

Much Ado About Nothing?: Local Resistance and the Significance of Sanctuary Laws

*Alyssa Garcia**

INTRODUCTION

Immigration has become a hot topic of national discourse in recent years. There have been calls on both sides of the aisle for immigration reform policies. As such, this highly publicized political discussion has evoked emotions, opinions, and actions from politicians and constituents alike.

President Donald Trump has made his intention to deport “millions and millions” of undocumented individuals vehemently clear.¹ He has outwardly voiced his opinion and intention to “stop . . . the killing machine that is illegal immigration.”² Additionally, he has made threats to build a wall along the United States–Mexico border and has characterized his approach as a “war on illegal immigration.”³ The administration has already taken anti-immigrant action by attempting to end the Deferred Action for Childhood Arrivals (DACA) program, stripping legal status from over 800,000 DREAMers who participated in the program.⁴ In

* J.D. Candidate, Seattle University School of Law. This Comment was inspired by the immigrant rights advocacy work I performed with OneAmerica prior to law school. I am indebted to the various members of the immigrant community who motivated me to attend law school and complete this Comment, including many of my own family members. I would also like to thank Professor Steven Bender and the exceptional *Seattle University Law Review* editing team for their guidance and assistance in bringing this work to life. Finally, special gratitude is owed to my family and Andrew for their support throughout this process.

1. Amy Wang, *Donald Trump Plans to Immediately Deport 2 Million to 3 Million Undocumented Immigrants*, WASH. POST (Nov. 14, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/11/13/donald-trump-plans-to-immediately-deport-2-to-3-million-undocumented-immigrants/?utm_term=.d4022a30418c [<https://perma.cc/S2N9-P2YF>].

2. Donald Trump (@RealDonaldTrump), TWITTER (Aug. 10, 2015, 5:58 PM), <https://twitter.com/realdonaldtrump/status/630906211790102528?lang=en> [<https://perma.cc/P63S-YL7T>].

3. Brenna Williams, *Trump’s Immigration Policy (or What We Know About It) in 13 Illuminating Tweets*, CNN (Aug. 26, 2016), <https://www.cnn.com/2016/08/26/politics/donald-trump-immigration-tweets/index.html> [<https://perma.cc/6JAB-UNHS>].

4. Vanessa Romo, Martina Stewart & Brian Naylor, *Trump Ends DACA, Calls on Congress to Act*, NPR (Sept. 5, 2017), <https://www.npr.org/2017/09/05/546423550/trump-signals-end-to-daca-calls-on-congress-to-act> [<https://perma.cc/M4TL-YMJH>].

January 2017, President Trump hastily gripped the nation in confusion, fear, and upset when he issued Executive Order 13769, commonly known as the Muslim Ban, which suspended individuals from several majority-Muslim countries from entering the United States.⁵

In response, organizations and advocates have risen up in opposition to prevent mass deportation tactics and to protect the communities most affected by these strong stances and tangible actions.⁶ Cities, states, counties, and institutions have also taken proactive action in the matter by enacting laws, commonly referred to as “sanctuary laws.” These laws limit local government cooperation with federal immigration officials in immigration enforcement.⁷

Sanctuary laws themselves have emerged as a central topic of national discourse. During the 2016 presidential election, these laws came to the forefront of the heated, controversial debate on immigration.⁸ President Trump has repeatedly made sanctuary laws the subject of his political platform and his infamous tweets. During his campaign, then-candidate Trump constantly made statements expressing his opposition to sanctuary jurisdictions specifically. In a campaign speech, he vowed that if he was elected he would “block funding for sanctuary cities” and “end the sanctuary cities.”⁹ During a radio interview, he again stated “sanctuary cities are out . . . over” and that the “federal government is going to have

5. Exec. Order No. 13769, 82 Fed. Reg. 8977 (Jan. 27, 2017), subsequently revoked and replaced by Exec. Order No. 13780, 8 U.S.C. § 1182 (March 6, 2017); *Timeline of the Muslim Ban*, ACLU WASH., <https://www.aclu-wa.org/pages/timeline-muslim-ban> [<https://perma.cc/U8SA-Y4TF>]; Press Release, White House, Executive Order Protecting the Nation from Foreign Terrorist Entry into the United States (Mar. 6, 2017), <https://www.whitehouse.gov/presidential-actions/executive-order-protecting-nation-foreign-terrorist-entry-united-states-2/> [<https://perma.cc/Q8BX-UCTF>].

6. See generally UNITED WE DREAM, <https://unitedwedream.org/our-work/> [<https://perma.cc/4YJ9-LQYL?type=image>].

7. *Sanctuary Cities: What and Where Are They?*, DOPPLR <http://www.dopplr.com/sanctuary-city-list/> [<https://perma.cc/YN6Z-LD3E>].

8. Throughout his presidential campaign, candidates on both sides heavily discussed sanctuary cities. Then-candidate Trump used his stance on immigration as a central campaign platform through advertisements, speeches, appearances, and formal statements. He repeatedly made threats to deport undocumented immigrants, ban individuals who practice the Muslim religion from entering the country, and cancel sanctuary cities. See generally Tami Luhby, *Trump Condemns Sanctuary Cities, but What Are They?*, CNN (Sept. 1, 2016), <https://www.cnn.com/2016/09/01/politics/sanctuary-cities-donald-trump/index.html> [<https://perma.cc/3S8F-47H4>]; *Democrats ‘Complicit’ in All Murders by Illegal Immigrants*, DONALDJTRUMP.COM (Jan. 20, 2018), <https://www.donaldjtrump.com/media/democrats-complicit-in-all-murders-by-illegal-immigrants> [<https://perma.cc/9J3A-J6NJ>]; *Promises About Immigration on Trump-o-Meter*, POLITIFACT <http://www.politifact.com/truth-o-meter/promises/trumpometer/subjects/immigration/> [<https://perma.cc/5TV4-4KPA>]. His opponent, Hillary Clinton, also made her support for sanctuary cities clear to improve public safety. Suzanne Gamboa, *Clinton Campaign: Sanctuary Cities Can Help Public Safety*, NBC NEWS (July 9, 2015), <https://www.nbcnews.com/news/latino/clinton-campaign-sanctuary-cities-can-help-public-safety-n389186> [<https://perma.cc/T2FE-M54X>].

9. Luhby, *supra* note 8.

to get involved . . . very sharply.”¹⁰ He has also tweeted that sanctuary areas were “crime infested & [a] breeding concept.”¹¹

In the past, the federal government decided to overlook these sanctuary laws and allow them to exist; however, as immigration evolved into a leading issue in American politics, the Trump administration has been more aggressive in immigration enforcement.¹² Despite President Trump’s attempts to take action, since sanctuary provisions are strictly products of local and state governments, the federal government’s oversight and control over them is significantly restricted by constitutional principles, including the Spending Clause and the anti-commandeering doctrine.¹³ Notwithstanding, the Trump administration has continued to attack the validity of these state and local sanctuary laws through executive action.

Within the first month of his presidency, President Trump issued Executive Order No. 13768.¹⁴ The order threatened to withhold substantial amounts of federal funding from “sanctuary jurisdictions.”¹⁵ The order provides, in relevant part:

In furtherance of this policy, the Attorney General and the Secretary, in their discretion and to the extent consistent with law, shall ensure that jurisdictions that willfully refuse to comply with 8 U.S.C. 1373 (sanctuary jurisdictions) are not eligible to receive Federal grants, except as deemed necessary for law enforcement purposes by the Attorney General or the Secretary.¹⁶

The Attorney General was given authority to enforce and remove federal funding eligibility from sanctuary jurisdictions.¹⁷ Attorney General Jeff Sessions subsequently spoke in a press conference, stating that the “Department of Justice will require jurisdictions seeking or applying for Department grants to certify compliance with § 1373 as a condition for

10. Fred Barbash, *Trump’s Campaign Words Stalk Him in Court on Sanctuary Cities, Just as in Travel Ban Cases*, WASH. POST (Mar. 30, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/03/30/trumpss-campaign-words-stalk-him-in-court-on-sanctuary-cities-just-as-in-travel-ban-cases/?utm_term=.7289e12952dc [<https://perma.cc/BE7H-7A4X>].

11. Z. Byron Wolf, Editorial, *Trump Blasts ‘Breeding’ in Sanctuary Cities. That’s a Racist Term*, CNN POLITICS (Apr. 18, 2018), <https://www.cnn.com/2018/04/18/politics/donald-trump-immigrants-california/index.html> [<https://perma.cc/U6D3-BQMR>].

12. See Pratheen Gulasekaram & Rose Villazor, *Sanctuary Policies & Immigration Federalism: A Dialectical Analysis*, 55 WAYNE L. REV. 1683, 1694 (2009).

13. Hugh Spitzer, “Sanctuary Cities” to Find Sanctuary in the Rehnquist and Roberts Courts, JURIST (Dec. 30, 2016), <http://www.jurist.org/forum/2016/12/Hugh-Spitzer-sanctuary-cities.php> [<https://perma.cc/J9VL-2JE4>].

14. Exec. Order No. 13768, 82 Fed. Reg. 8799, *reprinted in* 8 U.S.C.A. § 1103 (West 2018).

15. *Id.*

16. *Id.*

17. 8 U.S.C.A. § 1373 (West 2018); Exec. Order No. 13768, 82 Fed. Reg. 8799, *reprinted in* 8 U.S.C.A. § 1103 (West 2018).

these awards.”¹⁸ The federal government has also continued to keep a record of the jurisdictions it considers to be sanctuaries.¹⁹

In response to this direct attack on their policies, several jurisdictions, including Seattle and San Francisco, have brought lawsuits challenging the constitutionality of the Executive Order under the Spending Clause and Tenth Amendment.²⁰ They claim that if enforced, the Executive Order would subject them to a devastating loss of overall funding, crippling budget decisions, and an egregious penalty.²¹ They also allege that the Executive Order constitutes a violation of the Tenth Amendment separation of powers and anti-commandeering doctrine.²²

Amongst the heated political controversy and litigation, it is difficult to ascertain whether these debates are momentous legal developments or mere political grandstanding. On one hand, from their inception, sanctuary laws have been symbolic political tools used by localities to protect vulnerable individuals when the federal government has turned a blind eye. On the other hand, as the lawsuits reveal, sanctuary laws raise constitutional issues surrounding the tensions and assertions of power between federal and state governments.

In this Comment, I explore the current constitutional discourse of sanctuary laws and compare their various components. Part I provides background on the basic policy components of sanctuary laws and modern policies. Part II explores and compares the substantive legal and political value of sanctuary laws. Within this section I will first assess the impact of sanctuary policies on existing immigration and constitutional law. In doing so, I will compare specific sanctuary jurisdictions involved in litigation, Seattle, San Francisco, and Chicago, and their likelihood of withstanding preemption under existing doctrine. Then, I will discuss the impact sanctuary laws may have on the Tenth Amendment. Second, I will

18. Jeff Sessions, Att’y General, Dep’t of Justice, Remarks on Sanctuary Jurisdictions (Mar. 27, 2017), <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-sanctuary-jurisdictions> [<https://perma.cc/BYR6-YVDY>].

19. *Seattle v. Trump*, No. 17-497-RAJ, slip op. at 3 (Oct. 19, 2017).

20. *Id.*; see also Barbash, *supra* note 10. See generally *California v. Sessions*, No. 17-CV-04701-WHO (N.D. Cal. filed Oct. 13, 2017); *City of Chicago v. Sessions*, No. 17-2991 (N.D. Ill. filed Sept. 26, 2017); *City and County of San Francisco v. Trump*, No. 17-CV-04642-WHO (N.D. Cal. filed Aug. 11, 2017); *City of Seattle v. Trump*, No. 2:17CV00497 (W.D. Wash. filed Mar. 29, 2017).

21. *City and County of San Francisco v. Trump*, No. 17-CV-04642-WHO (N.D. Cal. filed Aug. 11, 2017); *City of Seattle v. Trump*, No. 2:17CV00497 (W.D. Wash. filed Mar. 29, 2017).

22. See *Complaint for Declaratory Relief, City of Seattle v. Trump*, No. 2:17CV00497 (W.D. Wash. Mar. 29, 2017). After the filing of these lawsuits, Attorney General Sessions issued an internal memo within the Department of Justice restricting the funding restrictions to only Department of Justice and Department of Homeland Security grants, narrowing the general federal funding restriction imposed by the original Executive Order. Memorandum from Jeff Sessions, Att’y General, Dep’t. of Justice, Memorandum for All Department Grant-Making Components (May 22, 2017).

assess the political impacts of sanctuary laws. I explore whether they serve as simple assertions of preexisting state powers or impactful legal doctrines. This dichotomy of interpretation will reveal that sanctuary laws are unlikely to yield any substantive change to current legal doctrine and, instead, are more valuable as political symbols of local resistance. It is my hope that this Comment provides a beacon of clarity amongst a foggy, crowded coast of controversy, opinions, and debate to guide policymakers, future sanctuary jurisdictions, and the public towards understanding the role of these laws in our society.

I. SANCTUARY POLICIES: THEN AND NOW

A. The Origins

Although sanctuary laws have entered the forefront of national discourse, they are no new phenomenon. The term “sanctuary” became associated with immigration during the Central American Sanctuary Movement back in the 1980s.²³ Civil wars in El Salvador and Guatemala, fueled by government violence, human rights abuses, and social unrest, forced over 468,000 people to flee and seek refuge in other countries, including the United States.²⁴ Meanwhile, the U.S. government provided financial and combat training support to the Salvadoran government regime.²⁵ Yet, thousands of individuals seeking political asylum in the United States were consistently denied legal entry by the U.S. government.²⁶ When the U.S. government continually rejected formal aid to Central American refugees, U.S. churches and organizations took matters into their own hands and declared themselves safe havens.²⁷ They provided refugees assistance in the form of basic necessities and shelter.²⁸ These organizations felt that it was their moral duty to provide assistance in light of wrongful actions by the U.S. government.²⁹

Soon, states and localities agreed with the grassroots assistance efforts and began to establish themselves as sanctuaries by enacting laws that provided safeguards for these Central American refugees. Common policies included prohibiting inquiry into immigration status and

23. Hector Perla & Susan Bibler Coutin, *Legacies and Origins of the 1980s US-Central American Sanctuary Movement*, REFUGE, No.1 2009, at 7, 9–10.

24. *Id.*

25. *Id.* at 10.

26. Rose Cusion Villazor, *What is a “Sanctuary”?*, 61 SMU L. REV. 133, 139–40 (2008).

27. Karla McKanders, *The Subnational Response: Local Intervention in Immigration Policy and Enforcement*, in COMPASSIONATE MIGRATION AND REGIONAL POLICY IN THE AMERICAS 33, 38 (Steven Bender & William Arrocha eds., 2017).

28. *Id.*

29. Villazor, *supra* note 26, at 133, 140.

eliminating valid immigration status as a requirement for local government benefits.³⁰ Additionally, law enforcement was prohibited from inquiring into immigration status to improve crime reporting. This component, in particular, was found to not only protect immigrant communities but also to improve public safety overall.³¹ These safeguards were intended to provide assistance where the federal government would not.³² Over time, these laws developed and evolved beyond their initial purpose of protecting Central American refugees to protecting the greater undocumented and immigrant communities.³³

B. Modern Policies

The term “sanctuary” has evolved into an umbrella term for cities, states, and localities with policies that limit their involvement with federal immigration enforcement. Modern sanctuary laws primarily exist to protect the national undocumented community for over 11.3 million individuals.³⁴ The political terrain in immigration has taken a drastic turn due to many factors including the events of 9/11 and the population increase of immigrants in many states.³⁵ A rise in recent mass deportation tactics and anti-immigrant sentiment across the country have fueled the modern resurgence of sanctuary laws.³⁶ The Trump Administration’s crackdown on immigration enforcement incites a sentiment of anxiety and fear among the millions of immigrants who are presently integrated within American society.³⁷ To address this concern, jurisdictions are emphasizing the compassionate labeling of their localities as “welcoming” or “sanctuary” jurisdictions.³⁸

30. *Id.* Over twenty-three localities enacted sanctuary laws in this era including New York, Massachusetts, and the city of Seattle. *Id.* at 140 n.59.

31. *Id.* at 142–43.

32. *Id.*

33. *Id.* at 143.

34. Jens Manuel Krogstad et al., *5 Facts About Illegal Immigration in the U.S.*, PEW RES. CTR. (Apr. 27, 2017), <http://www.pewresearch.org/fact-tank/2017/04/27/5-facts-about-illegal-immigration-in-the-u-s/> [<https://perma.cc/YXK8-4NZB>].

35. See McKanders, *supra* note 27, at 37; Villazor, *supra* note 26, at 143–44.

36. McKanders, *supra* note 27, at 38.

37. Krogstad et al., *supra* note 34.

38. Although this Comment directly addresses local and state governments, public and private universities have also joined the movement. Across the country, dozens of universities have implemented “sanctuary campus” policies, which protect their undocumented student population. See Emily Deruy, *The Push for Sanctuary Campuses Prompts More Questions Than Answers*, ATLANTIC (Nov. 22, 2016), <https://www.theatlantic.com/education/archive/2016/11/the-push-for-sanctuary-campuses-raises-more-questions-than-answers/508274/> [<https://perma.cc/WH7H-4CXK>]; Cesar Cuauhtemoc Garcia Hernandez, *Sanctuary Campuses Map*, CRIMMIGRATION (Feb. 7, 2017), <http://crimmigration.com/2017/02/07/sanctuary-campuses-map/> [<https://perma.cc/M2VP-YXPH>]. See generally Natasha Newman, *A Place to Call Home: Defining the Legal Significance of the Sanctuary Campus Movement*, 8 COLUM. J. RACE & L. 122 (2017); The Immigration Response

These jurisdictions decline to assist federal immigration enforcement agencies in their duties of enforcing immigration law in various ways. Sanctuary policies are not uniform; each jurisdiction maintains a unique policy in resistance to the enforcement of federal immigration law. The primary components of sanctuary policies are the (1) refusal to comply with federal civil detainer requests unless required by court order, (2) prohibition of inquiry by state and local authorities into immigration status, and (3) bar on the use of local funds and resources to assist federal enforcement.

Over 600 localities across the country have laws that limit enforcement of immigration laws by state and local authorities.³⁹ Three of these jurisdictions, Seattle, San Francisco, and Chicago, are explored here because of their unique approaches to limiting local involvement with immigration enforcement. All three led the country in the revival of sanctuary laws and other immigrant-friendly initiatives; they are also involved in recent litigation defending their policies against attack from the federal government.⁴⁰

1. Seattle

In 2016, then-Mayor Ed Murray issued an Executive Order establishing Seattle as a “Welcoming City.” The Welcoming City label allows Seattle to “consider all the policies and practices” needed to “reduce the barriers of success that immigrants and refugees often face.”⁴¹ The order prioritizes Seattle’s commitment to “foster[ing] an environment that makes it possible for Seattle to be a vibrant, global city where . . . immigrant residents can fully participate in and be integrated into the social, civic, and economic fabric” of the city.⁴² Thus, in discord with the anti-immigrant sentiment incited by the federal government,

Initiative, *Sanctuary Campus Toolkit Frequently Asked Questions*, <https://today.law.harvard.edu/wp-content/uploads/2017/02/Sanctuary-Campus-Toolkit.pdf> [<https://perma.cc/HEN8-W9CE>].

39. Press Release, Nat’l Immigration Law Center, *New State-by-State Interactive Shows How Much Federal Funding Sanctuary Cities Could Lose at the Hands of President Trump’s Administration* (Mar. 2017), <https://www.nilc.org/2017/03/07/state-state-interactive-on-possible-funds-loss/> [<https://perma.cc/9DJA-6Z5N>]; see *Laws, Resolutions and Policies Instituted Across the U.S. Limiting Enforcement of Immigration Laws by State and Local Authorities*, NAT’L IMMIGR. LAW CTR. (Dec. 2008), <http://www.ailadownloads.org/advo/NILC-LocalLawsResolutionsAndPoliciesLimitingImmEnforcement.pdf> [<https://perma.cc/DJ7H-Y6PL>].

40. See generally cases cited *supra* note 20.

41. Cuc Vu, Office of Immigrant and Refugee Affairs, *Seattle is a Welcoming City*, SEATTLE.GOV, <http://www.seattle.gov/iandraffairs/programs/welcomingcity> [<https://perma.cc/2HWM-UUH3>].

42. SEATTLE, WASH., EXEC. ORDER 2016-8 (Nov. 23, 2016).

Seattle has chosen to reaffirm its commitment to protecting its immigrant community.

The 2016 executive order contained four main sanctuary components. First, it reaffirmed Seattle's existing inquiry prohibition stating that city employees shall not inquire into immigration status. Second, it stated that city residents would have access to full city services regardless of immigration status.⁴³ Third, the order deferred civil detainer requests to King County, which operates jails in place of the City of Seattle.⁴⁴ Finally, the order established an Inclusive and Equitable City Cabinet composed of representatives from different city departments to protect the civil liberties and rights of Seattle residents.⁴⁵ The Cabinet is comprised particularly of those with marginalized identities like immigrants, refugees, low-income residents, LGBTQ residents, women, and people with disabilities.⁴⁶

Former Mayor Ed Murray's Order was not the first city action in this matter; the order built upon an existing city sanctuary policy. In 2003, the city council passed Ordinance 121063, Seattle's original sanctuary policy.⁴⁷ Ordinance 121063 was enacted in response to anti-immigrant sentiment after the attack of 9/11. It prohibited city employees from inquiring about immigration status, except when police officers have reasonable suspicions that a person committed a felony-level crime or was previously deported.⁴⁸ The original Ordinance also contained a clause stating that nothing in the Ordinance prohibits an employee from cooperating with federal immigration authorities as required by law.⁴⁹ This savings clause is likely a direct reference to fulfill the requirement of § 1373 of the Immigration and Nationality Act, which will be discussed later in this Comment.

2. San Francisco

San Francisco's sanctuary law has evolved over the last few decades into a comprehensive set of policies protecting the immigrant community. In 1989, San Francisco passed the "City and County of Refuge" ordinance

43. *Id.*

44. *Id.* King County policy honors civil detainer requests from Immigration and Customs Enforcement (ICE) only when they are accompanied by a criminal warrant. KING COUNTY, WASH., ORDINANCE 17886 (2014).

45. SEATTLE, WASH., EXEC. ORDER 2016-8 (Nov. 23, 2016).

46. Vu, *supra* note 41.

47. SEATTLE, WASH., ORDINANCE 121063 (Jan. 28, 2003) (codified at SEATTLE, WASH., MUN. CODE § 4.18.015 (2018)).

48. *Id.*

49. SEATTLE, WASH., MUN. CODE § 4.18.035 (2018).

establishing itself as a sanctuary jurisdiction.⁵⁰ It was created as a response to the federal government’s reluctance to aid Central American refugees during the Central American Sanctuary Movement.⁵¹ Similar to Seattle’s, the Ordinance serves to establish public trust and ensure that all San Francisco residents, regardless of immigration status, have access to city services and benefits.⁵²

The City of Refuge Ordinance provides three ways in which the city limits its participation in immigration enforcement. First, it prohibits city employees from using city funds or resources to assist Immigration and Naturalization Service (INS)—now Immigration and Customs Enforcement (ICE)—in the enforcement of immigration law. Second, it prohibits city employees from “gather[ing] or disseminat[ing]” personal information like the release status of individuals unless required by another statute, regulation, or court decision. Third, it restricts law enforcement officers from interacting with federal immigration officials. It provides a non-exhaustive list of prohibited actions including (1) assisting or cooperating in an official capacity with any federal immigration investigation or detention; (2) requesting or disseminating information regarding the release status of any individual or any other personal information; (3) conditioning the receipt of city services or benefits on immigration status; and (4) inquiring into immigration status on any city application, questionnaire, or interview forms.⁵³

The relevant part of the statute states:

(a) Assisting or cooperating, in one’s official capacity, with any investigation, detention, or arrest procedures . . . conducted by the Federal agency . . . except as permitted under Administrative Code Section 12I.3

. . . .

(c) Requesting information about, or disseminating information, in one’s official capacity, regarding the release status of any individual or any other such personal information . . . or conditioning the provision of services or benefits by the City and County of San Francisco upon immigration status, except as required by Federal or

50. S.F., CAL., ORDINANCE No. 375-89 (Oct. 24, 1989) (codified at S.F., CAL., ADMIN. CODE §§ 12H, 12I (1989)); Office of Civic Engagement and Immigrant Affairs, *Sanctuary City Ordinance*, SFGOV, <http://sfgov.org/oceia/sanctuary-city-ordinance-0> [https://perma.cc/6JTR-V76L].

51. Ignatius Bau, *Cities of Refuge: No Federal Preemption of Ordinances Restricting Local Government Cooperation with INS*, 7 BERKLEY LA RAZA L.J. 50, 54 (1994).

52. *Sanctuary City Ordinance*, *supra* note 50.

53. S.F., CAL., ADMIN. CODE §§ 12H, 12I (2018).

State statute or regulation, City and County public assistance criteria, or court decision.

(d) Including on any application, questionnaire, or interview form used in relation to benefits, services, or opportunities provided by the City and County of San Francisco any question regarding immigration status other than those required by Federal or State statute, regulation, or court decision.⁵⁴

Subsequently, in 2013, the “Due Process for All” Ordinance was passed. This Ordinance added a provision to the existing restrictions that prohibits civil detainer cooperation. It generally prohibits the practices of giving ICE advance notice of a person’s release from jail and of honoring ICE civil detainer requests. The relevant portion of the Ordinance provides: “A law enforcement official shall not detain an individual on the basis of a civil immigration detainer after that individual becomes eligible for release from custody.”⁵⁵

However, requests may be honored under certain circumstances. San Francisco officials may detain an individual for federal authorities up to forty-eight hours if the individual was convicted of a violent felony in the past seven years and there is probable cause that the individual is guilty of a violent felony.⁵⁶ Additionally, city officials can give ICE advanced notice of an individual’s release from custody if the individual has been convicted of a violent or serious felony, a series of three felonies, or by a ruling of probable cause that the individual is guilty of a felony. Nonetheless, even if these circumstances are established, before complying with ICE, the city officers must also consider these mitigating factors: evidence of the individual’s rehabilitation, ties to the community, contribution to the community, and participation in rehabilitation or social service programs.⁵⁷

Finally, the Ordinance provides a catch-all clause: “Law enforcement officials shall not arrest or detain an individual, or provide any individual’s personal information to a federal immigration officer, on the basis of an administrative warrant, prior deportation order, or other civil immigration document based solely on alleged violations of the civil provisions of immigration laws.”⁵⁸

54. *Id.*

55. S.F., CAL., ORDINANCE No. 204-13 (Sept. 24, 2013) (codified as S.F., CAL., ADMIN. CODE § 12I.3 (2018)).

56. *Id.*

57. *Id.*

58. *Id.* § 12I.3(e).

3. Chicago

Chicago also leads the nation with its immigrant-friendly initiatives. The sanctuary policies in Chicago began back in the 1980s during the Central American Sanctuary Movement.⁵⁹ In 1985, then-Mayor Harold Washington signed an Executive Order creating Chicago's first sanctuary law.⁶⁰ The Order prohibited city employees from inquiring into immigration status and mandated that city services be provided to all residents regardless of immigration status.⁶¹ However, the policy was not codified until 2006.⁶² The codified law specifically prohibits state officials or agencies from requesting information about or investigating the immigration status of any individual unless required by state statute, federal statute, or court order.⁶³ Additionally, it prohibits city officials from disclosing information regarding the immigration status of any individual unless required by the legal process or the individual consents to disclosure.⁶⁴ Furthermore, the city is prohibited from conditioning any city benefits, opportunities, or services on immigration status.⁶⁵

Mayor Rahm Emanuel, since he assumed office in 2011, has led the city in pioneering a new series of immigrant-friendly policies. In 2012, he introduced the "Welcoming City" provision to build off the existing sanctuary policies and to specifically address federal civil detainees.⁶⁶ The provision prohibits city officials from arresting or detaining a person solely upon (1) a belief that the individual is illegally present in the United States, (2) an administrative warrant for a violation of civil immigration law, or (3) an immigration detainer.⁶⁷

The provision also goes a step further to restrict cooperation of city officials with general ICE investigations. The provision states:

Unless an agency or agent is acting pursuant to a legitimate law enforcement purpose that is unrelated to the enforcement of a civil immigration law, no agency or agent shall: A. permit ICE agents access to a person being detained by, or in the custody of, the agency or agent; B. permit ICE agents use of agency facilities for

59. Kori Rumore, *Chicago's History as a Sanctuary City*, CHI. TRIBUNE (Oct. 13, 2017), <http://www.chicagotribune.com/news/ct-chicago-sanctuary-history-htmistory.html> [https://perma.cc/C6WN-LYJY].

60. CHI., ILL., EXEC. ORDER No. 85-1 (May 7, 1985); *The Chicago New Americans Plan*, CITY OF CHI. 33 (Nov. 2012), <https://www.cityofchicago.org/content/dam/city/depts/mayor/Office%20of%20New%20Americans/NewAmericanBookletfullplan.pdf> [https://perma.cc/82FB-KKSG].

61. CHI., ILL., EXEC. ORDER No. 85-1 (May 7, 1985).

62. CHI., ILL., MUN. CODE § 2-173-005 (2018).

63. *Id.* § 2-173-020.

64. *Id.* § 2-173-030.

65. *Id.* § 2-173-040.

66. *Id.* § 2-173-042.

67. *Id.*

investigative interviews or other investigative purpose; or C. while on duty, expend their time responding to ICE inquiries or communicating with ICE regarding a person's custody status or release date.⁶⁸

Thus, Chicago officials are prohibited from allowing ICE agents to gain access to an individual in city custody, responding to ICE inquiries regarding release and custody status while on duty, and allowing ICE to use city facilities for federal immigration investigations.⁶⁹ However, the provision also includes a clause stating that city officials may communicate with ICE to determine if a matter involves enforcement based solely on a violation of civil immigration law.⁷⁰ It further includes an exception that the above restrictions on communications with ICE will not apply if the individual has a criminal warrant, is convicted of a felony, has a felony charge pending, or is a known gang member.⁷¹

Mayor Emanuel also created the Chicago Office of New Americans (ONA), which is dedicated to immigrant integration and support.⁷² He subsequently released the Chicago New Americans Plan, recommending a comprehensive set of initiatives and programs to be implemented in Chicago to support immigrant communities and to improve the city's overall economic and cultural growth.⁷³

II. THE SIGNIFICANCE OF SANCTUARY LAWS

The President's legal challenges to state and local sanctuary laws have drawn increased public attention. In the lawsuits, the Government frames sanctuary provisions as infringements on the Executive's immigration power and the authority of the Immigration and Nationality Act (INA). In opposition, the sanctuary jurisdictions assert that their laws do not violate federal immigration law and are mere assertions of state police powers. In such a highly charged and politicized debate, it is difficult to discern which interpretation is most accurate.

In this section, I present an analysis of sanctuary laws under these two frameworks. First, I explore the legal impacts of sanctuary laws on existing immigration and constitutional law. To assess the impact on

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*; see *City of Chicago v. Sessions*, 264 F. Supp. 3d 933, 940 (N.D. Ill. 2017), *reconsideration denied*, No. 17 C 5720, 2017 WL 5499167 (N.D. Ill. Nov. 16, 2017).

72. *Office of New Americans*, CITY CHI., https://www.cityofchicago.org/city/en/depts/mayor/provdrs/office_of_new_americans.html [https://perma.cc/7TVC-EYNM].

73. *Office of New Americans, ONA Plan*, CITY CHI., https://www.cityofchicago.org/city/en/depts/mayor/supp_info/office-of-new-americans/ona_accomplishments.html [https://perma.cc/CJ8L-HWUN].

existing immigration law, I will analyze which sanctuary jurisdiction policy—Seattle, San Francisco, or Chicago—is most likely to survive a challenge under the INA. I will then delve into the federalism issue and determine whether sanctuary laws have any potential to change the Tenth Amendment doctrine. Finally, I will address the political impacts of sanctuary laws by embracing the theory that sanctuary laws are not revolutionary creatures of law; they merely assert existing state police powers. Ultimately, the analysis will reveal that sanctuary laws are most powerful as political expressions of a local government’s morals and values.

A. The Legal Impacts of Sanctuary Laws

1. Immigration Law

Sanctuary laws have, from their inception, allowed local governments to establish protections for immigrants when state laws are in disagreement with federal policies.⁷⁴ In the present day, the widespread presence of sanctuary laws across the country represents a unique shift in federalism that challenges the federal government’s exclusive control over the area of immigration. The following discussion of immigration law and federal preemption regarding the Seattle, San Francisco, and Chicago policies will reveal that sanctuary laws can legally coexist with and pose no threat to federal immigration law.

It is a long-standing principle that the federal government has plenary power to legislate in the area of immigration. This plenary power was first established by *Chae Chan Ping v. United States*, where the Court validated the Chinese Exclusion Act.⁷⁵ Policy concerns about the maintenance of a uniform national immigration policy support the upholding of the plenary power doctrine. Nonetheless, the plenary power of the Executive over the area of immigration was created by cases motivated by racial animus and xenophobic attitudes. Particularly, the seemingly pretextual use of national security and foreign affairs justifications used in previous cases seems to

74. *See supra* Part I.B. (discussing sanctuary laws originating from localities seeking to provide assistance to Central American refugees upon the U.S. government’s policy to deny the refugees political asylum due to involvement in the Salvadoran regime).

75. 130 U.S. 581, 609 (1889); *see also* *Arizona v. United States*, 567 U.S. 387, 416 (2012) (holding that immigration regulations surely fall within Congress’s plenary power); *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410, 419 (1948) (“The Federal Government has broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization.”).

require further judicial scrutiny.⁷⁶ Thus, even the circumstances under which the plenary power doctrine was established may not be as infallible as ordinarily thought. Even the Executive's plenary power over immigration is subject to judicial scrutiny for constitutional limitations.⁷⁷ The Supreme Court, in the past, has been inconsistent in its application of Congress's plenary power over immigration in several cases where it deemed federal immigration actions invalid on procedural fairness grounds.⁷⁸ Thus, despite claims of Executive plenary power, there is room for state and local regulations to have some impact on immigration law.

This plenary immigration power grants the federal government authority to enforce immigration law exclusively.⁷⁹ The Immigration and Nationality Act of 1965 (INA)—also known as the Hart-Cellar Act—is a comprehensive federal regulatory scheme for immigration and naturalization.⁸⁰ The INA repealed the original national-origin quota immigration policies.⁸¹ It has since become the primary means through which the federal government exercises its immigration authority.⁸²

The INA provision that is most threatening to local sanctuary laws is, § 1373.⁸³ Section 1373, titled “Communication between government agencies and the Immigration and Naturalization Service,” prohibits state and local governments from enacting laws that limit certain types of communication with the federal government about immigration and citizenship status information.⁸⁴ Section 1373 states:

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

76. Brief of Karen Korematsu, Jay Hirabayashi, Holly Yasui, the Fred T. Korematsu Center for Law and Equality, Civil Rights Organizations and National Bar Associations of Color as Amici Curiae Supporting Respondents at 15–18, *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (No. 17-965).

77. *Id.*

78. *See, e.g., Padilla v. Kentucky*, 559 U.S. 356, 374–75 (2010) (limiting the federal government's plenary power to deport by adding procedural requirements per the Sixth Amendment); *Dada v. Mukasey*, 554 U.S. 1, 21 (2009) (requiring the federal government to enact procedural notice requirements before deporting undocumented individuals who enter pleas).

79. *De Canas v. Bica*, 42 U.S. 351, 354 (1976).

80. Immigration and Nationality (Hart-Cellar) Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified as 8 U.S.C. Ch. 12).

81. *Id.*; Muzaffar Chishti, Faye Hipsman & Isabel Ball, *Fifty Years On, the 1965 Immigration and Nationality Act Continues to Reshape the United States*, MIGRATION INFO. SOURCE (Oct. 15, 2015), <https://www.migrationpolicy.org/article/fifty-years-1965-immigration-and-nationality-act-continues-reshape-united-states> [<https://perma.cc/P3BL-NEQR>].

82. The statute now dictates the bulk of the work performed by Immigration and Customs Enforcement and the Department of Homeland Security. Chishti, Hipsman & Ball, *supra* note 81.

83. 8 U.S.C.A. § 1373 (West 2018).

84. *Id.*

Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.⁸⁵

Also, government entities, in particular, may not be restricted or prohibited from sending, requesting, receiving, maintaining, or exchanging information regarding an individual's immigration status.⁸⁶

However, § 1373 does not compel local governments to comply with ICE civil detainer requests. As a matter of law, civil detainer requests are voluntary and local governments are not required to honor them.⁸⁷ Furthermore, courts have deemed ICE civil detainer requests as unconstitutional violations of the Fourth Amendment for detaining an individual without probable cause.⁸⁸ Laws restricting cooperation with civil detainer requests can be interpreted as merely precautionary measures to ensure that local governments do not violate the Fourth Amendment rights of individuals under their custody.

The primary consequence for jurisdictions that violate § 1373 is ineligibility for the Byrne Justice Assistance Grant (JAG) Program which provides federal funding grants to states and localities for law enforcement purposes.⁸⁹ In 2016, the Attorney General made Byrne JAG funding explicitly conditional upon compliance with § 1373.⁹⁰ Many other federal grant programs are also conditioned upon the general requirement of "compliance with all applicable federal laws."⁹¹ Section 1373 is currently being challenged in pending lawsuits brought by several sanctuary

85. *Id.* (emphasis added).

86. *Id.*

87. 8 C.F.R. § 287.7(a) (2018); *Galarza v. Szalczyk*, 745 F.3d 634, 643 (3d Cir. 2014) ("[S]ettled constitutional law clearly establishes that [immigration detainers] must be deemed requests" because any other interpretation would render them unconstitutional under the Tenth Amendment.).

88. *See generally* *Arizona v. United States*, 567 U.S. 387, 416 (2012); *Galarza*, 745 F.3d 634 (noting that local governments are not mandated to comply with federal detainer requests by ICE); *Miranda-Olivares v. Clackamas Cty.*, No. 3:12-CV-02317-ST, 2014 WL 1414305, at *11 (D. Or. Apr. 11, 2014). The Department of Homeland Security (DHS) recognized the district court decisions establishing that state civil immigration detainers violated the Fourth Amendment and accordingly changed its policy. *See generally* Memorandum from Jeh Charles Johnson, Sec'y of Dep't of Homeland Sec., for Thomas S. Winkowski, Acting Dir. of U.S. Immigration and Customs Enforcement, Megan Mack, Officer of Office of Civil Rights and Civil Liberties, and Philip A. McNamara, Assistant Sec. for Intergovernmental Affairs (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf [<https://perma.cc/FR8F-YG5F>].

89. Opposition to Plaintiff's Amended Motion for Preliminary Injunction at 4, *State of California v. Sessions*, No. 17-CV-04701 (N.D. Cal. Oct. 31 2017) [hereinafter *Opposition*]; BUREAU OF JUSTICE ASSISTANCE (BJA), *Edward Byrne Memorial Justice Assistance Grant Program*, <https://www.bja.gov/jag/> [<https://perma.cc/L545-DHGV>].

90. *Opposition*, *supra* note 89; *see* Memorandum from Michael E. Horowitz, Inspector Gen., to Karol V. Mason, Assistant Att'y Gen. of Office of Justice Programs, Department of Justice Referral of Allegations of 8 U.S.C. §1373 by Grant Recipients (May 31, 2016).

91. *See* *Opposition*, *supra* note 89, at 7.

jurisdictions. President Trump's Executive Order regarding sanctuary city funding, Attorney General Jeff Sessions' subsequent actions, and the Government's defenses in the pending lawsuits all rely heavily on § 1373 as valid grounds to invalidate or pre-empt sanctuary jurisdiction policies.

The constitutional doctrine of preemption maintains the generally exclusive federal power over immigration law. This doctrine also prevents state laws, here sanctuary laws, from impacting federal immigration law. The Supremacy Clause of the Constitution asserts that "the laws of the United States . . . shall be the supreme law of the land."⁹² Congress thus has the power to preempt state law through express federal legislation.⁹³ Additionally, state laws can be preempted through field preemption and conflict preemption.⁹⁴ Field preemption occurs when the federal regulation of a field is "so pervasive . . . that Congress left no room for the states" to legislate; thus, states are precluded from enacting policy in that area.⁹⁵ Conflict preemption arises when "compliance with both federal and state regulations becomes a physical impossibility."⁹⁶ To determine if a state law is preempted by federal immigration law, the court will inquire into whether the state law (1) attempts to regulate an existing immigration law, (2) attempts to regulate a field already fully occupied by Congress, or (3) conflicts with existing immigration law.⁹⁷

A preemption analysis of sanctuary provisions reveals that they pose no threat to existing federal immigration law and are well within the realm of state legislation. The strongest argument for federal preemption of state sanctuary laws is a combination of express and conflict preemption by § 1373 of the INA. Field preemption is not an issue because the Court has stated that there is room for states to legislate in immigration despite the plenary power of the Executive.⁹⁸ As such, a closer look at the language of § 1373 and a comparison with the language of the sanctuary provisions enacted in Seattle, San Francisco, and Chicago will reveal their likelihood of preemption.

Section 1373 prohibits state and local entities from preventing the *sending of information* about an individual's immigration status and the

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

93. *Marentette v. Abott Laboratories, Inc.*, 886 F.3d 112, 117 (2d Cir. 2018); *see also Arizona v. United States*, 567 U.S. 387, 416 (2012).

94. *Arizona*, 567 U.S. at 416.

95. *Id.*

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

97. *De Canas v. Bica*, 424 U.S. 351 (1976).

98. The Court stated that not every state enactment that deals with "aliens" is preempted by federal immigration schemes. *De Canas*, 42 U.S. at 355; *see Florida Lime*, 373 U.S. at 142–43 (holding that it was within state police powers to regulate the employment of undocumented individuals). *See generally Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948).

receiving of information about an individual from ICE.⁹⁹ First, consider the operative language of the San Francisco sanctuary provision, which states that no agent of the city of San Francisco “shall use any City funds or resources to assist in the enforcement of Federal immigration law or *to gather or disseminate* information regarding release status of individuals or any other such personal information”¹⁰⁰ It can be argued that San Francisco’s broad restriction on the gathering of information conflicts with the § 1373 language of “receiving information” about an individual from ICE. If this section was considered alone, the provision would seem to be preempted by conflict with § 1373.¹⁰¹ However, upon consideration of the greater construction and application of the San Francisco policy, the odds seem brighter for the city.

Taken as a whole, the San Francisco provision is more accurately described as a “don’t ask” policy. The policy prohibition on “gathering” information compared to the § 1373 language of “receiving” are reconcilable because “gathering” is proactive while “receiving” is passive.¹⁰² Thus, the San Francisco law only restricts local officials from proactively acquiring information or inquiring about immigration status, but there is no express prohibition on the passive receipt of information from ICE, which would conflict with § 1373. Cumulatively, since the policy bars any inquiry into immigration status, in practice the city would not have any information to “send” to federal immigration enforcement. Even if ICE requested information validly per § 1373, if the prohibition on inquiry was properly followed, the city would have no information to share. Thus, the San Francisco restriction on the “dissemination” of information avoids conflict with the “sending” language of § 1373 generally. The only information the city possesses that may be of concern is the release date of individuals from city custody, which falls under the civil detainer and release notice provision of § 12I.3. However, this provision provides guidelines for when city officials can respond to federal requests for notices of release.¹⁰³ Additionally, there is an anti-commandeering concern with this provision, which will be further discussed below.¹⁰⁴ Implicitly, the ordinance thus does not prohibit the passive receipt of information. It just restricts when state officials can respond to those requests, an action that is not mandated by § 1373.¹⁰⁵

99. 8 U.S.C.A. § 1373 (West 2018) (emphasis added).

100. S.F., CAL., ADMIN. CODE § 12H.2 (2018).

101. Gulasekaram & Villazor, *supra* note 12, at 1701–03.

102. *Id.* at 1702–03.

103. S.F., CAL., ADMIN. CODE § 12I.3 (2018).

104. *See infra* Part II.A.2.

105. S.F., CAL., ADMIN. CODE § 12I.3 (2018); *see also* 8 U.S.C.A. § 1373 (West 2018).

Thus, it seems that the San Francisco provision could likely withstand a preemption challenge.

In comparison to San Francisco, the Seattle preemption analysis is simpler, and the Seattle provision is more likely to withstand challenges because of its clear “don’t ask” approach. Since Seattle does not operate any jails or prisons, the sanctuary ordinance does not contain a provision defining the city officials’ involvement with civil detainees or notice of release requests by ICE.¹⁰⁶ As a result, the only possible conflicting provision with § 1373 states “unless otherwise required by law or by court order, no Seattle city officer *shall inquire* into the immigration status of any person, *or engage in activities designed to ascertain the immigration status* of any person.”¹⁰⁷ This provision explicitly prohibits the proactive inquiry by city officials into immigration status, but it is silent on sending or receiving of immigration status information with ICE. It simply embraces a “don’t ask” type of approach.¹⁰⁸ Thus, it does not seem to be within the same realm of § 1373’s regulation: the sending or receiving of information.

Similar to the first provision of the San Francisco policy, in application the city would have no relevant information to send to ICE. In addition, the Seattle code includes a savings clause that “[n]othing in this chapter shall be construed to prohibit any Seattle City officer or employee from cooperating with federal immigration authorities as required by law.”¹⁰⁹ If there was any slim doubt as to the validity of the Seattle sanctuary law, this statement clearly removes any concern about possible preemption or any outright restriction of interaction with federal authorities.

Unlike the Seattle and San Francisco sanctuary laws,¹¹⁰ the Chicago law embodies a “don’t ask and don’t tell” policy. It explicitly restricts cooperation of city authorities with ICE and prohibits not only inquiry into immigration status but also disclosure of such information.¹¹¹ Unlike the other sanctuary laws discussed, the Chicago law contains a prohibition on disclosure of immigration status information: “No agent or agency shall disclose information regarding the citizenship or immigration status of any person.”¹¹² Thus, a stronger argument could be made in this case that at

106. Daniel Beekman, *Seattle Officials Welcome Judge’s Block of Trump’s Sanctuary City Crackdown*, SEATTLE TIMES (Apr. 25, 2017), <https://www.seattletimes.com/seattle-news/politics/seattle-officials-welcome-judges-block-of-sanctuary-city-crackdown/>.

107. SEATTLE, WASH., MUN. CODE § 4.18.015 (2018).

108. See Gulasekaram & Villazor, *supra* note 12, at 1701–03.

109. SEATTLE, WASH., MUN. CODE § 4.18.035 (2018).

110. See *Id.* § 4.18; S.F., CAL., ADMIN. CODE § 121.3 (2018).

111. CHI., ILL., MUN. CODE §§ 2-173-030, 2-173-042 (2018).

112. *Id.* § 2-173-030.

least part of the Chicago sanctuary law is preempted by § 1373. The prohibition on “*communicating* with ICE regarding a person’s custody status or release date”¹¹³ could be interpreted as restricting the “receiving” and “sending” of information about an individual between city officials and ICE.¹¹⁴ Although in application, this policy would function like Seattle and San Francisco, where the inquiry restriction would essentially prevent any dissemination. The inclusion of this explicit restriction on “communicating” with ICE arguably conflicts with § 1373. The decision to include “communicating” after already using the term “responding” may indicate a broader reading of the term that prohibits not only responding to ICE requests but also information sharing.¹¹⁵ Additionally, the clause prohibiting disclosure, except under certain circumstances, seems to restrict the sending of information to ICE as well.¹¹⁶ Further, the disclosure provision arguably could be preempted, but the exception “as required by law” (including § 1373), may be enough to carve out an exception for § 1373 and avoid preemption.¹¹⁷

Ultimately, Chicago’s more comprehensive “don’t ask and don’t tell” approach, restricting inquiry and disclosure of information, treads closer to preemption than the other two laws discussed above. The safest approach is exhibited by Seattle in its focus strictly on a “don’t ask” policy without the inclusion of a civil detainer or notification request provision. San Francisco’s law also has a good likelihood of withstanding preemption even with inclusion of its civil detainer and notification request provision. Notably, this analysis reveals that state and local sanctuary laws can coexist with federal immigration law. Their existence does not conflict with or pose any potential change to current immigration doctrine.

2. Constitutional Law: Tenth Amendment

Although the federal government has plenary power over immigration, tension exists over what powers can be asserted over sanctuary laws as creatures of state law. The Tenth Amendment provides that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”¹¹⁸ As part of the Tenth Amendment, the anti-commandeering doctrine states that Congress may not enact regulations that directly compel states to enact or enforce a federal regulatory

113. *Id.* § 2-173-042 (emphasis added).

114. 8 U.S.C.A. § 1373 (West 2018).

115. CHI., ILL., MUN. CODE § 2-173-042 (2018).

116. *Id.* § 2-173-030.

117. *Id.*

118. U.S. Const. amend. X.

program.¹¹⁹ States must retain their ability to make independent state policy.¹²⁰ This allows states to remain accountable to their residents for policy decisions and prevents state governments from being blamed for federal policy decisions.¹²¹ The anti-commandeering doctrine prevents the federal government from compelling state governments to take affirmative actions to enforce or administer a federal program. But it has not, in the most recent applications, prohibited the federal government from issuing proscriptive restrictions on state governments.

Existing sanctuary laws may have the potential to expand the anti-commandeering doctrine of the Tenth Amendment to include a proscriptive element. A valid argument exists that § 1373 violates the anti-commandeering doctrine because in prohibiting localities from placing participation restrictions, it essentially compels enforcement or administration of a federal regulatory program.¹²² Although two courts have upheld § 1373 as a constitutional exercise of congressional power, there is some room for a bona fide challenge to the constitutionality of § 1373 to be successful.¹²³

There is an opportunity for the Court, however, to expand the anti-commandeering doctrine to allow states to prohibit voluntary compliance in regards to proscriptive federal statutes.¹²⁴ This move falls in line with the policy of the anti-commandeering doctrine. In application, local governments cannot comply with § 1373 and hold their employees accountable for the policy decision not to participate in the federal program.¹²⁵ Thus, it seems that the local government is commandeered by § 1373 because it “effectively thwarts” the ability of local government to extricate their jurisdiction from involvement in the federal program.¹²⁶

Additionally, as mentioned in *City of New York*, if a locality’s sanctuary law generally discussed the greater confidentiality and privacy concerns of information, then a stronger argument could be made that § 1373 commandeers the locality against its own interest.¹²⁷ However,

119. *New York v. United States*, 505 U.S. 144, 161 (1992).

120. *Id.*

121. Plaintiff State of California’s Notice of Amended Motion and Amended Motion for Preliminary Injunction, Memorandum of Points and Authorities in Support Thereof at 23, *State of California v. Sessions*, No. 17-CV-04701-WHO (N.D. Cal. Oct. 31, 2017) [hereinafter California’s Motion].

122. Complaint for Declaratory and Injunctive Relief at 39, *Santa Clara v. Trump*, No. 17-CV-00574-WHO (N.D. Cal. Feb. 3, 2017).

123. *See City of New York v. United States*, 179 F.3d 29, 31 (2d Cir. 1999) (holding that § 1373 was a valid exercise of power under the Tenth Amendment); *City of Chicago v. Sessions*, 264 F.Supp.3d 933, 949 (N.D. Ill. 2017).

124. *See Chicago*, 264 F. Supp. 3d at 949.

125. *Id.*

126. *Id.*

127. *New York*, 179 F.3d at 31.

in the absence of precedent, any change to the doctrine must be made by the Supreme Court.¹²⁸ In light of the challenges to President Trump's executive order, there is a possibility, although slim, that this change could occur soon.

City of New York v. United States is the only case where the court upheld the constitutionality of § 1373 under the Tenth Amendment anti-commandeering clause.¹²⁹ The case arose when the New York mayor enacted Executive Order No. 124, a sanctuary policy. The Ordinance prohibited city employees and officials from voluntarily providing federal authorities with information concerning the immigration status of any individual.¹³⁰ There were exceptions in the provision allowing communication with federal authorities when required by law if the individual authorized the sharing of information or if the individual was suspected of engaging in criminal behavior.¹³¹ If the information fit into an exception, the Ordinance named only particular officers that made the final decision on whether to alert federal authorities or not. Ultimately, the court held that § 1373 does not violate the anti-commandeering doctrine of the Tenth Amendment.¹³² Its decision rested on the premise that proscriptive regulations, contrary to affirmative ones, do not compel state and local governments to enact or administer any federal regulatory program.¹³³ The court stated that § 1373 does not “affirmatively conscript[] states, localities, or their employees into the federal government’s service.”¹³⁴ Additionally, it does not directly compel states or localities to affirmatively require or prohibit anything to comply with a federal regulatory scheme.¹³⁵ However, the holding is narrow because § 1373 infringed on the New York executive order alone.¹³⁶

The court left room for a decision involving “whether these Sections would survive a constitutional challenge in the context of generalized confidentiality policies that are necessary to the performance of legitimate municipal functions and that include federal immigration status,” and declined to offer an opinion on that matter.¹³⁷ Thus, a challenge to the proscriptive § 1373 by a city with a generalized confidentiality policy

128. *Chicago*, 264 F. Supp. 3d at 949.

129. 179 F.3d 29. In *City of Chicago v. Sessions*, in an opinion granting a preliminary injunction, the court held that § 1373 seemed to be a valid exercise of power; however, the case is still in litigation and no final decision has been rendered. 264 F. Supp. 3d at 949.

130. *New York*, 179 F.3d at 31.

131. *Id.*

132. *Id.* at 35.

133. *Id.*

134. *Id.* at 31.

135. *Id.* at 35.

136. *Id.*

137. *Id.* at 36.

could be successful. In *Chicago v. Sessions*, currently being litigated, the court has recognized that the “practical” impact of § 1373 is that “state and local governments are limited in their ability to decline to administer or enforce a federal regulatory program.”¹³⁸ Thus, there is potential that the proscriptive nature of § 1373 compels state and local governments to administer a federal regulatory scheme.

If formally recognized as such by the court, the decision would be a groundbreaking evolution of the anti-commandeering doctrine, which currently only applies to affirmative statutes. Sanctuary laws are well-suited to lead this change because most provisions preserve the confidentiality of personal information, including immigration status, and may conflict with the compelling requirements of § 1373.

B. The Political Impacts of Sanctuary Laws

Sanctuary laws—originating from churches that functioned as “sanctuaries” for asylum seekers¹³⁹—have been motivated by a sentiment of moral duty and ethical obligation.¹⁴⁰ Today, sanctuary laws continue to hold true to their origins and serve primarily as political symbols.¹⁴¹ The laws send a message to the jurisdiction’s citizens and the rest of the country denouncing anti-immigrant sentiment and policies. The language in the purpose and preamble provisions of sanctuary laws make this intention starkly clear. The policies assert the importance of immigrants in the community and emphasize the need to maintain a diverse and inclusive community within the jurisdiction.¹⁴²

Additionally, the substantive content of sanctuary laws, for the most part, seem to merely reiterate rights already protected within the state police power or other constitutional limitations. The state police power, protected by the Tenth Amendment, gives the state sovereign power in determining the best approach to address crime and public safety.¹⁴³ The courts have recognized that state and local governments have a compelling

138. California’s Motion, *supra* note 121, at 24; *see also* United States v. Morrison, 529 U.S. 598, 618 (2000).

139. *See supra* Part I.A.

140. *See* Villazor, *supra* note 26, at 140–42, 147.

141. *See id.* at 155.

142. CHI., ILL., MUN. CODE § 2-173-005 (2018) (“The vitality of the City of Chicago (the ‘City’), one of the most ethnically, racially and religiously diverse cities in the world, where one-out-of-five of the City’s residents is an immigrant, has been built on the strength of its immigrant communities. . . . One of the City’s most important goals is to enhance the City’s relationship with the immigrant communities.”); SEATTLE, WASH., ORDINANCE No. 121063 (Jan. 28, 2003) (stating “Seattle is a city comprised of immigrants . . . who contribute to Seattle’s social vivacity and cultural richness”).

143. California’s Motion, *supra* note 121, at 22; *see also* Morrison, 529 U.S. at 618.

interest in maintaining a strong, trustworthy relationship with undocumented and immigrant residents in their communities.¹⁴⁴

Jurisdictions assert that the purpose of their sanctuary laws is to improve trust between the local law enforcement authority and the undocumented immigrant community to encourage victims and witnesses to come forward in reporting crime and aid in investigations.¹⁴⁵ In the aggregate, by removing this obstacle for undocumented residents, the goal is to reduce crime and improve public safety overall.¹⁴⁶ A recent study proves that this goal is, in fact, being achieved; sanctuary jurisdictions are, as a whole, safer and stronger communities.¹⁴⁷ The research showed that in jurisdictions without sanctuary laws, where law enforcement agencies frequently comply with detainer requests, it was harder for the local agency to investigate crimes because victims and witnesses were less likely to come forward due to the risk of detainment and deportation.¹⁴⁸ Thus, the sanctuary law provisions that restrict compliance with ICE detainer or notification requests and prohibit inquiry into immigration status seem to be a valid means to the greater end of improving public safety. This action regarding safety would fit within the accepted scope of state police powers. In doing so, the primary purpose of sanctuary laws is to send a message establishing trust between the local community and its undocumented residents rather than make a substantive change to immigration law.

Sanctuary laws, to some extent, create effective legal protections for undocumented residents and other immigrants by protecting the collection

144. *City of Chicago v. Sessions*, 888 F.3d 272, 291 (7th Cir. 2018).

145. SEATTLE, WASH., ORDINANCE No. 121063 (Jan. 28, 2003) (addressing in the preamble that the attacks of September 11, 2001 “left immigrant communities of color afraid to access benefits to which they are entitled, for fear of being reported to the Immigration and Naturalization Service (INS)”); CHI., ILL., MUN. CODE § 2-173-005 (2018) (“The City Council finds that the cooperation of all persons, both documented citizens and those without documentation status, is essential to achieve the City’s goals of protecting life and property, preventing crime and resolving problems. The City Council further finds that assistance from a person, whether documented or not, who is a victim of, or a witness to, a crime is important to promoting the safety of all its residents. The cooperation of the City’s immigrant communities is essential to prevent and solve crimes and maintain public order, safety and security in the entire City. One of the City’s most important goals is to enhance the City’s relationship with the immigrant communities.”); *Sanctuary City Ordinance*, *supra* note 50 (explaining that the ordinance was adopted to promote public trust and cooperation: “It helps keep our communities healthy by making sure that all residents, regardless of immigration status, feel comfortable accessing City public health services and benefit programs”); *see also* California’s Motion, *supra* note 121, at 2.

146. *See* sources cited *supra* note 145.

147. Gene Demby, *Why Sanctuary Cities are Safer*, NAT’L PUB. RADIO (Jan. 29, 2017), <https://www.npr.org/sections/codeswitch/2017/01/29/512002076/why-sanctuary-cities-are-safer> (reporting that on average counties that did not comply with ICE detainers experienced 35.5 fewer crimes per 10,000 people than jurisdictions that did comply).

148. *Id.*

and distribution of personal identifying information.¹⁴⁹ However, these protections are neither infallible nor comprehensive.

Sanctuary policies have failed. Despite the state's sanctuary law, in 2017, the Washington State Department of Licensing (DOL) shared the personal information of hundreds of Washington residents with federal immigration enforcement agencies.¹⁵⁰ Community organizations also warn that sanctuary laws do not provide comprehensive protection from immigration enforcement; ICE can still operate in churches, schools, workplaces, and even homes.¹⁵¹ Local organizations still urge families to remain vigilant and prepare emergency plans should they become detained or separated.¹⁵² Nonetheless, sanctuary laws are a step forward in protecting immigrant communities.

Overall, state and local governments do not seem to be making any large-scale radical change in immigration law by enacting sanctuary laws. Instead, they are using sanctuary laws to send a message of opposition to harsh federal policies or a message of trust and commitment to diversity and inclusiveness to their residents—and the federal government. Though not impactful on substantive legal doctrine, sanctuary policies carry significant normative influence simply because they are laws.

The traditional intent of legal regulation is to change behaviors by changing collective attitudes among the community.¹⁵³ Mere publicity and knowledge of a law can curb discouraged behaviors and promote positive beliefs about the moral purpose of the law.¹⁵⁴ Further research is needed to determine the exact efficacy of sanctuary laws on creating safe, inclusive spaces for immigrants. Regardless, the message sent by cities,

149. See Nina Shapiro, *Washington Department of Licensing Details How Often It Gave Residents' Info to Immigration Officials*, SEATTLE TIMES (Apr. 17, 2018), <https://www.seattletimes.com/seattle-news/times-watchdog/washington-state-discloses-how-often-it-shared-information-with-immigration-authorities/> (“Every record shared by the Department with ICE represents a family that has been or may be ripped apart by federal immigration authorities.”).

150. *Id.*; see also Nina Shapiro, *Washington State Regularly Gives Drivers' Info to Immigration Authorities; Inslee Orders Temporary Halt*, SEATTLE TIMES (Jan. 11, 2018), <https://www.seattletimes.com/seattle-news/times-watchdog/washington-state-regularly-gives-drivers-info-to-immigration-authorities-inslee-orders-temporary-halt/>.

151. *Know and Exercise Your Rights!*, ONEAMERICA, http://weareoneamerica.org/wp-content/uploads/2017/05/Know_Your_Rights_Presentation_12_5_16pdf_0.pdf [<https://perma.cc/MQ8B-PTKG>]; see also *City of Chicago v. Sessions*, 888 F.3d 272, 281 (7th Cir. 2018) (“The federal government can and does freely operate in “sanctuary” locations. And the level of refuge provided by sanctuary cities is not unbounded.”).

152. *Know and Exercise Your Rights!*, *supra* note 151.

153. Jamillah Bowman Williams, *Breaking Down Bias: Legal Mandates vs. Corporate Interests*, 92 WASH. L. REV. 1472, 1481–82 (2017).

154. *Id.* at 1481–82, 1509 (describing the normative influence of law in the context of antidiscrimination and civil rights laws).

states, and counties declaring themselves as “welcoming,” “inclusive,” and places of “refuge” is a powerful one.

CONCLUSION

Sanctuary laws have come to the forefront of immigration law discussions in recent years due to recent concerns about terrorism and the changing population demographics in the country. Bucking these concerns, many jurisdictions have resisted xenophobia and opted to enact sanctuary laws that restrict the use of local resources in federal immigration enforcement. In an exploration of whether these sanctuary laws possess more legal or political influence, my analysis concluded that the primary purpose and influence of these laws is political in nature.¹⁵⁵

Although the federal government—the executive branch in particular—maintains plenary authority over immigration, state and local sanctuary laws can coexist with federal immigration law. Sanctuary provisions are unlikely to make any revolutionary change to existing immigration law because of the restrictions set forth in § 1373 of the INA and the doctrine of federal preemption. Sanctuary provisions must be narrowly tailored to fit within the space untouched by § 1373. The best approach would be a pure “don’t ask” policy, similar to Seattle’s. Meanwhile, a “don’t tell” policy, like Chicago’s, that restricts disclosure and communication with ICE, has a greater chance of being preempted by § 1373.¹⁵⁶ Sanctuary laws do have potential to expand the Tenth Amendment anti-commandeering doctrine and prevent federal proscriptive regulatory schemes. However, this does not seem to be their main purpose.

Ultimately, the power of sanctuary laws lies in their political and moral messaging. These policies symbolize opposition to current immigration enforcement tactics and promote the values of trustworthiness and inclusiveness among the community.¹⁵⁷ They represent a collective commitment to protecting immigrant communities in the face of aggressive government action. By no means are these policies perfect; however, they create protections for the some of the most marginalized members of American society. It is my hope that this Comment brings clarity to an area of public concern so heavily diluted with misinformation. Sanctuary policies are at their core, as they were at their origins, about preserving “life, liberty, and the pursuit of happiness”

155. *See supra* Part II (discussing the dichotomy between legal significance and political significance).

156. *See supra* Part II.A.

157. *See supra* Part II.B.

for all members of society—a founding principle of the United States of America.