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Expanding Printz in the Sanctuary City Debate

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Expanding *Printz* in the Sanctuary City Debate

ABSTRACT

American attitudes toward immigration shift with changes in the nation's economic and political climate. While waves of immigration to the United States are motivated by various factors, the extent to which immigrants are welcomed in the country does not consider these motivations. Rather, American perspectives of immigration vary by region and are informed by local economies and ideological majorities. Thus, while some localities work closely with federal immigration officials to facilitate federal regulatory schemes, other localities adopt policies that prohibit cooperation with federal immigration law, becoming "sanctuary cities" for undocumented immigrants. This Comment explores the constitutionality of a federal provision that attempts to subvert the ability of sanctuary cities to implement policies they believe promote trust and communication with local immigrant communities and which ultimately improve public safety. Analyzed within the framework of Tenth Amendment federalism and state sovereignty, this federal provision is an invalid infringement of states' power to sustain sanctuary cities.

INTRODUCTION

On February 27, 2003, the House of Representatives Subcommittee on Immigration, Border Security, and Claims began its first session of the 108th Congress with a "difficult, confused, and a very emotionally charged issue": sanctuary cities.[1] The hearing was held in response to a brutal rape and robbery that occurred on December 19, 2002 at Flushing Meadows Park in Queens.[2] The victim and several of her assailants were undocumented immigrants.[3] Concerned that New York City's (the City's) sanctuary policy may have enabled the attack, the House members engaged a panel of local law enforcement officers, federal immigration officers, and immigrant advocates to discuss the nationwide effect of sanctuary policies on federal immigration enforcement efforts.[4]

The City's controversial sanctuary policy originated in 1989. Mayor Edward Koch issued an executive order prohibiting local law enforcement officers from sharing identification information about undocumented immigrants with federal immigration authorities.[5] This order of noncompliance with federal immigration authorities deemed the City a

1. *New York City's 'Sanctuary' Policy and the Effect of Such Policies on Public Safety, Law Enforcement, and Immigration: Hearing Before the Subcomm. on Immigration, Border Sec., & Claims of the H. Comm. on the Judiciary*, 108th Cong. 49 (2003) [hereinafter *Hearing*] (statement of Rep. Chris Cannon, Member, Subcomm. on Immigration, Border Sec., & Claims). Sanctuary cities are defined by local policies that restrict local law enforcement agencies' cooperation with federal immigration authorities. Rose Cuison Villazor, *What Is a "Sanctuary"?*, 61 SMU L. REV. 133, 147–48 (2008). For example, some policies prohibit local law enforcement officers from inquiring about the immigration status of an individual or restrict the sharing of such information with federal immigration authorities. *Id.* at 148–49.

2. *Hearing*, *supra* note 1, at 1 (statement of Rep. John N. Hostettler, Chairman, Subcomm. on Immigration, Border Sec., & Claims); Paul Menchaca, *All Five Suspects Plead Guilty to 2002 Flushing Meadows Rape*, QUEENS CHRON., Dec. 11, 2003.

3. *Hearing*, *supra* note 1, at 1 (statement of Rep. John N. Hostettler, Chairman, Subcomm. on Immigration, Border Sec., & Claims).

4. *Id.* at 1–3.

5. N.Y.C., N.Y., Exec. Order No. 124 (Aug. 7, 1989), https://perma.cc/2XZZ-Q85R.

sanctuary jurisdiction.[6] The City's sanctuary policy reflected a commitment to "community-based policing," wherein law enforcement agents encouraged crime reporting to ultimately reduce crime by developing trust with immigrant communities.[7] Consistent with the goal of crime reduction, the order contained an exception for immigrants suspected of engaging in criminal activity.[8] Koch's successors, Mayors Dinkins and Giuliani, reissued the order,[9] and it endured until Congress passed section 642 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).[10]

Congress enacted IIRIRA in a series of border security and welfare reform measures that were passed in response to the surge in U.S. immigration during the 1990s.[11] Section 642 was eventually codified as 8 U.S.C. § 1373.[12] Section 1373, entitled "Communication between government agencies and the Immigration and Naturalization Service," prohibits state and local governments from restricting the sending, receiving, maintaining, and exchanging of information regarding the immigration status of any individual with federal immigration authorities.[13]

After its passage, Mayor Giuliani filed a lawsuit against the United States challenging the constitutionality of § 1373.[14] Giuliani relied on *Printz v. United States*[15] to argue that § 1373 violated Tenth Amendment principles of federalism and improperly trammeled state sovereignty.[16] The district

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6. *Hearing*, *supra* note 1, at 2 (statement of Rep. John N. Hostettler, Chairman, Subcomm. on Immigration, Border Sec., & Claims).

7. *Id.* at 7 (statement of Rep. Sheila Jackson Lee, Member, Subcomm. on Immigration, Border Sec., & Claims).

8. N.Y.C., N.Y., Exec. Order No. 124, § 2(a)(3) (Aug. 7, 1989), https://perma.cc/2XZZ-Q85R.

9. *See, e.g.*, Rudolph W. Giuliani, Mayor of N.Y.C., Address at the Conference on the New Immigrants in Cowles Auditorium, Minnesota (Sept. 30, 1996) (transcript available in the Archives of Rudolph W. Giuliani, https://perma.cc/KGQ4-82AZ).

10. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, § 642, 110 Stat. 3009, 3009-707 (1996) (codified at 8 U.S.C. § 1373 (2012)).

11. *See, e.g.*, Audrey Singer, *Welfare Reform and Immigrants: A Policy Review*, *in* IMMIGRANTS, WELFARE REFORM, AND THE POVERTY OF POLICY 21, 26 (Philip Kretsedemans & Ana Aparicio eds., 2004).

12. 8 U.S.C. § 1373.

13. *Id.*

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

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

16. *City of New York I*, 971 F. Supp. at 797–98. Specifically, the City argued that

> Congress has stripped State and local governments of choice and control over their own policies . . . . The fear of this precise danger—that Congress would devour the

court dismissed Giuliani's claim,[17] and, on appeal, the Second Circuit upheld § 1373 as constitutional.[18] Thus, when the Subcommittee on Immigration, Border Security, and Claims held its hearing in 2003, it understood § 1373 to be a constitutional preemption of the City's sanctuary policy.[19]

The members of the Subcommittee sought to confirm that in the wake of the Second Circuit's decision and the Flushing Meadows tragedy, the City had terminated its sanctuary policy to comply with § 1373.[20] New York City Criminal Justice Coordinator, John Feinblatt, assured the Subcommittee that the City was in compliance with §1373 but defended its sanctuary policy: "[The policy] was based upon the concern that the public's health, welfare, and safety could be harmed if, out of fear of being reported to the [Immigration and Naturalization Service], immigrants were reluctant to make use of city services."[21] Feinblatt's statement echoes a perspective frequently overlooked in the sanctuary city debate; it is also the very argument Mayor Giuliani made in *City of New York* seven years prior—that § 1373 violates a locality's constitutionally protected police power to implement sanctuary policies.[22]

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essence of State sovereignty—is what mobilized the States, including the State of New York, to demand the Tenth Amendment.

Appellants' Brief at 24–25, City of New York v. United States (*City of New York II*), 179 F.3d 29 (2d Cir. 1999) (No. 97-6182) [hereinafter Appellants' Brief].

17. *City of New York I*, 971 F. Supp. at 798.

18. *City of New York II*, 179 F.3d at 37.

19. *Hearing*, *supra* note 1, at 2 (statement of Rep. John N. Hostettler, Chairman, Subcomm. on Immigration, Border Sec., & Claims) ("New York City challenged [section 642 of the IIRIRA] in Federal court and lost.").

20. *See id.* The chairman set the context of the hearing by stating:

> We will examine whether New York City continued E.O. 124, amended it, or scrapped it altogether. We will also examine what guidance the city has sent to its officers on the street about reporting criminal aliens to the INS. At this hearing, the Subcommittee will also explore what effect any New York City sanctuary policy had on the fact that the three illegal aliens with arrest histories had not been deported.

Id.

21. *Id.* at 11 (statement of John Feinblatt, Criminal Justice Coordinator of the City of New York). In response to the 9/11 terrorist attacks, the Immigration and Naturalization Service was replaced by the Department of Homeland Security (DHS), and its functions transferred to three component agencies: Immigration and Customs Enforcement (ICE), Customs and Border Protection (CBP), and United States Citizen and Immigration Services (USCIS). *See* Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (codified as amended at 6 U.S.C. § 101 (2012)). ICE is responsible for identifying and detaining persons in violation of federal immigration law and is the agency with which sanctuary cities bar information sharing. *See Enforcement and Removal Operations*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, https://perma.cc/UC3K-MXCD.

22. *See infra* Part II.

The remainder of the Subcommittee hearing reflects a debate peppered with ideological clashes regarding the role of local law enforcement agencies in federal immigration regulatory schemes.[23] While some participants commended § 1373 and cautioned against the "dangerous message of ambivalence" that sanctuary policies portray,[24] others highlighted that sanctuary policies are "widely recognized as an effective tool for keeping kids off drugs, combating gang violence, and reducing crime rates in neighborhoods around the country."[25] Similarly, one Subcommittee member contended that without sanctuary policies, the victim of the Flushing Meadow tragedy may not have sought legal and medical recourse, and the attack "should not be used to paint the lives of all immigrants."[26] A solution to this dichotomy evaded the 108th Congress.[27] Notwithstanding purported preemption by § 1373, Mayor Bloomberg issued two executive orders instituting sanctuary policies within seven months of the 2003 Subcommittee hearing.[28] The 108th Congress did not again take up the issue.[29]

New York City is only one example of a jurisdiction that has maintained sanctuary policies despite the Second Circuit's upholding of § 1373 in *City of New York II*.[30] Sanctuary cities in states across the country have continued to coexist with § 1373,[31] and though they have collided with § 1373 in lawsuits since *City of New York II*,[32] the controversies have done little to

23. *Hearing*, *supra* note 1, at 39–65.

24. *Id.* at 15 (statement of Michael J. Cutler, former Senior Special Agent, New York District Office, Immigration and Naturalization Services).

25. *Id.* at 7 (statement of Rep. Sheila Jackson Lee, Member, Subcomm. on Immigration, Border Sec., & Claims).

26. *Id.* app. at 68 (statement of Rep. John Conyers, Jr., Member, Subcomm. on Immigration, Border Sec., & Claims).

27. *See Public Laws: 108th Congress (2003-2004)*, CONGRESS.GOV, https://perma.cc/5D4M-QBCP.

28. N.Y.C., N.Y., Exec. Order No. 34 (May 13, 2003), https://perma.cc/R7SL-V47B; N.Y.C., N.Y., Exec. Order No. 41 (Sept. 17, 2003), https://perma.cc/H67L-KKZY.

29. *See Public Laws: 108th Congress (2003-2004)*, *supra* note 27.

30. *See* Bryan Griffith & Jessica Vaughan, *Maps: Sanctuary Cities, Counties, and States*, CTR. FOR IMMIGR. STUD. (July 27, 2017), https://perma.cc/9LA4-QS2Z.

31. *See, e.g.*, Memorandum from Kevin L. Faulconer, Mayor, City of San Diego, to Hon. Myrtle Cole, President, San Diego City Council (Mar. 15, 2017) (on file with Campbell Law Review) (affirming the continuation San Diego Police Department's "long-standing policy where officers do not initiate contact for the sole purpose of checking an individual's immigration status, nor do they ask for the immigration status of victims or witnesses of crimes").

32. *See, e.g.*, Cty. of Santa Clara v. Trump, No. 17-cv-574-WHO; No.17-cv-00485-WHO, 2017 U.S. Dist. LEXIS 62871, at *85 (N.D. Cal. Apr. 25, 2017) ("The Government repeatedly emphasizes in its briefing that it does not know what it means to 'willfully refuse to comply' with Section 1373. Past DOJ guidance and various court cases interpreting Section

definitively settle the relationship between the policies and § 1373. Similarly, federal lawmakers have failed to pass proposed anti-sanctuary city measures despite a range of attempts within the last nine years.[33] Nonetheless, federal lawmakers have not ceded the command of § 1373 in the sanctuary city debate.

On June 22, 2017, federal legislators introduced H.R. 3003, the "No Sanctuary for Criminals Act," in the House of Representatives as a bill to amend § 1373.[34] H.R. 3003 expands the scope of § 1373 by barring state and local governments from commanding its officials to limit or restrict "compl[iance] with the immigration laws . . . or from assisting or cooperating with Federal law enforcement entities, officials, or other personnel regarding the enforcement of [immigration] laws."[35] The scope of H.R. 3003 is broader than § 1373. Whereas § 1373 prohibits local policies that interfere with the flow of information to federal immigration authorities, H.R. 3003 prohibits local policies that constitute any form of noncompliance with federal immigration authorities. For example, noncompliance with federal immigration authorities under H.R. 3003 encompasses not only restrictions on information sharing, but also restrictions on inquiring into immigration status.[36] H.R. 3003 therefore shortens the slack § 1373 left for the working relationship between immigrants and local police, adding a new

1373 have not reached consistent conclusions as to what [Section] 1373 requires."); Steinle v. City of S.F., 230 F. Supp. 3d 994, 1015–16 (N.D. Cal. 2017) (holding San Francisco did not violate § 1373 when it withheld an undocumented inmate's release date from ICE); Sturgeon v. Bratton, 95 Cal. Rptr. 3d 718, 731 (Cal. Ct. App. 2009) (holding that a Los Angeles sanctuary policy prohibiting police interaction with individuals initiated to obtain immigration information did not violate § 1373).

33. *See, e.g.*, Ending Sanctuary Cities Act of 2016, H.R. 6252, 114th Cong. (2016) (no action after referral to the Subcommittee on Immigration and Border Security on Oct. 21, 2016); Stop Dangerous Sanctuary Cities Act, H.R. 5654, 114th Cong. (2016) (no action after referral to the Subcommittee on Immigration and Border Security on July 20, 2016); Stop Sanctuary Policies and Protect Americans Act, S. 2146, 114th Cong. (2015) (cloture not invoked by the Senate on October 20, 2015); Protecting American Citizens Together (PACT) Act, S. 1764, 114th Cong. (2015) (no committee action after July 14, 2015 introduction); Mobilizing Against Sanctuary Cities Act of 2011, H.R. 2057, 112th Cong. (2011) (no action after referral to the Subcommittee on Immigration Policy and Enforcement on July 11, 2011); Putting an End to Sanctuary Cities Act, H.R. 5796, 111th Cong. (2010) (no action after referral to the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law on July 26, 2010); Loophole Elimination and Verification Enforcement (LEAVE) Act, H.R. 6789, 110th Cong. (2008) (no action after referral to the Subcommittee on Border, Maritime, and Global Counterterrorism on Sept. 29, 2008).

34. No Sanctuary for Criminals Act, H.R. 3003, 115th Cong. (2017).

35. *Id.* at § 2(a).

36. *Id.*

wrinkle to the web of ideologies that have complicated the sanctuary city debate since *City of New York II*.

The anomalous yet enduring coexistence of sanctuary cities and § 1373 illustrates two opposing constitutional philosophies. One embraces sanctuary policies as an exercise of state police power guaranteed by the Tenth Amendment, while the other deems sanctuary policies preempted by § 1373 under the Supremacy Clause.[37] The proper place of sanctuary cities thus involves a boundary dispute between the dueling sovereigns that must be resolved by constitutional principles of federalism. In upholding § 1373 as constitutional, *City of New York II* represents a critical juncture in the development of the sanctuary city discourse. *City of New York II* enabled § 1373 to cloud potential compatibility between sanctuary cities and federal immigration law. Likewise, since *City of New York II* did not draw a definitive line between § 1373 and sanctuary cities,[38] solutions to what has become an ongoing national controversy are often encumbered by partisan immigration politics to prevent a just, final resolution.

This Comment addresses the barrier to the mutual sovereignty of local law enforcement agencies and federal immigration law that § 1373 has created since *City of New York II*. Part I of this Comment explores the philosophy of sanctuary cities to illustrate their relationship to public safety and community policing. Part II analyzes *City of New York II* to conclude that the Second Circuit provided an incomplete analysis of § 1373 and likely would have held § 1373 unconstitutional with a proper interpretation of sanctuary policies, the Tenth Amendment, and the Supremacy Clause. Part III proposes two solutions that would resolve the boundary dispute between federal immigration law enforcement and sanctuary cities without compromising the respective powers of either.

I. PUBLIC SAFETY IN SANCTUARY CITIES

There is no singular legal definition of the term "sanctuary city."[39] Reduced to its most basic denominator, a sanctuary city is a locality that,

37. *See* Raina Bhatt, Note, *Pushing an End to Sanctuary Cities: Will It Happen?*, 22 MICH. J. RACE & L. 139, 148–49, 153–54 (2016).

38. For example, New York City has maintained sanctuary policies throughout the roughly twenty years since the enactment of § 1373 and *City of New York II*. Liz Robbins, *Council Seeks to Counter Trump's Crackdown on Undocumented Immigrants*, N.Y. TIMES, Apr. 27, 2017, at A21.

39. SARAH S. HERMAN, CONG. RESEARCH SERV., R44795, STATE AND LOCAL "SANCTUARY" POLICIES LIMITING PARTICIPATION IN IMMIGRATION ENFORCEMENT 3 (2017) ("Still, there is no official definition of a 'sanctuary' jurisdiction in federal statute or regulation.").

through uncodified policy[40] or official ordinance,[41] limits its cooperation with federal immigration policies.[42] In a March 2017 report,[43] the Congressional Research Service (CRS) identified three primary policies of noncompliance which sanctuary cities may implement: "don't enforce," "don't ask," or "don't tell."[44] The CRS defines "don't enforce" policies as the prohibition of collaboration between local law enforcement officials and federal immigration officials.[45] It defines "don't ask" policies as barring the affirmative discovery of an individual's immigration status, and "don't tell" policies as barring the sharing of such information with federal immigration officials.[46] Mayors, state legislators, and other local government officials institute sanctuary policies, which are primarily implemented by local law enforcement agencies during the course of everyday policing processes.[47]

Sanctuary cities emerged with the onset of the sanctuary movement of the 1980s, during which time churches extended harbor to Central American refugees.[48] However, as illustrated by the testimony of Mr. Feinblatt at the

40. *See, e.g.*, Memorandum from Kevin L. Faulconer, *supra* note 31 (affirming the continuation of San Diego Police Department's "long-standing policy where officers do not initiate contact for the sole purpose of checking an individual's immigration status, nor do they ask for the immigration status of victims or witnesses of crimes").

41. *See, e.g.*, MINNEAPOLIS, MINN., CODE OF ORDINANCES § 19.30(a)(1), (3) (2017) (providing that "[p]ublic safety officials shall not undertake any law enforcement action for the purpose of detecting the presence of undocumented persons, or to verify immigration status, including but not limited to questioning any person or persons about their immigration status"; nor shall they "question, arrest or detain any person for violations of federal civil immigration laws except when immigration status is an element of the crime or when enforcing 8 U.S.C. 1324(c).").

42. HERMAN, *supra* note 39.

43. *Id.*

44. *Id.* at Summary. The enumeration of these three policies did not originate in the March 2017 CRS Report. The tri-categorization of these policies emerged in the scholastic immigration law community. *See, e.g.*, Orde F. Kittrie, *Federalism, Deportation, and Crime Victims Afraid to Call the Police*, 91 IOWA L. REV. 1449, 1457 (2006); Laura Sullivan, Comment, *Enforcing Nonenforcement: Countering the Threat Posed to Sanctuary Laws by the Inclusion of Immigration Records in the National Crime Information Center Database*, 97 CALIF. L. REV. 567, 574 (2009); Rick Su, *Police Discretion and Local Immigration Policymaking*, 79 UMKC L. REV. 901, 910 (2011); *Developments in the Law—Policing Immigrant Communities*, 128 HARV. L. REV. 1771, 1791 n.142 (2015).

45. HERMAN, *supra* note 39, at Summary.

46. *Id.*

47. *See* Su, *supra* note 44, at 911–12.

48. *See* Michael J. Davidson, *Sanctuary: A Modern Legal Anachronism*, 42 CAP. U. L. REV. 583, 602–03 (2014). During the 1980s, an influx of Nicaraguan, Guatemalan, and Salvadoran citizens unlawfully entered the United States seeking refuge from civil wars in their home countries. *Id.* at 602. Many churches throughout the United States provided "sanctuary" to the refugees through the efforts of their ministries. *Id.* at 603.

2003 Subcommittee hearing,[49] modern perspectives of community safety[50] and administrative efficiency[51] have largely supplanted such faith-based practices of sanctuary.[52] Today, the adoption of sanctuary policies is primarily motivated by community-based policing methods that prioritize communication and trust.[53]

A. Communication, Trust, and the Philosophy of Sanctuary Cities

More than one hundred cities and counties in twenty-five states have instituted sanctuary policies.[54] Local law enforcement agencies within these jurisdictions prioritize trust in designing policing models that improve public safety.[55] Their philosophy of trust is based on the concern that immigrants may be reluctant to report crimes if they believe local police officers will share their information with Immigration and Customs Enforcement (ICE)

49. *See Hearing*, *supra* note 1, at 10–13 (statement of John Feinblatt, Criminal Justice Coordinator of the City of New York).

50. *See* MAJOR CITIES CHIEFS IMMIGRATION COMM., M.C.C. IMMIGRATION COMMITTEE RECOMMENDATIONS FOR ENFORCEMENT OF IMMIGRATION LAWS BY LOCAL POLICE AGENCIES 6 (2006) ("Immigration enforcement by local police would likely negatively effect [sic] and undermine the level of trust and cooperation between local police and immigrant communities. If the undocumented immigrant's primary concern is that they will be deported or subjected to an immigration status investigation, then they will not come forward and provide needed assistance and cooperation.").

51. *See* Ingrid V. Eagly, *Immigrant Protective Policies in Criminal Justice*, 95 TEX. L. REV. 245, 291–92 (2016) (noting that "[l]ocal officials throughout the country have realized that immigration enforcement requires investment of personnel hours, facility costs, transportation resources, and other related expenses" and that "[c]ontroversy over who will pay for immigration enforcement has only grown more tense as state and local budgets have shrunk, while the federal government's immigration budget has ballooned.").

52. *See* Davidson, *supra* note 48, at 608 ("Referred to as the New Sanctuary Movement in the United States since at least 2006, a small number of churches in the United States have either offered sanctuary to illegal immigrants or expressed their intent to do so.").

53. *See, e.g.*, Press Release, The U.S. Conference of Mayors, U.S. Mayors, Police Chiefs Concerned with Sanctuary Cities Executive Order (Jan. 25, 2016), https://perma.cc/8XP9-8MPH ("Local police departments work hard to build and preserve trust with all of the communities they serve, including immigrant communities. Immigrants residing in our cities must be able to trust the police and all of city government.").

54. *See* Griffith & Vaughan, *supra* note 30.

55. *See* Bill Ong Hing, *Immigration Sanctuary Policies: Constitutional and Representative of Good Policing and Good Public Policy*, 2 U.C. IRVINE L. REV. 247, 249–50 (2012).

agents.[56] Immigrants often reside in neighborhoods with high crime rates[57] and can be both victims of and witnesses to crimes.[58] Officials reason immigrants' fear of deportation may isolate local law enforcement agencies from critical information about crime and, in turn, inhibit effective policing and overall community safety.[59] Recent trends in crime reporting suggest that these apprehensions are not unfounded.[60]

Statistics from police departments in Texas, California, and New Jersey show a decrease in the number of crime reports made by immigrants since the inauguration of President Trump.[61] For example, data from Houston reflects that between January and March 2017, Hispanics reported 13% fewer violent crimes, 43% fewer rapes and sexual assaults, 12% fewer aggravated assaults, and 8% fewer robberies than they reported in the first three months of 2016.[62] In Los Angeles, Hispanics reported 10% fewer domestic violence incidents and 25% fewer rapes in the first three months of 2017 as compared to 2016.[63] Camden County in New Jersey reported that calls from the undocumented community decreased by 6% in the first four months of 2017.[64]

Police chiefs from these jurisdictions attribute the decrease in crime reporting to the Trump administration's promise to intensify national deportation efforts.[65] According to Houston Police Department Chief Art Acevedo, immigrants are "afraid that we're more interested as a society in deporting them than we are in bringing justice to the victims of crime."[66]

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56. *See* NIK THEODORE, DEP'T OF URBAN PLANNING & POLICY, UNIV. OF ILL. AT CHI., INSECURE COMMUNITIES: LATINO PERCEPTIONS OF POLICE INVOLVEMENT IN IMMIGRATION ENFORCEMENT (2013), https://perma.cc/BJ6L-DEGW.

57. Chase Sackett, HUD, *Neighborhoods and Violent Crime*, EVIDENCE MATTERS, Summer 2016, https://perma.cc/STP4-YZB8.

58. *See* Michael Kagan, *Immigrant Victims, Immigrant Accusers*, 48 U. MICH. J.L. REFORM 915, 916–21 (2015).

59. *See* THEODORE, *supra* note 56.

60. Lindsey Bever, *Hispanics 'Are Going Further into the Shadows' amid Chilling Immigration Debate, Police Say*, WASH. POST (May 12, 2017), https://perma.cc/7VBG-53MN.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *See, e.g.*, Devlin Barrett, *DHS: Immigration Agents May Arrest Crime Victims, Witnesses at Courthouses*, WASH. POST (Apr. 4, 2017), https://perma.cc/C3YG-QQKY; Jennifer Medina, *Too Scared to Report Abuse, For Fear of Being Deported*, N.Y. TIMES, Apr. 30, 2017, at A1; Tom Dart, *Fearing Deportation, Undocumented Immigrants Wary of Reporting Crimes*, THE GUARDIAN (Mar. 23, 2017), https://perma.cc/S9EX-FLEG.

66. John Burnett, *New Immigration Crackdowns Creating 'Chilling Effect' On Crime Reporting*, NAT'L PUB. RADIO (May 25, 2017),

Likewise, Camden County Police Chief Scott Thompson stated: "[Immigrants'] fear is palpable, and it's . . . altered [the community's] relationship with the police department in a reluctance to communicate with us."[67] These reports reflect that sanctuary policies are adopted in response to immigrants' fears and are designed to counteract the effect that immigrants' distrust of local law enforcement can have on public safety.

B. The Mechanics of Sanctuary Policies

Few sanctuary policies promise absolute bans on cooperation with federal immigration authorities. Sanctuary policies often contain exceptions to their general rules of noncompliance for circumstances that pose threats to public safety. For example, the New York City sanctuary policy examined by the 2003 House Subcommittee on Immigration, Border Security, and Claims, contained an exception to the prohibition on information sharing where an undocumented immigrant was suspected of engaging in criminal activity.[68] Likewise, Chicago—characterized as one of the nation's most immigrant-friendly cities[69]—has a comprehensive sanctuary policy restricting the disclosure of information to ICE yet carves out an exception for individuals with outstanding criminal warrants, felony charges or convictions, and those identified as gang members.[70] Los Angeles provides another example of a sanctuary city that nonetheless shares select information in a national law enforcement database routinely accessed by ICE.[71]

These exceptions demonstrate that while sanctuary policies seek to foster a certain sense of security within immigrant communities, they ultimately serve the strategic policing purpose of reducing crime.[72] Indeed, the philosophy of sanctuary policies and their crime-related exceptions

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http://www.npr.org/2017/05/25/529513771/new-immigration-crackdowns-creating-chilling-effect-on-crime-reporting.

67. *See* Bever, *supra* note 60.

68. *Hearing*, *supra* note 1, at 4–7 (statement of Rep. Sheila Jackson Lee, Member, Subcomm. on Immigration, Border Sec., & Claims); N.Y.C., N.Y., Exec. Order No. 124, § 2(c) (Aug. 7, 1989), https://perma.cc/2XZZ-Q85R.

69. *State Lawmakers Consider Expanding Illinois Immigrant Protections in Response to Trump*, CHI. TRIB. (Feb. 5, 2017), https://perma.cc/YXK9-DMVD.

70. CHI., ILL., MUN. CODE §§ 2-173-030, -042 (2017).

71. *See* George Joseph, *Where ICE Already Has Direct Lines to Law-Enforcement Databases with Immigrant Data*, NAT'L PUB. RADIO (May 12, 2017), http://www.npr.org/sections/codeswitch/2017/05/12/479070535/where-ice-already-has-direct-lines-to-law-enforcement-databases-with-immigrant-d (discussing ICE's relationship to local law enforcement databases).

72. *See* MAJOR CITIES CHIEFS IMMIGRATION COMM., *supra* note 50.

complement ICE's mission to detain immigrants "who present a danger to national security or are a risk to public safety."[73] Nevertheless, sanctuary cities are accused of obstructing federal immigration law—from both practical and legal standpoints.[74]

C. *Common Criticisms of Sanctuary Cities*

As hubs for fingerprints, addresses, and other personal identification data, local law enforcement agencies are considered integral players in the facilitation of federal immigration enforcement schemes.[75] Sanctuary cities are thus criticized as practical hindrances to the effectuation of federal immigration law and even accused of "harbor[ing] criminals."[76] According to Texas state Senator Charles Perry, sanctuary cities "help people who commit manslaughter and sexual assault evade federal immigration [law]."[77] Similarly, some state officials view sanctuary cities as instrumentalities of unlawful entry into the United States, creating "magnet[s] for illegal immigration."[78] These statements underscore a common belief among some state government officials that sanctuary cities harm local communities and represent a bulwark against federal regulation of immigration.

Legal scrutiny of sanctuary cities often yields a similar posture. Some legal scholars argue that federal immigration laws preempt sanctuary policies under the Supremacy Clause.[79] Two theories of preemption are used

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73. *Enforcement and Removal Operations*, *supra* note 21.

74. *See, e.g.*, Jeff Sessions, Attorney Gen., Remarks to Federal Law Enforcement Authorities About Sanctuary Cities (Sept. 19, 2017) (transcript available at https://perma.cc/67GV-JFMB); Colin Campbell, *NC Senate Bill Has Tougher Penalties on Immigration Sanctuary Cities—and Universities—than House Proposal*, NEWS & OBSERVER (Feb. 28, 2017), https://perma.cc/KY8X-G6ZJ; Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1259 (2009).

75. *See generally* Laurel R. Boatright, Note, *"Clear Eye for the State Guy": Clarifying Authority and Trusting Federalism to Increase Nonfederal Assistance with Immigration Enforcement*, 84 TEX. L. REV. 1633, 1643–50 (2006) (discussing state law enforcement of federal immigration law after the 9/11 terrorist attacks); Address to the Nation on Immigration Reform, 42 WEEKLY COMP. PRES. DOC. 931 (May 15, 2006) ("State and local law enforcement officials are an important part of our border security, and they need to be a part of our strategy to secure our borders.").

76. *See* Mark Krikorian, Opinion, *Counterpoint: Sanctuary Cities Like Chicago Harbor Criminals*, CHI. SUN TIMES (June 24, 2016), https://perma.cc/WUW7-ZHS4.

77. Priscilla Alvarez, *Will Texas's Crackdown on Sanctuary Cities Hurt Law Enforcement?*, THE ATLANTIC (June 6, 2017), http://perma.cc/U86H-9RVN.

78. Nicole Cobler, *Lawmaker to Try Again with Bill Banning "Sanctuary Cities"*, THE TEX. TRIB. (Nov. 15, 2016), http://perma.cc/67N7-EDBK.

79. *See, e.g.*, Linda Reyna Yañez & Alfonso Soto, *Local Police Involvement in the Enforcement of Immigration Law*, 1 HISP. L.J. 9 (1994) (arguing that the supremacy of federal immigration law forecloses the legality of sanctuary cities). The Supremacy Clause provides

to support this conclusion: implied field preemption and conflict preemption.[80] Implied field preemption arises where Congress works a "complete ouster of state power"[81] through comprehensive regulation of a subject.[82] Some argue that federal immigration regulatory schemes have "occupied the field"[83] of immigration to foreclose the states' power to implement sanctuary policies.[84] Alternatively, conflict preemption arises where federal law supersedes state law that obstructs the "purposes and objectives of Congress"[85] or renders compliance with federal law a "physical impossibility."[86] Critics reason that conflict preemption invalidates sanctuary policies—specifically in relation to § 1373—insofar as they curtail cooperation with federal immigration regulatory schemes.[87] While these theories are grounded in established federalism principles "central to the constitutional design,"[88] they rest on suppositions that cannot be reconciled with either the nature of sanctuary policies or the Tenth Amendment itself.

The argument that federal immigration laws invalidate sanctuary policies through implied field preemption relies on a mischaracterization of the objectives and functions of sanctuary policies. Implied field preemption is triggered by a federal regulatory scheme "so pervasive . . . that Congress left no room for the States to supplement it."[89] Therefore, implied field preemption would invalidate sanctuary policies if the policies regulate a field otherwise occupied by Congress. The occupied field—immigration—comprises laws that regulate the admission, registration, removal, and

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that "[the] Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land . . . ." U.S. CONST. art. VI, cl. 2. The Supreme Court has interpreted the Supremacy Clause to enable federal laws to "pre-empt," or nullify, state laws that conflict with federal laws. Arizona v. United States, 567 U.S. 387, 399 (2012).

80. LISA M. SEGHETTI, STEPHEN R. VINA & KARMA ESTER, CONG. RESEARCH SERV., RL32270, ENFORCING IMMIGRATION LAW: THE ROLE OF STATE AND LOCAL LAW ENFORCEMENT 4–6 (2004).

81. DeCanas v. Bica, 424 U.S. 351, 357 (1976).

82. Kerry Abrams, Essay, *Plenary Power Preemption*, 99 VA. L. REV. 601, 607–08 (2013).

83. *Arizona*, 567 U.S. at 401.

84. *See* SEGHETTI, *supra* note 80.

85. Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98 (1992) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

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

87. *See, e.g.*, Memorandum from Michael E. Horowitz, Inspector Gen., U.S. Dep't of Justice, to Karol V. Mason, Assistant Attorney Gen. for the Office of Justice Programs, U.S. Dep't of Justice (May 31, 2016) (on file with Campbell Law Review) (assessing sanctuary policies from ten states and localities that raise issues of conflict preemption by § 1373).

88. *Arizona*, 567 U.S. at 399.

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

deportation of immigrants.[90] Sanctuary policies do not infringe upon this field. Although sanctuary policies bear upon and affect immigrants, they do not attempt to regulate their admission, registration, removal, or deportation. Rather, sanctuary policies memorialize the policing priorities of local law enforcement agencies and govern police communications with immigrants and federal immigration authorities.[91] The theory of implied field preemption thus fails in the difference between the ambit of the Congressionally occupied field of immigration and the ambit of sanctuary policies.

Conflict preemption fails for the same reason. Under conflict preemption, federal law can only preempt state law that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[92] It inheres that conflict preemption arises where there is an "actual conflict" between state and federal law.[93] The objectives of sanctuary cities and the language of sanctuary policies themselves reflect that sanctuary cities are not designed to interfere with the efforts of federal immigration authorities.[94] Whereas sanctuary policies advance public safety and community policing strategies, they cannot obstruct the regulation of the admission, removal, and deportation of immigrants—a federal interest that is separate and distinct from local policing. Moreover, sanctuary policies offer immigrants no legal protection from ICE and from the initiation of deportation proceedings.[95] Although sanctuary policies limit communication with federal immigration authorities, they have neither the purpose nor the power to interfere with the authority of ICE to detain or deport immigrants.[96] Therefore, without the power to obstruct ICE, or an attempt to admit, register, or remove immigrants, sanctuary policies do not pose obstacles to the objectives of federal immigration law and do not invoke conflict preemption.

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90. *Arizona*, 567 U.S. at 395–96.

91. *See* Su, *supra* note 44.

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

93. English v. Gen. Elec. Co., 496 U.S. 72, 90 (1990) (quoting Savage v. Jones, 225 U.S. 501, 533 (1912)).

94. *See* Su, *supra* note 44, at 910–11.

95. Maura Ewing, *In Sanctuary Cities, Immigrants Find Themselves with Few Real Protections from Federal Officials*, PUB. RADIO INT'L (Dec. 29, 2016), https://perma.cc/5JSG-KBYS (quoting Villanova law professor Caitlin Barry, who said, "Sanctuary cities absolutely do not mean that the city is able to protect people from deportation . . . . The policy says that city employees are not going to use their time and resources to facilitate a deportation or to facilitate the detention of someone who the city's criminal system has already decided to release.").

96. *Id.*

The theory of conflict preemption is no more plausible when applied to § 1373, as it rests on the premise that § 1373 is constitutional under the Tenth Amendment. The power of a federal law to preempt conflicting state law under the Supremacy Clause is null if the federal law itself does not pass constitutional muster.[97] Conflict preemption thus requires sanctuary policies to give way to § 1373 where dual compliance is impossible, but only if § 1373 does not offend the Tenth Amendment. Conflict preemption, therefore, cannot categorically invalidate sanctuary policies if the validity of § 1373 is not ascertained but merely assumed. It is in this circular interplay of the Supremacy Clause and the Tenth Amendment where conflict preemption fails as a means of condemning sanctuary cities.

Considering the function of sanctuary policies and their role in local law enforcement tactics, it is evident why Mayor Giuliani challenged § 1373 as an infringement of state police power under the Tenth Amendment in *City of New York II*—and why he relied on the principles of federalism articulated in *Printz* to support his argument. Less clear is the reasoning the Second Circuit employed to reach the conclusion that § 1373 is constitutional.

II. SECTION 1373 AND THE TENTH AMENDMENT IN *CITY OF NEW YORK V. UNITED STATES*

In *City of New York II*, the City relied on *Printz v. United States*[98] to argue that § 1373 violates the Tenth Amendment.[99] The Second Circuit distinguished the facts of *Printz* from the City's claimed constitutional injury and upheld § 1373.[100] While the command of § 1373 is factually distinct from the federal legislation at issue in *Printz*, the reasoning of *Printz* and its controlling federalist principles suggest that the Second Circuit was incomplete in its analysis. Discounting the City's Tenth Amendment argument, the court invoked the Supremacy Clause to denounce the City's policy of "passive resistance" to § 1373.[101]

Relying on the facts of *Printz* rather than its analytical touchstones, the Second Circuit's decision lacks a thorough examination of the Tenth Amendment. This deficiency renders the court's treatment of the Supremacy Clause likewise flawed, as an erroneous—or even inadequate—

97. *See* Am. Trucking Ass'ns v. City of Los Angeles, 133 S. Ct. 2096, 2106 (2013) (Thomas, J., concurring) ("Congress cannot pre-empt a state law merely by promulgating a conflicting statute—the pre-empting statute must also be constitutional, both on its face and as applied.").

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

99. *City of New York II*, 179 F.3d 29, 34 (2d Cir. 1999).

100. *Id.* at 35.

101. *Id.*

constitutional analysis of § 1373 forecloses the relevance of the Supremacy Clause. Had the court thoroughly considered the constitutional teachings of *Printz* in determining the validity of § 1373, it would have concluded that § 1373 constitutes an invasion of state sovereignty under the Tenth Amendment and, in turn, would never have reached the Supremacy Clause.

A. The Constitutional Teachings of Printz

In *Printz*, the Supreme Court affirmed an enduring federalist principle: "It is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority."[102] *Printz* involved a controversy between state law enforcement agents and the command of a federal gun control regulatory scheme. Two state chief law enforcement officers (CLEOs) challenged the constitutionality of interim provisions of the Brady Act.[103] The Brady Act was an amendment to the Gun Control Act of 1968,[104] which governed the sale and possession of firearms.[105] The Brady Act's interim provisions required CLEOs to perform background checks on handgun dealers engaged in the transfer of firearms until Congress could institute a federal background check program under the Gun Control Act.[106] The CLEOs argued the provisions compelled state officials to execute federal law in violation of their state sovereignty under the Tenth Amendment.[107] The Court ruled in favor of the CLEOs.[108]

The Supreme Court engaged in a historical analysis of dual sovereignty to locate the proximity of the interim provisions to the boundary of Congress's constitutional authority.[109] The Court analyzed legislation from the first Congresses and the Federalist Papers to conclude that while state participation in federal regulatory schemes was both envisioned and practiced in the Early Republic, such participation was contingent upon the states' consent.[110] Significantly, the Court highlighted that where early Congresses enacted naturalization and immigration laws, none compelled the states to act or prohibited the states from acting.[111] Similarly, the Court opined that although Congress has the power to regulate pursuant to its

102. *Printz*, 521 U.S. at 928.
103. *Id.* at 904.
104. *Id.* at 902.
105. *Id.*
106. *Id.* at 902–03.
107. *Id.* at 905.
108. *Id.* at 933.
109. *Id.* at 905–18.
110. *Id.*
111. *Id.* at 906, 916.

enumerated powers, it cannot "regulate state governments' regulation" of a particular subject.[112] Emphasizing the states' "inviolable sovereignty"[113] explicit in the Tenth Amendment, the Court recalled that "the Framers rejected the concept of a central government that would act upon and through the States."[114]

After examining the contours of the Tenth Amendment, the Court harmonized state sovereignty with the mandate of the Supremacy Clause.[115] Parsing the language of the Supremacy Clause, the Court acknowledged that it binds the states to uphold the "Law of the Land" yet impressed that only laws which comport with the Constitution are validly the "Law of the Land."[116] Considering the CLEOs' argument that the interim provisions did not comport with the Constitution, the Court disposed of the relevancy of the Supremacy Clause, stating that it "merely brings us back to the question . . . whether laws conscripting state officers violate state sovereignty and are thus not in accord with the Constitution."[117] The Court answered this question not through a mechanical application of the Supremacy Clause, but rather through a holistic examination of "our constitutional system of dual sovereignty."[118] This suggests that the Supremacy Clause does not provide a crystalline lens to conclusively resolve an alleged Tenth Amendment violation, for its consideration merely led the Court back to the Tenth Amendment itself.

The historical and constitutional analyses that informed the outcome of *Printz* reflect two federalist principles that resurfaced in *City of New York II*. First, Congress cannot command the states to regulate a subject in a particular way under the Tenth Amendment.[119] Second, the Supremacy Clause cannot save federal legislation that is itself unconstitutional.[120] Collectively, it follows that the Supremacy Clause is inapposite where a federal law requires the states to govern a subject in a particular way, for what would otherwise be the "Law of the Land"[121] exceeds the boundaries of the Constitution and is, by nature, beyond the reach of the Supremacy

112. *Id.* at 924 (quoting New York v. United States, 505 U.S. 144, 166 (1992)).

113. *Id.* at 919 (quoting THE FEDERALIST NO. 39, at 198 (James Madison) (George W. Carey & James McClellan eds., 2001)).

114. *Id.*

115. *Id.* at 924–25.

116. *Id.* at 924.

117. *Id.* at 925.

118. *Id.* at 935.

119. *Id.* at 924 (quoting New York v. United States, 505 U.S. 144, 166 (1992)).

120. *Id.* at 925–27.

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

Clause. The Tenth Amendment, therefore, operates as a limitation on the command of the Supremacy Clause, and they must rise and fall together.[122]

In *City of New York II*, the City asked the Second Circuit to apply the constitutional reasoning of *Printz* to its argument against § 1373.[123] However, the Second Circuit engaged the City's request only superficially, confining itself instead to the factual circumstances of *Printz* to guide its opinion. The Second Circuit's analysis of the Tenth Amendment was likewise cursory and, ultimately, led the court to a misinterpretation of the Supremacy Clause that sealed its evaluation of § 1373.

B. An Inconsequential Factual Comparison of § 1373 and Printz

In *City of New York II*, the Second Circuit anchored its reasoning in the factual distinctions between the Brady Act and the directives of § 1373.[124] The Second Circuit held that, unlike the Brady Act, § 1373 did not compel the City to administer federal law in violation of the Tenth Amendment.[125] The court correctly distinguished the facts of *Printz* from the controversy presented by the City. The issue in *Printz* arose from the Brady Act's affirmative, federal directive that compelled states to execute a federal law.[126] It is likely a losing argument that § 1373 conscripts state executives; it does not place any affirmative duty on state executives.[127] Indeed, the City made no such argument.[128]

Instead, the City argued that as a sovereign—and like the petitioner in *Printz*—it had "the power to choose not to participate in federal regulatory

122. In *City of New York II*, the Second Circuit stated that the Tenth Amendment "confirm[s] that the power of the Federal Government is subject to limits that may . . . reserve power to the States." *City of New York II*, 179 F.3d 29, 33 (2d Cir. 1999) (quoting *New York*, 505 U.S. at 157). *See also* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 536 (2012) ("The independent power of the States . . . serves as a check on the power of the Federal Government . . . .").

123. Appellants' Brief, *supra* note 16, at 41–50.

124. *City of New York II*, 179 F.3d at 34–35.

125. *Id.* at 35.

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

127. *See* 8 U.S.C. § 1373 (2012).

128. The City briefly asserted that "[t]he whole object of [§ 1373] is to conscript State and local employees as agents of the Immigration and Naturalization Service." Appellants' Brief, *supra* note 16, at 40–41. The context of this statement cannot be ignored. The City made this claim in connection with an argument that the plain language of § 1373 is a pretext for conscription and that § 1373 reflects the *intent* of Congress to convert state and local officials into instrumentalities of federal immigration authorities. *Id.* This is distinct from an argument that § 1373 does, in practical effect, conscript state and local officials as "agents" of the federal government. Therefore, the City did not argue that § 1373 conscripts its officials in the same manner that the interim provisions of the Brady Act conscripted the CLEOs in *Printz*.

programs" and the power to enact the policies that § 1373 prohibits.[129] The City drew not from the facts of *Printz*, but rather its federalist principles. It argued that § 1373—which prohibited the policies of Mayor Koch's executive order—constituted a "congressionally-imposed displacement of the policy choices of the local electorate[,] demonstrat[ing] a lack of respect for the local political process and diminish[ing] the dignity of State sovereignty."[130] The court's factual comparison of § 1373 and the Brady Act thus resolved an argument that was never presented. Accordingly, although the court proffered an accurate factual evaluation of § 1373, it did little to explain how the doctrinal principles the *Printz* Court applied to the Brady Act did not apply to §1373.

C. A Misguided Constitutional Analysis

Addressing the City's "scope-of-state-sovereignty argument," the Second Circuit opined that it could "not read [*Printz*] so broadly" as permitting states to prohibit cooperation with federal regulatory schemes.[131] However, its reading of *Printz* considered little more than its holding: "Congress may not . . . directly compel states or localities to enact or to administer policies or programs adopted by the federal government."[132] Where the court did note the constitutional teachings of *Printz*, it stopped short of applying them to the City's argument against § 1373. Instead, the court criticized the City's position by entertaining the political ramifications of a world in which § 1373 violated the Tenth Amendment. This political assessment ultimately led the court to the Supremacy Clause, through which it upheld § 1373 with reasoning that, in the absence of a proper Tenth Amendment analysis, is untenable.

1. A Shallow Tenth Amendment Analysis

In *Printz*, the Supreme Court provided an extensive analysis of the structural framework of the Constitution's republican government that illuminates both the federalist dynamic of the sovereigns and, as the City argued before the Second Circuit, the effect of § 1373 on its sovereign exercise of sanctuary policies.[133] However, the Second Circuit's reasoning deviates from the principles of dual sovereignty established in *Printz* and instead emphasizes potential policy ramifications:

129. *City of New York II*, 179 F.3d. at 34.
130. Appellants' Brief, *supra* note 16, at 45.
131. *City of New York II*, 179 F.3d. at 34.
132. *Id.*
133. Appellants' Brief, *supra* note 16, at 44–50.

> The City's sovereignty argument asks us to turn the Tenth Amendment's shield against the federal government's using state and local governments to enact and administer federal programs into a sword allowing states and localities to engage in passive resistance that frustrates federal programs. If Congress may not forbid states from outlawing even voluntary cooperation with federal programs by state and local officials, states will at times have the power to frustrate effectuation of some programs. Absent any cooperation at all from local officials, some federal programs may fail or fall short of their goals unless federal officials resort to legal processes in every routine or trivial matter, often a practical impossibility.[134]

The court's assertions contemplate plausible policy concerns yet gloss over the constitutional relationship between federal and state governments that the City asked the court to consider in analyzing § 1373.

The court conflates the political advantage of cooperation between the sovereigns with a constitutional requirement that they do so. Instead of considering § 1373 under the light of the *Printz* Court's discussion of states' consent to participate in federal regulatory schemes, the court focused on the policy implications of states' refusal to participate. While the execution of federal immigration regulatory schemes might prove more efficient with the cooperation of the City—and localities nationwide[135]—the Constitution guarantees neither the success nor the efficiency of federal programs[136] and does not bind the states to such obligation.[137] Thus, when the court warned that federal agencies may "fail or fall short of their goals" or be inconvenienced by pursuing alternative means of local cooperation in the absence of legislation like § 1373, it described political rather than constitutional injuries to the Government.[138]

Had the court applied the federalist principles articulated in *Printz* to the City's Tenth Amendment argument, it would have properly concluded

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134. *City of New York II*, 179 F.3d at 35.

135. *See* Boatright, *supra* note 75, at 1637.

136. *See* United States v. Booker, 543 U.S. 220, 289 (2005) (Stevens, J., dissenting) ("[T]he Constitution does not permit efficiency to be our primary concern."); INS v. Chadha, 462 U.S. 919, 944 (1983) ("[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government . . . .").

137. *See* New York v. United States, 505 U.S. 144, 166 (1992) ("[T]he Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States."); THE FEDERALIST NO. 39, at 198 (James Madison) (George W. Carey & James McClellan, eds., 2001) ("[T]he local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority, than the general authority is subject to them within its own sphere.").

138. *City of New York II*, 179 F.3d at 35.

that § 1373 is unconstitutional. As the *Printz* Court asserted, "[e]ven where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts."[139] Therefore, although Congress unquestionably has the power to regulate immigration,[140] it does not have the power to regulate state and local governance of law enforcement agencies that operate under sanctuary policies.

Arguably, by prohibiting states and localities from implementing particular law enforcement policies, § 1373 regulates the states' and localities' regulation of policing and public safety. This violates Tenth Amendment federalism principles by infringing on the state police power to implement policies that local governments deem beneficial to public safety.[141] Sanctuary policies are, therefore, no less within the province of the states to enact, and no more within the province of the federal government to regulate.

2. *The Supremacy Clause Does Not Save § 1373*

Glossing over the City's Tenth Amendment argument, the Second Circuit reached its conclusion in precisely the manner that *Printz* foreclosed: through a mechanical application of the Supremacy Clause. After emphasizing the political effect of sanctuary cities on the enforcement of federal immigration laws, the court stated that the Supremacy Clause resolved this "potential for deadlock" by prohibiting state laws "that frustrate federal laws and regulatory schemes."[142] Invoking the Supremacy Clause, the court held that "states do not retain under the Tenth Amendment an untrammeled right to forbid all voluntary cooperation by state or local officials with particular federal programs."[143] While this interpretation of the Supremacy Clause is accurate in the abstract,[144] it is flawed in light of the court's miscalculated treatment of the City's Tenth Amendment argument.

In determining the constitutionality of § 1373, the Supremacy Clause offers the Second Circuit no more direction than it offered the Supreme Court

139. Printz v. United States, 521 U.S. 898, 924 (1997) (quoting *New York*, 505 U.S. at 166).

140. U.S. CONST. art. I, § 8, cl. 4 (giving Congress the power "[t]o establish an uniform Rule of Naturalization").

141. The U.S. Supreme Court has noted that "the regulation of health and safety matters is primarily, and historically, a matter of local concern." Hillsborough Cty. v. Automated Med. Labs., Inc., 471 U.S. 707, 719 (1985).

142. *City of New York II*, 179 F.3d at 35.

143. *Id.*

144. *See* Maryland v. Louisiana, 451 U.S. 725, 746 (1981).

in *Printz*[145]—it simply circles the inquiry back to whether § 1373 violates the Tenth Amendment. By sealing a sphere of subjects for exclusive regulation by the states, the Tenth Amendment invalidates federal laws that invade this sphere.[146] When the Tenth Amendment invalidates a federal law which would otherwise eclipse state law under the Supremacy Clause, the Supremacy Clause cannot save it.[147] Accordingly, a court cannot, without more, invoke the Supremacy Clause to determine that a federal law does not violate the Tenth Amendment when the gravamen of the controversy is that the law was not "made in Pursuance [of the Constitution]."[148] Therefore, the Second Circuit's reliance on the Supremacy Clause is misguided, considering the City's argument that § 1373 lacks constitutional force all together.[149] Furthermore, the Supremacy Clause is inapposite where the court neglected to identify how precisely the City's sanctuary policy "regulat[ed] conduct in a field that Congress . . . has determined must be regulated by its exclusive governance."[150]

Even if the Second Circuit was correct in upholding § 1373 as constitutional, it failed to demonstrate how the City's sanctuary policy obstructed the federal government's ability to execute its own objectives under § 1373 and why the command of the Supremacy Clause must quash the City's policy. The Second Circuit characterized the City's sanctuary policy as a "sword" for "passive resistance"[151] to federal immigration laws without determining the precise function of sanctuary cities that obstructs federal immigration law. The court appears to conclude that the City's sanctuary policy obstructed federal immigration law based on the general prohibition against information sharing with federal immigration authorities and one provision that addressed the power of the City's patrollers. The provision prohibited certain patrollers from transmitting information regarding immigrants involved in criminal activity directly to federal immigration authorities.[152] The policy instead directed local law enforcement agencies to designate select officers to be responsible for the handling and sharing of such information.[153] Offering a mere recitation of

145. Printz v. United States, 521 U.S. 898, 924–25 (1997)

146. *See* New York v. United States, 505 U.S. 144, 155–57 (1992).

147. *Printz*, 521 U.S. at 924–25.

148. *Id.* at 924 (alteration in original) (quoting U.S. CONST. art. VI, cl. 2).

149. Appellants' Brief, *supra* note 16, at 49.

150. Arizona v. United States, 567 U.S. 387, 399 (2012).

151. *City of New York II*, 179 F.3d at 35.

152. *Id.* at 32.

153. N.Y.C., N.Y., Exec. Order No. 124, § 2(c) (Aug. 7, 1989), https://perma.cc/2XZZ-Q85R.

this provision, the court undertook no examination of how the policy itself actually impeded the effectuation of federal immigration law.

Likewise, the court appears to have overlooked the language that followed the provision for patrollers: "Enforcement agencies, including the Police Department and the Department of Correction, shall continue to cooperate with federal authorities in investigating and apprehending aliens suspected of criminal activity."[154] If not compelled to do so before, this language should have prompted the court to examine the operation and effect of the City's sanctuary policy. This language indicates that the policy was not a simple pledge to obstruct federal immigration law. Therefore, a detailed analysis was necessary to discern the policy's legal relationship to federal immigration law. Without scrutinizing the provisions of City's sanctuary policy to highlight a conflict between it and § 1373, the court failed to sufficiently analyze how the policy obstructed federal immigration law from a legal—not merely a political—standpoint.[155] As a result of this analytical lapse, the court's reliance on the Supremacy Clause was improvident and ultimately fatal to the City's challenge of § 1373.

The Second Circuit's treatment of the City's sanctuary policy and § 1373 resulted in an incomplete analysis that misconstrues the federalist balance of the Tenth Amendment and the Supremacy Clause. Seemingly paralyzed by the factual differences of *Printz*, the court upheld § 1373 as constitutional without probing the federalist principles of *Printz* to ascertain the scope of the City's police power under the Tenth Amendment. In turn, the court's invocation of the Supremacy Clause not only contradicted *Printz*—it also represented a myopic resolution of what has become an enduring controversy.

III. HARMONIZING SANCTUARY CITIES AND FEDERAL IMMIGRATION LAW

Although *City of New York II* established that § 1373 is constitutional and preempts sanctuary policies, sanctuary cities continue to survive attempts at their abolition.[156] This anomaly represents an ongoing conflict that influences elections, law-making, and discourse in all levels of

154. *Id.*

155. Even in the absence of this analysis, examples of state obstruction of federal immigration law suggest the court's characterization of the City's sanctuary policy is inaccurate. *See, e.g.*, Arizona v. United States, 567 U.S. 387 (2012) (holding that provisions of an Arizona state statute that attempted to implement arrest, registration, and criminalization processes for undocumented immigrants were preempted by federal immigration law).

156. *See* Griffith & Vaughan, *supra* note 30.

government.[157] The conflict between sanctuary cities and federal immigration law can be eased by repealing § 1373 to foreclose the possibility of future federal legislation that attempts to subvert sanctuary cities. Alternatively, where disagreement persists in the debate regarding the relationship between § 1373 and sanctuary cities, policymakers must separate political ideologies of immigration from the underlying legal issue of separation of powers and dual sovereignty.

A. Repeal § 1373 to Prevent Future Federal Legislation Attempting to Subvert Sanctuary Cities

The simplest and most immediate solution to the conflict between § 1373 and sanctuary cities is to repeal § 1373. Although § 1373 has had little success in interfering with the implementation and maintenance of sanctuary policies, it has consumed the attention and resources of each the executive,[158] legislative,[159] and judicial branches.[160] Thus, § 1373 has enabled ongoing attempts to abolish sanctuary cities by providing a ground for their purported invalidity.

The repeal of § 1373 would end all ongoing efforts to dismantle sanctuary cities and prevent the proliferation of future attempts to do the same. This would not only quell a significant piece of the national immigration debate but also enable state and federal authorities to execute their respective regulatory schemes without the overshadowing threat of constitutional injury as alleged by either side. Without § 1373 and its genus of federal prohibition, federal immigration authorities would be able to enforce their civil regulatory schemes to achieve their mission of national public safety, while sanctuary cities would be able to enforce their policing regulations to achieve their mission of local public safety.

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157. *See* ROBERT P. JONES ET AL., PUB. RELIGION RESEARCH INST., HOW AMERICANS VIEW IMMIGRANTS, AND WHAT THEY WANT FROM IMMIGRATION REFORM (2016), https://perma.cc/5A5W-ET4T (discussing opposing views of immigration among partisan and geographical divides); POLICE EXEC. RESEARCH FORUM, LOCAL POLICE PERSPECTIVES ON STATE IMMIGRATION POLICIES 9 (2014) ("[I]mmigration policy has become increasingly fragmented across the country, with states enacting individual laws that reflect their own political, demographic, and ideological landscapes.").

158. *See, e.g.*, Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017).

159. *See, e.g.*, No Sanctuary for Criminals Act, H.R. 3003, 115th Cong. (2017).

160. *See, e.g.*, *City of New York II*, 179 F.3d 29 (2d Cir. 1999); Cty. of Santa Clara v. Trump, No. 17-cv-574-WHO; No.17-cv-00485-WHO, 2017 U.S. Dist. LEXIS 62871 (N.D. Cal. Apr. 25, 2017); Steinle v. City of S.F., 230 F. Supp. 3d 994 (N.D. Cal. 2017); Sturgeon v. Bratton, 95 Cal. Rptr. 3d 718 (Cal. Ct. App. 2009).

Alternatively, if the repeal of § 1373 is unfeasible due to persisting disagreement as to the validity of sanctuary cities, the following solution offers a strategy that can facilitate a definitive resolution to the controversy.

B. Separate Political Ideologies of Immigration from the Underlying Issue: Separation of Powers and Dual Sovereignty

Considering the enduring clash between § 1373 and sanctuary cities, it can reasonably be anticipated that the controversy will not be resolved in a manner as stark as the repeal of § 1373. If the controversy is to continue, it must proceed with a different approach than has been used since *City of New York*, for the dispute is currently no less impassioned than it was at its inception nearly twenty years ago. If policymakers are to come to an accord regarding the future of sanctuary cities, they must distill the politics of U.S. immigration from the principles of federalism.

Federal immigration law and sanctuary cities both fuel one of the most divisive issues in American politics: foreign migration to the United States. However, despite this overlap, it is critical to recognize that sanctuary cities touch this issue only tangentially—if at all. Although the state government officials who draft sanctuary policies may be politically opposed to certain components of federal immigration law or its surrounding rhetoric, the sanctuary policies they ultimately issue are not political ploys to counterattack unsavory federal immigration policy. Instead, they are political devices to promote the welfare of their local communities. Any frustrating effect sanctuary policies have on federal immigration law must then be treated as political rather than legal.

Where current and future federal officials attempt to change the nation's immigration policies, they must appreciate that whether the federal government should condemn sanctuary policies is not the same inquiry as whether it has the constitutional authority to do so. The importance of this distinction was underscored in *City of Chicago v. Sessions*,[161] in which the United States District Court for the Northern District of Illinois ruled that the executive branch lacked constitutional authority to impose certain conditions on federal grants issued in support of state and local law enforcement agencies.[162] The conditions would have enabled federal authorities to access information regarding the release of inmates suspected of immigration

161. City of Chi. v. Sessions, No. 1:17-CV-05720, 2017 U.S. Dist. LEXIS 149847 (N.D. Ill. Sept. 15, 2017).

162. *Id.* at *22. However, the court upheld a separate condition requiring grant recipients to comply with § 1373. *Id.* at *27–28.

violations—information ostensibly withheld under sanctuary policies.[163] The court ruled that the executive branch could not exercise such power without delegation from Congress. It also recognized that whether Congress itself possesses such authority would require a separate inquiry under the Spending Clause.[164]

The executive and legislative branches cannot minimize the implications of *Sessions*. *Sessions* demonstrates that the law does not necessarily provide a channel for political opposition to sanctuary cities, the popularity or force of such opposition notwithstanding. *Sessions* is the second case in which a federal court has found the executive branch in excess of its constitutional authority to take action against sanctuary cities. It was decided only five months after *County of Santa Clara v. Trump*,[165] in which President Trump's executive order attempting to withhold federal funding from sanctuary cities was held unconstitutional.[166] In turn, the executive branch must acknowledge that when it takes aim at sanctuary cities, it may only end up striking its own resources when a court is compelled to enjoin its measures.[167] Likewise, Congress must legislate with prudence and foresight to avoid a similar outcome. This charge is nonetheless imperative as Congress considers H.R. 3003. H.R. 3003 contains a condition tying federal grants to state and local compliance with § 1373, the constitutionality of which—as warned in *Sessions*—is subject to question.[168]

Sessions also serves as a charge to the Supreme Court. In *Sessions*, the court stated that § 1373 "may implicate the logic underlying the *Printz* decision" in that it "may effectively thwart policymakers' ability to extricate their state or municipality from involvement in a federal program."[169] Nonetheless, acknowledging *City of New York II* and the distinct

163. Defendant's Opposition to Plaintiff's Motion for Preliminary Injunction at 1, City of Chi. v. Sessions, No. 1:17-CV-05720, 2017 U.S. Dist. LEXIS 149847 (N.D. Ill. Sept. 15, 2017).

164. *Sessions*, 2017 U.S. Dist. LEXIS 149847, at *22.

165. Cty. of Santa Clara v. Trump, No. 17-cv-574-WHO; No.17-cv-00485-WHO, 2017 U.S. Dist. LEXIS 62871 (N.D. Cal. Apr. 25, 2017).

166. *Id.*

167. The loss of resources within the executive branch represents only a fraction of the risk that its actions created. Together, *Trump* and *Sessions* involved over forty briefs and the work of more than 100 lawyers in thirteen different states. *See id.* at *1–11; Reply Brief in Support of Plaintiff's Motion for Preliminary Injunction at 16, City of Chi. v. Sessions, No. 1:17-CV-05720, 2017 U.S. Dist. LEXIS 149847 (N.D. Ill. Sept. 15, 2017); Defendant's Opposition to Plaintiff's Motion for Preliminary Injunction at 26, City of Chi. v. Sessions, No. 1:17-CV-05720, 2017 U.S. Dist. LEXIS 149847 (N.D. Ill. Sept. 15, 2017).

168. *See* No Sanctuary for Criminals Act, H.R. 3003, 115th Cong. (2017); *Sessions*, 2017 U.S. Dist. LEXIS 149847, at *22.

169. *Sessions*, 2017 U.S. Dist. LEXIS 149847, at *37.

circumstances that gave rise to *Printz*, the court stated that holding § 1373 unconstitutional "would require an expansion of the law that only a higher court could establish."[170] The Supreme Court could expand *Printz* in precisely the manner the *Sessions* court suggested and the City advocated for in *City of New York II*: through its constitutional logic. Should the Supreme Court have the opportunity to rule § 1373 unconstitutional, it must distinguish the facts of *Printz* from its federalist underpinnings. Moreover, the Court must distinguish any political ramifications of striking down § 1373 from its legal duty "to say what the law is."[171]

The extraction of immigration politics from the sanctuary city debate will enable the examiner to analyze the components of sanctuary policies to determine whether and how they affect the execution of federal immigration law. Without the interference of ideological clashes, the determination can be made pursuant to constitutional principles of separation of powers and dual sovereignty, rather than political majorities. In turn, a constitutionally refined analysis of sanctuary policies will inform the constitutionality of § 1373 and similar measures.

CONCLUSION

City of New York decided the fate of § 1373 that has since been a platform for executive and legislative blasting of sanctuary cities. Nonetheless, sanctuary cities have withstood attempts at subversion and continue to exist across the nation. This conflict indicates a profound discord in our nation's understanding of state police power and its relationship to federal immigration law.

Considering the principles of dual sovereignty that informed the Court's reasoning in *Printz*, Congress cannot prohibit states or localities from implementing sanctuary policies as mandated in § 1373 and as proposed in H.R. 3003. Instead, Congress can repeal § 1373 to eliminate current and future risks that the federal government will usurp the power of the states to implement policing schemes that serve the public health, welfare, safety, and morals of their communities.

Alternatively, if Congress cannot agree that § 1373 violates the Tenth Amendment, or that it should otherwise be abrogated, it is paramount that policymakers distinguish political frustration from legal frustration when attempting to resolve the conflict around sanctuary cities. While the two can overlap, it is important to discern where they do not. Despite the practical or political frustrations that sanctuary policies may pose to federal

170. *Id.* at *38.

171. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

lawmakers, they cannot be deemed to obstruct federal immigration law where they regulate the policing priorities of local law enforcement agencies.

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