citing *Printz*, 521 U.S. at 933 n.17) (emphasis omitted).

105. *Id.*

with “the City’s control over confidential information obtained in the course of municipal business,” the court did not regard this as an “impermissible intrusion” on the city’s authority.¹⁰⁶ The only policy cited by the city that was disrupted was the sanctuary executive order that “single[d] out a particular federal policy for non-cooperation.”¹⁰⁷ The city’s order did not prevent voluntary sharing of immigration information with nonfederal immigration agents, suggesting to the court that the Executive Order was not very “integral” to local government operations.¹⁰⁸

The Second Circuit’s analysis definitely leaves room for subfederal sanctuary-style approaches in spite of §§ 1373 and 1644. Voluntary cooperation with ICE by local officials cannot be thwarted by sanctuary rules according to the Second Circuit.¹⁰⁹ However, this assumes that local officials have information to share, and the *City of New York* decision did not address the policy of instructing local police to not ask about immigration status. Additionally, if the confidentiality policy on immigration status is one that applies generally and is not exclusively aimed at ICE, then the situation is quite different. Finally, nothing in the Second Circuit’s opinion suggests that Congress or federal officials could force local officials to gather immigration information about crime victims, crime witnesses, or for that matter, arrestees.

As noted below, the Second Circuit’s interpretation of the Tenth Amendment vis-à-vis New York City’s sanctuary policies also is subject to criticism. The Second Circuit viewed §§ 1373 and 1644 as prohibitions from restricting voluntary cooperation with immigration officials.¹¹⁰ However, if the statutes are interpreted as a mandate to permit voluntary cooperation, then there may in fact be a Tenth Amendment problem.¹¹¹

B. *Sturgeon v. Bratton*

In *Sturgeon v. Bratton*,¹¹² Judicial Watch filed a taxpayer lawsuit, on behalf of Harold Sturgeon, against the LAPD in an attempt to put a stop to S.O. 40, the department’s sanctuary policy that had been in place since 1979.¹¹³ Judicial Watch is a conservative, educational foundation that boasts as one of its special projects

106. *Id.*

107. *Id.* at 37.

108. *Id.* As I argue below, I believe that the city’s argument for not asking about immigration status—at least as far as crime victims and witnesses, and even minor offenders—is a good one in terms of invoking the Tenth Amendment when the goal is public safety for everyone through gaining the trust of immigrant communities. See *infra* notes 180–83 and accompanying text.

109. *City of New York*, 179 F.3d at 34–37.

110. *Id.* at 34–35.

111. See *infra* notes 146, 180 and accompanying text.

112. 95 Cal. Rptr. 3d 718 (Ct. App. 2009).

113. *Id.* at 724; see also Tom Fitton, *You Can’t Trust ACLU*, JUDICIAL WATCH (Jan. 8, 2010), <http://www.judicialwatch.org/weeklyupdate/2010/01-you-cant-trust-aclu>.

the removal of undocumented immigrants.¹¹⁴ The action against the police chief and others sought to enjoin enforcement of S.O. 40, the policy governing the police department's interaction with undocumented immigrants.

S.O. 40 bars LAPD officers from engaging in action when the sole purpose is determining the immigration status of a suspect and arresting such persons for the federal crime of illegally entering the United States. Stated broadly, S.O. 40 prevents LAPD officers from initiating investigations for the purpose of finding violations of civil immigration laws and from arresting a suspect for an immigration misdemeanor not committed in the officers' presence.¹¹⁵ In an earlier 1987 case, the California Court of Appeal upheld S.O. 40 against a challenge that the "mere questioning of a criminal arrestee about his immigration status" and forwarding the information to the INS amounted to unconstitutional state enforcement of federal civil immigration law.¹¹⁶ That court found that the U.S. Constitution did not prevent the LAPD from voluntarily transferring arrest information to federal authorities.¹¹⁷ Under S.O. 40, "undocumented alien status in itself is not a matter for police action," and S.O. 40 directs officers not to "initiate police action with the objective of discovering the alien status of a person." However, "[w]hen an undocumented alien is booked for multiple misdemeanor offenses, a high grade misdemeanor or a felony offense, or has been previously arrested for a similar offense," the arresting officer shall notify Detective Headquarters Division of the arrest which, in turn, relays the information to immigration officials.¹¹⁸

Subsequently in 1996, as noted above, Congress enacted 8 U.S.C. § 1373, aimed at invalidating subfederal attempts to restrict local officials from voluntarily providing immigration information to federal immigration officials.¹¹⁹ In *Sturgeon v. Bratton*, the plaintiff Sturgeon argued that S.O. 40, as a local restriction, was

114. See *Our Programs*, JUDICIAL WATCH, <http://www.judicialwatch.org/programs> (last visited Sept. 22, 2011).

115. *Sturgeon*, 95 Cal. Rptr. 3d at 725.

[S.O.] 40 was promulgated by then Chief of Police Daryl Gates on November 27, 1979. Special orders are directives issued by the chief of police which amend the LAPD Manual. Although the parties and apparently, members of the community continue to refer to the LAPD's policy regarding illegal immigrants as "SO40," the relevant provision is in the LAPD Manual with a different section number. Volume IV, section 264.50 of the LAPD Manual provides, "ENFORCEMENT OF UNITED STATES IMMIGRATION LAWS. Officers shall not initiate police action where the objective is to discover the alien status of a person. Officers shall neither arrest nor book persons for violation of Title 8, Section 1325 of the United States Immigration Code (Illegal Entry)."

Id. at 724–25.

116. *Gates v. Superior Court*, 238 Cal. Rptr. 592, 600 (Ct. App. 1987).

117. *Id.* *Gates* involved a challenge to LAPD procedures before and after S.O. 40, by individuals encountered by LAPD prior to S.O. 40. The court of appeals concluded that the prior procedures were flawed.

118. *Id.* at 595.

119. 8 U.S.C. § 1373 (2006). The background to § 1373 is set forth in the discussion of *City of New York v. United States*. See *supra* notes 91–92 and accompanying text.

invalidated by § 1373. Namely, the plaintiff took the position that S.O. 40 violated the Supremacy Clause because S.O. 40 conflicted with § 1373. *Sturgeon* also argued that federal immigration law preempted S.O. 40.¹²⁰

In turning down the challenge, the state court of appeals began by noting that “[u]nder federal law, matters of immigration are handled by [ICE], a branch of the Department of Homeland Security.”¹²¹ Although the Attorney General of the United States may enter into a 287(g) agreement with local officials to help carry out the function of immigration officers, this requires a voluntary agreement, and the local officers would be subject to the supervision of federal officers.¹²² Although the Attorney General has the authority to use local law enforcement officers to help respond in an emergency in dealing with a mass influx of aliens, the Attorney General can only act “with the consent of the head of the department, agency, or establishment under whose jurisdiction the individual is serving” in those circumstances.¹²³

While the *Sturgeon* court did not rule on whether § 1373 violated the Tenth Amendment, the court noted that the Tenth Amendment “shields state and local governments from the federal government requiring them to administer federal civil immigration law.”¹²⁴ Although state law permits local police to enforce federal criminal statutes,¹²⁵ as a practical matter California police likely would never make an arrest for misdemeanor illegal entry because California officers may arrest for a misdemeanor only committed in the officer’s presence.¹²⁶

Turning to the plaintiff’s Supremacy Clause and preemption claims, the *Sturgeon* court also considered the language of § 1373(a) that prohibits local authorities from stopping local officers from voluntarily cooperating with ICE.¹²⁷ Section 1373(b) goes on to provide that no person or agency may prohibit or restrict a local entity from “(1) sending such information to, or requesting and receiving such information from, [ICE;] (2) maintaining such information[;] or (3) exchanging such information with any other . . . government entity.”¹²⁸ Finally, § 1373(c) requires ICE to respond to any inquiry by a federal, state, or local government agency “seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose

120. *Sturgeon*, 95 Cal. Rptr. 3d at 723.

121. *Id.*

122. 8 U.S.C. § 1357(g)(3) (2006).

123. *Id.* § 1103(a)(10).

124. *Sturgeon*, 95 Cal. Rptr. 3d at 724. The court’s approach appeared to assume that 8 U.S.C. § 1373 was constitutional.

125. *Gates v. Superior Court*, 238 Cal. Rptr. 592, 597–98 (Ct. App. 1987).

126. CAL. PENAL CODE § 836(a) (West 2010).

127. 8 U.S.C. § 1373(a).

128. *Id.* § 1373(b).

authorized by law, by providing the requested verification or status information.”¹²⁹

In attempting to establish that S.O. 40 violates § 1373, the plaintiff took the depositions of high-ranking LAPD officers (past and present), presumably in the hopes of learning how S.O. 40 may have prohibited individual officer action that violated § 1373. However, the plaintiff learned of no specific instance where S.O. 40 was applied. The plaintiff did not produce any evidence of individuals who had been prohibited by S.O. 40 from sending to ICE officials information regarding the immigration status of an individual, evidence of “individuals prohibited by S.O. 40 from receiving information from immigration officials, maintaining immigration information, and exchanging immigration information with any law enforcement agency,” nor evidence of any officers who “complained about the prohibitions” of S.O. 40.¹³⁰

The plaintiff argued that S.O. 40 violated the Supremacy Clause simply because S.O. 40 was impermissible under § 1373. To succeed with this facial challenge, the court ruled that Sturgeon had to “establish that S.O. 40’s provisions *inevitably* posed a present total and fatal conflict with section 1373”;¹³¹ a hypothetical conflict would not suffice. So the court looked closely at the language of the order and the federal statute. The text of S.O. 40 provides: “Officers shall not initiate police action where the objective is to discover the alien status of a person. Officers shall neither arrest nor book persons for violation of Title 8, Section 1325 of the United States Immigration Code (Illegal Entry).” On the other hand, § 1373(a) simply does not allow local officials from prohibiting local officers from voluntarily communicating with ICE. In the court’s opinion, the language of these provisions demonstrated no “total and fatal conflict.”¹³²

In the court’s assessment, S.O. 40 simply does not address communication with ICE which is the subject of § 1373; S.O. 40 addresses the initiation of police action and arrests for unauthorized entry. On the other hand, § 1373(a) does not address the initiation of police action or arrests for unauthorized entry; it addresses only communication with ICE. In other words, S.O. 40 bars the initiation of police action solely to discover immigration status, what might be characterized as a “don’t ask” policy. However, if local officials are aware of immigration status and want to communicate with federal officials, § 1373 protects those officials from a “don’t tell” policy. The court did not agree with Sturgeon that the language of § 1373(a) restricting the “sending” of information to ICE should be read to conflict with a prohibition on “obtaining information” that could be sent to ICE.¹³³ In the court’s view, § 1373(b) applies to restrictions on

129. *Id.* § 1373(c).

130. *Sturgeon v. Bratton*, 95 Cal. Rptr. 3d 718, 726 (Ct. App. 2009).

131. *Id.* at 730.

132. *Id.* at 731.

133. *Id.*

local entities that deal with the maintenance and exchange of information. Congress had the opportunity to prohibit restrictions on the obtaining of immigrant status information by local entities, but did not.¹³⁴

Moreover, if “in any way restrict[ing]” communication with ICE is read to include *obtaining information* to give ICE, there would be no need for § 1373(b) to specifically permit local entities to maintain immigration information and exchange it with other governmental entities as maintaining such information and obtaining it from other governmental entities makes the information available to be transmitted to ICE.¹³⁵

In short, the court felt that Sturgeon’s “strained interpretation” of § 1373 was not supported by the language of the statute.¹³⁶

The heart of Sturgeon’s preemption claim was based on an alleged overlap between S.O. 40 and § 1373 resulting in the federal law preempting the department’s order. However, the plaintiff offered no evidence that, as applied, S.O. 40 overlapped with the restrictions of § 1373. The court would not nullify the order on preemption grounds simply based on a “hypothetical possibility” of being applied in contravention to § 1373.¹³⁷

The court acknowledged that the power to regulate immigration generally is viewed as an exclusive federal power. However, that does not mean that every subfederal regulation “touching on aliens” is invalid.¹³⁸ Invalid state regulations of immigration involve laws that determine who “should or should not be admitted into the country, and the conditions under which a legal entrant may remain.”¹³⁹ Short of that, the subfederal law is preempted only when compelled by “affirmative congressional action.”¹⁴⁰ Here, S.O. 40 is a “regulation of police conduct and not a regulation of immigration,” so preemption did not apply.¹⁴¹

The court also concluded that S.O. 40 is not preempted on the grounds that it conflicts with the intent of Congress in enacting § 1373 and “stands as an obstacle to the accomplishment” of that intention.¹⁴² The goal of § 1373 was to make sure that “the voluntary flow of immigration information” to ICE from local officials was not restricted. Here, that “voluntary flow of immigration information” was not affected between LAPD officers and ICE.¹⁴³ S.O. 40

134. *Id.* As I explain later in the Article, in my view the Tenth Amendment would prohibit Congress from requiring local entities to obtain immigration information under anticommandeering principles.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* at 732.

139. *Id.*

140. *Id.* (citing *In re Jose C.*, 87 Cal. Rptr. 3d 674, 687 (2009)).

141. *Id.*

142. *Id.*

143. *Id.*

concerns the initiation of investigations and does not bar any officers from voluntarily contacting ICE. There was no evidence that S.O. 40 was applied or interpreted in a way that conflicted with § 1373, and the court would not make any assumptions to the contrary.¹⁴⁴

C. *The Tenth Amendment and Preemption*

In order to place *City of New York v. United States* and *Sturgeon v. Bratton* in proper context for evaluating sanctuary policies, we should step back a little, and take a closer look at the Tenth Amendment and the preemption doctrine. We need to ask whether federal laws violate the Tenth Amendment in precluding sanctuary policies. We also need to know if sanctuary policies are threatened by the preemption doctrine.

1. *Tenth Amendment*

A logical place to begin the constitutional analysis is in determining whether the federal law with which sanctuary laws may be in conflict is valid. Namely, we need to address the question of whether 8 U.S.C. §§ 1373 and 1644 are constitutional before we need to concern ourselves with whether they preempt sanctuary laws. Since the field of immigration is clearly within Congress's province to act, in answering the question of the constitutionality of these federal laws, Tenth Amendment jurisprudence becomes relevant.

As discussed above, in *City of New York v. United States*, the city argued that 8 U.S.C. §§ 1373 and 1644 were unconstitutional on the grounds that the federal laws violated the Tenth Amendment by not allowing the city to control immigration status information as it saw fit and interfered with control of its own employees.¹⁴⁵ The Second Circuit did not agree with the city's Tenth Amendment claim because the laws did not, in the court's opinion, compel New York City to enforce federal immigration laws; rather, the law simply forbade restrictions on voluntary cooperation, and the court concluded that the Tenth Amendment did not protect the states from passive resistance.¹⁴⁶ Additionally, the court held that the federal laws did not interfere with the city's general police power to regulate its operations without more evidence that the city's ordinance was intended as a more generalized restriction on the dissemination of confidential information.¹⁴⁷

144. *Id.* *Sturgeon* also relied on 8 U.S.C. § 1644, "which prevents prohibitions or restrictions on the communications between any [s]tate or local government *entity*' and ICE." *Id.* at 725 n.6. However, the court found that this case concerned communication between officers (not entities) and ICE, so § 1644 was not relevant. *Id.*

145. *See supra* notes 89–111 and accompanying text.

146. *City of New York v. United States*, 179 F.3d 29, 37 (2d Cir. 1999).

147. In fact in 2001, "New York City voters responded by adopting an amendment to the city's charter embodying the structural privacy principles that the [Second Circuit] had tentatively articulated," in order to strengthen the city's Tenth Amendment claim. Anil Kalhan, *The Fourth*

A fair reading of the Supreme Court's most recent cases on the Tenth Amendment (including a Supreme Court case decided after the Second Circuit decision) suggests that the Second Circuit's reasoning is plausible with respect to New York City's policy at the time. However, the cases also suggest that the constitutionality of the federal laws can turn on whether they are interpreted to affirmatively mandate certain behavior by subfederal officials or simply prohibit certain conduct. Whichever reading, the Supreme Court's jurisprudence in the area provides ample support for the constitutionality of sanctuary policies that do not restrict voluntary cooperation with federal immigration authorities. However, in spite of the Second Circuit's opinion to the contrary, in my view, Supreme Court jurisprudence is not definitive on the question of whether federal laws could validly prohibit subfederal laws that restrict even voluntary cooperation with federal officials.

The Tenth Amendment provides, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The Tenth Amendment has been interpreted "to encompass any implied constitutional limitation on Congress's authority to regulate state activities, whether grounded in the Tenth Amendment itself or in principles of federalism derived generally from the Constitution."¹⁴⁸ And, "the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States."¹⁴⁹

In the 1990s, the Supreme Court began using the Tenth Amendment more boldly to place limits on congressional power. Under this approach, the Tenth Amendment is a key protection of states' rights and federalism. The idea is that the Tenth Amendment reserves a zone of activity to the states for their exclusive control, and federal laws intruding into this zone should be declared unconstitutional.¹⁵⁰

Three common justifications are offered for the use of the Tenth Amendment in protecting federalism. "The first justification for protecting states from federal intrusions is that the division of power vertically, between federal and state governments, lessens the chance of federal tyranny."¹⁵¹ "A second frequently invoked value of federalism is that states are closer to the people and thus more likely to be responsive to public needs and concerns."¹⁵² Of course this value of federalism could be inconsistent with the first value.

To the extent that voters at the state and local level prefer tyrannical rule

Amendment and Privacy Implications of Interior Immigration Enforcement, 41 U.C. DAVIS L. REV. 1137, 1215 (2008).

148. *South Carolina v. Baker*, 485 U.S. 505, 511 n.5 (1988).

149. *New York v. United States*, 505 U.S. 144, 157 (1992).

150. ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW* 313 (3rd ed. 2009).

151. *Id.* at 313–14.

152. *Id.* at 314.

or, more likely, rule that abuses a particular minority group, greater responsiveness increases the dangers of subfederal government tyranny. In other words, the substantive result of decreasing tyranny will not always be best achieved by the approach of maximizing electoral responsiveness; indeed, the reverse might well be the result. In fact, there is a greater danger of special interests capturing government at smaller and more local levels.¹⁵³

This concern is important in understanding why subfederal anti-immigrant laws do not earn Tenth Amendment protections, in my view.¹⁵⁴ “A final argument made for protecting federalism is that states can serve as laboratories for experimentation.”¹⁵⁵ In the words of Louis Brandeis: “It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”¹⁵⁶ But again, if local experimentation tyrannizes a particular minority group (e.g., immigrants) then the values of the Tenth Amendment are not achieved through protecting states’ rights.

The Tenth Amendment cases of the 1990s were grounded in the Supreme Court’s 1976 case, *National League of Cities v. Usery*.¹⁵⁷ There, the court declared unconstitutional the application of the Fair Labor Standards Act, which required the payment of the minimum wage to state and local employees. “[T]here are limits upon the power of Congress to override state sovereignty, even when

153. *Id.* at 314–15.

154. *See supra* notes 180–83 and accompanying text.

155. CHEMERINSKY, *supra* note 150, at 315.

156. *Id.* Some have argued that local experimentation should be permitted in the immigration field. *See, e.g.,* Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567 (2008) (arguing that the “primary function state and local governments play [with regard to migration management] is to facilitate the integration of immigrants into public life”); Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57 (2007) (advocating local involvement in immigration because “in the administration and enforcement of immigration policy, the federal government needs all the help it can get”); Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 CONN. L. REV. 1627 (1997) (arguing that local participation serves as a “steam-valve” for federal immigration policy). This argument has been made in response to scholars who have concluded that local efforts to regulate immigration are generally preempted. *See, e.g.,* Pratheepan Gulasekaram & Rose Cuison Villazor, *Sanctuary Policies and Immigration Federalism: A Dialectic Analysis*, 55 WAYNE L. REV. 1683 (2009); Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787 (2008); Hiroshi Motomura, *Federalism, International Human Rights, and Immigration Exceptionalism*, 70 U. COLO. L. REV. 1361 (1999); Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373 (2006); Rick Su, *A Localist Reading of Local Immigration Regulations*, 86 N.C. L. REV. 1619 (2008); Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493 (2001); Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084 (2004). These articles on federalism and immigration offer theoretical suggestions. However, in this Article, I rely on the actual approach that the Supreme Court is using with respect to federalism and the Supremacy Clause.

157. 426 U.S. 833 (1976).

exercising its otherwise plenary powers to tax or to regulate commerce.”¹⁵⁸ Requiring states to pay their employees the minimum wage violated the Tenth Amendment because the law “operate[s] to directly displace the States’ freedom to structure integral operations in areas of traditional governmental functions.”¹⁵⁹ Forcing state and local governments to pay their employees minimum wage would require that they either raise taxes or cut other service to pay these costs. This would displace decisions traditionally left to the states and could “substantially restructure traditional ways in which the local governments have arranged their affairs.”¹⁶⁰ Importantly, the court noted that Congress violates the Tenth Amendment when it interferes with traditional state and local government functions.¹⁶¹ Although the Court did not attempt to define all such traditional functions, establishing a minimum wage was clearly one, and therefore the federal requirement was unconstitutional.

Using these principles, the Supreme Court invalidated a federal law that violated the Tenth Amendment in *New York v. United States* in 1992.¹⁶² The federal Low-Level Radioactive Waste Policy Amendments Act created a statutory duty for states to provide for the safe disposal of radioactive wastes generated within their borders. The Act provided monetary incentives for states to comply with the law and allowed states to impose a surcharge on radioactive wastes received from other states. Additionally, and most controversially, to ensure effective state government action, the law provided that states would “take title” to any wastes within their borders that were not properly disposed of by a certain date, and then would “be liable for all damages directly or indirectly incurred.”¹⁶³

Although Congress, pursuant to its authority under the commerce clause, could regulate the disposal of radioactive wastes, the Court held that the “take title” provision of the law was unconstitutional because it gave state governments the choice between “either accepting ownership of waste or regulating according to the instructions of Congress.”¹⁶⁴ It was impermissible for Congress to impose either option on the states. Forcing states to accept ownership of radioactive wastes would impermissibly “commandeer” state governments, and requiring state compliance with federal regulatory statutes would impermissibly impose on states a requirement to implement federal legislation. Because of the Tenth Amendment and limits on the scope of Congress’s powers under Article I, the Court ruled that the “Federal Government may not compel the States to enact or administer a federal regulatory program.”¹⁶⁵ Allowing Congress to commandeer state

158. *Id.* at 842.

159. *Id.* at 852.

160. *Id.* at 849.

161. *Id.* at 842–43.

162. 505 U.S. 144 (1992).

163. *Id.* at 153.

164. *Id.* at 175.

165. *Id.* at 188.

governments would undermine government accountability because Congress could make a decision but the states would take the political heat and be held responsible for a decision that was not theirs.¹⁶⁶ In fact, if a federal law compels a state legislative or regulatory activity, the law is unconstitutional under the Tenth Amendment even if there is a compelling need for the federal action.¹⁶⁷ Thus, the central holding of *New York* is that it is unconstitutional for Congress to compel state legislatures to adopt laws or state agencies to adopt regulations. However, Congress may attach strings on grants to state and local governments and through these conditions induce state and local actions that it cannot directly compel.¹⁶⁸

A few years later, in *Printz v. United States*,¹⁶⁹ the Supreme Court again used the Tenth Amendment to strike down a federal statute. The Court held that the Brady Handgun Violence Prevention Act violated the Tenth Amendment in requiring that state and local law enforcement officers conduct background checks on prospective handgun purchasers. Congress was impermissibly commandeering state executive officials to implement a federal mandate. The Court felt that Congress violates the Tenth Amendment when it conscripts state governments. The Brady law was unconstitutional because it compelled state officers to act and also violated separation of powers. The Constitution vests executive power in the President, and Congress impermissibly gave the executive authority to implement the law to state and local law enforcement personnel.¹⁷⁰ The Court explained:

The Brady Act effectively transfers this responsibility to thousands of [chief law enforcement officers] in the fifty states, who are left to implement the program without meaningful presidential control (if indeed meaningful presidential control is possible without the power to appoint and remove). The insistence of the Framers upon unity in the federal executive—to insure both vigor and accountability—is well known. That unity would be shattered, and the power of the President would be subject to reduction, if Congress could act as effectively without the President as with him, by simply requiring state officers to execute its law.¹⁷¹

Finally, in *Reno v. Condon*,¹⁷² a unanimous Court rejected a Tenth Amendment challenge in upholding the Driver's Privacy Protection Act. The law "prohibited states from disclosing personal information gained by departments of motor vehicles, such as home addresses, phone numbers, social security numbers, and

166. CHEMERINSKY, *supra* note 150, at 323–24.

167. *Id.* at 324.

168. *Id.* In the immigration enforcement area, when local police or sheriff's departments enter into INA section 287(g) agreements to assist in immigration enforcement efforts, funding is an incentive that is provided to the local entities.

169. 521 U.S. 898 (1997).

170. CHEMERINSKY, *supra* note 150, at 324–25.

171. *Printz*, 521 U.S. at 922.

172. 528 U.S. 141 (2000).

medical information.”¹⁷³ “The law was constitutional as an exercise of Congress’s commerce clause power because ‘Congress found that many States . . . sell this personal information to individuals and businesses [and these] sales generate significant revenues for the States.’”¹⁷⁴ The Court “stressed that the law is not limited to state governments; it also regulates private entities that possess the drivers’ license information” for resale and redisclosure.¹⁷⁵ Most importantly, the Court said that the law did not violate the Tenth Amendment because it was a prohibition of conduct, not an affirmative mandate as in *New York* and *Printz*: “It does not require the [state] Legislature to enact any laws or regulations, and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals.”¹⁷⁶

Thus, *Reno v. Condon* can be interpreted as holding that Congress may prohibit state governments from engaging in *harmful* conduct, particularly if the law applies to private entities as well. However, we know from other Tenth Amendment cases that Congress may not impose affirmative duties on state governments. Whether this distinction between prohibition and obligation makes sense can be questioned. Most duties can be characterized either way. The Driver’s Privacy Protection Act could be characterized as imposing the affirmative duty on states to keep information secret. Conversely, the Brady Act in *Printz* could be characterized as a prohibition on state and local governments from issuing gun permits without doing background checks. Also, it can be questioned whether an otherwise impermissible regulation of state governments should become acceptable because it includes private actors as well. Despite all these questions, the court relies on a distinction between affirmative obligations and negative prohibitions that is well established in constitutional law.¹⁷⁷

Reno v. Condon, decided after *City of New York*, arguably lends support to the Second Circuit’s decision because 8 U.S.C. § 1373 also does not require state officials to assist in federal immigration law enforcement, but simply bars restrictions on voluntary communications.¹⁷⁸ On the other hand, one could argue

173. CHEMERINSKY, *supra* note 150, at 325.

174. *Id.* at 325–26 (quoting *Reno*, 528 U.S. at 143–44).

175. CHEMERINSKY, *supra* note 150, at 326.

176. *Reno*, 528 U.S. at 151.

177. CHEMERINSKY, *supra* note 150, at 326.

178. After *Condon*, the Supreme Court decided another commerce clause case that raised the Tenth Amendment indirectly, providing some food for thought on the sanctuary issue. In *Gonzales v. Raich*, 545 U.S. 1 (2005), medical marijuana patients in California challenged the constitutionality of provisions in the Controlled Substances Act (CSA) that designates marijuana as contraband. Under California law, the plaintiffs were authorized to use marijuana for their serious medical conditions, but federal agents seized and destroyed their cannabis plants. The Supreme Court upheld the CSA, ruling that federal regulation of marijuana was well within congressional authority under the Commerce Clause. After the decision, the California Attorney General opined that under the Tenth Amendment, the federal government’s decision to criminalize marijuana “for all purposes does not require California to do the same.” Letter from Jonathan K. Renner, Deputy Att’y Gen., State of Cal. Dep’t

that § 1373 is more than a “prohibition of conduct” in that it mandates subfederal jurisdictions to enact laws that bar officials from preventing the discussion of immigration status. In *Reno v. Condon*, the federal law barred state governments (and private actors) from selling private information, and the court labeled the federal law a prohibition. However, if a sanctuary law barred local officials from asking about immigration status, a federal law that sought to prevent such local restrictions could just as well be labeled a mandate or a prohibition.

Where does the Tenth Amendment jurisprudence leave us in the context of federal laws (8 U.S.C. §§ 1373 and 1644) that prohibit bars on voluntary communication about immigration status between local officials and federal authorities because of sanctuary laws? We know that Congress could not mandate that subfederal law enforcement officials ask about immigration status without stepping into the minefield of anticommandeering language of cases like *Printz* and *New York v. United States*. Congress cannot require subfederal law enforcement officers to enforce federal immigration laws. In that respect, §§ 1373 and 1644 are certainly on safe footing because they contain no such affirmative mandates. We also know that a sanctuary policy that permits voluntary communication between local authorities and federal officials is probably fine.¹⁷⁹ The murkier question is whether federal prohibitions against subfederal laws that prevent voluntary communications between local officials and federal officials are valid under the Tenth Amendment.

The only decision that has come close to addressing this question is the Second Circuit’s *City of New York* case, which leaves some room for interpretation under a different set of facts. Certainly, the decision suggests that the federal prohibitions against laws that close off voluntary cooperation do not violate the Tenth Amendment because they do not force subfederal entities to enact or administer a federal program nor conscript local officials to do federal work.¹⁸⁰ However, the court’s approach to the question of whether the federal provisions interfered with the city’s operations by regulating confidential information obtained in the course of official business and seeking to control the actions of city officials leaves an important opening. On the facts in *City of New York*, the Second Circuit refused to conclude that there was an “impermissible intrusion”

of Justice, to Robert D. Tousignant, Chief Counsel, Cal. Dep’t of Health Servs., Department of Health Services’s Questions Regarding Medical Marijuana Identification Cards and Federal Law (July 15, 2005), available at http://aclu.org/files/FilesPDFs/ca_attorney_general_ltr.pdf. Relying on *Printz* and *New York*, the attorney general decided that even though state law enforcement officers knew the identities of state authorized medical marijuana users, officers were not required to arrest such individuals under the CSA. *Id.* The attorney general did concede, however, that state identity records could be subject to a federal subpoena. *Id.* This is arguably analogous to the sanctuary situation: local authorities are not required to enforce federal immigration laws or to ask about immigration status; once the immigration status is known, however, the federal law provides that the state cannot stop an officer from voluntarily turning over information to federal authorities.

179. This preemption issue is discussed below. See *infra* notes 183–84 and accompanying text.

180. *City of New York v. United States*, 179 F.3d 29, 34–35 (2d Cir. 1999).

into city business because the sanctuary policy “singled out” federal immigration officials in declining to share immigration status information.¹⁸¹ To the court, that was evidence that the Executive Order was not “integral” to local government operations.¹⁸² The clear implication is that if local officials are barred from gathering and sharing immigration status information to all interested parties because of important public policy considerations, the outcome in the Second Circuit case could have been different.

This is an important lesson for those supporting sanctuary policies. By explaining that the policies are based on community or preventive policing policy goals of gaining the trust of all parts of the community for public safety reasons, federal policies that would intrude on those goals could very well run afoul of the Tenth Amendment. In other words, even though §§ 1373 and 1644 are couched in terms of precluding bars on voluntary communications, those requirements arguably mandate local laws that do not interfere with voluntary communications, but in the process that mandate interferes with the administration of local public safety decisions. Local requirements that bar the seeking and sharing of immigration status information to all would be strong evidence of a serious public policy decision relating to public safety. In my view, therefore, sanctuary policies aimed at preventing local law enforcement officials from delving into the immigration status of criminal victims, witnesses, or minor offenders would be shielded by the Tenth Amendment against federal attempts to delve into that information even under the guise of permitting voluntary communications. Much in the way that the Supreme Court has deferred to state governments in their discrimination against lawful permanent residents in the area of state public functions employment because of legitimate state public interests,¹⁸³ public safety and community policy goals of sanctuary ordinances are expressions of public policies on spending and enforcement priorities that also deserve deference.

This reading of the Tenth Amendment jurisprudence may be controversial. Not surprisingly, jurisdictions such as San Francisco, New York City, and Los Angeles retain language in their policies that bar sharing of information “unless required by federal law,” presumably responsive to the voluntary communication protections of §§ 1373 and 1644. The City Attorney of San Francisco even has gone so far as to advise that a local official who voluntarily communicates immigration status information to ICE officials is not to be disciplined under the local sanctuary ordinance.¹⁸⁴ These examples demonstrate a concession, however

181. *Id.* at 36–37.

182. *Id.* at 36.

183. *See, e.g.,* *Ambach v. Norwick*, 441 U.S. 68 (1979); *Foley v. Connelie*, 435 U.S. 291 (1978).

184. “[I]f the City attempted to enforce the new [sanctuary ordinance] policy by disciplining an employee for violating it, the City could be exposed to damages for unlawful termination.” Legal Issues in Connection with Proposed Amendment to Sanctuary City Ordinance, Memorandum from Buck Delventhal, Miriam Morley & Wayne Snodgrass, Deputy City Att’ys of S.F., to Mayor Gavin Newsom, at 5 (Aug. 18, 2009) (on file with author).

unnecessary in my view, on the part of local policy makers that §§ 1373 and 1644 are constitutional. They take a defensive posture thinking that this position is necessary to defend against claims that their sanctuary policies are not preempted by valid federal law. In my view, their concession is unnecessary because §§ 1373 and 1644 have Tenth Amendment problems when they attempt to force local cooperation when resistance is based on a sanctuary policy premised on public safety and spending judgments.

2. Preemption of State and Local Laws

If one assumes that §§ 1373 and 1644 do not violate the Tenth Amendment, the next question is whether federal law preempts sanctuary policies. Under Article VI's Supremacy Clause, the Constitution and laws made pursuant to it are the supreme law of the land. When federal and state laws conflict, the state law must yield: "[U]nder the Supremacy Clause, from which our preemption doctrine is derived, 'any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.'"¹⁸⁵

Although preemption may appear, at first glance, to be a straightforward concept, in fact there is not a bright-line rule for deciding whether a state or local law should be invalidated on preemption grounds. Traditionally, the Supreme Court has identified two major situations where preemption occurs. One is where a federal law expressly preempts state or local law. The other is where preemption is implied by a clear congressional intent to preempt state or local law.

In *Gade v. National Solid Waste Management Association*, the Court noted that the tests for preemption may be either express or implied, and is compelled whether Congress's command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.¹⁸⁶ Of course, express and implied preemption can interact. Even when statutory language expressly preempts state law, Congress rarely is clear about the scope of what is preempted or how particular situations should be handled. Courts must decide what is preempted, and this inevitably is an inquiry into congressional intent. Conversely, implied preemption is often a function of both perceived congressional intent and the language used in the statute or regulation. The problem, of course, is that Congress's intent, especially as to the scope of preemption, is rarely expressed or clear. In fact, I argue below that while 8 U.S.C. § 1373 may have been intended to protect the voluntary exchange of information between local law enforcement and federal immigration authorities, the law does not (and probably could not) mandate local police to ask crime victims and witnesses about immigration status—the heart of sanctuary and confidentiality policies. In fact, the federal statute does not mandate asking about the immigration status of arrested

185. *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 108 (1992) (citations omitted).

186. *Id.* at 98.

individuals prior to conviction.¹⁸⁷ Congressional intent must be clear to find preemption because of a desire, stemming from federalism concerns, to minimize invalidation of state and local laws.

[B]ecause the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action. In all preemption cases, and particularly in those in which Congress has “legislated . . . in a field which the States have traditionally occupied,” we “start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purposes of Congress.”¹⁸⁸

Within the implied preemption situation, three types of implied preemption have been identified. One is termed “field preemption” where the scheme of federal law and regulation is “so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.”¹⁸⁹ The second is where there is a conflict between federal and state law. Even if federal law does not expressly preempt state law, preemption will be found where “compliance with both federal and state regulations is a physical impossibility.”¹⁹⁰ Finally, implied preemption also will be found if state law impedes the achievement of a federal objective. Even if federal and state law are not mutually exclusive and even if there is no congressional expression of a desire to preempt state law, preemption will be found if state law “stands as an obstacle to the accomplishment and execution of the full purposes and objective of Congress.”¹⁹¹ These categories frequently overlap in practice, and congressional intent, if it can be found, can be determinative.

Provisions in federal statutes expressly preempting state and local laws inevitably require interpretation as to their scope and effect. The explosion of litigation concerning the preemption provision in the Employee Retirement Income Security Act of 1974 (ERISA) demonstrates this. ERISA broadly preempts state laws that “relate to” employee benefit plans.¹⁹² A key problem, though, is the inherent ambiguity in the phrase “relates to.” The spectrum of modifiers to the term is potentially wide—directly, slightly, remotely. Thus, employers and others have argued that many state laws—from family leave to workers compensation to health care finance to malpractice claims—are preempted by ERISA because they “relate to” employee benefit plans. The sheer quantity of ERISA litigation shows that an express preemption provision leaves open countless questions about the scope of that preemption. Therefore, simply

187. See *supra* note 91 and accompanying text.

188. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (citations omitted).

189. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

190. *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963).

191. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

192. 29 U.S.C. § 1144(a) (2006).

pointing out that a subfederal law or policy “relates to” immigration is not sufficient to strike it down on preemption grounds.

a. Field Preemption

Even without express preemption, the Court will find implied preemption if there is a clear congressional intent that federal law should exclusively occupy a field. The Court has said that such preemption exists if “either . . . the nature of the regulated subject matter permits no other exclusion, or that the Congress has unmistakably so ordained.” So field preemption can be found either if Congress expresses a clear intent that federal law will be exclusive in an area or if comprehensive federal regulation evidences a congressional desire that federal law should completely occupy the field. Intent can be found from a “scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.”¹⁹³

The subjects of foreign policy and immigration provide examples of field preemption. When it comes to managing foreign affairs, the federal government has sole authority, so a state attempt to regulate in the area would be preempted. However, how far the Court would go to strike down a state or local law on preemption grounds is a challenge when the law has an “indirect effect” on immigration or foreign affairs.¹⁹⁴

A good example is *Hines v. Davidowitz*.¹⁹⁵ Pennsylvania enacted a law that required all immigrants to pay a registration fee and carry a state identification card—a process that the federal government already required. The Supreme Court struck down the state registration law on preemption grounds because registration “is in a field which affects international relations, the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority.”¹⁹⁶ In what serves as a standard description of federal immigration power, the Court emphasized the “broad and comprehensive plan describing the terms and conditions upon which aliens may enter this country, how they may acquire citizenship, and the manner in which they may be deported.”¹⁹⁷ Pervasive federal regulation existed, and in the context of the Pennsylvania statute, a federal law already specifically required alien registration with the federal government.

Hines is significant because even though the state law technically complemented and did not interfere with the federal law, the Court still found preemption. The fact that the Court relied on field preemption also is noteworthy because no direct preemption language was contained in the federal immigration

193. *Rice*, 331 U.S. at 230.

194. CHEMERINSKY, *supra* note 150, at 402.

195. 312 U.S. 52 (1941).

196. *Hines*, 312 U.S. at 68.

197. *Id.* at 69.

law. Thus, as Dean Chemerinsky points out, “Field preemption means that federal law is exclusive in the area and preempts state laws even if they serve the same purposes as the federal law and do not impede the implementation of federal law.”¹⁹⁸

Interestingly, in the challenge to Arizona’s S.B. 1070, the state argued that its law complements federal law, but as we can see, the *Hines* decision is not helpful to Arizona. In fact, in the Arizona case, the federal court of appeals has agreed with the federal government’s argument that the state law actually interferes with the federal government’s enforcement plan.¹⁹⁹ However, whether preemption should be found in the absence of an explicit congressional declaration is ultimately “a tension between the desire to effectuate the interests of the federal government and the desire to limit the instances where state power is limited.”²⁰⁰

Putting the field preemption principles announced in *Hines* to use, the Supreme Court struck down a California law that barred aliens ineligible for citizenship from purchasing commercial fishing licenses.²⁰¹ The Court’s language was clear:

The Federal Government has broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization. Under the Constitution the states are granted no such powers State laws which impose *discriminatory burdens* upon the entrance or residence of aliens lawfully within the United States conflict with this constitutionally derived federal power to regulate immigration.²⁰²

Again, Arizona’s defense of S.B. 1070 finds no help in a case like *Takahashi* because the state law definitely puts a discriminatory burden on the entrance of lawful immigrants insofar as its terms can lead to racial profiling of citizens and lawful residents.²⁰³

Similarly, in *Toll v. Moreno*,²⁰⁴ the Court invoked preemption in striking a Maryland law that denied to “non-immigrant aliens” in-state tuition that was accorded to citizens and to “immigrant aliens.” The Court found preemption based on the “broad principle that ‘state regulation not congressionally sanctioned that discriminates against aliens lawfully admitted to the country is impermissible if it imposes additional burdens not contemplated by Congress.’”²⁰⁵ The state had directly contravened the federal approach to G-4 aliens (employees of

198. CHEMERINSKY, *supra* note 150, at 403.

199. *United States v. Arizona*, 641 F.3d 339, 350–52 (9th Cir. 2011).

200. CHEMERINSKY, *supra* note 150, at 403.

201. *Takahashi v. Fish & Game Commission*, 334 U.S. 410, 419 (1948).

202. *Id.* (emphasis added).

203. *United States v. Arizona*, 641 F.3d 339, 360–66 (9th Cir. 2011).

204. 458 U.S. 1 (1982).

205. *Id.* at 12–13 (quoting *De Canas v. Bica*, 424 U.S. 351, 358 (1976)).

international organizations and their dependents). Federal law permitted them to establish domicile and afforded significant tax exemptions on organizational salaries. In such circumstances, the Court could not conclude that Congress ever contemplated that a State, in the operation of a university, might impose discriminatory tuition charges and fees solely on account of the federal immigration classification. Therefore the state bar on G-4 aliens from acquiring in-state status violated the Supremacy Clause.

However, in *De Canas v. Bica*, although the Court reminded that the “[p]ower to regulate immigration is unquestionably exclusively a federal power,”²⁰⁶ a state employer sanction law was not preempted because there the California law was about protecting lawful workers from unauthorized workers. The Court noted:

[T]he Court has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus per se preempted by this constitutional power, whether latent or exercised. . . .

[T]he fact that aliens are the subject of a state statute does not render it a regulation of immigration, which is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain.²⁰⁷

Not all state regulations of aliens are ipso facto regulations of immigration.²⁰⁸ “In this case, California sought to *strengthen its economy* by adopting federal standards in imposing criminal sanctions against state employers who knowingly employed aliens who have no federal right to employment within the country; even if such local regulation had some purely speculative and indirect impact on immigration.”²⁰⁹ The Court reasoned that “it does not thereby become a constitutionally proscribed regulation of immigration that Congress itself would be powerless to authorize or approve. Thus, absent congressional action, [the state law] would not be an invalid state incursion on federal power.”²¹⁰

In *Chamber of Commerce of the United States v. Whiting*,²¹¹ the Supreme Court recently reaffirmed its approach in *De Canas*, holding that the Immigration Reform and Control Act of 1986 (IRCA) did not preempt Arizona’s Legal Arizona Workers Act (not to be confused with the subsequently enacted S.B. 1070 that is the subject of separate litigation), which targets employers who hire undocumented immigrants and revokes their state business licenses. IRCA, which included a federal employer sanction law punishing employers who knowingly hire unauthorized workers, contains an express preemption provision, as well as a savings clause: “The provisions of this section preempt any State or local law

206. *De Canas*, 424 U.S. at 354.

207. *Id.* at 355.

208. *Id.*

209. *Id.* (emphasis added).

210. *Id.* In the Immigration Reform and Control Act of 1986, Congress did in fact enact a federal employer sanction law that likely preempted the California law upheld in *De Canas*.

211. 131 S. Ct. 1968 (2011).

imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ . . . unauthorized aliens.”²¹² The Court held that the Legal Arizona Workers Act fits within Congress’s intended meaning of licensing law in IRCA’s savings clause and is therefore not preempted. The Court also held that the INA, which makes the use of E-Verify voluntary, does not impliedly preempt Arizona from mandating that employers use the E-Verify system.

De Canas and *Whiting* remind us that without express preemption, states possess broad authority under their police powers to regulate the employment relationship to protect workers within the state. Child labor laws, minimum and other wage laws, laws affecting occupational health and safety, and workmen’s compensation laws are only a few examples. As I argue below, sanctuary policies similarly fall within these broad police powers to promote public safety through policies that are designed to gain community trust and allocate enforcement resources in accordance with those policies.

Of course, even state regulation designed to protect vital state interests must give way to paramount federal legislation. But the Court in *De Canas v. Bica* and *Chamber of Commerce v. Whiting* would not

presume that Congress, in enacting the INA, intended to oust state authority to regulate the employment relationship covered by [the state law] in a manner consistent with pertinent federal laws. Only a demonstration that complete ouster of state power—including state power to promulgate laws not in conflict with federal laws—was “the clear and manifest purpose of Congress” would justify that conclusion.²¹³

In contrast to *De Canas*, where the Court found that the state had an important economic goal behind its enactment of an employer sanction law,²¹⁴ Arizona’s S.B. 1070 and Hazleton, Pennsylvania’s no-renting-to-undocumented-immigrants ordinance present different questions. While those jurisdictions might offer an economic basis for the law, evidence is quite clear that the real purpose behind the laws is regulation of immigration—an area that is preempted by federal law. For example, Arizona Governor Jan Brewer signed and supports S.B. 1070 because the federal government “is not doing its job” of securing the border.²¹⁵ S.B. 1070 is about the regulation of immigration for its allies and Brewer.²¹⁶ When

212. 8 U.S.C. § 1324a(h)(2) (2006).

213. *De Canas*, 424 U.S. at 357 (citations omitted).

214. Similarly, in *Pacific Gas & Electric v. State Energy Resources Conservation & Development Commission*, the Supreme Court concluded that a California law imposing a moratorium on the construction of nuclear power plants was not preempted because its main purpose was economics and not safety; the state withstood a preemption challenge that Congress had intended to preempt the field of nuclear regulation. 461 U.S. 190, 216, 222–23 (1983); see *infra* notes 231–35 and accompanying text.

215. Howard Fischer, *Will SB1070 Remain on Hold?*, ARIZ. DAILY SUN, Nov. 2, 2010, http://azdailysun.com/news/state-and-regional/article_cfd0ac68-343a-5fc5-97d1-2464db66d7e8.html.

216. The Ninth Circuit noted the immigration purpose behind S.B. 1070:

In April 2010, in response to a serious problem of unauthorized immigration along the

Hazleton, Pennsylvania, enacted its ordinance, its supporters made clear that their intent was the control of Latino immigrants:

The consequences which this immigration disaster holds for our children [are] horrendous. Coloreds will take political control of more states, along with both houses of Congress and the presidency. Whites will quickly be stripped of their rights with our wealth confiscated for redistribution to non-whites as is taking place in South Africa. . . . Will America become the United States of Mexico?²¹⁷

Unfortunately for lawmakers in Arizona and Hazleton, they do not have the authority to regulate immigration.

Thus, in litigation challenging Arizona's S.B. 1070 and Hazleton's ordinance, the federal courts have had little difficulty in finding that the laws are preempted. In the Arizona case, the Ninth Circuit Court of Appeals upheld the injunction of the primary provisions of the law on preemption grounds: the requirement that local law enforcement verify the immigration status of all arrestees; the new state law making it a crime for failing to carry immigration papers; another new law that made it a crime to apply for work without proper documentation; and the attempt to authorize local police to enforce the civil provisions of the Immigration and Nationality Act.²¹⁸ The court agreed with the federal government that its enforcement plan would be thwarted by Arizona's law and was therefore preempted as an improper state attempt to regulate immigration.²¹⁹ Although the Third Circuit's decision on the Hazleton ordinance has been vacated for reconsideration in light of the *Whiting* decision, the court initially found that the no-renting-to-undocumented-immigrants provision was an attempt to "regulate which [immigrants] may live [here]."²²⁰ In other words, the ordinance attempted to regulate immigration, and was therefore preempted.

b. Conflict Preemption

If federal law and state law are mutually exclusive, so that a person could not simultaneously comply with both, the state law is deemed preempted. The Supreme Court has explained that such preemption exists when "compliance with

Arizona-Mexico border, the State of Arizona enacted its own immigration law enforcement policy [S.B. 1070, which] "make[s] attrition through enforcement the public policy of all state and local government agencies in Arizona."

United States v. Arizona, 641 F.3d 339, 343 (9th Cir. 2011).

217. Transcript of Record Vol. 2 at 5–6, *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477 (M.D. Pa. 2007) (No. 3:06-CV-1586), available at <http://www.aclupa.org/downloads/lozano2.pdf>.

218. United States v. Arizona, 641 F.3d at 366.

219. *Id.*

220. *Lozano v. City of Hazleton*, 620 F.3d 170, 220 (3d Cir. 2010), *vacated*, 131 S. Ct. 2958 (2011). The Supreme Court has asked the Third Circuit to reconsider *Lozano* in light of the Supreme Court's recent decision in *Chamber of Commerce of the U.S. v. Whiting*, 131 S. Ct. 1968 (2011). However, as long as the evidence reveals that the purpose behind the Hazleton ordinance is the regulation of immigration, the ordinance faces serious preemption problems nonetheless.

both federal and state regulation is a physical impossibility.”²²¹ The difficulty with regard to this type of preemption is in deciding whether there is a conflict between federal and state law.

There also are many harder cases that depend on determining federal intent in order to decide whether the federal law and state law are mutually exclusive. For example, if a state law conflicts with a federal goal, the state law can still be preempted even though there is no conflict with a specific federal law and in the absence of field preemption. In short, the state law is preempted if it “stands as an obstacle to the accomplishment and execution of the full purposes or objectives of Congress.”²²² Thus, in *Nash v. Florida Industrial Commission*, the Court determined that the filing of unfair labor practices was a primary purpose of the National Labor Relations Act.²²³ Any law that punished such a filing, such as the denial of unemployment benefits, was preempted. Likewise, in *Perez v. Campbell*, the Court ruled that the suspension of a driver’s license under state law was preempted by federal bankruptcy laws because the debt arising from an auto accident had been discharged by the bankruptcy court.²²⁴ Otherwise, the uniformity goals of the federal bankruptcy laws with respect to debts would be thwarted by state law.

In a challenge to an immigration package enacted by the Alabama state legislature, a federal district court judge upheld two provisions over conflict preemption arguments advanced by the federal government. In *United States v. Alabama*,²²⁵ the provisions that have been allowed to go into force include the authority of local law enforcement officers to detain or arrest anyone who is reasonably suspected of being undocumented and if a person is arrested for driving without a license and the officer is unable to determine that the person has a valid driver’s license, the person must be transported to the nearest magistrate; and a reasonable effort shall be made to determine the citizenship of the driver.²²⁶

221. Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–43 (1963).

222. Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

223. Nash v. Fla. Indus. Comm’n, 389 U.S. 235 (1967).

224. Perez v. Campbell, 402 U.S. 637 (1971).

225. No. 2:11-CV-2746-SLB, 2011 WL 4469941, at *19 (N.D. Ala. Sept. 28, 2011).

226. The contract provision lists two exceptions, that “[n]o court of this state shall enforce the terms of, or otherwise regard as valid, any contract between a party and an alien unlawfully present in the United States.” Order Denying Defendants’ Motion to Dismiss and Final Consent Judgment, *Perez v. GTX Auto Import & Auto Repair, LLC*, No. CV 2010-904012, (Cir. Ct. Jefferson County Ala. Oct. 24, 2011), available at <http://media.al.com/spotnews/other/Judge%20Vowell%20Immigration%20Order%2010.24.2011.pdf>. An Alabama Circuit Judge has pointed, however, that the anticontracting provision still has to overcome a big obstacle—the Alabama state constitution’s command that

There can be no law of this state impairing the obligation of contracts by destroying or impairing the remedy for their enforcement; and the legislature shall have no power to revive any right or remedy which may have become barred by lapse of time, or by any statute of this state. After suit has been commenced on any cause of action, the legislature shall have no power to take away such cause of action, or destroy any existing defense to such suit.

Id. Because the opinion deals with a breach of contract suit that was filed by an undocumented

On the other hand, the district court did strike down on conflict grounds the Alabama provision that would make it a state crime for an unauthorized alien to solicit or perform work in the state. The court found that the provision directly contravened Congress's decision as part of the Immigration Reform and Control Act of 1986 that unauthorized work by the worker should not be criminalized.²²⁷ If enforced, this provision would stand as an obstacle to IRCA's employer sanctions scheme.²²⁸ Similarly, the district court struck down the state's attempt to make it a state crime to harbor or transport an undocumented alien, to establish a civil cause of action against an employer who fails to hire a citizen while hiring an unauthorized worker, and to forbid employers from claiming a business tax deduction for wages paid to an unauthorized worker. Furthermore, even though the district court initially upheld four controversial provisions—one making it a state misdemeanor for an undocumented person to carry an alien registration document, a second that required public schools to check immigration status of school children for data purposes, and two others attempting to restrict the right of undocumented immigrants to enter into private contracts and business transactions with a state agency—the Eleventh Circuit Court of Appeals has enjoined those four provisions.²²⁹

c. Impeding Federal Objective

The challenge in conflict preemption cases often “lies in determining the federal objective and whether a particular type of state law is consistent with it.”²³⁰ A comparison of two particular Supreme Court cases is instructive. *Pacific Gas & Electric v. State Energy Resources Conservation & Development Commission*²³¹ involved a state moratorium on nuclear power plant construction, while *Gade v. National Solid Wastes Management Association*²³² involved a state law enacted for the health and safety of workers handling hazardous wastes.

In *Pacific Gas & Electric*, California halted new nuclear power plants until a state commission could certify that the disposal of high-level nuclear wastes could be done safely. The company wanted to proceed with new construction plans, arguing both that the state law was preempted in the nuclear regulation field by

immigrant before the law took effect, the opinion merely holds that the anti-immigrant law cannot constitutionally be applied to those suits because “the legislature shall have no power to take away” people’s right to pursue contacts claims that are already pending. *Id.* Nevertheless, the state court also suggests that the entire anticontracting provision may violate the state constitution’s requirement that no law may “destroy[] or impair the remedy” for enforcing a contract in court. *Id.*

227. *Alabama*, 2011 WL4469941, at *21.

228. *Id.* at *25.

229. *United States v. Alabama, Hispanic Interest Coalition v. Governor of Alabama*, No. 11-14532-CC slip op. at 13–15 (11th Cir. Oct. 14, 2011), *modified*, No. 11-14532-CC, (11th Cir. Mar. 8, 2012).

230. CHEMERINSKY, *supra* note 150, at 413.

231. *Pac. Gas & Elec. v. State Energy Res. Conserv. & Dev. Comm’n*, 461 U.S. 190 (1983).

232. *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88 (1992).

congressional intent and that the state law interfered with the federal goal of developing nuclear power. However, the Court ruled in favor of the state, determining that Congress's goal related to public safety, while California's interest was economic. Congress might intend that the federal government have exclusive control over regulating safety, but "the States retain their traditional responsibility in the field of regulating electrical utilities for determining questions of need, reliability, costs, and other related state concerns."²³³ The state's primary purpose was economics and "not radiation hazards. . . . Without a permanent means of disposal, the nuclear waste problem could become critical, leading to unpredictably high costs to contain the problem or, worse, shutdowns in reactors."²³⁴

The approach of the Court in *Pacific Gas & Electric*, is revealing:

Thus, in determining whether the California law interfered with achieving the federal objective, the Court had to make two major choices: One was in characterizing the federal objective; the other was in characterizing the state law and its purpose. If the Court saw a broad purpose for the Atomic Energy Act in encouraging the development of nuclear power, then the state law, which obviously limited it, would be preempted. The Court avoided preemption by more narrowly characterizing the federal goal as promoting nuclear reactors only when they were economically feasible.

Additionally, if the Court characterized California's purpose as ensuring safety before construction of nuclear power, then the law would have been preempted. The Court avoided preemption by accepting California's claim that its goal was economics, even though the law was written in terms of preventing construction of nuclear plants unless the *safety* of disposal was ensured.

The *Pacific Gas & Electric* case thus illustrates how preemption determinations are very much based on the record and the context of the particular case. It also shows how much the outcome turns on the manner in which the Court chooses to characterize the purposes of the federal and state laws.²³⁵

In *Gade*, the Court confronted a similar question but reached a different outcome. The federal Occupational Safety and Health Act of 1970 and related federal regulations regulated the health and safety of workers who handled hazardous waste materials. Illinois enacted its own law that sought to protect the health and safety of such workers. The state argued that its purpose was not limited to the workers' health and that public safety was a chief purpose. However, the Court rejected Illinois's argument ruling that the federal law

233. *Pac. Gas & Elec.*, 461 U.S. at 205 (1983).

234. *Id.* at 213–14.

235. CHEMERINSKY, *supra* note 150, at 414.

“preempts all state law that constitutes in a direct, clear and substantial way, regulation of worker health and safety.”²³⁶

Arguably, *Gade* is out of step with *Pacific Gas & Electric*. In *Pacific Gas & Electric*, the Court was open to California’s two reasons for halting new nuclear power plants—public safety and economics. However, the Court was not open to Illinois’s two reasons for regulating workers—worker health and public safety. One could argue that the California nuclear power moratorium was inconsistent with the federal goal of encouraging more nuclear power and that the Illinois law complemented the federal interest in worker health. However, preemption was avoided in *Pacific Gas & Electric* because the Court placed more emphasis on the state economic purpose, while preemption was found in *Gade* because the Court was more impressed with the broad federal purpose in hazardous waste worker safety.²³⁷

The point is that preemption based on state laws interfering with a federal goal turns on how the court characterizes the federal purpose. If a court wants to avoid preemption, it can narrowly construe the federal objective and interpret the state goal as different from or consistent with the federal purpose. But if a court wants to find preemption, it can broadly view the federal purpose and preempt a vast array of state laws as it did in *Gade*.²³⁸

In the S.B. 1070 situation, the Ninth Circuit used a conflict preemption technique in addressing the Arizona provision that made it a state crime for an unauthorized alien to seek employment in the state. Congress made an “affirmative choice not to criminalize work as a method of discouraging unauthorized immigrant employment”²³⁹ Arizona argued that provisions of S.B. 1070 were intended to further “the strong federal policy of prohibiting illegal aliens from seeking employment in the United States.”²⁴⁰ However, by “pulling the lever of criminalizing work—which Congress specifically chose not to pull,” the Arizona law becomes an obstacle to the execution of Congress’s goals and objectives; the Arizona law was a “substantial departure from the approach Congress” chose to address the problem.²⁴¹

In contrast, sanctuary policies appear immune from preemption if we accept that their goals are about public safety and represent economic decisions on how to spend policing resources and are not about regulating immigrants. Indeed, the language of most sanctuary policies speaks in terms of not expending resources and personnel time asking about immigration status.²⁴²

236. *Gade*, 505 U.S. at 107.

237. CHEMERINSKY, *supra* note 150, at 416.

238. *Id.*

239. *United States v. Arizona*, 641 F.3d 339, 359 (9th Cir. 2011).

240. *Id.* at 360 (internal quotation marks omitted).

241. *Id.* at 360.

242. *See infra* notes 319–25 and accompanying text.

3. *Martinez v. Regents of University of California—An Analogous Example*

The California Supreme Court recently decided a preemption case involving a state law that, like sanctuary policies, sends a message of inclusion to undocumented immigrants. Under state law, California state universities permit undocumented college students who meet certain requirements to pay in-state tuition rates.²⁴³ In *Martinez v. Regents of University of California*, a unanimous state supreme court found that the tuition law was not preempted by a federal statute that prohibits states from making unlawful aliens eligible for postsecondary education benefits under certain circumstances.²⁴⁴

In *Martinez*, plaintiffs, who were U.S. citizen residents of other states, challenged the California law, arguing that the state policy violated federal law and that they too should be eligible to pay in-state tuition fees. The main legal issue was this: The federal law, 8 U.S.C. § 1623, provides that an alien not lawfully present in this country shall not be eligible *on the basis of residence within a state* for any postsecondary education benefit unless a U.S. citizen is eligible for that benefit.²⁴⁵ In general, nonresidents of California who attend the state's colleges and universities must pay nonresident tuition.²⁴⁶ But California Education Code section 68130.5(a) exempts from this requirement students—including those not lawfully in this country—who meet certain requirements, primarily that they have attended high school in California for at least three years. The question to the court was whether this exemption violated § 1623.

The court held that section 68130.5 does not violate § 1623. The exemption is given to all who have attended high school in California for at least three years (and meet the other requirements), regardless of whether they are California residents. In other words, some who qualify for the exemption qualify as California residents for purposes of in-state tuition, but some do not. Furthermore, not all unlawful aliens who would qualify as residents but for their unlawful status are eligible for the exemption. In essence, the exemption is not based on residence in California. Rather, it is based on other criteria.

Asserting a field preemption theory, the plaintiffs argued that federal immigration law preempted the state statute. The state supreme court acknowledged that the Supremacy Clause makes federal law paramount, that Congress has the power to preempt state law, and that the power “to regulate immigration is unquestionably exclusively a federal power.”²⁴⁷ However, the court reminded us that,

243. CAL. EDUC. CODE § 68130.5 (Deering 2011).

244. 241 P.3d 855, 870 (Cal. 2010), *cert. denied*, 131 S.Ct. 2961 (2011); 8 U.S.C. § 1623 (2006).

245. 8 U.S.C. § 1623(b). Section 1623 was enacted on September 30, 1996, as part of the omnibus Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, § 505, 110 Stat. 3009-672 (1996).

246. CAL. EDUC. CODE § 68050 (Deering 2011).

247. *Martinez*, 241 P.3d at 861 (citations omitted) (internal quotation marks omitted).

While the immigration power is exclusive, it does not follow that any and all state regulations touching on aliens are preempted. Only if the state statute is in fact a “regulation of immigration,” i.e., “a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain,” is preemption structural and automatic. Otherwise, the usual rules of statutory preemption analysis apply; state law will be displaced only when affirmative congressional action compels the conclusion it must be.²⁴⁸

In the court’s view, because section 68130.5 does not “regulate[] who may enter or remain in the United States, [it would] proceed under the usual preemption rules.”²⁴⁹

Plaintiffs contend that section 68130.5 violates this statute, i.e., that section 68130.5 makes an unlawful alien eligible for a benefit (in-state tuition) on the basis of residence without making a citizen eligible for the same benefit. When it enacted section 68130.5, the Legislature was aware of section 1623. Indeed, Governor Gray Davis had vetoed an earlier version of what eventually became section 68130.5 because he believed section 1623 would require that the same exemption from nonresident tuition be given to all out-of-state legal United States residents. During the legislative process leading to section 68130.5’s enactment, the state Legislative Counsel issued an opinion concluding that the provision would not conflict with section 1623. Ultimately, in an uncodified section of the bill enacting section 68130.5, the Legislature found that “[t]his act, as enacted during the 2001–02 Regular Session, does not confer postsecondary education benefits on the basis of residence within the meaning of Section 1623 of Title 8 of the United States Code.”²⁵⁰

Plaintiffs’ central argument was that section 68130.5’s exemption from paying out-of-state tuition is based on residence. Section 1623(a) prohibits a state from making unlawful aliens eligible “on the basis of residence within a State” for a postsecondary education benefit.²⁵¹ However, the California Supreme Court concluded that the exemption is based on *other* criteria, specifically, that persons possess a California high school degree or equivalent; that if they are unlawful aliens, they file an affidavit stating that they will try to legalize their immigration status; and, especially important here, that they have attended “[h]igh school . . . in California for three or more years.”²⁵² Indeed, both before and after section 68130.5’s enactment, the law has been that unlawful aliens cannot be deemed California residents for purposes of paying resident tuition.²⁵³ Moreover, many

248. *Id.* at 861–62 (quoting *In re Jose C.*, 198 P.3d 1087, 1098 (Cal. 2009)).

249. *Id.* at 862 (quoting *In re Jose C.*, 198 P.3d at 1098).

250. *Id.* at 862–63 (citations omitted).

251. 8 U.S.C. § 1623(a) (2006).

252. CAL. EDUC. CODE § 68130.5(a)(1), (2), (4) (Deering 2011).

253. CAL. EDUC. CODE § 68062 (Deering 2011); *see also* Regents of the Univ. of Cal. v. Superior Court, 276 Cal. Rptr. 197, 201 (1990).

unlawful aliens who would qualify as California residents but for their unlawful status, and thus would not have to pay out-of-state tuition, will not be eligible for section 68130.5's exemption—only those who attended high school in California for at least three years and meet the other requirements are eligible for the exemption.

The California court noted that if Congress had intended to prohibit states entirely from making unlawful aliens eligible for in-state tuition, it could easily have done so. It could simply have provided, for example, that “an alien who is not lawfully present in the United States shall not be eligible” for a postsecondary education benefit.²⁵⁴ But it did not do so; instead, it provided that “an alien who is not lawfully present in the United States shall not be eligible *on the basis of residence within a State*” for a postsecondary education benefit.²⁵⁵ So § 1623 did not preclude California's approach.

Plaintiffs urged the court to consider Congress's overall purpose in its immigration legislation in support of their expansive view of § 1623. After all, in determining Congress's intent, courts may also consider the “structure and purpose of the statute as a whole.”²⁵⁶ Congress has provided statements of national policy concerning immigration. It stated that “[i]t continues to be the immigration policy of the United States that . . . the availability of public benefits not constitute an incentive for immigration to the United States”²⁵⁷ and that “[i]t is a compelling government interest to remove the incentive for illegal immigration provided by the availability of public benefits.”²⁵⁸ In the court's view, this general immigration policy may have supported an absolute ban on unlawful aliens receiving the exemption, but § 1623 does not impose an absolute ban.

In the California court's view, the fact that the state legislature's primary motivation in enacting section 68130.5 was to give unlawful aliens who reside in California the benefit of resident tuition in a way that does not violate § 1623 did not doom the state law. The legislature found and declared that “[t]here are high school pupils who have attended elementary and secondary schools in this state for most of their lives and who are likely to remain, but are precluded from obtaining an affordable college education because they are required to pay nonresident tuition rates”; and that “[t]hese pupils have already proven their academic eligibility and merit by being accepted into our state's colleges and universities.”²⁵⁹ While this description appears to apply primarily to unlawful aliens, the court found that nothing is legally wrong with the legislature's attempt

254. *Martinez v. Regents of the Univ. of Cal.*, 241 P.3d 855, 862 (Cal. 2010).

255. 8 U.S.C. § 1623(a) (2006) (emphasis added).

256. *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992).

257. 8 U.S.C. § 1601(2)(B) (2006).

258. 8 U.S.C. § 1601(6).

259. 2001 Cal. Stat. ch. 814, § 1, subd. (a)(1), (2). The sentiment is consistent with the Supreme Court's sentiment in *Plyler v. Doe* that reminded us why it is important not to foreclose public education to undocumented students at the K-12 level. See *infra* note 325 and accompanying text.

to avoid § 1623. The mere desire to avoid the restrictions provides no basis to overturn the legislation. This is relevant to sanctuary policies that may be drafted in a manner to avoid preemption or conflict with federal law in order to benefit undocumented immigrants; careful drafting to avoid conflict does not render the policy invalid.

Plaintiffs in *Martinez* also argued that section 68130.5 had a preemption problem with 8 U.S.C. § 1621. Section 1621 was enacted in August 1996, shortly before § 1623, as part of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRA).²⁶⁰ But the state court disagreed with the plaintiffs on that point as well.

Section 1621 has two parts: (1) a general rule that unlawful aliens are not eligible for state or local public benefits (§ 1621(a)); and (2) a description of the circumstances under which a state *may* make an unlawful alien eligible for those public benefits, namely, by “affirmatively” expressing the benefit (§ 1621(d)).²⁶¹ So in order to comply, the state statute must expressly state that it applies to undocumented aliens, rather than conferring a benefit generally without specifying that its beneficiaries may include undocumented aliens. The California court noted that if Congress had intended to require more, Congress should have said so clearly and not set a trap for unwary legislatures.

Plaintiffs argued generally that section 68130.5 is impliedly preempted

260. Pub. L. No. 104-193, § 411, 110 Stat. 2105 (1996); *see also* League of United Latin Am. Citizens v. Wilson, 997 F. Supp. 1244, 1249, 1251, 1253 (C.D. Cal. 1997).

261. 8 U.S.C. § 1621 (2006).

(a) In general

Notwithstanding any other provision of law and except as provided in subsections

(b) and (d) of this section, an alien who is not—

(1) a qualified alien (as defined in section 1641 of this title),

...

is not eligible for any State or local public benefit (as defined in subsection (c) of this section).

...

(c) “State or local public benefit” defined

(1) Except as provided in paragraphs (2) and (3), for purposes of this subchapter the term “State or local public benefit” means—

(A) any grant, contract, loan, professional license, or commercial license provided by an agency of a State or local government or by appropriated funds of a State or local government; and

(B) any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of a State or local government or by appropriated funds of a State or local government.

...

(d) State authority to provide for eligibility of illegal aliens for State and local public benefits

A State may provide that an alien who is not lawfully present in the United States is eligible for any State or local public benefit for which such alien would otherwise be ineligible under subsection (a) of this section only through the enactment of a State law after August 22, 1996, which affirmatively provides for such eligibility.

Pub. L. No. 104-193, §411.

through both field preemption and conflict preemption because of 8 U.S.C. § 1621. The idea is that Congress's intent to preempt can "be inferred if the scope of the statute indicates that Congress intended federal law to occupy the legislative field, or if there is an actual conflict between state and federal law."

The California court disagreed. Critical to the implied preemption analysis is the existence of two express preemption statutes, namely §§ 1621 and 1623. However, in this case, Congress did not merely imply that matters beyond the preemptive reach of the statutes are not preempted; it said so expressly. Section 1621(c) says that a state "may" provide public benefits for unlawful aliens if it does so in compliance with the statute's requirements. This language shows Congress did not intend to occupy the field fully. Because section 68130.5 complies with the conditions set out in both §§ 1621 and 1623, those statutes cannot impliedly preempt it.²⁶²

Strangely, plaintiffs relied substantially on *League of United Latin American Citizens v. Wilson*,²⁶³ which held that federal law preempted the restrictions that Proposition 187, a voter initiative enacted in 1994, had placed on unlawful aliens. Provisions of Proposition 187 denied K–12 access to undocumented students and denied certain public benefits to undocumented immigrants. The court regarded *Wilson* as irrelevant to the issues in *Martinez*. Relying heavily on § 1621, the federal district court in *Wilson* concluded that California "is powerless to enact its own legislative scheme to regulate alien access to public benefits."²⁶⁴ But the court added that California "can do what the PRA [including § 1621] permits, and nothing more."²⁶⁵ The California court felt that the *Wilson* opinion indicated what § 1621 barred, but left open the question of what § 1621 permits. And the California court in *Martinez* ruled that California's tuition scheme was well within what is permitted. In short, section 68130.5 was not impliedly preempted.

262. Although the California Supreme Court did address this issue, Congress's definition of restricted "public benefits" does not appear to cover in-state tuition anyway:

(c) "State or local public benefit" defined

(1) Except as provided in paragraphs (2) and (3), for purposes of this subchapter the term "State or local public benefit" means—

(A) any grant, contract, loan, professional license, or commercial license provided by an agency of a State or local government or by appropriated funds of a State or local government; and

(B) any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of a State or local government or by appropriated funds of a State or local government.

8 U.S.C. § 1621(c) (2006). Furthermore, Congress's attempt to restrict state or local benefits appears to raise serious Tenth Amendment problems; restricting state or local benefits that are not necessarily funded by federal dollars would appear to be beyond the reach of Congress.

263. 997 F. Supp. 1244 (C.D. Cal. 1997).

264. *Id.* at 1261.

265. *Id.*

The *Martinez*, *Whiting*, and *De Canas* cases teach us that carefully drafted subfederal laws that affect immigrants can avoid preemption problems. When the federal statute leaves room for state restrictions that serve a legitimate state purpose and do not in and of themselves regulate immigration, the subfederal action can be upheld. Under the Supreme Court's preemption discourse, sanctuary policies that require local police to refrain from asking crime victims and witnesses about immigration status appear quite safe from any preemption claims (field, implied, or conflict). If 8 U.S.C. §§ 1373 and 1644 withstand Tenth Amendment scrutiny and are interpreted to bar subfederal policies that prevent the voluntary cooperation of a local officer with a federal officer, then as long as the local policies do not bar voluntary cooperation, no conflict with the federal statute arises. Whether a subfederal law that bars officers from asking about immigration status during traffic stops and other minor encounters is preempted by §§ 1373 and 1644 may turn on whether the bar on asking is interpreted as being a restraint on voluntary cooperation. The DOJ inspector general has determined that at least three high profile "don't ask" sanctuary jurisdictions do not prevent such voluntary cooperation, which suggests no conflict with federal law. Although the inspector general was aware that Oregon and San Francisco have official sanctuary policies, and that New York City's executive order did the same, "in each instance, the local policy either did not preclude cooperation with ICE or else included a statement to the effect that those agencies and officers must assist ICE or share information with ICE as required by federal law."²⁶⁶

The question of whether sanctuary policies that bar officers from asking about immigration status would be preempted is also informed by the *Pacific Gas & Electric* case. The case illustrates how preemption determinations are very much based on the record and how the outcome turns on the manner in which the Court chooses to characterize the purposes of the federal and subfederal laws. In that case, the Court characterized the federal goal as promoting nuclear reactors only when they were economically feasible, rather than simply as encouraging the development of nuclear power. Conveniently, the Court characterized California's state law purpose as economic, rather than in terms of preventing construction of nuclear plants unless disposal was safe.

In the sanctuary context, if §§ 1373 and 1644 are construed to simply make sure that voluntary cooperation is not thwarted when a subfederal officer has information and wants to communicate, then a sanctuary policy based on a public policy decision to not ask about immigration status for effective community policing reasons does not conflict. The fact that "don't ask" sanctuary policies generally come in the form of a decision to not spend public funds and resources on delving into immigration questions is more evidence that the decision is one

266. AUDIT DIV., U.S. DEP'T OF JUSTICE, COOPERATION OF SCAAP RECIPIENTS IN THE REMOVAL OF CRIMINAL ALIENS FROM THE UNITED STATES 23 (2007).

about public expenditures for policing—something that is conventionally a local decision. Thus, the subfederal jurisdiction's reliance on careful deliberation relating to public safety in its decision to initiate a sanctuary policy is an important part of the record.

IV. GOOD POLICING

The processes used by local governments and police departments in deciding to implement sanctuary policies reveal that their primary goal is public safety for the entire community. The long, often painstaking, deliberations have little to do with thwarting enforcement efforts by federal immigration officials. The goal simply is better policing.

Consider the process in New Haven, Connecticut.²⁶⁷ In establishing its policy of making no distinction between documented and undocumented immigrants, the New Haven Police Department made clear that its mission and goals were to “protect life and property, prevent crime, and resolve problems.”²⁶⁸ Determining the immigration status of the city's residents was not part of its mission. Local policymakers drew a direct analogy between its program and the military's former “don't ask, don't tell policy.”²⁶⁹

Policymakers in New Haven gave serious consideration to what was happening in the community in arriving at their decision. The police department has stations in the two main immigrant neighborhoods. Each month, the commander of each station holds a meeting with residents to discuss community issues and concerns. In these meetings, the commanders learned that undocumented residents were reluctant to attend; they usually expressed their concerns through a local Catholic priest.²⁷⁰ Prior to the adoption of the formal policy, officers in these neighborhoods attempted to gain the trust of the immigrant communities through intensive outreach that met with some success. However, some police practices—particularly those related to questions about immigration status or identification documents—were misinterpreted, and immigrants often complained about disrespectful police behavior.²⁷¹ This dialogue and the input from immigrant advocacy groups led to the creation of a new policy for the department as well as the city's launch of a municipal identification card program for all residents irrespective of immigration status.²⁷² New Haven's immigrant-friendly image is one that the city has worked hard to promote through

267. See *supra* notes 35–42 and accompanying text.

268. HOFFMASTER ET AL., *supra* note 9, at 6.

269. *Id.*

270. *Id.* at 4–5.

271. *Id.* at 5.

272. *Id.* at 6. Although some officers do not understand the process and stringent requirements for the identification cards, in general, New Haven police officers regard the card as a good tool that helps them identify city residents, saving time and resources by eliminating the need to hold a person until documents are authenticated. *Id.* at 9.

special programs and policies, all with the purpose of “ensuring the safety of all of its residents, including undocumented persons.”²⁷³

Better policing was the motivation for hammering out the current approach to immigrants in Prince William County, Virginia, as well. Evidence of that motivation is symbolized by the process that the police chief followed in order to convince local politicians to modify their plans to implement a very strict anti-immigrant approach to public safety.²⁷⁴ The community was highly polarized over the issue of immigration. Anti-immigrant protests, email campaigns, and town hall testimony by hundreds of residents pressured county board members. Ultimately the board unanimously approved a policy that restricted social services for undocumented immigrants, instructed the police to enter into a 287(g) agreement with ICE, and required officers to ask about any detained person’s immigration status “if there is probable cause to believe such a person is in violation of federal immigration law.”²⁷⁵

Throughout the volatile process, the police chief urged restraint and a balanced approach because, he said, “I have a responsibility to provide service to the entire community—no matter how they got here. It is in the best interest of our community to trust the police.”²⁷⁶ He feared that the board action would increase the number of “silent victims” in immigrant communities, as the department’s relationship with the community soured and public trust eroded.²⁷⁷ The chief insisted that the order to detain individuals suspected of being undocumented was problematic and could lead to “racial profiling” litigation against the department.²⁷⁸ After consulting with other police departments and the county attorney, the county board of supervisors revised the policy in two ways: (1) immigration status inquiries are not required unless the person is arrested, not simply detained, and (2) the inquiry is made of every person arrested, not just those suspected of being foreign born.²⁷⁹ Thus, crime witnesses and victims are not subject to questioning about immigration status.

In contrast to Prince William County, Montgomery County, Maryland, was regarded as having political leadership that was much more liberal and accepting of undocumented immigrants. The police chief in Montgomery County addressed the issue proactively. Certainly, he wanted to get undocumented immigrant criminals “off the streets,” but the policy had to “allow officers to maintain the relationships that they had worked to build within various communities.”²⁸⁰ He did not want his officers to be in the business of enforcing federal immigration

273. *Id.* at 10.

274. *See supra* notes 43–51 and accompanying text.

275. HOFFMASTER ET AL., *supra* note 9, at 15–17.

276. *Id.* at 15–16 (quoting Police Chief Charlie T. Deane).

277. *Id.* at 15.

278. *Id.* at 17.

279. *Id.* at 18.

280. *Id.* at 21–22.

laws because that would make it difficult for police “to foster trust and cooperation with everyone in these immigrant communities.”²⁸¹ His meetings with community residents provided the chief with opportunities to clarify any misunderstandings, and the input he received influenced his plan. The policy that was ultimately adopted does require forwarding names of persons arrested and charged with certain serious crimes. However, inquiries about immigration status are not made of crime witnesses and victims. The chief learned of misinformation to the contrary, so he constantly engaged in community outreach on the policy to dispel rumors.²⁸²

The sanctuary policies for crime victims and witnesses developed in Phoenix and Mesa, Arizona, are also grounded on a theory of public safety and the promotion of better policing. In Phoenix, the focus is on violent crime and on maintaining a positive relationship with the immigrant community. As one officer put it, “The Phoenix Police Department can’t afford to squander the trust issue. . . . When we come out of the immigration cloud, we must have our reputation and trust intact.”²⁸³ The department constantly invests time and resources into improving communications with the immigrant community and to respond to criminal activity irrespective of immigration status.²⁸⁴ The department knows that the cooperation of all residents—even those who are in undocumented status—is required to ensure the safety of the entire community.²⁸⁵

The philosophy in Mesa, Arizona, is similar. The mayor and police officers were openly critical of Sheriff Arpaio’s operations in their city because his actions undermined the police department’s relationship with the immigrant community and “set back the Police Department’s efforts to build trust.”²⁸⁶ While trust and community confidence are the goals behind the police department’s policy of not inquiring about immigration status when it comes to crime victims and witnesses, the battle is difficult because the distinction between federal (ICE), county (Arpaio), and local (police department) law enforcement is confusing for the immigrant community. As one officer put it, “You’re not sure if you ever gain the trust. Maybe you just lessen the mistrust.”²⁸⁷ In spite of the tense atmosphere over immigration in Arizona, the Mesa police chief was determined not to adopt a policy that would damage the trust of a significant part of the community who were often victims or witnesses to crime. He held community meetings to encourage residents to discuss priorities and communication and consulted ICE. A new policy finally was adopted after seventeen revisions, followed by several

281. *Id.* at 22 (quoting Police Chief J. Thomas Manger).

282. *Id.* at 24.

283. *Id.* at 35.

284. *Id.*

285. *Id.* at 36.

286. *Id.* at 39 (quoting Police District Commander Steve Stahl).

287. *Id.* at 40.

months of officer training.²⁸⁸ Although the city takes pains not to be labeled a “sanctuary” for undocumented immigrants, perhaps for political reasons, the focus of the policy is on criminals, not crime victims or witnesses, and the department engages in continuous outreach to the immigration community.²⁸⁹ In testimony before Congress, Mesa’s police chief made clear why the immigration status of crime victims and witnesses needs to remain off the table:

Community policing efforts are being derailed where immigrants who fear that the police will help deport them rely less on the local authorities and instead give thugs control of their neighborhoods.

. . . It is nearly impossible to gain the required trust to make community policing a reality in places where the community fears the police will help deport them, or deport a neighbor, friend or relative.²⁹⁰

The goal of gaining trust in immigrant communities as an important step in achieving public safety for the entire community through sanctuary policies is evident in many other jurisdictions:

- ❖ In San Jose, California, the police chief has warned that using a shrinking pool of officers to target undocumented immigrants is inefficient, costly and would make cities more dangerous, not less. Looking to reassure its own large and growing Latino community, San Jose has long broadcast that it does not participate in immigration raids. Officers are ordered not to investigate someone’s immigration status even during arrests. San Jose police officers are looking to greatly improve their frayed relationship with immigrant communities amid allegations of overaggressive policing and racial profiling. The chief also discontinued a policy in which cars of unlicensed drivers stopped for minor traffic violations were impounded for a month—a policy many felt unfairly targeted the undocumented Latino community.²⁹¹
- ❖ Officials in Providence, Rhode Island, ironically where Danny Sigui was deported after testifying as a witness in a 2003 murder trial,²⁹² want to opt out of ICE’s Secure Communities program²⁹³ because the “success of [the] city’s community policing program has been based on the trust developed between law enforcement and the

288. *Id.* at 42.

289. *Id.* at 43.

290. *Public Safety and Civil Rights Implications of State and Local Enforcement of Federal Immigration Laws: J. Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Sec., & Int’l Law and the Subcomm. on the Constitution, Civil Rights, & Civil Liberties of the Comm. on the Judiciary H.R., 111th Cong. 84 (2009)* (testimony of George Gascón, Chief, Mesa Police Dep’t, Mesa, Ariz.).

291. Sean Webby, *San Jose: Chief Says Local Cops Shouldn’t Be Involved in Immigration Enforcement*, SAN JOSE MERCURY NEWS, Mar. 16, 2011.

292. *See supra* notes 2–4 and accompanying text.

293. *See infra* notes 332–34 and accompanying text (describing the Secure Communities Program).

community—especially the immigrant community.” City leaders worry that the Secure Communities program will breed fear and mistrust, undermining community policing practices. Witnesses and crime victims—including documented and undocumented immigrants—may shy away from the police, fearing that contact may lead to immigration problems.²⁹⁴

- ❖ The Minneapolis Police Department has had a policy in place for years that prohibits officers from asking about immigration status. That policy predates a city ordinance, passed in 2003, that prohibits all city employees from inquiring about immigration status.²⁹⁵ Police understand that building trust is a challenge for immigrant communities, including newcomers like Somalis. With the sanctuary policy as a foundation and using bilingual interpreters, the police work to establish trust by building relationships through regular meetings and conversations with community members, accessing Somali radio shows, distributing flyers in neighborhoods, and even making door-to-door visits.²⁹⁶
- ❖ Takoma Park, Maryland, adopted a sanctuary ordinance in 1985 that prohibits all local officials from releasing any information regarding the citizenship or immigration status of any individual to any third party. The city reaffirmed this policy in 2007 by declaring that “enforcement of immigration laws by the Takoma Park Police Department will discourage immigrant residents from reporting crimes and suspicious activity, and cooperating with criminal investigations; and . . . as a matter of public safety, the protection of a person’s citizenship and immigrant status will engender trust and cooperation between law enforcement officials and immigrant communities to aid in crime prevention and solving, and will discourage the threat of immigrant and racial profiling and harassment.”²⁹⁷
- ❖ Speaking in support of his department’s community policing policies, the police chief of Lowell, Massachusetts pointed out, “When immigrant residents of Lowell are afraid to report crimes because they worry that contact with my officers could lead to deportation, criminals are allowed to roam free and the entire community suffers as a result.”²⁹⁸
- ❖ The state of Oregon has a statewide sanctuary law prohibiting police agencies and local governments from using any resources to

294. Gregory Smith, *Providence Wants to Opt Out of ‘Secure Communities’ Database*, PROVIDENCE J., Feb. 23, 2011.

295. HOFFMASTER ET AL., *supra* note 9, at 50.

296. *Id.* at 51–52.

297. City of Takoma Park, Md., Ordinance No. 2007-58 (Oct. 29, 2007), available at <http://www.takomaparkmd.gov/clerk/agenda/items/2007/102907-2.pdf>.

298. TRAMONTE, *supra* note 2, at 6.

apprehend or report undocumented immigrants.²⁹⁹ The state's largest city—Portland—has its own official sanctuary ordinance as well. Both measures are promoted as important steps in developing trust in immigrant communities to insure public safety for all residents.³⁰⁰

The sanctuary policies discussed in this article fall within what some refer to as “community oriented policy,” “confidentiality policies,” or “preventive” policing.³⁰¹ They prohibit immigration status inquiries of individuals not suspected of having committed crimes.³⁰² The success of these policies “hinges upon the development of trust between community residents and law enforcement officials. For communities with significant immigrant populations, building trust means getting immigrants to know that if they are victimized by crime or they witness a crime, they can approach the police and not fear immigration-related consequences.”³⁰³ These policies are premised in part on the fact that immigrants are often victimized by criminals who assume that no report will be made out of fear of being deported.³⁰⁴

By whatever name—sanctuary policies, confidentiality practices, community policing—state and local rules that require law enforcement officers to refrain

299. OR. REV. STAT. § 181.850 (2007).

Enforcement of federal immigration laws.

(1) No law enforcement agency of the State of Oregon or of any political subdivision of the state shall use agency moneys, equipment or personnel for the purpose of detecting or apprehending persons whose only violation of law is that they are persons of foreign citizenship present in the United States in violation of federal immigration laws.

(2) Notwithstanding subsection (1) of this section, a law enforcement agency may exchange information with the United States Bureau of Immigration and Customs Enforcement, the United States Bureau of Citizenship and Immigration Services and the United States Bureau of Customs and Border Protection in order to:

(a) Verify the immigration status of a person if the person is arrested for any criminal offense; or

(b) Request criminal investigation information with reference to persons named in records of the United States Bureau of Immigration and Customs Enforcement, the United States Bureau of Citizenship and Immigration Services or the United States Bureau of Customs and Border Protection.

(3) Notwithstanding subsection (1) of this section, a law enforcement agency may arrest any person who:

(a) Is charged by the United States with a criminal violation of federal immigration laws under Title II of the Immigration and Nationality Act or 18 U.S.C. 1015, 1422 to 1429 or 1505; and

(b) Is subject to arrest for the crime pursuant to a warrant of arrest issued by a federal magistrate.

Id.

300. TRAMONTE, *supra* note 2, at 7. In Portland, the relationship between immigrant communities and police improved as police-community dialogue gave immigrants a better sense of security. *Id.*

301. *See supra* note 32.

302. NAT'L IMMIGRATION FORUM, IMMIGRATION LAW ENFORCEMENT BY STATE AND LOCAL POLICE 3 (2007).

303. *Id.* at 2.

304. TRAMONTE, *supra* note 2, at 7.

from asking crime witnesses, crime victims, and, in some instances, minor offenders about immigration status are intended to promote public safety. Their goal is to gain the immigrant community's trust—trust that is needed for the community's cooperation. Through that cooperation, the entire community is safer. The policies are adopted as measures of good policing.

V. GOOD PUBLIC POLICY

The success of sanctuary policies is evident:

As departments around the country embraced community policing, crime rates dropped substantially. Between 1993 and 2005, violent crime rates fell 57 percent for the general population, and 55 percent for the Latino population. The downward trend was attributed in many state and local police agencies, in part, to community policing strategies.³⁰⁵

These good policing measures have indeed turned into good public policy decisions that have achieved greater public safety.

Not surprisingly, law enforcement organizations have come to recognize the positive public policy ramifications of sanctuary policies. According to the International Association of Chiefs of Police (IACP), one of the “central benchmarks of a well-commanded police department is establishing good relationships with the local communities, including those composed of immigrants. Working with these communities is critical in preventing and investigating crimes.”³⁰⁶ The IACP warns,

Immigration enforcement by state and local police could have a chilling effect in immigrant communities and could limit cooperation with police by members of those communities. Local police agencies depend on the cooperation of immigrants, [documented and undocumented], in solving all sorts of crimes and in the maintenance of public order. Without assurances that they will not be subject to an immigration investigation and possible deportation, many immigrants with critical information would not come forward, even when heinous crimes are committed against them or their families. Because many families with undocumented family members also include legal immigrant members, this would drive a potential wedge between police and huge portions of the legal immigrant community as well.

This will be felt most immediately in situations of domestic violence. For example, many law enforcement agencies have been addressing the difficult issues related to domestic abuse and the reluctance of some victims to contact the police. This barrier is heightened when the victim is an immigrant and rightly or wrongly perceives her tormentor to wield

305. NAT'L IMMIGRATION FORUM, *supra* note 302, at 2.

306. INT'L ASS'N OF CHIEFS OF POLICE, POLICE CHIEFS GUIDE TO IMMIGRATION ISSUES 21 (2007).

the power to control her ability to stay in the country. The word will get out quickly that contacting the local police can lead to deportation or being separated by a border from one's children. Should local police begin enforcing immigration laws, more women and children struggling with domestic violence will avoid police intervention and help.³⁰⁷

The IACP cautions cannot be taken lightly: the prevalence of mixed families (families with both documented and undocumented members) in the United States and the particular challenge that domestic violence presents render the need for immigration confidentiality particularly high.

The reticence to call police that is born of fear that lack of immigration status will “trump the criminal justice protections afforded crime victims” is a concern that reaches far beyond immigrant communities.³⁰⁸ If victims are deterred from calling the police, criminals will not be held accountable. That leaves perpetrators free to commit other crimes, perhaps against U.S. citizens and lawful resident aliens.³⁰⁹

In spite of these data that verify the decline of crime rates in sanctuary localities and situations that demand confidentiality, critics argue that sanctuary policies forestall the removal of dangerous criminal immigrants.³¹⁰ However, a 2007 audit by the DOJ Office of Inspector General found that sanctuary or confidentiality policies “did not violate federal law and did not impede police cooperation with ICE regarding criminals in police custody.”³¹¹ Thus, the claim of obstruction appears meritless.

When the Department of Justice audited programs that received federal criminal assistance funds to defray costs of incarcerating criminal aliens, special attention was paid to jurisdictions that had sanctuary policies to determine if police cooperation with ICE was impeded. In fact, when auditors looked closely at the state of Oregon and San Francisco (two jurisdictions with sanctuary laws) as well as New York City (because of its executive order), “in each instance the local policy either did not preclude cooperation with ICE or else included a statement to the effect that those agencies and officers will assist ICE or share information

307. GENE VOEGTLIN, INT'L ASS'N OF CHIEFS OF POLICE, ENFORCING IMMIGRATION LAW: THE ROLE OF STATE, TRIBAL AND LOCAL LAW ENFORCEMENT 5 (2004), available at <http://www.theiacp.org/Portals/0/pdfs/Publications/ImmigrationEnforcementconf.pdf>.

308. TRAMONTE, *supra* note 2, at 6 (quoting Leslye Orloff, Director of the Immigrant Women Program of Legal Momento and cofounder of the National Network to End Violence Against Immigrant Women).

309. *Id.*

310. For example, this “sanctuary cities resource” website, which keeps track of sanctuary jurisdictions, maligns those jurisdictions that have adopted sanctuary policies. *About the Sanctuary Cities Resource Site*, http://www.sanctuarycities.info/sanctuary_cities_about.htm (last visited Dec. 8, 2011). The website claims that these jurisdictions are “defying ICE and other federal agencies whose goal it is to reduce terrorism and keep criminals and other law breakers out of the United States.” *Id.*

311. NAT'L IMMIGRATION FORUM, *supra* note 302, at 4.

with ICE as required by federal law.”³¹² There simply is no truth to the assertion that serious criminal aliens are averting immigration consequences because of sanctuary policies. In the words of DHS Secretary Michael Chertoff in 2007, “I’m not aware of any city . . . that actually interfered with our ability to enforce the law.”³¹³ Once a noncitizen is convicted of a serious offense, the person is reported to immigration authorities in every sanctuary jurisdiction.

In contrast, serious public policy problems can arise in cities that do not have clear sanctuary or confidentiality policies. Community trust in the police can be eroded, and public safety for everyone can be negatively affected. For example, in 2007, the New Jersey Attorney General issued a directive ordering police to question individuals about their immigration status upon arrest for a serious crime. If an officer has “reason to believe” that such an individual is an undocumented immigrant, the individual must be referred to ICE. However, the directive was silent as to whether police should question a person about immigration status and refer to ICE in other contexts, such as traffic stops or street encounters. A survey of sixty-eight individuals referred to ICE by New Jersey law enforcement officials when only a minor offense or no offense was charged revealed troubling data:

- ❖ Sixty-five were Latino;
- ❖ Forty-nine were questioned about their immigration status and turned over to ICE following a traffic stop, either based on a minor infringement, such as rolling through a stop sign, or based on no identifiable reason at all (forty-one as drivers, eight as passengers); and
- ❖ Nineteen were stopped by police on the street and questioned about their immigration status (seven for drinking in public, the others for no apparent reason at all).³¹⁴

In addition to these individuals, other persons who were witnesses or victims of crime also were questioned about their immigration status. One man called the police after he had been assaulted on the street by two men. The victim was detained for two days and transferred to ICE custody because he could not produce any identification.³¹⁵ Police questioned another man in his home as part of the investigation of a neighbor. The police detained the man after asking about

312. AUDIT DIV., U.S. DEP’T OF JUSTICE, COOPERATION OF SCAAP RECIPIENTS IN THE REMOVAL OF CRIMINAL ALIENS FROM THE UNITED STATES viii, x–xi, 27–28 (2007).

313. TRAMONTE, *supra* note 2, at 9. One might be concerned that sanctuary policies would hamper efforts to deal with criminal aliens or even terrorists. See, e.g., Orde F. Kittrie, *Federalism, Deportation, and Crime Victims Afraid to Call the Police*, 91 IOWA L. REV. 1449 (2006). However, the assurances by Secretary Chertoff and the DOJ audit should dispel such concerns.

314. BASSINA FARBENBLUM & JESSICA JANSYN, SETON HALL UNIV. SCH. OF LAW, CROSSING THE LINE: DAMAGING IMMIGRATION ENFORCEMENT PRACTICES BY NEW JERSEY POLICE FOLLOWING ATTORNEY GENERAL LAW ENFORCEMENT DIRECTIVE 2007-3, at 4 (2009).

315. *Id.* at 15.

his immigration status.³¹⁶ Individuals involved in car accidents were detained after police arrived and asked about immigration status.³¹⁷

These incidents send the wrong message to immigrant communities for those who are concerned about public safety for the entire community. Little wonder that victims and witnesses are hesitant to come forward if they fear being questioned about their own immigration status. In the words of the former Newark Police Chief,

The reluctance of local police to enforce federal immigration law grows out of the difficulty of balancing federal and local interests in ways that do not diminish the ability of the police to maintain their core mission of maintaining public safety, which depends heavily on public trust. In communities where people fear the police, very little information is shared with officers, undermining the police capacity for crime control and quality service delivery. As a result, these areas become breeding grounds for drug trafficking, human smuggling, terrorist activity, and other serious crimes. As a police chief . . . asked, “How do you police a community that will not talk to you?”³¹⁸

Voicing similar concerns about the aftereffects of a joint operation by federal agents and Chandler, Arizona police, the Attorney General of Arizona at the time, Grant Wood, called for an investigation because the operation “created an atmosphere of fear and uncertainty [that] greatly harmed the trust relationship” between police and residents.³¹⁹

In contrast, police took a preventive police approach in Austin, Texas, when they realized that forty-seven percent of reported robbery victims were Latino, even though Latinos constituted only twenty-eight percent of the population and many robberies went unreported.³²⁰ Police initiated an outreach campaign to the Spanish-speaking community to encourage undocumented residents to report crimes if they were victims or witnesses. Their message was clear: “Trust us. We are not immigration, we are not going to arrest you, and we are not going to deport you.”³²¹ A twenty-percent increase in robbery reports followed. But then the police did more. To reduce the victimization of undocumented residents, they negotiated with banks to accept Mexican consul-issued identification cards for

316. *Id.*

317. *Id.*

318. *Public Safety and Civil Rights Implications of State and Local Enforcement of Fed. Immigration Laws: J. Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Sec., & Int'l Law and the Subcomm. on the Constitution, Civil Rights, & Civil Liberties of the Comm. on the Judiciary H.R., 111th Cong. 81–82 (2009)* (statement of Hubert Williams, President, Police Foundation).

319. DAVID A. HARRIS, GOOD COPS 189 (2005).

320. *Id.* at 191.

321. *Id.*

purposes of opening bank accounts. Undocumented residents no longer had to hide or carry their cash around, and robberies declined.³²²

In short, sanctuary policies are a better public policy choice. They work. They encourage trust—a necessary ingredient to problem-solving community policing models, providing hope to police departments across the country.³²³ They promote public safety for everyone.

Sanctuary policies also are good public policy in an era when, unfortunately, anti-immigrant rhetoric that breeds hatred and distrust runs high in many quarters; and at times, the hate turns violent.³²⁴ Sanctuary policies are important emblems of inclusion, public statements that counter the vitriol spawned by misguided souls. Sanctuary policies make sense because, like it or not, undocumented immigrants are a part of the community and shunning them does harm to all of us. Sanctuary policies send a message of rapport and trust.

The Supreme Court confronted an analogous public policy decision in 1982 when it struck down Texas's attempt to deny undocumented children access to elementary and secondary public schools. Even though undocumented status was not deemed a suspect classification and the right to education was not regarded as fundamental, in *Phyller v. Doe*, the Court noted,

[M]any of the undocumented children disabled by this classification will remain in this country indefinitely, and . . . some will become lawful residents or citizens of the United States. It is difficult to understand precisely what the State hopes to achieve by promoting the creation and perpetuation of a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare, and crime. It is thus clear that whatever savings might be achieved by denying these children an education, they are wholly insubstantial in light of the costs involved to these children, the State, and the Nation.³²⁵

This remarkable statement of inclusion was an important philosophical policy announcement that also was wise as a practical matter—the entire country would pay the price if these students were not afforded the opportunity to be educated.

Similarly, the entire community loses when we force a segment into the shadows of mistrust and fear of local law enforcement officials. Many in the so-called undocumented community will someday become lawful residents and citizens. Many are members of mixed families where a parent, a child, or a sibling already is a lawful resident or citizen. Most interact with other residents of the entire community on a daily basis and might be present to witness a crime or

322. *Id.* at 192–93.

323. *Id.* at 222.

324. See Bill Ong Hing, *Vigilante Racism: The De-Americanization of Immigrant America*, 7 MICH. J. RACE & L. 441 (2002).

325. *Id.* at 230.

provide aid to someone who is in trouble. The members of these communities need to be integrated, not shunned, for good public policy reasons.

Governmental institutions need to play a lead role in integration efforts, and sanctuary policies set the necessary tone. The influence of local leaders and government agencies can have overwhelmingly positive and immediate effects on the lives of immigrants. Important forms of civic engagement are not predicated on formal U.S. citizenship. Schools, neighborhoods, community groups, and public service programs can all benefit from the immediate involvement of immigrants. The alternative—as illustrated in the hellish environment created by Sheriff Joe Arpaio in Maricopa County, Arizona³²⁶—breeds fear and distrust within the immigrant community, while promoting hate by misguided community residents who follow Arpaio's lead. Rejecting the Arpaio world through alternative public policy choices is a legitimate decision that should be promoted.

VI. CLOSING

In the interest of public safety, thousands of law enforcement agencies across the country engage in some form of sanctuary policy—officially or unofficially.³²⁷ This is an important message of inclusion, integration, and outreach to immigrant communities in our increasingly diverse nation. Official numbers likely understate the actual level of de-emphasis that local law enforcement officials practice when it comes to checking the immigration status of individuals they encounter for minor matters, traffic offenses,³²⁸ or as crime witnesses or

326. Prior to Arizona S.B. 1070, Sheriff Arpaio received widespread attention for his immigration enforcement antics pursuant to a 287(g) agreement with ICE. As part of his aggressive enforcement practices, Arpaio trained deputies to use minor traffic violations as an opportunity to check individuals' legal status. At Arpaio's county jail, prisoners were forced to wear black-and-white striped uniforms, with pink socks and underwear. Randy James, *Sheriff Joe Arpaio*, TIME (Oct. 13, 2009), <http://www.time.com/time/nation/article/0,8599,1929920,00.html>. In opening a new jail facility, he ordered seven hundred maximum-security prisoners to march four blocks to a new jail facility wearing only pink underwear and flip-flops. *Id.* Arpaio, who refers to himself as the "toughest sheriff" in the country is under investigation for breaking civil rights laws. Pierre Thomas, *Controversial Arizona Sheriff Joe Arpaio Under Investigation for Allegedly Violating Civil Rights*, ABC NEWS (Sept. 13, 2010), <http://abcnews.go.com/WN/arizona-sheriff-joe-arpaio-investigation-us-department-justice/story?id=11556736>. The allegations include: "unlawful searches and seizures, discriminatory police conduct, and a failure to provide basic services to individuals with limited English." *Id.* The Justice Department also has filed a lawsuit accusing Arpaio of obstructing the department's civil rights investigation. *Id.*

327. See *supra* note 17 and accompanying text.

328. I realize that for traffic stops, if the driver does not offer at least a form of identification that is acceptable to the officer, this can lead to immigration status questioning. That makes the issuance of driver's licenses to undocumented immigrants vitally important. Short of that, the issuance of local municipal identification cards that are acceptable to local police (as in New Haven) or the recognition of Mexican Consul-issued matriculas are very necessary. An incident in sanctuary-friendly San Francisco underscores the problem. Katie Worth, *Driver's Arrest Ignites Sanctuary City Debate*, S.F. EXAMINER (July 10, 2010), <http://www.sfexaminer.com/local/driver-s-arrest-ignites-sanctuary-city-debate>. On June 2, 2010, police stopped a driver who failed to come to a complete stop at a stop sign.

victims. Even without an “official” sanctuary policy, the officer’s choice is one born of a sense that most folks in these categories that they encounter who are likely immigrants should be allowed to go about their lives without an intrusion from federal immigration officials. Even if they are not intending to send a message of inclusion, these officers find it unwise, or at least unnecessary, to send an Arizona S.B. 1070 message of unwelcome.

The constitutionality of sanctuary policies is clear. Unlike anti-immigrant subfederal laws intended to regulate immigration, sanctuary policies, community policing, and confidentiality approaches are not about regulating the admission of immigrants. Sanctuary policies are about public safety and decisions on how to spend public funds and establish priorities, and therefore are not preempted. Congress cannot commandeer local authorities to enforce federal immigration laws. Thus, as long as sanctuary communities that choose not to ask about immigration status do not bar volunteer communications and follow other federal requirements of cooperation, they clearly are not preempted. In fact, I believe that there is a good argument that policies that instruct police officers not to ask about immigration status and also not to talk about immigration status that they are aware of may also be protected; a federal statute that is intended to mandate subfederal entities to allow voluntary communication could very well run afoul of the Tenth Amendment depending on how courts view the mandate-prohibition distinction. The central teaching of the Tenth Amendment cases is that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the states to require or prohibit those acts. Congress may not, therefore, directly compel states or localities to enact or to administer policies or programs adopted by the federal government. It may not directly shift to the states enforcement and administrative responsibilities allocated to the federal government by the Constitution. Such a reallocation would not only diminish the political accountability of both state and federal officers, but it would also compromise the structural framework of dual sovereignty and separation of powers. Thus, Congress may not directly force states to assume enforcement or administrative responsibilities constitutionally vested in the federal government. Forcing subfederal entities to allow voluntary cooperation raises the specter of violating those principles.

Sanctuary policies can, however, be thwarted by the use of overzealous federal initiatives. For example, 287(g) agreements between ICE and local law enforcement officials were meant to focus on the identification and removal of

Id. The driver did not have a driver’s license, but did provide a name and date of birth. *Id.* When officers performed a background check in the patrol car computer—standard procedure for every traffic stop—no criminal history was found, but a federal immigration warrant popped up with the same name and date of birth. *Id.* Since police could not confirm that the driver was the same person with the immigration warrant, he was arrested on suspicion of driving without a license and reported to ICE. *Id.*

dangerous criminal aliens. However, we have seen these agreements abused not simply by the likes of Sheriff Arpaio, but by other local officials as well—more than half of those deported under 287(g) were for minor offenses,³²⁹ and even some citizens have been mistakenly deported.³³⁰ In many 287(g) jurisdictions, immigrants fear the police and avoid public spaces.³³¹ Likewise, the Secure Communities initiative that refers fingerprint information to DHS via the FBI for all participating jurisdictions was also intended to focus on serious criminals. Yet, the vast majority of individuals removed as a result of Secure Communities referrals also have been noncriminal or low-level offenders.³³² And DHS has taken the strict position on Secure Communities that it can access all fingerprints submitted to the FBI by local law enforcement officials even without the permission of state and local officials.³³³ Secure Communities “casts too wide a

329. TRAMONTE, *supra* note 2, at 8 (citing a Migration Policy Institute report); Nate Rau, *287(g) Deportation Program Snags Few Felons, Memos from Feds Show; Critics Hit Deportation Program*, THE TENNESSEAN (Nashville) (Oct. 24, 2010), available at <http://mexicanexpulsions.blogspot.com/2010/10/287g-deportation-program-snags-few.html>.

330. Pedro Guzman, a U.S. citizen born in California, is a developmentally disabled man who was deported after the Los Angeles Sheriff's Department mistakenly referred him to ICE pursuant to a 287(g) agreement. Sam Quinones, *Disabled Man Found After 89-Day Ordeal*, L.A. TIMES (Aug. 8, 2007), <http://articles.latimes.com/2007/aug/08/local/me-found8>; Joanne Lin, *End It: 287(g) is Beyond Repair and Harms Local Communities Every Day*, ACLU BLOG OF RIGHTS (Apr. 5, 2010), <http://www.aclu.org/blog/immigrants-rights/end-it-287g-beyond-repair-and-harms-local-communities-every-day>. Mark Lyttle, a U.S. citizen was deported even though immigration officials had criminal record checks that said he was a U.S. citizen. Kristin Collins, *N.C. Native Wrongly Deported to Mexico*, CHARLOTTE OBSERVER (Aug. 30, 2009), <http://www.charlotteobserver.com/2009/08/30/917007/nc-native-wrongly-deported-to.html>. They had his Social Security number and the names of his parents. *Id.* They had Lyttle's own sworn statement that he had been born in North Carolina. *Id.* CNN researchers have found that every year hundreds of U.S. citizens are deported by mistake. Lisa DiVirgilio, *Report: Hundreds of U.S. Citizens Wrongfully Deported Every Year*, THE POST STANDARD (Syracuse, NY) (July 26, 2010), http://www.syracuse.com/news/index.ssf/2010/07/report_hundreds_of_us_citizens.html.

331. TRAMONTE, *supra* note 2, at 8–9 (citing a Migration Policy Institute report).

332. *Id.* at 8; see MICHELE WASLIN, IMMIGR. POLICY CTR., THE SECURE COMMUNITIES PROGRAM: UNANSWERED QUESTIONS AND CONTINUING CONCERNS, Nov. 2011, available at http://www.immigrationpolicy.org/sites/default/files/docs/Secure_Communities_112911_updated.pdf; Rachel R. Ray, *Insecure Communities: Examining Local Government Participation in U.S. Immigration and Customs Enforcement's 'Secure Communities' Program* (Seattle J. for Social Justice, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1941826. For example, an abused woman in San Francisco worked up the courage to call police, but she was arrested as well because the police saw a “red mark” on the alleged abuser's check. Lee Romney & Paloma Esquivel, *Caught in a Very Wide Net: A Federal Deportation Program Snares Many Noncriminals and Low-Level Offenders*, L.A. TIMES, Apr. 25, 2011, at A1. The charges against her were dropped, but her fingerprints were already forwarded to ICE under the Secure Communities program, and she faced deportation. *Id.* This case was an exact replica of one that occurred in Maryland.

333. Tara Bahrampour, *Immigration Authority Terminates Secure Communities Agreements*, WASH. POST (Aug. 7, 2011), http://www.washingtonpost.com/local/immigration-authority-terminates-secure-communities-agreements/2011/08/05/gIQA1wx80I_story.html. ICE Director John Morton announced, “We're going to continue the program, but we're going to do it without [written agreements].” *Id.* All states have signed agreements with the FBI to send arrestees' fingerprints to the FBI for criminal history checks. This is important for local law enforcement who need to know if an

net and scoops up the fingerprints of everyone not born in the United States whether or not they pose a criminal risk.”³³⁴ Similarly, many local law enforcement officials who use the National Crime Information Center database, a catalog of information on arrest warrants and wanted persons, can receive civil immigration violation information or erroneous immigration information that has led to the removal of noncriminal aliens.³³⁵ Given these outcomes, the challenge that many sanctuary and other forward-thinking communities have launched against the misuse of such programs is critical to ensuring that their communities do not become Gestapo-esque.³³⁶

The adoption of sanctuary policies at a time when segments of our nation are in a frenzy over immigration is an important, bold statement of support for a nation of immigrants. Choosing sanctuary policies over policies of fear tells immigrants and the rest of us what type of community our leaders and law enforcement officials are choosing. The nonsanctuary choice is closed-minded, resistant to continuing changes that will only breed tension and threaten public safety. The choice of sanctuary, confidentiality, or “don’t ask” is one of smart policing—one that embraces change and encourages integration in the hopes of building a stronger, safer community. That choice also represents an important step toward avoiding the pitfalls of division, hate, and insular living.

arrestee is wanted by another jurisdiction, for example. However, the confiscation of the fingerprints from the FBI by ICE is not part of these agreements, and the ICE action raises serious Tenth Amendment commandeering practices that will likely be subject to constitutional challenge. *See supra* notes 169–171 and accompanying text.

334. Michael Hennessey, *Secure Communities Destroys Public Trust*, S.F. CHRONICLE, May 1, 2011 (Hennessey was the Sheriff of San Francisco until January 2012, when he retired); *see also infra* note 336.

335. HOFFMASTER ET AL., *supra* note 9, at viii, 14, 21, 23, 62; Laura Sullivan, Comment, *Enforcing Nonenforcement: Countering the Threat Posed to Sanctuary Laws by the Inclusion of Immigration Records in the National Crime Information Center Database*, 97 CALIF. L. REV. 567 (2009).

336. Many police departments are critical of the problems with the National Crime Information Center database, arguing that “controls are needed to eliminate the entering of civil detainees into a system intended for criminal warrants, which creates confusion for local policy, and may cause them to exceed their authority by arresting a person on a civil detainer.” HOFFMASTER ET AL., *supra* note 9, at viii, 14, 62. Local jurisdictions that have attempted to opt out of the Secure Communities initiative include Santa Clara County, California, Arlington County, Virginia, and the City and County of San Francisco. WASLIN, *supra* note 332, at 11–12. The governors of Illinois and Massachusetts have sought to terminate their Secure Communities agreement with ICE, and the governor of Massachusetts declined to sign an agreement with ICE. *Id.* However, in August 2011, ICE took the position that it did not need written agreements with state officials to have access to fingerprints submitted to the FBI. *Id.* ICE argues that under 8 U.S.C. § 1722(a)(2), federal agencies can share information with impunity. *Id.* In other words, Secure Communities is “mandatory.” *Id.*

