Designing Sanctuary

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DESIGNING SANCTUARY

Rick Su*

In recent decades, a growing number of cities in the United States have adopted “sanctuary policies” that limit local participation in federal immigration enforcement. Existing scholarship has focused on their legality and effect, especially with respect to our nation’s immigration laws. Largely overlooked, however, is the local process through which sanctuary policies are designed and the reasons why cities choose to adopt them through city ordinances, mayoral orders, or employee handbooks. This Article argues that municipal sanctuary policies are far from uniform, and their variation reflects the different local interests and institutional actors behind their adoption and implementation. More specifically, municipal sanctuary policies can be broadly categorized into three models: administrative sanctuary, political sanctuary, and silent sanctuary. Each of these models reflects a specific approach in how cities choose to balance their political relationship with residents, their administrative relationship with employees, and their intergovernmental relations with the state and federal government. Moreover, these three models correspond with different eras in sanctuary’s development and anti-sanctuary responses at the state and federal level. This typology highlights the structural and institutional forces that have contributed to the diversity of sanctuary policies in the United States. In addition, it calls into question many of the assumptions in the sanctuary literature about the assessment of sanctuary policies, the goals of anti-sanctuary efforts, and the effect of all of this on local policymaking.

TABLE OF CONTENTS

INTRODUCTION ...............................................................................................................810

I. DISAGGREGATING THE SANCTUARY CITY ...........................................814
   A. The Sanctuary Enigma ..................................................................................814
   B. The Fractured City ......................................................................................819
   C. Sanctuary Through a Local Lens .................................................................822

II. TOWARDS A NEW SANCTUARY FRAMEWORK .................825
   A. Administrative Sanctuary ............................................................................826

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Sanctuaries are everywhere. There are “Second Amendment Sanctuaries” against the enforcement of firearm restrictions,1 “Sanctuaries for the Unborn” restricting abortion access,2 and even “First Amendment Sanctuaries” opposed to COVID restrictions on public gatherings.3 But perhaps no sanctuaries have been as impactful as the immigration sanctuaries upon which this


proliferation of sanctuaries is based. Since the 1980s, more than 500 jurisdictions have adopted sanctuary policies, limiting their participation in federal immigration enforcement. In recent years, these sanctuary cities have become a flashpoint in our nation’s immigration debates. Critics charge them with obstructing federal immigration laws. Supporters uphold them as bulwarks against the excesses of federal enforcement. All the while, states are aligned on both sides: While some have enacted anti-sanctuary measures in support of the federal government, others have adopted state-level sanctuary policies of their own.

Despite the prominence of sanctuary cities in today’s immigration debates, the legal definition of sanctuary remains elusive. There are no settled criteria for what makes a city a sanctuary. Even more striking is the wide diversity of policies commonly associated with the term. Cities differ in the kinds

4. While immigration sanctuaries are the model for subsequent sanctuary movements, they are not the first time that the term “sanctuary” term was used by a city. In the 1970s, for example, Berkeley, California declared itself a “sanctuary for navy soldiers resisting the war in Vietnam.” See Jennifer Ridgley, The City as a Sanctuary in the United States, in SANCTUARY PRACTICES IN INTERNATIONAL PERSPECTIVES 219, 219 (Randy K. Lippert & Sean Rehaag eds., 2013).

5. Grace Benton writes:

The number of sanctuary jurisdictions has increased exponentially in recent years. In 2000, there were eleven such jurisdictions. By the election of Donald Trump in November 2016, there were approximately 300, and that number nearly doubled after President Trump’s inauguration in January 2017. According to the Federation for American Immigration Reform, there currently are 564 sanctuary jurisdictions [states, cities, and other localities] in the United States.


of participation they allow and prohibit. They vary in how their policies are adopted and implemented. Cities also diverge in whether they publicize their policies or self-identify as sanctuaries. Indeed, the differences that divide sanctuary cities perhaps stand out as much as the commonalities they share under the sanctuary label.

Of course, why we care about this diversity—and the elusiveness of the sanctuary label—depends on why we think sanctuary matters. The prevailing view is that sanctuary’s significance lies in how it interacts with federal immigration laws. For immigrant advocates, the diversity of sanctuary policies highlights the uneven protections that immigrants receive and the need for more stringent restrictions on law enforcement. For sanctuary critics, the diversity demonstrates the creative ways that cities circumvent anti-sanctuary measures to obstruct our nation’s immigration laws. On both sides, the focus is on how sanctuary policies affect federal enforcement efforts. Variations among sanctuary cities are important because they reflect differing levels of commitment to the protection of immigrant residents or different degrees of resistance to federal policies. What tends to be overlooked, however, is why these variations exist. Why do municipal sanctuary policies vary across cities and over time? Why have they not converged around a well-defined standard, especially one that can give shape to a concrete definition of sanctuary?

This Article examines the development of sanctuary from the ground up. Focusing on the institutional structure of the cities themselves, I argue that sanctuary’s diversity is not just a reflection of how different local leaders assess the impact of immigration enforcement on their communities, or the depth of their commitment to immigrant residents. Rather, their variation is also the result of the municipal structure in which sanctuary policies are developed, and how local leaders navigate the competing roles, interests, and actors that vie for influence in the governance of these cities. Adopting this perspective, I offer three new frameworks for conceptualizing sanctuary cities: administrative sanctuary, political sanctuary, and silent sanctuary. Each model represents a different balance of interests and audiences to which the sanctuary policy is


13. See Martha F. Davis, The Limits of Local Sanctuary Initiatives for Immigrants, 690 ANNALS AM. ACAD. POL. & SOC. SCI. July 2020, at 100, 104 (describing cities that refrain from publicizing their sanctuary policies or “shy away from the sanctuary label”).

14. See Durkin, supra note 7.

directed. Each exhibits hallmark features that reflect the institutional capacity of the municipal actor primarily responsible for their adoption and implementation. Moreover, each model corresponds to different eras in sanctuary’s historical development, illustrating the different ways that the sanctuary issue can be framed in the eyes of local leaders.

Additionally, this Article is about how sanctuaries are designed. Analysis of municipal sanctuary policies tends to be limited to their substantive provisions, especially those expressed in the text of a formal policy. As a result, the municipal processes through which these provisions are developed often receive little attention. Other features—such as whether the policy is adopted through a municipal ordinance, mayoral order, or departmental handbook—also tend to be glossed over or overlooked entirely. I argue that the design process behind sanctuary, not unlike those of municipal policies generally, centers on how local leaders navigate the fractured identity of cities under American law as democratic polities, bureaucratic corporations, and intergovernmental agents. Furthermore, I suggest that how a city navigates these identities turns in large part on the municipal actor who assumes the responsibility, be it city councils, mayors, or department leadership. Sanctuaries are not just a city’s response to federal demands for their participation—they are also a reflection of how specific municipal actors navigate the institutional structure of the city government within which they operate.

At the most basic level, this Article explains the diversity of municipal sanctuary policies, and not only with respect to their substance, but also to their form and implementation. At a deeper level, however, this Article illustrates why this diversity matters. Focusing on the institutional mechanisms behind the design of sanctuary policies reveals how they are tailored to different interests, needs, and audiences. In turn, this focus complicates many of the prevailing assumptions about sanctuary. We might not be able to assume, for example, that gold-standard sanctuary policies are those that feature categorical prohibitions, formal policies, and widespread publicity. I argue that these features might reflect the challenges to implementing sanctuary in a particular city, rather than a deeper commitment to sanctuary. We also cannot assume that anti-sanctuary measures are exclusively or primarily aimed at increasing local participation and expanding federal enforcement capabilities. I suggest that if municipal sanctuary policies are revealed to serve many ends, then perhaps the design of anti-sanctuary laws might also serve a diversity of interests. Last, I question the common perception that sanctuary has benefitted cities by

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16. See, e.g., Ingrid V. Eagly, Immigrant Protective Policies in Criminal Justice, 95 TEX. L. REV. 245, 250 (2016) (“My analysis is confined to the text of these written policies, which are found in policy manuals, training bulletins, and internal memoranda and directives.”).

17. See, e.g., Lasch et al., supra note 11, at 1737–38 (examining sanctuary policies adopted in “municipal ordinances and resolutions, and internal sheriff and police regulations and policies,” but without differentiating between them in the analysis of their provisions).
elevating their status and influence over an issue that is widely considered national in scope and an exclusive federal responsibility. Instead, I argue that municipal governance has been undermined by sanctuary’s ascendance as a national issue.

This Article is divided into three parts. Part I reframes the sanctuary question—and its elusiveness in law and politics—around the cities where sanctuary policies first arose. Part II outlines a new framework that conceptualizes sanctuary cities as administrative sanctuaries, political sanctuaries, or silent sanctuaries. Part III explores the implication of this framework to our understanding of sanctuary policies; the nature of the battle between sanctuary and anti-sanctuary forces; and the impact of these considerations on municipal governance and policymaking.

I. DISAGGREGATING THE SANCTUARY CITY

The elusiveness of the sanctuary label is due in large part to the nature of immigration enforcement in our federal system. But as this Part argues, the sanctuary enigma is also the result of institutional divides within cities. When designing sanctuary policies, cities are not just responding to federal law and enforcement policies—they are also negotiating competing municipal roles that push the design of sanctuary policies in different directions. These internal tensions help explain why sanctuary policies are so diverse, not only among cities, but also across time. They also call attention to design features that are often overlooked, such as how sanctuary policies are adopted, implemented, and publicized. I later draw upon these insights in Part II to offer a new framework for understanding municipal sanctuary policies. My goal here is to detail why the institutional divide within cities matters to our understanding of sanctuary in contemporary law and politics.

This Part makes three claims. First, sanctuary is elusive not only because of the limitations of federal law, but also the diversity of sanctuary policies at the local level. Second, this diversity is a result of the fractured identity of American cities, both in practice and as a matter of law. Third, this fractured identity explains the varied (and sometimes competing) rationales for local sanctuary policies, which in turn shape how those policies are designed and implemented. Taken together, these claims suggest that the diversity in sanctuary policies is the result of the different combinations of municipal identities that may be salient at any given time.

A. The Sanctuary Enigma

Sanctuary is now commonly used to describe cities that do not fully participate in federal immigration enforcement. For supporters and detractors

18. See infra notes 26–32 and accompanying text.
19. See Lasch et al., supra note 11, at 1710.
alike, the term is meant to suggest a resistance to our federal immigration laws. But despite the common usage, the term “sanctuary” remains enigmatic. There is no consensus on the types of municipal policies that mark a city as an immigration sanctuary, nor is there much prospect that a concrete line can be drawn. There is also little agreement on the purpose and significance of local sanctuary policies among scholars and political observers. But the problem with sanctuary is not just that it eludes clear definition; it is also that our fixation on a clear definition leads us to overlook the diversity of local policies on immigration enforcement, their varied design features, and the competing interests that shaped those policies.

If one thing is clear about sanctuary, it is that the designation should not be understood literally. The term was first used in the 1980s to describe the network of churches that offered “sanctuary” to Central American refugees within their walls. But despite the same label, no sanctuary cities provide the same level of physical protection or active resistance as their faith-based predecessors. No city bars federal authorities from enforcing immigration laws within their jurisdiction. No municipal policies protect immigrants from the consequences of federal immigration regulations. Indeed, immigrant advocates have long complained that the term sanctuary imparts a false sense of security by suggesting that these cities offer any form of protection from immigration authorities.

20. See, e.g., Rose Cuisin Villazor & Pratheepan Gulasekaram, Sanctuary Networks, 103 MINN. L. REV. 1209, 1217 (2019) (“There is no precise definition of the term ‘sanctuary.’


23. Kathleen Arnold writes: [Faith-based sanctuaries] physically provid[e] a space of sanctuary and surround[] the structure with community members, to stop ICE from entering the site. In contrast to sanctuary localities, faith-based sanctuary more actively resists, interrupts, and alters sovereign power by openly sheltering would-be refugees and other undocumented migrants at the moment they are slated for detention and deportation.


25. Daniel E. Martínez, Ricardo D. Martínez-Schuldt & Guillermo Cantor, Providing Sanctuary or Fostering Crime? A Review of the Research on “Sanctuary Cities” and Crime, SOCIO. COMPASS (Jan. 18, 2018) https://compass.onlinelibrary.wiley.com/doi/10.1111/soc4.12547 [perma.cc/6DMT-PQXK], (“Although local communities adopt ‘sanctuary’ policies to limit cooperation with the federal government, the implementation of these policies does not imply that noncitizens are protected from federal immigration enforcement action, leading some to suggest that the term ‘sanctuary’ is a misnomer.”).
That we cannot understand sanctuary literally may be why most contemporary accounts define sanctuary cities in more limited terms: cities that restrict their participation in federal immigration enforcement efforts. But even this narrower definition does little to clarify the term’s boundaries. No city fully participates in federal immigration enforcement in all the ways permitted by law. Similarly, no city prohibits all involvement in federal immigration enforcement; even the most stringent sanctuary policies provide exceptions where local participation is allowed, if not encouraged. The definition of sanctuary then lies somewhere in the middle, between full participation and no participation. But despite repeated efforts, there remains no consensus on where that line should be drawn.

One reason for the lack of consensus is the absence of a federal baseline. Sanctuary cities are often condemned as lawless, which suggests that sanctuary cities might be defined as those that fall short of the requirements set by federal law. But no federal law sets out the immigration enforcement activities that cities must perform, nor is it clear that Congress can impose such a mandate without running afoul of the Constitution’s prohibition against federal

26. See, for instance, Fox:

In practice, sanctuary city policies nearly always include some pledge of limited or non-cooperation between state and local officials and federal immigration authorities. Among other things, this may include limits on information sharing or limiting compliance with immigration detainer requests. Local officials may also refrain from collecting data about legal status to limit the possibility of cooperation with immigration authorities. Non-cooperation has thus become virtually synonymous with sanctuary. Fox, supra note 21, at 176.

27. New York City is often considered to have one of the most protective sanctuary policies, including a provision stating that “[n]o city resources . . . shall be utilized for immigration enforcement.” N.Y.C., N.Y., ADMIN. CODE § 10-178(c). But that same code section specifically exempts “taking actions consistent with sections 9-205, 9-131, and 14-154,” which authorize compliance with federal detainers if the subject was convicted of a violent or serious crime, or identified in a terrorist database. Id. §§ 9-205 (department of probation), 9-131 (department of corrections), 14-154 (police department); see also, e.g., infra notes 178–79 and accompanying text (describing the ways that Chicago, a vocal sanctuary city, allows for immigration enforcement by city officials).


29. See Elizabeth M. McCormick, Federal Anti-Sanctuary Law: A Failed Approach to Immigration Enforcement and a Poor Substitute for Real Reform, 20 LEWIS & CLARK L. REV. 165, 169
“commandeering” of state and local officials.\(^\text{30}\) It may be argued instead that sanctuary should be defined as a deviation from historic customs or norms. To be sure, local officials have long assisted federal law enforcement as a matter of comity,\(^\text{31}\) including in the area of immigration.\(^\text{32}\) But such assistance has always been subject to local discretion and is often provided on an ad hoc basis.\(^\text{33}\) Moreover, the types of assistance that the federal government now expects—screening, verification, detainers—have a relatively short and contentious history.\(^\text{34}\) Indeed, given the long-standing view that immigration is a national issue and a federal responsibility, local nonparticipation arguably aligns better with historic customs and norms.

Another, and perhaps more significant, reason for the elusiveness of sanctuary is the sheer diversity of local policies commonly tagged with the sanctuary label. Sanctuary policies vary widely in substance—from those that limit when local officials can initiate immigration inquiries, to those that explicitly refuse to honor federal requests from immigration authorities.\(^\text{35}\) Sanctuary policies also differ in their form and formality—from ordinances and resolutions formally adopted by a city council, to executive orders issued by a sitting mayor, to handbooks and guidelines provided by departmental supervisors.\(^\text{36}\) Sanctuary cities even diverge on how they self-identify. Cities with similar policies might proudly don the sanctuary mantle or quibble with its fit. The details of sanctuary policies are publicized in some cities and obscured in others.

\(^{30}\) See Gulasekaram et al., supra note 8, at 852–53.

\(^{31}\) It is worth noting that there has been some debate regarding the use of the term “comity” to articulate the informal interaction of federal and local law enforcement. Compare Erin Ryan, Negotiation Federalism, 52 B.C. L. Rev. 1, 31–32 (2011) (arguing that discussions over which government entity will enforce these laws tend to be informal and amicable, and that many states tend to welcome federal intervention in matters of national concern, including immigration and counterterrorism), with Margaret H. Lemos, State Enforcement of Federal Law, 86 N.Y.U. L. Rev. 698, 702, 719 (2011) (noting that when states choose not to enforce federal laws, it is because they have “political incentives to challenge federal orthodoxy”), and John S. Baker, Jr., State Police Powers and the Federalization of Local Crime, 72 Temp. L. Rev. 673, 681 (1999) (arguing that federal and state actor motivations differ greatly and that reliable cooperation is “at best tenuous”).

\(^{32}\) See Ryan, supra note 31, at 31–32.

\(^{33}\) See Ryan, supra note 31, at 31–32; Lemos, supra note 31, at 719.


\(^{35}\) See Am. IMMIGR. COUNCIL, supra note 10.

\(^{36}\) See generally LOREN COLLINGWOOD & BENJAMIN GONZALEZ O’BRIEN, SANCTUARY CITIES 6–7 (2019).
Meanwhile, cities have embraced a growing array of alternatives to the sanctuary label: “city of refuge,” “city of peace,” “welcoming city.”

Confusion over sanctuary at the federal and local levels is further compounded by conflicting analytical frameworks. This is most apparent in how sanctuary observers describe the purpose and significance of the sanctuary policies. Invoking the church-based origins of the sanctuary movement, some see sanctuary as primarily aimed at the protection of immigrants. Yet they also recognize that many sanctuary policies either fail to mention undocumented immigrants or do not foreground their wellbeing or belonging as policy rationales. Given the political controversy over sanctuary in the national immigration debates, others cast sanctuary as an explicit rebuke of federal immigration policy. But many sanctuary cities actively avoid being drawn into political debates, justifying their policies instead as a matter of internal administrative governance and local resource allocation. From arguments like this, one might then assume that sanctuary can largely be understood through a federalism lens, as an effort to clarify the boundaries between governments at the federal and local levels over their respective responsibilities and priorities. Nevertheless, many sanctuary cities champion their policies as insulating immigrant residents from federal deportations, and many city leaders

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41. See Davis, supra note 13, at 104 (2020) (describing municipalities that avoid “publicizing” their policies of noncooperation for fear of drawing the attention of ICE or attracting local controversies”).


43. See COLLINGWOOD & GONZALEZ O’BRIEN, supra note 36, at 7.

44. See, e.g., id.
have explicitly challenged federal policies on immigration.\textsuperscript{45} Taking into account all these analytical frames, it would appear that efforts to develop a unifying framework that accounts for the diversity of sanctuary policies often do little more than illustrate the impossibility of the task.

In short, the definition of sanctuary remains enigmatic because neither federal law nor existing frameworks adequately capture the diversity of sanctuary cities. The precise line that divides sanctuary from nonsanctuary remains unsettled,\textsuperscript{46} and frameworks that seek to capture the sanctuary movement feel inadequate. However, the bigger problem is our desire to put sanctuary into a single, well-defined box—to account for sanctuary’s diversity with an overarching and all-encompassing model. This fixation draws attention away from why sanctuary policies are so diverse, both across cities and over time, and may also be the reason why the design of sanctuary policies by city leaders remains so undertheorized and overlooked. If the diversity of sanctuary policies is to be understood, we need to begin with a closer examination of the cities that adopt them.

B. The Fractured City

The sheer diversity of municipal sanctuary policies is one reason why sanctuary is so hard to define. To understand why the diversity exists, however, we must expand our scope of analysis beyond the traditional fixation on federal law and policy and turn our attention to the cities themselves. This means not only focusing on the local level where municipal sanctuary policies are adopted, but also taking a deeper look at what we mean when we talk about the city.

The elusiveness of sanctuary lies not only in the structure of the federal system, but also the fractured role of the American city. As literature on sanctuary cities well recognizes, cities are valuable and sometimes indispensable partners of state and federal governments.\textsuperscript{47} But the role of city leaders is not only defined by the management of intergovernmental relations with the federal government and the states. Those interests are also balanced against their relationship with local residents on the one hand, and municipal employees on the other.\textsuperscript{48} Focusing on these relationships reveals the multiple facets of the city’s identity: a democratic polity, a bureaucratic corporation, and an intergovernmental agent.

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\textsuperscript{46} Lasch et al., supra note 11, at 1710–12 (describing the “contestable” and imprecise understanding of sanctuary).

\textsuperscript{47} See, e.g., Gulasekaram et al., supra note 8, at 878.

Perhaps the most common understanding of the city is as a democratic polity.\footnote{Murray Low, Cities as Spaces of Democracy: Complexity, Scale, and Governance, in DOES TRUTH MATTER? DEMOCRACY AND PUBLIC SPACE 115, 115 (Raf Geenens & Ronald Tinnevel ed., 2009).} Under this view, the city is its residents, and the role of the city government is to represent its residents’ interests. The formulation of the city as a democratic polity draws upon the Tocquevillian ideal of local governments as the foundation of American democracy.\footnote{See generally ALEXIS DE TOQUEVILLE, DEMOCRACY IN AMERICA (Harvey C. Mansfield & Delba Winthrop trans., Univ. of Chi. Press 2000) (1835).} It is also reflected in the institutional structure of city governments. City leaders—from mayors to city council members—are elected almost everywhere by the city’s residents.\footnote{See DeSoto et al., supra note 48, at 163; Kellen Zale, Part-Time Government, 80 OHIO ST. L.J. 987, 994 (2019).} It is in service of those residents’ interests that authority is delegated to act on behalf of their health, welfare, and safety.\footnote{Shaheen Borna & Krishna G. Mantripragada, Morality of Public Deficits: A Historical Perspective, PUB. BUDGETING & FIN., Spring 1989, at 33, 35 (“The goal of public finance . . . is, ideally, to bring about maximum social welfare . . .”); U.S. DEP’T OF JUST., THE ROLE OF LOCAL GOVERNMENT IN COMMUNITY SAFETY (2001).} From this perspective, the measure of local policies is based on the degree to which they serve the public’s interest. City leaders should be responsive to their constituents’ demands and take actions that reflect the values and norms of their community. Local governance should also be transparent and accountable. After all, cities are local governments, and like governments at the state and federal level, we expect that they abide by democratic processes, and act on behalf of and in accordance with the will of the people.\footnote{See HANNA FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION 144 (1967) (describing the school of thought which claims that representatives must do the will of those they represent).}

But if the democratic polity represents the city’s ideals, the bureaucratic corporation might better reflect its everyday operations. In law and practice, cities are not just local governments; they are also “municipal corporations.”\footnote{Cory Howard, The Economic Expectations of Investors and Municipal Corporate Constituents on Public Entities: How the Legal Framework Guiding Public Finance Diverges from Current Economic Realities, 14 APPALACHIAN J.L. 75, 75 (2014); Zale, supra note 51, at 996; see also Gerald E. Frug, The City as a Legal Concept, 93 HARV. L. REV. 1057, 1117–18 (1980). See generally 3 JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS (Boston, Little, Brown, & Co., 5th ed. 1911).} They oversee a vast bureaucracy of municipal employees who are collectively responsible for most governmental services provided in the United States.\footnote{See RYAN NUNN, JANA PARSONS & JAY SHAMBAUGH, THE HAMILTON PROJECT, NINE FACTS ABOUT STATE AND LOCAL POLICY 5 (2019) (explaining that state and local direct expenditures on services are much larger than federal direct expenditures); State and Local Government, THE WHITE HOUSE, https://www.whitehouse.gov/about-the-white-house/our-government/state-local-government [perma.cc/7PUQ-NXJV].} The services provided by municipal employees is also how most city residents
engage with the city government. When functioning as a bureaucratic corporation, the primary role of city leaders is to manage its bureaucracy. Just as private firms must address the divide between “management” and “labor,” city leaders must navigate the relationship between the city and its workforce. In many ways, the path for cities is more fraught than for those in the private sector. Police and teacher unions can advance their interests within the municipal bureaucracy, or seek to circumvent it altogether by appealing directly to city residents or the state. In contract negotiations, public unions bargain not only over terms of employment, but also often over policies and practices. In addition, state laws frequently insulate municipal departments from the city’s control by mandating benefits or codifying protections. Amidst all this, the political leadership of the city must find ways to compel or motivate their own officials to pursue the city’s priorities, abide by its rules and regulations, and avoid liabilities that impinge on the city coffers.

These two models of the city—as democratic polities and bureaucratic corporations—center on the internal relationship between the city, its residents, and its officials. But for local leaders, these relationships are further complicated by the city’s external relations with the state and federal governments. Indeed, a third conceptualization of the city in American law is as a “creature of the state”—a “convenient agenc[y]” created in service of the state’s interest and goals. Since the New Deal, the federal government has also come to rely on cities to implement federal initiatives, from affordable housing to Medicaid to the “wars” on crime and drugs. As a result, intergovernmental relations define cities’ authority, especially given that cities can only exercise


59. See Stephen Rushin, Police Union Contracts, 66 DUKE L.J. 1191, 1206–07 (2017) (describing how courts have allowed police unions to negotiate disciplinary procedures in union contracts, thus turning collective bargaining into “a major avenue through which labor unions shape the internal policies and practices of American police”).

60. See, e.g., Anthony O’Rourke, Rick Su & Guyora Binder, Disbanding Police Agencies, 121 COLUM. L. REV. 1327, 1362 (2021); Rick Su, Anthony O’Rourke & Guyora Binder, Defunding Police Agencies, 71 EMOY L.J. 1222 (2022).


62. See JOHN H. MOLLENKOPF, THE CONTESTED CITY 55 (1983) (“[T]he many urban-oriented New Deal programs simultaneously made the federal government a key actor in local politics and provided FDR with a framework for pyramiding local political organizations into national political power.”).
those powers that are delegated to them by the state. Furthermore, intergovernmental grants shape the policy decisions of city leaders, especially as municipal coffers have become more dependent on federal and state funds. The reliance of the city on state and federal governments is mirrored in federal and state dependence on cities—as a result, cities have become powerful platforms for influencing politics at the state and federal level. Cities lobby for policies and funds; cities resist state and federal policies through selective implementation on the ground; cities express disagreement through formal resolutions and condemnation by officials; and sometimes, cities shirk state and federal obligations. Accordingly, local leaders must not only negotiate the internal divisions within the city, but also navigate the intergovernmental dynamics of the federal system.

The city, then, is not beholden to a single constituency, nor guided by a unitary interest. Local leaders must both navigate and negotiate a web of relations. The policies that they adopt may be directed at different audiences and serve different ends. Local policies often appear puzzling, especially when only a single lens is used in their assessment. But recognizing the fractured role of city governments—a fracture that is embedded in the very legal conceptualization of the city itself—helps explain how municipal policies are designed.

C. Sanctuary Through a Local Lens

How does the fractured identity of cities in American law and practice affect our understanding of sanctuary cities? At the most basic level, these

63. Richard Briffault, Our Localism: Part I—The Structure of Local Government Law, 90 COLUM. L. REV. 1, 7–8 (1990) (“The local government is a creature of the state . . . . The local government is an agent of the state, exercising limited powers at the local level on behalf of the state. A local government is like a state administrative agency, serving the state in its narrow area of expertise . . . .”).


67. Jessica Bulman-Pozen & Heather K. Gerken, Uncooperative Federalism, 118 YALE L.J. 1256, 1265–66 (2009) (citing Briffault, supra note 63, at 111–12 (“If power is defined as a legally enforceable right to . . . prevail in conflicts with higher levels of government, then local governments generally lack power . . . . But if power refers to the actual arrangements for governance at the local level, then local governments possess considerable power . . . . In our system, local governments often get what they want.” (footnote omitted))).

68. Daniel Farbman, “An Outrage upon Our Feelings”: The Role of Local Governments in Resistance Movements, 42 CARDOZO L. REV. 2097, 2175–77 (2021) (“The reason for a symbolic ordinance like those recently passed in Los Angeles and Cincinnati is not to offer more substantive protection to undocumented people. Rather it is to stake an expressive claim in a political struggle.” (footnote omitted)).

competing municipal roles offer useful frameworks for understanding the myriad rationales often given for adopting municipal sanctuary policies. More importantly, they suggest that the diversity of sanctuary policies may not simply reflect different approaches to achieving the same goal. Rather, the diversity of sanctuary cities may represent competing aims and objectives, each of which is manifested in the unique design of a city’s policies. In the same way that the identity of a city is fractured, the model sanctuary city may be fractured as well.

If city leaders flit between the city’s role as a democratic polity, bureaucratic corporation, and intergovernmental agent in drafting policies, it stands to reason that they do so in the sanctuary context. This suggests that creation of sanctuary policies may depend on which facet of the city’s identity is most salient at the time. Acting as a democratic polity, a city may pursue sanctuary to protect immigrant residents and uphold the values of the broader local community. A city focused on its role as a bureaucratic corporation, however, may instead emphasize the need to supervise line-level officials, set local priorities in allocating resources and manpower, and avoid unnecessary liability. Among cities that foreground their role as an intergovernmental agent, two separate motivations may be at play. For some, sanctuary may be an attempt to clarify the federalism divide between the federal government and the city over immigration enforcement. For others, sanctuary may be an explicit effort to use intergovernmental channels to directly influence federal policy and the national debate over immigration. These rationales are well-recognized in the sanctuary literature—the point here is to show how they align with different facets of the city.

The multiple facets of a city’s legal and political identity not only offer a framework for classifying the different rationales often given to justify sanctuary at the local level—they also shine light on the various design features associated with municipal sanctuary policies, where different motivations might pull sanctuary’s design and implementation in different directions. A city focused on its residents is likely to express the community’s political will through a formal ordinance or resolution, establish bright-line rules to assure resi-

70. See Lasch et al., supra note 11, at 1768–72.
71. See id. at 1754–68.
72. See Joshua W. Dansby, Sanctuary Cities and the Trump Administration: The Practical Limits of Federal Power, 20 S. Mary’s L. Rev. on Race & Soc. Just. 317, 326–27 (2018) (noting Seattle and Tacoma as examples of cities that have enacted sanctuary-like policies because of disagreement with federal policy). This aligns with the “dual sovereignty” model of federalism. See id. at 322.
74. See, e.g., Lasch et al., supra note 11, at 1752–73; Armacost, supra note 22, at 1201.
dents, and publicize its policy broadly to build trust with immigrant communities and demonstrate the city’s responsivenessto local constituencies.\textsuperscript{75} If the focus is on municipal administration, sanctuary might instead be adopted through an executive order or employee handbook, and focus on centralizing discretion in departmental leadership or outlining administrative procedures that establish a clear chain of command. Foregrounding intergovernmental relations, a city might minimize or disclaim its sanctuary status to avoid drawing the attention of the state or federal government, or instead grandstand and litigate to amplify its message to the federal government. In other words, the design of sanctuary policies varies depending on the salience of the competing municipal roles.

Lastly, understanding sanctuary through the fractured identity of the city illustrates the importance of design features that are often overlooked in the sanctuary literature. Much attention has been paid to the substance of the policies themselves.\textsuperscript{76} But how a city adopts, implements, and represents its sanctuary policy is just as important. Policies that are similar in substance may produce different effects if one is well-publicized and another obscured.\textsuperscript{77} The form and forum in which sanctuary is adopted may influence both how it is received by residents and the likelihood of compliance.\textsuperscript{78} A lot rides on the institutional relationships within a city. A city council may have closer ties to the city’s residents but wield far less authority over the city’s workforce than the mayor or department leadership;\textsuperscript{79} a departmental leader may find their efforts frustrated by political leadership.\textsuperscript{80} All the while, different actors in a municipal government may be more eager than others to foster relations with state and federal partners or mount a challenge against them. Accounting for

\textsuperscript{75} See Rose Cuison Villazor, \textit{What is a “Sanctuary”?}, 61 SMU L. REV. 133, 154–56 (2008) (describing instances in which cities proposed public resolutions that, although they ultimately failed, made their “message[s] . . . abundantly . . . clear,” which was seemingly the true purpose of the resolutions); Lasch \textit{et al.}, \textit{supra} note 11, at 1761–64; \textit{POLICE EXEC. RSCH. F., COMMUNITY POLICING IN IMMIGRANT NEIGHBORHOODS} \textit{8–10} (2019).

\textsuperscript{76} Many analyses of municipal sanctuary policies are limited to the text of the policies, and do not focus on the institutional actors responsible for their adoption or the manner in which they are implemented. \textit{See, e.g.}, Eagly, \textit{supra} note 16, at 250 (“My analysis is confined to the text of these written policies, which are found in policy manuals, training bulletins, and internal memoranda and directives.” (footnote omitted)).

\textsuperscript{77} Christopher Carlberg, Note, \textit{Cooperative Noncooperation: A Proposal for an Effective Uniform Noncooperation Immigration Policy for Local Governments}, 77 GEO. WASH. L. REV. 740, 758 (2009) (discussing the reasons less-publicized sanctuary policies are less effective).

\textsuperscript{78} \textit{Id.}


\textsuperscript{80} In one dramatic example, the police chief of Decatur, Alabama instituted a policy for local police officers to “refrain” from entering into “voluntary agreements” with ICE in most situations, only for the mayor to post a Facebook status publicly decrying the “sanctuary city” policy. Paul Gattis, \textit{’Decatur Will Not Be a Sanctuary City,’ Mayor Says}, AL.COM (Sept. 30, 2019, 1:31 PM), \url{https://www.al.com/news/2019/09/decatur-will-not-be-a-sanctuary-city-mayor-says.html} [perma.cc/6SQD-GAXQ].
sanctuary’s design requires us to look beyond the text of the sanctuary policies themselves.

In short, the fractured identity of the American city means that sanctuary is adopted for different reasons, designed with distinct features, and varied in its implementation. Of course, just because different facets of a city’s munipality influence the design of sanctuary policies does not mean that the facets themselves are mutually exclusive. But because these municipal identities pull in different directions, designing policies that serve all three is often difficult, especially on contentious issues like immigration and sanctuary. Models of sanctuary policies, then, are more likely to revolve around different combinations of these municipal roles. In this next Part, I turn to the results of these combinations and the design elements they might feature.

II. TOWARDS A NEW SANCTUARY FRAMEWORK

To understand the diversity and development of municipal sanctuary policies, we must consider the competing roles that define the modern city and how these roles shape the design of sanctuary. In other words, we must look beyond federal immigration policy and enforcement practices and focus instead on the cities themselves. Drawing on the competing identities of cities set out in Part I, this Part examines the design of different municipal sanctuary policies with an eye towards the cities that adopt them.

More specifically, I argue that municipal sanctuary policies generally fall into three categories: administrative sanctuary, political sanctuary, and silent sanctuary. To be sure, the fit for any given city is rarely perfect, just as a city may transition from one to another over time. Yet the models themselves offer a useful framework. Each of these models correspond with different sets of municipal roles, which are privileged at the expense of others (seen below in Table 1). As a result, each of these models emphasizes different design features, not only with respect to the substance of the underlying sanctuary policy but also how they are implemented by local officials. Moreover, I suggest that these models roughly correspond to three different time periods in our nation’s response to immigration enforcement and local participation. Background contexts make certain municipal roles more salient than others, which then shapes how local leaders design their sanctuary policies.

Classifying sanctuary along these three categories—administrative, political, and silent—helps explain how sanctuary policies differ and why those differences exist. These categories also shed light on the evolution of anti-sanctuary responses at the state and federal levels. As the following Sections outline, opponents of municipal sanctuary policies also design anti-sanctuary laws in response to the prevailing sanctuary model at the time. These anti-sanctuary laws target not only the sanctuary policies themselves, but also aim to reshape the municipal interests that gave rise to them in the first place.
TABLE 1

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<thead>
<tr>
<th>SANCTUARY MODEL</th>
<th>MUNICIPAL ROLE</th>
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<tbody>
<tr>
<td>Administrative Sanctuary</td>
<td>Democratic Polity &amp; Bureaucratic Corporation</td>
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<td>Political Sanctuary</td>
<td>Democratic Polity &amp; Intergovernmental Agent</td>
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<td>Silent Sanctuary</td>
<td>Bureaucratic Corporation &amp; Intergovernmental Agent</td>
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A. Administrative Sanctuary

1. The Design of Administrative Sanctuaries

Sanctuary policies can take different forms. Perhaps the earliest forms correspond with what I refer to as administrative sanctuaries. Administrative sanctuaries are focused on the internal relationship between the city, its residents, and its employees. Their primary concerns are how local participation in immigration enforcement affects city residents and the operational effectiveness of municipal departments. As a result, they are designed to centralize authority in municipal administration and ensure compliance by line-level employees. Because of their internal orientation, administrative sanctuaries are usually not concerned with federal immigration law per se, or how it is enforced by federal authorities. They often do not embrace the sanctuary label or highlight their resistance to federal policies. Instead, they are primarily concerned with negotiating the interests of city residents with the operational goals of municipal departments.

From this perspective, administrative sanctuaries lie at the intersection of a city’s roles as a democratic polity and a bureaucratic corporation. Administrative sanctuaries tend to arise from complaints by local constituents, who are often part of the immigrant communities most affected by local participation in immigration enforcement. The complaints are usually connected to an existing municipal policy that requires or encourages enforcement activities, which neighborhood advocates seek to overturn. Moreover, these complaints gain traction not only because of the specific impacts of enforcement activity, but also because they raise broader concerns that affect city residents more generally, like public safety. In this respect, the roots of administrative sanctuaries mirror the political feedback loop commonly associated with democratic polities.
But if the impetus for administrative sanctuary policies arises from the city residents, its goals are centered on the management of the city’s bureaucratic administration. If administrative sanctuaries are concerned about community relations, it is because erosion of public trust might undermine the operational effectiveness and institutional legitimacy of local law enforcement agencies. If they limit participation in federal immigration enforcement, it is because administrative sanctuaries are disinclined to divert resources and manpower that may otherwise be dedicated to more pressing municipal priorities. More importantly, administrative sanctuary policies often focus on the supervision and management of line-level officials by department heads and city leaders, especially as such policies relate to municipal efforts to address corruption, misconduct, and abuse. Though administrative sanctuaries may be prompted by democratic pressures, their structure and implementation tend to center on the city’s bureaucratic administration.

These joint concerns—democratic and bureaucratic—may be why administrative sanctuaries tend to exhibit certain features in their design. Councilmembers are often the most responsive to the demands of the local electorate, but the bureaucratic focus of administrative sanctuaries may mean that the design and the adoption of administrative sanctuary policies are left to mayors, police chiefs, or even the administrative departments themselves. To ensure compliance, the structure of administrative sanctuary policies often features strict procedures and a clear chain of command. Discretion may be granted over when, and in what circumstances, cooperation with federal authorities is permitted, but that discretion is likely to be centralized and withheld from line-level officials themselves. Notice, including publicity of the policies, is also important. This is in part so that city residents know what to expect when they interact with the city bureaucracy. Notice and publicity may also serve the city by recruiting residents to assist in holding municipal employees accountable.

2. The Rise of Administrative Sanctuaries

Administrative sanctuaries represent some of the earliest immigration sanctuaries in the United States. Indeed, many administrative sanctuary policies were adopted before the church-based movement popularized the sanctuary label in the 1980s. Though administrative sanctuaries are still commonplace today, their development is perhaps best associated with the initial wave in the 1980s and 1990s.

As I argued above, administrative sanctuaries largely see the sanctuary issue as a matter of internal bureaucratic governance. The prevalence of this view in the initial wave of sanctuary policies was partially the result of federal immigration policies at the time, which had not yet incorporated local participation into interior enforcement strategy.\(^85\) As a result, cities were more likely to see the question of local participation as a matter of internal policies. Additionally, they were more likely to assess their own participation independent of any federal pressure or in reference to federal policies. Even though pilot initiatives, such as the Alien Criminal Apprehension Program, were tested in many major American cities in the 1980s,\(^86\) those initiatives were not widely adopted until decades later.\(^87\) Moreover, the national focus on immigration enforcement was primarily directed towards the nation’s borders, not its interior.\(^88\) As the 1986 Immigration Reform and Control Act illustrated, if there was federal interest in interior enforcement, that interest focused on employers rather than local law enforcement.\(^89\) Nor were federal policymakers particularly concerned about local assistance in deportation, given that the prevailing view at the time was that “mass deportations were ineffective for addressing undocumented immigration in the long term.”\(^90\)

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85. Ridgley, supra note 4, at 224 (“At the time [early 1980s], the federal government rarely called upon local police or resources to enforce immigration law, and INS activities in most cities went unnoticed by most residents.”).


89. See 8 C.F.R. § 274a.2 (1986) (detailing requirements and procedures for compliance by persons or entities when hiring, as established by the 1986 Immigration Reform and Control Act).

90. See Carter, supra note 28, at 86.
Another reason why many cities understood sanctuary as an administrative issue was because the associated policies were perceived as internal reassessments of existing municipal policies. Even without the request or direction of federal authorities, many cities adopted immigration enforcement practices of their own due to intensifying concern about unauthorized immigration in the 1970s. The first wave of sanctuary policies was understood as a reexamination of internal municipal policies and practices, rather than a repudiation of federal policy. Early sanctuary cities believed they were simply revisiting the city’s earlier policies based on assessments of their benefits and costs, informed by the city’s own experience.

Unsurprisingly, the earliest sanctuary policies typified the administrative model. Take, for example, Special Order 40, which was adopted by the Los Angeles Police Department (LAPD) in 1979. Special Order 40 is generally recognized as the first municipal sanctuary policy to be adopted in the United States. Like many of the sanctuary policies that followed, it clarified the role of the LAPD by stating that “undocumented alien status in itself is not a matter for police action.” In addition, it set specific rules regulating the conduct of police officers, precluding “police action with the objective of discovering the alien status of a person” and arrests based solely on “illegal entry” into the United States.

Yet Special Order 40 also exhibits many of the hallmarks of administrative sanctuaries of the time. Prior to Special Order 40, the LAPD had an existing policy that required local law enforcement officials to verify and report the immigration status of all individuals they encountered who they suspected of

91. See, for instance, Report of the Rampart Independent Review Panel:

Prior to 1979, the Los Angeles Police Department required officers who came into contact with a person suspected of being in the United States illegally to determine the person’s immigration status and notify the United States Immigration and Naturalization Service (“INS”) if the person was an undocumented alien. This was required even if the person was not the subject of a police investigation or a criminal charge.

92. Id.

93. See, e.g., Laura Sullivan, Enforcing Nonenforcement: Countering the Threat Posed to Sanctuary Laws by the Inclusion of Immigration Records in the National Crime Information Center Database, 97 CALIF. L. REV. 567, 571 (2009); COLLINGWOOD & GONZALEZ O’BRIEN, supra note 36, at 17 (“[Special Order 40] was actually the first to explicitly forbid officers from inquiring or taking action based on immigration status and thus, based on our definition, made Los Angeles the first sanctuary city.”).


95. Id.
being in the United States illegally. Complaints by immigrant advocates raised concerns about this policy’s impact on community relations and operational effectiveness in immigrant neighborhoods. As a result, the LAPD created an ad hoc internal task force to study the existing policy and offer recommendations. Based on the recommendations of the task force, Police Chief Daryl Gates adopted Special Order 40 and incorporated it into the LAPD manual. This history shows how the first municipal sanctuary policy was the product of an internal departmental review of existing policy, and implemented directly by LAPD leadership.

Special Order 40 was also designed to strengthen the chain of command by transferring discretion from line-level officers to departmental leadership. Notably, Special Order 40 does not prohibit communications between the LAPD and federal immigration authorities. The order specifically requires the department to notify the federal government about the unauthorized status of detainees who have been arrested for “multiple misdemeanor offenses, a high grade misdemeanor or a felony offense, or ha[d] been previously arrested for a similar offense.” But the order specifies a detailed procedure about how the information should be reported—arresting officers are not allowed to reach out to federal immigration authorities themselves, but rather must notify the Headquarters Section desk officer of the Detective Headquarters Division. It is this officer who is then charged with the task of forwarding that information to federal authorities. Moreover, the Detective Headquarters Divisions was assigned the primary task of monitoring compliance with the order throughout the LAPD. Put otherwise, rather than rebuking federal policy, Special Order 40 aimed to manage rather than reject the working relationship between the LAPD and immigration authorities.

A similar story emerges out of New York—New York City adopted its first sanctuary policy in 1989 through Executive Order 124, originally signed by Mayor Edward Koch and reissued by his successors. At its basic level, Executive Order 124 forbade any “[c]ity officer or employee” from “transmit[ting] information respecting any alien to federal immigration authorities.” The

96. 2001 RAMPART REPORT, supra note 91, at 1.
97. See id.
98. Id.
99. Id.
100. See Special Order 40, supra note 94.
101. Id. at 1–2.
102. Id. at 1.
103. Id. at 2.
104. Id.
order additionally required that any services provided by a city agency be made available to all immigrants unless prohibited by law.\footnote{107} In comparison to Special Order 40, Koch’s order was simultaneously narrower and more expansive. Unlike Special Order 40, it did not directly prohibit police actions directed at identifying or removing unauthorized immigrants.\footnote{108} At the same time, Executive Order 124 generally prohibited local communication with federal authorities and covered all city agencies and services.\footnote{109}

Like Special Order 40, Executive Order 124 was developed through an internal study conducted by the city’s administrative staff—in this case, an agency within the Office of the Mayor called the New York Commission on Human Rights.\footnote{110} Executive Order 124 also focused on strengthening the chain of command by removing discretion from line-level employees and centralizing ultimate authority in department leadership.

Executive Order 124’s focus on administrative supervision is most apparent in its exception for individuals “suspected . . . of engaging in criminal activity,” and the procedure it sets out for how this determination is made.\footnote{111} First, the order draws a sharp distinction between “[l]ine worker[s] . . . whose duties involve contact with the public,” and “designate[d] . . . officers or employees” within a specific department.\footnote{112} Second, while line workers are required to report individuals who may fall into this exception to the designated officers or employee in their department, it is the designated officer or employee that determines, “on a case by case basis, what action, if any, to take on [that] report[].”\footnote{113} Indeed, Executive Order 124 specifically states that “[n]o such determination shall be made by any line worker, nor shall any line worker transmit information respecting any alien directly to federal immigration authorities.”\footnote{114} Any suspicions by line-level officials must be vetted through department leadership, and only leadership is authorized to make decisions on whether communication with federal authorities is justified.

The emphasis on supervision and chain of command is not only apparent when administrative sanctuary policies are designed—it is also apparent when the policies are challenged. When questions about the efficacy of Special Order 40 in Los Angeles were raised following the “Rampart Scandal” in the 1990s—during which a corrupt anti-gang LAPD task force was alleged to have colluded with federal immigration enforcement agents—an internal review board

\footnotesize
\begin{enumerate}
\item \footnote{107} \textit{Id.} § 3.
\item \footnote{108} See Exec. Order No. 124, supra note 106.
\item \footnote{109} Id. §§ 1(b), 2(a), 3.
\item \footnote{110} See Appellants’ Brief at 6, City of New York v. United States, 179 F.3d 29 (2d Cir. 1999) (No. 97-6182).
\item \footnote{111} Exec. Order No. 124, supra note 106.
\item \footnote{112} Id. §§ 1(b), 2(b).
\item \footnote{113} Id. § 2(b).
\item \footnote{114} Id.
\end{enumerate}
faulted lapses in the supervision of the Rampart Division’s leadership.\textsuperscript{115} As a result, the board recommended that LAPD supervisors authorize and document all contact between LAPD officials and federal authorities, strengthening the basic administrative strategy of Special Order 40.\textsuperscript{116} At the same time, when the City Council sought to amend Special Order 40 through a city ordinance in 2008, LAPD leadership zealously and successfully intervened to protect the department’s policy from the Council’s interference.\textsuperscript{117} Not only did LAPD leadership stress the merits of Special Order 40, but they also emphasized the importance of administrative governance by the LAPD outside of the city’s politics.\textsuperscript{118} In both cases, the central issue was municipal administration, not federal immigration policy.

3. The Response to Administrative Sanctuaries

Early sanctuary policies often followed the administrative model because of the way the issue of local participation in immigration was framed in the 1980s and 1990s. The design features of administrative sanctuaries, however, also shaped the legal backlash against sanctuary cities. Federal anti-sanctuary laws during this time targeted the relationship between municipal leadership and line-level officials—the same focus of administrative sanctuary policies. Moreover, federal anti-sanctuary efforts were primarily aimed at returning discretion to line-level officials by liberating them from municipal supervision.

The clearest example is Section 1373 of the Immigration and Nationality Act.\textsuperscript{119} Section 1373 was enacted as a part the Illegal Immigration Reform and Immigrant Responsibilities Act (IIRIRA), a comprehensive immigration reform law passed by Congress in 1996.\textsuperscript{120} This Section targets sanctuary policies by prohibiting any state and local officials from prohibiting any other state or

\begin{itemize}
  \item \textsuperscript{116} 2001 RAMPART REPORT, \textit{supra} note 91.
  \item \textsuperscript{119} 8 U.S.C. § 1373 (2022).
  \item \textsuperscript{120} \textit{Id}.
\end{itemize}
local officials from maintaining information about an individual’s immigration status, or exchanging such information with federal authorities.\footnote{121} Interestingly, the law does not require state or local officials to exchange information with federal authorities for the purposes of immigration enforcement.\footnote{122} Rather, it narrowly targets policies that would prevent such exchanges if a state or local official would otherwise choose to do so.\footnote{123}

The reason why Section 1373 is written in such a convoluted manner—a prohibition of state or local prohibitions—is commonly understood as an effort by Congress to avoid any claims of federal commandeering.\footnote{124} But even if Section 1373 does not (and perhaps cannot) mandate that state and local officials maintain, send, and receive immigration-related information, it notably targets the central features of administrative sanctuaries with remarkable precision. Typically, administrative sanctuary policies do not prohibit cooperation with federal authorities, instead reserving such discretion and authority to higher-level officials in a city’s bureaucratic hierarchy. But Section 1373 directly interferes with the ability of municipal leadership to establish such a chain of command, because it affirmatively grants all officials and employees the power to choose for themselves.\footnote{125}

Section 1373 recognizes the central design feature of administrative sanctuaries popular at the time and seeks to upend the municipal role upon which this feature is based. In challenging Section 1373, New York City asserted that it authorizes rogue officials to act free from political accountability and administrative supervision.\footnote{126} On the one hand, New York argued that Section 1373 intrudes on the city’s role as a polity, and the “democratic processes through [which] citizens … retain the power to govern … their local problems”;\footnote{127} on the other hand, the city claimed that the law interfered with its bureaucratic functions by allowing employees to “bypass their supervisors.”\footnote{128}

\begin{itemize}
  \item \footnote{121} Gulasekaram et al., supra note 8, at 845.
  \item \footnote{122} Id.
  \item \footnote{123} Id.
  \item \footnote{124} Id. at 852–53. Indeed, just a year after IIRIRA was enacted, the Supreme Court expanded the anti-commandeering doctrine by holding that the federal government could not compel county sheriffs to conduct background checks for gun purchases. See Printz v. United States, 521 U.S. 898, 900 (1997).
  \item \footnote{125} See H.R. REP. NO. 104-725, at 383 (1996) (Conf. Rep.) (”[The conference agreement] does not require, in and of itself, any government agency or law enforcement official to communicate with the INS. The conferees intend to give State and local officials the authority to communicate with the INS regarding the presence, whereabouts, or activities of illegal aliens.”).
  \item \footnote{126} Appellants’ Brief, supra note 110, at 14. For a discussion of policies that encourage “rogue” officials “by design” at the federal level, see Hiroshi Motomura, Arguing About Sanctuary, 52 U.C. DAVIS L. REV. 435, 451 (2018).
  \item \footnote{127} Appellants’ Brief, supra note 110, at 49 (alteration in original).
  \item \footnote{128} Appellants’ Reply Brief at 20, City of New York v. United States, 179 F.3d 29 (2d Cir. 1999) (No. 97-6182), 1998 WL 34099905.
\end{itemize}
authorizing “lineworkers” to assume “functions outside of the duties prescribed by their State and municipal employers,” and “placing a wall of separation between employers and employees.” Both of these consequences, New York claimed, violated the city’s rights under the Tenth Amendment.

Whereas New York’s challenge against Section 1373 was founded primarily on the managerial authority that cities wielded over their employees, the dismissal of that authority informed the Second Circuit’s rejection of the city’s claim in City of New York v. United States. As the court explained, Section 1373 does not commandeer local officials in violation of the Tenth Amendment because it does not require that local officials take any particular actions. Instead, it merely prohibits efforts that would interfere with the voluntary choice of a local official to work with federal authorities on immigration issues. Underlying the court’s holding was the assumption that local officials possess discretion or authority independent of the city itself—an assumption that administrative sanctuaries explicitly reject in instituting clear chains of command. From this perspective, City of New York did not simply hold that Executive Order 124 was preempted by Section 1373; it also challenged the democratic and bureaucratic relationships that administrative sanctuaries sought to balance within the city.

B. Political Sanctuary

1. The Design of Political Sanctuaries

Though administrative sanctuaries represent some of the earliest noncooperation policies in the United States, political sanctuaries are more frequently associated with the sanctuary movement. Political sanctuaries draw a sharp distinction between local values and federal policy. While the underlying restrictions imposed on local participation in political sanctuaries may resemble those of administrative sanctuaries, political sanctuaries tend to cast them as direct rebukes of the federal government. Because of their political orientation, political sanctuary policies are commonly adopted by the legislative branches of local governments, such as a city council. Lastly, political sanctuaries embrace publicity—not only internally so that residents are aware of the municipal enforcement actions that are restricted, but also externally in an effort to influence the national debate over immigration.

129. Id. at 3.
130. Id. at 20–21.
131. Id.; Appellants’ Brief, supra note 110, at 49.
133. Id. at 35.
134. Id.
135. See id.
In these respects, political sanctuaries straddle the line between a city’s role as a democratic polity and an intergovernmental agent. Like administrative sanctuaries, political sanctuaries are concerned about the interests of the community, including how local immigration enforcement might affect residents. But political sanctuaries also strive to channel the will of the community with respect to national immigration policy. The policies are adopted to express “[d]isagreement with the state’s foreign policy” and highlight “the consequences of migration policy through local governments and institutions.”

They eagerly embrace the sanctuary label to “convey[] a sense of moral and ethical obligation.” More so than administrative sanctuaries, political sanctuaries are expressions of the community: solidarity with immigrant neighbors, challenge to federal priorities, and rejoinder to the purported benefits of immigration enforcement.

What sets political sanctuaries apart from administrative sanctuaries is their focus beyond the internal relationships within the city. Instead, political sanctuaries are designed to account for city’s external and intergovernmental relationships, most notably with the federal government. Recognizing federal authorities’ dependence on local participation, the limitations imposed by political sanctuaries are intended to challenge the escalation of interior enforcement efforts at the federal level. By stressing the costs on the city—municipal resources, public safety, and residents’ fears—political sanctuaries try to insert the city into the national immigration debate.

Indeed, political sanctuaries are designed with both local and national audiences in mind. As researchers Blanca García-Mascareñas and Kristin Eitel explain:

Cities that proclaim themselves sanctuary cities want to be present, they want to be able to speak and to act. They challenge the state monopoly on who can stay and under what conditions. They do this in their own territory, protect-


137. See Cuison Villazor, supra note 75, at 135.


ing those the state wants to deport, creating a more inclusive “us” or preparing to welcome those who, not being legally under their responsibility, find themselves on their streets.¹⁴⁰

As a result of these motivations, political sanctuaries tend to be loud. The desire to communicate the city’s policies to local constituents is magnified by efforts to publicize the city’s stance on immigration to a national audience.¹⁴¹ Political sanctuaries are also more willing to resist federal pressure through strategies including litigation.¹⁴² This might explain why political sanctuaries are far more eager to challenge the federal government through lawsuits than any of the other sanctuary models.¹⁴³

2. The Rise of Political Sanctuaries

Early examples of political sanctuary policies can be traced to the 1980s, when many cities passed resolutions in support of the church-based sanctuary movement aimed at protecting Central American refugees.¹⁴⁴ Unlike administrative sanctuaries at the time, these resolutions were largely enacted by city councils at the urging of movement leaders opposed to federal immigration and foreign policy.¹⁴⁵ As a result, many of these resolutions directly addressed federal policies, from “end[ing]... US aid for the Salvadoran military junta”


¹⁴³. One example is San Francisco, where residents protested the Trump Administration’s anti-immigration policies and the city subsequently sued the administration. See Fuller, supra note 142.

¹⁴⁴. Peter Mancina, The Birth of a Sanctuary City: A History of Governmental Sanctuary in San Francisco, in SANCTUARY PRACTICES IN INTERNATIONAL PERSPECTIVES, supra note 4, at 205; see LUTHERAN IMMIGR. & REFUGEE SERV., supra note 40.

¹⁴⁵. Compare supra Section II.A.I, with Mancina, supra note 144, at 207.
and “the withdrawal of US military personnel from Central America,” to federal recognition of refugee status for those fleeing El Salvador and Guatemala and implementing a “halt to their deportations.”146 Despite their grand aims, however, these early political sanctuary resolutions were largely symbolic. Most were simply “statements of support for the Sanctuary Movement and Central American refugees.”147 Even resolutions that imposed specific restrictions on municipal employees were either not legally binding or lacked enforcement mechanisms. The sanctuary resolution adopted by San Francisco in 1985, for example, “created no institutional oversight body, no chain of command, no procedures for serving refugees, and no guidelines for when or how disciplinary action should be administered to non-compliant city employees.”148

Though the earliest wave of political sanctuaries largely focused on Central American refugees, their proliferation in the 2000s and 2010s targeted federal immigration policies more generally. Cities like Chicago expanded their noncooperation policies through ordinances and resolutions and framed their motivation around criticisms of federal policy.149 When the federal government leveled attacks against political sanctuary policies, localities like Santa Clara publicly denounced and brought court challenges against these attacks, resulting in high-profile litigation.150 All the while, political sanctuaries were cast in popular media as the “resistance” against federal immigration policies.151 Political sanctuaries did not simply displace administrative sanctuaries in the beginning of the twenty-first century—they also became the prevailing model of how the entire sanctuary movement was understood in political discourse over immigration.

Why did the administrative sanctuaries common in the 1980s and 1990s give way to political sanctuaries in the 2000s and 2010s? The growing political

146. Mancina, supra note 144, at 208.
147. Ridgley, supra note 4, at 224.
148. Mancina, supra note 144, at 212. These administrative deficits would later be corrected by an ordinance adopted in 1989. Id. at 214. Interestingly, and much like New York’s sanctuary order issued that same year, the impetus for the 1989 ordinance was led by San Francisco’s mayor and based on a formal study and recommendation by the city’s Human Rights Commission. Id. at 212–13.
activism of cities is certainly part of the reason—the rise of political sanctuaries coincides with expansions of local efforts to address pressing issues like climate change, discrimination, and economic inequality. But perhaps more important was the growing dependence of the federal government on local officials in the context of immigration. Indeed, almost all interior enforcement initiatives developed since the early 2000s have been designed around cooperation at the local level. For example: Secure Communities turned routine fingerprint checks at local jails into an immigration screening tool; detainer requests relied on local detention capacity to act as “lock-ups” for immigration investigations and deportations; and the 287(g) program sought to expand federal enforcement capabilities by training and deputizing local officials as federal immigration agents. The consequence of their dependence on local cooperation meant that the federal government was increasingly interested in municipal policies on immigration. At the same time, this federal dependence also changed incentives at the local level in three ways, each of which steered cities toward the political sanctuary model.

First, it became increasingly difficult for cities to cast local sanctuary policies as a matter of internal administration. Any regulation was now apt to be perceived as a repudiation of some federal policy or initiative. Any effort to define the role of local officials with respect to immigration was likely to be portrayed as an affront to federal law. As a result, cities had no choice but to defend local noncooperation policies in relation to federal law and policies. Moreover, they were incentivized to embrace the “resistance” label that would be imposed upon them regardless of their actual motivations.

154. Secure Communities was a federal information-sharing program that checked all fingerprints submitted by local law enforcement authorities with immigration records. It combined the FBI fingerprint database that local law enforcement authorities have come to rely on with DHS’ immigration database. See Ming H. Chen, Trust in Immigration Enforcement: State Noncooperation and Sanctuary Cities after Secure Communities, 91 CHI.-KENT L. REV. 13, 23, 43 (2016); see also Secure Communities, U.S. IMMIGR. & CUSTOMS ENF’T (Feb. 9, 2021), https://www.ice.gov/secure-communities [perma.cc/T5D2-AFZ3] (noting that the Secure Communities program description is outdated and does not reflect current practice); MICHELE WASLIN, IMMIGR. POL’Y CTR., AM. IMMIGR. COUNCIL, THE SECURE COMMUNITIES PROGRAM: UNANSWERED QUESTIONS AND CONTINUING CONCERNS (2011), https://www.americanimmigrationcouncil.org/sites/default/files/research/SComm_Exec_Summary_112911.pdf [perma.cc/YUUS-WQBL].
155. WASLIN, supra note 154, at 2.
156. Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act, U.S. IMMIGR. & CUSTOMS ENF’T (Sept. 27, 2023), https://www.ice.gov/identify-and-arrest/287g [perma.cc/EESQ-BFES].
158. See, e.g., Kunichoff, supra note 151.
Second, cities came to realize that sanctuary policies were no longer sufficient to address local concerns over the impact of immigration enforcement—direct influence on federal policies and practices was also necessary. When federal authorities depended on voluntary reports by city officials, cities could ensure that immigration enforcement aligned with local priorities by centralizing authority over how that reporting decision was made. But when, for example, the Obama Administration announced that Secure Communities would flag detainees for deportation automatically and irrespective of local policies, cities realized that local sanctuary policies must also be coupled with efforts to influence federal policies regarding who is prioritized for enforcement actions. To address many of the local issues with respect to immigration enforcement, cities now had no choice but to step into the national political fray over federal policy.

Third, the politicization of the sanctuary issue meant that residents now expected—and increasingly demanded—that their city leaders assume an oppositional posture towards the federal government on immigration. The political salience surrounding sanctuary also lessened some of the constraints that local leaders ordinarily faced. Litigation offers one such example. Because of the cost of litigation and the constraints on municipal coffers, city leaders are usually reluctant to embroil themselves in protracted litigation. One might presume even more caution with respect to litigation against the state.

159. Cf. Rick Su, *A Localist Reading of Local Immigration Regulations*, 86 N.C. L. REV. 1619, 1640 (2008) (arguing that because federal immigration enforcement authorities act independently of the cities, a seat at the table in partnership with federal authorities may be more effective in influencing federal enforcement priorities and serving local interests than noncooperation).


161. Per Dara Lind:

Secure Communities sends the fingerprints of anyone booked into a local jail to immigration officials; federal agents can then ask the local cops to hold the inmate, so they can pick him up. Federal officials have come under serious fire for using Secure Communities as a dragnet to deport plenty of unauthorized immigrants who aren’t serious criminals . . . .


163. See Fuller, supra note 142 (noting San Francisco as one of several cities where residents protested the Trump Administration’s anti-immigration policies and the city subsequently sued the administration).

or federal government. But cities eagerly filed suit against several Trump Administration policies, including those targeting sanctuary cities.\textsuperscript{165} On the one hand, city leaders appeared to have done so for political capital; this was precisely the posture that their constituents demanded.\textsuperscript{166} On the other hand, knowing that they had the support of their constituents, they may have felt more assured that local residents would be willing to bear the political and fiscal costs that such challenges might incur.\textsuperscript{167} In other words, if federal dependence on cities politicized the sanctuary issue, that politicization also incentivized cities to embrace sanctuary as a form of resistance.

Given this context—federal dependence on local cooperation, the need to influence federal policy, and the politicization of the sanctuary issue—many cities pursued political sanctuaries in the 2000s and 2010s. These policies respond to specific shifts in federal policies or national politics. Seattle, for example, already had a police directive limiting local involvement in immigration enforcement when the City Council passed an ordinance in 2003 codifying those restrictions in response to growing anti-immigrant sentiment after 9/11.\textsuperscript{168} A flurry of municipal activity also followed in the wake of President Trump’s election. Seattle Mayor Ed Murray issued an executive order reaffirming and expanding the city’s sanctuary provisions and explicitly rebuked Trump’s positions on immigration. Five days later, the City Council followed suit and adopted a resolution along the same lines.\textsuperscript{169} When Trump threatened sanctuary cities in the months following his inauguration, Seattle was among

\textsuperscript{165} Azadeh Shahshahani & Amy Pont, Sanctuary Policies: Local Resistance in the Face of State Anti-Sanctuary Legislation, 21 CUNY L. REV. 225, 255 (2018) (listing seven cities that had sued or planned to sue the Trump Administration over anti-sanctuary policies at the time of writing).

\textsuperscript{166} See Fuller, supra note 142; Evan Harper & Melanie Mason, With California’s ‘Sanctuary Cities,’ Trump Might be Starting a Fight He Can’t Win, L.A. TIMES (Jan. 27, 2017), https://www.latimes.com/politics/la-na-pol-sanctuary-provisions-20170127-story.html [perma.cc/2JCR-TPXQ] (“The sanctuary cities order creates a myriad of opportunities to enmesh the new administration in unending litigation — draining its resources and political capital and ultimately undermining Trump’s ability to pursue his broader agenda.”); Ruth Gomberg-Muñoz & Reyna Wences, Fight for the City: Policing, Sanctuary, and Resistance in Chicago, 111 GEOGRAPHICAL REV. 252, 257 (2021) (arguing that Chicago’s sanctuary policy and its lawsuit against the federal government “allowed city politicians to cultivate political capital for being “immigrant-friendly” without seriously challenging broader racialized categories or systems of governance, or even policing practices within their own city”).


170. See id.

171. Oskooii et al., supra note 139, at 956–57.

172. Id. at 957.

173. Davis, supra note 13, at 110.

174. Fox, supra note 21, at 194.

175. See infra Section II.A.2.


179. Ruthhart & Dardick, supra note 139.
police department.\textsuperscript{181} Similarly, City Council members framed the federal opposition as standing up “for what is right, . . . for our values, . . . [and] for those who cannot stand up for themselves.”\textsuperscript{182} Soon after, Chicago joined a host of cities suing the federal government, challenging the effort to target sanctuary cities.\textsuperscript{183}

It is important to note, however, that even if political sanctuaries are more vocal than administrative sanctuaries in their opposition to federal immigration policy, this does not mean that they are substantively more protective than the administrative sanctuaries that preceded them. Chicago may have been one of the most prominent cities opposing the federal government and defending its sanctuary status—yet its sanctuary policy actually permitted more local cooperation with federal authorities than many cities that were far less vocal in their opposition to the federal government.\textsuperscript{184} Throughout the entire period that it stood firm against the Trump Administration, Chicago’s sanctuary restrictions included four exceptions that permitted local participation in immigration enforcement: cases where an individual “(1) had an outstanding criminal warrant; (2) had been convicted of a felony; (3) was a defendant in a pending felony case; or (4) was ‘identified as a known gang member either in a law enforcement agency’s database or by his own admission.’”\textsuperscript{185} Even after these exceptions were eliminated by the City Council in 2021, reports suggested that the Chicago Police Department continued to support federal immigration authorities by sharing its database of suspected gang members.\textsuperscript{186} Though this may not have been what the City Council intended when it enacted and amended its sanctuary policy, it demonstrates how the external orientation of political sanctuaries might not translate into effective management of a city’s bureaucratic and administrative relations with its employees.


\textsuperscript{182} Ruthhart & Dardick, supra note 139.

\textsuperscript{183} Chris Kenning & Joseph Ax, Chicago to Sue Trump Administration over Sanctuary City Funding Threat, REUTERS (Aug. 6, 2017, 1:14 PM), https://www.reuters.com/article/us-usa-immigration-sanctuary/chicago-to-sue-trump-administration-over-sanctuary-city-funding-threat-idUSKBN1AM0Q5 [perma.cc/Y7TZ-S94A].


\textsuperscript{185} See JUST FUTURES L. ET AL., supra note 184, at 6.

\textsuperscript{186} Id.
3. The Response to Political Sanctuaries

Political sanctuaries channel their residents’ political sentiments by explicitly challenging federal immigration policy. Because they do so with public support, these sanctuaries are also willing to complement their political defiance with legal challenges. The rise of political sanctuaries can be traced to the growing backlash against sanctuary policies at the state and federal level in the 2000s and 2010s. In turn, the growing popularity of political sanctuaries appears to have shaped the evolution of anti-sanctuary efforts during the Trump Administration.

More specifically, the anti-sanctuary movement took a punitive turn—a turn that seemed to have been aimed at changing the political calculus behind political sanctuaries. City leaders pursued political sanctuary strategies to gain political capital with their residents. This is why political sanctuaries willingly expend fiscal resources to defend their policies and risk those policies being struck down. But by increasing the penalties imposed on sanctuary jurisdictions, and targeting specific aspects of municipal governance, the anti-sanctuary movement shifted the focus for many sanctuary cities away from political considerations towards other administrative interests.

First, anti-sanctuary efforts have increasingly sought to increase the fiscal costs of adopting sanctuary policies. President Trump infamously ordered that all federal funding be stripped from sanctuary cities, although that order was later narrowed down to a specific grant program for law enforcement agencies. More importantly, states began enacting anti-sanctuary laws that cut deeper into municipal finances by denying state funding, imposing fines, and subjecting cities to civil liability in court. These penalties raised the fiscal cost of local opposition to federal immigration policy. As a result, these policies tested the will of city residents and the balance of municipal budgets.

Second, states began imposing penalties directly on municipal officials. Many officials are now subject to personal fines, removal from office, and even

187. See supra notes 174–190 and accompanying text.
189. See supra note 166 and accompanying text.
criminal penalties for violating state restrictions on sanctuary policies.\textsuperscript{192} This is an extraordinary escalation of traditional preemption legislation, which usually seeks no more than to repeal local policies that irreconcilably conflict with state law.\textsuperscript{193} These individual-level penalties, however, target the incentives that may lead city leaders to grandstand in their opposition to federal policy. If local leaders pursue sanctuary to enhance their own political standing, these anti-sanctuary measures would directly threaten their political careers and personal wellbeing.

Third, the anti-sanctuary movement has shifted from the federal level to the state level.\textsuperscript{194} This alters the calculus of political sanctuaries in two ways: On the one hand, the shift to state anti-sanctuary restrictions circumvents the litigation strategies that cities have successfully used in resisting federal anti-sanctuary efforts.\textsuperscript{195} States have far more legal authority over their own localities under American law, and are not subject to constitutional restrictions like the Tenth Amendment’s anti-commandeering principle.\textsuperscript{196} The state’s expansive power over their localities may be why sanctuary cities appear far more eager to sue the federal government in federal court than they are to challenge state governments in state court.\textsuperscript{197} On the other hand, an alternative explanation is that states are a less appealing target for city leaders seeking national publicity. National attention is focused on cities that speak out against the federal government; much less so for those that stand in opposition to their state governments.\textsuperscript{198}

In short, just as changes in federal immigration policy led to the rise of political sanctuaries, the rise of political sanctuaries led to a shift in state and federal anti-sanctuary strategies. Many political sanctuaries are located in states that are not only sympathetic to their cause but have also embraced

\begin{itemize}
  \item See Gulasekaram et al., supra note 8, at 850; see also TEX. GOV’T § 752.0565; TEX. PENAL CODE ANN. § 39.07 (West 2017).
  \item See, e.g., Briffault, supra note 188, at 2002 (describing the “new preemption” as “[g]oing beyond preemption’s traditional focus on simply negating local laws”).
  \item Gulasekaram et al., supra note 8, at 848–50.
  \item See id. at 851–55.
  \item Id.
  \item Indeed, even when cities challenge state anti-sanctuary laws, they have preferred to do so in federal court and on the basis of federal claims. See, e.g., City of El Cenizo v. Texas, 264 F. Supp. 3d 744, 760–75 (W.D. Tex. 2017), aff’d in part and vacated in part, 890 F.3d 164 (5th Cir. 2018).
  \item Cities that challenged Trump’s anti-sanctuary efforts, for example, received sustained national attention. See, e.g., Fuller, supra note 142. In contrast, coverage of the only major effort by a city to legally challenge a state anti-sanctuary law, SB 4 in Texas, was largely relegated to regional and specialized news outlets. See, e.g., Jackie Wang, Border City, County Sues Texas over “Sanctuary” Law, TEX. TRIB. (May 9, 2017, 12:00PM), https://www.texastribune.org/2017/05/09/border-city-county-sue-texas-over-sanctuary-cities-law-constitutionali [perma.cc/8Q7U-CK57]. The difference in reporting is even more stark when one recognizes the fact that state anti-sanctuary laws were far more expansive than even Trump’s anti-sanctuary efforts. See Gulasekaram et al., supra note 8, at 850.
\end{itemize}
state-level sanctuary policies of their own.\textsuperscript{199} For others, the targeted opposition to political sanctuaries poses a challenge by targeting the balance of interests and incentives that might lead a city towards that model. Notably, this targeted opposition gives rise to a third model of sanctuary altogether—the silent sanctuary—which this next Section explores.

C. Silent Sanctuary

1. The Design of Silent Sanctuaries

The first wave of sanctuary policies—administrative sanctuaries—consisted of efforts by local leaders to negotiate the relationship between the city, its residents, and its bureaucratic administration. As federal reliance on local participation increased, many local leaders embraced political sanctuaries as a means of channeling the sentiments of their residents through the city’s intergovernmental ties with the federal government and the states.\textsuperscript{200} As the backlash against sanctuary coalesced at the state and federal level, however, many cities reconsidered the design of their sanctuary policies. Here we arrive at the third model of the sanctuary city: the silent sanctuary.

The defining feature of silent sanctuaries is how they publicize their sanctuary policies—namely, they don’t. Eschewing the ordinances and resolutions favored by political sanctuaries, silent sanctuaries tend to impose their restrictions through departmental directives or informal guidance. Unlike administrative sanctuaries that publicize their efforts to city residents, silent sanctuaries often deny, deflect, or obfuscate when inquiries are made. Indeed, many silent sanctuaries vehemently deny that they are sanctuaries at all.

To sanctuary observers, silent sanctuaries are perhaps the most puzzling. If the goal of sanctuary policies is to provide assurance to immigrant residents and build trust between the city and immigrant communities, then the behavior of silent sanctuaries appears to sabotage these efforts. After all, vagaries and demurrers about the details and existence of a city’s sanctuary policy are likely to breed more mistrust than the absence of a policy altogether. If the goal is to express the political values and will of the community, then silent sanctuaries seem to actively avoid expression. This may explain why residents of silent sanctuaries are often frustrated with their city’s policies.\textsuperscript{201} But if silent sanctuaries intend to serve neither of these traditional goals, then why adopt a sanctuary policy at all?


\textsuperscript{200}. See supra notes 159, 175–182 and accompanying text.

\textsuperscript{201}. For example, Miami residents protested after Mayor Gimenez’s immigration policy change. \textit{Activists Protest Dade Mayor’s Sanctuary City Policy Change}, CBS MIA. (Jan. 27, 2017,
Indeed, from the perspective of the city as a democratic polity, it is not clear why silent sanctuaries exist. They make more sense, however, when we view the silent sanctuary city as a bureaucratic corporation and an intergovernmental agent. Unlike cities that willingly participate in federal immigration enforcement efforts, silent sanctuaries limit the administrative impacts of that participation—ranging from fiscal burdens and the threat of liability to the effect on bureaucratic supervision and operational priorities. Silent sanctuaries wish to maintain the city’s control over the activities and responsibilities of their officials and employees. But if silent sanctuaries refrain from publicizing these internal policies, it is because they want to avoid straining intergovernmental relations at the state and federal levels. Perceived resistance against federal policies risks political attacks and the loss of federal funds, as well as antagonizing state officials and spurring preemptive legislation and punitive reprisals. To avoid these risks, silent sanctuaries strive to go unnoticed.

In short, silent sanctuaries seek to navigate the fine line between internal interests and external pressures. Sanctuary procedures are quietly imposed to serve the city’s administrative interests. At the same time, the existence and details of such policies are obscured to avoid backlash from state and federal authorities. Of course, what silent sanctuaries trade off in this effort is the interests of their residents and the city’s role as a democratic polity. Though they avoid unwanted publicity, silent sanctuaries provide little assurance to immigrant residents. By disclaiming the sanctuary label, they do little to channel the will of residents or assure them that the city government is on their side. In this respect, the role of the city as a democratic polity takes a back seat, and administrative and intergovernmental interests outweigh resident interests.

2. The Rise of Silent Sanctuaries

Silent sanctuaries are a relatively recent phenomenon. Moreover, they appear to be an offshoot of political sanctuaries. The concern of silent sanctuaries with intergovernmental relations coincides with the federal dependence on local participation in immigration enforcement. If local participation was not as central to federal immigration policy as it is now, the silent sanctuaries’ administrative goals regarding municipal governance would not undermine intergovernmental relations to the degree that silent sanctuaries fear. Yet silent sanctuaries would not be so easily cowed if it was not for the waves of federal and state backlash aimed at sanctuary cities in general, and political sanctuaries more specifically.


Silent sanctuaries are common among smaller cities, many of which have tight budgets and cannot afford to incur litigation costs or risk losing state or federal grants. Unlike large cities that are often politically active on the national stage, smaller localities are more inclined to avoid the attention and controversy that accompany the sanctuary label. Interestingly, it is also these smaller municipalities that have the most interest in sanctuary policies from a bureaucratic perspective: even more so than the major cities, they lack the resources to dedicate local manpower and funds to assist the federal government in immigration enforcement; and they financially suffer the most when held liable for federal detention mistakes. But what they lack in size, resources, and political influence, these small cities make up in numbers. Despite the outsized attention drawn by cities like San Francisco, Chicago, and New York, many smaller sanctuary jurisdictions today are best described as silent sanctuaries.

At the same time, big cities are hardly immune to the political and fiscal pressures of the anti-sanctuary backlash. During the Trump Administration, for example, Denver was surprisingly tight-lipped about its sanctuary policy. In spite of publicly declaring that Denver was “not a sanctuary city,” local officials offered conflicting sentiments regarding the city’s enthusiasm for cooperating with federal immigration officials. Fear of federal backlash appears to have been part of the reason why the city opted to remain vague on its own policies. Another part was resistance by the city’s police union, and presumably by line-level officers, to the city’s sanctuary policy. Police resistance might explain not only why Denver chose to remain vague, but why the city may have believed that a silent sanctuary policy was preferable to nothing: City leadership may have believed that a policy was still necessary as an administrative tool to curb the discretion of line-level police officers.

Another large city example is Buffalo. Buffalo officials explained that the city does not ask residents about citizenship or immigration status, nor did

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204. See Davis, supra note 13, at 104.
205. See id.
210. See id. at 127 (describing testimony by Denver’s Police Union against sanctuary policy before Congress).
any policy require police officers to verify immigration status.\textsuperscript{211} Further, the mayor declared that “the Buffalo Police Department [(‘BPD’)] does not participate in immigration enforcement actions.”\textsuperscript{212} Yet the city strenuously denies that it is a sanctuary city,\textsuperscript{213} and none of the BPD’s stated “policies” are set forth in a formal resolution, ordinance, executive order, or police handbook. The only reference to unauthorized immigrants in the Buffalo Police Manual directs officers to refer “any circumstances” in which they are involved to federal authorities.\textsuperscript{214} Interestingly, the mayor defended the city’s ambiguous status in his reelection campaign by declaring that there was “no need for Buffalo to become a sanctuary city, given that city police already have a policy of not working hand-in-hand with Immigration and Customs Enforcement as it tries to root out those without documentation.”\textsuperscript{215}

The interplay of intergovernmental relations and the city is on full display in the design and defense of New Orleans’s sanctuary policy. In 2016, the New Orleans Police Department (NOPD) adopted a policy prohibiting its officers from inquiring about immigration status.\textsuperscript{216} When that policy was challenged by state and federal policymakers, city leaders defended the policy by disclaiming its local origins. They explained that the sanctuary policy was only adopted because of a federal consent decree imposed upon the NOPD, following a lawsuit and investigation alleging “biased policing.”\textsuperscript{217} Further, officials said that the policy itself was designed in consultation with, and explicitly approved by, federal authorities—including Immigration and Customs Enforcement.\textsuperscript{218} New Orleans claimed that it could not now be identified as a sanctuary city opposed to the federal government, because its sanctuary policy resulted from a federal order and was vetted by federal officials. In all of this, New Orleans


\textsuperscript{213} See Schulman, supra note 211.

\textsuperscript{214} BUFFALO POLICE DEP’T, MANUAL OF PROCEDURES, ch.14, § 7.2.

\textsuperscript{215} Zremski, supra note 212.

\textsuperscript{216} NEW ORLEANS POLICE DEP’T, OPERATIONS MANUAL, ch. 41.6.1 (2016), https://nola.gov/getattachment/NOPD/NOPD-Consent-Decree/Chapter-41-6-1-Immigration-Status-approval.pdf [perma.cc/RT8C-7U3G].


\textsuperscript{218} Id.
presented itself as a faithful intergovernmental agent, carefully following federal directives in promoting public safety.

Of course, the implicit nature of silent sanctuaries makes them hard to identify. This is especially true if a city faces backlash from both the federal government and its state. In 2013, budget considerations convinced the Miami-Dade County Board of Supervisors to adopt a policy restricting compliance with federal detainers—which had cost the county an estimated $2 million since 2006—unless the federal government reimbursed the county for its costs.\(^{219}\) In 2016, it was also budgetary concerns—this time, the threat of losing federal funds—that led the mayor to order that detainer requests be honored and the Board to repeal the demand for federal reimbursement. Residents at the meeting condemned the board vote.\(^{220}\) But as one commissioner explained: “The reality is we have a working relationship at all levels of government that includes the federal government. And I don’t want to create antagonistic [relationships] in one area at the detriment of every other area.”\(^{221}\) Despite this appeasement, some suggest that Miami-Dade has simply shifted away from formal sanctuary policies in favor of informal sanctuary practices.\(^{222}\)

Similarly, given the longstanding anti-sanctuary law in Alabama, the mayor of Decatur intervened when the city’s police chief issued a new departmental policy on immigration enforcement and posted it on social media.\(^{223}\) When the policy was later labeled a “sanctuary policy,” the mayor loudly declared that Decatur would not be a sanctuary city and led a process to revise the department’s policy.\(^{224}\) The main revision focused less on when the city would not cooperate with federal immigration officials, and more on the circumstances in which they would.\(^{225}\) Because the updated policy allocates cooperation discretion entirely to the police chiefs and department supervisors,\(^{226}\) there is less guidance for city residents on when immigration

\(^{219}\) Daniel Rivero, supra note 42.

\(^{220}\) Id.

\(^{221}\) Id. (alteration in original).

\(^{222}\) For example, issuing tickets instead of taking unauthorized immigrants into custody where they might be flagged by federal authorities. Steve Salvi, The Original List of Sanctuary Cities, USA, OHIO JOBS & JUST. PAC, http://www.ojjpac.org/sanctuary.asp [perma.cc/QZ3WD9HJ].

\(^{223}\) See Gattis, supra note 80.

\(^{224}\) Id.


enforcement activities will be permitted or prohibited. Moreover, given state-
ments by the police chief and city leaders, observers have continued to argue
that Decatur remains a sanctuary jurisdiction under state law.227

3. The Response to Silent Sanctuaries

The emergence of silent sanctuaries is not only reflected in the peculiar
behavior of many city officials as they hem and haw in their implementation
of sanctuary restriction. It can also be gleaned from the shifts in the anti-san-
cuary response, as a growing number of states have expanded their legal pro-
hibition of local sanctuary policies.228 Indeed, the rise of silent sanctuaries
explains many of the new provisions now common in anti-sanctuary legisla-
tion adopted at the state level.

Silent sanctuaries navigate administrative priorities and intergovernmen-
tal relations through two distinct strategies. The first is to obscure or conceal
the details of their policy in an effort to avoid the sanctuary label or allow city
leaders to plausibly deny its applicability. The second is to implement those
policies through informal guidance, departmental practices, or supervisory di-
rectives that are less visible than formal policies adopted by a mayor or city
council. These two approaches exploit the confusion around the sanctuary
designation—not only what policies constitute sanctuary, but also what ac-
tions qualify as a sanctuary policy.

But if silent sanctuaries are meant to dodge the anti-sanctuary backlash,
the most recent wave of anti-sanctuary legislation seems specifically tailored
to counter these efforts. First, state legislatures have begun adopting excep-
tionally broad definitions of sanctuary that are much more difficult to disclaim
or write around. When Congress targeted sanctuary jurisdictions in 1996 with
Section 1373, it focused on policies that limited local-federal communications
on immigration status.229 In response, cities replaced earlier “don’t tell” poli-
cies with “don’t ask” policies that restricted local officials from gathering the
kind of information that could be shared with federal officials.230 However,
recent state-level anti-sanctuary laws are embracing catch-all provisions that
not only address “don’t ask” policies, but also try to foreclose other circum-
vention efforts. In Indiana and North Carolina, for example, cities are prohib-
ited from limiting or restricting involvement in immigration enforcement to
anything “less than the full extent permitted by federal law.”231 In Alabama,
cities are affirmatively required to “fully comply with and ... support the enforcement of federal immigration law.” By defining sanctuary as anything short of full involvement or support of federal immigration enforcement, these anti-sanctuary measures limit the ability of silent sanctuaries to quibble with the sanctuary label.

Second, state anti-sanctuary legislation is increasingly targeting efforts by silent sanctuaries to deny the existence of a sanctuary policy. They have done so by expanding what kind of municipal actions fall within the scope of their prohibition. Anti-sanctuary laws are now being applied not just to formal policies, but also “informal, unwritten policy[s],” “[p]attern[s] or practice[s],” and “procedure[s] or custom[s].” Furthermore, Texas prohibited local officials from simply “endors[ing]” any limitations on involvement in federal immigration enforcement, while Iowa forbids them from “discourag[ing]” inquiries into immigration status or assisting in federal enforcement. None of these provisions would be necessary for administrative and political sanctuaries, both of which depend on clear and transparent policies that are well-publicized to line-level employees and local residents. Yet these restrictions make sense as a response to silent sanctuaries, especially those that seek to conceal the existence of any policy.

Neither of these expanded anti-sanctuary provisions are easily enforced. If prohibited sanctuary policies are defined as any municipal action that leads a city to fall short of full support and involvement in federal immigration enforcement, then almost every city would be implicated. No city carries out all the immigration enforcement activities that are permitted under federal law,

234. TEX. GOV’T CODE ANN. § 752.053(a)(2) (West 2022).
236. TEX. GOV’T CODE ANN. § 752.053(a)(1) (West 2022). The Fifth Circuit struck down the “endorsement” ban on First Amendment grounds with respect to elected officials but upheld it with respect to “non-elected officials and employees” like police chiefs. City of El Cenizo v. Texas, 890 F.3d 164, 184–85 (5th Cir. 2018).
nor would any city have the resources and personnel to do so.\textsuperscript{238} Furthermore, even if anti-sanctuary laws cover informal “patterns and practices” or departmental “customs,” those are precisely the kind of “policies” that are the most difficult to prove in court. Resultantly, there have been no legal challenges against sanctuary cities on these expanded provisions.

Yet these targeted responses to silent sanctuaries are likely more effective than the scant enforcement actions suggest. They chill cities from pursuing sanctuary policies, especially cautious cities most inclined to pursue the silent model. Uncertainty over what could violate state anti-sanctuary provisions prevents cities from “toeing the line.”\textsuperscript{239} In turn, they are more likely to avoid any sanctuary restrictions altogether, rather than risk legal or political consequences.\textsuperscript{240} This may also explain why the term sanctuary remains so ill-defined. The line demarcating sanctuary jurisdictions is not just hard to draw—it also continues to shift as sanctuary and anti-sanctuary forces maneuver in response to one another.

III. REASSESSING THE SANCTUARY CITY

Municipal sanctuaries can broadly be understood through three different models: administrative sanctuary, political sanctuary, and silent sanctuary. These three models, I have suggested, correspond with the fractured identity of the American city. Taken together, the models and identities help explain the diversity of sanctuary policies and highlight the competing interests that underlie their design.

The goals, interests, and audience of municipal sanctuary policies are far more varied and complex than traditionally recognized, especially from a federal perspective focused on immigration policy and enforcement. But as this Part demonstrates, the localist dynamics behind this framework also complicate traditional assessments of both sanctuary policies and the anti-sanctuary

\textsuperscript{238} For example, federal law specifically authorizes local officials to “verify or ascertain the citizenship or immigration status of any individual... for any purpose authorized by law” and requires federal authorities to respond to those inquiries. 8 U.S.C. § 1373(c). Federal law also permits local jurisdictions to enter into 287(g) agreements with the federal government to depurate local officials as federal immigration enforcement agents with more expansive powers. See id. § 1357(g). Federal courts have also held that local police officers have “implicit authority... to investigate and make arrests for violations of federal law, including immigration laws.” United States v. Santana-Garcia, 264 F.3d 1188, 1194 (10th Cir. 2001) (quoting United States v. Vasquez-Alvarez, 176 F.3d 1294, 1295 (10th Cir. 1999)). There is no city that does all these things on every occasion it could.

\textsuperscript{239} See Bill Ong Hing, Immigration Sanctuary Policies: Constitutional and Representative of Good Policing and Good Public Policy, 2 U.C. IRVINE L. REV. 247, 251 (2012) (“[T]he principles of federalism represented in the Supreme Court’s approach to the Tenth Amendment and preemption drive a stake in the heart of subfederal anti-immigrant laws...”).

\textsuperscript{240} See Briffault, supra note 188, at 2022 (“[F]ew actions can have a greater chilling effect on local self-government than threatening local officials with fines or the loss of office simply for supporting certain local measures \textit{whether or not subject to preemption}.” (emphasis added)).
efforts that target them. I address these angles in the first two Sections below. Additionally, I offer some thoughts on the consequences of the sanctuary discourse and how it obscures, distorts, and delegitimizes the local negotiations behind the design of municipal sanctuaries.

A. City Structure and the Assessment of Municipal Policies

One of the central points of this Article is that the diversity of municipal sanctuaries is due in part to the municipal structure of the American city and the various institutional actors responsible for sanctuaries’ design and implementation. But even if this provides insight into why sanctuary policies differ, does it really affect how we assess the effectiveness of sanctuary policies or the commitment of the cities that adopt them? After all, the general consensus among immigrant advocates is that effective sanctuary requires categorical prohibitions, formal policies, and widespread publicity. Accordingly, one might assume that the degree to which a city’s policies correspond to these standards reflects that city’s commitment to sanctuary. From this perspective, a localist perspective might shine light on how sanctuary policies are designed but does not fundamentally alter how we might assess them.

But focusing on the municipal structure of city government does more than simply explain why sanctuary policies differ—it also challenges assumptions about what the substantive provisions actually mean. Whether a sanctuary policy relies on categorical prohibitions or discretionary standards does not neatly correlate with the degree to which a city will participate in federal immigration enforcement efforts. Similarly, formal policies may not be more effective than informal norms and may in fact be more common in cities where implementing sanctuary is more difficult. Even publicity and self-identification may not accurately reflect a city’s commitment to sanctuary.

The key here is that municipal policies do not simply correspond with the fractured identity of the city as democratic polities, bureaucratic corporations, and intergovernmental agents. Those fractured identities also correspond to different institutional actors within the city’s administrative structure. Sanctuary policies commonly ascribed to the city as a whole, for example, are in most cases designed and implemented by a specific segment of the municipal government: ordinances adopted by city councils, executive orders issued by mayors, or guidelines promulgated by police chiefs and other department heads. While all these institutional actors act on behalf of the city, they are situated differently with respect to the city’s role and function. To win and

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242. For example, San Francisco’s initial 1985 sanctuary policy was adopted by the city’s Board of Supervisors. San Francisco Approves Bill to Designate It a Sanctuary, N.Y. TIMES, Dec. 24, 1985, at B4. Similarly, New York’s Executive Order 124 was initially signed by Mayor Edward Koch. See City of New York v. United States, 179 F.3d 29, 31–32 (2d Cir. 1999).
maintain their office, councilmembers solicit the support and channel the will of their constituents. To be effective managers, department heads like police chiefs must cultivate the respect and trust of their subordinates. Mayors straddle the political and administrative functions of the city government, while simultaneously navigating the city’s relationship with the state and federal government.

From this perspective, the substantive provisions of a sanctuary policy do not only reflect the vertical relationship between cities and the state and federal governments. The design of these provisions necessarily involves the horizontal relationship between different—and often competing—institutional actors within the city. The mayor and police department may not share councilmembers’ enthusiasm for sanctuary.243 Departmental guidelines developed by police chiefs may face rebuke by mayors fearful of attracting state or federal attention,244 or by city councils responding to public uproar over sensational crimes committed by an unauthorized immigrant.245 Given these dynamics, a municipal sanctuary policy is more than just a statement about how a city envisions its role in federal immigration enforcement efforts, or how it balances its relationship with the federal government and the state. In many cases, it reflects ongoing negotiations between different institutional actors throughout the city government.

All of this complicates the traditional approach of assessing municipal policies. Take, for example, the substantive limitations imposed by a municipal sanctuary policy. It is easy to assume that categorical bans on local participation reflect a stronger commitment to sanctuary than policies that afford discretion. Yet in many cities, this difference may simply reflect the institutional limitation of the municipal actor responsible for its design. Because city councils do not oversee the day-to-day operations of the municipal bureaucracy, they have little choice but to rely on categorical bans and clear exceptions.246 In other words, city councils may overprescribe sanctuary restrictions, and allow for less flexibility than they might otherwise prefer, to compensate

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243. See, e.g., supra note 209 (describing Denver Police Department’s resistance to an explicit sanctuary policy).

244. See, e.g., supra notes 223-226 (describing the public quarrel between Decatur’s police chief and mayor over the police department’s sanctuary policy).

245. For example, the public outcry against Special Order 40 in Los Angeles after a seventeen-year-old was shot and killed by an undocumented immigrant gang member. See Jennifer Steinhauer, Immigration and Gang Violence Propel Crusade, N.Y. TIMES (May 15, 2008), https://www.nytimes.com/2008/05/15/us/15gangs.html [perma.cc/8RNW-EC59].

246. City councils are often inclined to eliminate exceptions if it is discovered that discretion may be exercised outside of their control. When the exception in Chicago’s sanctuary ordinance for those identified as a known gang member was criticized for affording police officers too much discretion to identify someone as a gang member, the City Council responded by eliminating that exception entirely. Fran Spielman & Elvia Malagón, Committee Eliminates Exceptions to Chicago’s Welcoming City Ordinance, CHI SUN TIMES (Jan. 19, 2021, 12:32 PM), https://chicago.suntimes.com/city-hall/2021/1/19/22235629/immigrants-chicago-federal-ice-immigration-customs-enforcement-welcoming-city-ordinance [perma.cc/FXK2-4E9K].
for their lack of direct supervisory control over municipal employees. Conversely, mayors and police chiefs may be more willing to afford discretion, especially if that discretion is centralized in personnel under their direct control. They may allow for more discretionary participation on paper than they might actually prefer in action in order to enhance administrative flexibility—especially if they are confident that they can control how that discretion is exercised on a case-by-case basis. The extent of this discretion may depend on the working relationship between mayors and their municipal departments, or department heads and line-level officials. But mayors and police chiefs can also rely on administrative supervision to tailor sanctuary limitations more than councilmembers can.

Another common view is that formal policies are preferable to informal guidance or norms. Given the criticism of silent sanctuaries, it is widely assumed that formal policies demonstrate commitment in ways that the latter does not. But how much of this view is founded on misperceptions about the nature of municipal governments in most cities? About half of municipal police departments in the United States have fewer than ten officers; three quarters have less than twenty-five. For most cities then, formal policies may simply not be necessary. Police chiefs may believe that oral guidance and department norms may be just as effective in setting departmental policies as a provision in the employee handbook. City officials may rely on personal relationships with their employees, rather than executive orders or municipal ordinances, to limit local enforcement activities. Conversely, if big city police departments tend to favor formal policies, it may simply be because their police departments are, well, big. Sure, it may be that big cities are more liberal,
have deeper pockets, and are therefore more likely to adopt formal policies that demonstrate their commitment to immigrants and opposition to federal policies. But it might also be that big cities favor formal policies and procedures because they have a far larger bureaucracy filled with municipal employees, many of whom are divorced from the direct supervision of the city’s political leadership. In other words, if big cities embrace formal policies, it may not necessarily reflect their deeper commitments to sanctuary. It might instead be an acknowledgement of the steeper challenges they face in managing their vast and sprawling bureaucracy.253

Last, attention to municipal structure casts the publicity of sanctuary policies, and the willingness of cities to identify as sanctuaries, in a new light. Publicity is more than the expression of values commonly associated with political sanctuaries—it is also a means by which city leaders can call upon the public to aid in the implementation of a municipal policy.254 Legislative bodies like the city council have little choice but to act in a public manner when they enact an ordinance or resolution. At the same time, they may also be eager to publicize those policies in order to recruit the public to help ensure their implementation and report deviations or violations. In contrast, the degree to which mayors and police chiefs need to rely on publicity for compliance purposes varies depending on their relationship with line-level employees. If that relationship is contentious (as it has historically for many big city police departments),255 then publicity may be necessary. If that relationship is amicable, mayors and police chiefs may be more inclined to rely on informal guidance and administrative processes, especially if doing so avoids the consequences of state and federal scrutiny. Given this, the “loudest” cities may not actually

253. A connection can be drawn to the Obama Administration’s decision to implement the Deferred Action for Childhood Arrivals program (DACA) at the federal level. As a formal and categorical program, DACA raises more constitutional concerns than if the administration had sought to achieve the same through the traditional exercise of prosecutorial discretion. Adam B. Cox & Cristina M. Rodríguez, The President and Immigration Law Redux, 125 YALE L.J. 104, 176 (2015). But by many accounts, one of the reasons DACA was thought necessary was because of resistance by immigration officials (and the union representing them) to earlier attempts to shape their exercise of discretion through informal guidance. See id. at 141, 195 (“These Obama relief policies [DACA and DAPA] are thus best understood as the most dramatic and politically salient examples of a larger effort to centralize the vast enforcement authority that modern de facto delegation has given to the Executive.”).


be those that provide the most sanctuary. Publicity in cities like Chicago\(^\text{256}\) may reflect fears that municipal officials will not faithfully comply, especially if their activities are easily hidden from the city’s political leadership. Conversely, while “silent sanctuaries” are commonly denounced by immigrant advocates for lacking commitment and transparency, they may be just as effective in limiting local participation in immigration enforcement as their more vocal counterparts.\(^\text{257}\) In fact, they might be more effective in limiting immigration enforcement by avoiding federal scrutiny.\(^\text{258}\)

In short, the substantive provisions of a municipal sanctuary policy are not simply the result of the city administration responsible for their design. Many of those provisions themselves exist as means for municipal actors to navigate the structure of the city’s administration. Assessments of municipal sanctuary policies need to account for dynamics in local policymaking, in addition to the perceived effects of these policies on federal immigration law and enforcement. In many cases, the varied design of sanctuary policies may reflect similar commitments and produce comparable outcomes. The variations themselves may simply reflect a course of action best suited to the institutional structure and internal dynamics of a particular city.

**B. Anti-Sanctuary and the Persistence of the Sanctuary Enigma**

Disaggregating sanctuary models not only challenges how we assess the substantive provisions of sanctuary policies—it also offers an alternative perspective on anti-sanctuary laws and their impact and goals. The traditional view is that anti-sanctuary laws serve to expand the federal government’s immigration enforcement capabilities by compelling local participation in federal enforcement efforts.\(^\text{259}\) But while there are few signs to suggest that anti-sanctuary policies are succeeding on these measures,\(^\text{260}\) they have played a significant role in shaping sanctuary’s development by reframing how local leaders perceive sanctuary. I argue here that this reframing is far from inconsequential. Moreover, I suggest that this reframing may be among the many purposes behind the enactment of anti-sanctuary measures. Indeed, the persistent confusion over what kinds of policies constitute “sanctuary” may be


\(^{257}\) See supra Section II.C.3.


\(^{259}\) See Su, supra note 34, at 1986.

\(^{260}\) See Gulasekaram et al., supra note 8, at 842 (“As it turns out, however, federal attempts to shut down sanctuary cities have largely been ineffective . . .”).
due in part to the broader set of interests—institutional, administrative, and political—that anti-sanctuary efforts serve.

There is little evidence to suggest that anti-sanctuary measures have been successful in increasing local participation in federal immigration enforcement.\(^{261}\) Nor does it appear that the expansion and escalation of anti-sanctuary restrictions have meaningfully increased federal apprehension or deportation of unauthorized immigrants.\(^{262}\) One reason may be that, given the many ways in which cities can shirk their efforts to assist the federal government, it is often hard to compel an active local response through legal sanctions and political shaming alone. Another reason is that cities thus far have largely succeeded in revising local sanctuary policies to skirt anti-sanctuary measures. When Section 1373 was enacted, for example, cities replaced “don’t tell” policies with “don’t ask” policies—instead of prohibiting local officials from reporting immigration status to federal authorities, cities prohibited them from inquiring about immigration status in the first place.\(^{263}\) When the federal government threatened to withhold funds from sanctuary jurisdictions, and state legislatures stepped in with even more expansive anti-sanctuary measures, many cities embraced the silent sanctuary model by obfuscating, concealing, or denying their sanctuary practices.\(^{264}\) This is why anti-sanctuary advocates often bemoan the “cat-and-mouse game” in their pursuit of sanctuary cities,\(^{265}\) where sanctuaries not only repeatedly elude capture, but also continue to proliferate. Meanwhile, local participation in federal immigration enforcement

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261. See id. at 878.

262. As Huyen and Van Pham have documented, immigrant detentions and deportations were relatively flat from 2005 to 2020, the same years that the number of sanctuary and anti-sanctuary laws grew exponentially. See Huyen Pham & Van Pham, The Subfederal in Immigration Polarization 9 fig. 3 (unpublished manuscript) (on file with the author). This means that neither sanctuary nor anti-sanctuary policies had much effect on federal immigration efforts during these years. But even if the prior result can be explained by the fact that sanctuary and anti-sanctuary policies increased, the authors’ finding also reveals that neither was prompted by an escalation or decline in immigration enforcement activity. Echoing the political sanctuary model I outlined, Huyen and Van Pham concluded that the political salience of sanctuary, and increased partisan polarization over the issue, played a more significant role in explaining this trend than federal immigration enforcement efforts. Id. at 58–59. Anti-sanctuary policies, especially in red states, grew in response to the election of President Obama, despite the fact that federal immigration detentions and deportations increased. Sanctuary policies, especially in blue states, spiked following the election of President Trump even though his anti-immigrant rhetoric never fully materialized in detention and deportation numbers. But by this time, it appeared that partisanship over sanctuary was more salient than its effects. Because federal, state, and local actors in the 2000s and 2010s largely framed the sanctuary issue on political grounds and designed them during this time to serve political goals, it makes sense that sanctuary and anti-sanctuary policies had little connection to federal immigration enforcement efforts.

263. Kittrie, supra note 105, at 1499; Gulasekaram et al., supra note 8, at 845–46.

264. See supra notes 208, 213, 217 and accompanying text.

has not measurably increased\textsuperscript{266} even as federal dependence on local assistance has grown.\textsuperscript{267}

Accordingly, one might presume that anti-sanctuary restrictions are largely ineffective, especially as a means of expanding local participation and increasing federal deportations. But my analysis of sanctuary models reveals that even if anti-sanctuary measures have not succeeded in eliminating sanctuaries, they have had a tremendous impact in shaping sanctuary’s development. The emergence and adoption of sanctuary models has repeatedly been influenced by anti-sanctuary efforts at the state and federal level. In addition, I have argued that these sanctuary models are not just different paths to the same end, but fundamentally distinct in terms of the interests that they serve, the audience they target, and the municipal roles that they elevate. Switching from “don’t tell” to “don’t ask” policies allowed cities to continue limiting their employees’ involvement in federal enforcement efforts.\textsuperscript{268} However, it also limits the cities’ ability to gather immigration status information for their own ends, especially in connection with efforts to assist those residents that lack formal status. Moreover, by limiting municipal authority over city employees, Section 1373 made it more difficult for local leaders to cast their sanctuary policies as a matter of internal administration.

When anti-sanctuary efforts escalated, silent sanctuary policies allowed many cities to retain administrative restrictions on local participation and elude state and federal scrutiny.\textsuperscript{269} But adopting this model resulted in cities abandoning efforts to provide a sense of security for immigrant residents, build trust with immigrant communities, and serve as a political forum for challenging federal immigration policy. Though anti-sanctuary campaigns have not meaningfully increased local participation in federal immigration enforcement, they have been effective in changing the design and orientation of sanctuary policies at the local level—after all, in a cat-and-mouse game, it is the cat, not the mouse, that hunts.

The effects of anti-sanctuary laws are far more extensive than commonly recognized. Furthermore, the purpose of anti-sanctuary efforts extend far beyond expanding local participation in federal enforcement efforts. Section 1373 and early anti-sanctuary efforts were just as interested in compelling local participation as they were in justifying a consolidated system of immigration enforcement involving federal, state, and local authorities—a system that was both novel and controversial at the time.\textsuperscript{270} The political bombast of the

\textsuperscript{266} See Pham & Pham, supra note 262, at 9 fig. 3.


\textsuperscript{268} Kittrie, supra note 105, at 1499.

\textsuperscript{269} See discussion of Denver, Buffalo, and New Orleans, supra, in notes 208–218 and accompanying text.

\textsuperscript{270} See Su, supra note 34, at 1986.
anti-sanctuary efforts directed at political sanctuaries in the 2010s suggests that the goal was to both force cities to capitulate to federal demands and also score political points by casting these jurisdictions as dangerous and subversive, sometimes exaggerating the degree of resistance in order to build support for increased immigration restrictions. And if some cities sought to elude these attacks by going “silent,” then all the better—another source of political opposition would be silenced, and the number of possible venues for mobilizing political opposition would be contained. From this perspective, it makes sense that anti-sanctuary efforts focus on sticks, rather than carrots. Even if incentives work better than sanctions in encouraging local participation, local participation in immigration enforcement is only one interest among many motivating anti-sanctuary efforts.

The myriad interests behind both sanctuary and anti-sanctuary policies may explain why sanctuary remains so ill-defined. Earlier, I suggested that the reason for the sanctuary enigma is the inherent difficulty in drawing a legal standard. But given the multiple purposes over which the legal battle over sanctuary policies is waged, there could be strong political incentives to keep the sanctuary label open and flexible. Anti-sanctuary advocates have an incentive to embrace an open definition, one that can be expanded to include local efforts to write around anti-sanctuary restrictions, and to inflate the number of sanctuary jurisdictions to justify restrictions. After all, attacking sanctuary cities can be a winning political strategy in the broader debate over federal immigration policy. On the other hand, sanctuary advocates may also be incentivized to keep the sanctuary label flexible. At times, they may want to exaggerate sanctuary’s numbers to demonstrate mass resistance against federal immigration enforcement policies, suggesting a groundswell of opposition at the local level. Other times, sanctuary advocates may invoke a higher threshold for what qualifies as sanctuary to challenge the need for anti-sanctuary restrictions, or help specific cities deflect state and federal scrutiny. The sanctuary enigma then is not simply the result of the multiple motivations, interests, and design features that underlie any given city’s sanctuary policy. The enigma may also be the intended outcome of a political battle in which the sanctuary label is too useful to pin down.


273. Id.
C. Municipal Governance and Sanctuary’s Shadow

Because of sanctuary, cities are now at the center of today’s immigration debates—but what effect does this have on the cities themselves? Immigration advocates and policymakers are now turning their attention to policymaking at the local level.\textsuperscript{274} At the same time, the battle over sanctuary suggests that the political and institutional dynamics of municipal governance will continue to play a significant role in the development of federal enforcement strategies.\textsuperscript{275} One could conclude that the rise of sanctuary has enhanced the standing of cities in the national debate over immigration. But, as I argue here, this increase in national standing may be undermining municipal governance at the local level. In other words, the growing significance of sanctuary has not simply brought attention to local governments—as a site for political mobilization, a partner in the implementation of enforcement strategies, or as a representative of local interests.\textsuperscript{276} The shadow sanctuary casts also obscures, distorts, and delegitimizes the myriad local interests that cities negotiate in the development of local policies.

Ironically, the incorporation of cities into the immigration debates may have benefited those engaged in the \textit{national} struggle over immigration policy. For immigrant advocates focused primarily on national reforms, cities now offer a potent political platform for challenging our nation’s immigration laws, a convenient administrative channel for obstruction of federal enforcement initiatives, and a useful conceptual model for constructing claims to membership and belonging on behalf of unauthorized immigrants.\textsuperscript{277} It makes sense then, that immigrant advocates who historically focused on national policies and international human rights are now standing up for sanctuary cities and

\textsuperscript{274} For example, the ACLU’s Immigrants’ Rights project, which addresses national immigration policy, now focuses on local policies as well as national. \textit{Immigrants’ Rights}, ACLU, https://www.aclu.org/issues/immigrants-rights [perma.cc/C8EC-4URY].


\textsuperscript{276} See supra Section I.C.

\textsuperscript{277} See Kittrie, supra note 105, at 1475–76.
championing local norms.\textsuperscript{278} On the other side, enforcement advocates vehemently contest the rise of sanctuary cities.\textsuperscript{279} Yet even these advocates have embraced the localist turn. After all, it was the promise of mobilizing local officials as a “force multiplier” for federal authorities that gave rise to their fixation on local sanctuary policies.\textsuperscript{280} Even if sanctuary cities continue to proliferate, enforcement advocates seem just as happy to elevate them as convenient political foes. President Trump reveled in his attacks on sanctuary cities, calling attention to his efforts to strip them of federal funding and directing immigration raids targeting their neighborhoods.\textsuperscript{281} Prominent red-state governors with national profiles, like Governors DeSantis of Florida and Abbott of Texas, now follow the same script: competing over how many immigrants they can bus or fly to sanctuary cities for political points, which seems to draw more attention than their efforts to apprehend or report them to federal authorities.\textsuperscript{282}

Though both sides of the national immigration debates seem to have embraced the localist frame in their respective campaigns, it is not clear that cities benefit from the attention. First, the conventional sanctuary framework obscures the local interests at play in the development of sanctuary policies, as well as the political and administrative structure responsible for its design. We readily acknowledge the local interests and institutional structures behind municipal policies generally. But when it comes to municipal sanctuary policies, we too often view them through an overarching national immigration lens. Instead of recognizing administrative concerns like resource allocation and personnel management, federal authorities redefine sanctuary policies as

\begin{itemize}
\item \textsuperscript{278} For example, the ACLU has advocated for sanctuary cities. \textit{ACLU Response to “Sanctuary City” Legislation}, ACLU, \url{https://www.aclu.org/aclu-response-sanctuary-city-legislation} [perma.cc/K2EM-H32W].
\item \textsuperscript{279} See, e.g., Somin, supra note 271, at 1247–48 (discussing the Trump Administration’s political attacks on sanctuary cities).
\item \textsuperscript{280} Armacost writes:

\begin{quote}
The most obvious [reason for federal interest in local enforcement] is that involving state and local officials acts as a “force multiplier” for immigration enforcement. While federal agencies employ approximately 18,000 immigration and customs enforcement officers, there are nearly 18,000 law enforcement agencies in the country employing over 750,000 police personnel with general arrest powers.
\end{quote}

\item \textsuperscript{281} See McCausland, supra note 141; Caitlin Dickerson et al., supra note 258.
\item \textsuperscript{282} See Will Sennott, Zolan Kanno-Youngs, Eileen Sullivan & Patricia Mazzei, With Faraway Migrant Drop-Offs, G.O.P. Governors Are Doubling Down, \textit{N.Y. TIMES} (Sept. 15, 2022), \url{https://www.nytimes.com/2022/09/15/us/desantis-abbott-migrants-immigration.html} [perma.cc/2AYN-QXVZ]. Indeed, seemingly lacking immigrants in Florida for this political stunt, Governor DeSantis dispatched officials to recruit immigrants in Texas to transport with Florida funds. \textit{Id}.\end{itemize}
local efforts to disrupt federal immigration policies. When sanctuary policies are explicitly used by local leaders to challenge federal policies, the response is often to question whether local governments like cities have any standing in the national immigration debates, rather than to recognize the impact that federal immigration policies are increasingly imposing on cities. Through the encompassing lens of immigration, local sanctuary policies often become nothing more than a proxy battle in the national struggle over federal immigration policies. One goal of this Article has been to shine light on the local dynamics surrounding the development and design of sanctuary policies. But the fact that this is even necessary highlights the extent to which sanctuary obscures these municipal dynamics while it simultaneously thrusts cities into the national spotlight.

Second—and perhaps more troubling—is the way the sanctuary battle distorts municipal governance and the delicate balance of local interests that city leaders navigate and negotiate. Municipal governance is hard. Cities must navigate a number of competing identities—balancing their roles as democratic polities, bureaucratic corporations, and intergovernmental agents. They must juggle those competing roles while negotiating the divisions between city residents, municipal departments and employees, and the state and federal governments. This is all made more difficult in the sanctuary context by the distortionary effects of federal demands and anti-sanctuary efforts on the local policymaking process. The already challenging task of balancing departmental budgets and city priorities is further burdened by federal pressure for local participation in immigration enforcement initiatives. Anti-sanctuary efforts at the state and federal levels not only add to this pressure through threats of defunding but also curtail city leaders’ administrative and regulatory authority. Meanwhile, sanctuary’s fevered politics steer city leaders away from traditional hallmarks of “good governance.” Transparency is now widely eschewed, be it silent sanctuaries seeking to avoid political scrutiny or political sanctuaries eager to score points. Reactive politics increasingly drive sanctuary

283. See, e.g., Arrieta-Kenna, supra note 45.

284. See Gulasekaram et al, supra note 8, at 875 (“Anti-sanctuary proponents often complain that cities and other localities are intruding upon the federal government’s plenary power over immigration in refusing to comply with federal policy on immigration enforcement.”).


286. See, e.g., DAVID CORTRIGHT, CONOR SEYLE & KRISTEN WALL, GOVERNANCE FOR PEACE 29 (2017) (describing the general “consensus” for good governance involving, among other things, “transparency, responsibility, accountability, participation and responsiveness to public need”).
development, leaving few opportunities for proactive approaches. Furthermore, who is accountable for local immigration decisions and policies is becoming less clear.

All of this leads to my third point, which is that sanctuary politics delegitimize local interests and the role of municipal governance. If local concerns are so easily dismissed—and distortions to municipal governance so widely accepted—the reason appears to be that neither are considered central in today’s sanctuary debates. Even when local interests or administrative considerations are raised, the politics of sanctuary relegate them to the margins. To be sure, many believe that the national interests behind federal immigration policymaking are inherently more consequential than the local concerns that drive municipal governance—and perhaps that is true. But it is precisely this belief that undermines the legitimacy of the local policymaking process, even when that process is ultimately responsible for the design of municipal sanctuary policies. Cities are then stuck in a double bind. Federal enforcement initiatives and immigration politics make it difficult for any city to avoid the sanctuary question entirely. At the same time, the traditional interests and process that form city policies are delegitimized once cities delve into the issue of local participation in the immigration context. It comes as no surprise then that preemption efforts on both sides of the sanctuary debate have continued to grow. Traditional rationales for local discretion and authority are treated as less relevant in the immigration context and therefore offer little counterbalance against increasingly brazen efforts to constrain local discretion or dictate municipal policies. In having the immigration issue foisted upon them, cities are not only losing control over their resources and personnel, but also the legitimacy of their own authority.

Again, perspective matters. From the federally oriented approach of traditional sanctuary analysis, cities are more important than ever. Indeed, they have achieved a surprising amount of influence over an issue—immigration—

287. Indeed, the proliferation of political and silent sanctuaries in recent years show the degree to which sanctuary policies are becoming increasing reactive. Both are driven, albeit in different directions, by growing federal demands for local participation and escalating attacks by state and national leaders. See supra notes 152–182, 206–227 and accompanying text.

288. See, e.g., supra notes 216–218 (describing how New Orleans disclaimed responsibility for their sanctuary policy, arguing that it was in response to the demands of the federal government); cf. David Alan Sklansky, Crime, Immigration, and Ad Hoc Instrumentalism, 15 NEW CRIM. L. REV. 157, 163 (2012) (arguing that the involvement of local officials in federal immigration enforcement also compromises political accountability).

that is widely recognized to be outside of their jurisdictional authority or institutional competence. But from the local perspective, this influence has come at a great cost: the obfuscation of local interests, the distortion of city governance, and the delegitimization of municipal authority. This Article has tried to argue that the city cannot be neglected in examining municipal sanctuary policies. But perhaps the better lesson is to question whether “sanctuary” should be used to frame our understanding of municipal policies at all.

CONCLUSION

It is difficult to define sanctuaries without accounting for their wide diversity in both design and implementation. At the same time, it is difficult to account for this diversity without understanding the municipal process and institutional structure within which their design and implementation takes place. This Article exposes the local dynamics that underlie the development of municipal sanctuary policies. It proposes a new framework for classifying sanctuary cities that highlights the local negotiations that underlie the adoption of municipal policies. Moreover, it suggests that an understanding of these local dynamics complicates commonly held views in the sanctuary literature and among sanctuary advocates. Throughout all of this, the goal has been to take seriously the “city” in our conversations about sanctuary cities.

The need for this kind of deep examination of cities and other local government is likely to continue into the foreseeable future. Not just because cities are likely to continue to maintain and evolve their sanctuary practices, but also because the federal government is unlikely to abandon its efforts to expand its enforcement capabilities on the backs of local officials and do so with the support of the states. Even if we were able to reverse the federal dependence on local authorities—and even if we can return to immigration politics not fixated on policymaking by local actors—the sanctuary issue persists. Local leaders will still need to make decisions about how to allocate resources and manage its employees; local leaders will still need to be responsive to local demands, even if those demands concern issues not traditionally associated with local governance; and local leaders will still have to manage their relationships with the state and federal government. It is easy to dismiss these responsibilities as local concerns—but the governance of American cities is no less vital to our national interests than the regulation of immigration.

290. See Massaro et al., supra note 73, at 14, 17.