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# FORBIDDING STATES FROM PROVIDING ESSENTIAL SOCIAL SERVICES TO ILLEGAL IMMIGRANTS: THE CONSTITUTIONALITY OF RECENT FEDERAL ACTION\*

## I. INTRODUCTION

"Welcome to the great national panic attack."<sup>1</sup> The debate over illegal immigrants<sup>2</sup> has been raging on a national scale since the passage of the California initiative entitled Proposition 187.<sup>3</sup> Through the passage of this initiative California voters have changed the face of the nation's discussion about undocumented aliens. Once a federal question, legislators now debate about illegal immigration issues on a state level. Many residents question whether to discourage illegal immigrants by denying them access to essential social services.<sup>4</sup>

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\* This note is dedicated to my parents, Robert and Dorothy, to whom I owe more than I could ever repay.

<sup>1</sup> See *No Tired, No Poor, No Huddled Masses, No Wretched Refuse, No Homeless*, NEWSDAY, Sept. 29, 1996, at A35.

<sup>2</sup> Throughout this Note the terms "illegal immigrant," "illegal alien" and "undocumented immigrant" are used interchangeably. Each refers to an individual who is neither a United States citizen nor present in the country with permission from the Immigration and Naturalization Service.

<sup>3</sup> Proposition 187's initiatives are codified at CAL. EDUC. CODE § 48215(a) (West Supp. 1995); CAL. HEALTH & SAFETY CODE § 130(a) (West Supp. 1995); CAL. WELF. & INST. CODE § 10001.5 (West Supp. 1995). The Proposition is premised on the belief that public services and schools draw illegal immigrants to the United States. Many initiative backers have acknowledged that what they want is a revolution in national immigration policy. Proposition 187's best-known provisions would deny undocumented immigrants from public schooling, foster care, non-emergency health care and other state-supported social services. A federal court has enjoined many of Proposition 187's initiatives. See *League of United Latin American Citizens v. Wilson*, 908 F. Supp. 755 (C.D. Cal. 1995). See, e.g., Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration, Status, Ethnicity, Gender and Class*, 42 UCLA L. REV. 1509 (1995); Jeffrey R. Margolis, *Closing the Doors to the Land of Opportunity: The Constitutional Controversy Surrounding Proposition 187*, 26 U. MIAMI INTER-AM. L. REV. 363 (1994-1995); Daniel W. Sutherland, *Immigration's [H]ard Problems and [E]asy [A]nswers*, WASH. TIMES, Jan. 12, 1995, at A17 (quoting Barbara Coe of the California Coalition for Immigration Reform, "[w]e anticipated the passage of Proposition 187 would have a ripple effect across the nation. Right now, we feel like we are in the midst of a tidal wave, for goodness sake"); Patrick J. McDonnell, *Prop. 187 Turns Up Heat in U.S. Immigration Debate*, L.A. TIMES, Aug. 10, 1994, at A1; Roger E. Hernandez, *California Initiative 'Attacks Phantoms'*, PORTLAND OREGONIAN, Sept. 12, 1994, at B6; *Proposition 187: Snoop or Snitch*, SACRAMENTO BEE, Sept. 12, 1994, at B14.

<sup>4</sup> See, e.g., Patrick McDonnell, *Anti-Illegal Immigration Proposition Fails to Qualify for Arizona Ballot*, L.A. TIMES, July 15, 1996, at A1. The Arizona "Save Our State" initiative, named after California's Proposition 187, failed to make the November ballot. *Id.* A similar initiative in Florida named Florida 187 also failed to make it on the ballot. See

The response from the national government has come in the form of two pieces of legislation, The Personal Responsibility and Work Opportunity Reconciliation Act of 1996<sup>5</sup> ("Welfare Reform Law") and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("Immigration Reform Law").<sup>6</sup> One section of these laws may have far-reaching and unintended consequences.<sup>7</sup> Section 1644 of the Welfare Reform Law and Section 1373 of the Immigration Reform Law expressly voids federal, state and local laws from prohibiting state and local agencies from exchanging information with the Immigration and Naturalization Service ("INS").<sup>8</sup> This legislation prevents states and their political subdivisions from directly or indirectly instructing their employees not to report illegal immigrants to the INS. The law, in effect, allows state and city employees to turn in illegal immigrants who seek essential social services like police protection, medical care, and public education.<sup>9</sup> This section is so controversial<sup>10</sup>

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*id.*

<sup>5</sup> Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections throughout the U.S.C.).

<sup>6</sup> Illegal Immigrant Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (codified as amended in scattered sections of 8 U.S.C. and 18 U.S.C.).

<sup>7</sup> See David Firestone, *Giuliani to Sue Over Provision on Welfare*, N.Y. TIMES, Sept. 12, 1996, at B1; Patrick K. McDonnell, *Welfare Law Will Allow Wilson to Cut Immigrant Aid*, L.A. TIMES, Nov. 2, 1996, at A1; David Firestone, *Mayor Widens Attack on Cuts to Welfare*, N.Y. TIMES, Oct. 1, 1996, at B1.

<sup>8</sup> See 8 U.S.C. §1644 (Supp. II 1996).

Notwithstanding any other provision of Federal, State, or local law, no State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from the Immigration and Naturalization Service information regarding the immigration status, lawful or unlawful, of an alien in the United States.

See 8 U.S.C. §1373 (Supp. II 1996).

(a) Notwithstanding any other provision of Federal, State, or local law a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.

(b) Notwithstanding any other provision of Federal, State, or local law, no person or agency may prohibit, or in any way restrict, a Federal, State, or local government entity from doing any of the following with respect to information regarding the immigration status, lawful or unlawful of any individual: (1) Sending such information to, or requesting or receiving such information from, the Immigration and Naturalization Service. (2) Maintaining such information. (3) Exchanging such information with any other Federal, State or local government entity.

<sup>9</sup> See Firestone, *Giuliani to Sue*, *supra* note 7; Firestone, *Mayor Widens Attack*, *supra* note 7.

<sup>10</sup> See, e.g., Patrick J. McDonnell, *Judge Upholds Curbs on Police-I.N.S. Cooperation*, L.A. TIMES, Mar. 4, 1997, at A3. The State of California, during the administration of Governor Pete Wilson, sought to implement presently-enjoined sections of Proposition

because many states and municipalities, including several in California, adopted laws that forbid municipal employees from cooperating with the INS.<sup>11</sup> These municipalities contend that the laws are essential to protect the health and welfare of their residents in light of the federal failure to control the borders and rely on the Tenth Amendment for their authority to regulate in this area.<sup>12</sup> This Note addresses whether the new congressional provisions can constitutionally supersede existing local practices governing contacts with the INS. The thesis of this Note is that federal direction regarding the distribution of social services unconstitutionally infringes upon the state's powers under the Tenth Amendment to legislate and to protect the health, safety and welfare of its citizens. Part II of this Note briefly discusses the problem of illegal immigration and the disproportionate impact it has on the states. Part III discusses the Constitutional implications of forbidding the states from designing their own systems to deal with illegal immigrants. Part IV demonstrates that barring social services to illegal immigrants will not diminish the problem of illegal immigration and may endanger public safety. Part V concludes that forbidding the states from devising their own policies regarding the delivery of essential social services is not only unconstitutional but oversimplifies the problem of illegal immigration.<sup>13</sup> It is counter-productive and, as this Note shows, it creates more problems than it solves.

## II. THE SCOPE OF THE ILLEGAL IMMIGRATION PROBLEM AND THE BURDEN ON THE STATES

### A. *Trying to Put a Finger on the Numbers*

There are a number of reasons why it is difficult to determine the true magnitude of the problem of illegal immigration. First, illegal aliens are, by definition, undocumented. Second, "[d]istinguishing fact from fiction has been almost impossible because the debate [over immigration] is so highly emotional."<sup>14</sup> As a

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187 which would bolster cooperation between the INS and local government agencies. *See id.* A U.S. District Judge found that Proposition 187 was a state "scheme" to regulate immigration and, as such, was preempted by federal law. *See id.* The ruling ensures that guidelines which exist in Los Angeles, San Diego, San Francisco and other localities which limit police cooperation with the INS remain viable. *See id.*

<sup>11</sup> *See infra* notes 47-48 and accompanying text.

<sup>12</sup> U.S. CONST. amend. X. *See also infra* notes 39-40 and accompanying text.

<sup>13</sup> *See Sutherland, supra* note 3 (noting that making welfare benefits for illegal immigrants the focus of immigration reform would be "perhaps the worst legacy of Prop[osition] 187").

<sup>14</sup> *See Hearing on Welfare Reform Proposals, Including H.R. 4605, the Work and Responsibility Act of 1994 Before the Subcomm. on Human Resources of the House Comm. of Ways and Means*, 103d Cong. 916 (1995) [hereinafter Jordan testimony] (testimony of Barbara Jordan, Chairperson of the U.S. Comm. on Immigration Reform) (noting "contradictory testimony, shaky statistics, and some honest confusion" regarding the impacts of immigration). *See also House Panel Finds Experts Disagree on Costs of Aliens, SAN*

result, scholars dispute all facts and numbers describing illegal immigrants.<sup>15</sup> Some scholars argue that illegal immigrants exact an economic hardship on the places where they live.<sup>16</sup> Others contend that illegal aliens occupy the jobs that American workers reject and that their contribution is, overall, beneficial.<sup>17</sup> The latest numbers estimate there are five million illegal aliens residing in the United States with annual increases of approximately 275,000.<sup>18</sup> This large number represents nearly two percent of the total U.S. population.<sup>19</sup> Illegal immigrants do not settle evenly among the states. Approximately forty percent of the total illegal immigrant population, or about two million people, live in the State of California.<sup>20</sup> Eighty-three percent of the total live in seven states: California, New

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ANTONIO EXPRESS NEWS, Apr. 6, 1995.

<sup>15</sup> For a discussion of the flaws inherent in counting illegal immigrants, see Richard A. Boswell, *Restrictions on Non-Citizens' Access to Public Benefits: Flawed Premise, Unnecessary Response*, 42 UCLA L. REV. 1475, 1501 (1995); see Cynthia Webb Brooks, *Health Care Reform, Immigration Laws, and Federally Mandated Medical Services: Impact of Illegal Immigration*, 17 Hous. J. INT'L L. 141, 146 (1994). Estimated numbers of undocumented immigrants in recent years have ranged anywhere from two to twelve million. See *id.* See also Patrick J. McDonnell, *Illegal Immigrant Population in U.S. Now Tops 5 Million*, L.A. TIMES, Feb. 8, 1997, at A1.

<sup>16</sup> See Lora L. Grandath, Note, *Illegal Immigrants and Public Education: Is There a Right to the 3Rs?*, 30 VAL. U. L. REV. 749, 750 n.7 (1996) ("The Heritage Foundation estimated that it cost \$3.9 billion to educate illegal immigrants in the United States in 1992.").

<sup>17</sup> See Brooks, *supra* note 15. See also Michael A. Olivas, *Preempting Preemption: Foreign Affairs, State Rights and Alienage Classifications*, 35 VA. J. INT'L L. 217, 227 (1994) (stating that "a fair review of all the evidence shows that undocumented aliens are, by the most reliable studies, a net gain for the economy, even if not for the polity").

<sup>18</sup> See William Branigin, *Illegal Immigrant Population Rose to 5 Million*, WASH. POST, Feb. 8, 1997, at A3; Eric Schmitt, *Illegal Immigrants Rose to 5 Million in '96*, N.Y. TIMES, Feb. 8, 1997, at A9. These numbers are derived from estimates based on Census Bureau data and the numbers of immigrants that the Government knows are here legally. See *id.* The five million figure has a margin or error of plus or minus 400,000. See *id.* These numbers represent a population increase of 28% in the four year period between 1992-1996 alone. See *id.* See also Frank del Olmo, *Human Behavior Skews Best Intentions: The Illegal Population Rises Despite the "Solutions,"* L.A. TIMES, Feb. 16, 1997, at M5. This estimate is the highest since 1987, at which time the INS estimated there were approximately six million illegals in the country. See *id.* This high number of undocumented immigrants prompted the passage of the Immigration Reform and Control Act which gave illegal immigrants a one time opportunity to legalize their status. See *id.*

<sup>19</sup> See Branigin, *supra* note 18.

<sup>20</sup> See *id.* Of the California population, 6.3% is undocumented as opposed to 1.9% of the population of the United States. See *id.* See also Bert C. Buzan & George M. Dery III, *California's Resurrection of the Poor Laws: Proposition 187, Preemption and the Peeling Back of the Hollow Onion of Immigration Law*, 10 GEO. IMMIGR. L.J. 141, 143 (1996) (noting that the plight of Boston and New York City, "the two leading immigrant receiving ports" of the late eighteenth and early nineteenth centuries, would be surprising familiar to present resident of Southern California).

York, Florida, Texas, Illinois, New Jersey and Arizona (hereinafter "the Seven States").<sup>21</sup> The geographic concentration of aliens within these states' major cities exacerbates the problem by placing the largest financial toll on the smallest governmental unit: the city.<sup>22</sup>

### B. *The Burden on the States*

Illegal immigrants place a significant burden on states in which they reside.<sup>23</sup> The revenue states receive from the taxes illegal immigrants pay do not meet this burden.<sup>24</sup> "Illegal immigrants generate a net annual fiscal deficit of \$2 billion, or about \$500 per person."<sup>25</sup> The negative impacts of undocumented aliens

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<sup>21</sup> See Branigin, *supra* note 18; Schmitt, *supra* note 18. See also *Hearing on the Impact of Illegal Immigration on Public Benefit Programs and the American Labor Force Before the Subcomm. on Immigration And Claims of the House Comm. on the Judiciary*, 104th Cong. 12 (1996) [hereinafter Fix and Passel testimony] (prepared testimony of Michael Fix and Jeffery S. Passel, Directors of the Urban Institute). The Urban Institute is a nonprofit, nonpartisan policy research organization which investigates the social and economic problems confronting the nation. With the exception of the newly updated INS numbers, the Institute's figures regarding immigration are generally deemed to be the most reliable and accurate. While their numbers have grown slightly dated their demographic information offers valuable insights. The information contained in the testimony of Fix and Passel is excerpted from a 1994 study done by the organization. The results of the study are published in MICHAEL FIX & JEFFREY S. PASSEL, *THE URBAN INSTITUTE, IMMIGRATION AND IMMIGRANTS, SETTING THE RECORD STRAIGHT* (1994).

<sup>22</sup> See Fix and Passel testimony, *supra* note 21, at 16. Los Angeles County may hold one third of the country's illegal immigrants. See *id.* New York City, Chicago and Miami have virtually all of the illegal aliens in their states. See *id.*

<sup>23</sup> The Seven States spent nearly half a billion dollars in 1994 to imprison illegal immigrants convicted of a crime, \$3.1 billion to educate their children and \$442 million on Medicaid costs. See Paula Sue Smith, *An Argument Against Mandatory Reporting of Undocumented Immigrants by State Officials*, 29 COLUM. J.L. & Soc. Probs. 147 (1995); Kim I. Mills, *Report: States Spend Millions for Aliens' Education, Health Care, Prison*, Associated Press, Sept. 15, 1994, available in 1994 WL 10123752.

<sup>24</sup> *Proposition 187: Snoop or Snitch*, SACRAMENTO BEE, Sept. 12, 1994, at B14. The greatest cost associated with illegal immigrants is the education of their children many of whom are U.S. citizens. The education of a child costs the state approximately \$5,000 per year. The illegal immigrant population, however, consists of a high proportion of children and a very low proportion of senior citizens. Any population with a high rate of children will not cover their own costs in a publicly financed educational system. See Fix and Passel testimony, *supra* note 21, at 18-19.

<sup>25</sup> Fix and Passel testimony, *supra* note 21, at 18. The testimony further notes that a complete assessment of the costs, revenues and other fiscal impacts associated with illegal immigration has not been done. Most surveys of the economics of illegal immigration do not measure the positive impacts of illegal aliens' participation in the economy. The characterization that natives subsidize services to illegal aliens by generating a "net plus" is misleading and inaccurate. See *id.* See, e.g., Rebecca L. Clark, et al., *Fiscal Impacts of Undocumented Aliens: Selected Estimates for the Seven States*, 1994 THE URBAN INSTITUTE ch. 2, app. A. This 199-page study was commissioned by the Office of Management

are concentrated at the state and local levels which bear the burden of providing services to this typically low-income population. Not surprisingly, the federal government's failure to control the nation's borders has led to hostility in many states.<sup>26</sup> Only some states, and further, some cities within those states, pay for this crisis. "These states cannot alter federal immigration policy but must nevertheless bear the entire social and economic burden of these policies."<sup>27</sup> Many argue that because the federal government does not have to pay for the failure to

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and Budget and the Justice Department. The study examined the cost of providing services to illegal aliens and the taxes they generate. It made no attempt to measure the illegal aliens' contribution to the state as workers, business owners and consumers. See Mills, *supra* note 23, at 1. But see Michelle Mittelstadt, *Experts Differ on Some Key Immigration Issues*, ASSOCIATED PRESS, Apr. 5, 1995, available in 1995 WL 4381920. At a House Immigration Subcommittee hearing on the fiscal impact of illegal immigrants, wildly varying numbers were presented. In addition to the aforementioned Urban Institute numbers, Rice University Economics professor Donald Huddle, whose studies typically estimate costs much greater than most others, stated that illegal immigrants cost the nation almost \$21.6 billion annually or \$4,240 per illegal immigrant. See *id.* See also Brooks, *supra* note 15, at 157 (noting that Dr. Huddle estimates the total population of immigrants that have arrived in the United States since 1970 will grow to 29.4 million by the year 2002).

<sup>26</sup> *Hearing on the Increasing Costs of Illegal Immigration Before the Senate Comm. On Appropriations*, 103d Cong. 16-17, 22 (1994) [hereinafter Wilson testimony] (testimony of Governor Pete Wilson) (noting that immigration is a federal responsibility and the federal government must either secure the borders or it must provide states with the finances to cover the cost of illegals). California, Florida, Arizona, Texas and New Jersey filed lawsuits against the federal government for reimbursement of costs related to the education, health care and welfare services provided to illegal aliens. See *Chiles v. United States*, 69 F.3d 1094 (11th Cir. 1995). State and local officials in Florida sued the federal government on the grounds that they failed to enforce immigration policies thereby causing the state to incur disproportionate and unfair expenses in educating and providing other public services to illegal aliens. See *id.* The case was dismissed on the grounds that all claims presented nonjusticiable political questions. See *id.* See also *New Jersey v. United States*, 91 F.3d 463 (3d Cir. 1996) (New Jersey brought an action against the United States seeking compensation for costs incurred by the state in incarcerating and educating illegal aliens). See *id.* The Court dismissed the case for failure to state a claim upon which relief can be granted. See *id.* See *Padavan v. United States*, 82 F.3d 23 (2d Cir. 1996) (seven New York senators and two counties brought action against the United States seeking compensation for costs associated with education, incarceration and the health and welfare of legal and illegal aliens). See *id.* The case was dismissed. See *id.* See Mills, *supra* note 23. In April 1994, California sought \$2 billion for the cost of incarcerating illegal immigrants. See *id.* Arizona filed suit in May 1994, demanding that the federal government reimburse it \$121 million for the cost of imprisoning illegal aliens. See *id.* Texas sued in June of 1994 for the cost of providing services to illegal aliens in 1993. See *id.* See also *Prodding Washington On Immigration*, PITTSBURGH POST-GAZETTE, Jan. 6, 1995, at C3; Dianne Klein, *A Hit or Miss Approach to Curbing Deportable Felons*, L.A. TIMES, Nov. 27, 1993, at A1.

<sup>27</sup> See Brooks, *supra* note 15, at 166-67.

secure its borders, it has no incentive to fix the system.<sup>28</sup> Additionally, the federal government may actually gain from the taxes illegal immigrants pay.<sup>29</sup>

### III. THE CONSTITUTIONALITY OF 8 U.S.C. §§ 1373 & 1644

The Welfare and Immigrant Reform Laws ("the Reform Laws") not only represent poorly drafted public policies, they violate the U.S. Constitution. The provisions infringe on the states' powers under the Tenth Amendment and the principles of federalism in two ways. First, the Reform Laws directly prohibit the states and their political subdivisions from engaging in the central sovereign process of passing laws or determining state policy. Second, the Reform Laws usurp the state and local governments' administration of their primary service functions, including provisions for police protection and regulation of their work forces.<sup>30</sup>

#### A. The Federal Government's Supremacy in Matters of Immigration

Article 1, Section 8, of the Constitution grants the federal government authority to regulate immigration.<sup>31</sup> The Supreme Court stated that "over no conceivable subject is the legislative power of Congress more complete."<sup>32</sup> Under the

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<sup>28</sup> See Pete Wilson, *Help States Fight Illegal Aliens . . . But Protect Legal Immigrants*, WASH. TIMES, Mar. 20, 1996, at A17 ("It is grossly unfair for the federal government first to fail to secure our borders against massive illegal immigration (a duty which the U.S. Constitution assigns exclusively to the federal government) and then to stick state taxpayers for the huge costs of its failure.").

<sup>29</sup> See Fix and Passel testimony, *supra* note 21, at 19. Disturbingly, most of the \$4.3 billion that immigrants paid in taxes went to the federal and state governments. *Id.* Very little stays in the cities that provide support and services. See *id.* See Brooks, *supra* note 15. See also *Hearing on Proposals for Immigration Reform Before the Senate Judiciary Comm.*, 103d Cong. 22-23 (1996) [hereinafter Graham statement] (statement of Bob Graham, U.S. Senator from Florida) (noting that "immigrant tax payments flow to Washington" while most of the financial burdens fall on the states).

<sup>30</sup> See Press Release of the City of New York, *Mayor Giuliani Announces City has Filed Suit to Challenge Federal Welfare and Immigration Laws*, Press Release 511-96 (Oct. 11, 1996).

<sup>31</sup> See U.S. CONST. art. I, § 8 ("The Congress shall have Power . . . [t]o establish a uniform Rule of Naturalization . . ."). See *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875) ("The 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"); *Truax v. Raich*, 239 U.S. 33, 42 (1915) ("The authority to control immigration . . . is vested solely in the Federal Government."). See also H.R. REP. NO. 1365, at 26 (1952), reprinted in 1952 U.S.C.C.A.N. 1653, 1676 (stating that the legislative history of the Immigration and Nationality Act reveals that "there has never been any question that the power of naturalization, whatever its scope, is vested exclusively in Congress . . . . It lies within the legislative discretion of Congress to determine the mode of naturalization, the conditions upon which it will be granted, and the persons and classes of persons to whom the right will be extended").

<sup>32</sup> *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (citing *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909)); see Buzan & Dery III, *supra* note 20 (discussing the his-



Supremacy Clause,<sup>33</sup> individual states do not have the capacity or the resources to control illegal immigrants' entry into the country.<sup>34</sup> The division between the federal, state, and municipal governments on the issue of illegal immigrants implicates the Tenth Amendment. The Tenth Amendment gives "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."<sup>35</sup> While Congress has the power to govern in the national interest, "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions."<sup>36</sup>

The federal government has limited, enumerated powers.<sup>37</sup> Therefore, unless the Constitution grants a specific power directly to the federal government, the states, their local subdivisions, and the people retain that power. One of the most obvious ways that the federal government uses its enumerated powers is by passing laws and issuing executive orders. The Constitution grants Congress the power to regulate immigration.<sup>38</sup> However, it also reserves to the states the power to provide police protection and ensure public health and safety.<sup>39</sup> The Reform Laws may appear to be a congressional attempt to control and regulate immigration, but they are really a clash of two sovereigns. The Supreme Court has interpreted the Tenth Amendment's reservation of power to encompass more than a state's power to police and protect society against crime.<sup>40</sup> The police power granted to the states is the power to provide for the health, safety, and well-being of the people in the community. States retain the right to determine the manner and enforcement of the law as it relates to the health and safety of the people within its jurisdiction.

#### B. *Limited Cooperation Ordinances*

The Reform Laws allow public employees to report suspected illegal immigrants to the INS.<sup>41</sup> The laws alter a generation of policies which arose as waves of illegal immigrants entered the United States. The state and local laws pre-

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torical background of the Supreme Court's endorsement of federal exclusivity in the immigration context).

<sup>33</sup> See U.S. CONST. art. VI, cl. 2.

<sup>34</sup> See Graham statement, *supra* note 29, at 21.

<sup>35</sup> U.S. CONST. amend. X.

<sup>36</sup> See *New York v. United States*, 505 U.S. 144, 162 (1992).

<sup>37</sup> See *United States v. Lopez*, 514 U.S. 549, 552 (1995) ("We start with the first principles. The Constitution creates a Federal Government of enumerated powers.").

<sup>38</sup> See U.S. CONST. art. I, § 8.

<sup>39</sup> See *Gold Cross Ambulance and Transfer v. City of Kansas City*, 538 F. Supp. 956, 967 (W.D. Minn. 1982), *aff'd* 705 F.2d 1005 (8th Cir. 1983) ("[E]xercise of the police power for the general public welfare is a right reserved to states and their subdivisions by the Tenth Amendment.").

<sup>40</sup> See *id.*; see also *Northern States Power Co. v. Minnesota*, 320 F. Supp. 172, 177 (D.C. Minn. 1970).

<sup>41</sup> See 8 U.S.C. § 1373(a); 8 U.S.C. § 1644.

empted by these federal provisions are generally called Limited Cooperation Ordinances.<sup>42</sup> Limited Cooperation Ordinances have their roots in sanctuary declarations.<sup>43</sup> These declarations arose during the 1980's when thousands of Central American refugees fled to the United States seeking protection from civil wars.<sup>44</sup> Despite the Refugee Act of 1980,<sup>45</sup> the INS refused to recognize these Central American refugee claims.<sup>46</sup> Thereafter, at least twenty-one city councils, three mayors, two state legislatures and two governors have issued sanctuary declarations which, in some form, prohibit municipal employees from offering information to or cooperating with federal immigration officials.<sup>47</sup> These declarations va-

<sup>42</sup> The Limited Cooperation Ordinances discussed in this Note are not unique. The IRS is now requiring that all illegal aliens obtain a nine-digit identification code similar to a social security number. The number is used for income tax purposes. Under the Tax Code, the IRS is barred from divulging the information regarding the individuals illegal status to the INS. See Patrick J. McDonnell, *I.R.S. Tries to Ease Noncitizens' Fears of New ID Numbers*, L.A. TIMES, Feb. 23, 1997, at A3.

<sup>43</sup> Ignatius Bau, *Cities of Refuge: No Federal Preemption of Ordinances Restricting Local Government Cooperation with the I.N.S.*, 7 LA RAZA LJ. 50, 50 (1994) (noting that "[a]lthough [limited cooperation] ordinances are often referred to as 'sanctuary' ordinances because of their emergence during the religious-based sanctuary movement on behalf of Central American refugees during the 1980's, these non-cooperation ordinances raise legal and public policy questions that endure beyond their historical genesis").

<sup>44</sup> See *id.*; see also *American Baptist Churches v. Thornburgh*, 760 F. Supp. 796 (N.D. Cal. 1991). This lawsuit alleged a pattern and practice of discrimination in the adjudication of asylum and withholding of deportation claims of Salvadoran and Guatemalan applicants. Surprisingly, the INS choose to settle the case. A key element of the settlement was the INS's agreement to readjudicate the asylum and withholding claims of every Salvadoran and Guatemalan applicant who had previously been denied relief. The readjudication was to take place under proper procedures negotiated by the plaintiffs in order to protect against the continued influence of impermissible considerations. See *id.*

<sup>45</sup> 8 U.S.C. §1525 (repealed 1994). The Act was intended to send a clear message to the world that the United States had adopted an explicit set of policies that committed it to receiving a substantial number of refugees. The law expanded the definition of "refugee" beyond those fleeing from communist countries and entitled refugees to certain federally reimbursable social and medical services. The Act increased the representation of non-European countries in the immigration flow. See Fix & Passel testimony, *supra* note 21, at 11-12.

<sup>46</sup> See Bau, *supra* note 43 (claiming that these refugees were not recognized because U.S. foreign policy interests supported the Central America).

<sup>47</sup> See Jorge L. Carro, *Municipal and State Sanctuary Declarations: Innocuous Symbolism or Improper Dictates?*, 16 PEPP. L. REV. 297, 305 (1989). See, e.g., Madison, Wis., Res. 39, 105 (June 7, 1983); Fargo, N.D., Res. Urging Federal Authorities to Grant Extended Voluntary Departure Status to Refugees or Temporarily Suspend Deportation of Refugees from Central America (July 14, 1986); Oakland, Cal., Res. 63950 (July 8, 1986), reprinted in 63 INTERPRETER RELEASES 643-46 (1986); Rochester, N.Y., Res. 86-29 (May 27, 1986); Davis, Cal., Res. 5407 (Mar. 5, 1986); San Francisco, Cal., Res. 1087-85 (Dec. 27, 1985); Sacramento, Cal., Res. 85-973 (Dec. 17, 1985); West Hollywood, Cal., Res. 129 (Nov. 25, 1985); Takoma Park, Md., Ordinance 1985-63 (Oct. 28, 1985); Takoma Park, Md., Ordinance 1985-29 (Oct. 28, 1985); Olympia, Wash., Res. M-1192

ried in content. Some merely prohibited municipal employees, including teachers and police officers, from giving information on illegal immigrants to the INS unless that individual had committed a crime.<sup>48</sup> Others went farther by declaring the city a "sanctuary" for illegal aliens, beyond the reach of federal authorities.<sup>49</sup> In December of 1996, San Francisco legislators passed a Limited Cooperation agreement, in sharp contrast to the message of Proposition 187.<sup>50</sup> The agreement states that the city will not deny illegal immigrants social services or health care benefits nor will city employees or police officers be required to ask people about their immigration status.<sup>51</sup> One reason for these policies is the general consensus that police officers and officials should not be required to act as immigration officers.<sup>52</sup> Municipalities have generally justified these ordinances

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(Aug. 30, 1985); Ithaca, N.Y., Res. Sanctuary for Salvadoran and Guatemalan Refugees (July 17, 1985); Cambridge, Mass., Res. Declaring the City a Sanctuary (Apr. 8, 1985), *reprinted in* 62 INTERPRETER RELEASES 382-85 (1985); Burlington, Vt., Res. Relating to Support for Efforts to Provide Sanctuary for Refugees from El Salvador and Guatemala, (Apr. 4, 1985); Madison, Wis., Res. 41,075 (Mar. 5, 1985); Minneapolis, Minn., Res. 85R-042 (Feb. 22, 1985); Berkeley, Cal., Res. 52,596 (Feb. 19, 1985); Brookline, Mass., Res. Concerning Sanctuary for Refugees from El Salvador, Guatemala and Haiti, art. 24 (1985); Duluth, Minn., Res. 84-0485R (July 2, 1984); San Jose, Cal., Res. Concerning U.S. Immigration and Naturalization Service Enforcement Policies (Apr. 24, 1984); Chicago, Ill., Exec. Order No. 85-1 (1985); Detroit, Mich., Exec. Order No. 26 (1987); *Koch Memo Directs City Workers Not to Report Illegal Aliens to the U.S.*, N.Y. TIMES, Oct. 18, 1985, at 1 col. 2. For reprints of sanctuary ordinances in Los Angeles, Cal. and Seattle, Wash., *see* 63 INTERPRETER RELEASES 135-38 (1986).

<sup>48</sup> *See, e.g.*, Chicago, Ill. Exec. Orders 85-1 and 89-6 (1989), *discussed in* 66 INTERPRETER RELEASES 988, 988-89 (1989); New York Mayor Memorandum (Oct. 15, 1985), *reprinted in* 62 INTERPRETER RELEASES 1056, 1070-71 (1985); New York Bill No. 1072-A (July 18, 1989), *discussed in* 66 INTERPRETER RELEASES 988-89 (1989); New York, N.Y. Exec. Order 124 (1989); Mass. Exec. Order 257 (1985), *reprinted in* 62 INTERPRETER RELEASES 1193, 1193-94 (1985).

<sup>49</sup> *See, e.g.*, Oakland California Administrative Instruction No. 323 (Oct. 31, 1986) (instructing city employees not to assist federal authorities in detaining, investigating or deporting undocumented immigrants).

<sup>50</sup> *See* [San Francisco] *Aiming to be Immigrant "Safety Zone,"* SACRAMENTO BEE, Dec. 11, 1996, at A4.

<sup>51</sup> *See id.*; *see also* Isabelle de Pommereau, *As Uncle Sam Cuts Benefits to Illegals Jersey City Declares Itself a Sanctuary Where Immigrants are Welcome*, CHRISTIAN SCI. MONITOR, Mar. 4, 1997, at 3. Jersey City's declaration is reminiscent of the sanctuary declarations of the 1980's. *See id.* The measure discourages municipal employees from reporting illegal immigrants to authorities and from using municipal funds to seek out and apprehend illegal immigrants. *See id.*

<sup>52</sup> *See* Patrick J. McDonnell, *Law Could Alter the Role of Police on Immigration*, L.A. TIMES, Sept. 30, 1996, at A1 (quoting retired police chief Daryl F. Gates, who said that reporting illegal aliens was "not our responsibility, and all it did was get us in trouble"). Gates pushed for the passage of Special Order 40, and LAPD policy which generally prevents officers from asking anyone about their immigration status, checking with the INS or turning in suspects accused of minor violations to the INS. *See id.*

under the rationale that police officers should not have to limit their time spent fighting crime by acting as agents of the INS.<sup>53</sup> These ordinances stem from the need to encourage new arrivals to report crime.<sup>54</sup> Proponents argue that the police have enough work to do fighting crimes and should leave the enforcement of federal immigration to the INS.<sup>55</sup>

### C. *The Immigration and Naturalization Act*

The Immigration and Naturalization Act<sup>56</sup> ("INA") is the federal statute that governs the immigration process. The Act falls within the exclusive federal power over immigration because it is "a pervasive regulatory scheme."<sup>57</sup> Once Congress enacts a "complete scheme of regulation," states are prohibited from legislating in any manner that might "conflict or interfere with . . . the federal law."<sup>58</sup> Regulation of immigration is the determination of who should or should not be admitted into the country and the conditions under which one legally in the United States may remain. "[T]he existence of the INS, a comprehensive administrative agency charged with the duty of enforcing the INA, indicate[s] Congressional intent to preempt state and local enforcement of the civil provisions of the Act."<sup>59</sup> The INA provides that undocumented immigrants are subject to both civil and criminal penalties.<sup>60</sup> Illegal entry occurs when one arrives in the United States without proper documents, and is considered both a civil<sup>61</sup> and criminal offense.<sup>62</sup> Illegal presence, on the other hand, is a civil violation under the INA.<sup>63</sup> Illegal presence occurs in one of two ways: either when one's entry to the United States is legal but continued presence is not (e.g., an overstayed

<sup>53</sup> See Hugo Martin, *Suit Challenges Police Policy on Reporting Illegal Immigrants*, L.A. TIMES, May 11, 1996, at 4.

<sup>54</sup> See *id.*

<sup>55</sup> See *infra* notes 119-29 and accompanying text.

<sup>56</sup> 8 U.S.C. §§ 1101-1503 (1994 & Supp. II 1996).

<sup>57</sup> See *Gonzales v. City of Peoria*, 722 F.2d 468, 475 (9th Cir. 1983).

<sup>58</sup> *Hines v. Davidowitz*, 312 U.S. 52, 66 (1941).

<sup>59</sup> Arthur C. Helton, *Ecumenical, Municipal and Legal Challenges to United States Refugee Policy*, 21 HARV. C.R.-C.L. L. REV. 493, 597 (1986). See *Gonzales*, 722 F.2d 468.

<sup>60</sup> See 8 U.S.C. § 1251(a)(1)(B) (1994); 8 U.S.C. § 1325(a) (1994).

<sup>61</sup> See 8 U.S.C. § 1251(a)(1)(B) (stating that immigrants who enter without inspection are subject to deportation).

<sup>62</sup> See 8 U.S.C. § 1325(a). Section 1325 states that:

Any alien who (1) enters or attempts to enter the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or (3) attempts to enter or obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact, shall, for the first commission of any such offense, be fined under title 18, or imprisoned not more than 6 months, or both, and, for a subsequent commission of any such offense, be fined under title 18, or imprisoned not more than 2 years, or both.

<sup>63</sup> See 8 U.S.C. § 1251(a).

visa); or, when illegal entry follows an undocumented stay. Thus, illegal entry is a criminal offense which can be enforced by both state and federal officials, whereas illegal presence is a civil offense, enforceable only by the INS.<sup>64</sup> Therefore, Limited Cooperation ordinances concern immigration, a subject matter wherein federal power is exclusive.<sup>65</sup> The mere fact that the undocumented are the subject of a state statute does not render it an immigration regulation.<sup>66</sup> Limited Cooperation ordinances, which prohibit municipal employees from giving information about an individual's status to the INS, do not interfere with the federal authorities' ability to administer the civil portions of the Act.<sup>67</sup> The INS is not deprived of its ability to deport illegal aliens from within jurisdictions because of such ordinances. Opponents argue that Limited Cooperation ordinances create localized immigration policy and dilute the enforcement of federal law.<sup>68</sup> The courts, however, have already limited the authority of police to enforce the majority of immigration violations which are civil, not criminal.<sup>69</sup> Additionally, the INA itself restricts state officials to the enforcement of its criminal provisions, such as those dealing with illegal entry and harboring.<sup>70</sup> In order for federal authority to constitutionally supersede Limited Cooperation ordinances, state officials need an affirmative duty to help the INS enforce the INA.<sup>71</sup> The INA does not create such an affirmative duty for anyone other than a federal department or agency to report undocumented aliens who are illegally present in the United States to the INS.<sup>72</sup> Local law enforcement is forbidden from actually enforcing most immigration law and therefore is under no affirmative duty to gather information on immigration status or to report violations.<sup>73</sup> Courts have determined that local law enforcement has no authority to arrest individuals for the civil offense of illegal presence in the United States.<sup>74</sup> This indicates that the federal government has delineated a clear separation of authority in relation to the civil provisions of the INA. Therefore, Limited Cooperation ordinances merely codify what the courts have already decided: that state and local officials

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<sup>64</sup> See Bau, *supra* note 43, at 54.

<sup>65</sup> See *DeCanas v. Bica*, 424 U.S. 351, 354-55 (1976).

<sup>66</sup> See *id.* at 355.

<sup>67</sup> See Helton, *supra* note 59, at 597.

<sup>68</sup> See 75 Op. Cal. Att'y Gen. 270 (1992).

<sup>69</sup> See *Gates v. Superior Court*, 193 Cal. App. 3d 205 (1987); *Gonzales*, 722 F.2d 468.

<sup>70</sup> See *Gonzales*, 722 F.2d at 477.

<sup>71</sup> See Helton, *supra* note 59, at 597.

<sup>72</sup> See *id.*

<sup>73</sup> See *Gonzales*, 722 F.2d at 476 (stating that the "arrest of a person for illegal presence would exceed that authority granted Peoria police by state law" under the Supremacy Clause). In the *Gonzales* case, the Ninth Circuit reviewed the authority of the Peoria police department to make immigration law related arrests. The Peoria police made a warrantless arrest of *Gonzales* for violating 8 U.S.C. §1325, the illegal entry provision. The Ninth Circuit ruled that the local police were prohibited from enforcing the civil provisions of the INA.

<sup>74</sup> See *id.* at 474-75. See also Smith, *supra* note 23 (noting that courts have found no constitutional problem with local enforcement of the criminal immigration statutes).

have no jurisdiction to enforce the civil provisions of federal immigration law.<sup>75</sup> The legislative history of the INA indicates that Congress intended that only certain officials would carry out the statute's provisions.<sup>76</sup> Courts have ruled that state and local officials have no authority to arrest, detain or otherwise seek to enforce the civil provisions of the INA.<sup>77</sup> State and local officials have no affirmative duty to report to the INS information they might have about a person's illegal presence in the United States unless that individual has committed a crime.<sup>78</sup> Trained federal immigration authorities are uniquely prepared to deal with complex immigration laws. Further, state and local governments have a right to control their own finances and to legislate for the health and welfare of their citizens. Gathering information on the citizenship of various individuals consumes valuable police time and fiscal resources.<sup>79</sup> Federal preemption of the local enforcement of civil immigration law actually supports local Limited Cooperation ordinances, which explicitly prohibit local officials from seeking to enforce the civil provisions of the INA.

#### D. *Limited Cooperation Ordinances as a Compromise*

The federal government does not have to open this nation's doors to everyone who would like to live here. However, preventing illegal immigration and deporting illegal aliens is the exclusive job of the federal government.<sup>80</sup> A serious proposal attempting to solve the problem of illegal immigration must recognize that a comprehensive plan and a large financial investment are needed.<sup>81</sup> The re-

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<sup>75</sup> See Smith, *supra* note 23, at 159 ("Federal case law demonstrates that enforcement of civil immigration provisions by state officials is preempted by federal law and conflicts with federal policy.").

<sup>76</sup> See H.R. REP. NO. 1505, at 1-3 (1952), *reprinted in* 1952 U.S.C.C.A.N. 1358, 1360-62. This report discusses the Attorney General's delegation of certain enforcement duties and powers provided that they be granted "to employees of the United States Immigration and Naturalization Service." The INA does not contemplate involvement of state officials. See also *Gonzales*, 722 F.2d at 474-75 (ruling that the Supremacy Clause prohibited the local police from enforcing the civil provisions of the INA. The civil provisions of the INA "constitute such a pervasive regulatory scheme, as would be consistent with the exclusive federal power over immigration" and therefore serve to oust state enforcement).

<sup>77</sup> See *supra* notes 73-75 and accompanying text.

<sup>78</sup> See Bau, *supra* note 43, at 58 (quoting 67 Op. Cal. Att'y Gen. at 338).

<sup>79</sup> See Helton, *supra* note 59.

<sup>80</sup> See *Truax v. Raich*, 239 U.S. 33, 42 (1915).

<sup>81</sup> See *Hearing on Proposals for Immigration Reform Before the Subcomm. on Immigration and Refugee Affairs of the Senate Comm. on the Judiciary*, 103d Cong. 4 (1996) (statement of Barbara Jordan, Chairperson of the U.S. Commission on Immigration Reform) ("Curbing unlawful immigration requires a more effective method of deterring the employment of unauthorized workers. We need better border management. There needs to be a willingness and ability to remove those who have no right to remain in the country, with particular focus on criminal aliens. We need a consistent policy regarding eligibility for public benefits and enhanced capacity to respond to immigration emergencies, an ef-

ality is that the federal government may never be able to completely stop the flow of illegal immigrants. This task is particularly overwhelming for a large country with borders spanning oceans, deserts and mountains, founded on a pledge to protect individual liberties, prompting a strong desire in people to immigrate. The federal government does not deport enough illegal aliens in any given year to put a dent in the illegal population.<sup>82</sup> Illegal aliens reside in the United States in great numbers. Limited Cooperation ordinances offer one solution by recognizing this reality and making adjustments for the benefit of public safety. Executive Order 124, of the City of New York, is a good example of a Limited Cooperation ordinance.<sup>83</sup> Mayor Koch issued the order in 1988 to provide for the health and well being of the citizens of New York,<sup>84</sup> and it has been renewed by subsequent New York Mayors.<sup>85</sup> The Order protects undocumented aliens who use city services that are necessary for their health and safety. For example, under the Order, undocumented aliens may seek help from the City when they become ill, fear for their safety or when they wish to educate their children.<sup>86</sup> Executive Order 124 protects these illegal aliens but it also protects the citizens of New York from the diseases or crimes they may face without the Order's protection. Those who oppose these ordinances agree that they do not directly regulate immigration.<sup>87</sup> The ordinances protect the health and safety of citizens in cities where illegal immigrants make up a small but significant portion of the population.<sup>88</sup> Illegal immigrants are here to stay, and both they and the broader society would benefit if access to essential government services were available in times of need.

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fective strategy to reduce the pressures for migration in sending countries and better data for policy formulation and its implementation."').

<sup>82</sup> The INS deported 67,000 illegal immigrants in fiscal 1996, a dramatic 34% increase over the total in 1995. However, this represents less than 1.7% of the illegal immigrants in the country. *See INS Says Deportations are Rising*, NEWS & OBSERVER (Raleigh, N.C.), Oct. 30, 1996, at A5.

<sup>83</sup> *See* New York, NY Exec. Order 124 (1989).

<sup>84</sup> *See* Mayor Rudolph Giuliani, Speech on the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Sept. 11, 1996) [hereinafter Giuliani: Speech on Reconciliation Act of 1996].

<sup>85</sup> *See* Mayor Rudolph Giuliani, Address at the Kennedy School of Government (Oct. 10, 1996).

<sup>86</sup> *See id.*

<sup>87</sup> *See* 75 Op. Cal. Att'y Gen. 270 (noting that the ordinance does not directly regulate immigration, but arguing that it regulates an important and related subject matter — the detection of persons whose presence in this country potentially violates the civil provisions of the INA).

<sup>88</sup> *See No Tired, No Poor, No Huddled Masses, No Wretched Refuse, No Homeless*, NEWSDAY, Sept. 29, 1996, at A35 (noting that New York City's Executive Order 124 is designed to educate, immunize and protect up to 7% of New York City's population).

## IV. THE PRACTICAL EFFECT OF 8 U.S.C. §§ 1373 &amp; 1644

The proponents and opponents of the federal regulation embodied in the Reform Laws have some critical differences. Proponents of laws which allow the reporting of illegals who use social services have several goals. First, this type of law is designed to discourage illegal aliens' use of public services based on fear of being reported to the INS and deported.<sup>89</sup> Discouraging access to social services may also save the state and federal government millions of dollars by discouraging future illegal immigration. In addition, it may prompt some of the illegal aliens who are already here to return to their native countries.<sup>90</sup> Proponents seek to create an environment that is so hostile to illegal aliens that they will not want to be in the United States.<sup>91</sup> Opponents argue that spending less for social services, health care and education now will cost more in the long run.<sup>92</sup> Cuts in spending will increase the crime rate, the rate of illness among the general population and emergency medical care costs.<sup>93</sup> Opponents also contend that illegal immigrants, like all immigrants past and present, come to this country primarily for the abundant employment opportunities.<sup>94</sup> Opponents argue that the provision will not encourage those here illegally to leave since many illegal immigrants have resided here for years and have a source of employment, U.S. born children who are legal citizens, and more importantly, no hope of a better life in their home countries.<sup>95</sup> While it is logical to question why U.S. citizens should have to pay for public services for illegal immigrants, the answer lies in what is best for society as a whole. If an alien is in the United States unlawfully, he or she should not be permitted to receive publicly funded aid except in a few select circumstances: for example, where there is a public health, safety or welfare issue (police protection, immunizations and steps to prevent the spread of communicable diseases) and where their eligibility is constitutionally protected (education).<sup>96</sup> Illegal aliens are not legally entitled to benefits such as welfare, unemployment or food stamps programs because they have no legal right to be in the United States. However, the exceptions that local communities have

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<sup>89</sup> See Smith, *supra* note 23, at 148.

<sup>90</sup> See *id.* at 149.

<sup>91</sup> See *id.*

<sup>92</sup> See, e.g., Dave Zweifel, *The First of Many Horror Stories To Come*, CAPITAL TIMES, Oct. 18, 1996, at 12A.

<sup>93</sup> See Margolis, *supra* note 3, at 382. See also McDonnell, *supra* note 7 (mentioning that critics of laws barring essential social services to illegal immigrants envision an ill-educated underclass of youngsters roaming the streets, prone to contagious diseases and drawn to crime, posing constant hazards for citizens and other legal residents).

<sup>94</sup> See Plyler v. Doe, 457 U.S. 202, 228 (1981) ("The dominant incentive for illegal entry into the State of Texas is the availability of employment; few if any illegal immigrants come to this country. . . in order to avail themselves of a free education."). See also Sutherland, *supra* note 3.

<sup>95</sup> See Patrick J. McDonnell, *The Great Social Laboratory*, L.A. TIMES, Dec. 10, 1996, at B2.

<sup>96</sup> See Jordan testimony, *supra* note 14, at 917.



made through Limited Cooperation Ordinances can be justified on two levels. First, a "no questions asked" policy regarding essential social services is the humanitarian thing to do. Second, it is in the community's interest to take steps to protect its own health, safety and welfare.<sup>97</sup>

The Reform Laws instill fear in the illegal immigrant population. The laws make illegal and undocumented aliens wary of contact with the government for basic services that they need to protect themselves, as well as the rest of the population.<sup>98</sup>

#### A. *The Use of Social Services by Illegal Immigrants*

Two myths of illegal immigration are that the "welfare magnet" draws undocumented immigrants to the United States and that they use welfare in disproportionate numbers.<sup>99</sup> There is very little evidence that public benefits attract illegal immigrants to the United States.<sup>100</sup> Jobs appear to be the primary motivation for entry into the United States.<sup>101</sup> In fact, all immigrants, legal and illegal, are less likely than native-born Americans to utilize social services.<sup>102</sup> Federal law bars illegal immigrants from using most public service programs<sup>103</sup> and their fraudulent use of these programs is quite low.<sup>104</sup> The few who are re-

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<sup>97</sup> See *id.*

<sup>98</sup> Many agencies, including the Labor Department, choose not to report illegal aliens because of their reliance on the undocumented for information they would not receive if those reporting feared deportation. The Labor Department says that involving themselves with citizenship concerns would impede their responsibility to carry out their mission of enforcing wage and hour requirements. "We are not trained, funded or assigned to carry out that responsibility." See Joel Stashenko, *Senator Challenging Labor Officials to Report Illegal Aliens*, Associated Press, Sept. 5, 1996, available in WL 5404581.

<sup>99</sup> See *Hearings on Welfare Reform Before the Subcomm. on Human Resources of the House Comm. on Ways and Means*, 104th Cong. 59 (1997) [hereinafter *Welfare Reform*] (testimony submitted by Congressman Xavier Becerra).

<sup>100</sup> See Fix and Passel testimony, *supra* note 21, at 13.

<sup>101</sup> It is interesting to note that if illegal immigrants obtain falsified documents they tend to *contribute* to the tax base rather than depend on social services. See Brooks, *supra* note 15.

<sup>102</sup> See *Welfare Reform*, *supra* note 99, at 60 (noting that of non-refugee immigrants of working age who entered during the 1980s, 2.0% report welfare income versus 3.7% of working-age natives).

<sup>103</sup> Illegal immigrants are ineligible for major-federally funded benefit programs, such as Aid to Families with Dependent Children (AFDC), Medicaid, food stamps and Supplemental Security Income (SSI). See 42 U.S.C. §§ 602(a)(3) (1994) (AFDC), 1382c(a)(1)(B) (1994) (SSI), 1396b(v)(1) (1994) (Medicaid); 7 U.S.C. §2015(f) (1994) (food stamps). See Fix and Passel testimony, *supra* note 21, at 11 ("[N]ot only are [illegal immigrants] barred by law from most public services, but their attempts to avail themselves of several benefits is policed by an automatic verification system — the Systematic Alien Verification for Entitlement (SAVE) Program — that has been in place since 1987.").

<sup>104</sup> See Olivas, *supra* note 17, at 227-30 (citing a 1992 project entitled "The Impact of

ceiving benefits are doing so illegally. They can be punished under existing law for fraudulent use of a benefit program. Illegal immigrants are eligible for *emergency* medical care under Medicaid<sup>105</sup> and special supplemental vouchers under the Nutrition Program for Women, Infants and Children ("WIC").<sup>106</sup> However, these programs do not cost the state anything and are one of the few examples where federal government pays for services that illegal immigrants have access to.<sup>107</sup> While the intent of the Reform Laws is surely to appease states who are fed up with paying for the failure of federal policy, the laws are not well reasoned. Barring illegal immigrants from receiving social services would not achieve a significant decline in illegal immigration because benefits are not the primary lure for these aliens.<sup>108</sup> In light of the inability of undocumented immigrants to receive most major federal assistance programs, an attack based on their disproportionate use of such services is misplaced.<sup>109</sup> States should allow illegal immigrants, without fear of deportation, to access services that are essential to public safety. Aside from the moral issues raised, one must consider the possibility that such a law will cost society far more in the long run by affecting the following three principal areas: medical care, police protection and education.

### 1. Medical Care

Undocumented immigrants will not seek medical treatment if they fear being reported to authorities by their doctor. The health care system should focus on controlling health care costs and stopping the spread of preventable diseases.<sup>110</sup> Illegal immigrants commonly live in high-risk communities where poverty, poor

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Undocumented Persons and Other Immigrants on Costs, Revenues and Services in Los Angeles County," a comprehensive government analysis of immigration, economic costs and benefits). "The study's findings are consistent with other studies that showed virtually no participation in the welfare programs by the undocumented." *Id.* See also Roger E. Hernandez, *California Initiative Attacks Phantoms*, PORTLAND OREGONIAN, Sept. 12, 1996, at B6 (discussing a study by the INS, that was "hardly likely to skew surveys in favor of illegal immigrants," finding that only one half of one percent of illegal aliens receive welfare or food stamps); Fix and Passel testimony, *supra* note 21, at 23 (indicating that undocumented aliens use relatively few social service programs). Illegal immigrants tend to be young and therefore do not qualify for the most expensive social service programs, such as Social Security and Medicare. See *id.* at 19.

<sup>105</sup> See 42 U.S.C. § 1396b(v)(2) (1994).

<sup>106</sup> See 42 U.S.C. § 1786 (1994). Undocumented children are also eligible for participation in related programs providing school lunch, breakfast and Headstart programs. See 42 U.S.C. § 1751 (1994).

<sup>107</sup> See *Kinder Line on Immigration Aid*, L.A. TIMES, Dec. 30, 1996, at B4; *Let Washington Pick Up the Check*, L.A. TIMES, Dec. 3, 1996, at B6.

<sup>108</sup> See Fix and Passel testimony, *supra* note 21, at 23.

<sup>109</sup> See Johnson, *supra* note 3, at 1518 ("The restrictions, therefore, may well represent deeper-seated hostility toward immigrants rather than simply concern about the fiscal impact of undocumented immigration.").

<sup>110</sup> See Brooks, *supra* note 15, at 144; Margolis, *supra* note 93.

housing conditions and poor nutrition are prevalent. As a result, they are more susceptible to infectious diseases such as tuberculosis.<sup>111</sup> Many illegal aliens earn their living as farm hands or in food services, handling food and often coming into contact with legal residents.<sup>112</sup> Additionally, migrant workers, both legal and illegal, tend to suffer higher rates of respiratory, infectious and digestive diseases than the general population.<sup>113</sup> These individuals are therefore more likely to suffer from debilitating preventable diseases that are communicable and could place the entire community at risk.<sup>114</sup> The public impact of illegal aliens' diseases is both physical and economic.<sup>115</sup> While terminating medical services would save money, providing only emergency care means waiting until a situation is no longer controllable.<sup>116</sup> It costs far less to prevent infectious diseases or treat serious conditions early-on than to wait until the acute stage and risk exposure to the general community.<sup>117</sup> Professor Linda Bosniak wrote that "people afraid to go to the doctor will simply create the conditions for a public health catastrophe and will end up costing the state more money later on."<sup>118</sup> Although politically appealing, excluding illegal immigrants from health care coverage may result in serious public health consequences to society as a whole.

## 2. Police Protection

Limited cooperation laws govern the police in many communities.<sup>119</sup> Under these laws, the police avoid any involvement in immigration matters on the premise that it would discourage victims and witnesses from reporting crimes and cooperating with the police.<sup>120</sup> Undocumented aliens who fear being investigated by local officials may, as a result, avoid contact with the police in communities without these laws.<sup>121</sup> Many people see these laws as essential to effective law enforcement because they maintain trust between the immigrant community and

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<sup>111</sup> Tuberculosis is a grave problem in many immigrant communities. California leads the nation in reported cases of tuberculosis. See McDonnell, *supra* note 7.

<sup>112</sup> See *id.*

<sup>113</sup> See Brooks, *supra* note 15, at 175 n.156 ("The Food and Drug Administration has estimated that 90,000 farm workers may suffer injury due to pesticide poisoning.").

<sup>114</sup> *Id.* at 169.

<sup>115</sup> *Id.*

<sup>116</sup> See Zweifel, *supra* note 92.

<sup>117</sup> See Fix and Passel testimony, *supra* note 21, at 14. See also McDonnell, *supra* note 3. Some public health benefits are available to illegal immigrants. See *id.* "Many programs have been kept open to everyone for a deliberate reason: to head off infectious diseases that inevitably cost less to prevent or treat at early stages than afterward, when illnesses become acute and may spread to others, regardless of immigration status." *Id.*

<sup>118</sup> Linda S. Bosniak, *Opposing Prop. 187: Undocumented Immigrants and the National Imagination*, 28 CONN. L. REV. 555, 563 (1996).

<sup>119</sup> See *supra* notes 47-48 and accompanying text.

<sup>120</sup> See *supra* notes 52-55.

<sup>121</sup> See Patrick J. McDonnell, *Police Fear Prop. 187 Will Crush Hard-Earned Trust*, L.A. TIMES, Nov. 5, 1994, at 1.

the police.<sup>122</sup> In addition to obtaining the cooperation of the community, Limited Cooperation ordinances enable police officers to concentrate on their duties and not worry about enforcing federal immigration law.<sup>123</sup> Police departments in major cities insist that they have enough work without conducting investigations for other agencies.<sup>124</sup> The majority of the country's immigrants are concentrated in the urban areas of California, New York, Florida, Illinois and Texas.<sup>125</sup> Since these urban areas tend to have high crime rates, many argue that police are already overburdened with violent crime and that immigration violations are a low priority.<sup>126</sup> Many Limited Cooperation ordinances make exceptions to the prohibition on reporting for illegal aliens convicted of a felony.<sup>127</sup> Society serves its best interest when the entire community cooperates with the police.<sup>128</sup> Illegal aliens who are victims of a crime or witnesses to a crime could provide valuable information to the police such as descriptions, identifications, or even physical evidence that could lead to an arrest. The disincentive to report crimes becomes particularly unsettling in cases where illegal aliens are the victims of abuse. Such a law effectively deprives people of their chance to leave dangerous and abusive relationships.<sup>129</sup> If an illegal alien does not provide such information, the next victim could be a citizen. The federal government should not mandate state and city policies that reduce the number of illegal immigrants reporting crimes.

### 3. Education

One of the most controversial aspects of the present federal policy is its effect on children.<sup>130</sup> The largest cost associated with illegal aliens is the education of

<sup>122</sup> Rebecca Chiao, *Two Sides to Preemption Comments on Bau*, 7 LA RAZA L.J. 72, 77 (1994) (citing Office of the Chief of Police, Special Order No. 40 (Nov. 27, 1979)). Special Order 40 is a 1979 policy in Los Angeles which prevents police from detaining or questioning a person for the sole purpose of determining his or her immigration status. See *id.* The police can, however, notify the INS if they have arrested an illegal immigrant. See Martin, *supra* note 53.

<sup>123</sup> See *id.*

<sup>124</sup> See *id.*

<sup>125</sup> See *supra* notes 21-22 and accompanying text.

<sup>126</sup> See McDonnell, *supra* note 121.

<sup>127</sup> See, e.g., MICH. COMP. LAWS § 404.31 (1988) (mandating that "alien inmates of state, county or private institutions" or homes for children be reported to the INS); N.D. CENT. CODE §44-04-04 (Supp. 1995) (requiring the officer in charge of a jail to report aliens convicted of a felony to the I.N.S.).

<sup>128</sup> See McDonnell, *supra* note 52.

<sup>129</sup> See Felicia E. Franco, *Unconditional Safety for Conditional Immigrant Women*, 11 BERKELEY WOMEN'S L.J. 99 (1996).

<sup>130</sup> See *GOP Drops Immigration Bill's School Clause*, COURIER-JOURNAL (Louisville, KY), Sept. 25, 1996, at 3A. Congress dropped the controversial Gallegly Amendment from the Immigration Reform Bill in September 1996 in order to get the bill passed. See *id.* The measure would have allowed states to bar illegal immigrants from public schools. See *id.* See also Eric Schmitt, *Police Scorn Plan to Deny Schooling to Illegal Aliens*, N.Y. TIMES, Apr. 9, 1996, at A16; 73 INTERPRETER RELEASES 1111 (1996) (noting that

their children.<sup>131</sup> The Supreme Court held in *Plyler v. Doe* that illegal immigrants have a right to receive a free public education in the United States.<sup>132</sup> Many opponents of schooling argue that illegal immigrants use money that should go to children who are legally in this country, and that keeping undocumented children out of school would save millions.<sup>133</sup> However, the purpose of public education is to reduce public ignorance and keep children in school.<sup>134</sup> Denying a basic education to a large group of people, for any reason, is a seemingly difficult line of argument to pursue.<sup>135</sup> Excluding these children from school effectively punishes those who are not at fault for their illegal status.<sup>136</sup> This also punishes children who are born in this country, and are therefore citizens, but are the children of illegal immigrants and fear having their parents "discovered." Even the Commissioner of the INS, Doris Meissner, recently dismissed the idea that education serves as a lure for illegal immigrants, saying that the "cure is worse than the disease."<sup>137</sup> Approximately 641,000 undocumented

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President Clinton vowed to veto the Immigration Bill if it included the Gallegly Amendment).

<sup>131</sup> The Heritage Foundation estimated that it cost \$3.9 billion to educate illegal immigrants in the United States in 1992. See William Booth, *Florida Plans To Sue U.S. Over Illegal Immigrants*, WASH. POST, Dec. 30, 1993, at A1. See also Wilson testimony, *supra* note 26 at 22 (noting that California schools would have to spend \$1.7 billion in 1995 to educate the children of illegal aliens). Research by the Urban Institute and the Immigration and Naturalization Service shows that it cost \$3.1 billion in 1993 to educate the children of illegal immigrants in the seven states. Mills, *supra* note 23. But see Fix and Passel testimony, *supra* note 21 at 19 (noting that because of the "sheer expense of education (roughly \$5,000 [plus] per child per year), populations with . . . a high ratio of children rarely 'pay their own way' " in government financed education).

<sup>132</sup> 457 U.S. at 202 (holding that the state of Texas could not deny undocumented school-age children a free public education).

<sup>133</sup> See Donna St. George, *Up Close: A Lesson in Citizenship*, TAMPA TRIB., June 5, 1996, at 6 ("Elton Gallegly (R-Cal.) says that illegal immigrants crowd classrooms, burden school districts and steer tax-dollars away from U.S. born-citizens.").

<sup>134</sup> See *id.* (noting that a coalition of police, teachers and immigrant groups have joined forces to oppose federal legislation barring illegal immigrants from public schools saying the measure would punish innocent children, lead to a surge in juvenile crime and do little to curb illegal immigration).

<sup>135</sup> See *Plyler*, 457 U.S. at 221 ("We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.").

<sup>136</sup> See *id.* at 223 ("[This law] imposes a lifetime of hardship on a discrete class of children not accountable for their disabling status."). See also *Patrol Borders, Control Immigration, But Don't Keep Children From School*, SUN SENTINEL (Ft. Lauderdale, Fla.), Mar. 28, 1996, at 20A ("[D]enying children access to education for the sins of their parents would only accelerate the growth of an illiterate and alienated underclass in a society already ravaged by ignorance, poverty and crime.").

<sup>137</sup> Claudia Dreifus, *The Worst Job in the World?*, N.Y. TIMES MAG., Oct. 27, 1996, at 54.

alien children attended public schools in the seven states in 1993-1994.<sup>138</sup> In New York City alone, officials estimate that there are approximately 40,000-70,000 of these children in public schools.<sup>139</sup> Without an education, these idle and unproductive children may pose a significant safety risk to society. Experts predict an increase in truancy and gang violence based on the theory that kids who are kept out of school will end up on the streets.<sup>140</sup> "If they're not in school, they're going to be on the streets — and they're going to learn all the wrong things."<sup>141</sup> Denying illegal immigrant children an education will likely create a class of juvenile delinquents who will grow up to be a long-term, costly burden to society. Professor Linda S. Bosniak noted that "to impose illiteracy on a class of children . . . will only undermine both the economy and the democratic fabric of society."<sup>142</sup> Without an education these children are more likely to be on the streets, involved in street gangs, using drugs and leading lives of crime.<sup>143</sup> "Education should be employed as an important tool to help solve America's immigration problem, not used as a weapon against its most helpless victims."<sup>144</sup>

### B. *The Net Effect*

Denying essential social services to illegal immigrants will not control immigration. Research and common sense tell us that illegal immigrants come to the United States for its abundant employment opportunities.<sup>145</sup> Therefore, the denial of social services will not serve to deter their entry.<sup>146</sup> The likely result of these

<sup>138</sup> See Mills, *supra* note 23.

<sup>139</sup> See Giuliani: Speech on the Reconciliation Act of 1996, *supra* note 85.

<sup>140</sup> See Bosniak, *supra* note 118, at 566 n.26 and accompanying text.

<sup>141</sup> See *Up Close*, TAMPA TRIB., June 5, 1996, at 6 (quoting a member of the 275,000-member Fraternal Order of Police that "banning the children from school . . . would create a 'farm team' for drug dealers and gang leaders"). Gov. Bush (R-Tex.) stated that "it is in our best interest to educate them . . . . An educated child is less likely to commit a crime and more likely to succeed." *Id.*

<sup>142</sup> Bosniak, *supra* note 118, at 563.

<sup>143</sup> See Margolis, *supra* note 3.

<sup>144</sup> See *Patrol Borders, Control Immigration, But Don't Keep Children From School*, SUN SENTINEL (Ft. Lauderdale, Fla.), Mar. 28, 1996, at 20A.

<sup>145</sup> See Fix and Passel testimony, *supra* note 21, at 13 ("[J]obs appear to be the illegal immigrants' primary motive for entry.").

<sup>146</sup> See Wayne A. Cornelius, *Don't Vote for a Fix that Won't Work*, L.A. TIMES, Oct. 28, 1994, at B7.

[T]he availability of higher paying jobs and family ties with immigrants already living in this country were the overwhelming incentives [for coming to the United States] . . . [Furthermore], [i]t is inconceivable that an immigrant family, in many cases containing at least some members who are here legally, a family that is already permanently settled in California, with at least one member of the household regularly employed, would pack up and return to a place where they have no viable economic options and no possibility of attaining anything remotely resembling even a modest U.S. standard of living . . . . If serious research is any guide, the vast major-

policies is that illegal immigrants, who have come here for jobs and not social services, would become a far greater social and medical problem if denied these services. This effectively creates an underground class with no rights.<sup>147</sup>

## V. CONCLUSION

Immigration law attempts to discourage illegal immigration.<sup>148</sup> Both federal and state policy makers should retain this goal as a focal-point for policy decisions. The assault on public benefits and services for illegal immigrants may appear to address an immediate financial goal but it is misdirected. The years since the amnesty granted by the Immigration Reform and Control Act<sup>149</sup> have not been kind to immigrants. California voters overwhelmingly passed Proposition 187,<sup>150</sup> and Congress passed comprehensive immigration control legislation cutting benefits to both legal and illegal immigrants.<sup>151</sup> Yet at the height of the anti-illegal immigrant movement their numbers are at a record high and are still growing.<sup>152</sup> The Reform Laws have failed to stem the tide of illegal immigrants because the promise of social services draws very few immigrants to this country.<sup>153</sup> Illegal immigration presents a complex problem encompassing demographics, individual hopes, desires and economics.<sup>154</sup> Simple, albeit attractive, solutions will not stop illegal immigration.<sup>155</sup> Focusing on social services

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ity of undocumented immigrants and their children who have been living continuously in California for five years or more will stay here, whether or not [restrictive social measures] are approved.

*See id.*

<sup>147</sup> *See Plyler*, 457 U.S. at 202. *See also* Patrick McDonnell, *Ahead of the Curve The Great Social Laboratory*, L.A. TIMES, Dec. 10, 1996, at B2.

<sup>148</sup> *See* Fix and Passel testimony, *supra* note 21, at 13. *See also* Jordan testimony, *supra* note 14, at 916.

[A] clear and consistent policy on eligibility for public benefits . . . is key to credible immigration policy and credible welfare policy . . . [The United States has] the sovereign authority to make distinctions as to the rights and responsibilities [of] the various persons who reside in [its] territory . . . [The] distinctions regarding eligibility for public benefits should be consistent with the objectives of our immigration policy — [to] [s]upport legal immigration . . . and [to] deter unlawful immigration.

*Id.*

<sup>149</sup> *See* Immigration Reform and Control Act, Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified in scattered sections throughout 8 U.S.C.).

<sup>150</sup> *See supra* note 3. While many of Proposition 187's provisions are enjoined the message of the legislation has been heard loud and clear in immigrant communities. *See del Olmo, supra* note 18.

<sup>151</sup> *See supra* notes 5-6.

<sup>152</sup> *See supra* notes 18-22 and accompanying text.

<sup>153</sup> *See* Fix and Passel testimony, *supra* note 21, at 13.

<sup>154</sup> *See del Olmo, supra* note 18 (noting that "[u]ltimately, [immigration] is the end result of millions of individual decisions made by millions of human beings . . . and neither governments nor laws can control those").

<sup>155</sup> *See id.*

for illegal immigrants will distract the federal government from enacting the bold, fundamental reforms that are truly necessary.<sup>156</sup> Instead of opting for vital reform Congress has hopped on the bandwagon of public outrage, providing the quick fix and not the long-term solution. The Personal Responsibility and Work Opportunity Reconciliation Act and Illegal Immigration Reform and Immigrant Responsibility Act of 1996 create fear and disincentives by trying to usurp state power and exercise it in the way that the federal government would like to see it exercised. They completely undermine the efforts of cities to educate, immunize and protect portions of their population. The result of these Acts raises the possibility of a permanent caste of undocumented resident aliens, encouraged by some businesses to remain here as a source of cheap, compliant labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents. The care rendered through Limited Cooperation ordinances is not exclusively for the benefit of illegal aliens, it is for all of society. As Justice Brennan observed, "The existence of such an underclass presents most difficult problems for a Nation that prides itself on adherence to principles of equality under law."<sup>157</sup>

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<sup>156</sup> See Daniel W. Sutherland, *Immigrant's Hard Problems and Easy Answers*, WASH. TIMES, Jan. 12, 1995, at A17.

<sup>157</sup> *Plyler*, 457 U.S. at 219.



