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Sanctuary, Safety and Community

Tools for Welcoming and
Protecting Immigrants
Through Local Democracy

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*Este informe está disponible en español en [Demos.org](https://www.demos.org) y [LatinoJustice.org](https://www.latinjustice.org).
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About Demos

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Our name means “the people.” It is the root word of democracy, and it reminds us that in America, the true source of our greatness is the diversity of our people. Our nation’s highest challenge is to create a democracy that truly empowers people of all backgrounds, so that we all have a say in setting the policies that shape opportunity and provide for our common future. To help America meet that challenge, Demos is working to reduce both political and economic inequality, deploying original research, advocacy, litigation, and strategic communications to create the America the people deserve. For more information, please visit: demos.org.

About LatinoJustice PRLDEF

LatinoJustice PRLDEF, originally established as the Puerto Rican Legal Defense and Education Fund (PRLDEF) in 1972, is one of the foremost national nonprofit civil rights legal defense and education funds working to advance, promote, and protect the legal rights of Latina/os throughout the nation. Our work is focused on addressing systemic discrimination and ensuring equal access to justice in the advancement of voting rights, housing rights, educational equity, immigrant rights, language access rights, employment rights, and workplace justice, seeking to address all forms of discriminatory bias that adversely impact Latina/os. For more information on LatinoJustice, please visit: latinojustice.org.

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Introduction

Concerned about increasing threats to immigrant communities by several racially-fraught immigration policy positions advanced by the incoming federal administration,¹ Demos and LatinoJustice PRLDEF are issuing this preliminary report on the ability of local communities to decide, based on their own form of local government, how they may enact policies to protect immigrant rights. This report is by no means comprehensive; it is intended to provide advocates with basic information about available options to effectively address the very real safety and security threats to immigrant communities. Our research demonstrates how local democratic institutions may enact counter-measures that welcome and include immigrants as equal members of society. We believe that this moment of crisis provides an opportunity for local governments and schools to dedicate themselves to building a “beloved community”² that assumes responsibility for protecting its most vulnerable members and, in doing so, expands the well-being and security of all.

Since the November 2016 election of a presidential candidate who ran on a platform of racialized xenophobia, a troubling wave of hate speech and hate crimes has been unleashed; the largest number has occurred in schools.³ Immigrant communities are not only living in fear of the termination of recent policies such as Deferred Action for Childhood Arrivals (DACA),⁴ but also in real fear of draconian federal government policies that include racial profiling,⁵ raids and mass deportations.⁶ President-elect Donald Trump made campaign promises to “build a wall” to keep out “Mexicans,” whom he universally labeled as “criminals;”⁷ to deny refuge for Syrians seeking asylum from civil war, including Syrian children;⁸ to institute an unconstitutional national registry for Muslims and temporarily ban Muslim immigrants from entering the country;⁹ to retract President Obama’s executive order deferrals of deportation for young people; and to deport 2-3 million undocumented immigrants.¹⁰ For communities of color, the rhetoric has already resulted in the creation of a hostile environment, saturated with high levels of hate speech and hate crimes, even in schools and directed against places of worship.¹¹ In the month following the election of Donald J. Trump to the nation’s highest office, over 1,000

bias-related incidents were documented, and nearly 37 percent of them included perpetrators expressing support for Mr. Trump while engaging in such deplorable acts against humanity.¹²

In response, starting in the days immediately after the election, cities around the country reaffirmed their commitment to providing some form of sanctuary for immigrants.¹³ Other local communities have sought to begin providing such protections, while student- and parent-led activism has led to schools reaffirming and seeking to expand them. Churches, hospitals and other local institutions may also provide protections for immigrants. It is important to know that these protections may be contested, as the federal government has “exclusive jurisdiction” over immigration law enforcement. Moreover, local jurisdictions that have provided protections for immigrants have had their federal funding threatened.¹⁴

But even with these threats, there are various ways in which local communities are working to meet these challenges and protect their own residents, such as refusing to provide local resources to enforce civil immigration law, and providing safeguards against racial profiling or other unconstitutional actions. Many of these protections are already in use, and as our research shows, recent case law challenging civil rights violations in this regard may provide some baseline of protection for immigrant communities in the coming years.

Currently, around 400 jurisdictions, including at least 4 states, 39 cities, and 364 counties, share a strong commitment to inclusion, diversity, and welcoming immigrant communities through what is loosely-termed “sanctuary policy,” through which they limit cooperation with federal requests to hold immigrants in detention.¹⁵ Additional forms of protection include not sharing information about immigration status, safeguarding school environments, and policies protecting against discrimination.¹⁶ Even though sanctuary policies are likely to be attacked, legal analysis shows that communities have some leeway to decide for themselves whether their local democracy will welcome and protect immigrants. While the federal government has “exclusive jurisdiction” over immigration enforcement, our constitutional system of federalism permits communities to exercise democracy at the local level, and creates avenues to resist the most draconian impulses of the federal government.¹⁷ **Although local communities cannot entirely stop federal immigration enforcement, violations of equal protection and tactics such as racial profiling and commandeering of local police to round up members of our local communities for**

deportation have been resisted effectively in the past, and can and should be resisted in the future.

Part A of this report will briefly describe various types of local protections for immigrants. Part B will describe the basic legal parameters, as well as current legal threats, regarding local governmental policies intended to protect undocumented persons from aggressive federal immigration enforcement. It will also explain how the U.S. Constitution supports local jurisdictions in shielding against inquiries into immigration status, protecting against racial profiling, refusing to detain immigrants, resisting excessive incarceration and deportations, and perhaps most importantly, safeguarding public school children, among other measures. Part C will summarize these conclusions and related policy advocacy recommendations.

We hope this information is helpful, and we encourage advocates to seek out and choose among a wide variety of tools in their pursuit of inclusive local democracies that reject discrimination, advance equal protection and welcome immigrants, in the way that best meets local community needs. This challenging time will require ongoing learning and adjustments in tactics and strategies to present the strongest defense of sanctuary policies and the inclusive vision of community, safety, security and local democracy that they embody.

A. What Are the Main Types of Local Protections for Immigrants?

There are 11 million undocumented immigrants living in the U.S. today, a majority of whom are people of color. They face a broken and much more restrictive immigration system than that faced by earlier waves of European immigrants, in large part due to policies that racialize, criminalize and exclude disproportionate numbers of immigrants of color from a path to citizenship.¹⁸ Since restrictive anti-immigrant reforms were enacted in 1996, it has become exceedingly difficult to gain legal status.¹⁹ Congress has failed to enact necessary comprehensive immigration reform, and in response, many local jurisdictions have decided to protect undocumented immigrants who have become members of their communities.

There are many variations among the hundreds of local policies protecting and welcoming immigrants. Here are the main types of protections that local jurisdictions have implemented:

1. Policies affirming constitutional protections against racial profiling and equal protection of all persons, and demonstrating the jurisdiction's commitment to aggressively prosecuting hate crimes.
2. Policies prohibiting immigration enforcement in public schools, where constitutional equal protection guarantees safeguard undocumented students.
3. Policies prohibiting immigration enforcement in other sensitive locations, such as churches and hospitals.
4. Inclusive programs that provide benefits to undocumented immigrants and their families, such as provisions that expand access to identification cards or health care; extend professional licenses to immigrants; and/or strengthen workers' rights in areas that predominantly affect low-wage immigrant workers (including farmworkers' and domestic workers' rights).
5. Amending or applying state criminal laws to reduce or eliminate the immigration consequences that might result from a criminal conviction, pardoning past felony convictions, or other applicable criminal justice reforms (including offering community policing training, or passing laws restricting officers' ability to arrest individuals for misdemeanors or for certain immigration offenses).

6. Policies or practices of declining to honor federal civil immigration detainers, which are *requests* issued by Immigration and Customs Enforcement (ICE) that local law enforcement continue to detain individuals already in custody.
7. Policies limiting use of community resources for enforcement of federal immigration law (or the civil provisions thereof).
8. Policies restricting inquiries into or investigations about immigration status.
9. Policies shielding information about immigration status from federal authorities. To avoid conflict with federal laws permitting individual state and local government employees to exchange immigration information with federal authorities, some jurisdictions have enacted policies restricting access to information about immigration status.²⁰
10. Policies providing public funds for legal services for undocumented immigrants, including those facing deportation.²¹

The practical and legal implications of each of these policies are discussed in more detail in Part B.1 and B.2, below, following a discussion of the basic framework governing how local control and self-determination intersect with federal authority.

B. Under the U.S. Constitutional System of Federalism, What Are the Rights of Local Communities to Self-Determination and Inclusive Democracy?

Under the U.S. constitutional system of federalism, power is balanced between the federal, state and local governments. During this moment in history, with widespread fear that the incoming Trump administration will seek to engage in mass deportation and racial profiling that could upend local safety, security and economies,²² state and local governments should seek to protect undocumented immigrants and immigrant communities from these threats. While the federal government has exclusive jurisdiction over immigration *enforcement*, state and local governments retain jurisdiction over how undocumented immigrants residing in their jurisdiction are *treated* through local policies. This authority is not unlimited, but there is ample leeway to create positive, community-based policies to protect undocumented immigrants. State and local governments are also obligated to refrain from unconstitutional actions, and have a right to refuse commandeering by a tyrannical federal government that might attempt to rule through discriminatory racial profiling and other unconstitutional policies or practices.²³ This section will discuss these legal rules and their application to various types of state and local policies that may protect immigrant families and communities.

1. Under the U.S. System of Federalism, State and Local Sanctuary Policies are Generally Permissible

Local protections for undocumented immigrants must fit into the U.S. constitutional system of federalism, which balances power between the federal government and the states.²⁴ In this dance of power, the Supreme Court has consistently held that the federal government “has broad, undoubted power over the subject of immigration and the status of [immigrants].”²⁵ Based on specific constitutional mandates, the federal government has exclusive authority to decide who (among noncitizens) may legally enter and stay in the country, especially because this impacts relations with other countries.²⁶ Immigrant rights advocates have relied on this federal authority over immigration policy to establish that

restrictive immigration laws in states such as Alabama (2012), Arizona (2012), and California (1976) were unconstitutional because they were pre-empted by federal law.²⁷ This same body of federal pre-emption law may also impact state and local laws designed to protect undocumented immigrants. However, **not all state and local laws impacting immigrants are pre-empted by federal authority.** In addition to the authority of the federal government to enforce federal immigration law, the Supreme Court also recognizes some positive, sovereign authority of state and local governments to provide for the health, safety, education and welfare of immigrant communities.²⁸

State and local sovereignty is sometimes termed local “police power,” but the term is a misnomer because it encompasses much more than traditional policing. The local “police power” falling under state sovereignty includes the ability to legislate and regulate to ensure public safety, education, health and welfare.²⁹ Many aspects of local immigrant sanctuary laws fall under this category and therefore are, arguably, constitutional.

Moreover, relying on local police power regarding public safety is amply justified by the facts. If undocumented immigrants and their family members are afraid to report crimes to local police, public safety is compromised. **One recent survey found that 44% of Latinos (not only immigrants) are less likely to contact police if they fear officers will ask about immigration status.**³⁰ For this reason, national police associations³¹ and groups fighting domestic violence and sexual assault consistently oppose legislation that would require local police to inquire about immigration status.³² Other local policy reasons for protecting immigrants include ensuring safe schools, access to health care, and community well-being.³³ For example, local economies are dependent on the significant contributions of immigrants,³⁴ and public school education is negatively impacted when children of undocumented immigrants cannot safely involve their parents in their education.³⁵ Local authorities may also need to provide protection from racial profiling, hate speech and hate crimes, and they may not want to divert local resources or compromise the efficiency of local programs to assist the federal government in immigration enforcement.³⁶ Local policies based upon these reasons are thus arguably well within the sovereign jurisdiction of state and local authorities.

(a) Current Threats of Pre-emption Under Federal Immigration Law Are Overblown

In February 2016, Congressman John Culberson (R-Tex.) inquired whether Department of Justice (DOJ) grantees with sanctuary policies were complying with federal law. His Congressional inquiry was based on a study conducted by an anti-immigrant group, the Center for Immigration Studies,³⁷ which was founded and funded by white supremacist John

Tanton.³⁸ Based on this inquiry, the DOJ Inspector General stated that 140 jurisdictions receiving federal funding may be in violation of federal law, due to their immigrant sanctuary policies.³⁹ He advised that the jurisdictions should be asked to show compliance with the **one federal law that expressly pre-empts state or local immigration policies**. This provision, 8 U.S.C. § 1373 (“Section 1373”),⁴⁰ is a double negative. It prohibits federal, state or local government authorities from *prohibiting* any state or local government entity or official from sending or receiving information about any person’s immigration status.⁴¹ It goes on to clarify that requesting, maintaining or exchanging such information with the federal government may not be prohibited.⁴² However, the law does not require state or local government entities or officials to inquire into immigration status or provide the same information.

Furthermore, the key elements of local sanctuary policies under attack are likely *not* pre-empted by this federal law.⁴³ This may be why threats of losing federal funding have not stopped major cities from publicly reiterating their commitments to refrain from providing information about immigration status to the federal government.⁴⁴ The only time that a federal court addressed this issue was when former New York City Mayor Giuliani challenged the constitutionality of Section 1373, immediately after it was enacted. In 1997, a federal court found that the new federal statute would not force the city to enforce federal immigration law.⁴⁵ Although the case was not about the legality of the city sanctuary law, it is instructive. Like key provisions of current sanctuary laws being challenged, the New York City sanctuary law provided that the City would not transmit immigration status information to the federal government, except as required by law, authorized by the individual, or if the person was suspected of criminal activity.⁴⁶ The New York federal court found that Section 1373 “does not require, in and of itself, any government agency or law enforcement official to communicate with the INS [now ICE].”⁴⁷ The court characterized the voluntary information exchange found in the statute as “optional,”⁴⁸ and not “intrusive,” because the federal provisions:

*do not require the City to legislate, regulate, or enforce, or otherwise implement federal immigration policy. Instead, they only direct that City officials be allowed, if they so choose, to share information with federal authorities. **The statutes do not even require any City official to provide any information to federal authorities.** They only prevent the City from interfering with a voluntary exchange of information. [Emphasis added.]⁴⁹*

(b) Shielding Information About Immigration Status Is a Viable Strategy for Local Communities

Sanctuary policies that limit access to immigration status information by limiting the collection or maintenance of such information are also not necessarily pre-empted by federal law. Federal law does not expressly prohibit restrictions on the ability of local employees to collect information on or ask about immigration status. Section 1373 only prohibits restrictions on local entities or employees from “sending to, or receiving [immigration status] information *from the federal government*”⁵⁰ or “requesting, maintaining or exchanging” such information *from or with the federal government*.⁵¹ It does not prohibit restrictions on having access to or asking about such immigration information from persons with whom state or local employees have contact. If the information is simply not collected, it cannot be given to the federal government.

However, some local benefit programs, such as drivers’ licenses, municipal identification cards, medical insurance or in-state tuition benefits, have necessarily involved local officials collecting immigration status information from undocumented immigrants or their family members. The legal structure of these programs typically includes privacy protections.⁵² Given the current threats, not collecting immigration status information, or only temporarily asking as needed for purposes of the benefit and not maintaining it with any personal identifying data, may be the best policy solution.

In addition, local jurisdictions may argue that allowing their employees to reveal immigration status would severely impair their ability to fulfill the duties of their job, and that those job duties fall under local “police powers” jurisdiction. For example, municipal identification cards or drivers’ licenses provided to undocumented immigrants are provided to increase state and local public safety, and those policy goals would be severely compromised if any employee could give immigration status information to the federal government. Moreover, schools should not collect immigration status information for enforcement purposes, because it would violate the right to equal protection under the law or other constitutional rights.⁵³ Similarly, in other scenarios, revealing immigration status “could lead to criminal prosecution, harassment and intimidation” that would deter undocumented immigrants from exercising their legal rights.⁵⁴

(c) Threats to Cut Federal Funding Should be Resisted

Because it would be coercive, threatening broad cuts to federal funding that is not directly tied to immigration enforcement is very

likely to be unconstitutional.⁵⁵ Law professor Ilya Somin recently argued that:

Few if any federal grants to state and local governments are conditioned on cooperation with federal deportation efforts. The Supreme Court has long ruled that conditions on federal grants to state and local governments are not enforceable unless they are “unambiguously” stated in the text of the law “so that the States can knowingly decide whether or not to accept those funds.” In ambiguous cases, courts must assume that state and local governments are not required to meet the condition in question. In sum, the Trump administration can’t cut off any federal grants to sanctuary cities unless it can show that those grants were clearly conditioned on cooperation with federal deportation policies.⁵⁶

Constitutional law experts, such as Erwin Chemerinsky, agree that jurisdictions with immigrant sanctuary policies may not be forced into doing the will of the federal government by threats of withdrawal of federal funding.⁵⁷ The Supreme Court has held that this type of “commandeering” and “tyrannical” abuse of federal power is unconstitutional.⁵⁸

Furthermore, there is no support for the arguments of some anti-immigrant groups that all future federal funding is related to immigration enforcement. Many of the funding streams that may theoretically be impacted by various types of sanctuary policies may be defended on their merits. For example, federal funding to assist victims of domestic violence should not be retracted because the federal Violence Against Women Act (VAWA) and the federal visa program for victims of domestic violence demonstrate that persons in this situation should not have to fear deportation to receive protection.⁵⁹ Accordingly, state and local policies keeping immigration status information confidential in these situations should not lead to retraction of funding. Similarly, because federal rules require that hospital emergency rooms treat everyone regardless of immigration status, and because there are strong local policy reasons to protect the public health, keeping health care-related immigration status information confidential also should not lead to retraction of federal funding.⁶⁰ Funding for criminal law enforcement and national security-related projects may present a harder case, but jurisdictions may be able to show that the purposes of these funds would be undermined by aggressive federal immigration enforcement.⁶¹ There is strong evidence that victims of or witnesses to crime are much less likely communicate

with the police if they fear immigration repercussions;⁶² therefore, not revealing immigration status in the course of critical public safety programs, in accordance with local sanctuary policies, may be defensible and provide further arguments against retraction of future federal funds.

(d) Threats to Retract Federal SCAAP Funding for Incarceration Costs Depend on Whether the Jurisdiction Chooses to Participate

Jurisdictions that receive funding from the State Criminal Alien Assistance Program (SCAAP) may be subject to some federal control. SCAAP reimburses state and local governments for a portion of the costs of incarcerating “undocumented criminal aliens,” who are defined as persons who are undocumented, have committed a felony or two or more misdemeanors, and were the subject of a deportation proceeding at the time they were taken into custody.⁶³ An agreement for SCAAP federal funding to reimburse some incarceration costs is entirely voluntary,⁶⁴ so not participating is one way to avoid any potential liability. Some sanctuary cities, such as Baltimore, Maryland, do not receive any SCAAP funding and thus are not as exposed to being questioned under the federal funding scheme. SCAAP funding has been very low,⁶⁵ and has recently been cut even further by Congress.⁶⁶ It arguably provides some implicit legal authority for DOJ (the funder) to request information about whether recipients’ sanctuary policies may be undermining the incarceration of this category of undocumented immigrants.⁶⁷ However, the issue of whether and how jurisdictions receiving SCAAP funding must change their sanctuary policies is still unsettled.

(e) Information About the Immigration Status of Persons Seeking Health Care or Insurance Is Subject to Privacy Rules Shielding It from Immigration Enforcement

As the National Immigration Law Center has emphasized since the November election, under federal law, “any information provided in the process of applying for Medicaid, CHIP, or a [federal health insurance] Marketplace plan may be used only to determine the individual’s eligibility for the program—not for immigration enforcement purposes, and ... [anyone] assisting in the process is required by law to keep information private and secure.”⁶⁸ Moreover, “hospitals with emergency rooms must screen and treat people who need emergency medical services regardless of ... their immigration status. Similarly, anyone can seek primary and preventive health care at community health centers regardless [of] ... their immigration status.”⁶⁹ Finally, medical providers may ask about immigration status to determine eligibility for public health insurance, “but they should not deny medical treatment based solely on your immigration status—or based on assumptions about your

immigration status they make because of the language you speak, your accent, what you look like, or whether you have an SSN. In fact, doing so may violate federal civil rights laws.”⁷⁰ State and local institutions that receive federal funding must abide by these same federal rules.

(f) Sensitive Locations Such as Places of Worship Should Continue to Protect Undocumented Persons

The sanctuary movement began when churches protected Central Americans fleeing violence, for whom the federal government refused to provide asylum in the 1980s.⁷¹ The current historic moment is remarkably similar, not only for Central Americans, but for many others seeking safety in the United States.⁷² Currently, over 450 faith communities are providing sanctuary for undocumented immigrants facing deportation.⁷³ They have taken the following pledge:

*As people of faith and people of conscience, we pledge to resist the newly elected administration’s policy proposals to target and deport millions of undocumented immigrants and discriminate against marginalized communities. We will open up our congregations and communities as sanctuary spaces for those targeted by hate, and work alongside our friends, families, and neighbors to ensure the dignity and human rights of all people.*⁷⁴

These faith communities are relying on a long-standing federal policy that immigration enforcement actions should not be undertaken in places of worship, hospitals, schools, and other “sensitive locations.”⁷⁵ The policy requires that immigration officers seek permission for any enforcement actions in sensitive locations, except in matters involving national security, terrorism or imminent risk of danger to the public.⁷⁶

While the current federal policy could be modified by the incoming administration, the policy reasons underlying the exercise of discretion against deporting an undocumented person who has been given sanctuary in a church are extremely persuasive. They should give pause to any consideration of attempting immigration enforcement in places of worship and other sensitive locations.

(g) States Are Prohibited from Enacting Their Own Laws or Policies to Punish Alleged Immigration Violations

The U.S. system of federalism also prohibits states from making their own immigration enforcement laws. As the Supreme Court held in *Arizona v. United States*, states may not make their own laws criminalizing undocumented status.⁷⁷ While the implications for

state and local sanctuary laws have yet to be fully decided by courts, clearly, since immigration enforcement falls under the exclusive jurisdiction of the federal government,⁷⁸ states have justifiable reasons to be less engaged in immigration enforcement. For example, being undocumented is a civil, not criminal, violation; therefore, if an arrest is based only on suspicion of undocumented status, the usual justification for an arrest is lacking.⁷⁹ Therefore, state and local police should *not* engage in identifying and arresting persons suspected of being undocumented. Moreover, *Arizona v. United States* and other recent cases illustrate that state and local policies limiting police engagement in civil immigration enforcement are justifiable, especially considering the increased risk of civil rights violations, including racial profiling, in the current climate in which some police officers may act on anti-immigrant statements made by the President-Elect.⁸⁰

2. A Progressive Form of Federalism, Including Rules Against Racial Profiling and Other Constitutional Guarantees, Supports Local Sanctuary Policies

As discussed above, under the U.S. system of federalism, federal immigration enforcement falls under the “exclusive” jurisdiction of the federal government, whereas the treatment or “integration” of immigrants generally falls under the jurisdiction of state and local governments. Immigrant rights scholars have argued that local powers include a “right of refusal” to enforce federal immigration laws, as well as a role for local governments in immigrant integration, under the Tenth Amendment of the U.S. Constitution.⁸¹ This is the amendment that traditionally has been used to support “states’ rights” to enact restrictive state civil and voting rights laws without federal oversight.⁸² However, by including racial equity considerations in the analysis, advocates can avoid supporting discriminatory state policies, while the sanctuary movement organically confronts the urgent need for racial justice.⁸³ A racial equity framework ensures that the role of local democracy is community-based and able to protect immigrant communities against hate crimes and other forms of racial discrimination. This emphasis is also supported by cutting-edge research in “immigration federalism,”⁸⁴ or “conflict federalism.”⁸⁵ Both are characterized by a principled support of civil and human rights that is critically important at this moment in history. As will be shown below, a principled form of federalism that recognizes the great need to protect immigrant rights and combat discrimination is also clearly emerging through recent case law.

To begin the racial justice analysis, neither the states nor the federal government may enact or enforce laws in a manner that would violate

the Constitution.⁸⁶ The incoming administration should be held accountable for any such efforts. Moreover, to protect against racial profiling and other constitutional violations, state and local governments have authority—and arguably a duty—to enact policies protecting against federal immigration enforcement by local police, schools, and other local institutions that interact with undocumented immigrants.

(a) State and Local Communities Can Rely Upon Equal Protection and Anti-Discrimination Case Law to Support Sanctuary Policies

In a long-standing series of cases, the Supreme Court has struck down state laws that infringed on the exclusive federal authority to enforce immigration laws. These cases are marked by a pattern of discrimination against immigrants that federal courts have also sometimes found to be unconstitutional. In the seminal case of *Yick Wo v. Hopkins* decided in 1886, regarding a city ordinance requiring laundry operation permits that disparately impacted Chinese immigrants, the Supreme Court found that a law that is neutral on its face may violate the fundamental right to equal protection.⁸⁷ In more recent cases, relying on federal pre-emption, the Court struck down parts of the California Labor Code in 1976; California Proposition 187 was enjoined on the same grounds, struck down in federal court in 1997, and ultimately removed from the state codes in 2014. Both would have required state officials to report immigration status and limited state benefits for immigrants.⁸⁸ In 2012, also based on federal pre-emption, the Court struck down the main portions of Arizona’s S.B. 1070.⁸⁹ In parallel litigation, Sheriff Joe Arpaio and the Maricopa County police “immigration patrols” were found to have repeatedly violated federal civil rights protections against racial profiling of Latinos, including legal residents and U.S. citizens.⁹⁰

Also in 2012, the Eleventh Circuit Court of Appeals struck down Alabama’s anti-immigrant law, which required schools to investigate children’s and parents’ immigration status, holding that this type of status-based discrimination violated equal protection.⁹¹ In 2013, after seven years of litigation, the Third Circuit reaffirmed its decision striking down the restrictive policies of Hazleton, Pennsylvania as clearly unconstitutional due to federal pre-emption; Hazleton had sought to legislate that local landlords and employers require documentary proof of legal immigration status, and to punish anyone contracting with undocumented immigrants.⁹² In an earlier decision, the Third Circuit had found the practices also violated the federal law codifying equal protection.⁹³ Also in 2013, the Fifth Circuit ruled against a similar anti-immigrant housing ordinance in Farmers Branch, Texas, based on federal pre-emption.⁹⁴ As a concurring opinion noted, because “the

purpose and effect” of the ordinance was “the exclusion of Latinos from the city of Farmers Branch ... legislation of [this] type is not entitled to wear the cloak of constitutionality.”⁹⁵

As LatinoJustice PRLDEF’s recent litigation against Frederick County, Maryland demonstrates, the risk of liability due to racial profiling also runs high when local police cooperate with federal immigration enforcement.⁹⁶ Frederick County had decided to enter into a “287(g) agreement” to assist the federal government in immigration enforcement.⁹⁷ Section 287(g) of the federal Immigration and Nationality Act (INA) permits state and local jurisdictions to voluntarily enter into agreements with the federal government to cooperate with enforcing federal immigration law. Section 287(g) requires that local officers are trained in the complexities of immigration law, supervised by federal officials, and trained in relevant civil rights protections.⁹⁸ These agreements have led to mistrust between local police and immigrant communities, and even decreased public safety.⁹⁹ The actions of local police in cooperating with immigration enforcement unfortunately mirror a nationwide “consistent pattern of racially disparate removals of noncitizens from the United States,” with Latina/o individuals and families, including “mixed-status” families where some members may be U.S. citizens, bearing the brunt of removals.¹⁰⁰

In Frederick County, Maryland:

In October 2008, Ms. Orellana Santos was sitting in a public area outside her workplace and without any justification whatsoever, except for her appearance as a Latina woman, however that’s defined by county law enforcement, two officers began to interrogate her and demand identification.

*They concluded that Orellana Santos had an outstanding warrant for removal and that’s where her odyssey began. Forty-six days of detention followed her unjustified arrest. Forty-six days that she was unable to see her two-year old son.*¹⁰¹

In subsequent litigation, in *Santos v. Frederick County Board of Commissioners*, the County was enjoined from arresting anyone based on suspicion of civil immigration violations.¹⁰²

In a similar case brought by the ACLU, Ernesto Galarza, a United States citizen of Puerto Rican descent, was swept up in drug raids by Allentown, Pennsylvania police and was later found to be innocent of any charges. Because of his race, local police called ICE, which issued a detainer. In May 2014, a federal court of appeals found “that ICE

detainers are merely requests, that Lehigh County was free to disregard the ICE detainer, and that it therefore shares in the responsibility for violating Galarza's Fourth Amendment and due process rights."¹⁰³

These cases reveal that the risk of racial profiling is high, and therefore prohibiting local government employees, including police, employment and housing authorities, from asking individuals about their immigration status, and shielding any immigration status information that the jurisdiction has collected, may be legally justifiable ways to protect against liability for racial profiling and other constitutional violations. These cases also show that there are good reasons why local jurisdictions should not enter into agreements with the federal government to assist in enforcing federal immigration law.

(b) Non-cooperation with ICE Immigration Detainer Requests is Clearly Permitted

Many sanctuary policies stop local officials from complying with immigration detainer requests issued by the U.S. Immigration and Customs Enforcement agency (ICE). These are *requests* from the federal government that local authorities detain persons who have been identified as unlawfully present. ICE detainers are civil in nature, and the discretion of whether to remove someone for unlawful status rests entirely with federal immigration officers.¹⁰⁴ Various cities limit cooperation with ICE detainers, and they may even have a legal duty to decline to honor ICE detainer requests. At least 8 federal courts have found that because such detainer requests are voluntary, local authorities' detention of such individuals without probable cause violates constitutional due process protections.¹⁰⁵

In the *Santos v. Frederick County* case discussed above, the Fourth Circuit held that because ICE detainer requests are based on civil, not criminal violations, local police should not enforce them.¹⁰⁶ In another case, in 2014, the Third Circuit also ruled that "immigration detainers do not and cannot compel a state or local law enforcement agency to detain suspected aliens [sic] subject to removal;"¹⁰⁷ and in 2015, the First Circuit agreed.¹⁰⁸ In Oregon, in 2014, a state district court held a county liable for damages under the Fourth Amendment for honoring a civil immigration detainer issued without probable cause,¹⁰⁹ and 9 other counties immediately stopped complying with ICE detainer requests.¹¹⁰ The Immigrant Legal Resource Center summarized that, after a number of "federal court rulings that ICE detainer requests are unconstitutional, hundreds of counties and cities no longer comply with or honor these requests."¹¹¹

In addition, refusing to honor ICE detainer requests is not pre-empted by 8 U.S.C. § 1373, the federal prohibition against restricting local

employees who want to exchange information about immigration status with the federal government. These constitutional protections against due process violations would take precedence over any conflicting statutory requirements.

(c) Rules Regarding Immigration Enforcement Against Persons in the Criminal Justice System Present More Complex Issues, and Show the Need for State Criminal Justice Reforms

The points of mandated cooperation and options for resistance against excessive federal immigration enforcement vary as a person moves through the criminal justice system. At the point of arrest, federal courts have held that local police may not arrest or detain anyone for suspicion of federal civil immigration law violations without an express order of the federal government, based on probable cause.¹¹² This would seem to leave non-cooperation options open if there is no criminal immigration violation, such as smuggling or trafficking. However, since 2008, many jurisdictions began to participate in “Secure Communities” programs that share fingerprint data with ICE if a person has been arrested or convicted of a crime. In 2011, ICE rescinded all the voluntary agreements and determined that this fingerprint data-sharing was mandatory for all jurisdictions.¹¹³ The fingerprint data taken by state or local authorities is matched against the ICE database, which may lead to an ICE detention order.¹¹⁴ Nonetheless, even if compelled to provide fingerprint data, jurisdictions may still refuse to honor any resulting ICE detention requests.¹¹⁵

If a person is incarcerated in state or local prison, some jurisdictions are finding ways to limit cooperation with excessive deportations. The INA limits the ability to deport persons from state prison as follows: ICE may only remove (deport) a person after completion of the person’s sentence, unless the state authority requests it.¹¹⁶ Because ICE has no discretion and must wait until completion of the sentence, some jurisdictions have chosen not to share information about release dates with ICE, especially for persons who have been convicted of nonviolent offenses.¹¹⁷ The California Trust Act of 2014 provides that no person shall be held in custody for any longer than provided by the person’s criminal sentence, which means the person cannot be further detained while waiting to be transferred to ICE.¹¹⁸ Early release is another way to try to protect nonviolent persons from possible deportation.

Overall state criminal justice policies can and should also be modified to limit overreach in federal immigration enforcement. Federal immigration law treats many convictions that would otherwise have less serious legal consequences, as deportable offenses.¹¹⁹ This

legal structure—along with existing draconian deportation policies implemented under the Obama administration—has led to the over-incarceration of immigrants and the separation of millions of families, largely based on low-level offenses.¹²⁰ Considering the excessive policing that communities of color are already subjected to, broader criminal justice reform to de-criminalize certain state offenses is urgently needed.¹²¹ State law can have a harsh and direct impact on who is deported. For example, Georgia law makes repeated instances of driving without a license criminal misdemeanors, which then constitute deportable offenses under the strict rules of immigration law.¹²² Reforms to ensure that state laws do not unduly criminalize minor offenses that federal laws deem “deportable” would lessen this risk. Governors may also pardon existing offenders to ensure that their records are free of deportable offenses.

Additionally, there are deeper forms of systemic discrimination that intersect with immigration enforcement. Latino communities—which include native-born U.S. citizens as well as immigrants—are over-policed and over-incarcerated, due in large part to “criminal” immigration enforcement.¹²³ Broader criminal justice reforms, such as ending racial profiling as well as stop and frisk policies, de-criminalizing minor drug possession offenses, counseling and recovery programs, bail reform, and increasing access to public defenders, are urgently needed. They would help stem over-incarceration, not only of native-born Latino U.S. citizens, but also of immigrants, who risk what may be the harshest sentences of all: deportation and permanent separation from their homes and families.¹²⁴ In the current climate, fighting the political influence of corporations that profit from private prisons is also critical to stopping the targeting and deportation of the members of our communities who are immigrants.¹²⁵

3. Heightened Constitutional Protections Apply in School: Immigration Enforcement Is Not Appropriate in Schools

Status-based discrimination against undocumented schoolchildren is unconstitutional. In the 1975 landmark *Plyler v. Doe* case (“*Plyler*”), the U.S. Supreme Court held that constitutional guarantees of equal protection under the law apply to undocumented schoolchildren, and therefore, the state of Texas could not deny them access to public education.¹²⁶ This was based on the long-standing rule that provisions of the Bill of Rights of the U.S. Constitution providing for equal protection and due process of law apply to *all persons* who happen to be in the territory of a state.¹²⁷ This rule is important with regard to all sanctuary policies, because it supports the constitutionality of state and local

protections of the fundamental rights of undocumented people. Generally, whether a policy is constitutional depends on evaluating the deprivation involved against whether the justifications are reasonable.

In the case of education, the Supreme Court found that deprivation of public education would have a lifelong, detrimental effect on children,¹²⁸ who had little control over their undocumented status.¹²⁹ Relying on the principles in *Brown v. Board of Education* (the case striking down school segregation in 1954), the *Plyler* Court emphasized the importance of equal access to public education, stating that:

*The inability to read and write will handicap the individual deprived of basic education ... every day of his [or her] life. The inestimable toll of that deprivation on the social, economic, intellectual, and psychological well-being of the individual and the obstacle it poses to individual achievement, make it most difficult to reconcile a status-based denial of basic education with the framework embodied in the Equal Protection clause.*¹³⁰

Since the Texas law denied access to education *based on status*—and because persons present unlawfully are still “persons” entitled to equal protection—it was unconstitutional.¹³¹ The Court also found that the state’s justifications for discriminating against undocumented students were “wholly insubstantial in light of the costs involved to these children, the State, and the Nation.”¹³² The *Plyler* Court “dismissed an interest in preservation of resources for the state’s lawful residents as no more than ‘a concise expression of an intention to discriminate.’”¹³³

These same constitutional principles should also apply to policies protecting undocumented students and their families from federal immigration enforcement at schools. Local policy-makers should determine whether a *status-based* denial of education would occur if there were no protections in place, and what the consequences would be if federal immigration enforcement or immigration status impacted equal access to children’s education. Does the school permit law enforcement within its jurisdiction in general? Considering that being undocumented is a civil law violation, do all types of civil law violations, such as failure to pay taxes, result in children being subject to law enforcement at school? Should the actions of parents be allowed to result in children not being able to go to school without triggering arrest and detention? What would the impact be on the children’s education and the costs involved to the community? The answers to these questions show that there would be unequal access to education based on status if local school policies resulted in children being subjected to immigration enforcement at school.

An Alabama state law that would have required public schools to determine whether an enrolling child “was born outside the jurisdiction of the United States or is a child of an alien [sic] not lawfully present in the United States” was thus held to violate the Equal Protection clause of the U.S. Constitution.¹³⁴ The federal court of appeals held that Alabama’s law significantly interfered with the ability of an undocumented child to receive a public education by mandating disclosure of immigration status of children and their parents as a prerequisite to enrollment.¹³⁵ It also expressed concern that “revealing illegal status of children could lead to criminal prosecution, harassment, and intimidation.”¹³⁶ The court found that “an **increased likelihood of deportation or harassment upon enrollment in school significantly deters undocumented children from enrolling and attending school, in contravention of their rights under *Plyler***. [Emphasis added.]”¹³⁷ In Alabama, Latino enrollment and attendance plummeted during the time the state law was in force.¹³⁸ After the anti-immigrant law that was eventually found to be unconstitutional was passed:

*[A]t one elementary school where enrollment was 20% Latino, teachers “went into crisis management mode ... to help children who were crying and afraid ... A teacher in Birmingham described how she struggled to reassure one little girl, who wanted to go home immediately and check on her parents, despite the fact that her parents are legal permanent residents.”*¹³⁹

Similar stories are already being heard in the wake of the election of a president threatening mass deportations.¹⁴⁰ With current threats, there are especially strong reasons justifying state and local educational policies that protect against disclosure of immigration status, and any form of immigration enforcement, at school.¹⁴¹

Similar considerations also weigh in favor of policies protecting against immigration enforcement in colleges and universities. Many undocumented students arrived when they were children, through the agency of their parents, and to deprive them of access to higher education that they earned through the competitive admissions process would result in high costs to the students, their families, and the community. If comparable types of law enforcement are generally prohibited on campus, allowing *status-based* civil immigration law enforcement would potentially violate equal protection. State and local governments may thus also provide in-state tuition for undocumented students who otherwise meet in-state tuition residency requirements, as the policy is consistent with the equal protection principles articulated in *Plyler*.¹⁴²

Other types of protections for K-12 as well as college students include policies against hate speech and hate crimes, which have become even more necessary for immigrant students since the 2016 presidential election. Counseling and proactive community education are also needed in this environment. Of the 1,094 bias-related incidents reported in the month following the election, the largest number (226) was committed in K-12 schools.¹⁴³ The second highest number of incidents took place in businesses such as stores and restaurants (203) and the third highest (172) occurred on college and university campuses.¹⁴⁴ It is critical to remember that these incidents impact many people; they have been not only anti-Latino, but also anti-immigrant, anti-black, anti-Muslim, anti-women, anti-Semitic, anti-Asian, and anti-LGBTQ, and many included the use of swastikas.¹⁴⁵

It is undeniable that hate crimes and hate speech are forms of discrimination that impact and undermine the safety and security of the learning environment. This not only shows the need for policies to protect against hate crimes, but also adds to the reasons that policies prohibiting immigration enforcement at schools are urgently needed.¹⁴⁶ Were educational institutions to allow immigration enforcement, fear, harassment, and hate crimes would only increase. Considering that schools are a place of learning, the safety and emotional security of all students must be paramount.

C. Conclusions and Recommendations

Immediately after the election of a presidential candidate who ran on a platform of racism and xenophobia, immigrant communities across the country have experienced dramatic increases in hate speech and hate crimes. Statistically and psychologically, elementary schoolchildren have experienced the worst of these effects. Many communities have responded by taking every measure possible to protect the most vulnerable, including undocumented immigrants, whose safety and security are even more threatened due to President-Elect Trump's declared intent to deport up to 3 million people. Protesters across the country who promised to resist mass deportations, denounce all forms of discrimination, and continue to welcome immigrants among us have also supported a full-throated call for local jurisdictions to provide sanctuary. Many local jurisdictions, churches and schools have responded by reaffirming and expanding their existing policies, while others have responded by developing new policies. Communities around the country are rising to confront the fear engendered by the stated policy positions of the incoming federal administration, and the threats that racially discriminatory policies pose to hundreds of local communities that believe in an inclusive and welcoming democracy.

This preliminary report shows the ways in which the U.S. constitutional system of federalism and anti-discrimination laws may support a wide range of local, pro-immigrant rights policies, including policies to protect undocumented community members from draconian federal immigration enforcement. Due to federal pre-emption, federal immigration enforcement cannot be entirely stopped, but well-crafted policies such as limiting the collection of immigration status information, refusing to honor requests for immigration detention, providing sanctuaries from racial profiling and hate crimes, and providing safe, nondiscriminatory educational environments, are likely to be constitutional and within the power of state and local governments. In particular:

- Policies shielding immigration status information are generally permitted.
- Refusal to honor ICE detainer requests is permitted and may be required to avoid liability for constitutional violations.

- Agreements with the federal government to enforce immigration law may lead to liability for unconstitutional local policing.
- Policies against participating in immigration enforcement to avoid racial profiling are justifiable.
- Threats to retract federal funding that is not tied to agreed-upon federal immigration enforcement obligations are over-reaching, and should be resisted.
- To protect against federal investigation, jurisdictions should reconsider accepting federal SCAAP funding, which reimburses a fraction of the cost of incarceration of persons with deportation orders.
- Immigration status information of persons seeking health care or insurance is protected by privacy laws and should not be provided to the federal government.
- State or local laws targeting persons for immigration enforcement are prohibited.
- Under our system of federalism, and considering the history of discrimination in the United States, arguments about state and local powers of self-determination should include a racial justice component.
- Policies protecting immigrants and others against discrimination are necessary, such as: prohibitions against discrimination on the basis of race, national origin, language and immigration status by local police, employment, housing and other public authorities; public denunciation and warnings that hate crimes will be prosecuted; strong policies with sanctions of hate speech (especially in schools and other public institutions); and public education and relevant training of public employees. Public declarations that the jurisdiction is a sanctuary jurisdiction may also be helpful.
- The complexity of immigration enforcement rules for persons in the criminal justice system shows the need for criminal justice reforms, including ending racial profiling, ending mass incarceration, decreasing the influence of the private prison lobby, de-criminalizing nonviolent deportable offenses, reducing racial disparities in sentencing, increasing access to public defenders, and other measures.
- In the criminal justice system, policies that shield information about state sentencing and release dates may be helpful.

- The heightened constitutional protections for schools show that collection of immigration status information and immigration enforcement in schools would violate equal protection.
- State and local education policies should protect families against any measures that would create fears of exposing a child, or parent's, immigration status.
- Since religious institutions have been provided with special status in our country, places of worship should be allowed to continue to provide sanctuary for undocumented people.

ENDNOTES

1. Leigh Ann Caldwell, "Trump Transition Team Filled with Hardline Anti-Immigration Advocates," *NBCNews.com*, Nov. 11, 2016, <http://www.nbcnews.com/politics/2016-election/trump-transition-team-filled-hardline-anti-immigration-advocates-n682651>.
2. Dr. Martin Luther King's vision of nonviolence and social justice included working towards a Beloved Community in which "racism and all forms of discrimination, bigotry and prejudice will be replaced by an all-inclusive spirit of sisterhood and brotherhood." The King Center, *The King Philosophy: The Beloved Community*, <http://www.thekingcenter.org/king-philosophy#sub4>. His vision was global and inclusive of immigrants, because justice and freedom from discrimination are the birthright of every human being. Id.
3. Holly Yan, Kristina Sgueglia and Kylie Walker, "Make America White Again': Hate Speech and Crimes Post-election," *CNN.com*, last Updated Dec. 22, 2016, <http://www.cnn.com/2016/11/10/us/post-election-hate-crimes-and-fears-trnd/index.html> (over 867 hate crimes reported by the Southern Poverty Law Center in the 10 days following the November 8, 2016 election, including "ugly episodes of racist or anti-Semitic, pro-Trump graffiti along with threats or attacks against Muslims"). Melanie Eversley, "Post-election Spate of Hate Crimes Worse than Post-9/11," *USA Today*, Nov. 14, 2016, <http://www.usatoday.com/story/news/2016/11/12/post-election-spate-hate-crimes-worse-than-post-911-experts-say/93681294/>.
4. Miriam Jordan, "Young Immigrants Fear Deportation Under Trump," *Wall Street Journal*, Nov. 20, 2016, <http://www.wsj.com/articles/young-immigrants-fear-deportation-under-donald-trump-1479671457> (President-elect may end DACA, authorized via federal Executive Action in 2012, which enables over 750,000 undocumented immigrants brought to U.S. as children before age 16 to apply for a two-year renewable work authorization and temporary protection from deportation). Emerging bipartisan legislation may help protect current DACA recipients. Seung Min Kim, "Graham Preparing 'Dreamers' Bill," *Politico.com*, Nov. 30, 2016, <http://www.politico.com/story/2016/11/lindsey-graham-dreamers-bill-immigration-232017>.
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6. Carter Evans, "Immigrants, Pointing to Past, Fear Impact of Trump's Mass Deportation Plans," *CBS News*, November 10, 2016, <http://www.cbsnews.com/news/immigrants-pointing-to-past-fear-impact-of-mass-deportations/>. See also *Reuters*, "Tech Employees Vow Not To Help Trump Surveil and Deport Immigrants," *Fortune*, December 13, 2016, <http://fortune.com/2016/12/13/tech-immigrants-trump/> (over 100 vital employees of major U.S. technology companies pledged not to help Trump's administration build a data registry to track people based on race, ethnicity, national origin, color or religion or assist in mass deportations).
7. Michelle Ye Hee Lee, "Donald Trump's False Comments Connecting Mexican Immigrants and Crime," *Washington Post*, July 8, 2015, https://www.washingtonpost.com/news/fact-checker/wp/2015/07/08/donald-trumps-false-comments-connecting-mexican-immigrants-and-crime/?utm_term=.2ef7f8c24e46 (quoting the presidential candidate, verbatim: "When Mexico sends its people, they're not sending their best. They're not sending you. They're not sending you. They're sending people that have lots of problems, and they're bringing those problems with us. They're bringing drugs. They're bringing crime. They're rapists. And some, I assume, are good people."—Real estate mogul Donald Trump, presidential announcement speech, June 16, 2015.).
8. Lauren Gambino, "Trump and Syrian Refugees in the US: Separating Fact from Fiction," *The Guardian*, September 2, 2016, <https://www.theguardian.com/us-news/2016/sep/02/donald-trump-syria-refugees-us-immigration-security-terrorism>; Nick Allen and Ruth Sherlock, "Donald Trump: 'I'll Look Syrian Children in the Face and Say They Can't Come,'" *The Telegraph*, February 9, 2016, <http://www.telegraph.co.uk/news/worldnews/donald-trump/12147515/After-tomorrow-Donald-Trump-could-be-unstoppable.html>.
9. Chris Riotta, "Will Donald Trump Require Muslims to Enter National Registry? Transition Team Proposal Sparks Constitutionality Debate," *International Business Times*, November 19, 2016, <http://www.ibtimes.com/will-donald-trump-require-muslims-enter-national-registry-transition-team-proposal-2447900>; see also Jenna Johnson, "Trump Calls for 'Total and Complete Shutdown of Muslims Entering the United States,'" *Washington Post*, December 7, 2015, https://www.washingtonpost.com/news/post-politics/wp/2015/12/07/donald-trump-calls-for-total-and-complete-shutdown-of-muslims-entering-the-united-states/?utm_term=.ed74e97ad297; cf.; Jeremy Stahl, "Obama Dismantles Program That Could Be Trump's Muslim Registry Prototype," *Slate.com*, December 22, 2016, http://www.slate.com/blogs/the_slate/2016/12/22/obama_dismantles_controversial_registry_before_trump_enters_office.html ("The Obama administration announced on Thursday that it would be dismantling a long unused registry for visitors from mainly majority-Muslim or Arab countries, a program which president-elect Donald Trump has indicated he might revive ... The program, known as the National Security Entry-Exit Registration System or NSEERS, initially required that men aged 16 and over from countries on the list register and be fingerprinted upon arrival in the United States, then regularly check in with immigration officers."). See also Michael Price and Faiza Patel, "Muslim Registry or NSEERS Reboot Would Be Unconstitutional," *LawFare*, November 22, 2016, <https://www.lawfareblog.com/muslim-registry-or-nseers-reboot-would-be-unconstitutional> (analyzing the constitutionality and legality of NSEERS and other "national security" proposals that discriminate on the basis of race/ethnicity or religion).
10. Julie Hirschfeld Davis and Julia Preston, "What Donald Trump's Vow to Deport Up to 3 Million Immigrants Would Mean," *New York Times*, November 14, 2016, http://www.nytimes.com/2016/11/15/us/politics/donald-trump-deport-immigrants.html?_r=0.
11. See Yan, Sgueglia and Walker, supra n. 2 (citing particularly egregious examples reported by CNN among the following ongoing list of hate crimes and bias incidents [for the definition of "Hate crime," see U.S. Federal Bureau of Investigation (FBI), *What We Investigate: Hate Crimes*, <https://www.fbi.gov/investigate/civil-rights/hate-crimes> (last visited Dec. 26, 2016)]: "Mosques get letters calling for genocide. 'Americans for a Better Way' sent copies of a letter to at least five California mosques, calling Muslims 'a vile and filthy people' and advocating genocide ... 'There's a new sherriff [sic] in town -- President Donald Trump,' reads the letter ... 'He is going to cleanse America and make it shine again,' it continues. 'And, he's going to start with you muslims [sic]. He's going to do to you muslims what Hitler did to the jews [sic]. You muslims would be wise to pack your bags and get out of Dodge.'"; "Deportation' letters handed out at school. A student at Shasta High School in Redding, California, posted a video on Twitter of himself handing letters with the word 'deportation' written across the top to half a dozen students [.]"; "Nazi-themed graffiti in Philadelphia. Someone spray-painted the words 'Sieg Heil 2016' and 'Trump'—with a swastika substituted for the T in Trump—on

- a building's glass window on South Broad Street[.]; "Graffiti in high school: 'Trump,' 'Whites only,' 'White America'." Minnesota high school student Moses Karngbaye said he was terrified to see racist graffiti scrawled inside a bathroom. Someone had written "#Go back to Africa" and "Make America great again" on a toilet paper dispenser ... The bathroom door was also covered with graffiti, including "Whites only," "White America" and "Trump"; "Build the wall" chanted at high school tournament. Students ... in northwest Texas say they were the target of ethnically charged slurs while warming up for a regional volleyball tournament. "When they were saying "Build that wall" and holding the Trump sign, we knew it was for us," ... Most of the school's students are Hispanic."; "Go home" scrawled on car. A Puerto Rican family's car was vandalized on November 17, with the words "Trump" and "Go home" scratched into the car in West Springfield, Massachusetts ... Jorge Santiago, an Army veteran who has served two deployments overseas, noticed ... after he put his daughter on the bus to school.").
12. Update: 1,064 Bias-Related Incidents in the Month Following the Election, Southern Poverty Law Center (SPLC), Dec. 16, 2016 [hereinafter "SPLC Report"], <https://www.splcenter.org/hatewatch/2016/12/16/update-1094-bias-related-incidents-month-following-election>. ("Overall, anti-immigrant incidents (315) remain the most reported, followed by anti-black (221), anti-Muslim (112), and anti-LGBT (109). Anti-Trump incidents numbered 26 (6 of which were also anti-white in nature, with 2 non-Trump related anti-white incidents reported).")
 13. For a list of some of the various types of sanctuary policies that provide protections for immigrant communities, see Section A.
 14. See Section B.1(a) for further discussion.
 15. Jasmine C. Lee, Rudy Omri and Julia Preston, "What Are Sanctuary Cities?," *New York Times*, September 3, 2016, <http://www.nytimes.com/interactive/2016/09/02/us/sanctuary-cities.html> (analyzing based on data from the Immigrant Legal Resource Center).
 16. The term sanctuary can be traced back to the 1980s when churches and local jurisdictions decided to protect Central American refugees who were fleeing violence, whom the United States government failed to give asylum. See, e.g., Huyen Pham, "The Constitutional Right Not to Cooperate – Local Sovereignty and the Federal Immigration Power," *Univ. Cincinnati L. Rev.* 1374, 1382-84 (2006). The concept can be traced back to abolitionist churches and some northern states providing sanctuary for former slaves. See Allan Colbern, DRAFT ARTICLE: "Regulating Movement in a Federalist System: Slavery's Connection to Immigration Law in the United States" (forthcoming, 2016), at 19-25, <http://www.allancolbern.com/uploads/2/6/5/4/26549732/colbern-regulatingmovement-underreview.pdf>, cited with author's permission.
 17. See discussion and sources cited in Part B, *infra*. See also Alex Dobuzinskis and Joseph Ax, "Mayors of NY and Los Angeles Pledge to Remain Immigrant Sanctuaries," *Reuters.com*, November 10, 2016, <http://www.reuters.com/article/us-usa-immigration-sanctuarycities-idUSKBN13604P>; Jennifer Medina, "California Weighs Protections for Immigrants Threatened by Trump Policies," *New York Times*, December 4, 2016, <http://www.nytimes.com/2016/12/04/us/california-to-consider-laws-to-protect-immigrants-from-trump-policies.html> (proposed legislation includes free legal help to undocumented immigrants during deportation proceedings, further assistance in criminal court, and further limitations on local law enforcement's cooperation with federal immigration agents. The new law would go even further than the current state Trust Act Law enacted in 2014, which prohibits local jails from holding immigrants any longer than required by criminal law, with exceptions for violent and other serious crimes, prohibiting all state and local law enforcement agencies from responding to requests from immigration authorities.). For an example of higher educational institutional sanctuary policies, see Teresa Watanabe, "UC Won't Assist Federal Agents in Immigration Actions Against Students," *L.A. Times*, November 30, 2016, <http://www.latimes.com/local/education/la-me-ln-uc-undoc-student-protections-20161130-story.html> (noting that the University of California system "would refuse to assist federal immigration agents, turn over confidential records without court orders or supply information for any national registry based on race, national origin or religion.").
 18. In 1960, 75% of immigrants came from Europe whereas by 2012 only 11.8% came from Europe. *The Facts on Immigration Today*, Center for American Progress, October 23, 2014, <https://www.americanprogress.org/issues/immigration/reports/2014/10/23/59040/the-facts-on-immigration-today-3/>. These changing demographics, in which the majority of immigrants are no longer identified as "white" or from Europe, correlate strongly with xenophobic campaigns to pass restrictive immigration policies, along with Congressional failure to pass Comprehensive Immigration Reform to fix problems in the system. See, e.g., Katherine Culliton-González, *Born in the Americas: Birthright Citizenship and Human Rights*, 25 *Harvard Human Rights Law Journal*, 127, 150-54 (Spring 2012). Moreover, criminalizing immigrants has exacerbated widening racial disparities. See, e.g., Kevin Johnson, "Doubling Down on Racial Discrimination: The Racially Disparate Impacts of Crime-Based Removals," 66 *Case Western Reserve L. Rev.* 994, 1000-01, 1002, 1017 (2016) (the people most directly affected by the failure of comprehensive immigration reform and increased removals are noncitizens of color); Doris Marie Provine and Roxanne Lynn Doty, "The Criminalization of Immigrants as a Racial Project," 27 *J. Contemp. Crim. Just.* 261 (2011) (examining how contemporary immigration policies "reinforce racialized anxieties"); see also Mariela Olivares, "Intersectionality at the Intersection of Profiteering and Immigration Detention," 94 *Neb. L. Rev.* 963, 1010-12 (2015) (reviewing state and federal immigration policies passed between 1965-2015, including "Secure Communities" and Arizona's S.B. 1070 and observing that more recent "historical and contemporary efforts highlight the fact that, although neither federal nor local laws explicitly and formally include racially or ethnocentrically prohibitive provisions, the practical effect of law and policy is to continue to disparately oppress immigrants of color and, particularly, Latina/os").
 19. Among other sweeping reforms, the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) changed the law such that rather than being able to "adjust status," persons who were present in the U.S. in an unlawful status became barred from legally entering the U.S. for 10 years. (Those who were "unlawfully present" from 6 months – 1 year are barred for 3 years.) See, e.g., Henry J. Chang, *Previously Removed or Unlawfully Present Aliens*, U.S. Immigration Law Center, at <http://www.americanlaw.com/exclud9A.html> (discussing the new INA §212(a)(9)(B)(i)(I) & §212(a)(9)(B)(i)(II) that IIRIRA enacted, which became effective April 1, 1997).
 20. For items (1) – (9), see, e.g., *States Reject Immigration Enforcement Measures and Advance Inclusive Policies in 2016*, National Immigration Law Center (NILC), 2016, <https://www.nilc.org/wp-content/uploads/2016/10/states-advance-inclusive-policies-2016-10.pdf>;
 21. See, e.g., *Dakota Smith and Cindy Carcamo*, "Responding to Trump, L.A. Proposes \$10-million Legal Defense Fund for Immigrants Facing Deportation," *L.A. Times*, December 19, 2016, <http://www.latimes.com/local/lanow/la-me-ln-lafund-20161219-story.html>. In this article, UCLA Law Professor Ingrid Eagly reportedly opined that she sees "no legal risk for the city and county in using taxpayer money for the program." *Id.*
 22. See sources and discussion in notes 3-11, *supra*.
 23. See generally *Printz v. U.S.*, 521 U.S. 898 (1997); *New York v. U.S.* 505 U.S. 144, 181 (1992).
 24. Whether and how state and local governments may protect undocumented immigrants also depends on state and local rules, but this study is limited to explaining federal legal parameters.
 25. *Arizona v. United States*, 132 S. Ct. 2492, 2497-8 (2012); [hereinafter "*Arizona v. U.S.*"]; see also *De Canas v. Bica*, 424 U.S. 351, 354 (1976) ("Power to regulate immigration is unquestionably exclusively a federal power."); *Kleindienst v. Mandel*, 408 U.S. 753, 767 (1972) (Congress has "plenary power to make rules for the admission of aliens [sic] and to exclude those who possess those characteristics which Congress has forbidden.") (internal citations omitted); *Takahashi v. Fish and Game Commission*, 334 U.S. 410, 416 (1948) ("The authority to control immigration—to admit or exclude

- aliens [sic]—is vested solely in the Federal government.”); *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909) (“over no conceivable subject is the legislative power of Congress more complete than it is over” the admission of immigrants into the United States).
26. This authority is based in part on the federal legislative power of Congress under the Constitution to “establish a uniform Rule of Naturalization.” U.S. Const. art. I, § 8, as well as the federal government’s inherent power as a sovereign over relations with foreign nations, as it is “fundamental” that foreign nations must be able to communicate with one federal government, rather than 50 states, on issues of foreign relations. *Arizona v. U.S.*, supra, at 2498. Federal immigration officials have broad discretion and responsibility for “the identification, apprehension, removal” of undocumented immigrants, including the decision of whether it makes sense to pursue removal at all. Id. at 2499–500 (internal citations omitted).
 27. *Hispanic Interest Coalition of Alabama (HICA) v. Governor of Alabama*, 691 F.3d 1236, 1245 (11th Cir. 2012) [hereinafter, “*HICA v. Gov. of Alabama*”], cert denied, 133 S. Ct. 2022 (2013); *Arizona v. U.S.*, supra n. 25; see also *De Canas v. Bica*, supra n. 25.
 28. The Supreme Court has held that:

Federalism, central to the constitutional design, adopts the principle that both National and State governments have elements of sovereignty the other is bound to respect. *Arizona v. U.S.*, supra, at 2500.

In the Pre-emption analysis, courts should assume that ‘the historic police powers of the States’ are not superseded ‘unless that was the clear and manifest purpose of Congress.’ Id. at 2501 (internal citations omitted).
 29. “Police powers” to protect health and safety are “primarily, and historically ... matter[s] of local concern.” *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 719 (1985). The Supreme Court has reasoned that “states traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.” *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985) (internal quotation marks omitted). For example, “States possess broad authority under their police powers to regulate to protect workers within the State. Child labor laws, minimum and other wage laws, laws affecting occupational health and safety ... are only a few examples.” *DeCanas v. Bica*, supra n. 25, 424 U.S. at 356.
 30. Statement of the American Immigration Law Association (AILA), U.S. House of Representatives, Judiciary Committee, Subcommittee on Immigration and Border Security, Hearing on Sanctuary Cities, July 21, 2015, [hereinafter “*AILA Testimony*”], at 2.
 31. See, e.g. Lynn Tramonte, *Debunking the Myth of Sanctuary Cities: Community Policing Protects American Communities*, Immigration Policy Center, Special Report, April 2011 [hereinafter “*Community Policing*”] at 6–7 (Int’l. Association of Police Chiefs, Major Cities Chiefs Association, the Police Foundation, and the Police Executive Research Forum oppose local police cooperation with federal immigration enforcement, as it would undermine public safety).
 32. *AILA Testimony*, supra n. 30, at 2; see also Testimony of Leslye E. Orloff before the Ad-Hoc Congressional Hearing: Emerging Issues in Ending Violence Against Immigrant Women (Feb. 10, 2011) at 5 (testifying that immigrant women are highly reticent to call police if they fear they or their children may be deported; recommending all state and local jurisdictions adopt policies encouraging immigrants to report crimes without fear of deportation).
 33. Regarding federalism, the *Plyler* Court found that because the decision of whether to deport someone was within the exclusive jurisdiction of the federal government, there was no reason to deny access to education while the child remained within the United States. *Plyler v. Doe*, 457 U.S. 202, 225–26 (1982).
 34. An empirical study analyzing the economic impact of local anti-immigrant laws found that “such laws resulted in a 1–2% drop in employment, or 337 to 675 lost jobs for the average county, with payroll dropping between 0.8 and 1.9%. This drop in employment includes both authorized and unauthorized workers.” Huyen Pham and Van Hoang Van, “The Economic Impact of Local Immigration Regulation: An Empirical Analysis,” 32:2 *Cardozo L. Rev.* 485 (2010); see also, *Bad for Business: How Anti-Immigrant Legislation Drains Budgets and Damages States’ Economies*, American Immigration Council (AIC), June 4, 2012, <https://www.americanimmigrationcouncil.org/research/bad-business-how-anti-immigration-legislation-drains-budgets-and-damages-states%E2%80%99-economies>. (For example: “if all of the unauthorized immigrants in California were removed, the state would lose \$301.6 billion in economic activity, decrease total employment by 17.4%, and eliminate 3.6 million jobs.”)
 35. See discussion and sources cited in Section B.3, infra.
 36. See discussion and sources cited in Section B.2, infra.
 37. Memo, DOJ Inspector General, Regarding DOJ Referral of Allegations of Potential Violations of 8 U.S.C. § 1373 by Grant Recipients (May 31, 2016)(discussing the Congressional inquiry)[hereinafter “*DOJ Inspector General Memo*”], <https://oig.justice.gov/reports/2016/1607.pdf>.
 38. *The Nativist Lobby: Three Faces of Intolerance*, Southern Poverty Law Center, January 31, 2009, <https://www.splcenter.org/20090201/nativist-lobby-three-faces-intolerance>.
 39. *DOJ Inspector General Memo*, supra n. 37.
 40. 8 U.S.C. § 1644 codifies exactly the same language as subsection (a) of 8 U.S.C. § 1373, in the chapter of the federal immigration code which restricts welfare and public benefits for immigrants. 8 U.S.C. §1644. Note that Section 287(g) of the Immigration and Nationality Act, which provides for the ability of local law enforcement agencies to voluntarily enter into contracts to assist the federal government, is not a pre-emption provision. For discussion of Section 287(g), see text and sources at Section B.2(a) and notes 96–99, infra.
 41. 8 U.S.C. § 1373(a).
 42. 8 U.S.C. § 1373(b).
 43. Among the sanctuary policies reviewed by the DOJ Inspector General, “none explicitly restricts the sharing of immigration status with ICE.” *DOJ Inspector General Memo*, supra n. 37 at 8 (Cook County (IL), Orleans Parish (LA), Philadelphia and New York). One hundred forty jurisdictions are being asked to demonstrate how they are complying with 8 U.S.C. § 1373, considering their sanctuary policies, because the Inspector General “believe[s] these policies and others like them may be causing local officials to believe and apply the policies in a manner that prohibits or restricts cooperation with ICE in all respects.” Id. (emphasis added). He added that if these jurisdictions are in violation of 8 U.S.C. § 1373, they may not only lose their federal funding, they may also be referred for federal civil or criminal prosecution. Id. at 9.
 44. See, e.g., Jennifer Medina and Jeff Bisgood, “Cities Vow to Fight Trump on Immigration, Even if They Lose Millions,” *New York Times*, November 27, 2016, <http://www.nytimes.com/2016/11/27/us/cities-vow-to-fight-trump-on-immigration-even-if-they-lose-millions.html?smid=fb-share>; Rowena Lindsay, “Big City Mayors Pledge to Protect Undocumented Immigrants,” *Christian Science Monitor*, November 15, 2016, <http://www.csmonitor.com/USA/2016/1115/Big-city-mayors-pledge-to-protect-undocumented-immigrants> (Trump promised to cut funding of sanctuary cities first day in office, yet mayors of prominent sanctuary cities “have vowed to continue to serve the people of their cities regardless of immigration status and say they will not coordinate with federal law enforcement in this matter.”)
 45. *City of New York v. United States*, 971 F. Supp 789 (S.D.N.Y 1997).
 46. Id. at 792.

47. *Id.* (citing Conference report).
48. *Id.* at 793.
49. *Id.* at 795 [emphasis added]. Note, Section 642 of the IIRIRA is codified as 8 U.S.C. § 1373.
50. 8 U.S.C. § 1373(a).
51. 8 U.S.C. § 1373(b).
52. In dicta, the Eleventh Circuit Court of Appeals opined that state or local privacy provisions may not be enough to prevent the federal government from successfully requesting immigration status information. *HICA v. Gov. Alabama*, supra n. 27, 691 F.3d at 1248 (“Any textual prohibition on revealing the immigration status of the children and their families is of little comfort when federal law requires that disclosure upon request. Consequently, the risks that accompany revealing the illegal status of the schoolchildren is not mitigated by the ineffectual privacy restrictions of section 28.”).
53. See discussion and sources cited in Section B.2.
54. *HICA v. Gov. Alabama*, supra n. 27, 691 F.3d at 1247 (citing cases).
55. See Spencer E. Amdur, “The Right of Refusal: Immigration Enforcement and the New Cooperative Federalism,” December 14, 2016, *Yale Law & Policy Review*, Vol. 35 (Forthcoming) SSRN: <https://ssrn.com/abstract=2824241> (under the anti-coercion jurisprudence set forth in *Nat’l Fed’n of Indep. Bus. (NFIB) v. Sebelius*, 132 S. Ct. 2566, 2602 (2012) (prohibiting funding conditions so coercive that they amount to a “gun to the head” of a state or local government, based on the anti-commandeering jurisprudence articulated by the late conservative Justice Antonin Scalia in *Printz v. United States*, 521 U.S. 898 (1997) and *New York v. United States*, 505 U.S. 144, 181 (1992)), denying Community Development Block Grants (CDBGs) or federal funding that has nothing to do with immigration or law enforcement would likely be an unconstitutional expansion of the federal power over states and municipalities in violation of the Tenth Amendment).
56. Ilya Somin, “Federalism, the Constitution, and Sanctuary cities,” *Washington Post*, November 26, 2016, https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/11/26/federalism-the-constitution-and-sanctuary-cities/?utm_term=.887fb700b0b9.
57. Erwin Chemerinsky, Annie Lai and Seth Davis, “Trump Can’t Force ‘Sanctuary Cities’ to Enforce His Deportation Plans,” *Washington Post*, December 22, 2016, https://www.washingtonpost.com/opinions/trump-cant-force-sanctuary-cities-to-enforce-his-deportation-plans/2016/12/22/421174d4-c7a4-11e6-85b5-76616a33048d_story.html?utm_term=.c51894179bac.
58. *Id.*; see also *Printz v. U.S.*, 521 U.S. 898, 921 (1997) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458, 111 S. Ct. 2395, 2400, 115 L. Ed. 2d 410 (1991)) (“just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.”).
59. AIC, *Violence Against Women Act (VAWA) Provides Protections for Immigrant Women and Victims of Crime*, Immigration Policy Center, May 2012, <https://www.americanimmigrationcouncil.org/sites/default/files/research/vawa.pdf>.
60. See Section B.1(e), *infra*.
61. See Tramonte, *Community Policing*, supra n. 31.
62. See, e.g., *ALA Testimony*, supra n. 30.
63. 8 U.S.C. §1231(i)(3).
64. The request for such an agreement is initiated by the “Chief Executive Officer” of the state or local jurisdiction. 8 U.S.C. §1231(i)(1).
65. The FY 2005 reimbursement rate was approximately 33%. *Immigration: Frequently Asked Questions on the State Criminal Alien Assistance Program*, Congressional Research Service Report, January 25, 2007, at 2.
66. See, e.g., Erin Kelley, “Congress Cuts Funds for Jailing Undocumented Criminal Immigrants,” *USA Today*, January 16, 2014, <http://www.usatoday.com/story/news/politics/2014/01/16/undocumented-immigrant-incarceration/4536453/>. (“Among the states that would be hit hardest are Arizona, California, Florida, New Jersey, New York and Texas, which have high numbers of undocumented immigrant criminals serving time in state prisons and county jails.”).
67. See *DOJ Inspector General Memo*, supra n. 37.
68. *Know Your Rights: Is It Safe to Apply for Health Insurance or Seek Health Care?*, National Immigration Law Center, November 30, 2016, citing Affordable Care Act Section 1411(g) and the Dept. of Homeland Security’s *Clarification of Existing Practices Related to Certain Health Care Information*, available in English at www.ice.gov/doclib/ero-outreach/pdf/ice-aca-memo.pdf and in Spanish at www.ice.gov/espanol/factsheets/aca-memoSP.
69. *Id.*
70. *Id.*
71. See, e.g., Pham, “The Constitutional Right Not to Cooperate – Local Sovereignty and the Federal Immigration Power,” supra n. 16.
72. See, e.g., Sanam Malik, *The Harrowing Lives and Traumas of Central American Refugees*, Center for American Progress, September 13, 2016, <https://www.americanprogress.org/issues/immigration/news/2016/09/13/144027/the-harrowing-lives-and-traumas-of-central-american-refugees/>.
73. Laurie Goodstein, “Houses of Worship Poised to Serve as Trump-Era Immigrant Sanctuaries,” *New York Times*, December 27, 2016, http://www.nytimes.com/2016/12/27/us/houses-of-worship-poised-to-serve-as-trump-era-immigrant-sanctuaries.html?_r=0
74. SanctuaryMovement.org (last visited Dec. 29, 2016).
75. John Morton, Director of ICE, Memorandum on Enforcement Actions at or Focused on Sensitive Locations, Oct. 24, 2011, <https://www.ice.gov/doclib/ero-outreach/pdf/10029.2-policy.pdf>.
76. *Id.* at 1-2.
77. *Arizona v. U.S.*, supra n. 25, at 2501-2507 (striking down major portions of Arizona’s anti-immigrant law).
78. *Id.* at 2505.
79. See *id.* at 2499 (“Removal is a civil, not criminal, matter.”), 2509 (“The state courts may conclude that, unless the person continues to be suspected of some crime for which he may be detained by state officers, it would not be reasonable to prolong the stop for the immigration inquiry.”); see also *Santos v. Frederick County Board of Commissioners*, 725 F.3d 451, 465 (4th Cir. 2013) cert. denied, 134 S. Ct. 1541 (2014) [hereinafter “*Santos v. Frederick County*”] (holding that “absent express direction or authorization by federal statute or federal officials, state and local law enforcement officers may not detain or arrest an individual solely based on known or suspected civil violations of federal immigration law.”).
80. See cases and discussion in Section 2(a), *infra*.
81. See sources cited supra notes 55-57. For a discussion of “home rule” charter municipality police power authority and local integration of immigrant communities at the municipal level, see generally Lynn A. Baker and Daniel B. Rodriguez, “Constitutional Home Rule & Judicial Scrutiny,” 86 *Denv. U. L. Rev.* 1337 (2009) (exploring judicial deference to home rule and the power of local government municipalities to provide for the health and safety of their own residents); Cristina M. Rodriguez, “The Significance of the Local in Immigration Regulation,” 106 *Mich. L. Rev.* 567, 581-80 (2008) (exploring local government refusals to comply with federal immigration detainer requests and local protections designed to advance health, safety, security and inclusion).

82. See, e.g., *Shelby County v. Holder*, 570 U.S. ___, 133 S. Ct. 2612, 2623 (2013). In striking down the preclearance formula of the Voting Rights Act because it was allegedly not based on “current conditions” of ongoing racial discrimination in voting, the Roberts Court also relied heavily on states’ rights arguments; it even had to go back to the Jim Crow Era to find support for its opinion in federal voting rights cases. (“Not only do States retain sovereignty under the Constitution, there is also a “fundamental principle of equal sovereignty” among the States. *Northwest Austin*, supra at 203, 129 S.Ct. 2504 (citing *United States v. Louisiana*, 363 U.S. 1, 16, 80 S.Ct. 961, 4 L.Ed.2d 1025 (1960); *Lessee of Pollard v. Hagan*, 3 How. 212, 223, 11 L.Ed. 565 (1845); and *Texas v. White*, 7 Wall. 700, 725–726, 19 L.Ed. 227 (1869); emphasis added). Over a hundred years ago, this Court explained that our Nation ‘was and is a union of States, equal in power, dignity and authority.’ *Coyle v. Smith*, 221 U.S. 559, 567, 31 S.Ct. 688, 55 L.Ed. 853 (1911).”).
83. See Kevin R. Johnson and Joanna E. Cuevas Ingram, “Anatomy of a Modern-Day Lynching: The Relationship Between Hate Crimes Against Latina/os and the Debate over Immigration Reform,” 91 N.C. L. Rev. 1613, 1642, n. 145 (2013) (citing sources, noting the role local governments can play in protecting immigrant communities by refusing to comply with federal immigration detention requests, in the context of a larger discussion regarding fighting hate crimes and other forms of discrimination against immigrant communities in the absence of comprehensive federal immigration reform).
84. Pratheepan Gulasekaram and S. Karthick Ramakrishnan, *The New Immigration Federalism* 191 (Cambridge Univ. Press, 2015). Empirical evidence of restrictive and pro-immigrant subfederal policy shows that “a legal framework grounded in racial discrimination concerns and equal protection doctrine is more suited for understanding immigration federalism than ones based on Pre-emption methodologies.” Id. at 10. “[N]ew immigration federalism begs a greater role for equality-based jurisprudential norms.” Id. at 191.
85. Allan Colbern, DRAFT ARTICLE: “Regulating Movement in a Federalist System: Slavery’s Connection to Immigration Law in the United States,” Forthcoming in 2017, <http://www.allancolbern.com/uploads/2/6/5/4/26549732/colbern-regulatingmovement-underreview.pdf>, cited with author’s permission. Historical review of state sanctuary laws for immigrants as well as “runaway slaves” in the Antebellum era shows that, as federal courts have upheld state laws providing for nonenforcement of slave laws and equality and inclusion of former slaves, they have similarly upheld state and local laws resisting enforcement of federal immigration laws and providing for integrationist, pro-immigrant measures. Id. at 5 (Table 3). These positive state measures differed from restrictive federal laws, thus the term “conflict federalism.” Id. at 22.
86. *Bolling v. Sharpe*, 347 U.S. 497 (1954)
87. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).
88. *De Canas v. Bica*, supra n. 25; *League of United Latin American Citizens v. Wilson*, 908 F. Supp. 755 (C.D. Cal. 1995), on reconsideration in part, 997 F. Supp. 1244 (C.D. Cal. 1997), 131 F.3d 1297 (9th Cir. 1997); Initiative Statute, Proposition 187, 1994 Cal. Legis. Serv. (West) (codified at Cal. Educ. Code § 48215(a) (West Supp. 1995); Cal. Health & Safety Code § 130(a) (West Supp. 1995); Cal. Welf. & Inst. Code § 10001.5 (West Supp. 1995)) (state court struck down nearly all of the proposed legislation that would have banned undocumented residents access to public programs as unconstitutional, the Ninth Circuit affirmed in part, and remanded several provisions for further adjudication). In 1999, Governor Gray Davis (D) withdrew the appeal, effectively killing the law; and as a symbolic act in 2014, the California legislature removed the enforceable passages of Prop. 187 from California’s education, health and safety, and welfare codes. Patrick McGreevy, “Gov. Brown Signs Bill Repealing Unenforceable Parts of Prop 187,” *L.A. Times*, Sept. 15, 2014, <http://www.latimes.com/local/politics/la-me-pol-brown-bills-20140916-story.html>; Patrick McGreevy and Phil Willon, “Gov. Brown Repeals Unenforced Sections of Prop. 187,” *L.A. Times*, Sept. 15, 2014, available at <http://www.latimes.com/local/political/la-me-pc-gov-brown-repeals-unenforced-sections-of-prop-187-20140915-story.html>.
89. *Arizona v. U.S.*, supra n. 25, at 2501-2507 (striking down major portions).
90. See *Meledres v. Maricopa County*, 989 F.Supp.2d 822 (2013) (barring Sheriff Arpaio and his officers from detaining or arresting Latinos solely based on reasonable belief that they are illegally present, from using race as a factor in determining to stop a vehicle with a Latino occupant, and from detaining Latinos longer than reasonably necessary to resolve a traffic violation without reasonable suspicion they are violating state or federal criminal law). *Based on concerns about noncompliance, the DOJ intervened and sued separately in 2015, and the court granted summary judgment in the DOJ’s discriminatory policing case. United States v. Maricopa County*, No. 2:12-cv-00981-ROS (D. Ariz., June 15, 2015) (requiring reforms to end racial profiling stemming from immigration patrols). In 2016, the 9th Circuit Court of Appeals found that Sheriff Arpaio and his top officers were in contempt, and most recently, he lost his bid for re-election, and has appealed the contempt order. Jonathan Stempel, “Arizona Sheriff Arpaio Asks Appeals Court to Void Contempt Finding,” *Reuters*, Dec. 29, 2016, <http://www.reuters.com/article/us-arizona-arpaio-idUSKBN1411YV>. The civil appeal of Dec. 27, 2016 is *Ortega v. Arpaio*, No. 16-16663 (9th Cir. 2016). The criminal contempt case is *United States v. Arpaio*, in the U.S. District Court, District of Arizona, No. 16-cr-01012.
91. *HICA v. Gov. Alabama* supra n. 27.
92. On remand from the Supreme Court after its decision in *Arizona v. U.S.* (supra n. 25), the Third Circuit found that Hazelton’s employment and housing policies were unconstitutional under the clear pre-emption doctrine just established in the Arizona case. *Lozano v. City of Hazelton*, 724 F.3d 297 (3d Cir. 2013).
93. *Lozano v. City of Hazelton*, 496 F.Supp.2d 477 (M.D. Pa. 2007) (finding violations of the Supremacy and Due Process Clauses of the United States Constitution, as well as 42 U.S.C. § 1981 (the Section of the U.S. Code protecting equal protection and protecting against impairment), *aff’d* 620 F.3d 170 (3d Cir. 2010), *vacated and remanded*, 563 U.S. ___, 131 S. Ct. 2958 (2011)).
94. *Villas at Parkside Partners v. City of Farmers Branch*, Texas, 675 F.3d 802 (5th Cir. 2013) (en banc), cert denied 134 S. Ct. 1491 (2014).
95. Id. at 543 (5th Cir. 2013) (Circuit Judges Reavley and Graves, concurring only in the judgment).
96. *Santos v. Frederick County*, supra n. 79, 725 F.3d at 465 (holding that “absent express direction or authorization by federal statute or federal officials, state and local law enforcement officers may not detain or arrest an individual solely based on known or suspected civil violations of federal immigration law.”).
97. See, e.g., Tramonte, *Community Policing*, supra n. 31. See also 8 U.S.C. § 1357(g)(1).
98. See, e.g., *The 287(g) Program: A Flawed and Obsolete Method of Immigration Enforcement*, American Immigration Council, November 29, 2012, <https://www.americanimmigrationcouncil.org/research/287g-program-flawed-and-obsolete-method-immigration-enforcement>.
99. *AILA testimony*, supra n. 30.
100. Johnson, *Doubling Down on Racial Discrimination*, supra n. 18, at 1003. This has an effect not only on a disparate number of undocumented Latinos, but also on Latino U.S. citizens, legal permanent residents and “mixed-status” families (families that include U.S. citizen, legal permanent resident and undocumented members); see Yolanda Vázquez, “Perpetuating the Marginalization of Latinos: A Collateral Consequence of the Incorporation of Immigration Law into the Criminal Justice System,” 54 *How. L.J.* 639, 668 (2011) (“Removal affects not only the individual removed, but also the families they leave behind. It is estimated that nearly 10% of families with children in the United States live in a ‘mixed status’ household ... From 1996 to 2007, it is estimated that 1.6 million families in the United States were separated in some form by removals. Involuntary and unexpected removal of a family member has particularly severe and long-lasting effects on the socioeconomic status and emotional well-being of a family.”) (internal footnotes omitted).

101. Juan Cartagena, “Eating While Brown,” *Huffington Post*, Aug. 14, 2013, available at http://www.huffingtonpost.com/juan-cartagena/eating-while-brown_b_3749943.html.
102. *Santos v. Frederick County*, supra n. 79.
103. The Third Circuit ultimately ruled that, under 8 C.F.R. § 287.7, “immigration detainers do not and cannot compel a state or local law enforcement agency to detain suspected aliens subject to removal.” *Galarza v. Szalczyk*, 745 F.3d 634, 636 (3d Cir. 2014). See also ACLU, *Galarza v. Svalzick* Case Page (updated June 14, 2014), <https://www.aclu.org/cases/immigrants-rights/galarza-v-szalczyk>.
104. In deciding whether states are permitted to enforce federal immigration law, the Supreme Court has noted that removal is a civil, not criminal matter, and the removal system is characterized by “the broad discretion of federal immigration officers.” *Arizona v. U.S.*, supra n. 25, at 2499. Also, there are defenses to removal, especially for persons seeking asylum or those with family and community who rely on them. *Id.* Note that nothing in this report argues for state and local police expanding their powers to enforce federal immigration law; instead we support local non-cooperation laws.
105. See DHS Secretary Jeh Johnson, Memo Regarding Secure Communities, Nov. 20, 2014, at n. 1 (discussing 8 federal cases in which the lack of probable cause in ICE detainer requests violated the Fourth Amendment of the U.S. Constitution).
106. *Santos v. Frederick County*, supra n. 79, 725 F.3d at 464-65 (“Lower federal courts have universally—and we think correctly—interpreted *Arizona v. United States* as precluding local law enforcement officers from arresting individuals solely based on known or suspected civil immigration violations. [citing cases].”)
107. *Galarza v. Szalczyk*, 745 F.3d 634, 636 (3d Cir. 2014). Issuing warrantless detainer requests has been a common ICE practice, impacting millions. In another case showing the racialized impact, in 2016, a Latino U.S. citizen and Legal Permanent Resident (not removable) won summary judgment in a class action suit on behalf of all persons subject to ICE detainer requests in the Chicago Area of Responsibility of ICE, because the Chicago ICE Field Office had exceeded its own statutory authority through its practice of issuing detainers without a warrant. Memorandum Op. & Order, *Jimenez Moreno v. Napolitano*, No. 1:11-cv-05452 (N.D. Ill. 2016) at 8 (class certification) & 13-17 (exceeding authority), available at <https://immigrantjustice.org/sites/default/files/content-type/press-release/documents/2016-11/JimenezMoreno-NDIL-ruling.pdf>. This order covers Illinois, Indiana, Kansas, Kentucky, Missouri, Wisconsin, and other ICE detainers sent to law enforcement in 24 other states. *Id.*
108. *Morales v. Chadbourne*, 996 F. Supp. 2d 19, 40 (1st Cir. 2015).
109. *Miranda-Olivares v. Clackamas Cty.*, No. 3:12-CV-02317-ST, 2014 WL 1414305 (D. Or. Apr. 11, 2014).
110. Andrea Castillo, “Immigration Detainer Changes Spreading Across Oregon; National Implications Possible,” *The Oregonian/OregonLive.com*, April 19, 2014, http://www.oregonlive.com/pacific-northwest-news/index.ssf/2014/04/federal_ruling_sparks_halt_on.html (also describing “a shift that legal experts say will inevitably spread across the state and, possibly, the nation.”).
111. Immigrant Legal Resource Center, *National Map of Local Entanglement with ICE*, December 19, 2016, <https://www.ilrc.org/local-enforcement-map>. For more information on the refusal of jurisdictions to comply with these requests, see generally, Lena Graber and Nikki Marquez, *Searching for Sanctuary: An Analysis of America’s Counties & Their Voluntary Assistance with Deportations*, Immigrant Legal Resource Center, December 2016, <https://www.ilrc.org/searching-sanctuary>.
112. *Santos v. Frederick County*, supra n. 79 (holding that “absent express direction or authorization by federal statute or federal officials, state and local law enforcement officers may not detain or arrest an individual solely based on known or suspected civil violations of federal immigration law.” 725 F.3d at 465).
113. *Secure Communities: A Fact Sheet*, American Immigration Council, Nov. 29, 2011, <https://www.americanimmigrationcouncil.org/research/secure-communities-fact-sheet>. The Department of Homeland Security asserted that when persons are fingerprinted by state or local police, under the USA PATRIOT Act of 2001 enacted after 9/11, and its 2002 amendments, their fingerprint information must be sent to the FBI which can then share it with ICE. See Dept. of Homeland Security (DHS), Office of the Inspector General, *Communication Regarding Participation in Secure Communities*, OIG-12-66 (June 2014), at 2, discussing Integrated Automated Fingerprint Identification System (IAFIS)(mandatory data-sharing between local police and the FBI) and the DHS Automated Biometric Identification System (IDENT)(made inter-operable with IDENT), and *The Enhanced Border Security and Visa Entry Reform Act of 2002* (Public Law 107-173), which amended *The USA PATRIOT Act of 2001*.
114. *Id.*
115. See, e.g., *Morales v. Chadbourne*, 793 F.3d 208, 217 (1st Cir. 2015).
116. The federal Immigration and Nationality Act (INA) expressly provides that, “the Attorney General may not remove an alien [sic] who is sentenced to imprisonment *until* they are released from imprisonment. Parole, supervised release, probation, or possibility of arrest or further imprisonment is not a reason to defer removal.” 8 U.S.C. §1231(a)(4) [emphasis added], with one exception if they are in state custody, based on the written request of the state. 8 U.S.C. §1231(a)(4)(B)(ii). INA §241(a)(4)(B)(ii).
117. The INA expressly limits federal discretion over persons in custody of the state as follows: “The Attorney General is authorized to remove an alien [sic] in accordance with applicable procedures under this chapter before the alien has completed a sentence of imprisonment . . . (ii) in the case of an alien in the custody of a State (or a political subdivision of a State), if the chief State official exercising authority with respect to the incarceration of the alien determines that (I) the alien is confined pursuant to a final conviction for a nonviolent offense (other than [an immigration offense]) (E) of this title, (II) the removal is appropriate and in the best interest of the State, and (III) *submits a written request to the Attorney General that such alien be so removed.*” *Id.* (8 U.S.C. §1231(a)(4)(B)(ii)). The federal Immigration and Nationality Act (INA) provides that, “the Attorney General may not remove an alien who is sentenced to imprisonment *until* they are released from imprisonment. Parole, supervised release, probation, or possibility of arrest or further imprisonment is not a reason to defer removal.” 8 U.S.C. §1231(a)(4) [emphasis added].
118. California Trust Act, 2013 Cal. Stat. 4650 (codified at CAL. GOV’T CODE §§ 7282–7282.5 (West Supp. 2014)); see also Medina, supra n. 17.
119. See, e.g., César Cuahtémoc García Hernández, “Creating Crimmigration,” 2013 *Brigham Young University Law Review* 1457, 1458 (2013)(“Convictions for a growing list of offenses result in removal— the technical umbrella term for exclusion and deportation. Sometimes commission—rather than conviction—of such an offense is sufficient. At the same time, immigration law enforcement has increasingly adopted the securitized approach of criminal law enforcement. And criminal investigations involving certain crimes related to immigration activity have borrowed many of the more lax procedures traditionally used in the civil immigration law system.”)
120. *Id.* at 1480-82 (increasing incarceration tied to “crimmigration,” the criminalization of immigrants) & 1469-1471 (increasing removals also tied to crimmigration).
121. See, e.g., *Restoring a National Consensus: The Need to End Racial Profiling in America*, Leadership Conference on Civil and Human Rights, March 2011, http://www.civilrights.org/publications/reports/racial-profiling2011/racial_profiling2011.pdf; Ranjana Natarajan, “Racial Profiling Has Destroyed Public Confidence in Police,” *Washington Post*, December 14, 2015, https://www.washingtonpost.com/posteverything/wp/2014/12/15/racial-profiling-has-destroyed-public-trust-in-police-cops-are-exploiting-our-weak-laws-against-it/?utm_term=.bc8c8e83777d. (“Racial profiling and excessive policing are unconstitutional. But they’re still happening.”); *Floyd v. City of New York*, 959 F. Supp. 2d 540, 667 (S.D.N.Y. 2013) (finding that NYPD’s “stop and frisk” program was unconstitutional, in large part, because it resulted in racial profiling against African Americans and Latinos).

122. *Manufacturing Felonies: How Driving Became a Felony for People of Color in Georgia*, Advancement Project and Georgia Latino Alliance for Human Rights, 2015, at 4 (“Although the original intent of the ‘felony driving law’ [making driving without a license a felony imposing hefty monetary penalties] was to discharge immigration by undocumented immigrants in the state, in practice it has significantly impacted other communities of color, especially African Americans.”), http://b3cdn.net/advancement/a23a889905f33b63a2_lim6bsbhf.pdf.
123. See, e.g., Maritza Pérez, Jessica González-Rojas and Juan Cartagena, “Why Latinos Should Invest in Sentencing Reform,” *Huffington Post*, May 25, 2016, http://www.huffingtonpost.com/maritza-perez/latinos-sentencing-reform_b_10127848.html (analyzing over-incarceration of Latinos, who comprise 17.4% of the U.S. population and 33.8% of the incarcerated population in federal prisons, due to policies and practices that perpetuate their involvement in the criminal legal system and immigration system, noting that Latinos are twice as likely to be incarcerated as whites and are over-represented in state prisons in 31 of the 50 U.S. states); *Hispanics Are Over-represented in U.S. Prisons and Jails*, Prison Policy Initiative, <https://www.prisonpolicy.org/profiles/US.html>; see also generally, César Cuauhtémoc García Hernández, “Naturalizing Immigration Imprisonment,” 103 *Calif. L. Rev.* 1449 (2015).
124. See Vázquez, *Perpetuating the Marginalization of Latinos*, supra n. 100.
125. See Jasmine Gómez and Pamela Cataldo, *Private Prisons and Political Contributions: How Big Money Shackles Immigration Policy*, Free Speech People, December 14, 2016, <http://freespeechforpeople.org/bilingual-private-prisons-report/>.
126. *Plyler v. Doe*, 457 U.S. 202, 211-15 (1982).
127. *Id.*
128. *Id.* at 221 (“Public education is not a ‘right’ guaranteed to individuals under the constitution. But neither is it merely some governmental ‘benefit’ indistinguishable from other forms of social welfare legislation. Both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of a child, mark the distinction.” [internal citations omitted].)
129. *Id.* at 220.
130. *Id.* at 222.
131. *Plyler v. Doe*, 457 U.S. 202, 210-16 (1982).
132. *Id.* at 230.
133. *HICA v. Gov. Alabama*, supra n. 27, 691 F.3d at 1245 (quoting *Plyler* at 227).
134. *Id.* at 1241 (quoting Alabama law S.B. 28).
135. *Id.* at 1247.
136. *Id.*
137. *Id.*
138. Human Rights Watch reported that, “[a]ccording to the State Department of Education, over 5,000 Hispanic children were absent at a point when normally about 1,000 absences could be expected. This is out of a total Hispanic school population in Alabama of about 31,000 students, including U.S. citizens.” *No Way to Live: Alabama’s Immigrant Law*, Human Rights Watch, 2011, at 45.
139. *Id.* at 47.
140. A few of the many incidents are documented in notes 11 and 12, supra.
141. See, e.g., AFT Pledges to Protect Undocumented Students and Educators, Nov. 28, 2016, <http://www.aft.org/news/aft-pledges-protect-undocumented-students-and-educators>
142. See, e.g., Watanabe, “UC Won’t Assist Federal Agents in Immigration Actions Against Students,” supra n. 17. In reviewing Alabama’s law, the Eleventh Circuit Court of Appeals noted that: “As the Supreme Court stated in *Plyler*, ‘Charging tuition to undocumented children constitutes a ludicrously ineffectual attempt to stem the tide of illegal immigration.’” (quotation marks and alteration omitted). *HICA v. Gov. of Alabama*, supra n. 27, 691 F.3d at 1236.
143. See *SPLC Report* at n. 12, supra.
144. *Id.*
145. *Id.* (26 reported hate crimes were anti-Trump).
146. See, e.g., AFT Pledges to Protect Undocumented Students and Educators, supra n. 143.

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