

The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power

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I. Introduction

After 9/11, when the holes in the U.S.'s immigration system became painfully apparent, the federal government began a concerted push to get local authorities involved in the enforcement of immigration laws. In April 2002, the Justice Department wrote (but did not release) a legal opinion stating that cities and states have "inherent authority" as sovereigns to enforce immigration laws.¹ Then-Attorney General John Ashcroft followed up with an invitation to local police to enforce immigration laws as part of "our narrow anti-terrorism mission."² And members of Congress have drafted legislation to give financial incentives to cities and states to enforce immigration laws (and financial penalties for those which refuse).³ The goal: to dramatically multiply the enforcement power of federal immigration authorities by enlisting the aid of local police and other local authorities, who are already "on the beat" in America's cities and towns.

While some local governments enthusiastically embraced the opportunity to enforce immigration laws,⁴ others refused to become involved, passing laws that limit, to different degrees, their authority to cooperate in immigration law enforcement ("non-

¹ In April 2003, a coalition of immigrant rights and civil rights groups sued DOJ, seeking disclosure of the opinion pursuant to the Freedom of Information Act (FOIA). The Second Circuit, in a decision issued in May 2005, ordered DOJ to release the opinion, holding that it was not protected by FOIA's deliberative process exemption or the attorney-client privilege. *Nat'l Council of La Raza v. Dep't of Justice*, No. 04-5474-cv, 2005 WL 1274270, at *6, *9 (2d Cir. May 31, 2005). DOJ's 2002 legal memo (with redactions by DOJ), available at <http://www.aclu.org/ImmigrantsRights/ImmigrantsRights.cfm?ID=19039&c=22>.

² Attorney General John Ashcroft, Prepared Remarks on the National Security Entry-Exit Registration System (June 6, 2002), <http://www.usdoj.gov/archive/ag/speeches/2002/060502agpreparedremarks.htm> (last visited June 3, 2005) [hereinafter Ashcroft Remarks on N-SEERS]. The National Security Entry-Exit Registration System required nonimmigrant males sixteen years or older from certain countries (mostly Arab and Muslim countries) to register with the federal government. N-SEERS was subsumed by US-VISIT, an automated system applicable to all nonimmigrant visitors to the United States. *Special Checks on Muslims at Border to End*, UPI NEWS, June 14, 2004, 00:00:00, WESTLAW, UPINWSPERSP Database.

³ See Section II.C.1, *infra*.

⁴ Florida, Alabama and Los Angeles County have entered into memoranda of understanding with the Department of Homeland Security. *State, Local Law Enforcement Get Support to Enforce Immigration Laws*, PR NEWswire, May 18, 2005, 23:31:00, WESTLAW, PRWIRE Database.

cooperation laws”).⁵ The language and scope of these non-cooperation laws vary. A typical non-cooperation law was that passed by the state of Alaska in May 2003, prohibiting Alaskan agencies from using state resources to enforce immigration laws.⁶ In Fresno, California, the non-cooperation law is much more specific: prohibiting the police from reporting undocumented immigrants to federal immigration authorities in cases where no other crimes have been committed.⁷ And Seattle’s ordinance, passed in January 2003, cuts off local cooperation at an earlier pass by prohibiting police officers and other city employees from even inquiring about the immigration status of any person, unless otherwise required by law.⁸

These cities, towns and states (collectively “local governments”) oppose local cooperation in immigration law enforcement for various reasons: concern for immigrants who may shun essential government services (police protection, schools, and hospitals) for fear of being deported, concern for public safety as immigrants may not report crimes or cooperate in criminal investigations, concern about racial profiling and civil liberties generally, and concern about overburdened police departments in times of strained local budgets.⁹ In all, some 49 cities and towns and three states have non-cooperation laws

⁵ Cooperation is defined as “voluntarily using resources to work toward a common goal.” THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th Ed. 2000), available at www.dictionary.com. Though I refer to non-cooperation “laws,” in fact, local governments seeking to limit local cooperation with immigration law enforcement have passed measures in various legal forms: laws, ordinances, resolutions, and departmental policies. I discuss the significance of these various legal forms in Section II.C.2.A, *infra*.

⁶ Alaska State Resolution 22 states in relevant part: “an agency or instrumentality of the state may not (1) use state resources or institutions for the enforcement of federal immigration matters, which are the responsibility of the federal government. . .” H.J.R. Res. 22, 23d Leg., 1st Sess. (Alaska 2003).

⁷ Fresno Police Department Standing Order 3.8.13 (effective July 1, 2003) (on file with author).

⁸ The relevant provision of Seattle’s ordinance provides, “[U]nless otherwise required by law or by court order, no Seattle City officer or employee shall inquire into the immigration status of any person, or engage in activities designed to ascertain the immigration status of any person.” SEATTLE, WASH., MUNICIPAL CODE, § 4.18.015(A) (2003).

⁹ As an example, the non-enforcement policy implemented by the Houston Police Department seems to be motivated mostly by concerns that the police maintain a cooperative relationship with immigrant communities. “Without the assurances they will not be deported, many illegal immigrants with critical

limiting or outright prohibiting their police and other authorities from cooperating in immigration law enforcement.¹⁰

Contrast these non-cooperation laws with two federal laws passed in 1996 (“1996 laws”), requiring local cooperation in immigration enforcement. Passed as part of separate welfare and immigration reform efforts, these laws prohibit local governments from preventing their employees from voluntarily reporting the immigration status of any individual to federal authorities. Section 434 of the Welfare Reform Act provides in relevant part:

[N]o State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from the Immigration and Naturalization Service information regarding the immigration status, lawful or unlawful, of an alien in the United States.

8 U.S.C. §1644 (2000).

Section 642 of the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”) contains almost identical language and further prohibits government entities from restricting the authority of their employees in:

[s]ending such [immigration] information to, or requesting or receiving such information from, the Immigration and Naturalization Service . . . [m]aintaining such information . . . [or] [e]xchanging such information with any other Federal, State, or local government entity.

8 U.S.C. §1373 (2000).

information would not come forward,” said Craig Ferrell, deputy director and administrative general counsel for the Houston Police Department (HPD) Chief’s Command Legal Services. Ferrell further noted that, “Police depend on the cooperation of immigrant communities to help them solve all sorts of crimes and to maintain public order.” Peggy O’Hare, *HPD Policy on Aliens Is Hands-Off/ Status of Immigrants Viewed as Federal Issue*, HOUS. CHRON., Mar. 3, 2003, at 15. The HPD policy itself states, “[W]e must rely upon the cooperation of all persons, including citizens, documented aliens, and undocumented aliens, in our effort to maintain public order and combat crime.” Sam Nuchia, Chief of Police, Houston Police Department, General Order to the Houston Police Department (June 25, 1992) (on file with author).

¹⁰ NAT’L IMMIGRATION LAW CTR, ANNOTATED CHART OF LAWS, RESOLUTIONS, AND POLICIES INSTITUTED ACROSS THE U.S. PROTECTING RESIDENTS FROM LOCAL ENFORCEMENT OF IMMIGRATION LAWS, (2004) (on file with author) [hereinafter NILC ANNOTATED CHART].

Examined closely, the 1996 laws do not require local governments to report undocumented persons, but rather, mandate that local government employees always have the *option* to voluntarily report the undocumented. In other words, the 1996 laws require that local governments allow their employees to cooperate with federal immigration enforcement.

May the federal government require local governments to cooperate with the enforcement of immigration law or other federal scheme? Or may local governments constitutionally refuse to provide that cooperation? The issue of cooperation is an important, but up to now, still unexplored area in the federalism debate.

Under current law, the federal government appears to have the upper hand. Congress has authority to regulate immigration matters,¹¹ so barring any other constitutional restriction,¹² it had authority to pass the 1996 laws. And the Supremacy Clause states that federal law is the law of the land, preempting any conflicting state or local law,¹³ so to the extent that there is direct conflict between the 1996 laws and individual non-cooperation laws, the 1996 laws would trump.¹⁴ Even in the absence of direct conflict, there is a persuasive argument that remaining non-cooperation laws may be preempted as impeding achievement of federal objectives.¹⁵

Moreover, the preemptive effect of the 1996 laws is not restricted by state sovereignty/Tenth Amendment concerns. Though the Supreme Court has shown willingness to strike down federal laws that commandeer states to take some action (e.g.,

¹¹ For further analysis of Congress' immigration power, see Section II.B.1, *infra*.

¹² See the discussion of the Tenth Amendment, Section III, *infra*.

¹³ Article VI of the Constitution provides that the "Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made under the Authority of the United States, shall be the Supreme Law of the Land." U.S. CONST. art. VI, cl. 2.

¹⁴ The local law in Fresno, California would be an example of a conflicting non-cooperation law. For more detailed preemption analysis of the non-cooperation laws, see Section II.C.2.C, *infra*.

¹⁵ See Section II.C.2.C.ii, *infra*.

enact legislation or enforce a federal regulatory scheme),¹⁶ the Court has drawn the line at federal laws that simply preempt state action.¹⁷ Here, the 1996 laws do not require local governments to report undocumented persons; rather, the laws prohibit local governments from restricting their employees who voluntarily report that information. Without a Tenth Amendment violation, the 1996 laws may constitutionally preempt conflicting non-cooperation laws.

Yet treating the conflict between the non-cooperation laws and the 1996 federal legislation as a mere preemption issue, with an exclusive focus on federal interests, ignores the resulting harm to federalism values. The federalism values harmed by the 1996 laws are three-fold. First, the 1996 laws undermine democratic rule by interfering with local governments' abilities to exercise their police powers in ways they deem most appropriate to protect their constituents' safety, health, and welfare. Second, the 1996 laws also upset the tyranny-prevention function of federalism by greatly augmenting federal power and disturbing the local-federal balance of power. Finally, the 1996 laws harm federalism by thwarting local governments' "right to experiment" and find the appropriate law enforcement balance for their communities.¹⁸

Nor are these federalism harms limited to the immigration field. In other areas where federal and local governments disagree, there is the potential for similar conflict.

¹⁶ *See, e.g.*, *New York v. United States*, 505 U.S. 144 (1992) (striking down a federal law that required states to "take title" of nuclear waste or to enact legislation disposing of the waste) and *Printz v. United States*, 521 U.S. 898 (1997) (striking down a federal law that required local law enforcement to conduct background checks on prospective gun buyers). For more Tenth Amendment analysis, see Section III, *infra*.

¹⁷ *See, e.g.*, *Reno v. Condon*, 528 U.S. 141 (2000) (unanimously holding that a federal law restricting the ability of states to disclose a driver's personal information without consent did not violate principles of federalism articulated in the Tenth Amendment).

¹⁸ "To stay experimentation in things might be fraught with serious consequences to the Nation. 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." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

The federal government has passed or is proposing legislation that would criminalize acts related to medical marijuana usage, stem cell research, and physician-assisted suicide.¹⁹ If the federal government passes cooperation laws in these areas similar to the 1996 laws, local governments would be required to cooperate with the enforcement of these controversial federal policies, notwithstanding the real federalism harms that would result.

Rather than ignore these harms or dismiss them out of hand as insignificant, I suggest that federal cooperation laws be subject to a type of intermediate review (in between the rational basis review given to Congress' exercise of its Spending Clause power and the strict scrutiny used to strike down federal laws that commandeer state processes). This review would essentially be a balancing test: a court would weigh the local sovereign interest in self-regulation against the federal interest in mandatory cooperation. Because this intermediate review gives voice to both local and federal sovereign interests, it is more likely to reach the correct federalism result.

In Section II, I use the conflict between the 1996 laws and the local laws as a case study to understand the potential harm to federalism interests caused by federal cooperation statutes. In Section III, I explain why existing case law, with its commandeering/preemption distinction, does not adequately consider the federalism harms caused by federal cooperation statutes. I then suggest in Section IV a new

¹⁹ 21 U.S.C. §§ 812(c), 844 (2000) criminalizes the possession of marijuana, regardless of intended purpose. And Senator Sam Brownback has proposed legislation that would criminalize any form of human cloning. The bill was referred to the Senate Committee on Health, Education, Labor, and Pensions on March 17, 2005. Human Cloning Prohibition Act of 2005, S. 658, 109th Cong. (2005). Finally, doctors who knowingly prescribe medication for an assisted suicide can be held criminally liable under the Controlled Substances Act. 21 U.S.C. § 842(2) (2000).

framework for analysis that subjects federal cooperation laws to an intermediate balancing test.

II. Federalism Harms of Cooperation Laws: Immigration as a Case Study

What result, from a federalism perspective, when the federal government requires local governments to cooperate in the enforcement of a federal scheme? Using immigration law enforcement as a case study, I argue that federal cooperation laws like the 1996 laws impose substantial federalism harms, both to the local governments subject to their mandate and to the system of federalism as a whole.

A. The Significance of Cooperation

In common usage, cooperation is defined as “the process of working together to the same end; assistance, especially by ready compliance with requests.”²⁰ Cooperation has also been defined as a “joint operation” or “common effort or labor.”²¹ These definitions share common elements: that those who cooperate with each other agree on a common goal and voluntarily join their efforts to reach that goal.

Framing this immigration debate as one about cooperation is appropriate for several reasons. First, cooperation accurately describes what the federal government seeks from local governments. Because of Tenth Amendment constraints, the federal government can’t force local governments to enforce federal immigration laws (e.g., to arrest those who are illegally present).²² So, short of exercising its Spending Clause

²⁰ THE NEW OXFORD AMERICAN DICTIONARY 378 (Elizabeth J. Jewell & Frank Abate, eds., 2001).

²¹ WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 501 (Philip Babcock Gove, ed., 2002).

²² See *Printz v. United States*, 521 U.S. 898 (1997) (striking down a federal law that required state officers to conduct background checks on potential gun buyers). Tenth Amendment issues and the preemption/commandeering distinction is discussed further in Section III, *infra*.

powers to obtain that joint enforcement, the federal government is limited to seeking local governments' voluntary cooperation. When the cooperation is not forthcoming at the local government level, the 1996 laws require that local government *employees* who want to assist in immigration law enforcement be allowed to do so.

The most obvious form of cooperation protected by the 1996 laws is the ability of a local government employee to report undocumented individuals to federal immigration authorities.²³ Other possible forms of protected cooperation: a local employee who suspects that an individual using local government services (e.g., school enrollment or medical care) is undocumented would be able to contact federal authorities to verify the individual's immigration status (even though legal status may not be a requirement to use the services), or a local employee could inquire about the immigration status of the same individual and compile that information for later transmission to federal authorities.²⁴

Second, cooperation has symbolic aspects that are relevant to this analysis. As stated previously, cooperation between parties implies agreement and shared goals. Local governments that have passed non-cooperation laws did so, in large part, to signal their disagreement with federal immigration policies. Some disagree with the immigration policies themselves. The majority of the local governments, however, have a narrower disagreement: that local governments should not be involved with immigration law enforcement.

²³ Under the restructuring that occurred after 9/11, the federal agency that would receive such reports is United States Immigration and Customs Enforcement (ICE), the agency responsible for interior (versus border) enforcement of immigration laws. See <http://www.ice.gov/graphics/about/index.htm> (last visited June 21, 2005).

²⁴ The language of the 1996 laws, particularly §642 of IIRIRA, supports the protection of these forms of cooperation. However, because there has been so little litigation of the 1996 laws, there has not been any judicial interpretation of what specific forms of cooperation are federally protected.

The various reasons that local governments passed non-cooperation laws is discussed in more detail, *infra*,²⁵ but one reason—maintaining effective relations with immigrant communities—is particularly relevant to this discussion of the symbolic importance of cooperation. Local governments that are concerned that their immigrant communities will go completely underground (cutting off contact with the police, health department, schools and other government agencies) if the immigrants hear rumors that local governments *may be* cooperating with federal immigration enforcement will want to signal strongly to these communities that they are not so cooperating.²⁶ So for various reasons, local governments with non-cooperation laws want to signal to the federal government and their own local constituencies that they are not “working together [with the federal government] to the same end” of immigration law enforcement.

For the federal government, there is also important symbolism to the cooperation it seeks. Even if the 1996 laws do not result in many cases of actual cooperation, the *appearance* of local government cooperation may bolster federal enforcement efforts. Those who are considering entering the U.S. illegally may be deterred if they believe that all police, teachers and other local government employees will cooperate in immigration law enforcement. For those who are already here without authorization, the possibility of local cooperation substantially increases the cost of their illegal presence. Furthermore, if the 1996 laws successfully preempt the non-cooperation laws so that the non-cooperation laws are removed from the books, then there at least appears to be unified support among

²⁵ See Section II(D)(2), *infra*.

²⁶ Says Austin, Texas, Police Assistant Chief Rudy Landeros, “Our officers will not, and let me stress this because it is very important, our officers will not stop, detain, or arrest anyone solely based on their immigration status. Period.” *Austin Police Won’t Arrest People Only for Immigration Status* (KEYE CBS Austin television broadcast, Apr. 5, 2002), at http://www.immigrationforum.org/currentissues/articles/043002_foi.htm (last visited Feb. 21, 2004).

local governments for federal immigration policies, which may have important political implications.²⁷

B. The Roots of Non-Cooperation

The attacks of 9/11 focused the nation's attention on immigration law enforcement and brought the issue of local-federal cooperation to the fore. But questions about whether local authorities should enforce immigration laws or whether they can refuse to cooperate in that enforcement—the issue here—long predates 9/11. For about as long as the U.S. has had an immigration policy, there has been debate about the appropriate roles of the local and federal governments in its enforcement.²⁸ And so, to understand the impact of the federal cooperation laws on immigration enforcement, it is important to understand the historical context of this local-federal debate.

1. Nature of the Immigration Power

Courts and scholars largely agree that the power to regulate immigration is exclusively federal.²⁹ The immigration power is not expressly enumerated in the Constitution, but the commonly understood sources of the power—the Naturalization Clause, the Foreign Affairs Clauses, the Commerce Clause, and the nation's status as a sovereign—all suggest that the power is an exclusively federal one.³⁰ Moreover, the immigration power's presumed effect on foreign affairs further supports its characterization as an exclusive federal power, because of the nation's need to speak with

²⁷ For example, the removal of non-cooperation laws would eliminate an important symbol of success for immigrant advocates and perhaps slow the momentum of their efforts.

²⁸ See Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 FLA. ST. U. L. REV. 965, 976-87 (2004).

²⁹ "Power to regulate immigration is unquestionably exclusively a federal power." *De Canas v. Bica*, 424 U.S. 351, 354 (1976).

³⁰ See Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493, 532-52 (2001).

one voice on these issues.³¹ For these reasons, the Supreme Court has struck down state laws that attempted to regulate immigration, while upholding substantially similar federal ones.³²

There is less consensus about whether the power to *enforce* immigration laws is exclusively federal. The courts that have considered the question have split: the Ninth Circuit held that local governments can enforce criminal but not civil immigration laws,³³ while the Eighth and Tenth Circuits allow local enforcement when authorized by state law (even when federal law appears to prohibit such enforcement).³⁴ Even the executive branch has changed its position on this issue. In a 1996 memorandum, the Department of Justice opined that local governments may enforce criminal, but not civil, provisions of the Immigration and Nationality Act.³⁵ But in 2002, DOJ reversed itself, declaring in an unreleased opinion that states and cities have “inherent authority” as sovereigns to enforce immigration laws.³⁶

³¹ See *Ekiu v. United States*, 142 U.S. 651, 659 (1892) (“In the United States this [immigration] power is vested in the national government, to which the Constitution has committed the entire control of international relations, in peace as well as in war.”)

³² Compare *Graham v. Richardson*, 403 U.S. 365, 376-77 (1971) (striking down state laws that denied welfare benefits to resident aliens as violations of the Equal Protection Clause and encroachments on the federal government’s exclusive immigration power) with *Mathews v. Diaz*, 426 U.S. 67, 87 (1976) (upholding federal law that limited Medicare eligibility to permanent residents with continuous residence).

³³ *Gonzales v. City of Peoria*, 722 F.2d 468, 475-76 (9th Cir. 1983), *overruled in part on other grounds by* *Hodgers-Durgin v. De La Vina*, 199 F.3d 1037 (9th Cir. 1999).

³⁴ See *United States v. Salinas-Calderon*, 728 F.2d 1298, 1301 n.3 (10th Cir. 1984) (holding that a state trooper has “general investigatory authority to inquire into possible immigration violations”); *United States v. Perez-Sosa*, 164 F.3d 1082, 1084 (8th Cir. 1998) (upholding state trooper’s arrest of defendant for transporting illegal aliens).

³⁵ Memorandum from the Office of Legal Counsel of the U.S. Department of Justice, for the United States Attorney for the Southern District of California, Assistance by State and Local Police in Apprehending Illegal Aliens II.B. (Feb. 5, 1996), at <http://www.usdoj.gov/olc/1996opinions.htm> [hereinafter 1996 DOJ Memo on Local Assistance].

³⁶ See footnote 1, *supra*.

2. Sanctuary laws:

On the flip side of whether local governments may enforce immigration laws is the question at issue here: may local governments *refuse* to cooperate with enforcement of those laws? This was the question at issue in the sanctuary movement of the 1980s, when local governments passed laws that prohibited their employees from participating in or cooperating with immigration law enforcement. In many cases, those sanctuary laws are the roots of today's current non-cooperation laws.

The sanctuary movement was originally started by churches and other private institutions, which believed that Guatemalans, Salvadorans, and other nationals of U.S. allies were wrongly being denied asylum to further American foreign policy objectives.³⁷ Working within a private network, these institutions declared themselves to be “sanctuaries” where undocumented persons seeking asylum could find safe shelter. Besides shelter, participants in the movement also provided asylum seekers with medical care, bond money (for those arrested), and legal assistance.³⁸

Cities and states also joined the movement, passing “sanctuary laws”³⁹ that declared asylum seekers could remain in their boundaries without fear of arrest by local law enforcement for immigration violations. Many of the sanctuary policies also contained provisions that prohibited local police from reporting immigration information to or otherwise cooperating with federal immigration enforcement.⁴⁰

³⁷ STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 1206-07 (4TH ED. 2005).

³⁸ SANCTUARY: A RESOURCE GUIDE FOR UNDERSTANDING AND PARTICIPATING IN THE CENTRAL AMERICAN REFUGEES' STRUGGLE 15-17 (Gary MacEoin, ed., 1985).

³⁹ Though I refer to sanctuary “laws,” it is important to note that the measures passed by cities and states during the sanctuary movement took various legal forms: laws, resolutions, ordinances, or executive orders. I discuss the significance of these legal forms in the context of non-cooperation laws in Section II.C.2.A, *infra*.

⁴⁰ *See, e.g.*, TAKOMA PARK, MD., MUNICIPAL CODE § 9.04.030 (2004), at http://207.176.67.2/code/Takoma_Park_Municipal_Code/Title_9/04/index.html (Dec. 13, 2004) (“no agent,

At the height of the movement, approximately 23 cities and four states participated.⁴¹ Cities that passed sanctuary laws included Rochester, NY; Minneapolis, Minn.; Seattle, and Chicago; states that passed such laws included New Mexico, Massachusetts and New York.⁴²

Typical of the sanctuary laws was that passed by Takoma Park, Maryland in 1985. In a resolution, Takoma Park expressed its belief that the United States has a responsibility under international law not to deport refugees back to places of persecution, that the United States violated international law by denying asylum to Guatemalan and Salvadoran refugees, and finally, that the individual volunteers in the sanctuary movement and the movement as a whole deserved government support.⁴³ In its law, Takoma Park prohibited its employees from assisting or cooperating with the INS in any investigation of immigration violations, from inquiring about the citizenship status of any resident, and from releasing the citizenship status of any resident to the INS.⁴⁴

3. Federal Reaction: 1996 Cooperation Laws

The federal reaction to the sanctuary laws and the sanctuary movement as a whole was rather muted. While it prosecuted individual participants in the movement for smuggling aliens and other violations of the immigration laws,⁴⁵ the federal government

officer, or employee of the City of Takoma Park, in the performance of official duties, shall release to the Immigration and Naturalization Service any information regarding the citizenship or residency of any City resident"); CITY OF CAMBRIDGE RESOLUTION (Apr. 8, 1985) (on file with author) ("no department or employee of the City of Cambridge will violate established or future sanctuaries by officially assisting or voluntarily cooperating with investigations or arrest procedures, public or clandestine, relating to alleged violations of immigration law by refugees from El Salvador, Guatemala or Haiti").

⁴¹ Jorge L. Carro, *Municipal and State Sanctuary Declarations: Innocuous Symbolism or Improper Dictates?*, 16 PEPP. L. REV. 297 (1989).

⁴² *Id.* at 311-16.

⁴³ Council Res. 1985-29, (City of Takoma Park, Md. 1985).

⁴⁴ TAKOMA PARK, MD., MUNICIPAL CODE ch. 9.04 (2004).

⁴⁵ See Jorge L. Carro, *Sanctuary: The Resurgence of an Age-Old Right or a Dangerous Misinterpretation of an Abandoned Ancient Privilege?*, 54 U. Cin. L. Rev. 747, 748 n.15 (1986); Carro, *Municipal and State Sanctuary Declarations*, *supra* note 41, at 326.

never sued to challenge the sanctuary laws that were passed to support the movement. To be sure, the executive branch criticized the laws,⁴⁶ but it never challenged any of the laws in court.

The sole legal challenge to sanctuary policies came instead from Congress in the form of the 1996 laws. The legislative history of both 1996 laws made clear that the laws were intended to nullify the sanctuary policies. Acknowledging that “various localities have enacted laws preventing local officials from disclosing the immigration status of individuals to INS,” the legislative history of Section 434 expressed the intent to preempt these sanctuary laws and open communication between local governments and federal immigration authorities.⁴⁷ In the Conference Report accompanying the bill, however, the conferees acknowledged that Section 434 does not require, “in and of itself,” any local government to communicate with federal immigration authorities.⁴⁸

Similarly, in passing Section 642 of IIRIRA (Illegal Immigration Reform and Immigrant Responsibility Act), Congress emphasized the benefits of open communication between local governments and federal authorities, restrictive local laws notwithstanding. As the Report of the Senate Judiciary Committee accompanying the Senate Bill explained, the “acquisition, maintenance, and exchange of immigration-related information by State and local agencies is consistent with, and potentially of

⁴⁶ When asked about the sanctuary law passed by the Los Angeles City Council, INS spokesperson commented, “We’re certainly not in favor of the resolution. It tends to encourage illegal immigration.” Still, “it’s more a moral problem than a practical one.” American Notes Los Angeles: Lashing out at “Sanctuary,” TIME MAG., Dec. 16, 1985, available at 1985 WLNR 830835.

⁴⁷ Section 434 was designed to “prevent any State or local law, ordinance, executive order, policy, constitutional provision, or decision of any Federal or State court that prohibits or in any way restricts any communication between State and local officials and the INS.” H.R. CONF. REP. NO. 104-725, at 383 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2649, 2771.

⁴⁸ *Id.*

considerable assistance to, the Federal regulation of immigration and the achieving of the purposes and objectives of the Immigration and Nationality Act.”⁴⁹

By 1996, however, the practical impact of the sanctuary movement had diminished because its intended beneficiaries, Guatemalans and Salvadorans, became eligible for special refugee consideration.⁵⁰ And so despite the obvious conflict between the 1996 laws and the sanctuary laws that local governments continued to keep on their books, there was little interest on either side in hashing out the legal effects of that conflict.

The one spark of litigation involving the 1996 laws was an action brought by the city of New York, challenging the constitutionality of the laws.⁵¹ At that time, New York had in effect Executive Order 124, prohibiting city employees from voluntarily providing immigration status information to federal authorities except under limited circumstances.⁵² Within weeks of the 1996 laws taking effect, the Giuliani administration filed a lawsuit, seeking declaratory and injunctive relief. The city raised two constitutional objections to the 1996 laws: (1) the laws violate the Tenth Amendment because they force New York City to cooperate in federal regulation of aliens and interfere with the City’s authority to control the use of confidential information and determine the duties of its employees. (2) The laws also violate the Guarantee Clause of the Constitution by interfering with the City’s chosen form of government.⁵³

⁴⁹ S.REP. NO. 104-249, at 19-20 (1996).

⁵⁰ LEGOMSKY, *supra* note 37, at 1207.

⁵¹ *See City of New York v. United States*, 971 F.Supp. 789 (S.D. N.Y. 1997), *aff’d*, 179 F.3d 29 (2d Cir. 1999).

⁵² The circumstances were limited to a written release by the alien to verify immigration status, a legal requirement that such status be disclosed (perhaps as an eligibility requirement to receive a government benefit), or a suspicion that the alien is engaged in criminal activity. *City of New York Exec. Order No. 124* (Aug. 1989), cited in *City of New York*, 179 F.3d at 31-32.

⁵³ *See City of New York*, 179 F.3d at 33.

The Second Circuit rejected these claims, upholding the constitutionality of the 1996 laws.⁵⁴

C. Non-Cooperation Laws Post 9/11:

Today's non-cooperation laws were largely defined by the attacks on 9/11. As discussed previously, many non-cooperation laws can trace their roots to the sanctuary movement of the 1980s, but it was the 9/11 attacks that refocused the nation's attention on the issue of local enforcement of immigration laws. As the country engaged in impassioned debate about what our immigration laws should be, there was also similarly heated debate about who should enforce those laws.

1. Federal Push for Local Enforcement:

The federal government, as noted previously,⁵⁵ made a concerted push after 9/11 to get local governments involved in the enforcement of immigration laws. First, to try to remove some of the legal ambiguity about enforcement authority,⁵⁶ the Office of Legal

⁵⁴ For more about the Second Circuit's reasoning, see note 146 and accompanying text. In response, the City in 2003 revoked Executive Order 124 and issued Executive Orders 34 and 41. Rather than explicitly prohibit the transmission of immigration information to federal authorities (a "don't tell" policy), Executive Order 34 (as amended by Executive Order 41) prohibits City employees from inquiring about immigration status in the first place except under limited circumstances (a "don't ask" policy). City of New York Exec. Order No. 34 (May 13, 2003) at http://friendsfw.org/Immigrant/NYC/NYC_Exec_Order_34_051303.htm (July 10, 2005) [hereinafter EO 34] as amended by City of New York Exec. Order No. 41 (Sept. 2003) at http://www.nyc.gov/html/imm/downloads/pdf/exe_order_41.pdf (July 10, 2005) [hereinafter EO 41]. As to the disclosure of immigration status information, EO 41 first provides that immigration information should be treated like all other confidential information (e.g. sexual orientation and status as a domestic violence victim) and should not be disclosed except under limited circumstances. *Id.* EO 41 also provides for disclosure of individual immigration status if the individual is suspected of criminal activity "other than mere status as an undocumented alien" or if disclosure is necessary to investigate "potential terrorist activity." *Id.*

⁵⁵ See notes 1-3 and accompanying text, *supra*.

⁵⁶ The ambiguity focused on a preemption question: whether Congress intended for local governments to enforce all immigration laws or just criminal immigration laws. Engaging in a preemption analysis, the Ninth Circuit, in *Gonzales v. City of Peoria*, held that Congress intended to preempt local enforcement of civil immigration provisions because those provisions constitute such a pervasive regulatory scheme. However, because the criminal immigration provisions are so "few in number and relatively simple in their terms," the Ninth Circuit concluded that there is room for concurrent local enforcement of these provisions. *Gonzales v. City of Peoria*, 722 F.2d 468, 475-76 (9th Cir. 1983). Citing to *Gonzales*, DOJ in a 1996

Counsel within DOJ authored a legal memo opining that states have “inherent authority” as sovereigns to enforce immigration laws.⁵⁷ With this inherent authority, according to DOJ, states (and their component local police forces) could voluntarily arrest individuals who have violated criminal or civil immigration laws and then transfer them to the custody of federal immigration officials.⁵⁸

Attorney General Ashcroft and other DOJ representatives also held press conferences and made presentations, encouraging local governments to enforce immigration laws as part of “our narrow anti-terrorism mission.”⁵⁹ Moreover, DOJ signed Memoranda of Understanding (MOU) with at least two states, authorizing them to jointly enforce immigration laws with DOJ.⁶⁰

Finally, members of Congress have drafted legislation to financially reward those local governments willing to enforce immigration laws and financially penalize those refusing to do so. In 2003, Rep. Charles Norwood (R-GA) introduced the CLEAR Act (Clear Law Enforcement for Criminal Alien Removal), which proposed to provide \$1 billion in federal funding each fiscal year to those local governments who agree to

opinion, agreed, making the same civil/criminal provision. 1996 DOJ Memo on Local Assistance, *supra* note 35, at II.B.

⁵⁷ See footnote 1 and accompanying text.

⁵⁸ The distinction between civil and criminal immigration provisions is that the committing the former may result in deportation, while committing the latter may result in a sentence in a U.S. prison. DAVID WEISSBRODT & LAURA DANIELSON, IMMIGRATION LAW AND PROCEDURE IN A NUTSHELL § 14-1 (5th ed. 2005).

⁵⁹ See footnote 2 and accompanying text.

⁶⁰ The states that signed MOUs are Florida and Alabama. *State, Local Law Enforcement Get Support to Enforce Immigration Laws*, *supra* note 4. MOUs are permitted by 8 U.S.C. § 1357(g)(1)-(3) (2000), which provides in relevant part: “[T]he Attorney General may enter into a written agreement with a State, or any political subdivision of a State, pursuant to which an officer or employee of the State or subdivision, who is determined by the Attorney General to be qualified to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States (including the transportation of such aliens across State lines to detention centers), may carry out such function at the expense of the State or political subdivision and to the extent consistent with State and local law.”

enforce immigration laws.⁶¹ The CLEAR Act also required states which receive federal reimbursement under SCAAP (State Criminal Alien Assistance Program) for the detention of criminal aliens or who want to receive additional federal funds under the CLEAR Act to pass laws permitting local enforcement of immigration laws.⁶² The CLEAR Act died in Congress, but its component provisions have resurfaced in other legislation currently being considered by Congress.⁶³

2. Non-Cooperation Laws:

Reacting to these federal initiatives, many local governments built upon their previous sanctuary laws; other local governments passed entirely new non-cooperation laws.⁶⁴

(a) Form of Non-Cooperation Laws:

Though I refer to non-cooperation “laws,” it is important to note that the measures passed by local governments to limit their cooperation with immigration law enforcement take various legal forms. In descending order of frequency, local governments have

⁶¹ H.R. 2671, 108th Cong. (2003).

⁶² *Id.*

⁶³ For example, the CLEAR provision that provided financial assistance to state and local police agencies enforcing immigration law (section 106) has now been attached to the DHS Authorization Bill in slightly revised form. H.R. 1817, 109th Cong. § 109 (2005). And the CLEAR provision that affirmed the inherent authority of state personnel to enforce immigration law (section 101) has also been attached to the DHS Authorization Bill. H.R. 1817, 109th Cong. § 520 (2005). The House passed the bill on May 18, 2005 and the Senate has referred it to the Committee on Homeland Security and Governmental Affairs.

⁶⁴ An example of the former method is San Francisco, which passed a resolution in 1985 declaring “the City and County of San Francisco [to be] a City and County of Refuge for Salvadoran and Guatemalan refugees.” The resolution directed that “City departments shall not discriminate against Salvadoran and Guatemalan refugees because of immigration status.” Ignatius Bau, *Cities of Refuge: No Federal Preemption of Ordinances Restricting Government Cooperation with the INS*, 7 LA RAZA L.J. 50, 52-53 (1994). In 1989, San Francisco passed an ordinance that more generally prohibits city employees from assisting in the enforcement of immigration laws or gathering or disseminating information about immigration status, unless required by law. SAN FRANCISCO, CAL., ADMINISTRATIVE CODE §12H.2.c (2005). After 9/11, the Board of Supervisors passed a resolution urging the San Francisco Chief of Police to remind all local police officers that the city has an ordinance against enforcing immigration laws. Bd. of Supervisors Res. 389-02, (City and County of San Francisco 2002).

passed their measures as (1) resolutions, (2) ordinances or laws, (3) executive orders, or (4) departmental orders or policies.⁶⁵

For present purposes, the relevant inquiry is the binding nature of these various forms, because arguably, there is only preemption (or the potential for preemption) if, in fact, these non-cooperation laws are enforced by the local governments that pass them.⁶⁶ Ordinances (at the municipal level) and laws (at the state level) are clearly binding, as legislation passed by a governing body.⁶⁷

Resolutions are also passed by legislative bodies (usually city councils or state legislatures), but their binding nature is less apparent. Resolutions, which make up the bulk of the non-cooperation laws, are not traditionally equivalent to ordinances. Rather, they are acts of a “temporary character,” “sufficient for council action on ministerial, administrative or executive matters.”⁶⁸

The limitation on local cooperation in immigration law enforcement is not a ministerial or administrative matter and so would appear to exceed the boundaries of a proper resolution. However, in the absence of a contrary statute or charter provision, courts will often accept a resolution in place of an ordinance, subject matter notwithstanding. Moreover, if a resolution is adopted with the same formalities as an ordinance (e.g., notice of meeting time and location, roll call vote, and recording of

⁶⁵ NILC ANNOTATED CHART, *supra* note 10.

⁶⁶ Even if some of the non-cooperation laws are not binding (e.g., advisory opinions), they might still run afoul of the 1996 laws, both of which broadly address restrictions, as well as prohibitions, on information exchange. Section 434 states, “no State or local government entity may be prohibited, *or in any way restricted*. . .” 8 U.S.C. § 1644 (2000) (emphasis added). Section 642 similarly provides that government entities or officials “may not prohibit, *or in any way restrict*. . .” *Id.* § 1373 (emphasis added). Even a non-binding local law might be preempted as an impermissible restriction.

⁶⁷ CHARLES S. RHYNE, THE LAW OF LOCAL GOVERNMENT OPERATIONS § 8.1, at 115 (1980). Black’s Law Dictionary defines an ordinance as “[a]n authoritative law or decree; especially a municipal regulation. Municipal governments can pass ordinances on matters that the state government allows to be regulated at the local level.” BLACK’S LAW DICTIONARY 1132 (8th ed. 2004).

⁶⁸ RHYNE, *supra* note 67, § 8.1, at 115.

votes),⁶⁹ then courts often treat the resolution as having the same legal effect as an ordinance. Here, the majority of the non-cooperation laws that were passed in the form of resolutions were passed with the requisite formalities and thus should be treated as having the same legal effect as ordinances.⁷⁰

As executive actions, executive orders and police policies should also be treated as binding. Executive orders are orders issued by a mayor or governor to direct the actions of executive agencies or other government officials and have the force of law.⁷¹ Departmental orders or policies (which make up only a small number of the non-cooperation laws) reflect policy decisions made by the department head, usually the chief of police. The process for forming orders or policies is more informal than executive orders, but because policies control the actions of police officers and other local government employees, the policies should also be considered binding for purposes of this analysis.

(b) Substantive provisions of Non-Cooperation Laws:

The substantive provisions of the non-cooperation laws are of five types. Often, non-cooperation laws contain more than one type of substantive provision. From broadest to most specific, the types of substantive provisions are:

⁶⁹ OSBORNE M. REYNOLDS, JR., HANDBOOK OF LOCAL GOVERNMENT LAW § 61, at 209, §§ 62-64 (2nd ed. 2001).

⁷⁰ See, e.g., Philadelphia Resolution (May 29, 2003) (passed with roll call vote) available at <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=12737&c=207> (last visited June 26, 2005); Sitka, Alaska Resolution 03-886 (Sep. 23, 2003) (passed with roll call vote) available at <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=13890&c=207> (last visited June 26, 2005); Talent, Oregon Resolution 03-642-R (Apr. 2, 2003) (passed with roll call vote) available at <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=12268&c=207> (last visited June 26, 2005).

⁷¹ Michael S. Herman, *Gubernatorial Executive Orders*, 30 RUTGERS L.J. 987, 989-90 (1999); BLACK'S LAW DICTIONARY, *supra* note 67, at 610

- (i) No discrimination based on citizenship status:
- (ii) No enforcement of immigration laws:
- (iii) No enforcement of civil immigration laws:
- (iv) No inquiry about citizenship status:
- (v) No notifying federal immigration authorities:

(i) No discrimination:

This provision is the most broadly worded, prohibiting local employees (including law enforcement) from discriminating in the provision of government services on the basis of citizenship status, race, or national origin. The provision is often accompanied by language emphasizing the city's commitment to equal protection generally. This type of provision usually does not make a specific reference to the enforcement of immigration laws.⁷²

(ii) No enforcement of immigration laws:

This provision is the most common among the non-cooperation laws. Local governments operating under this type of provision prohibit their police and other employees from using local government resources to enforce immigration laws. Often, the prohibition is accompanied by statements that the enforcement of immigration laws is a federal, not local, responsibility. Sometimes, the local government may specify what it considers to be immigration law enforcement, but often, this provision is a stand-alone provision, without any further explanation.⁷³

⁷² For example, Minneapolis has a resolution that, *inter alia*, directs the police department not to engage in profiling based on race, ethnicity, citizenship or religious or political affiliation. MINNEAPOLIS RESOLUTION 2003R-109 (April 4, 2003) available at <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=12291&c=207> (June 26, 2005). The resolution focuses more generally on criticizing the USA Patriot Act and other federal legislation perceived to threaten civil rights.

⁷³ Alaska's resolution passed in May 2003 is an example of the latter, stand-alone provision: "[A]n agency or instrumentality of the state may not use state resources or institutions for the enforcement of federal

(iii) No enforcement of civil immigration laws:

This type of provision is even more specific in its restriction: local government employees may not cooperate with the enforcement of immigration laws when the only immigration violation alleged is illegal presence or other civil violation.⁷⁴ However, (and some local laws make this explicit), local government employees may enforce criminal immigration laws or may inquire about immigration status when that status is relevant to a criminal investigation.⁷⁵

(iv) No inquiry about citizenship status:

Moving beyond a prohibition on the enforcement of immigration laws, some local governments restrict their employees from even asking about citizenship status in the first place.⁷⁶ Drafters of this type of provision clearly had the 1996 laws in mind: by preventing government employees from obtaining immigration status information, local governments can (in most cases) prevent these employees from reporting undocumented

immigration matters, which are the responsibility of the federal government.” ALASKA JOINT HOUSE RESOLUTION 22 (May 2003), *available at* <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=13141&c=207> (June 26, 2005). Syracuse, New York’s resolution, passed in September 2003, similarly calls on its police department to refrain from enforcing immigration laws, “except when specifically requested by federal officials in relation to particularized suspicion of criminal activity.” SYRACUSE RESOLUTION 37-R (Sep. 2003) *available at* <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=13528&c=207> (June 26, 2005).

⁷⁴ Requirements for illegal presence are laid out in 8 U.S.C. § 1227 (2000). The difference between civil and criminal immigration violations is discussed in footnote 58, *supra*.

⁷⁵ An example of a local government that enforces this type of provision is the District of Columbia which has a general order that prohibits its officers from inquiring about immigration status for the sole purpose of determining whether an individual has violated civil immigration laws. However, officers may inquire about immigration status if they are investigating criminal smuggling and other criminal immigration violations. Memorandum Reaffirming District of Columbia General Police Order 201.26 (July 28, 2003) at http://mpdc.dc.gov/mpdc/cwp/view,a,1247,q,551596,mpdcNav_GID,1543.asp (June 25, 2003).

⁷⁶ An example of this type of provision is the resolution passed by Durham, North Carolina in October 2003, which states that no city officer or employee is permitted to inquire into the immigration status of any person or engage in activities designed to discover that immigration status unless otherwise required as part of his/her duties or by law or court order. *See* Durham Resolution 9046 (October 20, 2003) at http://www.ci.durham.nc.us/agendas/minutes/cc_minutes_10_20_03.pdf. (June 22, 2005).

persons to federal immigration authorities, achieving non-cooperation without directly violating the 1996 laws.⁷⁷

(v) No notifying federal immigration authorities:

The most specific of the five types of non-cooperation provisions, this provision prohibits local government employees from reporting any person's immigration status to federal immigration authorities. Sometimes the provision specifies the circumstances where the prohibition applies: when the person is a material witness to a crime, is seeking medical treatment, or is involved in a family disturbance, minor traffic offense, or minor misdemeanor.⁷⁸ And often the provision provides exceptions when reporting is allowed: when the person consents in writing, when immigration status is an eligibility condition for participation in a federal program, or the transmission is otherwise required by law.⁷⁹

(c) Preemption of Non-Cooperation Laws

The language of the 1996 laws makes clear that Congress intended to preempt conflicting local laws. The question then becomes, what is the scope of that preemption? Applying principles of express and implied preemption, it is apparent that at least one category of non-cooperation provisions—no notifying federal immigration authorities—is preempted; arguably, the remaining categories of non-cooperation provisions are also preempted by the 1996 laws.⁸⁰

⁷⁷ The legal effect of “no inquiry” laws is discussed further in Section II.C.2.C, *infra*.

⁷⁸ CHANDLER POLICE DEPARTMENT GENERAL ORDER E-17 (eff. Mar. 1, 1999, revised July 1, 1999) at <http://www.chandlerpd.com/gos/E17forgn.pdf> (July 10, 2005).

⁷⁹ New York City, as discussed in note 54, *supra*, has this type of provision in its non-cooperation law. The state of Maine has a similar policy. See Maine Exec. Order (April 9, 2004) at http://www.maine.gov/governor/baldacci/news/executive-orders/EX_ORDER_4_9_04.doc (June 26, 2005).

⁸⁰ The broadest category of non-cooperation provisions—no discrimination based on citizenship status—is not preempted by the 1996 laws. See note 90, *infra*.

The Supremacy Clause of the Constitution states that the “Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made under the Authority of the United States, shall be the Supreme Law of the Land.”⁸¹ If there is a conflict between federal and local law, the Supremacy Clause resolves that conflict in favor of federal law.⁸² Because of federalism concerns, the starting assumption in preemption analysis is that a local law is valid unless it is “the clear and manifest purpose of Congress” to preempt it.⁸³

The Supreme Court has identified two situations in which federal preemption occurs: (1) express preemption where Congress explicitly states in a federal statute its intent to preempt local law or (2) implied preemption where Congress’ preemptive intent is implicit in the federal statute’s structure and purpose.⁸⁴

(i) Express Preemption:

Congress’ intent to preempt conflicting local laws is clear in the identical introductory language of both 1996 laws (“Notwithstanding any other provision of Federal, State, or local law. . .”)⁸⁵ and in the substance of the laws themselves. Section 434 and 642 both prohibit local governments from preventing their employees from voluntarily sending any individual’s immigration status to or receiving that information from federal authorities.⁸⁶ And Section 642 further prohibits local governments from restricting their employees’ ability to maintain immigration status information or to exchange that information with other state or local government agencies.⁸⁷

⁸¹ U.S. CONST. Art. VI, cl.2.

⁸² *Gade v. Nat’l Solid Waste Mgmt. Ass’n*, 505 U.S. 88, 108 (102).

⁸³ *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

⁸⁴ *Gade*, 505 U.S. at 98.

⁸⁵ 8 U.S.C. §§ 1373, 1644 (2000).

⁸⁶ *Id.* §§ 1373, 1644.

⁸⁷ *Id.* § 1373.

What is the scope of this express preemption? The obvious targets for express preemption are non-cooperation laws like that in San Francisco and Takoma Park, Maryland, that contain the most specific category of restriction—no notifying federal immigration authorities.⁸⁸ Because the 1996 laws broadly address restrictions as well as prohibitions,⁸⁹ arguably most of the remaining categories of non-cooperation provisions⁹⁰ could be expressly preempted as well if their directives restrict the ability of local government employees to cooperate with federal immigration authorities. For example, if enforcing immigration laws (or specifically, enforcing civil immigration laws) is defined to include reporting an undocumented person to the federal authorities, maintaining information status information, or requesting such information, then local non-cooperation laws with these provisions—no enforcement of (civil) immigration laws—would be expressly preempted. Similarly, if prohibiting local government employees from inquiring about citizenship status is interpreted as restricting their ability to cooperate with federal immigration authorities (because they are prohibited from obtaining the information that makes their cooperation possible), then those types of non-cooperation laws are also expressly preempted.

⁸⁸ TAKOMA PARK, MD., MUNICIPAL CODE § 9.04.030 (2004), at http://207.176.67.2/code/Takoma_Park_Municipal_Code/Title_9/04/index.html (Dec. 13, 2004) (“No agent, officer or employee of the City, in the performance of official duties, shall release to the Immigration and Naturalization Services any information regarding the citizenship or residency status of any City resident.”); SAN FRANCISCO, CAL., ADMIN. CODE § 12H.2 (2005) (“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.”).

⁸⁹ Section 434 states, “no State or local government entity may be prohibited, *or in any way restricted*. . .” 8 U.S.C. § 1644 (emphasis added). Section 642 similarly provides that government entities or officials “may not prohibit, *or in any way restrict* . . .” *Id.* § 1373 (emphasis added).

⁹⁰ The broadest category of non-cooperation provision—no discrimination based on citizenship status—is not subject to preemption under either an express or implied preemption analysis. Its broad directive to local government employees (essentially to respect equal protection principles in the provision of local government services) neither restricts communication with federal authorities, nor impedes federal immigration objectives.

(ii) Implied Preemption:

There is also the plausible (albeit less persuasive) argument that three middle categories of non-cooperation provisions—no enforcement of immigration laws (or civil immigration laws) and no inquiry about citizenship status--are preempted under an implied preemption analysis. Even in the absence of direct conflict between federal and local law, courts have been willing to imply preemption if the local law “stands as an obstacle to the accomplishment and execution of the full purposes or objectives of Congress.”⁹¹

The crucial inquiry then becomes, what was Congress’ purpose in passing the 1996 laws and are the non-cooperation laws consistent with that purpose? As constitutional scholars have noted, a broadly defined federal purpose tends to lead to preemption, as local laws are more likely to interfere with that broad purpose. A more narrowly defined federal purpose, on the other hand, is less likely to be inconsistent with local laws.⁹²

Narrowly defined, Congress’ purpose in passing the 1996 laws could be characterized as a desire to improve communication between local governments and federal immigration authorities. Indeed, the legislative history of the 1996 laws supports this narrowly defined purpose.⁹³ If Congress’ purpose is so defined, then the majority of non-cooperation laws would not be preempted because they do not explicitly prohibit that communication and thus are not “obstacle[s] to the accomplishment and execution of the full purposes or objectives of Congress.”

⁹¹ *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (holding that a state cannot force aliens to register when the federal government already required such registration).

⁹² ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 398 (2d ed. 2002).

⁹³ See notes 94-95 and accompanying text.

If Congressional purpose is broadly defined, however, then most, if not all, of the non-cooperation laws would likely be preempted. Consider that Section 642 was passed as part of IIRIRA, one of the toughest crackdowns on illegal immigration in modern history.⁹⁴ The Senate Report accompanying IIRIRA states that Congress' purpose in passing the Act was to "increase control over immigration to the United States-- decreasing the number of persons becoming part of the U.S. population in violation of this country's immigration law . . .; expediting the removal of excludable and deportable aliens, especially criminal aliens; and reducing the abuse of parole and asylum provisions."⁹⁵ With this background, it could be persuasively argued that Congress had broader purposes in passing Section 642: (1) to facilitate the deportation of illegal immigrants and/or (2) to facilitate those deportations by recruiting local governments to enforce immigration laws.

If Congress' purposes are thus broadly defined, then arguably the three middle categories of non-cooperation provisions are preempted as obstacles to those purposes. Except for the broadest category of non-cooperation provisions (those that simply prohibit discrimination based on citizenship status),⁹⁶ the substantive provisions in the remaining non-cooperation laws prohibit some or all forms of local involvement in

⁹⁴ IIRIRA also severely restricted the ability of legal immigrants to access the public benefits system. 8 U.S.C. § 1624 (2000).

⁹⁵ S. REP. NO. 104-249, at 2 (1996).

⁹⁶ Because these provisions do not specifically prohibit immigration law enforcement, they do not hinder the goal of deporting illegal immigrants. The provisions merely prohibit discrimination based on citizenship status, which can be interpreted as benefiting the categories of people who, though not citizens, are here legally (e.g., permanent residents, foreign tourists and students, and foreign workers with valid work visas).

immigration law enforcement. These prohibitions hinder the deportation goal by making the detection and detaining of illegal immigrants more difficult.⁹⁷

The argument for implied preemption, however, is problematic for two related reasons. First, as a doctrinal matter, implied preemption analysis is reserved for cases where the federal statute is silent as to any preemptive intent.⁹⁸ Here, the 1996 laws expressly state an intent to preempt conflicting local law and then go on to state what local laws are preempted. Second, as a policy matter, if the goal is to determine Congressional intent, it seems counterintuitive to graft an implied preemption analysis where Congress has already expressly stated its intent. Congress has already demonstrated its ability and interest in preempting at least some non-cooperation laws; if it wanted to preempt the remaining laws, presumably it would have done so (or could still do so). The more relevant inquiry would be to determine the scope of that express preemptive intent.

D. Federalism Harms of the 1996 Laws:

If, as predicted above, many of the non-cooperation laws currently on the books are preempted, the result will be substantial federalism harms, imposed on both local governments and the system of federalism as a whole. By federalism harms, I mean harms to the values of federalism, to the underlying reasons why we care about balancing

⁹⁷ Given that Section 434 was passed as part of the Welfare Reform Act, Congress' purpose could also be broadly defined as reducing illegal immigrants' use of public benefits. With this goal, however, the preemption argument would be hard to make: because illegal immigrants are not eligible for most public benefits anyway, it's difficult to see how restrictions on local enforcement of immigration laws would affect their use of these benefits. Moreover, other federal law already requires local case workers to verify the citizenship status of applicants before distributing benefits. For example, 8 U.S.C. § 1611 prohibits granting "any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit" to illegal immigrants with few exceptions. *Id.* These narrow exceptions include disaster relief, immunizations, and some emergency health care. *Id.*

⁹⁸ "Preemption may be *either* express *or* implied. . . *Absent explicit preemptive language*, we have recognized at least two types of implied preemption. . ." *Gade*, 505 U.S. at 98 (emphasis added).

power between the states and the federal government. Those values, briefly stated, are to enhance democratic rule, prevent governmental tyranny, and encourage innovation among local governments.⁹⁹

1. Defining Federalism and Its Values

Federalism is a rich and complex topic, with its contours, implications and even its merits, the subject of much policy and academic debate. Its widely accepted definition, by contrast, is simple: the allocation of power between federal and state governments.¹⁰⁰ Why do we care about correctly allocating power between the different levels of government? Though the application of federalism principles in recent cases has often resulted in the boosting of state sovereignty,¹⁰¹ we value state sovereignty not as an end in itself, but for the positive effects that state sovereignty, correctly calibrated within our system of federalism, generates. These positive effects are what I call “federalism values.”

The values of federalism that are traditionally acknowledged by courts and scholars can be grouped into three categories: enhancing democratic rule by creating governments more responsive to their constituents, preventing tyranny by diffusing

⁹⁹ See Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499, 504 (1995). Others have categorized federalism values in different ways. See, e.g., Barry Friedman, *Valuing Federalism*, 82 Minn. L. Rev. 317, 386-404 (1997) (defining the values of federalism as including the encouragement of public participation in democracy, accountability, and experimentation among the states; protecting health, safety, welfare, and cultural and local diversity; and diffusing power to protect liberty).

¹⁰⁰ Chemerinsky, *supra* note 99, at 504. See also Deborah Jones Merritt, *Three Faces of Federalism: Finding a Formula for the Future*, 47 VAND. L. REV. 1563, 1563 (1994) (defining federalism as “the relationship between state and federal power”).

¹⁰¹ See, e.g., *Printz*, 521 U.S. 898 (invalidating federal legislation that required state officers to conduct background checks on prospective gun buyers).

power between the federal and state levels of government, and encouraging policy innovation among states.¹⁰²

The first federalism value of enhancing democratic rule is complex, intertwining theories about representative government and federal structure. The essence of this value is that federalism benefits democratic rule by creating local governments that, because of their smaller size and physical proximity to their constituents, are more responsive to those constituents' needs. Flowing from the creation of more responsive governments are the related benefits of (1) better government that reflects constituents' diverse social values (a responsive local government is more likely to provide the specific governing policies that its constituents want), (2) increased political participation (because there is more opportunity for political involvement at the local levels), and (3) more political accountability (constituents involved in local political processes will more closely monitor government officials and demand accountability).¹⁰³

The second value--preventing tyranny--has been the focus of the Supreme Court's recent federalism cases. According to supporters of this value, federalism prevents tyranny by diffusing governmental power between the federal and local governments. "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the

¹⁰² Chemerinsky, *supra* note 99, at 525. Professor Chemerinsky questions the descriptive accuracy of these values and suggests that the Supreme Court's decisions protecting state sovereignty did so for reasons unrelated to federalism values. *Id.* at 525-33. For other critiques of federalism's traditionally stated values, see Edward L. Rubin and Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903 (1994) (arguing that federalism accomplishes none of the benefits touted by the Supreme Court).

¹⁰³ See Merritt, *supra* note 100, at 1573-74 ("For a nation composed of diverse racial, cultural, and religious groups, this opportunity to express multiple social values is essential.").

risk of tyranny and abuse from either front.”¹⁰⁴ Any law that significantly expands the power of one level of government at the expense of the other level threatens federalism and thus, liberty.¹⁰⁵

The third value of policy innovation is often explained by reference to Justice Brandeis’s famous suggestion that the states “serve as a laboratory” to “try novel social and economic experiments without risk to the rest of the country.”¹⁰⁶ Supporters of this federalism value point to anti-discrimination laws, no-fault insurance programs, and unemployment compensation as successful social programs that originated in states.¹⁰⁷

2. Analyzing Federalism Harms

By requiring local governments to cooperate with federal immigration law enforcement, the 1996 laws do significant harm to federalism values, particularly to the value of enhancing democratic rule.

(a) Democratic Rule

The federalism value most threatened by the 1996 laws is that of enhancing democratic rule. The local governments that have adopted non-cooperation laws exemplify the goals of democratic rule; these governments have decided, at the local level, that their communities are best served by not involving their police and other employees in immigration law enforcement.

As discussed in more detail below, many local governments made this decision because of concerns that immigration cooperation would interfere with their police

¹⁰⁴ *Printz*, 521 U.S. at 921, *citing to* *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

¹⁰⁵ In striking down a federal law that required state officers to conduct background checks on prospective gun buyers, the Court observed that “[t]he power of the Federal Government would be augmented immeasurably if it were able to impress into its service—and at no cost to itself—the police officers of the 50 States.” *Id.* at 922.

¹⁰⁶ *New State Ice Co.*, 285 U.S. at 311 (Brandeis, J., dissenting).

¹⁰⁷ *Merritt*, *supra* note 100, at 1575.

powers to protect public safety, health, and welfare. Federal preemption of the non-cooperation laws would intrude significantly on local police powers and upend decisions made by local governments. The result would be federally-directed policies that do not reflect local preferences and values. Federal preemption would also, in this case, confuse the lines of political accountability, resulting in further harm to democratic rule.

(i) Police Powers:

The term “police powers” is often used but defies precise definition. A common formulation describes the police power as the power inherent in the states to pass reasonable laws to protect the health, safety, and general welfare of the people.¹⁰⁸ Notwithstanding the “police” component of its term, the police power is not limited to the security powers exercised by police departments.¹⁰⁹ Acknowledging that the term is “neither abstractly nor historically capable of complete definition,” the Supreme Court has said that the legislature essentially determines what is or is not a police power.¹¹⁰

The police power belongs to the states and is exercised by the state legislature, which can delegate its authority to cities and towns, as political subdivisions of the state.¹¹¹ Examples of the varied police powers that have been recognized by the courts include the regulation of fishing along a local waterway,¹¹² shooting a loose dog during a rabies scare,¹¹³ and establishing a board to license dry cleaners.¹¹⁴

¹⁰⁸ See 16 AM. JUR. 2D *Constitutional Law* § 316 (2004), citing to *Matter of Yellowstone River*, 832 P.2d 1210 (Mont. 1992).

¹⁰⁹ James G. Hodge, *The Role of New Federalism and Public Health Law*, 12 J.L. & Health 309, 319 (1998) citing to RUTH LOCKE ROETTINGER, *THE SUPREME COURT AND STATE POLICE POWER: A STUDY IN FEDERALISM* 10 (Public Affairs Press) (1957).

¹¹⁰ *Berman v. Parker*, 348 U.S. 26, 31 (1954)

¹¹¹ 16 AM. JUR. 2D *Constitutional Law*, *supra* note 108, at §324.

¹¹² *In re Quinn*, 110 Cal.Rptr. 881 (Cal. Ct. App. 1973).

¹¹³ *Ruona v. City of Billings*, 323 P.2d 29 (Mont. 1959).

¹¹⁴ *Jack Lincoln Shops v. State Dry Cleaners' Bd.*, 135 P.2d 332 (Okla. 1943).

(a) Public Safety Police Power:

If the 1996 laws preempt non-cooperation laws, local governments could experience substantial harm to their public safety police power. Police chiefs and police associations have been some of the strongest advocates of non-cooperation laws because of public safety concerns. Specifically, they argue that the involvement of their employees in immigration law enforcement (or even the *perception* of involvement) will hinder the ability to investigate and prevent crimes throughout their jurisdictions, as immigrant communities would shun contact with local police.¹¹⁵

Immigrants, already vulnerable to extortion and organized crime, may refuse to report crimes or participate in criminal investigations, for fear of the immigration consequences. Says Hillsboro, Oregon Police Chief Ron Louie, “We’re trying to build bridges with people living in fear. . . . If police officers become agents of the Immigration and Naturalization Service, . . . their ability to deal with issues such as domestic violence and crime prevention will be severely curtailed.”¹¹⁶ Nor are the immigration concerns limited to illegal immigrants; because many immigrant families are mixed status (e.g., some children have legal status, while older siblings and parents may not), those here legally may be reluctant to contact the police because they don’t want to focus immigration attention on other family members who don’t have legal status.

¹¹⁵ Lieutenant Tomas Padilla of the Hackensack, New Jersey, Police Department recounts an example of immigrant assistance: “[T]wo immigrants recently helped us solve a crime. . . . Maybe they were undocumented, we didn’t ask. But maybe that cooperation would not have occurred if we were forced to ask them for their immigration documents. . . . When immigrants fear they might be deported, they are not going to report the crime.” Miguel Perez, *Ashcroft Comes to His Senses*, RECORD (Bergen County, N.J.), June 10, 2002, at L01, available at 2002 WL 4661090.

¹¹⁶ Rosario Daza, *Helping People Without Papers*, PORTLAND OREGONIAN, Apr. 5, 2002, at C01, available at 2002 WL 3954137.

(b) Public Health Police Power:

Another reason frequently advanced by local governments for passing local laws is to protect their communities' public health. Immigrants may refuse to seek medical care when they have serious health problems if they believe that hospital workers will report them or their family members to federal immigration authorities. Not only are the immigrants themselves at risk, but their family members, neighbors, co-workers, and others in the community are also at risk if the health problem is contagious.¹¹⁷

(c) Public Welfare Police Power:

Communities where immigrants avoid contact with local government entities risk experiencing other public welfare harms. For example, immigrant children who don't go to school because their families fear deportation may become a permanent uneducated underclass, possibly leading to more crimes and increased dependence on public benefits.¹¹⁸ And if immigrants shun engagement with the government system altogether, then they are less likely to enforce their rights as employees, tenants, or consumers, leading to underenforcement of these important laws.¹¹⁹ Finally, if local authorities start

¹¹⁷ For example, in response to a recent outbreak of rubella among Latinos living on Long Island, Suffolk County health officials organized a free vaccination clinic at a community center. Emphasizing that health workers will not inquire about immigration status or require immigration documents, Dr. Mahfouz Zaki, the county's director of public health stated, "We don't do that in any program because we don't want to scare people away. We want people to come regardless of their status." Michele Salcedo, *Seven Cases of Rubella on LI in Two Weeks, Follow Westchester Outbreak*, NEWSDAY, May 27, 1998, at A26, available at 1998 WLNR 583960.

¹¹⁸ It was this concern about creating a permanent underclass that led the Supreme Court to strike down a Texas statute that denied public education to undocumented children. "Children denied an education are placed at a permanent and insurmountable competitive disadvantage, for an uneducated child is denied even the opportunity to achieve. And when those children are members of an identifiable group, that group--through the State's action--will have been converted into a discrete underclass." Plyler v. Doe, 457 U.S. 202, 234 (1982) (Blackmun, J., concurring).

¹¹⁹ A report issued by the City of New York Commission on Human Rights reported that many immigrants were reluctant to report their problems relating to employment, housing and public accommodations because they feared that contact with a government agency would lead to deportation. In addition, the

enforcing immigration laws without proper training, they are prone to engage in racial profiling or other abuses of authority.¹²⁰

(ii) Political Accountability:

Local constituents are also likely to experience significant political accountability confusion with the double-negative prohibition of the 1996 laws. A constituent who hears that her neighbor or co-worker has been reported to federal immigration authorities by a city police officer or teacher is more likely to conclude that it is the city's policy to engage in such reporting, rather than to attribute the reporting to a federal prohibition and the voluntary action of the individual city employee.

(b) Tyranny

Preemption of non-cooperation laws also harms the federalism value of tyranny prevention by shifting power toward the federal government and thus upsetting the federal-local balance of power. If the federal government can force local governments to cooperate in the enforcement of immigration laws, the federal government will be able to significantly expand its enforcement power (or at least the *perception* of that power), without paying any financial or political cost.¹²¹ Unlike Spending Clause cases where the federal government secures local acquiescence through fiscal enticements, the federal

report stated that “fear of reprisals is very real to an immigrant community that is often mistrustful by virtue of previous experience with discrimination.” JOHN E. BRANDON, CITY OF N. Y. COMM’N ON HUMAN RIGHTS, A REPORT ON THE WIDESPREAD DISCRIMINATION AGAINST IMMIGRANTS AND PERSONS PERCEIVED AS IMMIGRANTS WHICH HAS RESULTED FROM THE IMMIGRATION REFORM AND CONTROL ACT OF 1986, 22 (1989).

¹²⁰ Says Eric Nishimoto, spokesperson for the Ventura County Sheriff’s Department, “We’re not in favor of having our department being responsible for that function [immigration law enforcement] The number one risk is the potential for civil rights violations. Right now we’re involved in preventing any kind of racial profiling and this type of function could open us to that kind of risk. . . . We feel our officers are not equipped to make that kind of determination of who is legal. Frank Moraga, Police Balk at Having to Do INS Work; Several Local Agencies Denounce Justice Plan, VENTURA COUNTY STAR, Apr. 6, 2002, at B01, available at LEXIS, News Library, VNCST File.

¹²¹ For discussion of why the federal government’s perceived enforcement power is so significant in the immigration context, see Section II.A, *supra*.

government here does not have to expend any federal funds. The federal government also does not have to expend any political capital to persuade local governments to cooperate, as it would have to do under a cooperative federalism scheme.¹²²

This expansion of federal power comes at the expense of local power. Local governments required to cooperate with federal immigration enforcement lose powers that strike at the core of their sovereign status: the ability to set the duties of their employees and to control the use of confidentially gained information.

Though the Supreme Court has largely abandoned any efforts to define exclusive spheres of state authority,¹²³ it has recognized that states must retain certain core powers as part of their sovereign identities.¹²⁴ And though it has not addressed the specific power at issue here (the power of local governments to set the duties of their employees), the Court has, in another context, acknowledged the important sovereignty implications of state control over its employees. “Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign. It is obviously essential to the independence of the States, and to their peace and tranquility, that their power to prescribe the qualifications of their own officers. . .

¹²² In a cooperative federalism program, Congress passes federal statutes that provide for state regulation or implementation to achieve federal goals. An example of a cooperative federalism statute is the Clean Air Act: “The federal government through the EPA determines the ends—the standards of air quality—but Congress has given the states the initiative and a broad responsibility regarding the means to achieve those ends through state implementation plans and timetables for compliance. . .” *Bethlehem Steel Corp. v. Gorsuch*, 742 F.2d 1028, 1036-37 (7th Cir. 1984). See also Phillip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663 (2001) (noting that Congress has rejected the dual federalism model of regulation in favor of cooperative federalism programs).

¹²³ See *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 546-47 (1985) (“We therefore now reject, as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is ‘integral’ or ‘traditional.’”) (overruling *Nat’l League of Cities v. Usery*, 426 U.S. 833 (1976)).

¹²⁴ See, e.g., *FERC v. Mississippi*, 456 U.S. 742, 761 (1982) (“The power of the States to make decisions and set policy is what gives the State its sovereign nature. It would follow that the ability of a state legislative . . . body—which makes decisions and sets policy for the State as a whole—to consider and promulgate regulations of its choosing must be central to a State’s role in the federal system.”)

should be exclusive, and free from external interference, except so far as plainly provided by the Constitution of the United States.” Lower courts have also recognized that control over government employees lies at the core of state sovereign powers.¹²⁵

But under the 1996 laws, local governments lose this important sovereign power. Those local governments that do not want their employees to cooperate with federal immigration law enforcement are powerless to stop them from doing so. Local employees can cooperate with federal immigration law enforcement during working hours (when they are being paid by their government employers) and even without the knowledge of their employers.¹²⁶ The federal government is, in effect, inserting itself between local governments and their employees, carving out a substantive area (immigration law enforcement) where their employers cannot tread.

The 1996 laws also interfere with the sovereign power of local governments to control the use of confidential information they obtain. The Second Circuit, in *New York City’s* litigation challenging the 1996 laws, recognized the sovereign implications of controlling confidential information like immigration status: “The obtaining of pertinent information, which is essential to the performance of a wide variety of state and local governmental functions, may in some cases be difficult or impossible if some expectation

¹²⁵ See *Koog v. United States*, 79 F.3d 452, 460 (5th Cir. 1996) (“Whatever the outer limits of state sovereignty may be, it surely encompasses the right to set the duties of office for state-created officials and to regulate the internal affairs of governmental bodies.”); *Romero v. United States*, 883 F.Supp. 1076, 1086 (W.D. La. 1995) (“One way in which the State of Louisiana exercises its sovereign right of maintaining a public order within its borders is by defining and assigning the duties of its sheriffs”).

¹²⁶ If local governments passed laws to prohibit such cooperation during business hours or to require employees to report their cooperation activities, the laws would likely be preempted by the 1996 laws as illegal restrictions on employees’ protected cooperation rights. For more on the preemption analysis, see Section II.C.2.C, *supra*.

of confidentiality is not preserved.”¹²⁷ And without access to pertinent, confidential information, local government operations may likely be hindered.

It is important to note that the immigration information at issue here is *government* information. Local government employees are given access to the information, not in their capacities as private citizens, but as representatives of their local government employers. As such, the 1996 laws are particularly intrusive of local government sovereignty, enabling the federal government to insert itself between local governments and their constituents, to obtain otherwise confidential information.

(c) Innovation

The harm to the federalism value of innovation is apparent by comparing the small number of local governments that has passed non-cooperation laws¹²⁸ with the majority that have not. For various reasons, those local governments with non-cooperation laws have decided to separate immigration law enforcement from their other governmental functions.¹²⁹ The non-cooperation laws may be successful in achieving their policy goals or they may not. If they are successful, the laws would serve as models for other local governments seeking to find the appropriate law enforcement balance. If the laws are not successful, then other local governments will know to avoid such laws.

¹²⁷ City of New York, 971 F.Supp. at 36. The Second Circuit declined to consider this argument because New York City did not, despite a request from the court, substantiate its position that the immigration information at issue was protected under City law from dissemination generally (versus dissemination only to federal immigration authorities, as the contested Executive Order provided). *Id.* at 37.

¹²⁸ At the time that this article went into publication, the number of local governments with non-cooperation laws was approximately 49. NILC ANNOTATED CHART, *supra* note 10.

¹²⁹ The federal government, in a reorganization of its immigration functions post 9/11, has implemented a similar separation: the enforcement arm of the former INS has been reorganized into two separate agencies (Bureau of Immigration and Customs Enforcement and the Bureau of Customs and Border Protection), while the service functions of the INS (e.g., visa and citizenship applications) are now done by the Bureau of Citizenship and Immigration Services. LEGOMSKY, *supra* note 37, at 3-4.

By preempting non-cooperation laws, the 1996 laws eliminate this experimentation and the possible positive synergies that could result.

III. Ignoring Federalism Harms of Cooperation Statutes: Why Current Law is Inadequate

Despite the substantial federalism harms that cooperation laws like the 1996 laws cause, these laws pass constitutional muster under current law. Under current law, the 1996 laws preempt the non-cooperation laws as a valid exercise of the federal government's immigration power. The Tenth Amendment and principles of state sovereignty, used in recent years to strike down overreaching federal legislation, do not provide any relief to the local non-cooperation laws here. Current Tenth Amendment jurisprudence draws a bright line distinction between (1) unconstitutional federal laws that commandeer local governments into passing federal laws or enforcing federal schemes and (2) constitutional federal laws that simply preempt local law by prohibiting local government action in a particular area. The 1996 laws, because they are framed as prohibitions, fall on the constitutional side of the bright line. But this bright line rule, while ostensibly easy to administer, ignores the significant federalism harms discussed above that prohibitions like the 1996 laws cause.¹³⁰

¹³⁰ See Section II.D.2, *supra*.

This preemption/commandeering distinction has analogies in other areas of constitutional law. For example, Supreme Court decisions have held that the government violates a person's due process rights if a government official, acting under color of law, beats a person, but there is no similar due process violation if the government fails to protect a person from privately inflicted beatings. Compare *Grandstaff v. City of Borger*, 767 F.2d 161, 167, 169 (5th Cir. 1985) (finding due process violation when police officers fatally shot an innocent man, mistakenly believing he was a fugitive) with *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 195-96 (1989) (no due process violation when state social services department failed to protect a boy from severe beatings by his father, though department had been informed of the abuse over a 26 month period).

A. Unconstitutional Commandeering

In a pair of landmark decisions issued in the 1990s, the Supreme Court defined an anticommandeering principle to protect states from overreaching by Congress.¹³¹ The essence of this principle is that states and the federal government co-exist as dual sovereigns, and any attempt by Congress to treat states as mere political subdivisions of the federal government is commandeering that violates the Tenth Amendment.¹³² Applying the anticommandeering principle, the Court in *New York v. United States* struck down federal legislation that required states to accept ownership of radioactive waste or regulate according to Congress' instructions.¹³³ The federal law was unconstitutional, reasoned the Court, because it commandeered state lawmaking processes; regardless of the "choice" that states made, they would be required to pass laws to effectuate that choice.¹³⁴ And independent lawmaking, said the Court, is at the core of state sovereignty protected by the Tenth Amendment.¹³⁵

In *Printz v. United States*, the Court engaged in similar analysis to extend the anticommandeering principle to strike down a federal provision that required local law enforcement officers to conduct background checks on prospective gun buyers.¹³⁶ The provision was unconstitutional, the Court held, because it commandeered state executive officials into enforcing a federal law, violating principles of dual sovereignty. The Court

¹³¹ The anticommandeering principle was articulated in earlier cases (*see, e.g.*, *Hodel v. Virginia Surface Mining & Reclamation Ass'n., Inc.*, 452 U.S. 264 (1981) and *FERC v. Mississippi*, 456 U.S. 742 (1982)), but *New York* and *Printz* were the first cases in which the Court rejected federal laws on this basis.

¹³² The Tenth Amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited to it by the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

¹³³ *New York v. United States*, 505 U.S. 144 (1992).

¹³⁴ *Id.* at 175-76.

¹³⁵ *Id.* at 188.

¹³⁶ *Printz v. United States*, 521 U.S. 898 (1997).

categorically rejected the government’s proposed balancing test of federal-state interests: “It is the very *principle* of separate state sovereignty that such a law offends, and no comparative assessment of the various interests can overcome that fundamental defect.”¹³⁷

What about commandeering—whether of state legislative process or of state executive officials—did the Court find so offensive so as to categorically reject it? The Court’s overriding concern was that commandeering upsets the proper balance between federal and state authority, a balance necessary to protect individual liberty. “[T]he Constitution divides authority between federal and state governments for the protection of individuals. . . . Just as the separation and independence of the coordinate branches of the Federal Government serves to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.”¹³⁸

A secondary but related concern for the Court was the negative effects of commandeering on political accountability: “[W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decisions.”¹³⁹

Because it believed that these concerns would always be problematic in the context of commandeering laws, the Court drew a bright line distinction, holding that laws that commandeered states into enacting or enforcing federal laws are always unconstitutional.

¹³⁷ *Id.* at 932 (emphasis in original).

¹³⁸ *New York*, 505 U.S. at 181.

¹³⁹ *Id.* at 169.

B. Constitutional Preemption

On the constitutional side of the Court's bright line rule are federal laws that preempt state action in an area of federal power. There is no violation of the Tenth Amendment or state sovereignty principles if Congress, by passing its own laws, simply prohibits states from taking action in an area in which Congress has legislative authority. Federal preemption remains constitutional even if local governments have to take some legislative or executive action to comply with the federal law (e.g., rescinding conflicting local law or familiarizing local government employees with federal requirements).

This, essentially, was the Court's holding in *Reno v. Condon*, decided three years after *Printz*.¹⁴⁰ In *Condon*, South Carolina raised a Tenth Amendment challenge to a federal law that prohibited states from disclosing drivers' personal information without their consent.¹⁴¹ South Carolina argued that the federal law required state officials to learn and apply the law's restrictions, thus commandeering them into enforcing federal law in violation of *Printz*.¹⁴² The Court agreed that state officials would have to spend time and effort to comply with the federal law, but the Court, in a unanimous decision, found no Tenth Amendment violation because the federal law at issue regulated state activity (owning a database), rather than state regulation of its own citizens.¹⁴³

More significantly, the federal law pressed no affirmative duty on the state: "It does not require the South Carolina 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." Because it did not require an affirmative duty, the Court held that

¹⁴⁰ *Reno v. Condon*, 528 U.S. 141 (2000).

¹⁴¹ *Id.*

¹⁴² *Id.* at 149-50.

¹⁴³ *Id.* at 150-51.

the federal law was “consistent with the constitutional principles enunciated in *New York* and *Printz*.”¹⁴⁴

C. Cooperation Laws as Federal Preemption

The peculiar language of the 1996 laws shows that they were drafted to take advantage of this preemption/commandeering distinction drawn by the Supreme Court. The 1996 laws are drafted as a double-negative: local governments are prohibited from prohibiting their employees from reporting undocumented persons. The intended (and practical) effect of this double-negative is that local government employees will report undocumented persons, because they are not prohibited by non-cooperation laws from doing so.

Though the 1996 laws may likely result in affirmative action by local government employees, their phrasing as prohibitions means that under current case law, they are per se constitutional. There is no affirmative obligation placed on local governments to report undocumented persons, because arguably this would be commandeering in violation of *Printz*.¹⁴⁵ Rather, the 1996 laws are more like the federal prohibition upheld in *Condon*. The Second Circuit, in turning away New York City’s constitutional challenge to the 1996 laws, held that *New York* and *Printz* did not apply. “In the case of

¹⁴⁴ *Id.* at 151.

¹⁴⁵ The constitutionality of this hypothetical federal obligation is not clear. In *Printz v. United States*, the Court reserved judgment on the constitutionality of federal laws that “require only the provision of information to the Federal Government.” 521 U.S. 898 at 918 (1997). In her concurrence, Justice O’Connor emphasized that the Court was not deciding the constitutionality of “purely ministerial reporting requirements imposed by Congress on state and local authorities.” *Id.* at 936. Scholars have suggested that reporting requirements are unconstitutional because they are more intrusive of state sovereignty than the commandeering laws prohibited by *New York* and *Printz*. With the reporting requirements, states have no policymaking discretion. See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 885 (3d ed. 2000).

It’s also not clear whether the hypothetical reporting requirement would be “purely ministerial” in nature. As a practical matter, the federal government would also need local governments to detain the undocumented persons until ICE or another federal agency could take custody. The federal government would also likely need local governments to conduct small-scale investigations to determine who is illegally present in the first place. Either of these requirements would easily cross the purely ministerial threshold into the realm of unconstitutional commandeering laws.

Sections 434 and 642, Congress has not compelled state and local governments to enact or administer any federal regulatory program. Nor has it affirmatively conscripted states, localities, or their employees into the federal government's service."¹⁴⁶ In other words, the 1996 laws merely preempted New York City's executive order but did not unconstitutionally commandeer the city into enforcing a federal scheme.

But given the significant federalism harms that cooperation laws like the 1996 laws cause, the laws should not be given a constitutional pass simply because they are technically phrased as prohibitions.

IV: Intermediate Review as the Federalism Fix

A better approach than hewing to the commandeering/preemption distinction is to allow for intermediate review of federal cooperation laws on a case-by-case basis. Intermediate review has the advantages of allowing for a more nuanced consideration of federalism interests and of reflecting the potential harm of cooperation statutes, leading to a better federalism result.

A. The Intermediate Review Model:

Intermediate review here would essentially be a balancing test. Local governments challenging federal cooperation laws would have to demonstrate an important sovereign interest in self-regulation and substantial federal interference with that sovereign interest. The court considering the challenge would weigh these local interests against the federal government's articulated interest in requiring local cooperation, determining whether that federal interest is substantially related to the cooperation law and whether there are viable alternatives to mandatory cooperation.

¹⁴⁶ City of New York, 179 F.3d at 35.

The intermediate nature of this review stems from the neutral stance that it takes toward cooperation laws.¹⁴⁷ Instead of stacking the deck toward either federal or local governments as the current paradigm does,¹⁴⁸ intermediate review allows for a neutral weighing of competing federal-local interests. To meet their burden of proof, local governments are required to demonstrate an important sovereign interest (in between rational and compelling) and substantial federal interference with that interest (in between just some interference and crippling interference). And those local interests are then weighed against federal interests, taking into account whether federal interests are substantially related to enforcement of the cooperation law and whether the federal government has viable alternatives to mandating cooperation (e.g., the costs of obtaining local cooperation through exercise of its Spending Clause power).

B. Why Intermediate Review Make Sense:

The neutral weighing of federal and local interests, with the goal of achieving the correct federalism balance, is the biggest advantage of intermediate review. Moreover, the level of scrutiny in intermediate review also accurately reflects the potential federalism harm of cooperation laws—less harm than outright commandeering but more harm than in Spending Clause cases.

1. Weighing Federal-Local Interests

The biggest advantage of intermediate review is that the conflict between federal and local interests that cooperation laws create can be weighed in a judicial forum. Not

¹⁴⁷ In this respect, it is similar to use of intermediate review in the equal protection context: *See* Jeffrey M. Shaman, *Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny*, 45 OHIO ST. L.J. 161, 162-63 (1984) (describing the Burger Court’s development of intermediate review as a “neutral stance that favors neither the government nor the party challenging [the legislation]”).

¹⁴⁸ *See* Section III.C, *supra*.

only is this weighing more likely to lead to the “correct” federalism result, but the public weighing of competing interests can, of itself, have beneficial federalism effects.

Unlike a bright line rule that would hold federal cooperation laws to be *per se* constitutional (as the current legal framework does) or *per se* unconstitutional, intermediate review allows for the weighing of competing local-federal interests on a case-by-case basis. This weighing is more likely to lead to the correct federalism result, with some cooperation laws upheld and others struck down, depending on the different local-federal interests at stake in each case. In this way, application of intermediate review here parallels the use of intermediate review in the equal protection context: there is the recognition in both that the contested federal law may have unconstitutional results in some but not all cases.¹⁴⁹

I’ve argued above that the local interests in the immigration context make a compelling federalism argument for striking down the 1996 laws. There may be, however, other contexts where the federal interest in cooperation outweighs the local interest in sovereignty. For example, the federal interest in requiring local cooperation with federal criminal tax enforcement would clearly be significant, while any local interest in non-cooperation is less clear.¹⁵⁰

Regardless of the judicial result in any particular case, the weighing process itself has a positive federalism effect. Under the current legal framework, these competing interests are not aired or discussed; rather, federal cooperation laws are presumed to be *per se* constitutional. Intermediate review is an opportunity for local governments to articulate the sovereignty effects of cooperation laws on them, an opportunity that is

¹⁴⁹ CHEMERINSKY, *supra* note 92, at 646.

¹⁵⁰ State taxing authorities are one of the main sources of information for federal criminal tax investigations. PATRICIA T. MORGAN, *TAX PROCEDURE AND TAX FRAUD IN A NUTSHELL* 256 (1990).

currently denied them. Knowing that it could be called upon to defend its interests in passing cooperation laws, the federal government would be forced to consider the full federalism costs of cooperation laws and thus perhaps may be more willing to employ other methods to secure local cooperation, like exercising its Spending Clause power, that arguably have fewer negative federalism effects.

2. Intermediate Review for Intermediate Harm

The intermediate scrutiny of intermediate review also accurately reflects the potential federalism harm of cooperation statutes--between the outright disruption that federal commandeering causes and the federalism choice that federal Spending Clause cases present.

Compare the effect of the 1996 laws with hypothetical federal laws requiring local governments outright to report illegal immigrants or to do so as a condition for receiving federal funds. The first hypothetical law would be a commandeering of local officials of the type prohibited by *Printz*. To comply, local officials would have to institute procedures to implement the mandatory reporting (e.g., determining who are mandatory reporters) and set aside time and other resources to do so, with the result that in most local jurisdictions, illegal immigrants would be reported to federal authorities. The federalism harms of this commandeering are apparent: local officials are required to implement federal policies, at great expense to local resources and local sovereignty, while the federal government gains considerable additional enforcement power, paying little financial or political cost.

The second hypothetical law would be a federal exercise of its Spending Clause power, of the type approved by *Condon*.¹⁵¹ If local governments choose to help enforce immigration laws, they would take many of the same steps that local governments commandeered into enforcement would have to take. The difference, of course, is that under this hypothetical, local governments make the initial decision about whether to participate and thus all the subsequent steps they take to implement enforcement are arguably voluntary.¹⁵²

The federalism harms that cooperation laws cause fall in between, justifying the application of a more neutral intermediate review. As the Second Circuit in *New York City* recognized, the 1996 laws do not require local officials to pass federally directed legislation or to enforce a federal scheme.¹⁵³ Yet, as explained earlier, the federalism harms are substantial,¹⁵⁴ and certainly more substantial than in Spending Clause cases because federal cooperation laws do not offer local governments any choice regarding participation. Thus, because of the intermediate federalism harm that cooperation laws can cause, subjecting them to intermediate review makes sense.

Others have argued persuasively that balancing tests should be applied in *all* Tenth Amendment cases.¹⁵⁵ My purpose here is more limited: rather than articulate a

¹⁵¹ This second example may not be hypothetical for too much longer. Proposed federal legislation provides financial assistance to local governments enforcing immigration laws. See Section II.C.1, *supra*.

¹⁵² Many have questioned whether Spending Clause cases actually offer local governments any real choice, given disparities in federal versus local taxing powers and local reliance on federal tax revenues. See Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911, 1935 (1995) (arguing that because of the federal government's monopoly power over state revenue sources, any offer of federal funds to states should be "presumptively coercive").

¹⁵³ *City of New York*, 971 F.Supp. at 35.

¹⁵⁴ See Section II.D.2, *supra*.

¹⁵⁵ See Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2257 (1998) (criticizing *Printz*'s bright line rule and favoring a "deferential, flexible, multifactor approach" to developing limits on Congressional authority); see also *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 588 (1985) (O'Connor, J., dissenting) (instead of abandoning all efforts to

complete doctrine for all Tenth Amendment challenges, I focus on federal cooperation laws as a compelling case for discarding the bright line rules of current Tenth Amendment jurisprudence and applying a balance test that better achieves the purposes of federalism.

V: Conclusion

Returning to the question posed in the introduction, it is clear that local governments, under current Tenth Amendment jurisprudence, do not have a constitutional right to refuse cooperation with a federal enforcement scheme. *Should* local governments have this right? Using immigration law enforcement as a case study, I've suggested that there are compelling federalism interests that may justify local non-cooperation with federal enforcement schemes. Because federal cooperation laws significantly boost federal power at the expense of local sovereignty interests, they may harm the underlying values of federalism: promoting democracy, preventing tyranny, and encouraging innovation among local governments.

Under the current legal framework, however, these federalism interests are ignored on the technical grounds that the federal government is not commandeering local governments, but rather, is merely exercising its preemption power. As an alternative that better addresses the federalism interests, I've suggested applying intermediate review that, in a more neutral way, weighs the competing local-federal interests on a case-by-case basis to reach a better federalism result.

define state spheres of power in favor of political resolution, the Court should employ a balancing test with state sovereignty as a factor to weigh).