

State and Local Regulation of Immigration and Immigrants: A Connecticut Case Study

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December 17, 2013

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Table of Contents

Introduction	1
I. Local Immigration Measures	2
II. Preemption and Approaches to the Role of State and Local Governments in Regulating Immigration and Immigrants	11
A. Structural Preemption	11
B. Statutory Preemption	16
C. Approaches to the Role of State and Local Governments in Regulating Immigration and Immigrants	17
III. Recent Connecticut Regulation of Immigrants	33
A. Public Act No. 11-43, An Act Concerning Access to Postsecondary Education [2011]	34
B. Public Act No. 13-89, An Act Concerning the Issuance of Motor Vehicle Operators' Licenses [2013]	49
C. Public Act No. 13-155, An Act Concerning Civil Immigration Detainers [2013]	55
Conclusion	60

Introduction

In March 2007, the New York Times published an editorial contrasting the approaches of three Connecticut cities—Stamford, New Haven, and Danbury—to the issue of undocumented immigration.¹ Entitled “Immigration: A Tale of Three Cities,” the article began by observing that “Connecticut does not speak with one voice on immigration. . . . Cities send their own messages, some welcoming, some divisive.”² Yet expressive measures addressing undocumented immigration are not confined to the local level; Connecticut’s state legislature has in recent years “spoken” multiple times on the issue by passing legislation favorable to the state’s undocumented population. My examination of subfederal regulation of immigration in Connecticut provides a counterpoint to oft-articulated arguments against state and local immigration measures. While such arguments tend to focus on restrictive measures, recent developments in Connecticut highlight the potential for furthering immigrants’ rights through subfederal regulation.

This paper is divided into three parts. First, I contrast policies on local participation in immigration enforcement adopted by Danbury and New Haven, focusing particularly on the responses of officials in both cities to the implementation of the federal government’s Secure Communities program. Next, I canvass legal and theoretical approaches to the proper role of state and local governments in regulating immigration and immigrants, applying the arguments to the disparate policies adopted by municipal officials in Danbury and New Haven. Then, I consider three pieces of immigrant-friendly legislation recently enacted by the Connecticut legislature, analyzing the types of arguments made on both sides. Ultimately, I conclude that by

¹ Editorial, *Immigration: A Tale of Three Cities*, N.Y. TIMES, Mar. 4, 2007, <http://query.nytimes.com/gst/fullpage.html?res=9507E3DE1631F937A35750C0A9619C8B63> [hereinafter *Three Cities*].

² *Id.*

attempting to undermine restrictionist subfederal measures by arguing for federal primacy over immigration, many supporters of immigrants’ rights overlook the potential for advancing those rights through pro-immigrant state and local measures.

I. Local Immigration Measures

In its 2007 editorial, the New York Times compared the policies of Stamford, New Haven, and Danbury on undocumented immigration.³ It first described the establishment of a “‘no hassle’ zone”⁴—a designated hiring area for day laborers to secure work—in Stamford under then-Mayor Dannel Malloy.⁵ It opined that “New Haven has gone a step further”⁶ than Stamford, citing the New Haven Police Department’s policy of refraining from questioning residents about their immigration status and the city’s (subsequently implemented) plan to issue municipal identification cards to its residents.⁷ Finally, it contrasted these policies with measures adopted in Danbury, where Mayor Mark Boughton “invited”⁸ the federal Immigrations and Customs Enforcement agency (ICE) to enforce immigration laws in the city in response to a burgeoning immigrant population and “soaring school enrollment, overcrowded housing, [and] unlicensed drivers.”⁹ The editorial concluded by eschewing Danbury’s approach and calling for “a compassionate local response,”¹⁰ citing Stamford and New Haven as examples to be emulated by cities attempting to manage immigrant inflows.

Hartford joined the ranks of Stamford and New Haven on August 11, 2008, when Hartford’s city council passed an ordinance barring its police officers from inquiring about an

³ See *Three Cities*, *supra* note 1.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

individual's immigration status except when required by a criminal investigation.¹¹ Moreover, the Hartford ordinance provided that local police officers were not to "arrest or detain a person based solely on their immigration status" absent a criminal warrant.¹² It specifically forbade officers from arresting or detaining persons on the basis of ICE-issued administrative warrants.¹³ Interestingly, however, the ordinance concluded with the caveat that "[n]othing in this section shall be construed to prohibit any Hartford police officer from cooperating with federal immigration authorities as required by law."¹⁴

In this section, I focus on the responses of municipal officials in New Haven and Danbury to the issue of undocumented immigration. I first examine what has been characterized as the New Haven Police Department's "don't ask, don't tell"¹⁵ approach to immigration status, as well as the city's resistance to the implementation of the federal government's Secure Communities program in Connecticut. I then touch briefly on the issuance and impact of New Haven's municipal identity cards. Finally, I consider Danbury officials' efforts to clamp down on undocumented immigration, culminating with the Danbury Police Department's entrance into a cooperative agreement with ICE to enforce immigration laws in that city.

On December 14, 2006, the New Haven Police Department provided to its officers General Order 06-2, with the stated purpose of setting the department's "policy and procedures concerning citizenship status, enforcement of federal immigration laws and the disclosure of confidential information."¹⁶ According to a press release issued by the New Haven Mayor's

¹¹ HARTFORD, CONN., MUN. CODE ch. 2, § 2-928 (2008), *available at* http://library.municode.com/HTML/10895/level3/PTIIMUCO_CH2AD_ARTXXICISEREIMST.html#TOPTITLE.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Three Cities*, *supra* note 1.

¹⁶ NEW HAVEN DEP'T OF POLICE SERV., GENERAL ORDER 06-2, DISCLOSURE OF STATUS INFORMATION: POLICIES & PROCEDURES (2006), *available at*

Public Information Office, the order formalized policies already followed by city police officers.¹⁷ While stating that the order was “unique among municipalities in Connecticut,”¹⁸ the press release added that New Haven was not striking out entirely on its own, noting that “dozens of municipal and state governments in the U.S. ... have adopted similar procedures.”¹⁹

Like the Hartford ordinance that followed and largely echoed it, the order barred New Haven police officers from asking about an individual’s immigration status unless as part of a criminal investigation.²⁰ The order went on to specify that New Haven police officers were “not to inquire about the immigration status of crime victims, witnesses, or others who call or approach the police seeking assistance.”²¹ While confirming that New Haven police officers “shall continue to cooperate with federal authorities in investigating and apprehending illegal immigrants *suspected of criminal activity*,”²² the order provided that a person was not to be detained solely on suspicion of the person’s illegal presence or commission of “a civil immigration violation.”²³ Moreover, “unless [a] person is arrested on a criminal charge,” the order did not require a police officer to notify ICE about that person.²⁴ Finally, the order barred officers from arresting individuals based on ICE-issued “administrative warrants for arrest or removal,” including “warrants for persons with outstanding removal, deportation or exclusion

<http://www.newhavenindependent.org/archives/upload/2006/12/NHPDGeneralOrder.doc> [hereinafter GEN. ORDER 06-2].

¹⁷ PUBLIC INFORMATION OFFICE OF MAYOR JOHN DE STEFANO, NEW HAVEN POLICE ISSUE EXECUTIVE ORDER – NO RESIDENT SHOULD BE AFRAID OF REPORTING CRIME (Dec. 14, 2006), <http://www.cityofnewhaven.com/Mayor/ReadMore.asp?ID={874974A9-AC89-465B-A649-57D122E9FAF9}> [hereinafter NEW HAVEN POLICE].

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ GEN. ORDER 06-2, *supra* note 16, § II(C)(1).

²¹ *Id.* § II(C)(2) (emphasis added).

²² *Id.* § II(C)(3).

²³ *Id.* § II(C)(4).

²⁴ *Id.*

orders.”²⁵

The order’s introductory language was as telling as the policy itself. Its tone was emphatically inclusive: beginning by recognizing the diversity of New Haven’s residents, it averred that “[t]he City and the Police Department are committed to promoting the safety [of] and providing proactive community policing services to *all* who live here.”²⁶ Above all, the order emphasized that ensuring that residents—“regardless of their immigration status”—are willing to report crime and seek help from the police would ultimately enhance the safety of not only immigrants, but all persons in New Haven.²⁷ The order stated that immigrants’ “cooperation is needed to prevent and solve crimes and maintain public order, safety and security in the entire community.”²⁸ This underlying purpose was also cited by Mayor John DeStefano, who described the measure as “a smart extension of community policing that will make all residents safer.”²⁹ Beyond the primary goal of strengthening relations between the police and immigrant populations, the order included a long list of additional policy rationales including “[t]he limited resources of the city; the complexity of immigration laws; limitations on authorities, [and the] risk of civil liability for immigration and enforcement activities.”³⁰ Finally, the order underscored that immigration enforcement was not a task for local police officers; rather, it stated plainly that “[e]nforcement of the civil provisions of U.S. immigration law is the responsibility of federal immigration officials.”³¹

The next year, on July 24, 2007, New Haven adopted another immigrant-friendly

²⁵ *Id.* § II(C)(5).

²⁶ *Id.* § I(A).

²⁷ *Id.*

²⁸ *Id.*

²⁹ NEW HAVEN POLICE, *supra* note 17 (internal quotation marks omitted).

³⁰ GEN. ORDER 06-2, *supra* note 16, § I(B).

³¹ *Id.* § II(C)(5).

measure in the form of a municipal identification card, the Elm City Resident Card.³² On the day of the program's launch, the city received 250 applications for Elm City Resident Cards.³³ Five years after the program began, "and 10,000 cards later,"³⁴ the New Haven Independent reported that relatively few cardholders had actually used their cards for the purposes for which they were publicized, including opening a bank account or accessing the local library.³⁵ However, the article emphasized the card's "less tangible" results, such as a strengthened "sense of community" and improved communication between police officers and immigrant populations.³⁶

Interestingly, DeStefano also credited efforts to create the program with spurring the city's subsequent resistance to the federal government's Secure Communities program.³⁷ Begun in 2008 and managed by ICE, the Secure Communities program provides for fingerprint information received by the Federal Bureau of Investigation (FBI) from arrests by state and local law enforcement officers to be shared with the Department of Homeland Security (DHS).³⁸ ICE then searches for matches between the information it receives and records in federal immigration databases.³⁹ If it finds a match, ICE may decide to issue a detainer, which requests that the state or local law enforcement agency hold the arrestee so that he or she may be taken into federal

³² PUBLIC INFORMATION OFFICE OF MAYOR JOHN DE STEFANO, CITY ACCEPTS 250 APPLICATIONS AT LAUNCH OF ELM CITY RESIDENT CARDS (July 24, 2007), <http://www.cityofnewhaven.com/Mayor/ReadMore.asp?ID={7823DD93-CD1C-491C-A97E-152A75034A89}>. Multiple commentators have cited New Haven's issuance of municipal identification cards as an example of a subfederal measure aimed at integrating immigrants into their community. *See, e.g.*, Hiroshi Motomura, *Immigration Outside the Law*, 108 COLUM. L. REV. 2037, 2077-78 (2008); Rose Cuison Villazor, "Sanctuary Cities" and Local Citizenship, 37 FORDHAM URB. L.J. 573, 575 (2010).

³³ *Id.*

³⁴ Thomas MacMillan, *Elm City ID Card Turns 5*, NEW HAVEN INDEPENDENT (July 23, 2012), http://www.newhavenindependent.org/index.php/archives/entry/id_card_anniversary/.

³⁵ *See id.*

³⁶ *Id.*

³⁷ *See id.*

³⁸ TASK FORCE ON SECURE COMMUNITIES, U.S. DEP'T OF HOMELAND SECURITY, FINDINGS & RECOMMENDATIONS 4-5 (2011), available at <http://www.dhs.gov/xlibrary/assets/hsac-task-force-on-secure-communities-findings-and-recommendations-report.pdf>.

³⁹ *Id.*

custody.⁴⁰ Activated incrementally in 3,181 jurisdictions,⁴¹ Secure Communities was fully implemented by January 2013.⁴² In Connecticut, Secure Communities was activated in Fairfield County on June 29, 2010.⁴³ On February 22, 2012, the program was implemented in the rest of Connecticut.⁴⁴

In 2011 and again in 2012, New Haven officials lambasted the federal government's attempts to implement the program in Connecticut. At a news conference in December 2011, DeStefano criticized the program, arguing that its implementation would undermine New Haven's efforts to strengthen relations between its police department and immigrant residents, such as its issuance of General Order 06-2.⁴⁵ DeStefano also raised a commandeering concern, stating that the program would "make local police part of the immigration system."⁴⁶ In February 2012, shortly before the statewide activation of Secure Communities, this sentiment was echoed by New Haven Police Chief Dean Esserman, who averred that "[t]his does not help our job. We are not the American immigration police, nor do we want to be."⁴⁷

New Haven officials' aversion to involvement in immigration enforcement contrasts sharply with the approach of Danbury officials, who have actively sought a larger role for state and local police officers in immigration enforcement. On April 15, 2005, Danbury Mayor Mark Boughton sent a letter to then-Connecticut Attorney General Richard Blumenthal asking that

⁴⁰ *Id.* at 10-11.

⁴¹ *Id.* at 5 n. 4.

⁴² U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, U.S. DEP'T OF HOMELAND SECURITY, ACTIVATED JURISDICTIONS (2013), available at <http://www.ice.gov/doclib/secure-communities/pdf/sc-activated.pdf> [hereinafter ACTIVATED JURISDICTIONS].

⁴³ *Id.* at 3.

⁴⁴ *Id.*

⁴⁵ See Melissa Bailey, *City Swings Back Against "Secure Communities"*, NEW HAVEN INDEPENDENT (Dec. 13, 2011), http://www.newhavenindependent.org/index.php/archives/entry/secure_communities_decried/.

⁴⁶ *Id.* (internal quotation marks omitted).

⁴⁷ 'Legitimate Concerns' About Federal Deportation Program, HARTFORD COURANT (Feb. 20, 2012), http://articles.courant.com/2012-02-20/community/hc-new-haven-secure-communities-0221-20120220_1_federal-deportation-program-immigration-system-immigration-fugitives (internal quotation marks omitted).

state police be allowed to enforce immigration law.⁴⁸ Boughton's request drew significant media attention to Danbury, leading one newspaper to characterize the city as "a flash point in the national immigration debate."⁴⁹ In support of his request, Boughton cited problems he associated with the city's rising population of immigrants, including "overcrowded" housing, "unpaid health care services, unpaid vehicle property taxes, [and] a rash of uninsured, unlicensed and unregistered motor vehicle operators."⁵⁰ Moreover, Boughton emphasized that his request was necessitated by what he described as the federal government's "inability to do its job as it relates to immigration."⁵¹

Boughton's proposal galvanized the immigrant community in Danbury. Immigrant advocates opposed to Boughton's request organized a "unity march"⁵² on June 12, 2005, "to demand respect from the mayor"⁵³ and to highlight, in the words of one organizer, "the contributions [immigrants] are making to this city, this state, and this country."⁵⁴ The march, which drew over 1,000 immigrants and their supporters to Danbury's Main Street, was sponsored by the Danbury Area Coalition for the Rights of Immigrants, a pro-immigrant group formed after Boughton's proposal.⁵⁵

⁴⁸ See Mark Spencer, *City Experiences Clash of Cultures; Immigration Proposal Puts Danbury Mayor at the Center of a Storm*, HARTFORD COURANT, May 7, 2005, http://articles.courant.com/2005-05-07/news/0505070736_1_immigration-law-immigration-advocates-national-immigration-debate.

⁴⁹ *Id.*

⁵⁰ *Danbury Mayor Calls For Deputizing State Troopers to Serve As Immigration Agents*, ASSOCIATED PRESS, April 17, 2005, available at <http://news.google.com/newspapers?nid=1916&dat=20050417&id=fm4rAAAIBAJ&sjid=L3UFAAAIBAJ&pg=3030,2158847>.

⁵¹ *Id.*

⁵² Mark Spencer, *A Show of Unity; Seeking Respect, Marchers Demand Danbury Mayor Withdraw Request That State Police Enforce Laws on Immigration*, HARTFORD COURANT, June 13, 2005, http://articles.courant.com/2005-06-13/news/0506130352_1_immigrants-day-laborers-main-street.

⁵³ William Yardley, *Volleyball and Violations: Immigrants' Pastime Is Out of Bounds in Danbury*, N.Y. TIMES, Aug. 2, 2005, http://www.nytimes.com/2005/08/02/nyregion/02danbury.html?_r=0.

⁵⁴ Mark Spencer, *Immigrant Groups Prepare For 'Unity March'; Danbury Event Will Go On, Despite Mayor's Change of Attitude*, HARTFORD COURANT, June 11, 2005, http://articles.courant.com/2005-06-11/news/0506110051_1_immigration-law-immigration-policies-state-police.

⁵⁵ *See id.*

In June 2005, Boughton's request was rejected by Leonard Boyle, then-Commissioner of the State Department of Public Safety, who stated that "deputization would not seem to be a wise use of state resources" because of "the extensive amount of training necessary to deputize state officers and the absence of any meaningful deportation process for illegal aliens who have not committed felony offenses."⁵⁶ Then-Governor Jodi Rell stated that she backed Boyle's decision, but nevertheless acknowledged the "many problems that illegal immigration imposes on our cities."⁵⁷

Despite the rejection, Danbury officials continued to take measures to address issues related to the city's influx of immigrants. Perhaps the most surprising issue to garner national attention was the conflict between city officials and Ecuadorean immigrants over backyard volleyball games held at the immigrants' homes.⁵⁸ The "sometimes raucous volleyball games"⁵⁹ irked neighbors, who complained not only of noise but also of lights used to illuminate nighttime games and streets crowded by attendees' cars.⁶⁰ Danbury officials raised more serious concerns, namely that the volleyball games had also become venues for "gambling, prostitution, [and] drugs and alcohol sales."⁶¹ While city officials considered passing an ordinance that would target the games by restricting "repetitive outdoor activities,"⁶² ultimately, no such ordinance was

⁵⁶ Mark Spencer, *Immigration Proposal Rejected; State Police Won't Be Deputized To Enforce Federal Laws*, HARTFORD COURANT, June 18, 2005, http://articles.courant.com/2005-06-18/news/0506180589_1_immigration-law-illegal-immigration-immigration-debate.

⁵⁷ *Id.*

⁵⁸ See, e.g., Nathan Thornburgh, *Serving Up a Conflict; Raucous Volleyball Games Pit New Immigrants Against Old Neighbors in a New England Town*, TIME MAGAZINE, July 25, 2006, <http://content.time.com/time/magazine/article/0,9171,1086143,00.html>.

⁵⁹ See Yardley, *supra* note 53.

⁶⁰ See *Unlikely Player in Immigrant Dispute: Volleyball*, NAT'L PUB. RADIO, May 29, 2005, <http://www.npr.org/templates/story/story.php?storyId=4671934>.

⁶¹ William Yardley, *Volleyball, and Some Hardball; Debate on Immigration Also Involves Ecuador's Top Sport*, N.Y. TIMES, May 25, 2005, <http://query.nytimes.com/gst/fullpage.html?res=9505EEDB1339F936A15756C0A9639C8B63>.

⁶² Yardley, *supra* note 53.

adopted.⁶³ Instead, Danbury officials “responded with stricter code enforcement,” including neighborhood “sweeps ... conducted by a new unified neighborhood inspection team [Boughton] had formed.”⁶⁴ A sweep on July 23, 2005 resulted in “city workers issu[ing] cease-and-desist orders for seven properties.”⁶⁵

Four years after Boughton’s failed attempt to enable *state* police officers to enforce immigration law, Danbury officials tried again with local law enforcement. In September 2009, Danbury police officers partnered with ICE to enforce immigration laws in Danbury.⁶⁶ Interviewed by the New York Times shortly before the city’s decision to apply for the partnership program, Boughton again listed the effects of illegal immigration on the city—“[t]he expenses, health care, the schools, social service programs”—and pointed the finger at the federal government, adding that the problems were “a direct reflection on the federal government’s failure to get the job done.”⁶⁷

The partnership between ICE and the Danbury Police Department included a 287(g) component, named for a section added to the Immigration and Nationality Act (INA) by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).⁶⁸ Section 287(g) permits ICE to partner with state and local law enforcement, such that a state or local police officer may be permitted to enforce immigration law “at the expense of the State or

⁶³ Dirk Perrefort, *Volleyball a Growing Concern—Again*, NEWS-TIMES, May 3, 2012, <http://www.newstimes.com/news/article/Volleyball-a-growing-concern-again-3527953.php>.

⁶⁴ Yardley, *supra* note 53.

⁶⁵ *Id.*

⁶⁶ See Dirk Perrefort, *Once Feared ICE Program Ends Quietly*, NEWS-TIMES, Jan. 29, 2013, <http://www.newstimes.com/local/article/Once-feared-ICE-program-ends-quietly-4233490.php>.

⁶⁷ Jill P. Capuzzo, *Connecticut City Plans to Team Its Police With Federal Immigration Agents*, N.Y. TIMES, Feb. 6, 2008, http://www.nytimes.com/2008/02/06/nyregion/06immig.html?pagewanted=all&_r=0 (internal quotation marks omitted).

⁶⁸ U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, U.S. DEP’T OF HOMELAND SECURITY, FACT SHEET: DELEGATION OF IMMIGRATION AUTHORITY SECTION 287(G) IMMIGRATION AND NATIONALITY ACT, *available at* <http://www.ice.gov/news/library/factsheets/287g.htm>.

political subdivision and to the extent consistent with State and local law.”⁶⁹ Thus, under the 287(g) component of the partnership, ICE delegated immigration enforcement authority to selected Danbury police officers, who were “nominated, trained, and approved by ICE to perform certain functions of an immigration officer”⁷⁰ within the Danbury Police Department’s jurisdiction. Although the agreement drew protests when city officials voted to apply for the program, it had ended by January 2013.⁷¹

As part of Fairfield County, Danbury had been involved in the Secure Communities pilot program in Connecticut since 2010.⁷² Unlike their counterparts in New Haven, Danbury officials expressed little concern about the program’s requirements.⁷³ Comparing Secure Communities to the city’s partnership with ICE, Danbury Police Chief Al Baker stated that “[l]ike 287(g), the program is aimed toward violent offenders. Just because you get a traffic offense doesn’t mean you’re going to be deported.”⁷⁴

II. Preemption and Approaches to the Role of State and Local Governments in Regulating Immigration and Immigrants

A. Structural Preemption

In *Arizona v. United States*,⁷⁵ perhaps the most visible recent Supreme Court case addressing federal preemption of state regulation of immigration, Justice Anthony Kennedy’s opinion begins with a strong statement of the federal government’s authority to regulate immigration: “The Government of the United States has broad, undoubted power over the

⁶⁹ 8 U.S.C.A. § 1357 (West, WestlawNext through P.L. 113-52 approved Nov. 21, 2013).

⁷⁰ U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, U.S. DEP’T OF HOMELAND SECURITY, MEMORANDUM OF AGREEMENT, *available at* http://www.ice.gov/doclib/foia/memorandumsofAgreementUnderstanding/r_287gdanbury101509.pdf.

⁷¹ *See* Perrefort, *supra* note 66.

⁷² *See* ACTIVATED JURISDICTIONS, *supra* note 42, at 3.

⁷³ *See* Dirk Perrefort, *Secure Communities Coming to Connecticut*, NEWS-TIMES, Jan. 29, 2013, <http://www.newstimes.com/local/article/Secure-Communities-coming-to-Connecticut-3344872.php>.

⁷⁴ *Id.* (internal quotation marks omitted).

⁷⁵ *Arizona v. United States*, 132 S. Ct. 2492 (2012).

subject of immigration and the status of aliens.”⁷⁶ Echoing Supreme Court precedent, the opinion grounds this authority in Article I, Section 8 of the U.S. Constitution, which empowers Congress “to establish a uniform rule of naturalization,”⁷⁷ and in the federal government’s “inherent power as sovereign to control and conduct relations with foreign nations.”⁷⁸

Justice Kennedy’s discussion of federal primacy over immigration regulation is yet another articulation of the principle that the “[p]ower to regulate immigration is unquestionably exclusively a federal power.”⁷⁹ This “federal exclusivity principle”⁸⁰ underlies a major, contested legal limitation on state and local immigration regulation, constitutional preemption. Under the doctrine of constitutional preemption, also referred to as structural preemption,⁸¹ state and local enactments are constitutionally preempted when they attempt to regulate what some scholars have termed “pure immigration law,” that is, “the admission and removal of non-citizens”⁸² and “the conditions under which [non-citizens] may remain.”⁸³

In this section, I first examine the sources cited and justifications advanced by proponents of the federal exclusivity principle, which, as noted above, undergirds structural preemption. I then consider legal, functional, and historical challenges to structural preemption.

Proponents of the federal exclusivity principle point to multiple sources of federal power over immigration law, including the federal government’s constitutional power to establish a uniform rule of naturalization, its authority to conduct foreign affairs, its authority to regulate

⁷⁶ *Id.* at 2498 (citations omitted).

⁷⁷ U.S. CONST. art. I, § 8.

⁷⁸ *Arizona*, 132 S. Ct. at 2498 (citation omitted).

⁷⁹ *DeCanas v. Bica*, 424 U.S. 351, 354 (1976) (citations omitted).

⁸⁰ Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 571 (2008).

⁸¹ Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power over Immigration*, 86 N.C. L. REV. 1557, 1600 (2008).

⁸² Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787, 794 (2008).

⁸³ *DeCanas*, 424 U.S. at 354.

foreign commerce, and its inherent sovereignty.⁸⁴ These rationales for exclusive federal power over immigration regulation were initially articulated by the Supreme Court when it first “discerned a federal power to regulate immigration in the late nineteenth century.”⁸⁵ The “seminal case”⁸⁶ cited for federal exclusivity based on structural preemption is *Chy Lung v. Freeman*,⁸⁷ in which the Court invalidated a California statute mandating a bond for certain passengers arriving from abroad. According to the Court, such state laws would hamper the federal government’s authority to regulate foreign commerce and conduct foreign affairs.⁸⁸ In language that has been repeatedly cited in support of the federal exclusivity principle,⁸⁹ the Court averred that “[t]he passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the States.”⁹⁰

The federal government’s authority to conduct foreign affairs was again cited to justify federal exclusivity in *Chae Chan Ping v. United States*,⁹¹ one of the foundational cases in which the Supreme Court established the much-criticized plenary power doctrine.⁹² In *Chae Chan Ping*, the Court characterized “[t]he power of exclusion of foreigners” as “an incident of sovereignty belonging to the government of the United States.”⁹³ The Court further stated that such sovereign powers “are incapable of transfer to any other parties,”⁹⁴ language that has been cited to argue

⁸⁴ See, e.g., Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493, 532 (2001).

⁸⁵ *Id.* at 530 (citations omitted).

⁸⁶ Huntington, *supra* note 82, at 821.

⁸⁷ *Chy Lung v. Freeman*, 92 U.S. 275 (1875).

⁸⁸ *Id.* at 280.

⁸⁹ Hiroshi Motomura, *Federalism, International Human Rights, and Immigration Exceptionalism*, 70 U. COLO. L. REV. 1361, 1369 (1999).

⁹⁰ *Chy Lung*, 92 U.S. at 280.

⁹¹ *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

⁹² See Rodríguez, *supra* note 80, at 613; Motomura, *supra* note 89, at 1369-70 (1999).

⁹³ *Chae Chan Ping*, 130 U.S. at 609.

⁹⁴ *Id.*

that Congress may not devolve its power over immigration to the states.⁹⁵ The *Chae Chan Ping* decision offered other rationales for federal exclusivity apart from powers inherent in sovereignty: namely, the need for national unity when conducting foreign relations.⁹⁶ Thus, the Court distinguished national from “local” concerns, declaring that “[f]or local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power.”⁹⁷ This need to speak with a unified national voice on issues of foreign affairs continues to be cited as a justification for federal exclusivity, and was articulated recently in *Arizona v. United States*.⁹⁸ Arguing specifically that a unified approach to immigration is necessary to prevent state laws leading to “harmful reciprocal mistreatment of American citizens abroad,” Justice Kennedy underscored the importance of “foreign countries concerned about the status, safety, and security of their nationals in the United States ... be[ing] able to confer and communicate on this subject with one national sovereign, not the 50 separate States.”⁹⁹

However, federal exclusivity and structural preemption have been subject to compelling criticisms. Commentators have repeatedly pointed out that although the Constitution empowers the federal government to establish a uniform rule of naturalization, it does not expressly grant exclusive control over immigration to the federal government.¹⁰⁰ Scholars such as Cristina Rodríguez and Clare Huntington have also undermined the argument that federal exclusivity is necessary to protect national interests through uniform immigration law. Rodríguez advances two arguments against the foreign affairs justification for federal exclusivity: first, she notes the

⁹⁵ See Wishnie, *supra* note 84, at 531-32.

⁹⁶ See Rodríguez, *supra* note 80, at 614.

⁹⁷ *Chae Chan Ping*, 130 U.S. at 606.

⁹⁸ See *Arizona v. United States*, 132 S. Ct. 2492, 2498 (2012).

⁹⁹ *Id.* (citations omitted).

¹⁰⁰ See, e.g., Huntington, *supra* note 82, at 812.

growing involvement of states and localities in “activities that implicate foreign affairs.”¹⁰¹ She cites approvingly Peter Spiro’s argument that because of this growing involvement, foreign governments understand when they are dealing with state as opposed to national actors, diminishing the need for a single national voice on immigration.¹⁰² Second, while acknowledging that immigration necessarily implicates foreign affairs, Rodríguez highlights competing state and local interests, emphasizing immigration’s “direct implications for state and local institutions and their fiscal well-being, as well as for the public healthy, safety, and welfare of the communities that state and local entities govern.”¹⁰³ Along similar lines, Huntington emphasizes the substantial impact of immigration on state and local governments, noting that “state and local governments bear a disproportionate cost in absorbing the consequences of immigration.”¹⁰⁴ She also cites Spiro’s argument that “as other countries grow accustomed to multiple actors, there is less cause for concern about a state asserting its own interests in an international setting.”¹⁰⁵

Apart from these legal and functional objections to federal exclusivity, the history of immigration regulation in the United States prior to 1875 demonstrates that states regulated migration through various measures.¹⁰⁶ As Gerald Neuman has described, before the federal government enacted immigration legislation in the late nineteenth century, “[r]egulation of transborder movement of persons existed, primarily at the state level.”¹⁰⁷ This state control over migration was embodied in laws regulating the movement of criminals and the poor, public

¹⁰¹ See Rodríguez, *supra* note 80, at 615.

¹⁰² *Id.*

¹⁰³ *Id.* at 616.

¹⁰⁴ Huntington, *supra* note 82, at 817 (footnote and citations omitted).

¹⁰⁵ *Id.* at 818.

¹⁰⁶ See generally Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833 (1993).

¹⁰⁷ *Id.* at 1834.

health, and slavery.¹⁰⁸ Because such laws applied to both citizens and noncitizens, they “do not fit [within] our modern conception of immigration law.”¹⁰⁹ By Neuman’s account, federal legislation regulating immigration was enabled in the late nineteenth century by the “uncoupling of migration from slavery by the Civil War,” such that federal control over immigration no longer implicated potential federal regulation of the slave trade.¹¹⁰ This coincided with calls for Congress to limit Chinese immigration,¹¹¹ and subsequent federal legislation began a “dialectical process, [through which] federal regulation steadily expanded, and the Supreme Court steadily contracted state powers,”¹¹² as illustrated by the aforementioned decisions.

Despite these criticisms, however, the federal exclusivity principle persists,¹¹³ and structural preemption continues to result in courts “put[ting] a thumb on the scale in favor of preemption.”¹¹⁴

B. Statutory Preemption

Structural preemption aside, there are three additional grounds on which federal law may preempt state legislation. The first is express preemption, which occurs when Congress enacts a statute “containing an express preemption provision.”¹¹⁵ A state law may also be impliedly preempted, through field preemption or conflict preemption. Field preemption occurs when Congress intends to regulate a legislative field exclusively, which may be inferred “from a framework of regulation ‘so pervasive ... that Congress left no room for the States to supplement it’ or where there is a ‘federal interest ... so dominant that the federal system will be assumed to

¹⁰⁸ *Id.* at 1841.

¹⁰⁹ *See* Motomura, *supra* note 32, at 2056 (footnote and citations omitted).

¹¹⁰ *Id.*

¹¹¹ *See id.*; Neuman, *supra* note 106, at 1893.

¹¹² Neuman, *supra* note 106, at 1893.

¹¹³ *See* Huntington, *supra* note 82, at 794.

¹¹⁴ Rodríguez, *supra* note 80, at 621.

¹¹⁵ *Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012) (citation omitted).

preclude enforcement of state laws on the same subject.”¹¹⁶ Lastly, a state law is conflict preempted “if it ‘stands as an obstacle to the accomplishment and execution of the purposes and objectives of Congress,’ making compliance with both state and federal law impossible.”¹¹⁷

C. Approaches to the Role of State and Local Governments in Regulating Immigration and Immigrants

Proponents of greater state and local involvement in immigration regulation cite a number of benefits resulting from increased subfederal participation, including the potential for innovation through experimentation, increased efficiency, and greater political accountability and involvement. They emphasize that as a practical matter, states and localities are significantly impacted by immigrant inflows¹¹⁸ and are already engaged in regulating newcomers to their communities.¹¹⁹ Given states and localities’ strong interests in regulating immigration and the federalism benefits that can be realized through subnational regulation, these scholars argue that both judges and Congress should embrace (or at least countenance) a broader role for state and local governments in this area.

Both Cristina Rodríguez and Peter Schuck have taken functional approaches to the question of state and local involvement in immigration regulation. According to Rodríguez, managing immigration requires the participation of federal, state, and local governments.¹²⁰ Rodríguez argues that, contrary to the federal exclusivity principle, all three levels of government constitute a necessary, “integrated regulatory structure”¹²¹ that enables the United States to effectively handle demographic change.¹²² Within this regulatory framework, Rodríguez

¹¹⁶ *Id.* (citations omitted).

¹¹⁷ Stumpf, *supra* note 81, at 1602 (citations omitted).

¹¹⁸ See Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57, 90 (2007).

¹¹⁹ See Rodríguez, *supra* note 80, at 569.

¹²⁰ *Id.* at 571.

¹²¹ *Id.*

¹²² *Id.*

maintains that states and localities are primarily responsible for “integrat[ing] immigrants, legal and illegal alike, into the body politic.”¹²³ Thus, Rodríguez avers, “managing immigrant movement is itself a state interest,”¹²⁴ to be recognized alongside the more traditional interests attributed to states.¹²⁵

Peter Schuck also argues that the regulation of immigration should be recognized as a state interest primarily because certain states and localities disproportionately bear “the burdens imposed by immigrants—such as increased demand for public benefits and services, and downward pressure on wage rates.”¹²⁶ According to Schuck, a significant portion of this uneven burden-bearing is caused by a “fiscal mismatch” where taxes paid by immigrants primarily “flow to Washington, ... while almost all of the costs ... are borne locally.”¹²⁷ Schuck argues that because of this disproportionate impact of immigrants on subfederal entities, states not only have a valid interest in regulating immigration, but are also “best position[ed] to assess and manage the tradeoffs among conflicting public goals peculiar to their polities.”¹²⁸ Thus, Schuck has advocated for expanding state authority in areas including “employment-based admissions, integration with state and local criminal justice systems, and employer sanctions.”¹²⁹ The justifications offered by Danbury officials for their attempts to control immigration closely track the arguments advanced by Schuck and Rodríguez and for recognizing the impact of immigration on states and localities. Defending his policies, Boughton has consistently cited the strains placed on local services by the growing immigrant population in Danbury.¹³⁰

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ Schuck, *supra* note 118, at 70.

¹²⁷ *Id.* at 80 (citation omitted).

¹²⁸ *Id.* at 70.

¹²⁹ *Id.* at 64.

¹³⁰ *See, e.g.,* Capuzzo, *supra* note 67; Spencer, *supra* note 48.

While both recognize significant subfederal interests in regulating immigration, Schuck and Rodríguez differ as to the degree to which state and local regulations must be consistent with federal immigration policy. Whereas Schuck argues that state laws regulating immigrants should be allowed to stand provided that “they reflect a legitimate state interest and do not interfere with the goals of federal immigration policy, properly and conventionally understood,”¹³¹ Rodríguez goes further, maintaining that even subfederal regulations that are “in tension with federal objectives”¹³² should not necessarily be preempted.¹³³ According to Rodríguez, counterintuitively, striking down state and local measures that are hostile to immigrants in fact hampers integration.¹³⁴ Integration, Rodríguez argues, “is more likely to occur not only if the local debate over immigration is permitted to run its course,”¹³⁵ but also if the states and localities that adopt restrictionist measures experience the economic costs of excluding immigrants.¹³⁶

The responses of municipal officials in New Haven and Danbury to the presence of undocumented immigrants in their communities illustrate how the policy arguments advanced by Schuck and Rodríguez would lead to different outcomes when applied to the two cities’ law enforcement approaches. As noted previously, Schuck identifies “integration [of immigration enforcement] with state and local criminal justice systems” as an area in which state authority should be acknowledged and expanded.¹³⁷ Thus, Schuck, who supports “improving coordination between federal immigration enforcement and state and local criminal justice systems, and

¹³¹ Schuck, *supra* note 118, at 59.

¹³² Rodríguez, *supra* note 80, at 631.

¹³³ *Id.*

¹³⁴ *See id.* at 639.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ Schuck, *supra* note 118, at 64.

increasing the authority of the latter to assist in the former,”¹³⁸ would look favorably on both Boughton’s request to enable state police to enforce immigration law and on the Danbury Police Department’s partnership with ICE. In fact, Schuck cites 287(g), arguing that through its enactment, “Congress had endorsed [the] approach” of expanding state and local authority to work with the federal government in enforcing immigration laws.¹³⁹ Although Schuck acknowledges that serious criticisms have been leveled against broadening the role of state and local police officer in immigration enforcement,¹⁴⁰ he argues that they cannot be assessed without “reliable empirical data” that has yet to be collected.¹⁴¹ Ultimately, however, he hypothesizes that empirical data would not “condemn [cooperation programs] categorically,” but only suggest areas for improvement.¹⁴²

Whereas, at least in theory, Schuck would support Danbury’s efforts to increase its police officers’ immigration enforcement authority through partnership with ICE and participation in the federal government’s Secure Communities program, Schuck’s approach would strike down the position taken by New Haven officials in their opposition to the implementation of Secure Communities. For Schuck, in order to determine whether state and local policies “are preempted by the federal government’s plenary power over immigration, ... the decisive principle is that they be consistent with, track, mirror, or reinforce the federal law and policy.”¹⁴³ Thus, Schuck would argue that because New Haven’s resistance to the implementation of Secure Communities actively opposes federal policy, any measures undertaken by the city inconsistent with that policy should be invalidated. Schuck’s approach would lead to the same conclusion about

¹³⁸ *Id.* at 74

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 74-75.

¹⁴¹ *Id.* at 75.

¹⁴² *Id.* at 77.

¹⁴³ *Id.* at 85.

Connecticut's passage of Public Act No. 13-155,¹⁴⁴ discussed subsequently, which limits the state's participation in Secure Communities.

Rodríguez's arguments support Danbury's ICE partnership and involvement in Secure Communities. Both are instances of "cooperative activity between state and local officials and the federal government," which Rodríguez argues should be encouraged by Congress.¹⁴⁵ Rodríguez specifically identifies 287(g) agreements as an example of multilevel cooperation "[i]n its most productive form," which "would involve enlisting the states in immigration-related policy."¹⁴⁶ Like Schuck, however, Rodríguez acknowledges that there is scant empirical data to assess the performance of 287(g) agreements.¹⁴⁷ Moreover, Rodríguez recognizes the dangers that could accompany greater state and local authority over immigration enforcement, including racial profiling.¹⁴⁸ Rodríguez would also sympathize with the concerns raised by New Haven officials about Secure Communities, acknowledging that "as police chiefs around the country have cautioned, state and local engagement in immigration enforcement may seriously undermine the confidence and trust of immigrant communities in law enforcement."¹⁴⁹ But ultimately, Rodríguez suggests that in general, the benefits of cooperation between federal, state, and local officials outweigh its costs.¹⁵⁰

Unlike Schuck, and despite her favorable view of cooperation between different levels of government, Rodríguez would let stand the decision of New Haven officials to resist the implementation of Secure Communities. Similarly, Rodríguez would support New Haven officials' ability to promulgate and enforce General Order 06-2, which prohibits city police

¹⁴⁴ 2013 Conn. Legis. Serv. P.A. 13-155 (H.B. 6659) (West) (hereinafter P.A. 13-155).

¹⁴⁵ Rodríguez, *supra* note 80, at 632.

¹⁴⁶ *Id.* at 634 (citation omitted).

¹⁴⁷ *See id.* at 635.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* (citation omitted).

¹⁵⁰ *See id.*

officers from inquiring about an individual’s immigration status unless necessary to a criminal investigation. Rodríguez would allow these measures on two grounds: first, more generally, she avers that successful integration at times requires that subfederal entities be permitted to undertake policies “in tension with federal immigration policy.”¹⁵¹ Policies like those adopted in New Haven, which restrict cooperation with federal immigration enforcement officers, are “instances of local officials staking out political positions in some tension with federal intentions.”¹⁵² Second, she argues specifically that Congress should not force state and local involvement in immigration enforcement, noting that doing so “directly ... would raise commandeering issues,”¹⁵³ a concern raised by DeStefano in his response to the implementation of Secure Communities.¹⁵⁴ For these reasons, Rodríguez would also allow Connecticut’s recently enacted statute restricting its involvement in Secure Communities to stand.¹⁵⁵

Ultimately, Rodríguez would view the law enforcement approaches of both New Haven and Danbury as occupying different points on a broad spectrum of acceptable local responses to undocumented immigration. Discussing laws that discourage municipal officials from sharing immigration information with the federal government, Rodríguez argues that

[w]hen understood in contrast to the willingness of some police departments to enter into 287(g) agreements to cooperate with federal officials to enforce immigration laws, the existence of sanctuary laws highlights the range of views held by public officials and local communities on the subject of how best to interact with unauthorized populations—a judgment that goes to the heart of a city’s ability to promote public health, safety, and welfare, and to govern its residents.¹⁵⁶

¹⁵¹ *Id.* at 567.

¹⁵² *Id.* at 604.

¹⁵³ *Id.* at 631.

¹⁵⁴ *See* Bailey, *supra* note 45.

¹⁵⁵ P.A. 13-155, *supra* note 144.

¹⁵⁶ *Id.* at 603 (footnote and citation omitted).

Thus, for Rodríguez, New Haven and Danbury might exemplify how municipalities will, and should be permitted to, react differently to the issues associated with influxes of immigrants into their jurisdictions.

Allowing those states and localities that are particularly affected by immigrant inflows to regulate immigration may also benefit immigrants by preventing the passage of restrictionist legislation at the federal level, Peter Spiro has argued.¹⁵⁷ Under this “steam-valve” theory of federalism, “states harboring intense anti-alien sentiments [are permitted] to act on those sentiments at the state”¹⁵⁸ rather than the federal level, such that “one state’s preferences, frustrated at home, are not visited on the rest of [the nation] by way of Washington.”¹⁵⁹ While some might fear that allowing states to enact regulations hostile to immigrants would lead to a “race to the bottom,”¹⁶⁰ Spiro reasons that because “states will be forced to weigh the assumed savings of anti-alien measures against the costs associated with interstate and international opprobrium provoked by such discrimination,”¹⁶¹ the high economic and political costs will cause at least some states to refrain from passing restrictionist measures.¹⁶²

Beyond arguments that the impact of immigration of states and localities should entitle them to a greater role in its regulation, scholars have also invoked “traditional federalism values”¹⁶³ in the immigration context to argue for subfederal entities’ increased involvement. For example, Clare Huntington identifies “four central benefits”¹⁶⁴ of federalism that are applicable to the immigration context: experimentation, increased efficiency achieved through regulatory

¹⁵⁷ See Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 CONN. L. REV. 1627, 1627 (1997).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 1628.

¹⁶¹ *Id.* at 1627.

¹⁶² See *id.* at 1627-28.

¹⁶³ Huntington, *supra* note 82, at 826.

¹⁶⁴ *Id.* at 827.

competition, greater “political accountability and participation,”¹⁶⁵ and “checks against national power.”¹⁶⁶ Huyen Pham closely examines how these values were harmed by the passage of two federal laws in 1996 that mandated that local government employees be allowed to voluntarily report an individual’s immigration status to federal enforcement authorities.¹⁶⁷ These laws passed as a reaction to local non-cooperation laws that varied in form but generally restricted local governments’ ability to cooperate with federal immigration enforcement authorities.¹⁶⁸ With regard to experimentation, Pham laments that because these non-cooperation laws were preempted by the 1996 laws, other local governments would be deprived of the opportunity to gauge the laws’ success and either replicate or decide not to adopt them.¹⁶⁹ Pham also argues that the 1996 laws diminished and confused political accountability by “enabling the federal government to insert itself between local governments and their constituents,”¹⁷⁰ suggesting that constituents will assume that allowing municipal employees to report individuals’ immigration statuses to federal enforcement authorities is a local, as opposed to federal, mandate.¹⁷¹

Critics of state and local involvement in immigration regulation cite numerous countervailing concerns, such as the protection of antidiscrimination norms and individual rights, the shaping of a national identity, and the negative externalities created by restrictionist subfederal measures.

A fundamental concern expressed by critics of subfederal immigration regulation is that allowing such regulation will undermine antidiscrimination norms at the state and local levels.

¹⁶⁵ *Id.* at 828.

¹⁶⁶ *Id.*

¹⁶⁷ See Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373, 1376 (2006).

¹⁶⁸ See *id.* at 1374-75.

¹⁶⁹ *Id.* at 1404.

¹⁷⁰ *Id.* at 1403.

¹⁷¹ *Id.* at 1401.

This position has been articulated by Michael Wishnie, who argues that permitting Congress to devolve its immigration and immigration-related powers to the states “should be rejected to preserve the vitality of equality principles at the subfederal level.”¹⁷² Specifically, Wishnie emphasizes that the plenary power doctrine shields the federal government from challenges to federal laws on equal protection grounds, subjecting those laws only to rational basis review.¹⁷³ By contrast, state laws affecting immigrants have been subject to closer judicial scrutiny.¹⁷⁴

Wishnie illustrates this point by contrasting two cases, *Graham v. Richardson*¹⁷⁵ and *Mathews v. Diaz*,¹⁷⁶ which address the issue of alienage discrimination—that is, discrimination against noncitizens. The Court in *Graham* held that Arizona and Pennsylvania welfare laws that conditioned eligibility for benefits on citizenship as well as, in Arizona’s case, duration of residency violated the Equal Protection Clause of the Fourteenth Amendment.¹⁷⁷ Noting that “classifications based on alienage ... are inherently suspect and subject to close judicial scrutiny,” the Court described noncitizens as “a prime example of a ‘discrete and insular minority’ for whom such heightened judicial solicitude is appropriate.”¹⁷⁸ Balancing this against Arizona and Pennsylvania’s interest “in favoring [their] own citizens over aliens in the distribution of limited resources such as welfare benefits,”¹⁷⁹ the Court decided that “a State’s desire to preserve limited welfare benefits for its own citizens is inadequate to justify” restricting access to welfare benefits on the basis of alienage.¹⁸⁰

In *Mathews v. Diaz*, however, the Court held that the federal government could

¹⁷² Wishnie, *supra* note 84, at 554.

¹⁷³ *See id.* at 501.

¹⁷⁴ *Id.* at 501-02.

¹⁷⁵ 403 U.S. 365 (1971).

¹⁷⁶ 426 U.S. 67 (1976).

¹⁷⁷ *Graham*, 403 U.S. at 376.

¹⁷⁸ *Id.* at 372 (footnotes and citation omitted).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 374.

constitutionally “condition an alien’s eligibility for participation in a federal medical insurance program on continuous residence in the United States for a five-year period and admission for permanent residence.”¹⁸¹ The Court in *Mathews* rested its decision on the sweeping scope of the federal immigration authority, stating that “[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.”¹⁸² Distinguishing its earlier decision in *Graham*, the Court in *Mathews* explained that

[i]nsofar as state welfare policy is concerned, there is little, if any, basis for treating persons who are citizens of another State differently from persons who are citizens of another country. Both groups are noncitizens as far as the State’s interests in administering its welfare programs are concerned. Thus, a division by a state of the category of persons who are not citizens of that State into subcategories of United States citizens and aliens has no apparent justification, whereas, a comparable classification by the Federal Government is a routine and normally legitimate part of its business.¹⁸³

As Wishnie notes, this distinction between state and federal alienage classifications persists, such that “state alienage classifications have been subjected to strict scrutiny and generally invalidated, whereas federal alienage classifications have been reviewed for rationality and generally upheld.”¹⁸⁴

Wishnie’s concern is that extending authority over immigration to state and local governments would “amplify [the] distortion”¹⁸⁵ created by the plenary power doctrine at the federal level, which “distort[s] constitutional jurisprudence and countenance[es] what otherwise

¹⁸¹ *Mathews*, 426 U.S. at 69.

¹⁸² *Id.* at 79-80.

¹⁸³ *Id.* at 85 (footnote omitted).

¹⁸⁴ Wishnie, *supra* note 84, at 507 (footnote and citations omitted).

¹⁸⁵ *Id.* at 553.

would be invalidated as arbitrary or discriminatory government behavior”¹⁸⁶ by applying only rational basis review to federal immigration laws. According to Wishnie, expanding subfederal control over immigration will “privileg[e] the plenary power doctrine over equal protection norms at the state and local level,”¹⁸⁷ undermining the antidiscrimination principles that may be invoked to challenge restrictionist state and local immigration measures.¹⁸⁸ For Wishnie, the need to protect these principles is critically important, especially given the “recurring state and local impulse to enact anti-immigrant socioeconomic legislation,”¹⁸⁹ although this view has been subject to significant challenges.¹⁹⁰

Wishnie’s argument that “devolution [of the power to regulate immigration and immigrants to the states] would erode the antidiscrimination and anticaste principles that are at the heart of our Constitution and that long have protected noncitizens at the subfederal level”¹⁹¹ relies on the assumption that localities permitted to enact provisions pertaining to immigration will by and large enact anti-immigrant measures. At both the state (discussed subsequently) and local levels, Connecticut’s experience belies this assumption. Despite the perhaps inordinate media focus on the restrictionist actions undertaken by officials in Danbury, the fact remains that three of Connecticut’s major cities have, contrary to Wishnie’s predictions, adopted measures designed to protect and further the rights of immigrants within their jurisdictions. Stamford’s establishment of a “no-hassle zone” where day laborers can secure work, New Haven and Hartford’s adoption of “don’t ask, don’t tell” approaches to immigration status, and New Haven’s resistance to Secure Communities and issuance of a municipality identity card all evince

¹⁸⁶ *Id.* (citations omitted).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 554 (footnote and citations omitted).

¹⁹⁰ *See, e.g.,* Schuck, *supra* note 118, at 59-64; Huntington, *supra* note 82, at 834-35.

¹⁹¹ Wishnie, *supra* note 84, at 553 (citations omitted).

a desire to support immigrants and assist them in integrating into their communities. Moreover, while Wishnie warns of “the possibility of a race-to-the-bottom among states”¹⁹² (and presumably, localities), the adoption of restrictionist measures in Danbury does not appear to have triggered a rash of Connecticut municipalities enacting anti-immigrant legislation.

A second justification for preserving the federal exclusivity principle is that immigration implicates the process of “national self-definition.”¹⁹³ Thus, Hiroshi Motomura argues that because immigration policy determinations “reflect and define a sense of immigration and citizenship that is (and should be) national, . . . immigration exceptionalism is appropriate for federalism purposes.”¹⁹⁴ While Motomura also acknowledges the importance of immigrants’ rights, he emphasizes that federal control over immigration is critical to continue the collective shaping of a national identity.¹⁹⁵ For Motomura, expanding state and local involvement in immigration regulation will undermine the “incremental process by which we define national citizenship and thus, over time, our future as a nation.”¹⁹⁶

However, as Huntington argues, it is not clear that national self-definition should take precedence over “the state and local interest in ‘self-preservation.’”¹⁹⁷ Moreover, Huntington maintains that self-definition does not happen solely at the national level, but may also take place regionally.¹⁹⁸ The interest in self-definition arguably extends even further, to the local level. The approaches to undocumented immigration taken by officials in New Haven and Danbury are certainly as expressive as they are practical. For example, public comments from municipal

¹⁹² *Id.* at 554 (citations omitted).

¹⁹³ Motomura, *supra* note 89, at 1374.

¹⁹⁴ *Id.* at 1365.

¹⁹⁵ *See id.* at 1394.

¹⁹⁶ *Id.*

¹⁹⁷ Huntington, *supra* note 82, at 814. Indeed, Huntington goes on to argue that “the dichotomy between self-definition and self-preservation is not sufficiently clear that it can bear the weight of a constitutional mandate for federal exclusivity.” *Id.* at 815.

¹⁹⁸ *See id.* at 815-16.

officials have reinforced the messages sent by the policies they have adopted. Explaining his attempts to make immigrants feel welcome in New Haven, DeStefano said: ““You have this population that works hard and lives among us as neighbors; we ought to know who they are. The last thing you want is them not to talk to City Hall because they are afraid of us.””¹⁹⁹ By contrast, Boughton has focused on the costs imposed on Danbury by its newcomers, and on the discomfort felt by Danbury residents in the face of the city’s rapidly changing population, noting that he ““get[s] complaints at a two- or three-a-day clip from longtime residents about culture clashes.””²⁰⁰

Keith Cunningham-Parmeter advances a version of the national identity justification for federal exclusivity, arguing that states involved in immigration regulation “export identity-based harms to the nation”²⁰¹ in part by encouraging Tieboutian sorting, which in turn undermines “shared values such as individualism, egalitarianism, and pluralism.”²⁰² More tangible is Cunningham-Parmeter’s argument that the federalism benefits of state experimentation with immigration regulation are difficult, if not impossible, to achieve within the current immigration system. Cunningham-Parmeter maintains that because of federal exclusivity, states attempting to experiment with immigration regulation face “a narrow set of enforcement decisions based on federally defined norms.”²⁰³ Given these constraints, Cunningham-Parmeter claims, states cannot engage in successful experimentation because they are unable to “fully internalize costs or yield replicable results.”²⁰⁴ According to Cunningham-Parmeter, because states lack “regulatory

¹⁹⁹ Jennifer Medina, *New Haven Welcomes a Booming Population of Immigrants, Legal or Not*, N.Y. TIMES, Mar. 5, 2007, http://www.nytimes.com/2007/03/05/nyregion/05haven.html?pagewanted=all&_r=0.

²⁰⁰ Spencer, *supra* note 48.

²⁰¹ Keith Cunningham-Parmeter, *Forced Federalism: States As Laboratories of Immigration Reform*, 62 HASTINGS L.J. 1673, 1714 (2011).

²⁰² *Id.* at 1723.

²⁰³ *Id.* at 1673.

²⁰⁴ *Id.* at 1677.

autonomy”²⁰⁵ over immigration, they are unable to innovate on a scale that can provide potential solutions to the most pressing national immigration issues, such as “whether to tighten border security, expand the nation’s guestworker program, or grant amnesty to unauthorized immigrants.”²⁰⁶ However, the structural limitations on state experimentalism that Cunningham-Parmeter emphasizes result from the presumption of federal exclusivity, and may presumably be remedied by relaxing the federal exclusivity principle as other commentators have suggested.

Given the weaknesses in these defenses of the federal exclusivity principle, and the fact that federal exclusivity arguments may easily be employed to preempt pro-immigrant in addition to restrictionist state and local measures, supporters of immigrants’ rights may well question the wisdom of attacking restrictionist actions taken at the state and local level by continuing to argue for the federal government’s primacy over immigration. But does relaxing the federal exclusivity principle necessarily mean that regardless of whether a state or local measure is pro-immigrant or restrictionist, it should be allowed to stand?

Lucas Guttentag suggests that to distinguish “between [subfederal] measures that further immigrant equality ... and laws that threaten to engender discrimination,” courts evaluating whether such measures are preempted should “look beyond the confines of the immigration statute and immigrant control” to other federal equality norms.²⁰⁷ Specifically, Guttentag argues that courts should consider what he terms an “immigrant equality norm”²⁰⁸ grounded in the Civil Rights Act of 1870’s proscription of alienage discrimination by the states.²⁰⁹ Guttentag points to section 16 of the 1870 Civil Rights Act, which provides

²⁰⁵ *Id.* at 1726.

²⁰⁶ *Id.* at 1679 (citation omitted).

²⁰⁷ Lucas Guttentag, *The Forgotten Equality Norm in Immigration Preemption: Discrimination, Harassment, and the Civil Rights Act of 1870*, 8 DUKE J. CONST. L. & PUB. POL’Y 1, 2, 52 (2013).

²⁰⁸ *Id.* at 51.

²⁰⁹ *Id.* at 3.

[t]hat all persons within the jurisdiction of the United States shall have the same right in every State and Territory in the United States to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens,²¹⁰

While Guttentag notes that Congress enacted section 16 largely out of concern about discrimination against Chinese immigrants, he argues that over the next several decades, the Supreme Court relied on the Act to “preempt[] discriminatory state and local welfare, business, and registration laws that targeted immigrants.”²¹¹ Through this series of cases,²¹² Guttentag argues, the “alien anti-discrimination provisions”²¹³ of the 1870 Civil Rights Act became part of “the federal framework governing immigration and immigrants.”²¹⁴

For example, Guttentag cites the case of *Yick Wo v. Hopkins*, in which the Supreme Court held that the Equal Protection Clause protected Chinese immigrants from discrimination in the enforcement of San Francisco’s laundry ordinances.²¹⁵ Guttentag highlights that the Court quoted section 16 of the 1870 Civil Rights Act,²¹⁶ then stated that “the rights of every citizen of the United States” are to be treated “equally with those of the strangers and aliens who now invoke the jurisdiction of the court.”²¹⁷

Like Wishnie, Guttentag also relies on *Graham v. Richardson*,²¹⁸ but as support for the

²¹⁰ Civil Rights Act of 1870 § 16.

²¹¹ *Id.* at 10.

²¹² In addition to *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), and *Graham v. Richardson*, 403 U.S. 365 (1971), discussed subsequently, Guttentag includes in this line of cases *Hines v. Davidowitz*, 312 U.S. 52 (1941) (striking down a Pennsylvania statute that mandated alien registration) and *Takahashi v. California Fish & Game Commission*, 334 U.S. 410 (1948) (striking down a California law barring the issuance of commercial fishing licenses to aliens “ineligible to citizenship”). Guttentag, *supra* note 207, at 27.

²¹³ *Id.*

²¹⁴ *Id.* at 3.

²¹⁵ 118 U.S. 356 (1886).

²¹⁶ See Guttentag, *supra* note 207, at 28.

²¹⁷ *Yick Wo*, 118 U.S. at 369.

²¹⁸ 403 U.S. 365 (1971).

proposition that there is a federal norm barring alienage discrimination.²¹⁹ Thus, whereas Wishnie focuses on the Court’s equal protection holding,²²⁰ Guttentag focuses on *Graham*’s “second—and independent—holding” that federal law preempted the Arizona and Pennsylvania welfare laws.²²¹ Guttentag notes that in holding that the state restrictions were preempted, the Court quoted section 16 of the 1870 Civil Rights Act, which had been codified at 42 U.S.C. § 1981.²²² After stating that “[t]he protection of this statute has been held to extend to aliens as well as to citizens,”²²³ the Court concluded that “[s]tate laws that restrict the eligibility of aliens for welfare benefits merely because of their alienage conflict with these overriding national policies in an area constitutionally entrusted to the Federal Government.”²²⁴ Guttentag thus argues that “[t]he Court’s analysis [in *Graham*] stands unmistakably for the principle that the preemptive force of federal law derives not just from immigration-control statutes that regulate the admission, expulsion, and residence of non-citizens; preemption also enforces the prohibitions against discrimination originating” in section 16 of the 1870 Civil Rights Act.²²⁵

Although Guttentag acknowledges that after *Graham*, the antidiscrimination norm of the 1870 Civil Rights Act as a ground for federal preemption “has largely been overlooked or forgotten,”²²⁶ he argues that it should be resuscitated as a means of preempting certain state and local immigration regulation.²²⁷ Specifically, Guttentag argues that instead of confining themselves to the federal immigration framework, courts examining subfederal regulation of

²¹⁹ See Guttentag, *supra* note 207, at 37.

²²⁰ See Wishnie, *supra* note 84, at 505-06.

²²¹ See Guttentag, *supra* note 207, at 36.

²²² *Id.* at 37.

²²³ *Graham v. Richardson*, 403 U.S. 365, 377 (1971) (citing *Takahashi v. California Fish & Game Commission*, 334 U.S. 410, 419 n. 7 (1948)).

²²⁴ *Id.* at 378.

²²⁵ Guttentag, *supra* note 207, at 38.

²²⁶ *Id.* at 3.

²²⁷ See *id.*

immigration and immigrants should also ask whether such laws should be preempted because of their “discriminatory consequences.”²²⁸ Adding this layer of preemption analysis, Guttentag maintains, should enable courts to distinguish “[l]ocal measures that further equality and reduce discrimination” from those “that diminish equality or engender discrimination.”²²⁹ Under a federal framework that incorporates an anti-alienage discrimination norm, restrictionist state and local measures would be more easily preempted than pro-immigrant measures.²³⁰

Guttentag’s approach may thus be used to distinguish between Danbury and New Haven’s policies toward undocumented immigrants. Although Guttentag does not categorically condemn state and local “enforcement” laws,²³¹ he would argue that to the extent Danbury’s policies “single out immigrants for separate treatment, impose discriminatory burdens, or encourage disparate effects,”²³² they may be in conflict with federal antidiscrimination norms and could be preempted. By contrast, Guttentag would argue that New Haven’s promulgation of General Order 06-2 and issuance of municipal identity cards are measures consistent with the federal immigration equality norm, and thus should not be preempted. Rather, Guttentag explicitly identifies such immigrant-friendly measures, which are “designed to reduce the salience of immigration status for local matters,”²³³ as “not merely operating in the interstices of federal immigration enforcement requirements,” but also “affirmatively furthering” the immigrant equality norm.²³⁴

III. Recent Connecticut Regulation of Immigrants

In this section, I consider three recent laws passed by the Connecticut state legislature:

²²⁸ *Id.* at 40.

²²⁹ *Id.*

²³⁰ *See id.*

²³¹ *See id.* at 51.

²³² *Id.* at 42.

²³³ *Id.* at 48.

²³⁴ *Id.*

Public Act No. 11-43, An Act Concerning Access to Postsecondary Education [2011];²³⁵ Public Act No. 13-89, An Act Concerning the Issuance of Motor Vehicle Operators' Licenses [2013];²³⁶ and Public Act No. 13-155, An Act Concerning Civil Immigration Detainers [2013].²³⁷ All of the laws may be characterized as immigrant-friendly: the first allows undocumented immigrants who have completed four years of high school in Connecticut to pay in-state tuition rates at state universities and community colleges; the second allows undocumented immigrants, subject to certain conditions, to obtain driver's licenses; and the third limits the authority of law enforcement officers to hold individuals pursuant to civil immigration detainers.

In enacting these immigrant-friendly laws, Connecticut stands as an interesting counterpoint to states whose restrictive laws generally command greater publicity and perhaps disproportionately influence debates about the desirability of state involvement in immigration regulation. In this section, I closely examine the arguments advanced for and against the legislation in committee hearings and debates in the House of Representatives and Senate. To some degree, these arguments reflect the previously discussed policy analyses advanced by legal scholars, but they also powerfully illustrate the additional normative concerns that are brought to light when “the local debate over immigration is permitted to run its course.”²³⁸

A. Public Act No. 11-43, An Act Concerning Access to Postsecondary Education [2011]

Signed into law by Governor Dannel Malloy on June 13, 2011, Public Act No. 11-43, An Act Concerning Access to Postsecondary Education, enables students who are undocumented immigrants to pay in-state tuition rates at state postsecondary institutions, provided that they

²³⁵ 2011 Conn. Legis. Serv. P.A. 11-43 (H.B. 6390) (West) [hereinafter P.A. 11-43].

²³⁶ 2013 Conn. Legis. Serv. P.A. 13-89 (H.B. 6495) (West) [hereinafter P.A. 13-89].

²³⁷ P.A. 13-155, *supra* note 144.

²³⁸ Rodríguez, *supra* note 80, at 639.

meet a number of conditions.²³⁹ Under the law, in order to qualify for in-state tuition rates, a student who is an undocumented immigrant must complete four years of high school in Connecticut and graduate; register or be enrolled at a public postsecondary institution in Connecticut; and file an affidavit with that institution “stating that he or she has filed an application to legalize his or her immigration status, or will file such an action as soon as he or she is eligible to do so.”²⁴⁰

The bill was the Connecticut legislature’s second attempt to secure in-state tuition rates for undocumented immigrant students. In 2007, a similar bill passed the Senate and House, both with a Democratic majority, but was ultimately vetoed by then-Governor Jodi Rell, a Republican.²⁴¹ Rell’s office released a statement explaining her position, in which she raised a number of arguments that were repeated in later debates by opponents of the second bill. While acknowledging that “these students are not responsible for their undocumented status, having come to the United States with their parents,” Rell underscored “[t]he fact ... that these students and their parents are here illegally.”²⁴² Rell also raised the concern that the bill’s requirement that students either apply to legalize their status or affirm that they will apply when eligible would effectively alert the federal government to their unlawful presence, which “would greatly increase the likelihood that they would be deported.”²⁴³ Most interestingly, Rell’s statement expressed significant deference to the federal government’s authority over immigration regulation and concern that the bill’s enactment would attract undocumented immigrants to Connecticut. Noting that she wished to avoid “encourag[ing] individuals to circumvent federal

²³⁹ See P.A. 11-43, *supra* note 235.

²⁴⁰ *Id.*

²⁴¹ OFFICE OF GOVERNOR M. JODI REL, GOVERNOR RELL VETOES BILL TO PROVIDE IN-STATE TUITION TO ILLEGAL ALIENS (Feb. 20, 2012), <http://www.ct.gov/governorrell/cwp/view.asp?A=2791&Q=385102>.

²⁴² *Id.*

²⁴³ *Id.*

immigration laws,” Rell expressed concern that “the bill, by providing benefits to undocumented aliens, may serve to encourage others to come to Connecticut in violation of federal immigration law.”²⁴⁴ Ultimately, Rell concluded that such immigration issues should be decided by Congress, stating that “the most prudent course for the State of Connecticut is to wait for resolution at the federal level.”²⁴⁵

In ultimately passing Public Act No. 11-43, Connecticut followed the lead of several other states which had enacted legislation giving undocumented immigrants access to in-state tuition rates. The first state to do so was Texas, in June 2001.²⁴⁶ California passed similar legislation later that year.²⁴⁷ Texas and California were followed by Utah²⁴⁸ and New York²⁴⁹ in 2002, Washington,²⁵⁰ Oklahoma,²⁵¹ and Illinois²⁵² in 2003, Kansas²⁵³ in 2004, New Mexico²⁵⁴ in 2005, Nebraska²⁵⁵ in 2006, Wisconsin²⁵⁶ in 2009, and Maryland²⁵⁷ and Connecticut in 2011. Connecticut has been followed in 2013 by Oregon,²⁵⁸ Colorado,²⁵⁹ and Minnesota.²⁶⁰

In 2007, however, the Oklahoma legislature changed its law to allow the Oklahoma Board of Regents to determine whether to grant in-state tuition rates to undocumented

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ H.B. 1403, 77th Leg., Reg. Sess. (Tex. 2001).

²⁴⁷ Assemb. B. 540, 2001-02 Leg., Reg. Sess. (Cal. 2001).

²⁴⁸ H.B. 144, 54th Leg., Gen. Sess. (Utah 2002).

²⁴⁹ S.B. 7784, 225th Leg., 2001-02 Sess. (N.Y. 2002).

²⁵⁰ H.B. 1079, 58th Leg., Reg. Sess. (Wash. 2003).

²⁵¹ S.B. 596, 49th Leg., 1st Reg. Sess. (Okla. 2003).

²⁵² H.B. 60, 93rd Gen. Assemb., Reg. Sess. (Ill. 2003).

²⁵³ H.B. 2145, 177nd Leg., Reg. Sess. (Kan. 2004).

²⁵⁴ S.B. 582, 47th Leg., 1st Reg. Sess. (N.M. 2005).

²⁵⁵ Leg. B. 239, 99th Leg., 2d Reg. Sess. (Neb. 2006).

²⁵⁶ Assemb. B. 75, 2009-10 Leg., Reg. Sess. (Wis. 2009) (repealed 2011).

²⁵⁷ S.B. 167, 2011 Leg., Reg. Sess. (Md. 2011).

²⁵⁸ H.B. 2787, 77th Leg., Reg. Sess. (Or. 2013).

²⁵⁹ S.B. 33, 69th Leg., 1st Reg. Sess. (Colo. 2013).

²⁶⁰ S.F. 1236, 88th Leg., Reg. Sess. (Minn. 2013).

students.²⁶¹ The Oklahoma Board of Regents continues to permit undocumented students who meet certain requirements to qualify for in-state tuition rates.²⁶² Wisconsin repealed its in-state tuition law in 2011.²⁶³

State higher education boards have also taken initiative to extend in-state tuition rates to undocumented students. In 2011, the State Board of Governors for Higher Education in Rhode Island made in-state tuition rates available to undocumented immigrant students at public higher educational institutions.²⁶⁴ In February 2013, the University of Hawaii's Board of Regents did the same for public colleges in Hawaii.²⁶⁵

California's in-state tuition statute²⁶⁶ came under fire from American citizens paying out-of-state tuition rates at California's public universities and colleges in *Martinez v. Regents of the*

²⁶¹ H.B. 1804, 51st Leg., 1st Reg. Sess. (Okla. 2007).

²⁶² See NAT'L CONFERENCE OF STATE LEGISLATURES, *Undocumented Student Tuition: Overview* (July 2013), <http://www.ncsl.org/research/education/undocumented-student-tuition-overview.aspx>.

²⁶³ Assemb. B. 40, 2011-2012 Leg., Reg. Sess. (Wis. 2011).

²⁶⁴ *Residency Policy*, R.I. BD. OF GOVERNORS FOR HIGHER EDUC. (Nov. 26, 2011), <http://www.ribghe.org/residency1for2012.pdf>.

²⁶⁵ *Regents Approve Undocumented Immigrant Policy*, UNIV. OF HAW. NEWS (Feb. 26, 2013), <http://www.hawaii.edu/news/2013/02/26/regents-approve-undocumented-immigrant-policy/>.

²⁶⁶ Section 68130.5 of the California Education Code states in relevant part that

(a) A student, other than a nonimmigrant alien ... who meets all of the following requirements shall be exempt from paying nonresident tuition at the California State University and the California Community Colleges:

- (1) High school attendance in California for three or more years.
- (2) Graduation from a California high school or attainment of the equivalent thereof.
- (3) Registration as an entering student at, or current enrollment at, an accredited institution of higher education in California not earlier than the fall semester or quarter of the 2001-02 academic year.
- (4) In the case of a person without lawful immigration status, the filing of an affidavit with the institution of higher education stating that the student has filed an application to legalize his or her immigration status, or will file an application as soon as he or she is eligible to do so. ...

Cal. Educ. Code § 68130.5 (West, Westlaw Next through all of the 2013 Regular Session and all of the 2013-14 First Extraordinary Session) [hereinafter Cal. Educ. Code § 68130.5].

University of California.²⁶⁷ Decided in 2010 by the California Supreme Court, *Martinez* held that federal immigration laws did not preempt California’s granting of in-state tuition status to certain undocumented immigrants.²⁶⁸ The plaintiffs in *Martinez* argued that California’s statute, which permits undocumented immigrants to pay in-state tuition rates provided that they attended a California high school for three years and graduated, registered at one of California’s public colleges or universities, and filed an affidavit stating that they had applied to legalize their immigration status or would do so as soon as they became eligible,²⁶⁹ was expressly preempted by federal immigration law, namely 8 U.S.C. § 1623.²⁷⁰ Section 1623 codifies section 505 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), which provides that “an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State ... for any postsecondary education benefit unless a citizen or national of the United States is eligible for” the same benefit, regardless of residency.²⁷¹ Disagreeing with both the plaintiffs and the court of appeals, the California Supreme Court found that California’s exemption of undocumented immigrants from paying out-of-state tuition rates was “not based on residence in California.”²⁷² Rather, the court cited other requirements on which the exemption was based, including the student’s attendance for three years and graduation from a California high school and indication in an affidavit of the student’s intent to obtain legal immigrant status.²⁷³ The court emphasized that under these criteria, even nonresidents, including U.S. citizens residing in other states, could gain entitlement to the exemption, because “[a]ttending

²⁶⁷ 241 P.3d 855 (Cal. 2010).

²⁶⁸ *Id.*

²⁶⁹ See Cal. Educ. Code § 68130.5, *supra* note 266.

²⁷⁰ *Martinez*, 241 P.3d at 859.

²⁷¹ 8 U.S.C.A. § 1623 (West, WestlawNext through P.L. 113-52 approved Nov. 21, 2013) [hereinafter 8 U.S.C.A. § 1623].

²⁷² *Martinez*, 241 P.3d at 860.

²⁷³ *Id.* at 863.

high school in California for at least three years and meeting the other requirements are not the functional equivalent of residing in California.”²⁷⁴ Thus, the court held that section 1623 did not expressly preempt California’s in-state tuition statute.

The *Martinez* plaintiffs also argued that California’s nonresident tuition exemption for undocumented immigrants was expressly preempted by 8 U.S.C. § 1621(a), which codified section 411 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), passed by Congress just prior to IIRIRA.²⁷⁵ Section 1621(a) provides that an unlawful alien “is not eligible for any State or local public benefit.”²⁷⁶ The court pointed to 8 U.S.C. § 1621(d), however, which states:

A State may provide that an alien who is not lawfully present in the United States is eligible for any State or local public benefit for which such alien would otherwise be ineligible under subsection (a) of this section only through the enactment of a State law after August 22, 1996, which affirmatively provides for such eligibility.²⁷⁷

Citing language in the original bill that expressly included undocumented immigrants in its purview, the court held that the law “satisfie[d]” section 1621 by providing for undocumented immigrant students’ eligibility.²⁷⁸

Finally, in response to the plaintiffs’ argument that California’s in-state tuition statute was impliedly preempted, both because it conflicted with sections 1621 and 1623 and because Congress meant “to occupy the legislative field,”²⁷⁹ the court responded that section 1621 expressly allows states to extend public benefits to undocumented immigrants under certain

²⁷⁴ *Id.* at 864.

²⁷⁵ *See id.* at 866.

²⁷⁶ 8 U.S.C.A. § 1621(a) (West, WestlawNext through P.L. 113-52 approved Nov. 21, 2013).

²⁷⁷ 8 U.S.C.A. § 1621(d) (West, WestlawNext through P.L. 113-52 approved Nov. 21, 2013).

²⁷⁸ *Martinez*, 241 P.3d at 866-68.

²⁷⁹ *Id.* at 868 (quoting *Altria Grp., Inc. v. Good*, 555 U.S. 70, 76 (2008)) (internal quotation marks omitted).

circumstances.²⁸⁰ California’s statute was not impliedly preempted, the court concluded, because “Congress did not impliedly prohibit what it expressly permitted.”²⁸¹

In the discussion that follows, I consider arguments raised at a public hearing before the Higher Education Committee, as well as by state legislators in the House and Senate debates. I have grouped the arguments into four categories: arguments concerning the state’s economic wellbeing; arguments about equity; “law-and-order” arguments;²⁸² and arguments about the proper role of the state vis-à-vis the federal government in the area of immigration regulation.

Both supporters and opponents of the bill discussed at length its predicted effects on Connecticut’s economic wellbeing. These arguments encompassed both the bill’s immediate fiscal impact and its long-term effects. With regard to present impact, proponents of the bill emphasized that it had a fiscal note of zero.²⁸³ There would be no financial impact, supporters explained, because certain state higher educational institutions were not at capacity, so enabling undocumented students to fill otherwise open spaces by paying in-state tuition would actually be a gain for the state.²⁸⁴ This argument was articulated by State Representative Roberta Willis in the House debate:

Our community colleges and our CSU, state university systems have adequate spaces and slots for additional students. In fact, this bill would have a positive impact on the state’s finances, because it

²⁸⁰ *Id.*

²⁸¹ *Id.* at 869.

²⁸² Jill Esbenschade et al., *The “Law-and-Order” Foundation of Local Ordinances: A Four-Locale Study of Hazleton, PA, Escondido, CA, Farmers Branch, TX, and Prince William County, VA*, in *TAKING LOCAL CONTROL: IMMIGRATION POLICY ACTIVISM IN U.S. CITIES AND STATES* 255, 267 (Monica W. Varsanyi ed., 2010).

²⁸³ Conn. Sen., Floor Debate, 2011 Sess. (May 24, 2011), available at <http://search.cga.state.ct.us/adv/dtsearch.asp?cmd=getdoc&DocId=29875&Index=I%3a\zindex\2011&HitCount=24&hits=d+e+f+145+146+147+166+167+168+26a+26b+26c+da2+da3+da4+1456f+14570+14571+1458f+14590+14591+1461d+1461e+1461f+&hc=30&req=May+24%2C+2011&Item=1> [hereinafter Conn. Sen. In-State Tuition Debate] (statement of State Sen. Beth Bye).

²⁸⁴ *Id.*

would generate more tuition dollars. Because right now, the cost is prohibitive and these students cannot pay the out-of-state rates.²⁸⁵

Phrased differently, proponents argued that because many undocumented students are unable to pay out-of-state tuition, by allowing them to pay in-state tuition and fill open slots, “the state would be getting the in-state tuition from students who otherwise would not be attending if they had to pay the out-of-state tuition price.”²⁸⁶ Supporters of the bill also pointed to other states that had passed similar legislation, noting that they had subsequently realized revenue gains.²⁸⁷

Beyond these predictions of immediate effects, the bill’s proponents placed significant emphasis on what they argued would be the long term economic benefits to Connecticut from allowing undocumented immigrants to pay in-state tuition. In the committee hearing and legislative debates, supporters of the bill repeatedly, and in slightly varying formulations, advanced the argument that undocumented immigrants allowed to pay in-state tuition would later contribute to economic growth in Connecticut by remaining in the state and expanding its educated workforce. This argument was framed before the Higher Education Committee by State Senator Martin Looney, who argued that the bill would “strengthen[] the labor market, by slowing the rate of loss of talented workers and increasing the number of taxpayers, thus reducing the overall burden on families.”²⁸⁸ Noting that “those who have college degrees are more likely to build careers in Connecticut and be able to be even more significantly contributing members of our society, as time goes on,” Looney concluded his remarks by tying the bill to

²⁸⁵ Conn. H., Floor Debate, 2011 Sess. (May 12, 2011), *available at* <http://search.cga.state.ct.us/adv/dtsearch.asp?cmd=getdoc&DocId=29867&Index=I%3a\zindex\2011&HitCount=15&hits=e+f+10+34e+34f+350+36e+36f+370+90ff+9100+9101+911e+911f+9120+&hc=18&req=May+12%2C+2011&Item=0> [hereinafter Conn. H. In-State Tuition Debate] (statement of State Rep. Roberta Willis).

²⁸⁶ Conn. Sen. In-State Tuition Debate, *supra* note 283 (statement of State Sen. Beth Bye).

²⁸⁷ *See, e.g., id.*

²⁸⁸ Conn. Joint Standing Committee Hearings, Higher Education and Employment Advancement, 2011 Sess. (Mar. 15, 2011), *available at* <http://search.cga.state.ct.us/adv/dtsearch.asp?cmd=getdoc&DocId=6730&Index=I%3a\zindex\2011&HitCount=1&hits=6e7f+&hc=52&req=6390&Item=0> [hereinafter Higher Education Committee Hearing] (statement of State Sen. Martin Looney).

Connecticut's future economic competitiveness: "[T]he only way [in] which Connecticut will be able to compete in the future, is through a highly-skilled and advanced and sophisticated workforce. This will help us to meet those needs in the future."²⁸⁹

The bill's Republican detractors, by contrast, argued that the bill could have a large negative financial impact on the state, and were skeptical of Connecticut's ability to realize the future economic benefits forecast by the bill's proponents. First, opponents of the bill expressed the concern, articulated by then-Governor Rell when she vetoed the bill's predecessor in 2007, that allowing undocumented immigrants to pay in-state tuition rates would incentivize undocumented immigrants in nearby states to attempt to take advantage of the law by moving their families to Connecticut. As phrased by State Senator John McKinney,

if New York or Massachusetts or Rhode Island or New Jersey didn't have this policy and you lived in one of those states, maybe you lived close to the border of Connecticut, what would you do? I would move and every parent would move with the option of getting their child a college education that's affordable. So if Connecticut is offering this, ... and other states aren't, are we then going to attract more people?²⁹⁰

Second, the bill's opponents repeatedly attacked the argument that enabling undocumented immigrants to pay in-state tuition rates would lead to long-term economic growth by pointing out that Connecticut prohibits employers from knowingly hiring undocumented workers. Thus, State Representative Vincent Candelora questioned the underlying assumption "that these individuals are going to graduate from these institutions and become a productive part of our workforce," arguing that "[t]he dilemma here is that under current law, these individuals cannot get a job, not only in the state of Connecticut or anywhere in the United States."²⁹¹ Likewise, offering a subsequently rejected amendment that would require undocumented immigrants to secure "an

²⁸⁹ *Id.*

²⁹⁰ Conn. Sen. In-State Tuition Debate, *supra* note 283 (statement of State Sen. John McKinney).

²⁹¹ Conn. H. In-State Tuition Debate, *supra* note 285 (statement of State Rep. Vincent Candelora).

approved immigration sponsor”²⁹² in order to be classified as in-state students, State Senator Toni Boucher lamented that while the bill would allow undocumented immigrants to “spend four years in our State institutions at a lower cost, when they graduate they cannot get a job and they can’t vote.”²⁹³

Both sides also advanced arguments invoking equitable considerations. Supporters of the bill argued that undocumented students should not be penalized for their parents’ decision to enter the United States without documentation. “This bill is for those undocumented children whose parents brought them to our country without proper documentation and [through] no fault of their own,”²⁹⁴ State Representative Juan Candelaria maintained in the House debate. Proponents of the bill also emphasized national values, such as State Senator Donald Williams, who argued that “[i]t is not the American way to visit the shortcomings of the parents upon the children.”²⁹⁵ Supporters highlighted the expressive power of this national values argument: then-State Representative John Hetherington stated that “[t]he message of America has always been, in its best days, we don’t care who your parents were, you can make whatever you decide to make of yourself. And this [bill] is consistent very much with that.”²⁹⁶ Finally, state legislators repeatedly cited *Plyler v. Doe*²⁹⁷ to support the proposition that undocumented students should be granted access to public education.²⁹⁸

Opponents of the bill countered with another fairness argument, contrasting undocumented immigrants with legal residents and asking why the former should be granted the

²⁹² Conn. Sen. In-State Tuition Debate, *supra* note 283 (statement of State Sen. Toni Boucher).

²⁹³ *Id.*

²⁹⁴ Conn. H. In-State Tuition Debate, *supra* note 285 (statement of State Rep. Juan Candelaria).

²⁹⁵ Conn. Sen. In-State Tuition Debate, *supra* note 283 (statement of State Sen. Donald Williams).

²⁹⁶ Conn. H. In-State Tuition Debate, *supra* note 285 (statement of State Rep. John Hetherington).

²⁹⁷ 457 U.S. 202 (1982).

²⁹⁸ See Conn. H. In-State Tuition Debate, *supra* note 285 (statement of State Rep. Roberta Willis); Conn. Sen. In-State Tuition Debate, *supra* note 283 (statement of State Sen. Martin Looney).

same privileges as the latter. As State Senator John Kissel, describing why his constituents “oppose this kind of legislation,”²⁹⁹ explained: “[A]s much as we can characterize the children of illegal immigrants as perhaps innocent to the process, there’s almost this notion that it’s unfair to those who do comply with the laws to grant equal benefits to those [whose] family members ... don’t.”³⁰⁰ Specifically, multiple legislators expressed concern that undocumented students would displace legal residents from spots in the entering class at the University of Connecticut. These legislators often framed the issue as a rhetorical question, asking how they should respond to their constituents whose children failed to gain admission to the University of Connecticut. One formulation was articulated by State Representative Pamela Sawyer: “[H]ow do we say to that student whose family has worked so hard to get them to where they are today, they are legal, they have applied to UConn, that they might lose a seat that they would qualify for to a student who is not here legally?”³⁰¹

This type of argument may also be characterized as a form of “law-and-order” argument.³⁰² Such arguments emphasize respect for the rule of law and the importance of immigrating to the United States through legal avenues. For example, speaking against the bill, then-State Senator Andrew Roraback stated that “our country is about the rule of law,”³⁰³ and argued that in moving toward the bill’s passage, “[state legislators] are on a collision course with the rule of law.”³⁰⁴ Following the proper procedures to immigrate to the United States, opponents of the bill argued, was “doing it the right way.”³⁰⁵ This sentiment was articulated by State Senator McKinney, who argued that by passing the bill, the legislature would be

²⁹⁹ Conn. Sen. In-State Tuition Debate, *supra* note 283 (statement of State Sen. John Kissel).

³⁰⁰ *Id.*

³⁰¹ Conn. H. In-State Tuition Debate, *supra* note 285 (statement of State Rep. Pamela Sawyer).

³⁰² See Esbenshade et al., *supra* note 282, at 267.

³⁰³ Conn. Sen. In-State Tuition Debate, *supra* note 283 (statement of State Sen. Andrew Roraback).

³⁰⁴ *Id.*

³⁰⁵ *Id.* (statement of State Sen. John Kissel).

sending a message of, it doesn't matter if you did it the right way or not. ... [B]y a stroke of a pen, we can be changing a policy that very well will mean that someone who is here properly, who is here legally, whose parents did it the right way will not get that spot. It may be only two or four [undocumented students] at UConn. It may grow to be more, but to me, that message of fairness for all overrides the message of hope for some couple of hundred.³⁰⁶

Moreover, opponents of the bill repeatedly highlighted the difficulties faced by those who immigrated to the United States legally. State legislators often contrasted undocumented immigrants with the legislators' own family members who had undergone hardship to immigrate legally. For example, State Representative Tony Hwang stated that he would "vote against this bill out of respect for my parents and so many other great immigrants that came into this country. ... They went through hoops and obstacles to live out the American dream."³⁰⁷

Finally, opponents of the bill questioned whether, by extending in-state tuition rates to undocumented immigrants, Connecticut's legislature was attempting to engage in immigration reform that would potentially violate federal law, or would be more appropriately handled by the federal government. This perspective was advanced both at the Higher Education Committee hearing and at the Senate debate by State Senator Toni Boucher, who averred that "this issue definitely belongs at the federal level."³⁰⁸ Noting that "[w]e are embarking on many pieces of legislation this year that seem to go against federal law,"³⁰⁹ Boucher argued that the bill "doesn't address the central problem we have, and that is our immigration policies and our immigration laws."³¹⁰ This argument—that the bill detracted from the ultimate objective, federal immigration reform—was echoed by State Senator Andrew Roraback. While decrying the fact that

³⁰⁶ *Id.* (statement of State Sen. John McKinney).

³⁰⁷ Conn. H. In-State Tuition Debate, *supra* note 285 (statement of State Rep. Tony Hwang).

³⁰⁸ Higher Education Committee Hearing, *supra* note 288 (statement of State Sen. Toni Boucher).

³⁰⁹ Conn. Sen. In-State Tuition Debate, *supra* note 283 (statement of State Sen. Toni Boucher).

³¹⁰ *Id.*

undocumented youth “are punished by virtue of being born into a family that came here when they were kids unlawfully,”³¹¹ Roraback argued that rather than “nibbling around the edges and throwing this particular benefit at them,” state legislators should call on *federal* legislators to pass comprehensive immigration reform.³¹² The bill would in fact slow change at the national level, Roraback argued, because it “take[s] the pressure off the people in Washington to do the right thing by skirting around the edges as this bill does.”³¹³

Some proponents of the bill responded by arguing that “this [bill] is not about federal immigration reform; we can’t control that in this Circle.”³¹⁴ State Senator Bye emphasized that in considering such a bill, the state was not striking out on its own—“Connecticut would not be a leader”³¹⁵—but was rather following several states, including Texas, Utah, Kansas, Illinois, California, and Washington, and even the federal government, which, she noted, “has considered the Dream Act.”³¹⁶ Interestingly, however, other supporters of the bill explicitly advanced a state experimentation rationale, arguing that the bill could serve as an example for immigration reform at the federal level. State Senator Carlo Leone urged passage of the bill for this reason: “I think we can shape the policy of the federal government by trying to pass something like this, because then it at least shows them a path on how they can get it done.”³¹⁷ Even if the bill’s effects proved problematic, Leone argued, “we can either revise it, repeal it or make some other kind of changes to make it workable. But at least then there’s a model that the federal government can work with in making a path toward citizenship”³¹⁸

³¹¹ *Id.* (statement of State Sen. Andrew Roraback).

³¹² *Id.*

³¹³ *Id.*

³¹⁴ Conn. Sen. In-State Tuition Debate, *supra* note 283 (statement of State Sen. Beth Bye).

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ *Id.* (statement of State Sen. Carlo Leone).

³¹⁸ *Id.*

State legislators opposed to the bill also expressed concern that its passage would directly violate federal law, echoing legal claims raised by the plaintiffs in *Martinez v. Regents of the University of California*.³¹⁹ For example, while stating that he “personally like[d] the assertion of state rights,” State Representative John Shaban maintained that “[i]n the immigration context, however, it’s pretty clear that federal law preempts state law.”³²⁰ In the House debate, Shaban lambasted his fellow legislators for “picking and choosing what federal legislation we decide to follow.”³²¹ Specifically, multiple opponents of the bill, including Shaban, pointed to 8 U.S.C. § 1623, which, as noted previously, provides that an unlawful alien “shall not be eligible on the basis of residence within a State ... for any postsecondary education benefit unless a citizen or national of the United States is eligible for” the same benefit.³²² Citing this provision, Shaban argued that “[i]f we give in-state tuition to non documented aliens ..., then we have to give in-state tuition to everybody else.”³²³ State Representative Candelora also argued that by passing the bill, Connecticut would make itself a potential “victim of a federal lawsuit” that could prove enormously costly to the state.³²⁴ Candelora noted that “[t]here is no Second Circuit decision and no Connecticut Supreme Court decision that has ruled on this matter. So this would be new, uncharted waters for the state of Connecticut.”³²⁵ In response to such concerns, State Senator Bye argued along the lines of *Martinez* that because the bill imposed requirements in addition to residency, it would not be affected by Section 1623.³²⁶ Nevertheless, Candelora criticized the “legislative gymnastics” undertaken by supporters of the bill “to try to prevent us from triggering

³¹⁹ 241 P.3d 855 (Cal. 2010).

³²⁰ Conn. H. In-State Tuition Debate, *supra* note 285 (statement of State Rep. John Shaban).

³²¹ *Id.*

³²² 8 U.S.C.A. § 1623, *supra* note 271.

³²³ Conn. H. In-State Tuition Debate, *supra* note 285 (statement of State Rep. John Shaban).

³²⁴ *Id.* (statement of State Rep. Vincent Candelora).

³²⁵ Conn. H. In-State Tuition Debate, *supra* note 285 (statement of State Rep. Vincent Candelora).

³²⁶ Conn. Sen. In-State Tuition Debate, *supra* note 283 (statement of State Sen. Beth Bye).

or invoking that penalty under that federal law.”³²⁷

While Rodríguez would agree with Candelora that the additional eligibility requirements imposed by Connecticut’s in-state tuition bill constitute little more than “a clever route around the language of section 505, whose intent to deny unauthorized immigrants in-state tuition seems clear on the face of the statute,”³²⁸ Rodríguez would nevertheless defend Connecticut’s ability to pass such legislation. For Rodríguez, the passage of in-state tuition statutes is yet another example of how states may proactively address growing immigrant populations by adopting positions contrary to federal policies.³²⁹ Thus, Rodríguez would disagree with Roraback and Boucher’s arguments that immigration regulation is best left to the federal government; rather, she would cite Connecticut’s in-state tuition statute as another instance of a state taking steps “to accomplish what [it has] determined to be crucial integrative goals.”³³⁰

Writing while *Martinez* was still being litigated, Schuck cited in-state tuition statutes as evidence for his argument “that many states are more generous than Congress toward both legal and undocumented immigrants.”³³¹ In-state tuition, for Schuck, is an example of how “[s]tates’ willingness to provide even costly public benefits for immigrants, including undocumented ones, has grown.”³³² Whether Schuck would let Connecticut’s in-state tuition statute stand, however, depends on the statute’s consistency with federal objectives. To the extent that it appears that 8 U.S.C. § 1623 was meant to bar undocumented students from eligibility for in-state tuition rates, then, Schuck’s approach might find Connecticut’s in-state tuition statute to be preempted.

Guttentag, by contrast, would argue that Connecticut’s in-state tuition statute should not

³²⁷ Conn. H. In-State Tuition Debate, *supra* note 285 (statement of State Rep. Vincent Candelora).

³²⁸ Rodríguez, *supra* note 80, at 607.

³²⁹ *See id.*

³³⁰ *See id.* at 607-08.

³³¹ Schuck, *supra* note 118, at 61.

³³² *Id.* at 62.

be preempted, because it “affirmatively further[s] the anti-discrimination, immigrant-equality purposes of federal law.”³³³ In fact, Guttentag cites Connecticut’s in-state tuition statute as an example of a state measure consistent with the federal immigrant equality norm for which he argues.³³⁴

B. Public Act No. 13-89, An Act Concerning the Issuance of Motor Vehicle Operators’ Licenses [2013]

Public Act No. 13-89, An Act Concerning the Issuance of Motor Vehicle Operators’ Licenses, was signed by Governor Malloy on June 6, 2013. The act allows undocumented immigrants who submit proof of identity and residency to obtain Connecticut driver’s licenses, provided that they meet certain additional requirements.³³⁵ Specifically, the act provides that “the Commissioner of Motor Vehicles shall not decline to issue a motor vehicle operator’s license to any applicant who meets the licensure requirements ... but who cannot establish that he or she is legally present in the United States or does not have a Social Security number, if such applicant” presents proof of residency and identity and “files an affidavit with the commissioner attesting that such applicant has filed an application to legalize his or her immigration status or will file such an application as soon as he or she is eligible to do so.”³³⁶ The act bars from eligibility for a driver’s license “any applicant who has been convicted of any felony in Connecticut.”³³⁷ Additionally, the act provides that any driver’s license issued pursuant to it “shall include an indication ... that such license shall not be acceptable for federal identification purposes,”³³⁸ and specifically prohibits use of the driver’s license “as identification for voting purposes.”³³⁹

³³³ See Guttentag, *supra* note 207, at 45.

³³⁴ *Id.* at 46 n. 195.

³³⁵ See P.A. 13-89, *supra* note 236.

³³⁶ *Id.*

³³⁷ *Id.* § 1(b)(2).

³³⁸ *Id.* § 1(c).

³³⁹ *Id.* § 1(e).

At the time the Connecticut legislature debated Public Act No. 13-89, there were six states that gave driving privileges to immigrants without legal status: New Mexico,³⁴⁰ Washington,³⁴¹ Utah,³⁴² Illinois,³⁴³ Oregon,³⁴⁴ and Maryland.³⁴⁵ After the Senate debate on May 29, 2013, Nevada,³⁴⁶ Colorado,³⁴⁷ Vermont,³⁴⁸ California,³⁴⁹ and the District of Columbia³⁵⁰ also extended driving privileges to undocumented immigrants. Notably, three of these states—California,³⁵¹ Oregon,³⁵² and Maryland³⁵³—had previously enacted, then repealed, legislation granting driving privileges to undocumented immigrants.

The following discussion considers arguments raised during the legislative debates concerning public safety, the bill’s potential facilitation of fraud, and the proper role of the state in enacting legislation bearing on immigration.

Proponents of the bill presented it as a straightforward measure to promote public safety. Because tens of thousands of undocumented drivers are currently driving without licenses in Connecticut, proponents argued, it would be safer not only for them but also for the rest of the public to allow such drivers to gain the requisite qualifications to obtain driver’s licenses. Introducing the bill in the House, State Representative Juan Candelaria began by noting that “we have approximately 120,000 undocumented immigrants residing in the State of Connecticut, of which approximately 54,000 may be driving [on] our city and state roads without a driver’s

³⁴⁰ H.B. 173, 46th Leg., Reg. Sess. (N.M. 2003).

³⁴¹ S.B. 5428, 58th Leg., Reg. Sess. (Wash. 2004)

³⁴² S.B. 227, 56th Leg., Gen. Sess. (Utah 2005).

³⁴³ S.B. 957, 97th Gen. Assemb., Reg. Sess. (Ill. 2013).

³⁴⁴ S.B. 833, 77th Leg., Reg. Sess. (Or. 2013).

³⁴⁵ S.B. 715, 2013 Leg., Reg. Sess. (Md. 2013).

³⁴⁶ S.B. 303, 77th Leg., Reg. Sess. (Nev. 2013).

³⁴⁷ S.B. 251, 69th Leg., 1st Reg. Sess. (Colo. 2013).

³⁴⁸ S.B. 38, 2013-14 Leg., Reg. Sess. (Vt. 2013).

³⁴⁹ Assemb. B. 60, 2013-14 Leg., Reg. Sess. (Cal. 2013).

³⁵⁰ 60 D.C. Reg. 16026 (2013).

³⁵¹ S.B. 1, 2003-04 Leg., 3d. Ex. Sess. (Cal. 2003).

³⁵² S.B. 1080, 74th Leg., Sp. Sess. (Or. 2008).

³⁵³ H.B. 387, 2009 Leg., Reg. Sess. (Md. 2009)

license, insurance, or registration.”³⁵⁴ Because undocumented immigrants are “driving without the proper qualifications and skill standards that make us all safer when we travel our state roads,” Candelaria argued, allowing them to obtain driver’s licenses would “guarantee safer roads, [and] reduction to an already overburdened law and judicial system.”³⁵⁵ Similarly, State Senator Andrew Maynard, Chair of the Transportation Committee, characterizing the proposal as “a common-sense, public safety oriented bill,” argued that “it’s in the interest of all of Connecticut’s citizens to have safe, registered, and insured drivers on the roads.”³⁵⁶

To the extent that these public safety concerns actually motivated the passage of the bill, Rodríguez would argue that the bill is another example of the “public health and safety concerns”³⁵⁷ animating state and local governments’ responses to undocumented immigration. Rodríguez makes a similar case for the issuance of municipal identification cards, recognizing “New Haven’s interest in reaping the public health and safety benefits of universal identification.”³⁵⁸ By giving undocumented immigrants to driver’s licenses, Rodríguez might argue, Connecticut is similarly acting on its interest in furthering public safety by ensuring that drivers on its roads, documented or not, are licensed and insured.

Interestingly, even if the primary concern motivating the bill was advancing the rights of immigrants, rather than promoting public safety, Rodríguez would arguably let it stand nevertheless. As noted previously, Rodríguez argues that “managing immigrant movement is itself a state interest” on par with a state’s interest in “the regulation of health, safety, and

³⁵⁴ Conn. H., Floor Debate, 2013 Sess. (May 22, 2013), *available at* <http://www.cga.ct.gov/2013/trn/H/2013HTR00522-R00-TRN.htm> [hereinafter Conn. H. Driver’s License Debate] (statement of State Rep. Juan Candelaria).

³⁵⁵ *Id.*

³⁵⁶ Conn. Sen., Floor Debate, 2013 Sess. (May 29, 2013), *available at* <http://www.cga.ct.gov/2013/trn/H/2013HTR00522-R00-TRN.htm> [hereinafter Conn. Sen. Driver’s License Debate] (statement of State Sen. Andrew Maynard).

³⁵⁷ Rodríguez, *supra* note 80, at 591.

³⁵⁸ *Id.* at 579.

welfare.”³⁵⁹ Thus, because she believes that facilitating immigrant integration is an independent state interest, Rodríguez would argue that even if the bill is primarily an immigrants’ rights (as opposed to a public safety) measure, Connecticut should be allowed to undertake it.

Opponents of the bill in the Connecticut legislature argued that it would in fact undermine public safety and facilitate voter fraud. Specifically, detractors seized on the bill’s language barring from eligibility “any applicant who has been convicted of any felony *in Connecticut*,”³⁶⁰ questioning why its drafters had not extended the restriction to persons who had committed a felony in any state. The objection, as articulated by State Representative Larry Cafero, is that “if you’ve committed a felony in Connecticut, this bill determines that you shall not get a license. But if you committed a felony in New York, you could come to Connecticut and get a license.”³⁶¹ Limiting restrictions to drivers who have committed felonies in Connecticut, opponents argued, could actually make the state *more* dangerous by “attracting more folks to Connecticut who may have questionable background[s],”³⁶² including potential terrorists.³⁶³ In the Senate, opponents also raised concerns about use of the driver’s licenses to perpetrate voter fraud, leading some senators to urge that the driver’s licenses be marked more conspicuously to demonstrate that they are not permissible forms of voter identification.³⁶⁴

Finally, like the in-state tuition bill, this bill engendered significant debate about the proper role of the Connecticut legislature vis-à-vis the federal government. Proponents of the bill again emphasized that Connecticut was not engaging in legislative innovation, listing a number of states that had recently passed such bills, including Illinois, New Mexico, Utah, and

³⁵⁹ *Id.* at 571.

³⁶⁰ P.A. 13-89, *supra* note 236, § 1(b)(2) (emphasis added).

³⁶¹ Conn. H. Driver’s License Debate, *supra* note 354 (statement of State Rep. Larry Cafero).

³⁶² *Id.* (statement of State Rep. Rob Sampson).

³⁶³ *Id.*

³⁶⁴ *See* Conn. Sen. Driver’s License Debate, *supra* note 356 (statement of State Sen. Rob Kane).

Washington.³⁶⁵ However, the bill’s opponents responded by noting that other states that had enacted similar bills had later repealed them, including Hawaii, Maine, Michigan, and Tennessee.³⁶⁶ These opponents acknowledged the value of state experimentation with different policies, but urged their fellow legislators to heed the results of attempts to implement similar bills in other states. Speaking in opposition to the bill, State Senator Jason Welch began by extolling the virtues of experimentation, stating that “one of the many beautiful things about that government that we have in the United States, in the federal system” is the ability of states “to experiment. States are allowed to try new things, to solve problems that either aren’t being addressed on a national front or might be unique to them.”³⁶⁷ Noting that “the State of Connecticut has been doing a lot of experimenting, a lot of trying to get out ahead of a number of issues that ... face our country and face our state,” Welch argued that Connecticut legislators were *not* at the forefront of this issue, and would do well to learn from “from the experience of those other states” which had enacted similar bills and subsequently repealed them.³⁶⁸

This dialogue undermines Cunningham-Parmeter’s argument that states cannot engage in successful experimentation in the field of immigration because they are unable to “yield replicable results.”³⁶⁹ At the very least, the arguments advanced by the bill’s opponents suggest that state legislators do in fact take into account the results of other states’ experimentation with immigration measures.

Opponents of the bill also argued that immigration-related issues would be more properly handled at the federal level. This position was articulated forcefully by State Senator Boucher. Boucher argued that rather than having states determine undocumented immigrants’ eligibility

³⁶⁵ *Id.* (statement of State Sen. Andrew Maynard).

³⁶⁶ *See id.* (statement of State Sen. Toni Boucher).

³⁶⁷ *Id.* (statement of State Sen. Jason Welch).

³⁶⁸ *Id.*

³⁶⁹ Cunningham-Parmeter, *supra* note 201, at 1677.

for driver's licenses in "a state-by-state, ... haphazard way,"³⁷⁰ the issue should be addressed at the national level through advocacy for and passage of the DREAM Act, which "would allow immigrants not in Connecticut legally to embark on a path to obtain a valid Connecticut's [sic] driver's license."³⁷¹ However, the bill's proponents countered by arguing that the state legislators were not engaging "in an immigration debate," but rather acting "within our purview ... to regulate the roadways, regulate our highways, to talk about what our expectations are of individuals who are driving on our highways."³⁷² Thus, state legislators on both sides of the debate sparred over its parameters, alternately characterizing the issue as an immigration issue, best handled by the federal government, then as a public safety issue, appropriately addressed at the state level.

While Schuck cited state statutes permitting the issuance of driver's licenses to undocumented immigrants along with in-state tuition statutes as evidence for his argument that state governments often provide for better treatment of immigrants than does the federal government,³⁷³ Schuck's approach suggests that Connecticut's driver's license law should be preempted because it conflicts with federal immigration law, namely, the REAL ID Act of 2005.³⁷⁴ Schuck notes that states have persisted in issuing driver's licenses to undocumented immigrants "[d]espite the REAL ID Act of 2005, which bars states from issuing driver's licenses or identification cards to most undocumented workers."³⁷⁵

Guttentag, however, would argue that Connecticut's statute permitting the issuance of driver's licenses to undocumented immigrants should not be preempted, because it enhances

³⁷⁰ *Id.* (statement of State Sen. Toni Boucher).

³⁷¹ *Id.*

³⁷² *Id.* (statement of State Sen. Andres Ayala).

³⁷³ Schuck, *supra* note 118, at 61.

³⁷⁴ Pub. L. No. 109-13, Div. B, § 106, 119 Stat. 231 (2005).

³⁷⁵ Schuck, *supra* note 118, at 61.

immigrant equality consistent with the federal antidiscrimination norm. Guttentag specifically cites statutes that “authorize drivers licenses to every qualifying driver”³⁷⁶ as examples of pro-immigrant subfederal measures that would be allowed to stand under the more expansive preemption approach he suggests.³⁷⁷

C. Public Act No. 13-155, An Act Concerning Civil Immigration Detainers [2013]

Signed into law on June 25, 2013 by Governor Malloy, Public Act No. 13-155, An Act Concerning Civil Immigration Detainers, limits Connecticut’s participation in the federal government’s Secure Communities program.³⁷⁸ The bill as enacted provides that, with certain exceptions, “[n]o law enforcement officer who receives a civil immigration detainer with respect to an individual who is in the custody of the law enforcement officer shall detain such individual pursuant to such civil immigration detainer”³⁷⁹ The bill excepts from this provision seven categories of persons, including persons with felony convictions; persons “subject to pending criminal charges”³⁸⁰ in Connecticut who have not made bail; persons with outstanding arrest warrants; gang members; persons who appear to be “possible match[es]”³⁸¹ in federal terrorism databases; persons with final deportation or removal orders; and persons who “[p]resent an unacceptable risk to public safety, as determined by the law enforcement officer.”³⁸² The bill extends to state and local police officers, Department of Correction (DOC) officers, and judicial and state marshals.³⁸³ The bill also provides that a law enforcement officer must notify ICE of a

³⁷⁶ Guttentag, *supra* note 207, at 46 (footnote and citations omitted).

³⁷⁷ *See id.* at 45-46.

³⁷⁸ *See* P.A. 13-155, *supra* note 144.

³⁷⁹ *See* P.A. 13-155, *supra* note 144, § 1(b).

³⁸⁰ *Id.* § 1(b)(2).

³⁸¹ *Id.* § 1(b)(5).

³⁸² *Id.* § 1(b)(7).

³⁸³ *Id.* § 1(a)(4).

decision either to detain or release.³⁸⁴ If a person is detained pursuant to a civil immigration detainer, the law enforcement agency will hold the person for ICE to take into its custody for no longer than 48 hours.³⁸⁵

Whereas the Connecticut legislature had followed several other states in passing both its in-state tuition and driver's licensing statutes, Connecticut led the field in its enactment of Public Act No. 13-155, also known as the TRUST Act.³⁸⁶ Although the California legislature had preceded Connecticut in passing a version of the TRUST Act in 2012, it was vetoed by Governor Jerry Brown, who expressed concern that "list of offenses codified in the bill" that would allow a local law enforcement officer to comply with an immigration detainer was "fatally flawed because it omits many serious crimes."³⁸⁷ The California legislature subsequently passed another version of the TRUST Act, which was signed by Brown on October 5, 2013.³⁸⁸

Before examining the legislative history of the bill, I first consider significant developments preceding the bill's passage. Although, as noted previously, Secure Communities was implemented in Fairfield County as early as 2010,³⁸⁹ both state and local officials publicly expressed opposition to its statewide activation in February 2012.³⁹⁰ On February 20, 2012, two days before Secure Communities was scheduled to be implemented throughout Connecticut, the governor's office issued a statement by Mike Lawlor, Under Secretary for Criminal Justice

³⁸⁴ *Id.* § 1(c).

³⁸⁵ *Id.*

³⁸⁶ See Lucy Nalpathanchil, *Connecticut Leads the Way on Immigration TRUST Act as California Considers It*, WNPR NEWS, Sept. 16, 2013, <http://wnpr.org/post/connecticut-leads-way-immigration-trust-act-california-considers-it>.

³⁸⁷ OFFICE OF GOVERNOR EDMUND G. BROWN, A.B. 1081 VETO MESSAGE, http://gov.ca.gov/docs/AB_1081_Veto_Message.pdf.

³⁸⁸ Patrick McGreevy, *Signing Trust Act Is Another Illegal-Immigration Milestone for Brown*, LOS ANGELES TIMES, Oct. 5, 2013, <http://www.latimes.com/local/la-me-brown-immigration-20131006,0,5441798.story#axzz2nkldfzqT>.

³⁸⁹ ACTIVATED JURISDICTIONS, *supra* note 42, at 3.

³⁹⁰ See, e.g., Brian Lockhart et al., *Malloy, Others Wary of Immigration Crackdown*, CONN. POST (Feb. 23, 2012), <http://www.ctpost.com/news/article/Malloy-others-wary-of-immigration-crackdown-3344187.php>.

Policy and Planning.³⁹¹ Lawlor, while recognizing “the need to enhance public safety,” stated that “there are legitimate concerns” about implementing Secure Communities in Connecticut.³⁹² Although Secure Communities had been scheduled for statewide activation “[s]ix months ago,” Lawlor explained, Governor Malloy requested that DHS postpone its implementation “because of these concerns.”³⁹³ Specifically, the statement expressed concern about the federal government commandeering state and local law enforcement agents, stating that the Secure Communities program “essentially converts local law enforcement officers into defacto [sic] agents of the Immigration and Customs Enforcement Agency (ICE).”³⁹⁴ The statement went on to question whether the program’s implementation would actually further its aim of improving public safety, noting that it could strain relations between immigrants and state and local law enforcement officers: “The Governor shares the opinion of many police chiefs that this policy could lead to a situation where victims and witnesses in the immigrant community would be reluctant to cooperate with local and state law enforcement, something that would completely undermine the goals of this program.”³⁹⁵ The statement next detailed Malloy’s response, which included requesting that the DOC commissioner “create an ongoing review of” the program’s implementation and effects and determine whether “any corrective action is needed going forward.”³⁹⁶ The statement also made clear that detentions under the program would be discretionary, stating that “[d]ecisions on how to respond to each request will be made on a case-by-case basis.”³⁹⁷ Lawlor concluded by quoting from a DHS Task Force report critical of Secure

³⁹¹ OFFICE OF GOVERNOR DANIEL P. MALLOY, STATEMENT BY UNDER SECRETARY FOR CRIMINAL JUSTICE MIKE LAWLOR (Feb. 20, 2012), <http://www.ct.gov/malloy/cwp/view.asp?A=4010&Q=499428>.

³⁹² *Id.*

³⁹³ *Id.*

³⁹⁴ *Id.*

³⁹⁵ *Id.*

³⁹⁶ *Id.*

³⁹⁷ *Id.*

Communities, which called on ICE to concentrate “its immigration enforcement resources” on “individuals who pose a threat to public safety such as criminal aliens and national security threats”³⁹⁸

On April 16, 2012, a DOC administrative directive entitled “Inmates, Admissions, Transfers and Discharges” went into effect, outlining procedures for the detention and release of inmates held pursuant to ICE detainees.³⁹⁹ The language of Public Act No. 13-155 echoes the DOC protocol. Under the protocol, a detention facility’s “Duty Officer” made the determination of whether to hold an inmate on the basis of an ICE detainee.⁴⁰⁰ The protocol required staff at the detention facility to complete a checklist of items that were largely replicated as exceptions to the general rule of not holding individuals pursuant to ICE detainees in Public Act No. 13-155, including previous felony convictions, pending charges, and outstanding removal orders and warrants.⁴⁰¹

At the Judiciary Committee hearing on the proposed bill, its supporters spoke on behalf of multiple interest groups and organizations, including the New Haven Police Department; immigrant rights advocacy groups, among them Junta for Progressive Action and the Worker and Immigrant Rights Advocacy Clinic at Yale Law School; the American Civil Liberties Union; the Connecticut Criminal Defense Lawyers Association; and the Connecticut local property services workers’ union, 32BJ SEIU.⁴⁰²

The bill’s supporters advanced two main arguments: first, they emphasized that requiring

³⁹⁸ *Id.*

³⁹⁹ CONN. DEP’T OF CORR., ADMINISTRATIVE DIRECTIVE 9.3, INMATE ADMISSIONS, TRANSFERS & DISCHARGES (2012), available at <http://www.scribd.com/doc/86978971/AD-9-3-4-16-2012>.

⁴⁰⁰ *Id.*

⁴⁰¹ *Id.*

⁴⁰² Conn. Joint Standing Committee Hearings, Judiciary, 2013 Sess. (Mar. 22, 2013), available at <http://www.cga.ct.gov/2013/JUDdata/chr/2013JUD00322-R001130-CHR.htm> [hereinafter Judiciary Committee Hearing].

state and local law enforcement officers to honor civil detainers issued by ICE would in fact diminish public safety by undermining relationships between law enforcement officers and the communities they protect. Speaking on behalf of the New Haven Police Department, Lieutenant Holly Wasilewski stated that “[o]ur department has worked hard to establish trust with all residents in the community. . . . Last year the Secure Communities . . . program, went live in Connecticut, undermining the efforts we had made, creating fear in much of the immigrant community.”⁴⁰³ Nor was the public safety harm limited to immigrant populations, the bill’s supporters argued, because “[e]veryone in the community is less safe when people are afraid to report crimes or suspicious activity.”⁴⁰⁴ Responding to this argument, some members of the Judiciary Committee expressed concern that the bill would conflict with federal law. This view was articulated by State Senator Michael McLachlan, who stated that “I just don’t see how we can be selective in law enforcement, being very concerned about state and local law, and not also be equally concerned about federal law.”⁴⁰⁵

Second, the bill’s supporters repeatedly argued that requiring full compliance with the Secure Communities program would misuse state and local law enforcement resources. A number of these arguments implied that the federal government was improperly commandeering state and local law enforcement agencies to carry out its immigration enforcement objectives: one proponent of the bill maintained, for example, that the passage of bill would help to “prevent the *unauthorized* use of state and local resources for immigration enforcement activities.”⁴⁰⁶

Whereas the original proposed bill had provided that “[a] law enforcement officer shall

⁴⁰³ *Id.* (statement of Holly Wasilewski).

⁴⁰⁴ *Id.* (statement of Sandra Staub).

⁴⁰⁵ *Id.* (statement of State Sen. Michael McLachlan).

⁴⁰⁶ *Id.* (statement of Lisa Villa) (emphasis added).

not give effect to a civil immigration detainer by,”⁴⁰⁷ *inter alia*, “[n]otifying federal immigration authorities of such individual’s relief,”⁴⁰⁸ the substitute bill that ultimately passed both the House and Senate unanimously requires law enforcement officers to communicate to ICE whether an individual for whom ICE issues a detainer will be held or released.⁴⁰⁹ Specifically, the substitute bill provides that “[u]pon determination by the law enforcement officer that such individual is to be detained or released, the law enforcement officer shall immediately notify United States Immigration and Customs Enforcement.”⁴¹⁰ At the House debate, proponents of the substitute bill emphasized this difference, noting that under the original bill, “any police department could have taken it upon their individual selves to make the decision” to notify ICE, whereas the substitute bill “require[s] that the police department contact ICE.”⁴¹¹ By requiring law enforcement officers to notify ICE regardless of whether an individual is held or released, proponents argued, the bill would actually serve as “an avenue of cooperation between our police departments and the Federal Immigration Service.”⁴¹²

IV. Conclusion

A close examination of Connecticut’s recent regulation of immigration complicates any blanket opinion on the appropriateness of state and local involvement in immigration regulation. Whereas opponents of state and local participation in regulating immigration tend to point to restrictive legislation passed at the subfederal level, such critiques often ignore the potential for innovation through the adoption of immigrant-friendly measures by states and localities. In light

⁴⁰⁷ Raised Bill No. 6659, *available at* <http://www.cga.ct.gov/2013/TOB/H/2013HB-06659-R00-HB.htm>.

⁴⁰⁸ *Id.*

⁴⁰⁹ P.A. 13-155, *supra* note 144, § 1(c).

⁴¹⁰ *Id.*

⁴¹¹ Conn. H., Floor Debate, 2013 Sess. (May 22, 2013), *available at* <http://www.cga.ct.gov/2013/trn/H/2013HTR00522-R00-TRN.htm> [hereinafter Conn. H. Civil Detainer Debate] (statement of State Rep. Rosa Rebimbas).

⁴¹² *Id.* (statement of State Rep. Richard Smith).

of recent legislation passed by the Connecticut legislature, and measures adopted in Hartford, New Haven, and Stamford, supporters of immigrants' rights may find that permitting states and localities to address immigration may significantly benefit not only immigrant populations but also the jurisdictions in which they live.