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A Localist's Case for Decentralizing Immigration Policy

A LOCALIST'S CASE FOR DECENTRALIZING IMMIGRATION POLICY

MATTHEW PARLOW[†]

INTRODUCTION

Illegal immigration¹ has once again captured political discourse. In fact, many believe that political candidates' stances on illegal immigration will play a major role in determining the 2008 presidential and congressional elections. Divergent viewpoints in the illegal immigration debate argue vigorously about the economic, social, and political effects of undocumented immigrants.² But both sides seem to agree on one premise: that the current federal immigration system is broken.

Perhaps it is unsurprising, then, that both state and local governments³ have attempted to supplement federal illegal immigration efforts. Recently, many local governments have considered and/or adopted ordinances aimed at addressing undocumented immigrants within their respective boundaries.⁴ These laws have been met by fierce opposition, with claims of unconstitutionality and preemption. Yet the local government foray into this public-policy arena raises an important theoretical and practical question about what role, if any, local governments should play in regulating illegal immigration.

Part I of this article provides a brief overview of the circumstances facing the federal government in crafting and enforcing its immigration laws and policies. Part II explores four primary types of local illegal immigration laws—housing, employment, day laborer, and English-only ordinances—and the constitutional and legal issues surrounding them. Part III discusses local governments' ability or inability to enforce, or refuse to enforce, federal immigration laws. Some cities seem to be neu-

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1. In this article, I use the term "illegal immigration" to refer to the phenomenon of persons entering the United States illegally—as defined by our federal immigration laws—or who remain in the country illegally after their permitted period of time to be lawfully present has expired.

2. In this article, I use the term "undocumented immigrant" to refer to a person who enters the United States illegally—as defined by our federal immigration laws—or who remains in the country illegally after his/her permitted period of time to be lawfully present has expired. Others refer to such individuals as "illegal aliens," as do our federal immigration laws.

3. In this article, I use the term local governments, cities, counties, and localities interchangeably and broadly to refer to local government entities.

4. See *infra* notes 16-30 and accompanying text.

tral towards, if not supportive of, undocumented immigrants: these sanctuary cities refuse to enforce federal immigration laws. Other cities actively seek to enforce federal immigration laws. However, both approaches face constitutional and legal hurdles. Part IV questions whether the current constitutional and legal landscape where local governments are preempted in the area of immigration regulation is wise or desirable. By highlighting the values of federalism and localism, this section makes the case for why local governments should be able to regulate in the immigration arena and supplement—but not conflict with—federal efforts.

I. BACKGROUND

Scholarly and political views on this imbalance and illegal immigration generally vary dramatically. Some claim that illegal immigration and what is perceived as inadequate federal enforcement pose a threat to national security and the current war on terror.⁵ Others argue that undocumented immigrants cause many social and economic problems, such as serving as a drain on social-service provisions at the federal, state, and local level.⁶ On the other side of the spectrum, some argue that undocumented immigrants contribute more in taxes and economic stimulus than they deplete in governmental resources.⁷

Public-opinion polls demonstrate that a majority of Americans consider illegal immigration to be a serious problem.⁸ The federal government's inability to enforce immigration laws may help shape this perception. An estimated eight to twelve million undocumented immigrants live in the United States, with hundreds of thousands more adding to that number each year.⁹ This figure constitutes approximately four percent of the United States population and is more than double the number of undocumented immigrants in the country a decade ago.¹⁰ The United States Bureau of Immigration and Customs Enforcement ("ICE") is charged with enforcing our nation's immigration laws, including removing undocumented immigrants.¹¹ However, while it has more than

5. See, e.g., Jeff Sessions & Cynthia Hayden, *The Growing Role for State & Local Law Enforcement in the Realm of Immigration Law*, 16 STAN. L. & POL'Y REV. 323, 324-33 (2005).

6. See, e.g., 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, 1639-43 (2006).

7. See Francine J. Lipman, *The Taxation of Undocumented Immigrants: Separate, Unequal, and Without Representation*, 9 HARV. LATINO L. REV. 1, 1-8 (2006).

8. See Joseph Chamie, Center for Migration Studies, Presentation at the Population Association of America Annual Meeting: *What About Illegal Aliens?* 4-6 (Mar. 30, 2006), available at <http://paa2006.princeton.edu/download.aspx?submissionId=60186> (citing various public opinion polls).

9. See Daniel Booth, Note, *Federalism on Ice: State and Local Enforcement of Federal Immigration Law*, 29 HARV. J.L. & PUB. POL'Y 1063, 1065 n.15 (2006) (citing 151 CONG. REC. S7852 (daily ed. June 30, 2005)).

10. See Chamie, *supra* note 8, at 2.

11. See Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179, 180 n.5 (2005).

17,000 employees, ICE only has approximately 2,000 immigration enforcement agents.¹² Perhaps in response to this seemingly pervasive sentiment and the perceived inadequacies of the federal response to illegal immigration, local governments—as discussed further below—have attempted to fill this void through their own local initiatives. With more than 800,000 state and local law enforcement officers nationwide, there appears to be an untapped potential for further collaboration and coordination in immigration enforcement.¹³

II. LOCAL ILLEGAL IMMIGRATION ORDINANCES

The first city to experiment with local illegal immigration laws was the City of San Bernardino, California.¹⁴ In the spring of 2006, a group called “Save Our State” proposed an illegal immigration ordinance and requested that the San Bernardino City Council place the measure on the ballot for the November 2006 election.¹⁵ The proposed “City of San Bernardino Illegal Immigration Relief Act Ordinance” sought to regulate the activities of day laborers; penalize businesses that employed undocumented immigrants; prohibit renting property to undocumented immigrants; and mandate that all city business be conducted in English only.¹⁶ The San Bernardino City Council voted 4-3 against adopting the ordinance or placing it on the ballot for voter consideration.¹⁷ In July 2006, the City of Hazleton, Pennsylvania, became the first locality to adopt an illegal immigration ordinance when it adopted the Illegal Immigration Reform Act Ordinance, which was modeled after the San Bernardino ordinance.¹⁸ The Mayor of Hazleton, Lou Baletta, sponsored the proposed ordinance, claiming that such a measure was necessary to ad-

12. See *id.* at 180.

13. See *id.* at 181.

14. See San Bernardino, Cal., Illegal Immigration Relief Act Ordinance §§ 4-8 (Sept. 2006) [hereinafter San Bernardino Illegal Immigration Ordinance], available at <http://www.campaignsitebuilder.com/templates/displayfiles/tmpl68.asp?SiteID=843&PageID=12139&Trial=false>.

15. See Chris Richard, *Proposed Immigration Relief Act Ordinance Brings Turmoil*, RIVERSIDE PRESS-ENTERPRISE, May 8, 2006, at 1, available at <http://www.saveourstate.org/vforums/archive/index.php/t-11066.html>.

16. See San Bernardino Illegal Immigration Ordinance, *supra* note 14, §§ 4-8.

17. See Booyeon Lee, *Escondido to Look at Housing Ordinance: Illegal Immigrants Focus of Proposal*, SAN DIEGO UNION-TRIBUNE, Aug. 13, 2006, at N1, available at http://www.signonsandiego.com/uniontrib/20060813/news_1mil3imrent.html.

18. See Hazleton, Pa., Ordinance 2006-18, §§ 4-5 (proposed Sept. 2006) [hereinafter Hazleton Ordinance 2006-18], available at <http://www.smalltowndefenders.com/090806/2006-18%20Illegal%20Alien%20Immigration%20Relief%20Act.pdf>; see also Hazleton, Pa., Ordinance 2006-13 (proposed Sept. 2006) [hereinafter Hazleton Ordinance 2006-13], available at http://www.smalltowndefenders.com/090806/2006-13%20_Landlord%20Tenant%20Ordinance.pdf (prohibiting renting to undocumented immigrants); Hazleton, Pa., Ordinance 2006-19 (2006) [hereinafter Hazleton Ordinance 2006-19], available at http://www.smalltowndefenders.com/090806/2006-19%20_Official%20English.pdf (requiring that all city business be conducted in English only, with some limited exceptions).

dress crime committed by undocumented immigrants in the City and the economic drain illegal immigration had on City services.¹⁹

The trailblazing efforts by the cities of San Bernardino and Hazleton spurred a flurry of local activity in the immigration realm. In fact, during the past year, approximately one hundred cities or counties in twenty-five states have adopted and/or considered ordinances aimed at addressing illegal immigration within their respective boundaries.²⁰ There are four main types of these ordinances: employment, day laborer, housing, and English-only.²¹ Some of them mimic federal laws, while others go farther than federal immigration laws.

The first type of illegal immigration ordinances are the employment ordinances. These laws seek to punish businesses that employ undocumented immigrants. Some of these laws impose fines on such businesses,²² while others withhold businesses license from, and/or revoke city contracts with, businesses that employ undocumented immigrants.²³ Many of these employment ordinances impose an affirmative duty on businesses within their respective jurisdiction to verify the lawful residency and/or immigration documentation of their employees.²⁴

A second type of employment ordinances are the day laborer ordinances. These laws do not prohibit employment of undocumented immigrants, but instead require those who hire day laborers to register with the city and display a certificate in their car windows.²⁵ Other cities have sought to deal with day laborers directly by severely restricting the activities and availability of day laborers within their boundaries.²⁶

The housing ordinances may be the most controversial of the illegal immigration ordinances. These measures prohibit landlords from renting

19. See Welcome to Small Town Defenders, <http://www.smalltowndefenders.com/public/> (last visited Apr. 9, 2007).

20. See Database of Local Immigration Ordinances, <http://www.fairimmigration.org/learn/immigration-reform-and-immigrants/local-level/database-of-ordinances.html> (last visited Apr. 9, 2007); see also Puerto Rican Legal Defense and Education Fund, <http://www.prldef.org/Civil/Latino%20Justice%20Campaign.htm> (last visited Apr. 9, 2007).

21. Some cities have adopted and/or considered ordinances that incorporate all four of these areas, as San Bernardino proposed. See, e.g., San Bernardino Illegal Immigration Ordinance, *supra* note 14, §§ 4-8. Other cities, such as Hazleton, have adopted and/or considered such measures through several ordinances. See Hazleton Ordinance 2006-13, 2006-18, 2006-19, *supra* note 18; see also Database of Local Immigration Ordinances, *supra* note 20 (noting the type of illegal immigration ordinance that each city proposed and/or adopted).

22. See, e.g., San Bernardino Illegal Immigration Ordinance, *supra* note 14, § 4.

23. See, e.g., Riverside Township, N.J., Ordinance 2006-16, § 4 (2006), available at <http://www.prldef.org/Civil/Documents/Riverside%20Ordin%2016%20&%2018%20Passed%207-06.pdf>.

24. See, e.g., Suffolk County, N.Y., Ordinance 2025-2006, § 3 (2006), available at <http://www.prldef.org/Civil/Documents/Suffolk%20County.pdf>.

25. See, e.g., Vista, Cal., Ordinance 2006-9, § 5.90.030 (2006), available at <http://www.prldef.org/Civil/Documents/Vista,%20CA%20Ordinance.pdf>.

26. See, e.g., John Doe No. 1 v. Vill. of Mamaroneck, 462 F. Supp. 2d 520, 526 (S.D.N.Y. 2006) (noting how the Village limited where day laborers could congregate and launched a law enforcement campaign to reduce the number of day laborers within the jurisdiction).

to undocumented immigrants and impose severe penalties for doing so, such as a \$1,000 per day fine.²⁷ Some of these housing ordinances even go so far as to require landlords to verify the legal resident status of their tenants—a very controversial aspect of these laws.²⁸

Finally, there are the English-only ordinances. These laws establish English as the official language of the city and require that all city departments conduct business in English.²⁹ Cities with these laws do provide for certain limited exceptions when language other than English may be spoken by city employees when conducting official business.³⁰ While these English-only ordinances may not appear to target illegal immigration at first glance, they are intended—at least in part—to discourage undocumented immigrants from availing themselves of social services provided by the particular locality.

These recent local illegal immigration ordinances raise many constitutional and legal questions. The United States Constitution designates immigration as a federal prerogative, giving Congress the power “[t]o establish a uniform rule of naturalization” for the country.³¹ Thus, most courts considering challenges to these local laws have invalidated or enjoined them pursuant to the Supremacy Clause³² of the United States Constitution.³³ On one hand, these results are consistent with United States Supreme Court precedent holding that the federal government has exclusive powers over immigration matters, thus preempting state and

27. See, e.g., Hazleton Ordinance 2006-18, *supra* note 18, § 5 (“It is unlawful for any person or business entity that owns a dwelling unit in the City to harbor an illegal alien in the dwelling unit, knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, unless such harboring is otherwise expressly permitted by federal law.”); Escondido, Cal., Ordinance 2006-38R, § 3 (2006), available at <http://aclusandiego.org/pdf/EscondidoOrdinance110306.pdf>; Nashville, Tenn., Ordinance BL2006-1234 § 6.30.020 (2006), available at http://www.nashville.gov/mc/ordinances/bl2006_1234.htm; Valley Park, Mo., Ordinance 1708 § 3 (2006), available at <http://www.prldef.org/Civil/Documents/valley%20park%20ordinance.pdf>.

28. See Cherokee County, Ga., Ordinance 2006-003, § 3, available at <http://www.cherokeega.com/departments/boc/Harboring%20Illegal%20Aliens%20Ordinance.pdf>.

29. See, e.g., Hazleton Ordinance 2006-19, *supra* note 18, § 3; Farmers Branch, Tex., Resolution 2006-130, § 2, available at <http://www.ci.farmers-branch.tx.us/Communication/Resolution%202006-130.html>; Cherokee County, Ga., Ordinance 2006-004 § 3 (2006), available at <http://www.cherokeega.com/departments/boc/English%20Language%20Ordinance.pdf>.

30. See, e.g., Hazleton Ordinance 2006-19, *supra* note 18, § 4 (providing exceptions to teach English to non-English speakers or to protect public health or safety, among others).

31. U.S. CONST. art. I, § 8, cls. 1, 4.

32. U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).

33. See, e.g., *Reynolds v. City of Valley Park*, No. 06-CC-3802U (Cir. Ct. St. Louis County, Mo. Sept. 27, 2006) (granting and amending a temporary restraining order), available at http://www.aclu.org/pdfs/immigrants/valleypark_amendedtro.pdf (enjoining the City from enforcing its illegal immigration ordinance because of the likelihood that it is preempted by federal law); *Lozano v. City of Hazleton*, No. 3:06cv1586, at 9-10 (M.D. Pa. Oct. 31, 2006) (granting a temporary restraining order) (finding that it is reasonably likely that two of Hazleton’s illegal immigration ordinances violate the Supremacy Clause, the Due Process Clause of the Fourteenth Amendment, and the Equal Protection Clause of the Fourteenth Amendment).

local regulation in the area.³⁴ For example, in *Hines v. Davidowitz*,³⁵ the Supreme Court considered a Pennsylvania law that required aliens to register with, and receive a registration card from, the State.³⁶ The Court struck down the law as preempted, stating that immigration regulation is intertwined with international policy that is recognized as an exclusive federal power.³⁷

On the other hand, in *Hines*, the Supreme Court oddly left open the door to state—and by extension, local government—regulation in the immigration field by stating that “[a]ny concurrent state power that may exist is restricted to the narrowest of limits.”³⁸ Similarly, despite stating that regulating immigration was an exclusively federal power, the Supreme Court in *DeCanas v. Bica*,³⁹ held that a California labor law that prohibited employers from hiring aliens not entitled to residence within the United States was not preempted by federal immigration law.⁴⁰ The Court stated that “the fact that aliens are the subject of a state statute does not render it a regulation of immigration.”⁴¹ In fact, the Court noted that federal immigration laws and corresponding legislative history indicated that Congress intended for states to regulate the employment of undocumented immigrants.⁴² Accordingly, the Court found the law to be a valid exercise of police power regarding employment issues in the state.⁴³

Courts have also found that these local illegal immigration ordinances may violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment.⁴⁴ Moreover, the Fair Housing Act—which prohibits discrimination based on race, color, national origin, and other characteristics—may also provide a valid basis for challenging the illegal immigration housing ordinances.⁴⁵ Nevertheless, as mentioned above, most courts have found state and local laws aimed at addressing illegal immigration to be preempted by federal law.⁴⁶

34. See *DeCanas v. Bica*, 424 U.S. 351, 354-55 (1976) (stating that regulating immigration is an exclusive federal power).

35. 312 U.S. 52 (1941).

36. See *Hines*, 312 U.S. at 59.

37. See *id.* at 66-67.

38. *Id.* at 68.

39. 424 U.S. 351.

40. *Id.* at 365.

41. *Id.* at 355.

42. *Id.* at 361.

43. *Id.* at 356-57.

44. See, e.g., *Lozano*, No. 3:06cv1586, at 9-10 (granting a temporary restraining order based on the likelihood that the two of Hazleton’s illegal immigration ordinances violate the Supremacy Clause, the Due Process Clause of the Fourteenth Amendment, and the Equal Protection Clause of the Fourteenth Amendment); *Vill. of Mamaroneck*, 462 F. Supp. 2d at 547 (finding equal protection violations stemming from the Village’s regulation of day laborers).

45. 42 U.S.C.S. §§ 3601-19.

46. See, e.g., *Louisiana v. Barrientos*, No. 06-1726 (D. La. Jan. 31, 2007), available at <http://www.democracyinaction.org/dia/organizationsORG/NILC/images/020107%20Barrientos%20decision.pdf> (ruling that the Louisiana statute prohibiting driving without lawful presence in the

III. LOCAL GOVERNMENTS AND ENFORCEMENT OF FEDERAL IMMIGRATION LAWS

Not all local governments have taken anti-illegal immigration approaches.⁴⁷ In fact, many cities have passed sanctuary—or non-cooperation—laws that designate their respective boundaries as safe-havens for undocumented immigrants.⁴⁸ By designating itself as a sanctuary city, a locality adopts a policy that prevents its employees from enforcing federal immigration laws or coordinating with immigration enforcement.⁴⁹ While such local government policies have not been invalidated to date, federal law provides some limitations to these sanctuary laws.

Two federal laws adopted in 1996—the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”) and the Welfare Reform Act—prohibit local governments from preventing their employees from voluntarily reporting the immigration status of an individual to federal authorities.⁵⁰ These federal laws do not mandate that local governments report undocumented immigrants to federal officials, but rather require that cities do not restrict their employees from voluntarily reporting such individuals to immigration agents.⁵¹

Recently, Congress has twice sought to provide disincentives for cities to designate themselves as sanctuaries for undocumented immigrants. In 2003, and again in 2005, the U.S. House of Representatives introduced the Clear Law Enforcement for Criminal Alien Removal Act (“CLEAR Act”),⁵² and the U.S. Senate considered the Homeland Security Enhancement Act (“HSEA”).⁵³ Both bills emphasized that state and local governments were entitled to support the federal government in enforcing immigration laws.⁵⁴ The CLEAR Act proposed denying certain federal funds to state or local governments that “ha[ve] in effect a statute, policy, or practice that prohibits law enforcement officers . . . from assisting or cooperating with Federal immigration law enforce-

United States—the “driving while illegal” law—is “an impermissible attempt to regulate immigration and conflicts with federal immigration law”).

47. For example, many cities have passed resolutions of support for bi-partisan, comprehensive immigration reform. See Database of Local Immigration Ordinances, *supra* note 20. The City of Boston, Massachusetts even passed a resolution supporting resident status for undocumented immigrants currently in the United States. *Id.*

48. See *id.* (noting cities that have designated themselves as sanctuary cities).

49. See Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373, 1382-84 (2006).

50. See 8 U.S.C.A. § 1644 (West 2007). Section 434 of the Welfare Reform Act provides that: “[N]o State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from the Immigration and Naturalization Service information regarding the immigration status, lawful or unlawful, of an alien in the United States. See *id.* Section 642 of IIRIRA prohibits essentially the same. See 8 U.S.C.A. § 1373.

51. See 8 U.S.C.A. §§ 1644, 1373.

52. H.R. 2671, 108th Cong. (2003); H.R. 3137, 109th Cong. (2005).

53. S. 1906, 108th Cong. (2003); S. 1362, 109th Cong. (2005).

54. H.R. 3137, 109th Cong. § 2 (2005); S. 1362, 109th Cong. § 3 (2005).

ment.”⁵⁵ However, Congress never passed either the CLEAR Act or the HSEA.⁵⁶

Other local governments have actively sought to enforce federal immigration laws. Unsurprisingly, legal issues arise as to what types of immigration laws cities may enforce—civil immigration laws (such as being present in the United States without authorization) and/or criminal immigration laws (like crossing the border without inspection).⁵⁷ Courts have consistently upheld state and local government enforcement of federal criminal immigration laws.⁵⁸ However, there seems to be a circuit split as to whether state and local governments may enforce federal civil immigration laws.⁵⁹

In *Gonzalez v. City of Peoria*,⁶⁰ a group of Mexican-American citizens challenged the City’s policy of having its police officers arrest and detain aliens suspected of illegally entering the United States, a federal criminal immigration violation.⁶¹ The Ninth Circuit held for the City based on the established precedent that states and local governments can enforce federal criminal immigrations statutes.⁶² However, the court expressed doubt—in dicta—as to whether states and local governments could enforce federal civil immigration statutes.⁶³ The Ninth Circuit posited that because Congress enacted a “pervasive regulatory scheme” regarding immigrant entry, resident status, and deportation, it had reserved exclusive federal control over civil immigration laws and thus preempted state and local government efforts in that field.⁶⁴

The Fifth and Tenth Circuits, on the other hand, have held otherwise. In *Lynch v. Cannatella*,⁶⁵ the Fifth Circuit addressed whether federal law constituted the sole manner for detaining sixteen Jamaican stowaways who were held by the Port of New Orleans Harbor Police after

55. H.R. 3137, 109th Cong. § 3(a) (2005).

56. The CLEAR Act was introduced again in the current session. See H.R. 842, 110th Cong. (2007).

57. Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 FLA. ST. U. L. REV. 965, 976-77 (2004).

58. See *Gonzalez v. City of Peoria*, 722 F.2d 468, 475 (9th Cir. 1983); *Lynch v. Cannatella*, 810 F.2d 1363, 1371 (5th Cir. 1987); *United States v. Vasquez-Alvarez*, 176 F.3d 1294, 1300 (10th Cir. 1999); see also Pham, *supra* note 57, at 977-78 (detailing why local governments have been allowed to enforce federal criminal immigration laws under traditional preemption analysis).

59. Scholars are similarly split on this topic as well. See, e.g., Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084, 1089-90 (2004) (arguing that the breadth of federal civil immigration law demonstrates Congress’ intent to fully occupy the policy field and thus preempt state and local governments from enforcing such laws); Kobach, *supra* note 11, at 199-219 (arguing that state and local governments have the inherent authority to enforce federal civil immigration laws and that Congress has not preempted this policy field).

60. 722 F.2d 468.

61. *Gonzalez*, 722 F.2d at 472-73.

62. *Id.* at 474-75.

63. *Id.* at 474-77.

64. *Id.*

65. 810 F.2d 1363.

their discovery.⁶⁶ The Fifth Circuit's conclusion was unequivocal and validated the inherent authority of state and local governments to enforce federal civil immigration laws: "No statute precludes other federal, state, or local law enforcement agencies from taking other action to enforce this nation's immigration laws."⁶⁷ In *United States v. Vasquez-Alvarez*,⁶⁸ the Tenth Circuit considered an undocumented immigrant's claim that his arrest by an Oklahoma police officer—based solely on his illegal presence in the United States—was not permitted by federal law.⁶⁹ The Tenth Circuit rejected the appellant's argument finding a variety of federal statutes that demonstrated that Congress did not intend to preempt state and local government enforcement of federal criminal and civil immigration laws.⁷⁰

The United States Department of Justice (the "DOJ") has also been of two minds on this point. Prior to 2002, the DOJ's position was that state and local governments could not enforce federal civil immigration laws.⁷¹ However, in 2002, the DOJ reversed itself, stating that state and local governments have inherent authority as sovereigns to enforce these federal laws.⁷² Nevertheless, to hedge its bets—and to be proactive in engaging state and local governments in coordinating with federal officials in immigration enforcement—the DOJ entered into memoranda of understanding ("MOU") with states and cities to enforce federal civil immigration laws.⁷³

IV. PREEMPTION, FEDERALISM, AND THE LOCALIST'S CASE

Whether a local government adopts an illegal immigration ordinance, designates itself a sanctuary city, or enforces federal civil immigration laws, the issue of federal preemption looms large. Yet one has to ask the question of whether such a stringent preemption position makes sense and is desirable. The preemption doctrine stems from principles of federalism.⁷⁴ Federalism is our intergovernmental system that allocates and disperses power between higher and lower levels of government.⁷⁵

66. *Lynch*, 810 F.2d at 1367.

67. *Id.* at 1371.

68. 176 F.3d 1294.

69. *Vasquez-Alvarez*, 176 F.3d at 1295-97.

70. *Id.* at 1300.

71. See Memorandum from Teresa Wynn Rosenborough, Deputy Assistant Attorney General, Office of Legal Counsel, Assistance by State and Local Police in Apprehending Illegal Aliens (Feb. 5, 1996), available at www.usdoj.gov/olc/immstopo1a.htm.

72. See Memorandum for the Att'y Gen. from Jay S. Bybee, Assistant Att'y Gen., U.S. Dep't of Justice, Office of Legal Counsel on Non-Preemption of the Authority of State and Local Law Enforcement Officials to Arrest Aliens for Immigration Violations (Apr. 3, 2002), available at <http://www.aclu.org/FilesPDFs/ACF27DA.pdf> (with DOJ redactions).

73. See Kobach, *supra* note 11, at 196-99 (detailing different MOUs entered into by the DOJ and the legal basis for them). These MOUs also extended federal liability protections and immunities to local officials conducting warrantless investigations and detentions for federal civil immigration law violations. See *id.*

74. See *Cnty. Commc'ns Co., Inc. v. City of Boulder*, 455 U.S. 40, 61 (1982).

75. BLACK'S LAW DICTIONARY (8th ed. 2004).

In light of this system, the United States Supreme Court has crafted a test to determine if federal law preempts state and/or local law: express preemption by Congress; field preemption if the federal statutory scheme is so pervasive that it leaves no room for state or local supplementing; and conflict preemption, where a state or local government permits something that federal law forbids or forbids something that federal law allows.⁷⁶ Federalism is also intended to serve a number of different values—innovation, democracy, accountability, and checking too much federal power.⁷⁷ Local governments seem best suited to fulfill these values, both generally and specifically to immigration regulation and enforcement.

In reflecting on federalism, Justice Brandeis once famously stated that “[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”⁷⁸ If the fifty states serve as such laboratories, then certainly the tens of thousands of local governments nationwide offer enticing opportunities for experimentation and reform. Local governments have proven to be incubators for innovative policies in a variety of areas: firearm regulation, gay and lesbian rights, domestic partnership laws, campaign finance reform, and living wage law.⁷⁹ Therefore, local government experimentation in the immigration realm can lead to successes or failures that can inform federal policy-making.

Local governments also advance the value of democracy by providing opportunities for public participation in their decision-making processes.⁸⁰ The federal and state governments may have more resources at their disposal and have control over a broader range of policies than local governments, but these higher levels of government are too large and inaccessible for meaningful civic engagement. Small governmental entities like cities thus invite a higher percentage of their respective constituency to deliberate directly over issues facing their communities because people find it easier to meet, share their opinions, and share the results of this dialogic process with their local elected officials. Therefore, local governments are more in touch with their constituents and are thus able to be more responsive to the needs of their communities—whether friendly or hostile to undocumented immigrants.⁸¹ This, of course, is consistent with the Tenth Amendment, which charges state and local

76. *Fid. Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153 (1982).

77. See Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 10 (1988).

78. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

79. Richard Briffault, *Home Rule for the Twenty-First Century*, 36 URB. LAW. 253, 254-55 (2004).

80. Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115, 1126-27 (1996).

81. See *id.* at 1123-24.

governments with police power to regulate the health, safety, and general welfare of its citizens.⁸² Correspondingly, because of the close proximity to their local elected officials and administrators and the opportunity to be engaged in local government decision-making, community stakeholders can better oversee the work of their local governments and thus hold them accountable.⁸³ This dynamic in local government furthers the democratic and accountability ideals of federalism.

Accordingly, it seems odd that traditional theories of federalism overlook local governments as facilitators of these federalism values with their focus on a two-tiered system of federal and state governments. Localists espouse a more modern view of federalism with local governments as quasi-sovereign governmental entities that constitute a third-tier.⁸⁴ The aforementioned emphasis on federal preemption of local government regulation and enforcement in the immigration field runs afoul of this modern view because preemption thwarts local experimentation and innovation in immigration reform.⁸⁵ It also precludes localities from passing laws and enforcing federal civil immigration laws to further the health, safety, and general welfare of their citizens.⁸⁶ Indeed, different states and local governments are affected in drastically different manners—both positively and negatively—by illegal immigration.⁸⁷ Local governments should be able to respond accordingly, especially if the federal government is not meeting those communities' needs.

This argument does not derive from an anti-illegal immigration position. In fact, calls for requiring local governments to enforce federal immigration laws are similarly untenable for a localist because this would constitute an unfunded mandate that undermines local autonomy and violates the Tenth Amendment. It is important to recognize that there are multiple motivating factors for why localities would adopt the illegal immigration ordinances detailed above—some of them are no doubt unsavory. But it is also plausible that cities have determined—whether correctly or incorrectly—that illegal immigration negatively affects their communities and that the federal government is failing in its duties to enforce federal immigration laws in a manner that sufficiently protects their constituents. If this is a factor, and we believe in the values

82. See *Gonzalez v. Raich*, 545 U.S. 1, 42 (2005) (O'Connor, J., dissenting) (interpreting the Tenth Amendment).

83. See Archon Fung & Erik Olin Wright, *Deepening Democracy: Innovations in Empowered Participatory Governance*, 29 POL. & SOC. 5, 26 (2001).

84. See PAUL E. PETERSON, CITY LIMITS 15 (1981) ("A modern theory of federalism becomes possible only when cities, states, and national governments are understood to differ in their essential character."). See generally Richard Briffault, *Our Localism: Part I – The Structure of Local Government Law*, 90 COLUM. L. REV. 1 (1990) (detailing the considerable autonomy that local governments enjoy).

85. See Boatright, *supra* note 6, at 1669-700.

86. See Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 227 (2000).

87. See Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 CONN. L. REV. 1627, 1631-32, 1642-43 (1997).

of federalism, then localities should have some recourse to address these perceived problems—something that the current preemption regime does not allow.⁸⁸ This does not mean the cities should be able to enact laws that conflict with federal or state immigration laws. Rather, under a concurrent powers doctrine and a modern theory of federalism, local government efforts in the immigration realm should stand unless they make legal something the federal government deems illegal or prohibit something that federal immigration laws permit. In fact, one could read many of the local illegal immigration ordinances as making illegal through local laws that which is already illegal under federal immigration law.

While this localist position may have some appeal, there is an understandable reticence for such local government regulation and enforcement in the immigration field. One concern is that these local ordinances will have impacts that extend beyond the undocumented immigrants they target.⁸⁹ United States citizens and legally admitted aliens may have their civil rights violated by these ordinances. Local police forces may engage in racial profiling and discrimination. These concerns raise equal protection issues, which may wind up rendering some of these local illegal immigration ordinances unconstitutional—and rightly so. However, even if these ordinances did not raise Equal Protection or Due Process concerns, they would be struck down under the current preemption regime—thus precluding local government from supplementing federal immigration policy.

There is also a concern that such ordinances are based on racial fears and stereotypes, not evidence of a threat to the health, safety, and welfare of the community.⁹⁰ Moreover, local police forces may not be trained in immigration issues, thus causing a problem with enforcement. Further, an individual's immigration status can change in a short period of time. There is also a lack of an assured database to determine an individual's immigration status. These training issues pose challenges, but none which are merely germane to local governments. Cities ought to seek training—as evidenced by the MOUs with the DOJ—on immigration matters to be truly effective. However, even if they do not, that concern is not a valid basis for broadly preempting local action in the immigration field.

Others worry that local governments will divert valuable police time and resources away from every-day enforcement functions.⁹¹ Opponents also claim that undocumented immigrants will not trust local police forces and thus not come forward with critical information regarding

88. *See id.* at 1631-32.

89. Wishnie, *supra* note 59, at 1088.

90. *See* FAIR IMMIGRATION REFORM MOVEMENT, RECLAIMING OUR COMMUNITIES TOOLKIT (2007), available at <http://64.243.188.204/CCCFTP/local.pdf>.

91. *See* Booth, *supra* note 9, at 1066 (noting arguments against local government enforcement of federal immigration laws).

crimes for fear of being deported.⁹² These may be valid criticisms, but they are policy concerns that cities must grapple with in deciding how to expend their resources and where to target their focus—both in terms of regulation and enforcement. While it would be an unfortunate consequence to have undocumented immigrants distrust police and not voluntarily offer information on crimes, it is merely a consideration a city must weigh in deciding whether to adopt such illegal immigration positions. Moreover, as mentioned above, if constituents are unhappy with cities' decisions to divert police time and resources to illegal immigration enforcement and away from normal public safety work, community members are more likely to be able to hold their local government accountable because of their smaller sizes.

CONCLUSION

Cities provide opportunities to test out many of the claims made by both sides of the illegal immigration debate. A locality could adopt these illegal immigration ordinances and/or enforce federal criminal and civil immigration laws to see if expelling undocumented immigrants from their jurisdiction actually improved crime rates or stopped the perceived depletion of government social service resources.⁹³ Or the local government might find that such measures hurt the local economy through lost tax dollars and workforce. In contrast, a city could designate itself a sanctuary city to see if maintaining its undocumented immigrant population helps maintain a strong local economy. The locality might instead experience an influx of undocumented immigrants that may have some unintended and undesirable consequences. Such possibilities to test the rhetoric on both sides on a local level—and thus inform federal decision-makers—through these innovative local efforts are currently largely precluded because of preemption. As we grapple as a nation with this highly complex and divisive issue, we should not preempt and ignore local governments, as they provide opportunities for new, supplemental approaches to what is seen by both sides of the debate as a broken federal immigration policy.

92. See Sessions & Hayden, *supra* note 5, at 338 (noting critics' claims of such a result).

93. Such a city would presumably coordinate with federal immigration agents to have undocumented immigrants deported. Undocumented immigrants might also leave such a city to move to a sanctuary city.

