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## 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 United States'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 U.S. Department of Justice wrote (but did not release) a legal opinion stating that cities and states have "inherent authority" as sovereigns to enforce immigration laws.<sup>1</sup> 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."<sup>2</sup> And members of Congress have drafted legislation providing financial incentives to cities and states that enforce immigration laws (and financial penalties for those that refuse).<sup>3</sup> 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.<sup>4</sup>

While some local governments enthusiastically embraced the opportunity to enforce immigration laws,<sup>5</sup> others refused to become involved, passing laws that limit their authority to cooperate in immigration law enforcement (non-cooperation laws).<sup>6</sup> The language

1. In April 2003, a coalition of immigrant rights and civil rights groups sued the Department of Justice (DOJ), seeking disclosure of the opinion pursuant to the Freedom of Information Act (FOIA). The U.S. Court of Appeals for 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*, 411 F.3d 350, 358, 361 (2d Cir. 2005). See also Memorandum from Jay S. Bybee, Assistant Att'y Gen., on Non-Preemption of the Authority of State and Local Law Enforcement Officials to Arrest Aliens for Immigration Violations (Apr. 3, 2002), available at <http://www.aclu.org/FilesPDFs/ACF27DA.pdf> (with redactions by DOJ).

2. John Ashcroft, U.S. Att'y Gen., Remarks on the National Security Entry-Exit Registration System (June 6, 2002), <http://www.usdoj.gov/archive/ag/speeches/2002/060502agpreparedremarks.htm> [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 PERSPECTIVES, June 14, 2004.

3. See *infra* Part II.C.1.

4. See generally Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179 (2005) (arguing that local police enforcement of immigration laws is good policy and legally sound).

5. 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.

6. Cooperate 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](http://www.dictionary.com). Though this Article refers to non-cooperation "laws," in fact, local governments seeking to limit local cooperation with immigration law enforcement have passed measures in various legal forms, including statutes, ordinances, resolutions, and departmental policies. The significance of

and scope of these non-cooperation laws vary. A typical, broadly defined non-cooperation law was passed by Alaska in May 2003, which prohibited Alaskan agencies from using state resources to enforce federal immigration laws.<sup>7</sup> In Fresno, California, the non-cooperation law is much more specific; it prohibits police from reporting undocumented immigrants to federal immigration authorities in cases where no other crimes have been committed.<sup>8</sup> Seattle, Washington'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.<sup>9</sup>

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 for overburdened police departments in times of strained local budgets.<sup>10</sup> In all, some forty-nine cities and towns and three states have non-cooperation laws limiting or prohibiting their police and other authorities from cooperating in immigration law enforcement.<sup>11</sup>

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these various legal forms is discussed in *infra* Part II.C.2.a.

7. 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.R.J. Res. 22, 23d Leg., 1st Sess. (Alaska 2003).

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

9. 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).

10. 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 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, "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, available at [http://www.chron.com/CDA/archives/archive.mpl?id=2003\\_3631515](http://www.chron.com/CDA/archives/archive.mpl?id=2003_3631515). 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 Dep't, General Order to the Houston Police Department (June 25, 1992) (on file with author).

11. NAT'L IMMIGRATION LAW CTR, ANNOTATED CHART OF LAWS, RESOLUTIONS, AND POLICIES

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.”<sup>12</sup>

Section 642 of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) contains nearly 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.”<sup>13</sup>

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

May the federal government require local governments to cooperate with the enforcement of immigration laws or other federal schemes? Conversely, may local governments constitutionally refuse to provide that cooperation? The issue of cooperation is an important but largely unexplored area in the federalism debate.<sup>14</sup>

Under current law, the federal government appears to have the upper hand. Congress has authority to regulate immigration matters,<sup>15</sup> so barring any other constitutional restriction,<sup>16</sup> 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.<sup>17</sup> Therefore,

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INSTITUTED ACROSS THE U.S. PROTECTING RESIDENTS FROM LOCAL ENFORCEMENT OF IMMIGRATION LAWS (2004) (on file with author) [hereinafter NILC ANNOTATED CHART].

12. 8 U.S.C. §1644 (2000).

13. *Id.* §1373.

14. The impact of required cooperation in the immigration context is discussed in *infra* Part II.D.

15. For further analysis of Congress’s immigration power, see *infra* Part II.B.1.

16. See the discussion of the Tenth Amendment, *infra* Part III.

17. Article VI of the Constitution provides that the “Constitution[] and the Laws of the United

to the extent that the 1996 laws are in direct conflict with individual non-cooperation laws, the 1996 laws would trump.<sup>18</sup> Even in the absence of direct conflict, however, remaining non-cooperation laws arguably may be preempted as impeding achievement of federal objectives.<sup>19</sup>

Moreover, the preemptive effect of the 1996 laws is not restricted by Tenth Amendment concerns regarding state sovereignty. Though the U.S. Supreme Court has shown a willingness to strike down federal laws that commandeer states to take some action (e.g., enact legislation or enforce a federal regulatory scheme),<sup>20</sup> the Court has drawn the line at federal laws that simply preempt state action.<sup>21</sup> Here, the 1996 laws do not require local governments to report undocumented persons; rather, the laws prohibit local governments from restricting their employees from voluntarily reporting 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 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 determine the appropriate law enforcement balance for their communities.<sup>22</sup>

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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.

18. The local law in Fresno, California, is an example of a conflicting non-cooperation law. For more detailed preemption analysis of the non-cooperation laws, see *infra* Part II.C.2.c.

19. See *infra* Part II.C.2.c.ii.

20. 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 *infra* Part III.

21. 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).

22. "To stay experimentation in things . . . may be fraught with serious consequences to the [N]ation. 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

Nor are these federalism harms limited to the immigration field. In other areas where federal and local governments disagree, potential for similar conflict exists. Congress has proposed or passed legislation that would criminalize acts related to medical marijuana usage, stem cell research, and physician-assisted suicide.<sup>23</sup> 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 as insignificant, this Article suggests that federal cooperation laws be subject to a type of intermediate review—one in between the rational basis review given to Congress's 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.

Part II uses 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. Part III explains why existing case law, with its commandeering/preemption distinction, does not adequately consider the federalism harms caused by federal cooperation statutes. Then, Part IV suggests a new 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, this Part argues that federal cooperation laws like the 1996 laws impose substantial federalism harms, both to the local governments

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rest of the country.” *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

23. 21 U.S.C. § 812(c) (2000) criminalizes the possession of marijuana, regardless of intended purpose. Senator Sam Brownback proposed legislation that would criminalize any form of human cloning. Human Cloning Prohibition Act of 2005, S. 658, 109th Cong. (2005). The bill died in committee. Finally, doctors who knowingly prescribe medication for assisted suicide can be held criminally liable under the Controlled Substances Act. 21 U.S.C. § 842(2).

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.”<sup>24</sup> Cooperation has also been defined as a “joint operation” or “common effort or labor.”<sup>25</sup> These definitions share common elements: cooperators agree on a common goal and voluntarily join their efforts to reach that goal.

Framing the 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 cannot force local governments to enforce federal immigration laws (e.g., to arrest those who are illegally present).<sup>26</sup> Therefore, short of exercising its Spending Clause powers to entice that joint enforcement, the federal government is limited to seeking local governments’ voluntary cooperation. When cooperation is not forthcoming at the local government level, the 1996 laws require that individual 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 a local government employee reporting undocumented individuals to federal immigration authorities.<sup>27</sup> Other possible forms of protected cooperation include a local employee contacting federal authorities to verify an individual’s immigration status when that individual uses local government services such as school enrollment (even though legal status may not be a requirement to use the service) or asking an individual for immigration status and compiling that information for later transmission to federal authorities.<sup>28</sup>

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24. THE NEW OXFORD AMERICAN DICTIONARY 378 (2d ed. 2001).

25. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 501 (3d ed. 2002).

26. 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 *infra* Part III.

27. Under the post-9/11 restructuring, the federal agency that would receive such reports is the United States Immigration and Customs Enforcement (ICE), which is responsible for interior (versus border) enforcement of immigration laws. See U.S. Immigration and Customs Enforcement, Partners, <http://www.ice.gov/partners/enforce.htm> (last visited June 6, 2006).

28. The language of the 1996 laws, particularly Section 642 of IIRIRA, supports protection of these forms of cooperation. However, because there has been so little litigation of the 1996 laws, no

Second, cooperation has symbolic aspects 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.

The various reasons local governments passed non-cooperation laws are discussed in more detail below,<sup>29</sup> but one reason—maintaining effective relations with immigrant communities—is particularly relevant to this discussion of the symbolic importance of cooperation. Local governments 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 strongly signal to these communities that they are not so cooperating.<sup>30</sup> Therefore, for various reasons, local governments with non-cooperation laws want to signal to the federal government as well as 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 consider illegally entering the United States 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

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judicial interpretation of what specific forms of cooperation are federally protected exists.

29. See *infra* Part II.D.2.

30. 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), <http://www.immigrationforum.org/DesktopDefault.aspx?tabid=568>. See also David A. Harris, *The War on Terror, Local Police, and Immigration Enforcement: A Curious Tale of Police Power in Post-9/11 America*, Bepress Legal Repository 9, May 18, 2006, <http://law.bepress.com/expreso/eps/1382> (“[O]fficers and departments using community policing know that they can only make their communities safe—from criminals, from terrorists, or any other threat—by working *with* communities, and decidedly *not* by instilling the type of fear that working as adjunct immigration agents will create.”) (emphasis in original).



successfully preempt non-cooperation laws, then there at least appears to be unified support among local governments for federal immigration policies, which may have important political implications.<sup>31</sup>

### *B. The Roots of Non-Cooperation*

The 9/11 attacks 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.<sup>32</sup> 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.<sup>33</sup> Although the immigration power is not expressly enumerated in the Constitution, 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.<sup>34</sup> 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 one voice on these issues.<sup>35</sup> For these reasons, the Supreme Court has struck down state laws that attempted to regulate immigration, while upholding substantially similar federal ones.<sup>36</sup>

31. The impact of the 1996 laws on non-cooperation laws is discussed in *infra* Part II.D.

32. 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) (reviewing cases that have considered the legality of local enforcement).

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

34. 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).

35. See *Ekiu v. United States*, 142 U.S. 651, 658 (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.”).

36. 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).

There is less consensus about whether the power to *enforce* immigration laws is exclusively federal. The courts that have considered the question are split: the U.S. Court of Appeals for the Ninth Circuit held that local governments can enforce criminal but not civil immigration laws,<sup>37</sup> while the Eighth and Tenth Circuits allow local enforcement when authorized by state law (even when federal law appears to prohibit such enforcement).<sup>38</sup> Even the executive branch has changed its position on this issue. In a 1996 memorandum, the Department of Justice (DOJ) opined that local governments may enforce criminal, but not civil, provisions of the Immigration and Nationality Act.<sup>39</sup> But in 2002, the DOJ reversed itself, declaring that states and cities have “inherent authority” as sovereigns to enforce immigration laws.<sup>40</sup>

## 2. Sanctuary Laws

On the flip side of whether local governments may enforce immigration laws is the question addressed by this Article: may local governments *refuse* to cooperate with enforcement of those laws? This question was presented by the sanctuary movement of the 1980s, when local governments passed laws prohibiting their employees from participating in or cooperating with immigration law enforcement. In some 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 that believed that Guatemalans, Salvadorans, and other nationals of U.S. allies were wrongly denied asylum to further American foreign policy objectives.<sup>41</sup> Working within a private

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37. *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).

38. *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).

39. 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), <http://www.usdoj.gov/olc/1996opinions.htm> [hereinafter 1996 DOJ Memo on Local Assistance].

40. *See supra* note 1. *See also* Pham, *supra* note 32 (arguing that non-uniform enforcement by local authorities raises constitutional problems); Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084 (2004) (suggesting that local enforcement of immigration laws is preempted by congressional legislation). *But see* Kobach, *supra* note 4 (arguing that local authorities have inherent authority to enforce immigration laws).

41. STEPHEN H. LEGOMSKY, *IMMIGRATION AND REFUGEE LAW AND POLICY* 1206–07 (4th ed.

network, these institutions declared themselves “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.<sup>42</sup>

Cities and states also joined the movement by passing “sanctuary laws”<sup>43</sup> 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 prohibiting local police from reporting immigration information to or otherwise cooperating with federal immigration enforcement.<sup>44</sup>

At the height of the sanctuary movement, approximately twenty-three cities and four states participated.<sup>45</sup> Cities that passed sanctuary laws included Rochester, New York; Minneapolis, Minnesota; Seattle, Washington; and Chicago, Illinois. States that passed such laws included New Mexico, Massachusetts, and New York.<sup>46</sup>

An example of a typical sanctuary law was passed by Takoma Park, Maryland, in 1985. By resolution, Takoma Park expressed its belief that, under international law, the United States has a responsibility not to deport refugees back to places of persecution, that the United States had 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.<sup>47</sup> Takoma Park also prohibited its employees from assisting or cooperating with the U.S. Immigration and Naturalization Service (INS) in any investigation of immigration violations, from inquiring about the citizenship status of any resident, and from releasing

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2005).

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

43. Though this Article refers to sanctuary “laws,” it is important to note that the measures passed by cities and states during the sanctuary movement took various legal forms including statutes, resolutions, ordinances, and executive orders. The significance of these legal forms in the context of non-cooperation laws is discussed in *infra* Part II.C.2.a.

44. See, e.g., TAKOMA PARK, MD, MUNICIPAL CODE § 9.04.030 (2004), available at [http://207.176.67.2/code/Takoma\\_Park\\_Municipal\\_Code/Title\\_9/04/030.html](http://207.176.67.2/code/Takoma_Park_Municipal_Code/Title_9/04/030.html) (“No agent, 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 Res. (Apr. 8, 1985) (on file with author) (stating that “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”).

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

46. *Id.* at 311–16.

47. Takoma Park, Md., Council Res. 1985–29 (1985).

the citizenship status of any resident to the INS.<sup>48</sup>

### 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 for smuggling aliens and other violations of the immigration laws,<sup>49</sup> the federal government never sued to challenge the sanctuary laws passed to support the movement. To be sure, the executive branch criticized the laws,<sup>50</sup> but never challenged 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 Congress 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 sanctuary laws and open communication between local governments and federal immigration authorities.<sup>51</sup> 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.<sup>52</sup>

Similarly, in passing section 642 of IIRIRA, 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 considerable assistance to, the Federal regulation of immigration and the achieving of the purposes and objectives of the Immigration and Nationality Act.”<sup>53</sup>

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

49. 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, *supra* note 45, at 326.

50. When asked about the sanctuary law passed by the Los Angeles City Council, an 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.” *Lashing out at “Sanctuary,”* TIME, Dec. 16, 1985, at 25, available at 1985 WLNR 830835.

51. 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. REP. NO. 104-725, at 383 (1996) (Conf. Rep.), reprinted in 1996 U.S.C.C.A.N. 2649, 2771.

52. *Id.*, reprinted in 1996 U.S.C.C.A.N. at 2771

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

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.<sup>54</sup> Therefore, despite the obvious conflict between the 1996 laws and the sanctuary laws local governments kept on their books, there was little interest 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.<sup>55</sup> 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.<sup>56</sup> 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. First, the city argued that 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. Second, according to the city, the laws violate the Guarantee Clause of the Constitution by interfering with the city's chosen form of government.<sup>57</sup> The Second Circuit rejected these claims, upholding the constitutionality of the 1996 laws.<sup>58</sup>

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54. LEGOMSKY, *supra* note 41, at 1207.

55. *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).

56. 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.

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

58. For more about the Second Circuit's reasoning, see *infra* notes 157–59 and accompanying text. In response, the city revoked Executive Order 124 and issued Executive Orders 34 and 41 in 2003. 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 except under limited circumstances (a “don’t ask” policy). *City of New York Exec. Order No. 34* (May 13, 2003), *available at* [http://friendsfw.org/Immigrant/NYC/NYC\\_Exec\\_Order\\_34\\_051303.htm](http://friendsfw.org/Immigrant/NYC/NYC_Exec_Order_34_051303.htm) [hereinafter EO 34] as amended by *City of New York Exec. Order No. 41* (Sept. 17, 2003) *available at* [http://www.nyc.gov/html/imm/downloads/pdf/exe\\_order\\_41.pdf](http://www.nyc.gov/html/imm/downloads/pdf/exe_order_41.pdf) [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.*

*C. Non-Cooperation Laws Post 9/11*

Today's non-cooperation laws were heavily influenced by the 9/11 attacks. Some non-cooperation laws can trace their roots to the sanctuary movement of the 1980s, but the 9/11 attacks refocused the nation's attention on the issue of local enforcement of immigration laws. As the country engaged in impassioned debate about the content of our immigration laws, there was also similarly heated debate concerning who should enforce those laws.

## 1. Federal Push for Local Enforcement

The federal government, as noted previously,<sup>59</sup> made a concerted push after 9/11 to get local governments involved in the enforcement of immigration laws. First, to remove the legal ambiguity about enforcement authority,<sup>60</sup> the Office of Legal Counsel within DOJ authored a legal memorandum opining that states have "inherent authority" as sovereigns to enforce immigration laws.<sup>61</sup> With this inherent authority, 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.<sup>62</sup>

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."<sup>63</sup> Moreover, DOJ signed Memoranda of Understanding (MOU) with at least two states, authorizing them to

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59. See *supra* notes 1–3 and accompanying text.

60. 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. 722 F.2d 468 (9th Cir. 1983). 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. *Id.* at 475–76. Citing to *Gonzales*, the DOJ in a 1996 opinion agreed, making the same civil/criminal provision. 1996 DOJ Memo on Local Assistance, *supra* note 39, at II.B.

61. See *supra* note 1 and accompanying text.

62. The distinction between civil and criminal immigration provisions is that 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).

63. See *supra* note 2 and accompanying text.

jointly enforce immigration laws with DOJ.<sup>64</sup>

Finally, members of Congress drafted legislation to financially reward those local governments willing to enforce immigration laws and financially penalize those refusing to do so. In 2003, Representative Charles Norwood (R-GA) introduced the Clear Law Enforcement for Criminal Alien Removal Act (CLEAR Act), which proposed to provide \$1 billion in federal funding each fiscal year to those local governments agreeing to enforce immigration laws.<sup>65</sup> The CLEAR Act also required states receiving federal reimbursement under the State Criminal Alien Assistance Program (SCAAP) for the detention of criminal aliens, or wanting to receive additional federal funds under the CLEAR Act, to pass laws permitting local enforcement of immigration laws.<sup>66</sup> The CLEAR Act died in Congress, but its component provisions have resurfaced in other legislation currently being considered by Congress.<sup>67</sup>

## 2. Non-Cooperation Laws

Reacting to these federal initiatives, some local governments built upon their previous sanctuary laws while other local governments passed entirely new non-cooperation laws.<sup>68</sup>

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64. The states that signed MOUs are Florida and Alabama. *State, Local Law Enforcement Get Support to Enforce Immigration Laws*, *supra* note 5. MOUs are permitted by 8 U.S.C. § 1357(g)(1) (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.

65. H.R. 2671, 108th Cong. (2003).

66. *Id.*

67. For example, the CLEAR provision that provided financial assistance to state and local police agencies enforcing immigration law (section 106) passed the House in slightly revised form as part of the Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005. H.R. 4437, 109th Cong. § 222 (2005). The CLEAR provision that affirmed the inherent authority of state personnel to enforce immigration law (section 101) also passed the House as part of the same act. H.R. 4437 § 220. The House passed the bill on December 16, 2005. The bill was received in the Senate and referred to the Senate Committee on the Judiciary on January 27, 2006.

The Senate is also considering the Comprehensive Immigration Reform Act of 2006, which affirms the inherent authority of state and local police agencies to enforce criminal immigration law. S. 2612, 109th Cong. § 229 (2006). The bill was introduced on April 7, 2006, and was referred to the Committee on the Judiciary.

68. 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 “[c]ity departments shall not discriminate against

*a. Form of Non-Cooperation Laws*

Though this Article refers 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 passed their measures as resolutions, ordinances or statutes, executive orders, or departmental orders or policies.<sup>69</sup>

For present purposes, the relevant inquiry is the binding nature of these various forms, because 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. Ordinances and statutes are clearly binding as legislation passed by a governing body.<sup>70</sup>

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.”<sup>71</sup>

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 votes),<sup>72</sup> then courts often treat the resolution as having the same legal effect as an ordinance. Here, the majority of the non-

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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 (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. City and County of S.F. Bd. of Supervisors Res. 389-02 (2002) (on file with author).

69. NILC ANNOTATED CHART, *supra* note 11.

70. 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).

71. RHYNE, *supra* note 70, § 8.1, at 115.

72. OSBORNE M. REYNOLDS, JR., HANDBOOK OF LOCAL GOVERNMENT LAW § 61, at 209, §§ 62–64 (2d ed. 2001).



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.<sup>73</sup>

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.<sup>74</sup> 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 fall into one of five categories. Often, non-cooperation laws contain more than one type of substantive provision. From broadest to most specific, the types of substantive provisions are: no discrimination based on citizenship status, no enforcement of immigration laws, no enforcement of civil immigration laws, no inquiry about citizenship status, and 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 more general language emphasizing the city's commitment to equal protection. This type of provision usually does not specifically refer to the enforcement of immigration laws.<sup>75</sup>

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73. See, e.g., Phila., Pa., City Council Res. (May 29, 2003) (passed with roll call vote), available at <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=12737&c=207>; Sitka, Alaska, Res. 03-886 (Sept. 23, 2003) (passed with roll call vote), available at <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=13890&c=207>; Talent, Or., Res. 03-642-R (Apr. 2, 2003) (passed with roll call vote), available at <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=12268&c=207>.

74. Michael S. Herman, *Gubernatorial Executive Orders*, 30 RUTGERS L.J. 987, 989-90 (1999); BLACK'S LAW DICTIONARY, *supra* note 70, at 610

75. 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, Minn., City Council Res. 2003R-109 (Apr. 4, 2003) available at <http://www.aclu.org/>

## 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. The prohibition is often 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 usually, there is no further explanation.<sup>76</sup>

## 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 another civil violation.<sup>77</sup> 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.<sup>78</sup>

## 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.<sup>79</sup> Drafters of this type of

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SafeandFree/SafeandFree.cfm?ID=12291&c=207. The resolution focuses more generally on criticizing the USA Patriot Act and other federal legislation perceived to threaten civil rights.

76. For example, Alaska's resolution passed in May 2003 states: "[A]n agency or instrumentality of the Municipality may not . . . use Municipality resources or institutions for the enforcement of Federal immigration matters, which are the responsibility of the Federal government." Alaska H.R.J. Res. 22 (May 2003), available at <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=13141&c=207>. 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, N.Y., Res. 37-R (Sept. 2003), available at <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=13528&c=207>.

77. 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 *supra* note 62.

78. An example of a local government that enforces this type of provision is the District of Columbia, which has a general order prohibiting 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), available at [http://mpdc.dc.gov/mpdc/cwp/view,a,1247,q,551596,mpdcNav\\_GID,1543.asp](http://mpdc.dc.gov/mpdc/cwp/view,a,1247,q,551596,mpdcNav_GID,1543.asp).

79. An example of this type of provision is the resolution passed by Durham, North Carolina, in

provision most likely had the 1996 laws in mind. By preventing government employees from obtaining immigration status information, local governments can, in most cases, prevent employees from reporting undocumented persons to federal immigration authorities, thus, achieving non-cooperation without directly violating the 1996 laws.<sup>80</sup>

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.<sup>81</sup> 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.<sup>82</sup>

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.<sup>83</sup>

The Supremacy Clause of the Constitution states that the “Constitution and the Laws of the United States which shall be made in

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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, N.C., Res. 9046 (Oct. 20, 2003), available at [http://www.ci.durham.nc.us/agendas/minutes/cc\\_minutes\\_10\\_20\\_03.pdf](http://www.ci.durham.nc.us/agendas/minutes/cc_minutes_10_20_03.pdf).

80. The legal effect of “no inquiry” laws is discussed further in *infra* Part II.C.2.c.

81. Chandler Police Department General Order E-17 (eff. Mar. 1, 1999, revised July 1, 1999), (on file with author).

82. New York City has this type of provision in its non-cooperation law. *See supra* note 58 (discussing EO 41). The state of Maine has a similar policy. *See* Order Concerning Access to State Services by All Entitled Maine Residents, Me. Exec. Order (Apr. 9, 2004), available at [http://www.maine.gov/governor/baldacci/news/executive-orders/EX\\_ORDER\\_4\\_9\\_04.doc](http://www.maine.gov/governor/baldacci/news/executive-orders/EX_ORDER_4_9_04.doc).

83. The broadest category of non-cooperation provisions—no discrimination based on citizenship status—is not preempted by the 1996 laws. *See infra* note 93.

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.”<sup>84</sup> If there is a conflict between federal and local law, the Supremacy Clause resolves that conflict in favor of federal law.<sup>85</sup> 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.<sup>86</sup>

The Supreme Court has identified two situations in which federal preemption occurs: express preemption where Congress explicitly states in a federal statute its intent to preempt local law or implied preemption where Congress’s preemptive intent is implicit in the federal statute’s structure and purpose.<sup>87</sup>

### i. Express Preemption

Congress’s 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. . .”)<sup>88</sup> and in the substance of the laws themselves. Both sections 434 and 642 prohibit local governments from preventing their employees from voluntarily sending any individual’s immigration status to or receiving that information from federal authorities.<sup>89</sup> 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.<sup>90</sup>

What is the scope of this express preemption? The obvious targets for express preemption are non-cooperation laws like those of San Francisco and Takoma Park, which contain the most specific category of restriction—no notifying federal immigration authorities.<sup>91</sup> Because the

84. U.S. CONST. art. VI, cl.2.

85. *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 108 (1992).

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

87. *Gade*, 505 U.S. at 98.

88. 8 U.S.C. §§ 1373, 1644 (2000).

89. *Id.* §§ 1373, 1644.

90. *Id.* § 1373.

91. TAKOMA PARK, MD., MUNICIPAL CODE § 9.04.030 (2004), available at [http://207.176.67.2/code/Takoma\\_Park\\_Municipal\\_Code/Title\\_9/04/index.html](http://207.176.67.2/code/Takoma_Park_Municipal_Code/Title_9/04/index.html) (“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.”); S.F., CAL., ADMINISTRATIVE CODE § 12H.2 (2005), available at <http://www.municode.com/Resources/gateway.asp?pid=14131&sid=5> (follow “CHAPTER 12H IMMIGRATION STATUS” hyperlink) (“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

1996 laws broadly address restrictions as well as prohibitions,<sup>92</sup> arguably most of the remaining categories of non-cooperation provisions<sup>93</sup> could be expressly preempted as well if they restrict the ability of local government employees to cooperate with federal immigration authorities. For example, if enforcing immigration laws, or more 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.

## 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, no enforcement of 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 and objectives of Congress.”<sup>94</sup>

The crucial inquiries then become: what was Congress’s 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

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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.”).

92. 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).

93. 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.

94. *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).

federal purpose, on the other hand, is less likely to be inconsistent with local laws.<sup>95</sup>

Narrowly defined, Congress's 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.<sup>96</sup> If Congress's 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 and objectives of Congress."<sup>97</sup>

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.<sup>98</sup> The Senate Report accompanying IIRIRA states that Congress's 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."<sup>99</sup> With this background, it could be persuasively argued that in passing section 642, Congress broadly intended to facilitate the deportation of illegal immigrants and to facilitate those deportations by recruiting local governments to enforce immigration laws.

If Congress's purposes are so broadly defined, then the three middle categories of non-cooperation provisions arguably 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),<sup>100</sup> the substantive provisions in the remaining non-cooperation laws prohibit some or all forms of local involvement in immigration law enforcement. These prohibitions hinder the deportation goal by making the detection and detention of illegal immigrants more

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

96. See *supra* notes 51–53 and accompanying text.

97. *Hines*, 312 U.S. at 67.

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

99. S. REP. NO. 104-249, at 2 (1996).

100. 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).

difficult.<sup>101</sup>

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.<sup>102</sup> Here, the 1996 laws expressly state an intent to preempt conflicting local law and then specify what local laws are preempted.<sup>103</sup> Second, as a policy matter, if the goal of preemption analysis is to determine congressional intent, it seems counterintuitive to graft an implied preemption analysis onto a statute for which Congress has already expressly stated its intent. Because Congress has already demonstrated its interest in preempting at least some non-cooperation laws, and its ability to draft preemptive law, presumably it would expressly state any desire to preempt the remaining laws. Therefore, the more relevant inquiry would be to determine the scope of that express preemptive intent.

#### *D. Federalism Harms of the 1996 Laws*

What result then if, as predicted above, many of the non-cooperation laws currently in the books are preempted? The importance of this inquiry is more than just academic. Though the federal government may not sue to enforce the 1996 laws,<sup>104</sup> local governments always face the *possibility* of such enforcement and, thus, may feel constrained in the positions that they can take on non-cooperation.

Even without the threat of federal litigation, local governments may have other interests that motivate them to abide by the 1996 laws.<sup>105</sup>

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101. Given that section 434 was passed as part of the Welfare Reform Act, Congress's purpose could also be broadly defined as reducing illegal immigrants' use of public benefits. Under this goal, however, the preemption argument would be hard to make. Because illegal immigrants are not eligible for most public benefits, it is difficult to see how restrictions on local enforcement of immigration laws would affect their use of these benefits. Moreover, other federal law already require 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. These narrow exceptions include disaster relief, immunizations, and some emergency health care. *Id.* § 1611(b).

102. "Preemption may be *either* express or implied . . . . *Absent explicit preemptive language*, we have recognized at least two types of implied preemption . . . ." *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992) (emphasis added).

103. *See* 8 U.S.C. § 1373.

104. In the ten years since the 1996 laws took effect, the federal government has not sued to enforce the laws. The only litigation challenging the constitutionality of the 1996 laws was a lawsuit brought by the City of New York. *See infra* notes 55–58 and accompanying text.

105. These interests may include avoiding possible litigation by non-federal parties, preserving the legitimacy of their own local laws, or genuinely desiring to comply with federal law.

Under the federal laws then, these local governments would not be able to clearly proclaim that they are not involved with immigration law enforcement.<sup>106</sup> Rather, local governments wishing to distance themselves from immigration enforcement must take a more nuanced public position on enforcement or remain silent on the issue.<sup>107</sup>

As explored further in this section, local governments facing this constraint experience substantial harm to federalism values as a result. Federalism values are the underlying reasons why we care about balancing 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.<sup>108</sup>

### 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. By contrast, its widely accepted definition is simple: the allocation of power between federal and state governments.<sup>109</sup> 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,<sup>110</sup> we value state sovereignty not as an end in itself but for the positive effects that state sovereignty generates when correctly calibrated within our system of federalism. These positive effects are what is meant by “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

106. The reasons why local governments do not want to become involved with immigration law are explained in *supra* Part II.A.

107. For example, Seattle’s non-cooperation ordinance, passed in January 2003, does not state that Seattle employees will not cooperate with immigration law enforcement; rather, the ordinance prohibits city employees from inquiring about immigration status in the first place. *See supra* note 9.

108. *See* Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499, 525 (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).

109. Chemerinsky, *supra* note 108, 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 “[t]he relationship between state and federal power”).

110. *See, e.g.*, *Printz v. United States*, 521 U.S. 898 (1997) (invalidating federal legislation that required state officers to conduct background checks on prospective gun buyers).



constituents, preventing tyranny by diffusing power between the federal and state levels of government, and encouraging policy innovation among states.<sup>111</sup>

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 reflecting 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).<sup>112</sup>

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 risk of tyranny and abuse from either front."<sup>113</sup> Any law that significantly expands the power of one level of government at the expense of the other level threatens federalism and, thus, liberty.<sup>114</sup>

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

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111. Chemerinsky, *supra* note 108, 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).

112. See Merritt, *supra* note 109, at 1574 ("For a nation composed of diverse racial, cultural, and religious groups, this opportunity to express multiple social values is essential.").

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

114. 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 [fifty] States." *Id.* at 922.

to the rest of the country.”<sup>115</sup> 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.<sup>116</sup>

## 2. Analyzing Federalism Harms

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

### *a. Democratic Rule*

The federalism value most threatened by the 1996 laws is that of enhancing democratic rule. 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 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.<sup>117</sup> Notwithstanding the “police” component of its term, the police power is not limited to the security powers exercised by police departments.<sup>118</sup> Acknowledging that the

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115. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (Brandeis, J., dissenting).

116. Merritt, *supra* note 109, at 1575.

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

118. James G. Hodge, Jr., *The Role of New Federalism and Public Health Law*, 12 J.L. & HEALTH

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.<sup>119</sup>

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.<sup>120</sup> Examples of the varied police powers that have been recognized by the courts include the regulation of fishing along a local waterway,<sup>121</sup> shooting a loose dog during a rabies scare,<sup>122</sup> and establishing a board to license dry cleaners.<sup>123</sup>

*(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 their ability to investigate and prevent crimes throughout their jurisdictions, as immigrant communities would shun contact with local police.<sup>124</sup>

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.”<sup>125</sup> Nor are the immigration concerns limited to illegal immigrants. Because many immigrant families are of mixed status (e.g., some children have legal

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309, 319 n.47 (1998) (citing RUTH LOCKE ROETTINGER, *THE SUPREME COURT AND STATE POLICE POWER: A STUDY IN FEDERALISM* 10 (1957)).

119. *Berman v. Parker*, 348 U.S. 26, 32 (1954).

120. 16 AM. JUR. 2D *Constitutional Law* § 324 (2004).

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

122. *Ruona v. City of Billings*, 323 P.2d 29 (Mont. 1958).

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

124. Lieutenant Tomas Padilla of the Hackensack, N.J., 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. . . . [W]hen 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 L1, available at 2002 WLNR 11657316.

125. Rosario Daza, *Helping People Without Papers*, OREGONIAN, Apr. 5, 2002, at C1.

status, while older siblings and parents may not), those here legally may be reluctant to contact the police because they do not want to focus immigration attention on other family members without legal status.

(b) *Public Health Police Power*

Another reason frequently advanced by local governments for passing local laws is to protect their communities' public health. Immigrants with serious health problems may refuse to seek medical care 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.<sup>126</sup>

(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 do not go to school because their families fear deportation may become a permanent uneducated underclass, possibly leading to more crime and increased dependence on public benefits.<sup>127</sup> Likewise, if immigrants shun engagement with the government system altogether, they are less likely to enforce their rights as employees, tenants, or consumers, leading to underenforcement of these important laws.<sup>128</sup> Finally, if local authorities start enforcing immigration laws

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126. 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 health 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. See also Toni Whitt, *A Promise for Immigrants Who Seek Hospital Care*, N.Y. TIMES, May 31, 2006, at B6 (reporting that New York City distributed a letter reassuring immigrants that no one will question their legal status when they seek medical care at city hospitals).

127. This concern about creating a permanent underclass 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).

128. 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 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.

without proper training, they are prone to engage in racial profiling or other abuses of authority.<sup>129</sup>

## 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 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.<sup>130</sup> Unlike Spending Clause cases where the federal government secures local acquiescence through fiscal enticements, the federal 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.<sup>131</sup>

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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) *cited in* Appellants' Brief at 6, *City of New York v. United States*, 179 F.3d 29 (2d Cir. 1999) (No. 97-6182), 1997 WL 33546932.

129. 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 illegal.

Frank Moraga, *Police Balk at Having to Do INS Work; Several Local Agencies Denounce Justice Plan*, VENTURA COUNTY STAR, Apr. 6, 2002, at B1.

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

131. 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

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,<sup>132</sup> it has recognized that states must retain certain core powers as part of their sovereign identities.<sup>133</sup> And though it has not addressed the specific power at issue here—the power of a local government to set the duties of its 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 . . . should be exclusive, and free from external interference, except so far as plainly provided by the Constitution of the United States.”<sup>134</sup>

Lower courts have also recognized that control over government employees lies at the core of state sovereign powers.<sup>135</sup>

But under the 1996 laws, local governments lose this important

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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 (7th Cir. 1984). See also Philip 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).

132. See *Garcia v. San Antonio Metro. Transit Auth.*, 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)).

133. See, e.g., *F.E.R.C. v. Mississippi*, 456 U.S. 742, 761 (1982) (“[T]he power to make decisions and to 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.” (citation and parenthetical omitted)).

134. *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (quoting *Taylor v. Beckham*, 178 U.S. 548, 570–71 (1900)) (alteration in original).

135. 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. 1994) (“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 . . .”).

sovereign power. Local governments that do not want their employees to cooperate with federal immigration law enforcement cannot stop them from doing so. Under the 1996 laws, 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.<sup>136</sup> 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 U.S. Court of Appeals for 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 of confidentiality is not preserved."<sup>137</sup> 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

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136. Even if the federal government did not sue to enforce the 1996 laws, a local government would be constrained in its ability to discipline employees who cooperate with immigration enforcement. An employee could cite to the 1996 laws as proof that her cooperation is legal, notwithstanding the contrary laws of her local government employer. 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 *supra* Part II.C.2.c.

137. *City of New York v. United States*, 179 F.3d 29, 36 (2d Cir. 1999). 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.

comparing the small number of local governments that have passed non-cooperation laws<sup>138</sup> to those 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.<sup>139</sup> The non-cooperation laws may or may not be successful in achieving their policy goals. If 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.

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 unconstitutional federal laws that commandeer local governments into passing federal laws or enforcing federal schemes and constitutional federal laws that simply preempt local law by prohibiting local government action in a particular area. Because they are framed as prohibitions, the 1996 laws 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.<sup>140</sup>

138. At the time that this Article went into publication, the number of local governments with non-cooperation laws was approximately forty-nine. NILC ANNOTATED CHART, *supra* note 11.

139. 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 performed by the Bureau of Citizenship and Immigration Services. LEGOMSKY, *supra* note 41, at 3-4.

140. See *supra* Part II.D.2. 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, physically abuses a person, but there is no similar due process violation if the government fails to protect a person from privately inflicted physical abuse. Compare *Grandstaff v. City of Borger*, 767 F.2d 161, 167, 169



*A. Unconstitutional Commandeering*

In a pair of landmark decisions issued in the 1990s, the Supreme Court defined an anti-commandeering principle to protect states from overreaching by Congress.<sup>141</sup> 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.<sup>142</sup> Applying the anti-commandeering principle, the Court in *New York v. United States* struck down federal legislation requiring states to accept ownership of radioactive waste or regulate it according to Congress's instructions.<sup>143</sup> The Court held the federal law was unconstitutional because it commandeered state lawmaking processes; regardless of the "choice" that states made, they would be required to pass laws to effectuate that choice.<sup>144</sup> And independent lawmaking, said the Court, is at the core of state sovereignty protected by the Tenth Amendment.<sup>145</sup>

In *Printz v. United States*, the Court engaged in similar analysis to extend the anti-commandeering principle to strike down a federal provision that required local law enforcement officers to conduct background checks on prospective gun buyers.<sup>146</sup> 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 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."<sup>147</sup>

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(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 Dep't of Soc. Servs.*, 489 U.S. 189, 195–96 (1989) (finding 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).

141. *New York v. United States*, 505 U.S. 144 (1992); *Printz v. United States*, 521 U.S. 898 (1997). The anti-commandeering principle was articulated in earlier cases, *see, e.g.*, *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981) and *F.E.R.C. 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.

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

143. *New York*, 505 U.S. at 174–76.

144. *Id.*

145. *Id.* at 188.

146. *Printz*, 521 U.S. at 933.

147. *Id.* at 932.

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.”<sup>148</sup>

A secondary but related concern for the Court was the negative effect 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 decision.”<sup>149</sup>

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.

### *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. The Tenth Amendment is not violated and state sovereignty principles are not offended 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).

Both *New York* and *Printz*, while defining the contours of the anti-commandeering principle, explicitly recognized the federal government’s authority to preempt local regulation.<sup>150</sup> And in *Reno v.*

148. *New York*, 505 U.S. at 181 (quoting *Gregory v. Ashcroft*, 501 U.S. 722, 759 (1991)).

149. *Id.* at 169.

150. “[W]here Congress has the authority to regulate private activity under the Commerce Clause, it may, as part of a program of ‘cooperative federalism,’ offer States the choice of regulating that

*Condon*, decided three years after *Printz*, the Court upheld a federal law that prohibited states from disclosing drivers' personal information without their consent.<sup>151</sup> 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*.<sup>152</sup> 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.<sup>153</sup>

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."<sup>154</sup> Because it did not require an affirmative duty, the Court held that the federal law was "consistent with the constitutional principles enunciated in *New York* and *Printz*."<sup>155</sup>

### C. Cooperation Laws as Federal Preemption

The 1996 laws benefit from this preemption/commandeering distinction. The 1996 laws are drafted as a double-negative: local governments are prohibited from prohibiting their employees from reporting undocumented persons. The intended 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 reporting by local government employees, their phrasing as prohibitions means that under current case law, they are per se constitutional. No affirmative obligation is placed on local governments to report undocumented persons, because this would arguably be commandeering in violation of *Printz*.<sup>156</sup> In the only court decision considering the issue, the Second

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activity according to federal standards or having state law pre-empted by federal regulation." *Printz*, 505 U.S. at 145 (citing *Hodel v. Va. Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264 (1981)). See also *New York*, 521 U.S. at 929 (also citing *Hodel* for the same proposition).

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

152. *Id.* at 149–50.

153. *Id.* at 150–51.

154. *Id.* at 151.

155. *Id.*

156. 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

Circuit held that the 1996 laws are more like the federal prohibition upheld in *Condon*. In turning away New York City's constitutional challenge to the 1996 laws, the court held that *New York* and *Printz* did not apply.<sup>157</sup> "In the case of 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."<sup>158</sup> 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.<sup>159</sup>

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.

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provision of information to the Federal Government." 521 U.S. 898, 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 (O'Connor, J., concurring). 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 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 885–86 (3d ed. 2000) (citing Justice Scalia's majority opinion in *Printz* for this proposition). But see Orde F. Kittrie, *Federalism, Deportation, and Crime Victims Afraid to Call the Police*, 91 IOWA L. REV. (forthcoming 2006) (arguing that *Reno v. Condon* decided the constitutionality of federally mandated reporting requirements by upholding a federal law that required states, as owners of databases, to disclose certain information to the federal government).

It is unclear 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 Immigration and Customs Enforcement or another federal agency could take custody. In addition, 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.

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

158. *Id.* at 35.

159. *Id.*

*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 to determine whether that federal interest is substantially related to the cooperation law and whether viable alternatives to mandatory cooperation exist.

The intermediate nature of this review stems from the neutral stance that it takes toward cooperation laws.<sup>160</sup> Instead of stacking the deck in favor of either federal or local governments as the current paradigm does,<sup>161</sup> 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). Those local interests are then weighed against federal interests, taking into account whether federal interests are substantially related to the 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 Makes 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 accurately reflects the potential federalism harm of cooperation laws—less harm than outright commandeering but more harm than in Spending Clause cases.

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160. 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, 163 (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]").

161. See *supra* Part III.C.

## 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 only is this weighing more likely to lead to the “correct” federalism result, but the public weighing of competing interests can, in and 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 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: recognition that the contested federal law may have unconstitutional results in some but not all cases.<sup>162</sup>

This Article has argued 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.<sup>163</sup>

Regardless of the judicial result in any particular case, the weighing process itself has a positive federalism effect.<sup>164</sup> Under the current legal

162. CHEMERINSKY, *supra* note 95, at 646.

163. 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).

164. Perhaps the most compelling argument *against* the application of intermediate review to federal cooperation laws is in the context of civil rights. Civil rights advocates might question whether local governments should be allowed to refuse to cooperate with federal civil rights legislation, federalism interests notwithstanding.

There are two responses to this argument. First, it is not clear that civil rights legislation passed pursuant to the Fourteenth and Fifteenth Amendments would even be subject to a Tenth Amendment challenge. *See City of Rome v. United States*, 446 U.S. 156, 178–79 (1980) (upholding provisions of the Voting Rights Act against a federalism challenge: “[P]rinciples of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments by ‘appropriate legislation.’ Those Amendments were specifically designed as an expansion of federal power and an intrusion on state sovereignty.”). *See also* Robert W. Adler, *Unfunded Mandates and Fiscal Federalism: A Critique*, 50 VAND. L. REV. 1137, 1202–03 (1997) (“[U]nder the legislative authority granted to Congress in the Civil War amendments, congressional mandates designed to enforce individual rights are not subject to Tenth Amendment or other federalism limitations, even if those mandates require significant state expenditures.”).

framework, these competing interests are not aired or discussed; rather, federal cooperation laws are presumed to be per se constitutional. Intermediate review provides an opportunity for local governments to articulate the sovereignty effects of cooperation laws, an opportunity that is currently denied. By knowing that it could be asked to defend its interests in passing cooperation laws, the federal government would be forced to consider the full federalism costs of cooperation laws. Thus, the federal government may be more willing to employ other methods to secure local cooperation that arguably have fewer negative federalism effects, such as exercising its Spending Clause power.

## 2. Intermediate Review for Intermediate Harm

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 alternative hypothetical federal laws requiring local governments to either outright enforce immigration laws or to do so as a condition for receiving federal funds. First, consider a hypothetical law of the type prohibited by *Printz*: commandeering local officials to enforce immigration law. To comply, local officials would have to institute numerous procedures and expend local resources to enforce the federal laws (e.g., training employees on the requirements of federal immigration law). 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, with 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*.<sup>165</sup> 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 law, local governments make the initial decision about

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Second, even if civil rights cooperation laws are subject to Tenth Amendment challenge, the important federal interests in cooperation and the minimal local interests in non-cooperation would point to the right result—that is, that federally mandated cooperation in the civil rights context would be constitutional.

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

whether to participate and, thus, all the subsequent steps they take to implement enforcement are arguably voluntary.<sup>166</sup>

The federalism harms that cooperation laws cause fall in between these hypotheticals, 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.<sup>167</sup> Yet, as explained earlier, the federalism harms are substantial<sup>168</sup> 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.<sup>169</sup> The purpose here is more limited: rather than articulate a complete doctrine for all Tenth Amendment challenges, this Article focuses on federal cooperation laws as a compelling case for discarding the bright-line rules of current Tenth Amendment jurisprudence and applying a balancing 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, this Article suggests that compelling federalism interests may justify local non-cooperation with federal enforcement schemes. Because federal cooperation laws significantly boost federal power at the expense of local sovereignty

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166. 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").

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

168. See *supra* Part II.D.2.

169. 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 Metro. Transit Auth.*, 469 U.S. 528, 588–89 (1985) (O'Connor, J., dissenting) (arguing that, instead of abandoning all efforts to 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).



interests, they may harm the underlying federalism values of 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 federalism interests, this Article suggests 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.