

SANCTUARY POLICIES & IMMIGRATION FEDERALISM: A DIALECTIC ANALYSIS

PRATHEEPAN GULASEKARAM[†]
ROSE CUISON VILLAZOR[‡]

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INTRODUCTION

More than twenty years ago, the city of San Francisco declared itself a “City of Refuge” for immigrants, particularly those who do not have authorized status.¹ To bolster the city’s symbolic declaration, San Francisco subsequently passed an ordinance that restricted city employees from obtaining information about a person’s immigration status or revealing a person’s known unauthorized immigration status to the federal government.² In so doing, San Francisco took the bold step of aiming to assure undocumented immigrants that the city would serve as a

[†] Assistant Professor of Law, Santa Clara University School of Law. B.A., 1996, Brown University; J.D., 2001, Stanford Law School.

[‡] Associate Professor of Law, Hofstra University Law School. B.A., 1996, University of Texas at Austin; J.D., 2000, American University Washington College of Law; LL.M., Columbia Law School.

1. San Francisco Bd. of Supervisors Res. 1087-85 (1985), *available at* <http://www.sfcityattorney.org/Modules/ShowDocument.aspx?documentid=486> (declaring San Francisco a “City of Refuge”).

2. S.F., CAL., ADMIN. CODE § 12H.2 (1989).

safe haven by not cooperating with federal immigration authorities,³ whose responsibilities include removing unauthorized immigrants from the United States.⁴

Two decades later, San Francisco continues to be a “sanctuary city.”⁵ With notable exceptions, the city maintains its policy of not inquiring or reporting undocumented immigrants to immigration officials. Specifically, in 1992, the city exempted noncitizens who either have committed felony crimes or have been detained for allegedly committing felony crimes from the policy.⁶ A recent amendment to the ordinance, passed by the Board of Supervisors over the mayor of San Francisco’s veto, provided that juvenile noncitizens would be treated separately from adult criminal noncitizens.⁷ Under the current version, which became effective in December 2009, juvenile noncitizens may be reported to federal authorities only if they have been convicted of a felony.⁸

Many have criticized San Francisco’s ordinance, both its current and previous forms. Among these is former Congressman and U.S. presidential candidate, Tom Tancredo. Vehemently opposed to San Francisco’s stance, Mr. Tancredo has argued that the city’s noncooperation law constitutes a “flagrant violation of federal law.”⁹ In particular, Mr. Tancredo was referring to 8 U.S.C. § 1373, which proscribes state and local governments from prohibiting their employees from voluntarily reporting the immigration status of individuals, lawful

3. San Francisco joined a number of other municipalities that passed similar sanctuary laws that were enacted in the mid-1980s. Cities passed these laws primarily to address the plight of Central Americans whose asylum applications had been denied by the federal government and were thus subject to removal. See Ignatius Bau, *Cities of Refuge: No Federal Preemption of Ordinances Restricting Local Government Cooperation with INS*, 7 LA RAZA L.J. 50, 51-52 (1994).

4. Currently, the U.S. Department of Homeland Security’s Immigration and Customs Enforcement (ICE) is charged with enforcing the Immigration And Nationality Act (INA), including its removal procedures. See generally U.S. Immigration and Customs Enforcement, Detention and Removal, available at <http://www.ice.gov/pi/dro/index.htm> (last visited Apr. 18, 2010).

5. MAYOR OF SAN FRANCISCO, MAYOR’S 2009 ACCOUNTABILITY MATRIX 210 (Sept. 30, 2009), available at http://www.sfgov.org/site/mayor_index.asp?id=27047.

6. S.F. CAL., ADMIN. CODE § 12H.2-1 (2009).

7. S.F. CAL., ADMIN. CODE § 12H.2 (2009).

8. Note that while the ordinance was effective on December 11, 2009, the mayor and city attorney have a sixty-day window to implement the policy. Mike Aldax, *Legal Fight Continues over Sanctuary Policy*, S.F. EXAMINER, Dec. 11, 2009, available at <http://www.sfexaminer.com/local/Legal-fight-continues-over-sanctuary-policy-79029422.html>.

9. The Associated Press, *Killings Turn Focus on S.F. Sanctuary Law*, July 24, 2008, available at <http://msnbc.msn.com/id/25827381>.

or unlawful, to federal immigration officials.¹⁰ Indeed, San Francisco's city attorney acknowledged in a legal memorandum that the Supervisors' non-dissemination addendum "generally prohibits providing information about immigration status to ICE,"¹¹ which implicates its validity under 8 U.S.C. § 1373.¹²

More broadly, the ordinance represents a growing trend in sub-federal lawmaking with significant impact on immigrants, and potentially, immigration.¹³ In passing the ordinance, both the mayor and the Board of Supervisors operated with the presumption that the provision of sanctuary to immigrants constituted a legitimate exercise of local lawmaking. Yet, the validity of local and state laws—whether intended to integrate and be more inclusive of non-citizens or designed to exclude undocumented immigrants—is largely contested in both the courts and legal scholarship.¹⁴ Concerns about the legality of sub-federal laws generally center on the well-established principle that the federal government has exclusive authority to regulate immigration law.¹⁵ Accordingly, in addition to the concerns occasioned by contradictions with 8 U.S.C. § 1373, the city's noncooperation policies specifically, and sanctuary policies generally, must withstand federal plenary power claims arguing that federal authority on matters of immigration and immigrants excludes the possibility of state or municipal lawmaking that relates to non-citizens.

This Article explores the doctrinal and theoretical challenges confronting San Francisco's non-cooperation ordinance, and similar sub-federal actions. It does so using a non-conventional but useful method of engaging in a dialectic exchange. In using the dialectic structure, we take our cue from Professor Stephen Legomsky's elegant use of the device in

10. 8 U.S.C. § 1373(a) (West 2010):

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

11. Memorandum from Deputy City Attorneys to Mayor Gavin Newsom 4 (Aug. 18, 2009), available at <http://www.sfcityattorney.org/index.aspx?page=272> [hereinafter *Memorandum*].

12. *Id.* The memo also notes, however, that "no one has challenged in court the legality of San Francisco's City of Refuge Ordinance under Section 1373." *Id.*

13. See discussion *infra* Part III (explaining that the debate about sanctuary laws is located within a larger conversation about the extent to which states and local governments may participate in immigration regulation).

14. See *id.*

15. See, e.g., *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

his recent article on the meaning of undocumented status.¹⁶ As he noted, the format has been “under-utilized” in legal scholarly literature.¹⁷ More scholars should use this method, he contended, because it helps to reveal the diametrically opposed positions of various groups concerning a particular issue.¹⁸ Importantly, a dialectic conversation facilitates a more constructive discussion of the issues at stake.

Convinced of the valuable contribution that a dialectic discourse would bring to the debate about the validity of San Francisco’s ordinance and other similar sanctuary laws, we employ this method to draw out the hotly contested perspectives galvanized by the controversial topic of sub-federal immigration regulations. Through a fictional conversation between “Professor Locke” and “Professor Shepherd,”¹⁹ we present the opposing doctrinal views on whether San Francisco’s ordinance is preempted by 8 U.S.C. § 1373.²⁰ Agreeing that only one provision of the ordinance potentially faces a preemptive strike, we articulate the underlying doctrinal and theoretical issues facing sanctuary laws specifically and sub-federal immigration regulation generally. Ultimately, through the exchange, we develop how inclusionary measures such as sanctuary laws may survive preemption analysis and exclusionary measures such as bans on rental housing may be invalidated on preemption grounds. In addition, apropos to the focus of this symposium, we assess the impact of any potential comprehensive federal immigration reform on such policies.

The Article proceeds as follows. Part I provides a brief discussion of the history and current state of the sanctuary ordinance and other immigrant-friendly aspects of San Francisco’s policy. Part II engages in a conversation about the constitutionality of sub-federal enactments like the San Francisco ordinance. It highlights the motivations and purposes of San Francisco’s policy and the specific preemption challenges it faces. Part III launches into a more general examination of the preemption doctrine on sub-federal lawmaking related to undocumented immigrants. In this part, we posit ways of doctrinally distinguishing inclusionary

16. Stephen H. Legomsky, *Portraits of the Undocumented Immigrant: A Dialogue*, 44 GA. L. REV. 65 (2009).

17. *Id.* at 66.

18. *Id.* at 73-140. In his article, the dialectic exchange showed the general opposing views about the ways in which undocumented immigrants should be treated. *Id.*

19. The authors were both fans of the television series “Lost.”

20. We began this “conversation” in October on the N.Y. Times Bay Area blog. See Gerry Shih, *Legal Scholars Dissect S.F. Sanctuary Policy*, N.Y. TIMES BAY AREA BLOG, Oct. 21, 2009, available at <http://bayarea.blogs.nytimes.com/2009/10/21/legal-scholars-dissect-sf-sanctuary-policy/>. The arguments presented here build on the earlier positions we took on the N.Y. Times Bay Area blog.

from exclusionary laws and policies. Part IV concludes with a discussion of the implications of the arguments presented for comprehensive federal immigration reform.

I. THE SAN FRANCISCO SANCTUARY ORDINANCE

The city's sanctuary ordinance is, in actuality, several related policies.²¹ Conclusions as to the policy's constitutionality may be a multi-part question that requires separate analysis of these constituent parts. The law begins with a self-identifier provision without any discernable legal consequence. It states, "[i]t is hereby affirmed that the City and County of San Francisco is a City and County of Refuge."²² Turning to the operative provisions, the ordinance bars expenditure of city funds or resources to assist with immigration enforcement or discovery of immigration status.²³ In addition, the ordinance prohibits local officials from detaining, arresting, or questioning an individual solely because of immigration status.²⁴

Finally, the law contains several information gathering and disseminating provisions, which have become the subject of recent political and legal scrutiny. First, the ordinance prohibits "gathering information" about individuals' immigration status.²⁵ Second, subject to important exceptions, it prohibits "disseminat[ing] information" concerning individuals' immigration status.²⁶ In its original form, the ordinance applied to all noncitizens. The city subsequently narrowed the ordinance in 1992 when it amended it to remove informational protections for criminals and criminal suspects.²⁷ Pursuant to the amendments, the ordinance does not prohibit local officials and officers from providing information to other government employees and entities about (1) suspected violators of the Immigration and Nationality Act's (INA) civil provisions who have been booked for alleged felony commission, and (2) suspected violators of the INA's civil provisions who are prior felony convicts currently in county jail.²⁸

21. S.F., CAL., ADMIN. CODE §§ 12H.1-.6 (2009).

22. S.F., CAL., ADMIN. CODE § 12H.1.

23. S.F., CAL., ADMIN. CODE § 12H.2 (stating that "[n]o 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 . . .").

24. *Id.*

25. *Id.*

26. *Id.*

27. S.F., CAL., ADMIN. CODE § 12H.2-1.

28. *Id.*

In the middle of 2008, however, the sanctuary policy underwent a change after a number of critical events. Chief of these was the tragic killings of Anthony Bologna and two of his sons by an alleged undocumented immigrant, Edwin Ramos.²⁹ Their deaths shocked the city not only for the execution-style killing but also because they revealed an unknown exception to the city's policy. Ramos had previously been under the custody of city officials when he was a minor but he was not turned over to federal authorities.³⁰ The non-disclosure of his status to immigration officials exposed the city policy of not reporting the immigration status of undocumented youths, including those who had committed crimes, to the federal government.³¹

Indeed, news reports uncovered that the city not only hid the immigration information of undocumented youths from immigration authorities but also placed them in group-housing, which enabled them to walk away from custody.³² The city had also repatriated some to their home countries to help them avoid removal proceedings.³³ In light of those revelations, Mayor Newsom pledged a "top-to-bottom" review of the city's refuge policies. As part of that review, he changed the policy and directed local police officers to also report alleged criminal juveniles (under suspicion of violating the INA's civil provisions) to Immigration and Customs Enforcement (ICE) officers.³⁴ At least sixty-seven undocumented immigrant minors were allegedly reported to the Immigration and Customs Enforcement (ICE) and removed from the U.S. since the mayoral policy change.³⁵

29. Jaxon Van Derbeken, *Edwin Ramos Won't Face Death Penalty*, S.F. CHRON., Sept. 11, 2009, at D-1, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/09/11/BAM819L7NE.DTL>.

30. It should be noted that there is a dispute regarding whether the city had in fact not reported Edwin Ramos's immigration information to immigration officials. See *Agencies Play Blame Game in San Francisco's Illegal's Murder Case*, FOX NEWS, July 23, 2008, available at <http://www.foxnews.com/story/0,2933,389147,00.html> (discussing how federal immigration officials claimed they never received notice of Edwin Ramos custody and suspected immigration status, but local officials claimed they disclosed information to federal officials).

31. *S.F.'s Sanctuary City Story So Far*, S.F. CHRON., Aug. 31, 2008, available at http://articles.sfgate.com/2008-08-31/news/17125186_1_sanctuary-city-immigration-law-enforcement-jvenile.

32. Jaxon Van Derbeken, *S.F. Fund Aids Teen Felons Who Are Illegals*, S.F. CHRON., Aug. 3, 2008, at A1, available at http://articles.sfgate.com/2008-08-03/news/17124569_1_immigrant-felons-justice-grant-program.

33. *Id.*

34. See MAYOR'S 2009 ACCOUNTABILITY MATRIX, *supra* note 5, at 210.

35. A report by the San Francisco Juvenile Probation Department indicates that between January 1, 2005 and April 3, 2009, a total of 252 youths suspected of being undocumented had cases in the juvenile system. From January 2005 to July 2008, it

In November 2009, disagreeing with the mayor's executive change that required disclosure of juveniles' immigration information to federal officials upon detention, the San Francisco Board of Supervisors voted to reinstitute the differentiated policy for juveniles.³⁶ Although the Supervisors version allowed reporting after a felony conviction, it reverted to the prior policy of prohibiting reporting individuals to ICE after arrest and charging, but before conviction.³⁷ As he promised, Mayor Newsom vetoed the policy, stating that "I believe in the sanctuary ordinance and I wanted to promote it within the diverse communities that are impacted, but we never promoted it, never believed it was a way to shield criminal behavior."³⁸

The intra-municipal drama continued with the Supervisors overriding the mayor's veto. Not to be outdone, Mayor Newsom directed city law enforcement to ignore the ordinance, arguing that the city cannot act in violation of federal law.³⁹ His decision had immediate effects, as through January 2010, a few adolescent undocumented immigrants suspected of criminal activity were reported to federal authorities and are currently in removal proceedings.⁴⁰

Meanwhile, since the override of the mayor's veto, the city attorney of San Francisco has been corresponding with federal enforcement officials, attempting to clarify the federal government's position on the Supervisors' policy. In an initial exchange of letters between the city attorney and the U.S. attorney for the Northern District of California, the federal prosecutor explained that he considered compliance with the City's new information-dissemination policies to be violations of federal

appears that up to 185 youths may have been shielded by the juvenile non-dissemination policy. From July 2008, when the program was discovered and repealed, to April 2009, sixty-seven youths were turned over to ICE officials. See Heather Knight, *S.F. Sanctuary Policy Shielded up to 185 Youths*, S.F. CHRON., Apr. 3, 2009, available at http://articles.sfgate.com/2009-04-03/news/17194960_1_drug-charges-juvenile-probation-system-youths. Notably, of those 252 youths, 180 were in custody for alleged drug-related offenses. *Id.* Non-reporting of these youth could implicate state law provisions as well. See *Fonseca v. Fong*, 84 Cal. Rptr. 3d 567, 570 (Cal. Ct. App. 2008) (discussing CAL. HEALTH & SAFETY CODE § 11369).

36. See Knight, *supra* note 35.

37. See *id.*

38. Richard Gonzales, *San Francisco Youth Sanctuary Law Prompts Battle*, NAT'L PUB. RADIO, Nov. 4, 2009, available at <http://www.npr.org/templates/story/story.php?storyId=120061381&ft=1&f=1001>.

39. *Id.*

40. Heather Knight, *No Sanctuary for Boy after Charges Dropped*, S.F. CHRON., Jan. 24, 2010, at A1, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2010/01/24/MNDI1BLR40.DTL>.

criminal and immigration laws.⁴¹ Subsequently, in March 2010, the city attorney wrote to the deputy attorney general at the Department of Justice (DOJ), requesting that the DOJ counsel the U.S. Attorney's Office not to criminally prosecute city officials or employees who abide by the City's new policy.⁴² As discussed in greater detail *infra*, San Francisco's sanctuary ordinance implicates 8 U.S.C. § 1373. It also raises legal questions under other federal and state law. The U.S. attorney for the Northern District of California, for instance, threatened that city officials who complied with the city law may be federally prosecutable for "harboring" youths who are unlawfully present for immigration law purposes.⁴³ In particular, the U.S. Attorney's Office is looking into whether the transportation of undocumented youths and provision of group homes to them constituted unlawful harboring under the anti-harboring provision of the Immigration and Nationality Act (INA).⁴⁴

On the state law end, the San Francisco Police Department, even prior to the Ramos incident, unsuccessfully defended itself against legal challenges under California law based on its non-communication with federal authorities. In *Fonseca v. Fong*,⁴⁵ San Francisco taxpayers claimed that the police department was in violation of a state law that required arresting officials to notify the appropriate federal authorities when they had reason to believe that a drug-related arrestee was "not a citizen" of the United States.⁴⁶ Although plaintiff based his claim on a conflict between city practice and state law, the police department demurred on the basis that the state law mandating federal notification⁴⁷ constituted an unconstitutional immigration regulation. Forced to opine on federal preemption issues,⁴⁸ the *Fong* court ruled that the state law, just by requiring city officials to report certain drug-related arrestee's to federal authorities, did not impermissibly invade federal power. It then remanded the case for a determination on the merits of the alleged conflict between city practice and state law.⁴⁹

41. U.S. Attorney Joseph P. Russoniello's response to City Attorney Dennis Herrera regarding recent amendments to the San Francisco Sanctuary Ordinance, Dec. 3, 2009, available at www.sfcityattorney.org/index.aspx?page=272.

42. Letter from City Attorney Herrera to Deputy Attorney General of the United States, Mar. 12, 2010, available at www.sfcityattorney.org/index.aspx?page=272.

43. Heather Knight, *Sanctuary Veto Overridden, Legal Action Possible*, S.F. CHRON., Nov. 11, 2009, at C-1, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/11/11/BA041A18CG>.

44. *Id.* See generally 8 U.S.C. § 1324(a)(1)(A) (West 2010).

45. 84 Cal. Rptr. 3d 567.

46. CAL. HEALTH & SAFETY CODE § 11369 (West 2010).

47. *Id.*

48. *Fong*, 84 Cal. Rptr. 3d at 574-75.

49. *Id.* at 583-84.

As the foregoing illustrated, what started off as a symbolic “City of Refuge” statement has turned into an ordinance that lies at the center of political and legal debates about the extent to which states and local governments such as San Francisco may enact laws that affect the federal government’s exclusive authority over the regulation and enforcement of immigration law.⁵⁰

II. SAN FRANCISCO’S ORDINANCE, 8 U.S.C. § 1373, AND PREEMPTION ANALYSIS

Having provided the relevant background, the Article presents a dialectic exchange about legal issues concerning San Francisco’s ordinance. In this Part, Professors Locke and Shepherd engage in a conversation about whether San Francisco’s ordinance is preempted by 8 U.S.C. § 1373. As we aim to make clear through their conversation, the scope of the city’s non-cooperation law has been the source of political fights between the mayor and the Board of Supervisors, with both sides seeking to engage the federal government to support their dichotomous positions. Notwithstanding the political battle between these public actors, the overall concern with this ordinance is whether or not it will sustain a preemption challenge. The professors first highlight the political issues surrounding the ordinance before addressing the specific doctrinal issue of preemption.

50. As collateral damage caught in the increased scrutiny of the city’s immigrant policies in the wake of the Ramos incident and repatriation program revelations, the city’s Municipal ID program was also put on temporary hold after its passage in November 2007. Modeled on a similar initiative in New Haven, Connecticut, the ID program provides an identification card, regardless of immigration status, to bona fide city residents who can then use the card to access city services and private enterprises within the city who chose to accept the card for identification purposes. *See* Office of the County Clerk, *What is the SF City ID Card?*, available at <http://www.sfgov2.org/index.aspx?page=110> (last visited June 11, 2010). After a brief suspension, however, the program has been in effect now for over a year. After surviving preemption challenges in state court in October 2008, and undergoing amendment in November of that same year, the city began issuing resident cards in January 2009. Based on initial reports, the card appears to be very popular among city residents. Heather Knight, *Hundreds Wait for Hours To Buy S.F. ID Card*, SAN FRAN. CHRON., Jan. 16, 2009; *see also* Heather Knight, *Sanctuary Veto Overridden, Legal Action Possible*, S.F. CHRON., Nov. 11, 2009, at C1, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/11/11/-BAO41AI8CG.DTL>.

A. Political Showdown

Locke: Both the San Francisco ordinance generally, and the recent non-dissemination addendum specifically, exist despite the background doctrinal proscription against sub-federal lawmaking affecting immigrants. At base then, both Mayor Newsom and the Board of Supervisors agree that the federal constitutional and political framework allows the city of San Francisco to legislate integrationist policies—such as its sanctuary policy—for undocumented persons within its borders. Viewed in this light, the dispute between the Mayor and Supervisors occurred within a small band of the political spectrum, where all parties believe that the city can rightfully resist cooperation with federal enforcement schemes.

Shepherd: To understand the ways in which the ordinance got caught up in an intra-municipal political showdown, we should first address this question: why did the Board of Supervisors want to enact a policy of non-dissemination of undocumented juveniles' immigration status?

Locke: I think there are some fundamental concerns with juveniles and the operation of our legal system that justify non-reporting of criminal, undocumented juveniles prior to conviction. As you know, determinations of undocumented presence are administrative decisions that require a hearing in front of an immigration judge.⁵¹ So, in the first instance, lay understandings of "illegal" must be approached with caution; the consequences of an unlawful presence determination are significant for these individuals.

Shepherd: That is true but it seems to me that the justification for treating undocumented juveniles would similarly apply to adults. That is, having the determination of one's unlawful presence in the country or guilt with respect to a particular crime decided through the proper regulatory procedures is equally important to unauthorized adults. Yet the city chose not to provide protections for such adults.

Locke: The city opted to treat children differently from adults, a group whose culpability for their own unlawful presence is highly dubious. As the Supreme Court's opinion in *Plyler v. Doe* rightly noted, it is often not a juvenile's choice to cross a national border without inspection.⁵² Perhaps the point that most intuitively resonates with our society's sense of fairness is that our criminal system is based on the fundamental notion that one is not guilty until proven so. The city's policy doesn't ban all reporting of the immigration status of suspected

51. See 8 U.S.C. § 12299(a) (West 2010).

52. 457 U.S. 202, 245 (1982).

undocumented youth in the criminal system; it only requires that city officials hold-off on any such reporting of immigration status until that youth is adjudged as a criminal, after an opportunity to present a defense.⁵³

Shepherd: Perhaps you are correct that the difference between the treatment of immigration information of undocumented adults and juveniles is that the city is addressing the needs of children. By not reporting those juveniles who have not been proven guilty of the crimes for which they were arrested, the city facilitates keeping the juveniles' ties to their families and the communities. I recognize these humanitarian concerns that convinced the Board of Supervisors to amend the ordinance. Yet, the Mayor has taken the position that children must be treated in the same way as adults.

Locke: Yes, the recent addendum underwent a political battle between Mayor Newsom and the Board of Supervisors.⁵⁴ One of the reasons Mayor Newsom proffered for his version of the policy is his belief that pushing the boundaries of legality with the new version will jeopardize the remainder of the policy.⁵⁵ He stated that he is still a strong proponent of the general sanctuary policy, and doesn't want to endanger the general provisions by inviting litigation on the specific juvenile aspects.⁵⁶ I believe the Mayor has overstated the risk of the policy as a whole being in danger. The general ordinance has now been in existence for over two decades, and several other jurisdictions have similar noncooperation laws.⁵⁷

Shepherd: I do think that there is merit to the Mayor's argument that the Board of Supervisors' recent change to the ordinance has made it vulnerable to a potential federal preemption challenge that could affect the ordinance as a whole.⁵⁸ For over twenty years, San Francisco's sanctuary ordinance co-existed with 8 U.S.C. § 1373 with very little resistance from the federal government despite the ordinance's apparent

53. S.F., CAL., ADMIN. CODE § 12H.2-1 (2009).

53. Richard Gonzales, *San Francisco Youth Sanctuary Law Prompts Battle*, NAT'L PUBLIC RADIO, Nov. 4, 2009, available at <http://www.npr.org/templates/story/story.php?storyId=120061381>.

55. See MAYOR'S 2009 ACCOUNTABILITY MATRIX, *supra* note 5, at 210; see also, Gonzales, *supra* note 53 (quoting Mayor Newsom: "I believe in the sanctuary ordinance and I wanted to promote it within the diverse communities that are impacted but we never promoted it, never believed it was a way to shield criminal behavior.").

56. *Id.*

57. See generally Rose Cuison Villazor, *What is a Sanctuary?*, 61 SMU L. REV. 133 (2008); see also Huyen Pham, *The Constitutional Right Not to Cooperate?*, 74 U. CIN. L. REV. 1373, 1382-84 (2006).

58. See Memorandum, *supra* note 11, at 9.

inconsistency with the federal law. That is, in principle, the ordinance's purpose of providing a safe haven for unauthorized noncitizens (mainly to those who have not committed crimes) by not reporting them to federal officials collides with the federal government's responsibility of determining whether those persons are removable and, if they are, then eventually deporting them after the appropriate removal process.⁵⁹ To date, the federal government had chosen to overlook this ostensible conflict between the local and federal laws.⁶⁰

Yet, the federal inaction could change as a result of the significant attention that has been raised about the new ordinance provision regarding the non-reporting of unauthorized juveniles who have not been convicted of a felony crime.

Not only San Francisco's policy is at stake; so are the other sanctuary policies in other cities.⁶¹ The federal government may have not addressed them before but under today's heightened immigration enforcement trends, the possibility that federal officials will step in to seek to invalidate such policies is greater.⁶² Arguably, the mayor's 2008 change to the policy (that the current amendment overturned) was a just-in-time save that may have delayed federal intervention.

Locke: I view the lack of federal action to counter sanctuary policies as lack of power and political desire to do so, rather than a choice by federal authorities to leave those policies alone. Although never explicitly articulated, the federal government's legal inaction likely stems from recognizing the limits of federal authority, and understanding the scope of local discretion. Legislatively, in the last few years, although the general issue of sanctuary cities has generated debate and controversy in Congress, a recent Congressional attempt to punish sanctuary jurisdictions failed to pass the Senate.⁶³ In fact, to the contrary, there was even a draft proposal introduced this past year that would have repealed

59. See 8 U.S.C. § 1229a (West 2010) (removal proceedings).

60. See Villazor, *supra* note 56; see Pham, *supra* note 56.

61. See NAT'L IMMIGRATION LAW CTR., LAWS, RESOLUTIONS AND POLICIES INSTITUTED ACROSS THE U.S. LIMITING ENFORCEMENT OF IMMIGRATION LAWS BY STATE AND LOCAL AUTHORITIES (2008), available at <http://www.nilc.org/immlawpolicy-/LocalLaw/locallaw-limiting-tbl-2008-12-03.pdf> (providing a list of over 70 jurisdictions that have adopted sanctuary laws and policies).

62. See John Schwartz, *Immigration Enforcement Fuels Rise in U.S. Cases*, N.Y. TIMES, Dec. 29, 2009, at A-16 (reporting the rise in federal immigration enforcement in 2009).

63. The "Vitter Amendment" to the 2007 Appropriations Bill, drafted by David Vitter (R-La.) would have withheld federal law enforcement funds from jurisdictions that continued their sanctuary policies. The measure passed the House 234-189, but was voted down 52-42 in the Senate. Senator Dianne Feinstein (D-Cal.), a former mayor of San Francisco, voted against the Vitter Amendment.

§ 1373 altogether.⁶⁴ Realistically, there simply isn't enough political will to expressly override these policies, or to prosecute the city officials of the several dozens of cities across the country that have sanctuary-type ordinances.

Shepherd: Perhaps there might not be political will at the congressional level but there seems to be ample support at the local level to undermine the San Francisco ordinance. As noted earlier, the U.S. attorney began investigating the ordinance's potential violation of 8 U.S.C. § 1324(a)(1)(A)⁶⁵ for transporting undocumented youths and placing some of them in group homes. Although this provision has yet to be extended to situations such as what occurred in San Francisco, a court might be convinced to interpret the statute in this way.

Locke: I think it's important to note here that only the transportation of youth under the juvenile court system's "unofficial" policy of repatriation or half-way housing fits neatly into the U.S. attorney's interpretation of federal law. In that situation, the city's juvenile court system, with the aid of city officials and public funds, was not only keeping information about convicted juvenile offenders from federal officials, but was also secreting them out of the country or into situations wherein the juveniles could avoid federal criminal and immigration prosecution.⁶⁶

As applied to the recent non-disclosure policy adopted by the Supervisors, however, I think the U.S. attorney's response was likely bluster, intended to intimidate the City into changing its policies through threat of federal action. First, the U.S. attorney's current investigation into San Francisco's policies was occasioned by, and relates to, the city's prior practice of repatriating immigrant juvenile offenders; the juvenile non-dissemination policy is not thus far the subject of the federal grand jury investigation.⁶⁷ Second, although U.S. attorneys have broad discretion, they cannot independently dictate federal prosecution priorities. In other words, he could not have publically stated that he would refrain from prosecuting city officials even if they potentially violated the INA by following the city ordinance.⁶⁸ He is compelled to investigate violations of federal law unless a directive from the attorney general or the president provides otherwise.⁶⁹ Third, and importantly, he

64. See H.R. 264, 111th Cong. (1st Sess. 2009).

65. *Id.*

66. See *id.*

67. See Memorandum, *supra* note 11, at 3.

68. See Letter from City Attorney Herrera to Deputy Attorney General, *supra* note 41.

69. Cf. Memorandum from Deputy Attorney General of the United States to Selected United States Attorneys Re: Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana (Oct. 19, 2009), available at <http://blogs.usdoj.gov->

weighed in on the San Francisco policy in response to a query by the San Francisco city attorney, who was seeking assurance of non-prosecution of city officials for complying with the juvenile “don’t tell” policy.⁷⁰ The city attorney is compelled to provide the city and its officials with legal information about even remote liability. Finally, knowing that the U.S. attorney’s response would suggest robust federal enforcement, Mayor Newsom’s accountability for refusing to enforce the Supervisors’ policy is lessened. In a year when the mayor is considering seeking statewide office, he likely did not want to assume the political heat of an immigrant-shielding policy, even if those policies are supported by a majority of other elected city officials. Furthermore, a city official waiting until conviction to disseminate information about the suspected immigration status of a juvenile was, in all likelihood, not what the “harboring” crimes section of the INA was meant to deter, and I think it is an open question whether a federal court would interpret the INA to cover that situation. In any case, his response to the city attorney’s query didn’t deter the Board of Supervisors and the notoriety has created some political heat, with some in the jurisdiction calling for Senators Feinstein and Boxer to push to replace him.⁷¹

Shepherd: The city attorney’s March 2010 letter to the U.S. Department of Justice requesting non-prosecution of city employees who choose to follow the law by not reporting undocumented juvenile to federal officials, however, suggests that the mayor wants to enforce the ordinance. It appears that he and the city attorney simply want to be assured that their local enforcement officers do not become subject to prosecution by the U.S. Attorney’s Office.

/blog/archives/192 (“As a general matter, pursuit of [illegal drug enforcement] priorities should not focus federal resources in your States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana.”).

70. See Letter from San Francisco City Attorney Dennis Herrera to United States Attorney Joseph P. Russoniello (Nov. 10, 2009), *available at* <http://www.sfcityattorney.org/-/index.aspx?page=272> (“I ask that the U.S. Attorney’s Office provide an assurance that if the City proceeds to implement this Amendment in accordance with its terms, City law enforcement officers and employees will not be prosecuted for violating federal criminal laws.”); Letter from U.S. Attorney Russoniello to S.F. City Attorney Dennis Herrera (Dec. 3, 2009), *available at* <http://www.sfcityattorney.org/index.aspx?page=272> (“In specific response to the question you posed in your letter, it probably will come as no surprise to you that I have no authority, discretionary or otherwise, to grant amnesty from federal prosecution to anyone who follows the protocol set out in the referenced ordinance.”).

71. See S.F. Board of Supervisors Res. No. 78-09, 2009 Reg. Meeting (Cal. Mar. 17, 2009), *available at* www.sfbos.org/ftp/uploadedfiles/bdsupvrs/resolutions09/r0078-09.pdf (urging President Barack Obama and Senators Barbara Boxer and Dianne Feinstein to appoint a new U.S. attorney for the Northern District of California).

Locke: I don't think he has a choice. The Board had passed the law and ultimately he has the obligation to enforce it.

B. Preemption Analysis: Doctrinal Framework

Shepherd: That takes us to the inescapable question of whether San Francisco's ordinance is preempted either by 8 U.S.C. § 1373 specifically, the INA generally, or by federal exclusivity in the immigration field. But in order for us to engage in this discussion, we should first determine the doctrinal framework courts would employ to evaluate the preemption questions. Next, we would need to examine 8 U.S.C. § 1373's precise scope to more fully analyze whether or not it expressly preempts San Francisco's policy.

Locke: I agree. Determining the doctrinal paradigm is not only important but timely. Within the last few years, federal courts have considered a number of challenges to state and local laws that have been challenged on the grounds that they are preempted under the federal government's exclusive province over immigration regulation.⁷² A brief review of some of the recent cases demonstrates that courts examined them under related but slightly different preemption frameworks,⁷³ making it uncertain what precise analytical test would be applied in examining San Francisco's sanctuary ordinance. One set of cases applied

72. See, e.g., *Chamber of Commerce of U.S. v. Edmonson*, 594 F.3d 742 (10th Cir. 2010) (reviewing preemption challenge to the Oklahoma Taxpayer and Citizen Protection Act, which imposed sanctions to employers for hiring undocumented workers, which is a prohibited act under Immigration Reform and Control Act (IRCA)); *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856, 863 (9th Cir. 2009), *cert. granted*, *Chamber of Commerce of U.S. v. Candelaria*, 130 S. Ct. 3498 (U.S. Jun. 28, 2010) (No. 09-115) (reviewing preemption challenge to the Arizona Legal Workers Act because the law led to an employer's loss of a business license for hiring unauthorized workers); *Villas at Parkside v. City of Farmers Branch*, No. 303-CV-1615, slip op. 2010 WL 1141398 (N.D. Tex.) (March 24, 2010) (reviewing preemption challenge to Ordinance 2952 enacted by the City of Farmers Branch, Texas, which denied undocumented immigrants the ability to enter into a residential lease); *Villas at Parkside Partners v. City of Farmers Branch*, 577 F. Supp. 2d 858, 865-76 (N.D. Tex. 2008) (reviewing preemption challenge to Ordinance 2903 enacted by the city of Farmers Branch, Texas, which barred undocumented immigrants from renting housing); *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 517-33 (M.D. Pa. 2007) (preemption challenge to the City of Hazleton, Pennsylvania's Illegal Immigrant Relief Act, which barred employers from hiring undocumented immigrants and prohibited landlords from renting housing to undocumented immigrants).

73. Compare *Villas at Parkside*, 2010 WL 1141398 at *13 (using three-part analysis set forth in *De Canas v. Bica*, 424 U.S. 351 (1976), which asks whether a state or local law is attempting to regulate immigration law, is regulating a field occupied by Congress or conflicts with federal law) with *Lozano*, 496 F. Supp. 2d at 517-33 (using both express preemption analysis and implied preemption analysis, which asks whether Congress occupied the field or whether the state or local law conflicts with federal law).

an express and implied preemption analysis focused in large part on whether a federal law included a specific "preemption" clause.⁷⁴ Another group of cases utilized the test for preemption established under *De Canas v. Bica*,⁷⁵ which is unique to immigration issues.

Under the traditional preemption analysis, courts generally consider whether a federal law expressly precludes state and local governments from passing such a law. The strongest evidence of Congress's intent to preempt sub-federal law-making is a provision, section or clause within a federal law that explicitly preempts other federal, state or local laws. For instance, recent challenges to laws in Arizona and Oklahoma that prohibited employers from hiring undocumented workers have focused on whether these laws fell within the exception recognized in the Immigration Reform and Control Act's (IRCA) preemption clause.⁷⁶ Moreover, some courts, even after conducting express preemption, have chosen to undertake implied preemption analyses as well. That is, even where courts have found that a law is expressly preempted, they have chosen to analyze whether the state or local law conflicts with the federal law or whether the law is occupying a field that falls within Congress's domain.⁷⁷

A related but slightly different analysis was established in *De Canas*. In that case, the Supreme Court employed a three-part test for determining whether a state or local law is preempted.⁷⁸ First, a court would analyze whether the law is attempting to regulate immigration law.⁷⁹ Second, even if the law does not constitute an impermissible

74. *Chamber of Commerce*, 594 F.3d at 765 (applying express and implied preemption analysis to determine whether the Oklahoma Taxpayer and Citizen Protection Act was preempted under IRCA); *Chicanos Por La Causa*, 558 F.3d at 863 (utilized express and implied preemption analysis to examine whether the Arizona Legal Workers Act was preempted under IRCA); *Lozano*, 496 F. Supp. 2d at 518-21 (employing express and implied preemption analysis to examine whether the employment provision of Hazleton's Illegal Immigrant Relief Act was expressly preempted under federal law).

75. *De Canas*, 424 U.S. 351. See *Villas at Parkside*, 2010 WL 1141398 at *13 (employing the *De Canas* framework to analyze whether Farmers Branch Ordinance 2952 was preempted); *Villas at Parkside Partners*, 577 F. Supp. 2d at 867 (utilizing the *De Canas* three-part test to determine whether Farmers Branch Ordinance 2903 was preempted).

76. See, e.g., *Chamber*, 594 F.3d at 765; *Chicanos Por La Causa*, 558 F.3d at 863. 8 U.S.C. § 1324a(h)(2) provides that the "provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens."

77. See, e.g., *Chamber of Commerce*, 594 F.3d at 765; *Chicanos Por La Causa*, 558 F.3d at 863; *Lozano*, 496 F. Supp. 2d at 518-21.

78. *De Canas*, 424 U.S. at 354-62.

79. *Id.* at 354.

immigration regulation, it might otherwise still be regarded as preempted by implication if it regulates a field occupied by Congress.⁸⁰ Third, a state or local law is preempted if it conflicts with federal law.⁸¹ The first two parts of the *De Canas* test are unique to immigration law or have had different application in the immigration field. Because of the oft-repeated, but very general, proposition that “[p]ower to regulate immigration is unquestionably exclusively a federal power,”⁸² the first part of the test can invalidate some state regulation even in the absence of federal legislative or executive action. The second part of the test is not unique to the immigration field, but because aspects of immigration are considered exclusively federal, field preemption appears to operate more expansively in immigration law than it does in other legislative areas, such as criminal law, where co-regulation between federal and state authorities has long-been acknowledged. The last test of the tripartite analysis is uncontroversial and not unique to the immigration field. As per the Constitution’s Supremacy Clause,⁸³ any properly enacted federal law overrides a conflicting state law, both within and outside of the immigration context.⁸⁴

Thus, in this case, assuming the city of San Francisco is sued on preemption grounds, the question that emerges is whether 8 U.S.C. § 1373 expressly preempts the ordinance or, even if no such express preemption had occurred, whether the ordinance is nevertheless preempted by implication because it either intrudes or conflicts with the exclusive federal power over immigration.

Shepherd: Before we analyze the ordinance, however, it is necessary to clarify precisely the scope of what 8 U.S.C. § 1373 prohibits in order to analyze whether or not San Francisco’s ordinance as a whole or its particular provisions contravene federal law. From a broad perspective, the text of 8 U.S.C. § 1373 deals with “[c]ommunication between [g]overnment agencies and the Immigration and Naturalization Service.”⁸⁵ The plain language of 8 U.S.C. § 1373(a) proscribes federal, state and local entities and officials from doing at least two general acts. First, it prohibits them from preventing “any entity or official” from sending information about a person’s immigration status to the “Immigration and Naturalization Service,” which would now be ICE.⁸⁶

80. *Id.* at 357.

81. *Id.* at 361.

82. *Id.* at 354.

83. See U.S. CONST., art. VI, cl. 2.

84. See *Gibbons v. Ogden*, 22 U.S. 1, 82 (1824) (stating that the Supremacy Clause strikes down any state or local law that “interfere[s] with or [is] contrary to” federal law).

85. 8 U.S.C. § 1373 (West 2010).

86. 8 U.S.C. § 1373(a).

Second, it proscribes any government entity or official from prohibiting another "entity or official" from receiving information about an individual's immigration information from ICE.⁸⁷ 8 U.S.C. § 1373(b) bans any "person or agency" from prohibiting any federal, state or local government entity from sending or receiving specific immigration information to or from ICE.⁸⁸

It also adds two additional proscriptions: the section prohibits any person or agency from preventing federal, state or local government entities from maintaining information or exchanging information with other governmental entities.⁸⁹ Summed up in simpler terms, 8 U.S.C. § 1373 prohibits government entities, agencies, officials and persons from preventing the voluntary reporting of a person's immigration status by any governmental entity, officials or employees to federal immigration authority.⁹⁰

Locke: That is correct. Let us then examine each of the constituent parts of the San Francisco sanctuary ordinance to assess whether it is expressly preempted by 8 U.S.C. § 1373 or if it is preempted by implication. At the outset, 8 U.S.C. § 1373 does not contain a provision that expressly preempts any federal, state or local law.⁹¹ Unlike the IRCA,⁹² which, as courts have noted, contains an explicit preemption provision,⁹³ 8 U.S.C. § 1373 fails to include such an express provision.

Shepherd: That is true although there is reason to believe that the express preemption analysis would not end there. Both subsections (a) and (b) of 8 U.S.C. § 1373 include the relevant language, "[n]otwithstanding any other provision of Federal, State, or local law."⁹⁴ Although the language is distinguishable from IRCA's express preemption provision that that has been at issue in the Arizona and Oklahoma laws, as Professor Huyen Pham argued previously, these clauses arguably demonstrate Congress's intent to expressly preempt similar sub-federal laws.⁹⁵

Locke: That leads us then to an analysis of the more specific provisions of the ordinance. It is clear to me that the declaration of San Francisco as a "City of Refuge" is not expressly preempted by 8 U.S.C.

87. *Id.*

88. 8 U.S.C. § 1373(b).

89. 8 U.S.C. § 1373(b)(2), (3).

90. See Pham, *supra* note 56.

91. See 8 U.S.C. § 1373.

92. See 8 U.S.C. § 1324a.

93. *Chamber of Commerce*, 594 F.3d at 765; *Chicanos Por La Causa*, 558 F.3d at 863 (explaining that IRCA contains an explicit preemption provision).

94. See 8 U.S.C. § 1373(a); see 8 U.S.C. § 1373(b).

95. See Pham, *supra* note 56, at 1391-92.

§ 1373. Nor does this provision suffer from conflict and field preemption concerns. Indeed, in my view, this provision lacks any operative, legal force. Any city should be free to identify itself and stake-out symbolic positions.

Shepherd: I agree that the general statement about being a “City of Refuge” is neither expressly preempted nor preempted by implication. As a practical matter, however, I wonder if the declaration even accomplishes anything or actually has the impact the city believes it will have. Do immigrants, especially undocumented ones, distinguish between local, state, and federal authorities such that they would be aware of and take advantage of a sanctuary city?⁹⁶

Locke: The empirical question you pose is an important one. When Mayor Newsom changed the policy to allow immigrant juveniles to be reported, many immigrants and immigrant-rights advocates protested against him.⁹⁷ That suggests to me that immigrants do recognize the significance of the sanctuary policy.⁹⁸ Although I wish I could prove that identifying provisions such as San Francisco’s have real practical effects, I cannot. Mayor Newsom, along with the Board of Supervisors, did fund and implement a significant awareness campaign with public money to inform undocumented persons and their families about the city’s policies.⁹⁹ I can only assume that the publicity campaign had some effect.

Perhaps more importantly then, I am convinced that section 12H.2, restricting the use of city funds to enforce immigration law, is similarly consistent with federal law. If the irreducible sovereignty of states the Supreme Court discussed in federalism jurisprudence means anything,¹⁰⁰ it must at least mean that states, and sub-divisions thereof, can decide how to distribute their revenues for the betterment of those within their

96. See Orde Kittrie, *Federalism, Deportation, and Crime Victims Afraid to Call the Police*, 91 IOWA L. REV. 1449 (2006).

97. See Marisa Lagos, *Mission District Rally for Immigrant Rights*, S.F. CHRON., Feb. 26, 2009, at B3, available at http://articles.sfgate.com/2009-02-26/bay-area/17188791_1_immigration-raids-immigrant-families-jordan-school; See also Marisa Lagos & John Coté, *New Sanctuary Proposal on Protecting Youths*, S.F. CHRON., Aug. 18, 2009, at A1, available at http://articles.sfgate.com/2009-08-18/news/-17177061_1_immigration-sanctuary-felony.

98. See Marisa Lagos, *Protesting City’s Treatment of Immigrants*, S.F. CHRON., Feb. 26, 2009, at B3; See also Marisa Lagos & John Cote, *New Effort to Shield Youths*, S.F. CHRON., Aug. 18, 2009, at A1.

99. MAYOR OF SAN FRANCISCO, *supra* note 5, at 210 (detailing the public awareness campaign to inform residents of San Francisco’s refuge status).

100. See, e.g., *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring) (“The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other.”).

jurisdictions. Dictating the way in which states and localities must use their resources or prioritize their law-enforcement functions turns them into arms of the federal government, in a manner frowned upon by the Supreme Court.¹⁰¹ Because forcing sub-federal governments to expend resources to apprehend federal law violators is not a trivial or ministerial task, I can't imagine the "no funds or resources" provisions being invalidated.

Shepherd: I agree that nothing in 8 U.S.C. § 1373 may be viewed to expressly preempt the ordinance's proscription of the use of its local revenues to assist the federal government in enforcing the civil provisions of immigration law. I also do not think that this provision is preempted by implication because I view the prohibition of local funds for enforcement purposes to be different from 8 U.S.C. § 1373's broad purpose of enhancing communication between the federal and state and local governments and 8 U.S.C. § 1373's specific proscription against barring employees from voluntarily reporting known unauthorized immigration status to federal immigration authorities.¹⁰²

The provisions of the city's ordinance that raise both express and implied preemption concerns deal with the proscriptions against "gathering" or "receiving information" and "disseminating information" regarding the immigration status of any individual.

To begin, the "no gathering" portion of San Francisco's ordinance is arguably expressly preempted by federal law. As explained previously, 8 U.S.C. § 1373 explicitly prohibits the act of preventing a government entity, official, agency or person from "receiving" information from ICE. San Francisco's ordinance does prohibit the receipt of information and is thus prohibited by the express language of 8 U.S.C. § 1373.

Locke: I disagree. There is a difference between the act of "gathering" or affirmatively obtaining information from the more passive act of "receiving." The "no gathering" provision of San Francisco's ordinance proscribes city employees from acquiring information through some kind of an affirmative inquiry about her immigration status. It is what has been referred to as a "don't ask" provision. By contrast, the language of 8 U.S.C. § 1373 suggests that Congress sought to bar the proscription against the more passive conduct of simply receiving

101. See *Printz v. United States*, 521 U.S. 898 (1997) (striking down provisions of the federal Brady Handgun Violence Prevention Act which required local law enforcement officers to conduct background checks and other related tasks on prospective gun buyers); See also *New York v. United States*, 505 U.S. 144 (1992) (striking down "take title" provisions of the Federal Low Level Radioactive Waste Policy Act of 1985 which required states to assume liability for waste generated within their borders and regulate according to Congress' instructions).

102. See *Pham*, *supra* note 56, at 1393-94.

information. Additionally, the text of the statute explains from whom the receipt of information should not be prohibited: federal officials. That is, 8 U.S.C. § 1373 bars state and local governments from prohibiting the receipt of information *from* federal officials about a persons immigration status. There is no express conflict with 8 U.S.C. § 1373.

Indeed, Congress, in passing 8 U.S.C. § 1373, opted *not to require* state and local governments to ask for an individual's immigration status or mandate them to report such status to immigration officials. Congress was well aware of the sanctuary movement when it passed this law yet it chose not to mandate the gathering or reporting of information.¹⁰³ Thus, even if San Francisco's ordinance provided that city officials may not "ask" or "inquire" about a person's immigration status, it would still not be expressly preempted. Importantly, Congress cannot constitutionally command state and local government entities, officials and employees to do so.¹⁰⁴

Congress may of course attempt to enact spending provisions, which could practically compel sub-federal reporting by making non-cooperation too financially detrimental,¹⁰⁵ but it has thus far not successfully passed any such legislation.

Shepherd: In my view, under a statutory construction of the plain language of the law, 8 U.S.C. § 1373's prohibition against proscribing "receiving" information would encompass the "no gathering" provision of the law. Even if there is no express preemption violation, there is the strong argument to be made that the law is preempted by implication because prohibiting employees from "not asking" about a person's immigration status would conflict with the 8 U.S.C. § 1373's purpose of promoting communication between federal and state and local governments.

In similar textual fashion, San Francisco's provision requiring non-dissemination of immigration information of juveniles who are arrested for felony crimes is also expressly preempted by 8 U.S.C. § 1373. There is no escaping the fact that failing to report such information to federal officials directly contravenes what 8 U.S.C. § 1373 proscribes: prohibiting state and local governments from quashing voluntarily reporting of potential immigration violations to federal immigration

103. See Pham, *supra* note 56, at 1393-94 (explaining that Congress had intended to preempt sanctuary laws when it passed laws in 1996 that were subsequently codified in 8 U.S.C. § 1373).

104. See *Printz*, 521 U.S. at 935 (holding that the federal government may not compel states and local governments to enforce a federal program).

105. See, e.g., *South Dakota v. Dole*, 483 U.S. 203 (1987) (upholding federal scheme for highway fund allocations depending on enactment of state laws regulating drinking age).

authorities. This “don’t tell” portion of the San Francisco ordinance is essentially akin to the executive order struck down by the Second Circuit in *City of New York v. United States*.¹⁰⁶ If you recall, that executive order prohibited New York City employees from voluntarily reporting immigration information to federal officials.¹⁰⁷ In ruling against the city’s Tenth Amendment claim, the court held that the city did not have the “untrammelled right to forbid all voluntary cooperation by state or local officials with particular federal programs.”¹⁰⁸ It is difficult to determine how San Francisco’s non-dissemination policy can be distinguished from the ones at issue in *New York*.

Locke: I concede that the “don’t tell” provisions are problematic. Here, the issue as you point out is one of explicit discord with 8 U.S.C. § 1373, which potentially bars the very prohibition the city purports to institute. One potential factor distinguishing San Francisco’s “don’t tell” policy from the one held preempted in *New York* is the fact that the San Francisco provisions only require non-dissemination for arrested juveniles prior to a conviction.¹⁰⁹ This may change the calculus. In *New York*, the court noted that the city failed to establish how its general policy of non-disclosure of immigration information of non-citizens only to the federal government (and not other city employees) could survive federalism principles. In the case of San Francisco’s ordinance, the sanctuary law’s specific provision with respect to non-disclosure of undocumented juveniles’ immigration status to federal officials is consistent with restrictions on the release of various information concerning juveniles to other public officials. California state law, for instance, limits the dissemination of information about those under the age of majority in criminal proceedings.¹¹⁰ Additionally, federal immigration law itself treats noncitizens under the age of majority differently from adults, manifesting Congressional desire to variegated rules based on age.¹¹¹ On this point, even the *New York* court recognized that its preemption of the city’s non-dissemination policy was subject to

106. 179 F.3d 29 (2d Cir. 1999).

107. *Id.* at 30.

108. *Id.* at 35.

109. S.F., CAL., ADMIN. CODE § 12H.2-1 (2009).

110. See CAL. WELF. & INST. CODE §§ 827-828 (requiring that juvenile court records be kept confidential but authorizing several categories of officials to inspect the juvenile’s file); see also Memorandum, *supra* note 11.

111. See, e.g., 8 U.S.C. § 1182(a)(2)(A)(I) (West 2010) (exception to criminal inadmissibility grounds for crimes committed by aliens under 18 years of age); 8 U.S.C. § 1227(a)(1)(A) (West 2010) (deportability provision incorporating inadmissibility grounds).

exceptions.¹¹² As the Second Circuit noted, the city of New York facially challenged the federal law, which did not provide the court with an opportunity to determine if specific applications—for example, to juveniles—may withstand preemption.¹¹³ If we understand San Francisco's non-dissemination of information regarding the suspected immigration status of juveniles to be part of a general state and local scheme to preserve confidentiality in non-adult criminal proceedings, the San Francisco Supervisors' policy does not run afoul of *New York*.

Shepherd: The exceptions outlined by the Second Circuit, however, were fairly narrow in scope. In a case involving San Francisco's ordinance, the city would have to present evidence of how its undocumented juvenile non-reporting policy is "integral to the operation of city government."¹¹⁴ Even the San Francisco city attorney acknowledged the difficulty of saving the new ordinance under that exception.¹¹⁵

Locke: I think that on this point, the currently pending case regarding the viability of Arizona's Legal Arizona Workers Act (LAWA)¹¹⁶ is of potential significance. That case, dealing with state law that imposes penalties on businesses that hire undocumented workers, is currently on the Court's docket, awaiting argument and a decision.¹¹⁷ The Ninth Circuit opinion held LAWA non-preempted by federal laws that also impose penalties on state law, and preempt sub-federal regulation.¹¹⁸ However, the Ninth Circuit was willing to find that Arizona's enactment fit into a narrow exception to the federal law.¹¹⁹ So too, here, it is possible that a court would be willing to read the exceptions read into §

112. *City of New York*, 179 F.3d at 36 ("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. Preserving confidentiality may in turn require that state and local governments regulate the use of such information by their employees.").

113. *Id.* at 35.

114. *Id.* at 37. The city of New York was unable to meet this test when it defended its policy. *Id.*

115. Memorandum, *supra* note 11, at 4-5.

116. See *Chicanos Por La Causa*, 558 F.3d at 863 (holding that the Legal Arizona Workers Act was not expressly preempted by IRCA because the law fell within the licensing exception to IRCA).

117. *Candelaria*, 130 S. Ct. 3498.

118. Immigration Reform and Control Act of 1986 § 101(a)(1), 8 U.S.C. § 1324a(h)(2) (West 1986) ("The provisions of this section preempt any State or Local law imposing civil or criminal sanctions (other than through licensing or similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.").

119. *Chicanos Por La Causa*, 558 F.3d at 864.

1373 by *New York* to save San Francisco's recently enacted non-dissemination policy.

Shepherd: The Tenth Circuit, however, reached the opposite conclusion in a recent case.¹²⁰ There, the court held that an Oklahoma state law that subjected employers to various penalties for employing an unauthorized noncitizen imposed "sanctions" on employers in violation of IRCA's express terms.¹²¹ This textualist reading of the statute that led to a preemptive strike of the state law supports a similar preemption approach to San Francisco's ordinance.

Moreover, I'm skeptical of the analogy between the business penalty laws that implicate IRCA's express preemption provision and "don't tell" policies such as San Francisco's. However, I do agree with the general point that Supreme Court adjudication of LAVA in the coming term will substantially impact preemption analysis in federal courts.

In any case, up until now, no one has brought a direct challenge to the city's ordinance in its current form. If such a lawsuit is brought, the city would have to brace itself for an uphill legal battle that could have an impact on the other cities that have similar policies. The U.S. Attorney Russinello's threatened federal prosecution of city officials adhering to the Supervisors' policy may bring about this issue, although given the Mayor's non-enforcement of the policy, it is not clear that the U.S. Attorney will have any one to prosecute in the near future.

Locke: In sum, we disagree on two points regarding whether 8 U.S.C. § 1373 expressly preempts San Francisco's sanctuary ordinance. You contend that the text of 8 U.S.C. § 1373 preempts both San Francisco's proscription against the receiving of immigration status information as well as the dissemination of such information. I, on the other hand, argue that neither one is preempted because San Francisco's law prevents gathering or inquiring individuals about their immigration status, which in my view is not expressly prohibited by 8 U.S.C. § 1373. Additionally, San Francisco's non-reporting provision is covered by the exceptions noted in *New York* and will thus not be struck down on preemption grounds.

120. *Chamber of Commerce*, 594 F.3d at 765.

121. *Id.*

III. SUB-FEDERAL IMMIGRATION REGULATION AND PREEMPTION DOCTRINE

A. Local Matters Versus Local Immigration Regulation

Shepherd: Thus far, we've only focused on the preemption issues between a specific federal provision and the city's policies. But, there are broader concerns with San Francisco's—and any other city's—sanctuary ordinances. In particular, San Francisco's ordinance is part of the increasing number of sub-federal laws that either intend to control immigration law or have the effect of regulating immigration law. Aren't you concerned about the eventual creation of what other commentators have called the “patchwork” of immigration regulation and enforcement across the country? The Supreme Court has long recognized the need to have uniformity in immigration regulation, which can best be accomplished by maintaining the federal government's exclusive control over immigration matters.¹²² Sanctuary ordinances like San Francisco's inject variation and incongruity into the field.

Locke: Generally, I think the “patchwork” argument proves too much. Plenty of legislative areas vary between localities and states. Enforcement officials, private businesses, and individuals have been able to navigate that variegation in areas such as criminal law, taxation, environmental standards, and family law. Undoubtedly it causes inefficiencies, but our Constitution doesn't compel wise or efficient public policy.

Shepherd: It doesn't, but with regard to immigration regulation and enforcement, the Supreme Court has consistently held that the federal government must have control over immigration law. As the Supreme Court explained in *Takahashi v. Fish and Game Commission*,¹²³ states and local governments “can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States.”¹²⁴

Yet, states and local governments today continue to encroach on this well-established principle by passing laws that attempt to regulate immigration and, as a result, facilitate the fragmentation of immigration regulation. On one side of the spectrum are laws that are intended to exclude undocumented immigrants from a state or local domain. The most recent example of this is Arizona's law, SB 1070, that allows local police officers to identify and detain persons who they reasonably

122. See *Chae Chan Ping*, 130 U.S. at 581.

123. 334 U.S. 410 (1948).

124. See *Takahashi*, 334 U.S. at 419.

suspect to be present in the United States unlawfully or without authorized immigration status.¹²⁵ Another law, also from Arizona, further underscores the trend in subfederal immigration regulation. LAWA, which was passed in 2007, punished employers who knowingly hired unauthorized workers by revoking their business licenses.¹²⁶ In so doing, Arizona imposed a higher penalty than the federal IRCA compels on employers who employ undocumented immigrants.¹²⁷ Imposing greater penalties than are required under IRCA would undercut IRCA's goal of having a uniform and consistent set of laws governing the unlawful hiring of unauthorized workers.¹²⁸ Still another example is a local ordinance passed in the City of Farmers Branch, Texas, that restricts undocumented noncitizens from renting residential property.¹²⁹

On the other side of the spectrum are laws that are deemed to be more inclusive of noncitizens, regardless of their immigration status. San Francisco's sanctuary ordinance clearly falls under this category. So does San Francisco's prior policy of repatriating noncitizen minors to their home countries.¹³⁰ The city had the understandably humanitarian concern of ensuring that the noncitizen minors would not be harshly treated by federal authorities and permanently barred from return to the country. Yet, allowing local municipalities to engage in such conduct could open the door to inconsistent removal actions. Critically, determining who should be removed from the United States is a core function of the federal government.

Locke: Your examples actually persuade me that non-uniformity is non-problematic. They are fundamentally different situations that require different analysis.

125. *United States v. Arizona*, No. 10-1413, 2010 U.S. Dist. WL 2926157 (D. Ariz. Jul. 28, 2010) (temporarily enjoining key provisions of Arizona's law); Arizona Sen. Bill 1070, available at <http://www.azleg.gov/legtext/49leg/2r-bills/sb1070h.pdf>; see also Randal C. Archibold, *Arizona Enacts Stringent Law on Immigration*, N.Y. TIMES, at A1, Apr. 23, 2010.

126. ARIZ. REV. STAT. §§ 23-211 to 23-216 (2007).

127. 8 U.S.C. § 1324 (West 2010).

128. See Peter Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57, 88-89 (explaining that *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001) may be used to argue that the creation of additional sanctions may be deemed to undermine federal regulatory goals of IRCA).

129. FARMERS BRANCH, TEX., ORDINANCE 2952 (2008), available at <http://www.ci.farmers-branch.tx.us/sites/default/files/Ordinance%20No%202952.pdf> (requiring proof of lawful immigration status prior to entering a residential lease).

130. See Heather Knight, *S.F. Sanctuary Policy Shielded Up to 185 Youths*, S.F. CHRON., Apr. 3, 2009, at A1, available at http://articles.sfgate.com/2009-04-03/news/17194960_1_drug-charges-juvenile-probation-system-youths.

I agree with you that the city's prior program of repatriating undocumented felonious juveniles is unconstitutional because it invades federal exclusivity over border regulation. Although I support the city's reasoning for maintaining the program, the act of physically removing the individuals and avoiding federal procedures is naked control over entry and exit¹³¹ and possibly a violation of federal immigration and criminal law.¹³² And, the city's repatriation without removal hearings and orders has a clear effect on the repatriated juveniles' future prospects for re-entry into the United States.¹³³ In this way, the city of San Francisco directly (and negatively) burdens other cities and states, and the national polity as a whole, by obscuring critical factors necessary for immigration control. Thus, in this highly unusual circumstance—where a city is actually removing individuals out of the country—the *De Canas* prohibition of sub-federal laws that “regulate immigration” invalidates the repatriation policy. Unless we accept Professor Peter Spiro's provocative thesis that states—and, in this case, municipalities—have indeed become cognizable demi-sovereignities,¹³⁴ the repatriation program had to be stopped. Even though we have taken steps towards increased direct sub-federal governmental engagement with foreign and international entities in areas such as environmental regulation,¹³⁵ we are not at the point—and neither should we be—when sub-federal entities can engage in admission and deportation on their own terms.

But, I read LAWA to be of a different ilk than the repatriation policy. The Ninth Circuit noted when it upheld LAWA, that IRCA only

131. See *De Canas*, 424 U.S. at 356-57 (setting forth a preemption framework for state immigration laws, wherein the first category of invalid state laws regulate immigration as such).

132. See 8 U.S.C. § 1342(a)(1)(A) (West 2010) (criminalizing concealing and transporting persons known to be unlawfully present).

133. 8 U.S.C. § 212(a)(9)(A) (repealed 1952) (containing time bars to admissibility for arriving aliens with prior order of removal).

134. Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignities*, 35 VA J. INT'L L. 121 (1995).

135. See, e.g., Cindy Holden, *Ca. Gov. Schwarznegger Urges World Leaders to Embrace Subnational Leadership in Climate Change Fight*, CAL. NEWSWIRE, Dec. 16, 2009, available at http://californianewswire.com/2009/12/16/CNW6312_205703.php; see also *Gently Does It: Mexico and America*, THE ECONOMIST, Dec. 3, 2009 (“One reason is that relations have grown so intense and complex that they are no longer managed only through the respective governments. Arturo Sarukhán, Mexico's ambassador in Washington, is pleased by the multiplication of actors in the relationship: ‘mayors, governors, universities, chambers of commerce, and not just the foreign ministry.’ Andrew Selee, director of the Mexico Institute at Washington's Woodrow Wilson International Centre for Scholars, says it has become commonplace for officials in nearly every federal agency to pick up the phone and chat directly to their Mexican counterparts.”).

preempts states and local laws that impose civil or criminal sanctions.¹³⁶ In this case, LAWA compels business license revocation, which IRCA itself expressly excluded from what states and local governments may not do. LAWA does not directly deal with issues of admission or removal. A court can render a decision based on statutory interpretation of the express terms of the law, in a context wherein no individual is allowed entry or exit from the United States.

The harder cases are ones like the recently preliminary enjoined Arizona law provisions that give broad powers to local law enforcement regarding the apprehension and prosecution of noncitizens suspected of being unlawfully present,¹³⁷ as well as the Farmer's Branch local housing ordinance. But even with these ordinances, my concern is not with the non-uniformity that they create; rather it is that they likely violate other constitutional dictates meant to protect individual liberties and maintain equality.¹³⁸

Shepherd: I grant that one could try to distinguish all of these situations. Yet, the situations we discussed—city repatriation, LAWA, rental ban and enhanced local police powers—are all likely to have some attenuated effect on entry and exit and terms and conditions of a noncitizen's residence in the United States.

Locke: I agree that sanctuary policies and non-rental policies have an attenuated effect on immigration. Despite this relationship, however, I think we would agree that there is a qualitative difference between indirectly or marginally influencing decisions to remain in or leave the country and directly admitting or removing individuals. If we do not recognize a legally cognizable line between those positions, then literally every sub-federal policy that even minimally affects or includes non-citizens is invalid.

Shepherd: *De Canas* addresses precisely this concern. That case recognized that of course, not every law that affects non-citizens constitutes immigration regulation.¹³⁹ In setting up the three tests, however, *De Canas* takes a strong preemptive strike against a sub-federal policy that has been strategically labeled a "local law" that is purported to be historically based on traditional local police powers but is in fact regulating immigration law.¹⁴⁰ Even in the federalism context outside of

136. *Chicanos Por La Causa*, 558 F.3d at 864, *cert. granted*, 130 S. Ct 3498.

137. *United States v. Arizona*, No. 10-1413, 2010 U.S. Dist. WL 2926157 at *9-10, *19-20 (D. Ariz. Jul. 28, 2010).

138. See *infra* text accompanying notes 163-178 (arguing that due process and equal protection paradigms should be applied to the immigrant and immigration-related context).

139. 424 U.S. at 355.

140. *Id.* at 361 n.9.

immigration law, the Supreme Court has recognized the near impossibility of separating the “traditional” areas of local governance from areas of federal control.¹⁴¹

Locke: It is difficult to cleanly separate federal and sub-federal provinces, and further, decisions regarding the viability of laws should not hinge on how the law is labeled. But, my point is that from the perspective of unanimity—or, as you put it, avoiding a “patchwork”—I remain convinced that the only persuasive claim to unanimity adheres to sub-federal policies, like San Francisco’s abandoned repatriation program, that actually affect entry and removal. Beyond that context—when we’re discussing laws that may affect non-citizens—I question how different the immigration context is from other areas of concurrent federal and sub-federal regulation that are highly variegated.

Shepherd: Any attempt to cabin acceptable immigration preemption claims to “entry/exit” situations is similarly not easy to achieve. True, non-cooperation and non-dissemination policies do not physically transport persons in or out of the country, but they nevertheless affect the conditions in which a noncitizen can reside in the United States. As *Takahashi* teaches, domestic laws that affect how, where, and under what circumstances a non-citizen may reside within a sub-federal jurisdiction should also be considered immigration regulations.¹⁴² *De Canas* may have explained that not every law that affects noncitizens should constitute immigration regulation,¹⁴³ but in my view, sanctuary policies come close to blurring the line between local governance of local matters and local interference with immigration regulation. Any measure—whether inclusionary or exclusionary—could have some marginal effect on attracting or deterring immigration. After LAWA and SB 1070 went into effect, for instance, many reported the out-migration of noncitizens from Arizona.¹⁴⁴ That result is not at all surprising, given that then-Governor Napolitano didn’t shy away from noting that the purpose of LAWA was to “take strong action to discourage the further flow of illegal immigration through our state.”¹⁴⁵

141. See, e.g., *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (abandoning the categorical protection of state autonomy developed in *Nat’l League of Cities v. Usery*, 426 U.S. 833 (1976), which argued that areas of “traditional” state control were immune from federal regulation under the commerce clause).

142. 334 U.S. at 422 (invalidating a law that prohibited those persons who were ineligible for citizenship from obtaining a fishing license).

143. 424 U.S. at 355.

144. Randal C. Archibold, *Arizona Seeing Signs of Flight by Immigrants*, N.Y. TIMES, Feb. 12, 2008, at A13.

145. Press Release, *Governor Signs Employer Sanctions Bill* (July 2, 2007), available at <http://www.formi9.com/news/ArizonaBillSigned.pdf>.

Locke: Undoubtedly, under plausible interpretations of *De Canas* and *Takahashi*, LAWA could be found unconstitutional if a court gives weight to Napolitano's statement. But, to do so would be to concede that any state and local measure affecting immigrants should be invalidated as encouraging or discouraging undocumented migration. And, it begs the question whether the constitutional viability of any sub-federal law should turn on whether the enacting executive was foolhardy enough to detail a desire to control immigration flows.

More broadly, I think that the *Takahashi/De Canas* definitional problem you raise is clear evidence that the Supreme Court itself has woefully under-theorized the definition of "immigration regulation." Early cases establishing broad immigration authority for the federal government concentrated on issues of entry and removal.¹⁴⁶ Later cases like *Takahashi* and *Graham v. Richardson*¹⁴⁷ (if we understand *Graham* to be an immigration case rather than a welfare case) elasticized the definition of "immigration" rather than focusing on entry and removal.

Shepherd: This definition may be elastic but it need not be ambiguous. A line must be drawn between federal and state/local laws concerning immigration regulation. And this may be accomplished under either express, conflict, or field preemption approaches. Under either an analytic framework that relies on federal exclusivity in immigration matters, or one that maintains a presumption against preemption on immigration matters, the federal government could accomplish similar goals. Under the former, courts would invalidate noncooperation and other sanctuary policies even in the absence of federal action. In the latter, courts could still invalidate sanctuary policies but only if Congress enacted specific legislation. Either way, courts would get to the same result.

Locke: Yes, courts may reach the same conclusion but I prefer that courts rely more on the express preemption framework to strike down laws that are preempted and utilize less the implied preemption approach.

The advantage I see in a doctrine that focuses solely on express preemption is that it holds open the possibility of localities with high immigrant populations—for example, San Francisco, Los Angeles, and New York—making life easier for undocumented persons and their families as long as Congress doesn't act. More generally, I see great

146. See *Chae Chan Ping*, 130 U.S. at 589 (upholding Chinese Exclusion Act and barring re-entry of Chinese citizen); See also *Fong Yue Ting v. United States*, 149 U.S. 698 (1893) (upholding removal procedures of Chinese Exclusion Act).

147. 403 U.S. 365 (1971).

value in forcing Congress to react to sub-federal lawmaking.¹⁴⁸ First, sanctuary and other non-cooperation ordinances may send a clear message to local law enforcement officials of the prevailing majoritarian will of their communities;¹⁴⁹ those officials may not be legally prevented from voluntary disclosure, but the city can announce to them that such reporting is frowned upon by the community they serve. Second, preserving the ability of sub-federal entities to enact a variety of immigrant-related legislation pressures the federal government during its debate of comprehensive immigration overhaul to engage the various sub-federal policies.¹⁵⁰ As Professor Heather Gerken notes, in engaging sub-federal policies, Congress will either have to expressly override, tolerate, or adopt the sub-federal policy preference.¹⁵¹ If we start from the premise that the federal government already has the constitutional power to enact some of the most restrictive of the current array of sub-federal policies—and, in fact, has done so in the past—then some progress can come out of possibilities of Congress potentially accounting for the benefits of less antagonistic, or openly inclusive, sub-federal policies. Remember that it was then-Governor of Arizona, now-Department of Homeland Security Secretary, Napolitano who signed LAWA into law, based significantly on this legislation-forcing principle. She stated, “[b]ecause of Congress’ failure to act, states like Arizona have no choice but to take action. . . . I renew my call to Congress to enact comprehensive immigration reform legislation.”¹⁵²

Importantly, I want to clarify that I’m not wedded to a court ruling that LAWA is non-preempted. Rather, I am more concerned with the method of adjudication and the understanding of the case within the *De Canas* framework. As a judicial approach, I am more at peace when courts engage in statutory interpretation to determine actual conflict between state and federal law, than I am when courts defer to nebulous notions of federal exclusivity in the federal plenary power framework to reach their decision.¹⁵³ Focusing solely on express preemption forces

148. See, e.g., Jessica Bulman-Pozen & Heather Gerken, *Uncooperative Federalism*, 118 YALE L. J. 1256, 1263 (2009) (developing an account of the ways in which states “playing the role of federal servant can also resist federal mandates, the ways in which integration—and not just autonomy—can empower states to challenge federal authority”).

149. See generally, Pham, *supra* note 56, at 1398-99.

150. See Bulman-Pozen & Gerken, *supra* note 146, at 1287.

151. *Id.*

152. Signing Statement and Letter from Janet Napolitano, Governor of Arizona, to Jim Weirs, Speaker of the House, Arizona House of Representatives, (July 2, 2007), available at www.formi9.com/news/ArizonaBillSigned.pdf.

153. See Jack Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 SUP. CT. REV. 175, 208 (2000); See also Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL

positive lawmaking at the federal level, ensuring that at least one policymaking body has considered the benefits and burdens of any particular course of action.

Concentrating on narrowly proscribed conflicts between laws also has the benefit of helping prioritize legislative goals. Presumably, those sub-federal enactments that truly endanger the functioning of the several states as one nation will receive legislative priority.

B. Inclusionary and Exclusionary Measures

Shepherd: What you are suggesting, however, is a paradigm shift in federal preemption jurisprudence. As Professor Michael Olivas noted, the legal tendency to preempt state and local legislation that attempt to legislate immigration or conflict with federal immigration law and policy promotes uniformity across the borders.¹⁵⁴ As I explained earlier, there is tremendous value to having consistency in the ways in which immigrants are not only admitted and removed but also treated within the U.S. polity. Otherwise, we would create zones or pockets in the United States where some cities or even states are anti-immigrants and others that are more welcoming.¹⁵⁵

Locke: Yes, that is a possible consequence of the shift I am proposing. First, I am not certain why defined zones or pockets are necessarily undesirable. And even if we agreed that such an outcome was normatively undesirable, other constitutional and statutory restrictions may forestall significant deviations between different regions. Second, and perhaps more fundamentally, I simply don't think we can hold on to broad notions of the federal exclusivity principle any longer. I know Professor Michael Olivas has persuasively argued that it's the "devil we know," and preferable to other available modes of adjudicating these sub-federal laws.¹⁵⁶ However, my own view is that the doctrine is ill-

L. REV. 767, 771-73 (1994) (arguing that the Supremacy Clause only covers express and conflict preemption and that beyond those parameters, preemption becomes an exercise of judicial discretion).

154. Michael A. Olivas, *Immigration-Related State and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement*, 2007 U. CHI. LEGAL F. 27, 53 (2007) ("We certainly do not want and cannot tolerate hundreds [of immigration policies], allowing liberal Santa Fe, New Mexico to carve out a 'sanctuary' while Hazelton, Pennsylvania or Norcross, Georgia get to run every bilingual speaker or dark-complexioned person out of town after sundown."); Michael A. Olivas, *Preempting Preemption: Foreign Affairs, State Rights, and Alienage Classifications*, 35 VA. J. INT'L L. 217, 236 (1994) ("[P]reemption, for all its detriments and foolish inconsistencies, is the devil we know. A postmodern state cannot coexist with medieval constructs.").

155. See Olivas, *supra* note 152, at 53; Olivas, *supra* note 152, at 236.

156. Olivas, *Preempting Preemption*, *supra* note 152, at 236.

fitted to contemporary realities of the interaction between federal and sub-federal entities with regards to immigrants.¹⁵⁷ Preemption based on federal exclusivity may be the devil we know, but familiarity doesn't make it any less of a devil. In recent years, preemption has been the sword wielded just as much by immigration restrictionists to challenge immigrant-friendly laws, as it has been by immigrant advocates to challenge unfriendly ones. Doctrinally, the foreign policy rationales for federal exclusivity weaken when the legislative focus strays from decisions of entry and exit. The sanctuary ordinances are only concerned with those already in the country and within a city—regardless of their method of entry. They cannot increase or decrease visa allotments, nor can they prevent federal authorities, acting with their own resources and investigative information, from capturing, detaining, or deporting unlawfully present immigrants. As then-Secretary of Homeland Security Michael Chertoff in testimony in front of the House Homeland Security Committee clarified, "I'm not aware of any city, although I may be wrong, that actually interferes with our ability to enforce the law."¹⁵⁸

The other liability with heavy reliance on federal exclusivity challenges to immigrant-related sub-federal lawmaking is the absence of a strong judicial check. At least courts have to evaluate the due process and equal protection concerns of restrictive state and local legislation. No such backstop exists for federal lawmaking. Federal immigration policies are much more sticky than sub-federal ones, and continued genuflection to broad versions of federal immigration exclusivity reify the wide-latitude courts provide the federal government.

Shepherd: I have faith that federal courts are, as they have done in the past, best able to balance the competing tensions between granting deference to the federal government on immigration matters on the one hand and recognizing traditional state police powers on the other hand.

To address your other point, while it may be true that ICE may enter a state or local jurisdiction at any time to enforce the INA, there is no doubt that localities that choose to not cooperate with federal officials arguably make it more difficult for ICE to remove unauthorized immigrants from the country. Such fragmentation of immigration regulation is problematic not only from a constitutional perspective but from a public policy view as well. Some states will be burdened with the higher costs associated with the migration of noncitizens into their

157. Cristina Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 576-80 (2008).

158. Alex Koppelman, *Congress to New York (and Chicago and L.A.): Drop Dead*, SALON.COM (Oct. 4, 2007), available at <http://www.salon.com/news/feature-/2007/10/04/sanctuary>.

borders, including increased use of hospitals, schools and other services. Other states may experience heightened anti-immigrant environments that could be conducive to discriminatory treatment of racialized noncitizens. As Professor Michael Wishnie argued, devolving the exclusive federal immigration power historically facilitated state-sanctioned discrimination against immigrants.¹⁵⁹ Additionally, if the exclusionary ordinances enacted in Hazleton, Pennsylvania,¹⁶⁰ and Farmers Branch, Texas,¹⁶¹ are any indication, the laws typically target racialized noncitizens, and specifically, Latinos. Professor Huyen Pham pointed out, for instance, that state and local anti-immigrant laws have had discriminatory impact on Latinos who found themselves having to prove their citizenship and legal status frequently in places where such laws have been enacted.¹⁶²

Locke: I am definitely concerned, based on my own notions of justice and humanity, about the rise of several Arizonas and Farmers Branches. Even though some such laws were struck down, federal courts elsewhere have upheld similarly restrictive ordinances meant to drive out undocumented persons. I have serious due process, equal protection, and fourth amendment concerns with these types of laws that devolve immigration status determinations, in the first instance, to private parties or local officials. In enacting LAWA, Governor Napolitano herself noted that one of the problems with the bill was the “lack [of] an antidiscrimination clause to ensure that it is enforced in a fair and non-discriminatory manner.”¹⁶³ The most significant concern with these laws is the one you rightly identify: the probability of racial profiling in the jurisdictions that enact these laws. The self-proclaimed “America’s Sheriff,” Joe Arpaio in Maricopa County, Arizona, is already the subject of multiple racial profiling lawsuits,¹⁶⁴ as citizens and legal residents of Latin American descent continue to complain of persecution for “crimes”

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

160. HAZLETON, PA., ORDINANCE 2006-13 § 7(b)(1)(g) (2006); Illegal Immigration Relief Act Ordinance, HAZLETON, PA., ORDINANCE 200-18 (2006).

161. FARMERS BRANCH, TX., ORDINANCE 2952 (2008).

162. Huyen Pham, *When Immigration Borders Move*, 61 FLA. L. REV. 1115, 1148-49 (2009) (explaining that although “moving border laws . . . do not single out any particular ethnic or racial group,” the contexts in which they were passed demonstrated that they were enacted to target Latinos).

163. Press Release, *Governor Signs Employer Sanctions Bill* (July 2, 2007), available at <http://www.formi9.com/news/ArizonaBillSigned.pdf>.

164. See, e.g., Randy James, *Sheriff Joe Arpaio*, TIMES.COM (Oct. 13, 2009), available at <http://www.time.com/time/nation/article/0,8599,1929920,00.html>.

like “driving while brown.”¹⁶⁵ Arizona’s most recent enactment allowing local apprehension and prosecution based on suspected unlawful status magnifies these concerns.

But, the fact that this tragic likelihood exists is a good policy reason to oppose such enactments; it doesn’t, however, answer the question whether such enactments are unconstitutional as a function of the division of powers between federal and sub-federal governments. Moreover, this is exactly why I argued earlier that *Takahashi* and *Graham* are better understood as due process or equal protection cases; the more we ingrain those rights-based concerns into our immigration jurisprudence, the less likely we are to produce discriminatory results.

Shepherd: Given the Court’s demonstrated reluctance to expand the classes of persons receiving heightened protection under the equal protection clause, and the long-established exceptionalism attendant to immigration cases, I am not optimistic that the doctrinal change you suggest will occur any time soon. Taking the jurisprudential framework as we find it today, part of my hesitation with recognizing the validity of sanctuary policies under the preemption doctrine is that I worry that it would acknowledge the validity of local exclusionary laws designed to remove noncitizens. It strikes me that allowing inclusionary measures to survive the preemption doctrine requires similar treatment of exclusionary laws. It’s the “one can’t have your cake and eat it too” argument. Although they serve distinct functions, they share the same underlying principle that a local government has authority to pass laws that come close to immigration regulation.

Locke: Based on my own preferences, I would like to believe that integrationist policies can be legally distinguished from exclusionary policies, with the former being upheld and the latter struck down. I have some affinity for arguments against exclusionary policies—rental ordinances and the like—based on freedom of movement principles¹⁶⁶ and due process concerns related to private actors inquiring about immigration status. And, arguably, exclusionary policies export the externalities of undocumented immigration—or immigration generally—to other jurisdictions, whereas inclusionary and integrationist policies internalize the cost.

Shepherd: But even here, inclusionary practices by localities arguably also create negative externalities by incentivizing continued

165. Indeed, a recent ordinance enacted on Long Island, New York, which aims to prohibit solicitation of day labor work, has been dubbed a law against “waving while Latino.” Robin Finn, *Town Divides Over Law Aimed at Day Laborers*, N.Y. TIMES, Dec. 24, 2009, at MB1.

166. See *Saenz v. Roe*, 526 U.S. 489 (1999).

unlawful presence within the country and thereby increasing enforcement and adjudication costs. I don't think you can really differentiate between inclusionary and exclusionary policies on that basis.

Locke: So, you may be right; despite my preferences, I may have to accept some exclusionary policies if I want to justify inclusionary sub-federal policies. At least on the broad question of whether one or the other affects undocumented migration, it's hard to distinguish between them. But, as I've tried to convince you throughout our discussion, the larger systemic response—admittedly a long-term project—is to challenge the exclusionary policies through due process, equal protection, and statutory civil rights provisions well-established in areas outside the treatment of non-citizens. Sub-federal entities seeking to enact restrictive legislation are likely to run afoul of separate constitutional and civil rights mandates. The threat of such civil liability itself may deter the proliferation of such enactments. Otherwise, the concerns occasioned can be fought in policy battles at the local level as well as the national level. Part of the reason Congress didn't pass proposed federal laws to coerce more sub-federal cooperation in immigration enforcement was the position taken by local police chiefs in a joint statement.¹⁶⁷ They argued that mandated local immigration regulation impeded local law enforcement's ability to work with certain communities and adequately protect the safety of citizens and non-citizens alike.¹⁶⁸ Presumably these are influential local law enforcement officials who would make the same claims to their respective mayors and city councils during local debates on these same issues.

Shepherd: So recognize their validity under the preemption doctrine but arguably strike them down under due process or equal protection? Although you are correct that discriminatory laws that target racialized noncitizens relate more to questions of equal protection and due process, the tests for recognizing violations under both, particularly equal protection are difficult to meet. Importantly, the fact that racial discrimination might occur at the state and local level as a result of the conferral of shared immigration regulation, in my view, does support the argument of ensuring that immigration regulation continues to be the exclusive province of the federal government. It all goes back to assuring

167. Major Cities Chiefs of Police, Immigration Committee, *Recommendations for Enforcement of Immigration Laws by Local Police Agencies* 9 (2006) (arguing that the “decision to enter [immigration] enforcement should be left to the local government and not mandated or forced upon them by the federal government through the threat of sanctions or the withholding of existing police assistance funding”); See also Pham, *supra* note 56, at 1399-1400 (“Police chiefs and police associations have been some of the strongest advocates of non-cooperation laws because of public safety concerns.”).

168. Pham, *supra* note 56, at 1399-1400.

consistent treatment of noncitizens that is more easily achieved from a top-down, federal approach.

Even more worrisome to me than the theoretical notion that the “bad” comes with the “good” if we resolve the preemption questions as you would, is the on-the-ground possibility that restrictionism and anti-immigrant sentiment will soon become the dominant trend. Because I consider myself an immigrant advocate, and one concerned about the restrictionist bent of many communities, I am wary of supporting sub-federal legislation: for every city of refuge there will be a city signing a 287(g) memorandum; for every state granting in-state tuition benefits regardless of citizenship status, there will be one that enacts a legal workers act.

Locke: One answer is to trust that as a matter of practicality and economic rationality, jurisdictions that attempt exclusionary or enforcement measures will find them to be bad policy and rescind them. By no means conclusive, some evidence from cities that have repealed restrictive measures have found them to be too costly,¹⁶⁹ or have found no money to enforce their enforcement goals, suggests that this could be the case.¹⁷⁰ The Migration Policy Institute’s 2008 Report on Regulating Immigration at the State Level noted some significant trends. First, it found that states passing legislation expanding immigrant rights were enacted at a higher rate than bills contracting rights, regulating employment, or related to enforcement.¹⁷¹ Second, it found that a substantial part of the contracting, employment, and enforcement legislation originated in states that are not traditional immigrant-receiving states, and are facing their first significant influx of non-citizens.¹⁷² The first finding suggests that a “race to the top” could occur rather than a “race to the bottom.” The second finding may be even more significant. It suggests that state and local restrictionism may be a time-bound reaction—one that is destined to change when those jurisdictions caught off-guard by an increasing immigrant population and a declining economy become accustomed to outsiders in their community. Indeed,

169. Ken Belson & Jill P. Capuzzo, *Towns Rethink Laws Against Illegal Immigrants*, N.Y. TIMES, Sept. 26, 2007.

170. Cameron McWhirter, *State’s Strict Immigration Law Goes Unenforced*, THE ATLANTA JOURNAL-CONSTITUTION, Jan. 25, 2009.

171. CRISTINA RODRIGUEZ, ET. AL, REGULATING IMMIGRATION AT THE STATE LEVEL: HIGHLIGHTS FROM THE DATABASE OF 2007 STATE IMMIGRATION LEGISLATION AND THE METHODOLOGY 3 (2008), available at http://www.migrationinformation.org/datahub-/statelaws_home.cfm. Note that the report used data from state enactments, not local legislation.

172. *Id.* at 3-4.

the rate of cultural change can be politically de-stabilizing when it accelerates for the first time.¹⁷³

Shepherd: I hope that you are right. But we both also know that these reactionary laws have occurred in the past and at great costs. Consider for instance the alien land laws of the early 1920s when western states passed laws that restricted the ability of noncitizens who were ineligible for citizenship to own property.¹⁷⁴ These laws were targeted at Japanese. As Professor Keith Aoki has noted, there was a correlation between these laws and the internment of Japanese Americans during World War II.¹⁷⁵ I am not arguing that the current local anti-immigrant laws will lead to such appalling consequences but I am suggesting that thinking of these laws as single reactionary legislation addressed at cultural change might foster a climate of racial discrimination against noncitizens, particularly Latinos. Tragic instances in places such as Long Island, New York, where exclusionary laws have been enacted¹⁷⁶ and Latinos have been assaulted and harassed¹⁷⁷ highlight this correlation. The "Save our State" campaign supporting California's Proposition 187 in the mid-1990's gave social sanction to an anti-immigrant ethos.¹⁷⁸

Locke: But history also shows that the federal government has not entirely been uniformly better for immigrants. Although it is true that in the absence of federal action, the most restrictive and harshest of state and local legislation would be invalidated under a federal exclusivity framework, once the federal government acts, it also has a proven anti-immigrant track record. First, the federal government maintained express racial, ethnic, and national origin exclusions in immigration law long-after the passage of the Fourteenth Amendment, and even after *Brown v. Board of Education*.¹⁷⁹ It was not until the 1950s and 1960s that those

173. See Pratheepan Gulasekaram, *Sub-National Immigration Regulation & the Pursuit of Cultural Cohesion*, 77 CINC. L. REV. 1441, 1451-56 (2009).

174. See Rose Cuison Villazor, *Oyama v. California: At the Intersection of Property, Race and Citizenship*, 87 WASH. U. L. REV. ____ (2010 forthcoming) (examining the alien land laws that were intended to deprive Japanese nationals and Japanese Americans of land ownership).

175. See Keith Aoki, *No Right to Own?: The Early Twentieth-Century "Alien Land Laws" as a Prelude to Internment*, 40 B.C. L. REV. 37, 66-68 (1998).

176. See Finn, *supra* note 163.

177. See Anne Barnard, *Assault on Latinos Spur Inquiry*, N.Y. TIMES, Jan. 13, 2009, at A1 (discussing a recent U.S. Attorney investigation of hate crimes committed against Latinos on Long Island); see also Kirk Semple, *A Killing in a Town Where Latinos Sense Hate*, N.Y. TIMES, Nov. 13, 2008, at A25 (reporting the killing of an Ecuadorian man).

178. See Kevin Johnson, *An Essay on Immigration Politics, Popular Democracy, and California's Proposition 187: The Political Relevance and Legal Irrelevance of Race*, 70 WASH. L. REV. 629 (1995).

179. 347 U.S. 483 (1954).

naked restrictions were excised from the INA.¹⁸⁰ Importantly, those changes are not compelled by the Constitution; they were instituted solely as a matter of majoritarian preference, and can be repealed by that same process. I am not claiming that we will revert to times of outright racial exclusion, or that such return is politically feasible in 2010, but it is worth noting that our constitutional order doesn't prevent federal excess in that regard.

Even if we cabin those nineteenth and twentieth century exclusions as admissions decisions from a different constitutional era, recent federal activity doesn't inspire hope either. The diversity lottery for admission into the country specifically benefits individuals from certain world regions. The National Security Entry-Exit Registration System (NSEERS) program requires mandatory registration of non-citizens from Arab and Muslim countries, and monitoring of their residency by federal authorities.¹⁸¹ The federal government restricts public assistance to classes of non-citizens,¹⁸² and in 1996 authorized states to do so,¹⁸³ even in the face of Supreme Court precedent disallowing the same.¹⁸⁴ In addition, although state laws providing in-state tuition benefits to undocumented persons are both normatively desirable and constitutionally valid,¹⁸⁵ federal bans on undocumented work authorization prevent states from capturing the economic benefits of highly educated undocumented persons. Even prior to 1996, others have cautioned immigrant-advocates from excessive reliance on federal plenary power strategies.¹⁸⁶

Shepherd: I think we both agree that both federal and state governments have proven themselves to be at times hostile to immigrants

180. See Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified as amended in scattered sections of 8 U.S.C.); see also Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. REV. 273, 279 (1996).

181. U.S. Immigration and Customs Enforcement, available at <http://www.ice.gov/pi/specialregistration/> (last visited Mar. 28, 2010).

182. See *Mathews v. Diaz*, 426 U.S. 67 (1976) (upholding federal alienage distinctions for Medicare against equal protection challenges).

183. Professional Responsibility and Work Opportunity Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified in scattered sections of 8, 42, U.S.C.)

184. See *Graham*, 403 U.S. at 382 (striking down state alienage distinctions for welfare benefits on both equal protection and preemption grounds); *Soskin v. Reinertson*, 353 F.3d 1242 (10th Cir. 2004); *Aliessa ex rel. Fayad v. Novello*, 96 F.2d 418 (1st Cir. 2001).

185. See Olivas, *Immigration-Related State and Local Ordinances*, *supra* note 152, at 53.

186. See Evangeline G. Abriel, *Rethinking Preemption for Purposes of Aliens and Public Benefits*, 42 UCLA L. REV. 1597, 1625-30 (1995).

and, other times, welcoming of them. The issues we are discussing now—sub-federal immigration regulation in general and sanctuary laws in particular—are without question part of the overall question of how the preemption and other doctrines such as due process and equal protection can better respond to the fundamental reality noted by you and Professor Cristina Rodriguez: whether the federal government likes it or not, states and local governments are participating in some way in immigration regulation, broadly defined. But this is not a new reality; states and localities have always been the front lines of dealing with immigrants as residents. The country's first immigration laws were state and local laws.¹⁸⁷ Yet, the fact is that once the federal government robustly entered the field, states and localities were relieved of the need to individually and separately regulate entry. National standards dictate entries at airports and borders; national standards dictate visa allowances and procedures for removal. Similarly, one national standard should dictate judicial understanding of immigrant-related lawmaking.

IV. 8 U.S.C. § 1373 AND COMPREHENSIVE IMMIGRATION REFORM

Locke: You may get your wish for national standards if the current presidential administration's promise of comprehensive federal immigration reform becomes a reality. To the extent that such a federal proposal is truly comprehensive, my concern regarding judicial decision-making based on plenary power rationales is mitigated. The more expansive the federal regulation, the more likely it is that a court will assess sub-federal lawmaking affecting non-citizens—sanctuary policies as well as business penalties—under an express preemption framework.

But a systemic response to the proliferation of restrictive regulation is that a federal exclusivity response may not be better for immigrants. Although in the short run it would require invalidation of the LAWAs and Hazelton ordinances—and perhaps non-cooperation or sanctuary laws—in the long run its anybody's guess as to whether the federal government would accomplish the same restrictive or exclusionary goals on a national level. If we accept Professor Wishnie's highly persuasive argument that many of the sub-federal provisions enacted to help enforce federal immigration law are impliedly preempted,¹⁸⁸ the underlying corollary has to be that Congress could expressly provide for such cooperation, or coerce it through spending provisions. In fact, Congress has already attempted the coercive compliance tack twice in recent years,

187. See Gerald Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833 (1993).

188. Wishnie, *supra* note 157, at 567.

both attempts failing to pass floor votes.¹⁸⁹ So far, the consistent failure of these measures suggests that there is insufficient political will to strong-arm states and localities into participating in federal schemes.

Shepherd: Alternatively, it could also suggest that less overt methods of securing compliance—for example, voluntary 287(g) agreements and inclusion of immigration data on the NCIC database¹⁹⁰—accomplish many of the same enforcement goals without the attendant political liabilities. But, Congress, in other circumstances has been able to gather the political will to pass national legislation that aids in its immigration enforcement capabilities. The San Francisco “don’t tell” policy at issue here is a good example; federal law bars the city from preventing voluntary dissemination of immigrant status information.

Locke: Assuming Congress has the political will and support to preempt sanctuary laws, it may choose to undertake three options with respect to 8 U.S.C. § 1373. The first is that it can opt to leave the law as is. The second approach is to pass a law that would expressly preempt sanctuary or non-cooperation laws. The third possible approach is for Congress to recognize some areas where states and local governments may choose to participate in exchange for economic incentives.

Shepherd: I agree that any of these three options will explicitly demonstrate Congress’s intent to prohibit state and local governments from enacting sanctuary policies. Indeed, until it does, the validity of sanctuary laws such as San Francisco’s will be left open for the courts to decide under the current preemption framework we’ve discussed.

CONCLUSION

For more than twenty years, San Francisco’s sanctuary ordinance has provided a safe haven for undocumented immigrants in the city. The recent amendment to the ordinance, which pushes the boundaries of what a municipality may do with respect to the treatment of noncitizens in the U.S., threatens to undermine two decades of efforts to ensure that

189. See, e.g., Accountability in Enforcing Immigration Laws Act of 2007, H.R. 3531, 110th Cong. (2007) (expressly authorizing sub-federal law enforcement officials to enforce immigration provisions related to unlawful presence and providing financial disincentives to noncooperating jurisdictions); Clear Law Enforcement Act of 2005, H.R. 3137, 109th Cong. (2005) (authorizing sub-federal law enforcement officials to apprehend unlawfully present aliens and allowing federal grants to cooperating jurisdictions).

190. Comment, *Enforcing Nonenforcement: Countering the Threat Posed to Sanctuary Laws by the Inclusion of Immigration Records in the National Crime Information Center Database*, 97 CAL. L. REV. 567, 583-91 (2009).

immigrants continue to be part of the San Francisco community despite their status.

San Francisco's policy represents a growing trend in the United States of places that aim to offer protection to undocumented immigrants from removal from the United States, but it is also part of broader efforts to deploy state and local governmental powers to participate in immigration regulation. The key, as we discussed above, is striking the right balance between what constitutes federal immigration law and state and local laws. Addressing this tension requires, at minimum, a closer examination of the preemption doctrine to consider whether it ought to create more space for states and local governments to participate in the regulation of immigration law.