NOT IN MY BACKYARD: HOW STATES AND LOCALITIES USE CIVIL RESISTANCE TACTICS TO PROTECT IMMIGRANT COMMUNITIES

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ABSTRACT

Chicago Mayor Rahm Emmanuel told federal authorities that his city "is and will remain a sanctuary city."[1] Denver Mayor Michael Hancock said, "Local law enforcement is not going to do the job of the federal immigration agency."[2] A federal judge upheld two California laws that set out to restrict cooperation with federal immigration authorities.[3] A different federal judge struck down an Arizona law mandating state and local cooperation with a federal law.[4]

The United States is a federal republic and follows republican principles in its governance. This necessarily means that there is a clear line between federal and state authorities. The Guarantee Clause of Article IV of the U.S. Constitution highlights the independence of states in making most governance decisions.[5] Likewise, the Tenth Amendment to the Constitution reiterates the point that most powers of governance are managed by the states and not the federal government.[6] And of course, the balance is struck with the Supremacy Clause found in Article VI, which ensures that federal authority is given relevant enforcement power by preempting any state laws that interfere with lawful federal legislation.[7]

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1. Kori Rumore, *Chicago's History as a Sanctuary City*, CHI. TRIB. (Oct. 13, 2017), *https*://www.chicagotribune.com/news/ct-chicago-sanctuary-history-htmlstory.html.

2. Henry Grabar, *Not in Our Town: Can American Cities Stop Trump from Deporting Millions?*, SLATE (Nov. 20, 2016, 8:01 PM), http://www.slate.com/articles/news_and_politics/cover_story/2016/11/how_cities_could_thwart_donald_trump_s_deportation_plan.html.

3. United States v. California, 314 F. Supp. 3d 1077, 1086 (E.D. Cal. 2018).

4. Arizona v. United States, 567 U.S. 387, 416 (2012). *See generally* S.B. 1070, 49th Leg., 2nd Sess. (Ariz. 2010) (discouraging and deterring immigration into the United States).

5. U.S. CONST. art. IV, § 4.

6. *Id.* amend. X.

7. *Id.* art. VI.

The balance of power between states and the federal government—federalism—has created its fair share of controversies over the years.[8] *Yet recently, a substantial portion of these controversies involve immigration law and, more specifically, immigration law enforcement. The growing body of law and controversies surrounding immigration federalism has begun to highlight the limits of republican governance. However, little doubt remains about the lawfulness of federal immigration enforcement. States have pushed back in highly visible ways against federal intrusion into their communities to enforce federal immigration laws.*

In this paper, I will provide a brief explanation of federal immigration law enforcement and how those enforcement authorities work with (or without) the states to carry out their duties. I will then contextualize state efforts to ward off federal incursion into their affairs by providing historic examples ranging from civil rights to marijuana laws. Finally, I will draw attention to recent state efforts to hinder, and in a minority of cases to enhance, federal immigration enforcement efforts. I conclude with policy prescriptions for states and local jurisdictions looking for legal cover to support their efforts.

I. INTRODUCTION

I have argued in the past that states have no legal role to play in the enforcement of immigration laws.[9] This has been reaffirmed in a number of cases addressing federalism and Article I of the U.S. Constitution, which, together, give near exclusive authority in the enforcement of immigration law to the federal government.[10] However, states have stumbled upon a novel approach to assert their rights as they relate to immigration law. Through the application of narrow policy statements to circumvent the broad enforcement actions of federal agencies, states have been able to affect immigration enforcement. These policy mechanisms include: terminating information-sharing relationships that might reveal information about a city's immigrant population; designating the city a "sanctuary city" in an effort to stymie cooperation with federal enforcement authorities; and failing to inform immigration authorities of immigrants in detention for other crimes, thus impeding their transfer to immigration enforcement authorities following release. These and similar efforts are happening at the local and state level around the country with increasing frequency.

In this paper, I will argue that policy statements, voter initiatives, and state and local legislation that attempt to use non-cooperation as a means of resistance to disagreeable federal laws, are a historically viable and lawful action. Likewise, I will argue that attempts by the federal government to punish states for such actions are likely unconstitutional. The central question that I will be addressing in this paper is whether states are acting

8. *See, e.g.*, Gonzales v. Raich, 545 U.S. 1 (2005); Wickard v. Filburn, 317 U.S. 111 (1942); Gibbons v. Ogden, 22 U.S. 1 (1824).

9. Kevin J. Fandl, *Putting States Out of the Immigration Law Enforcement Business*, 9 HARV. L. & POL'Y REV. 529, 530 (2015).

10. *See, e.g.*, Arizona v. United States, 567 U.S. 387 (2012) (concluding that Arizona's efforts to mirror federal immigration law enforcement with their own state-based laws was preempted by federal law).

lawfully when they fail to cooperate with federal law enforcement in the field of immigration and, if so, how far their non-cooperation may extend.

This paper proceeds as follows. First, I will provide a primer on immigration federalism and the legally-supported view that immigration enforcement is within the exclusive realm of federal law enforcement authorities. Second, I will describe a number of historic efforts by states to impede or stop altogether efforts by federal law enforcement. Third, I will focus these endeavors squarely on immigration law enforcement, comparing past efforts and legal guidance to current practice. Finally, I will conclude with policy recommendations for states and localities that choose to take a stand on immigration enforcement in their jurisdictions.

II. A BRIEF JAUNT THROUGH IMMIGRATION LAW HISTORY

It may be hard to imagine today, but throughout the first 100 years or so of the United States' existence, the government took an active role in promoting and encouraging immigration from Europe and Asia to the United States.[11] Industrialization and westward expansion had given rise to opportunity, yet labor shortages meant that citizens would not be able to capitalize on those opportunities without help. In what was known as the "exit revolution," shipping companies promoted the emigration of labor migrants from Europe to the United States, which were further encouraged by poor economic conditions in Europe.

The U.S. Congress enacted the Steerage Act of 1819 in order to create a more orderly entry of immigrants to the United States.[12] That Act imposed the first entry requirements for arriving immigrants, imposing quantitative limits on the number of immigrants any ship could carry, and required each ship to submit a manifest with information about the demographics of the arriving immigrants.[13]

By 1863, rapid industrialization in the United States led to an increasingly vociferous call for more immigration. In President Lincoln's address to congress that year, he stated:

> I again submit to your consideration the expediency of establishing a system for the encouragement of immigration. Although this source of national wealth and strength is again flowing with greater freedom than for several years before the insurrection occurred, there is still a great deficiency of laborers in every field of industry, especially in agriculture and in our mines, as well as of iron and coal as of the precious metals. While the demand for labor is much increased here, tens of thousands of persons, destitute of remunerative occupation, are

11. Aristide Zolberg, *Rethinking the Last 200 Years of Immigration Policy*, MIGRATION POL'Y INST. (June 1, 2006), https://www.migrationpolicy.org/article/rethinking-last-200-years-us-immigration-policy.

12. Steerage Act of 1819, Pub. L. No. 15-46, 3 Stat. 488 (1819) (repealed 1855).

13. *Id.*

> thronging our foreign consulates and offering to emigrate to the United States if essential, but very cheap assistance, can be afforded them.[14]

Lincoln's approach was well-received, especially by American industrialists in search of labor. Riding this wave of immigration-support, Congress enacted the Act to Encourage Immigration in 1864. The Act actively sought immigrants abroad and brought them to the United States under labor contracts whereby the costs of their recruitment would be paid back through their wages earned in the United States.[15] That Act also created the first Commissioner of Immigration, a post housed in the U.S. Department of State. The Secretary of State, however, used its discretionary authority to create the Bureau of Immigration, which promoted immigration and helped to place arriving immigrants in areas facing labor shortages.

The Republican Party widely accepted the economic benefits of immigration. In their 1864 party platform, they asserted: "That foreign immigration, which in the past has added so much to the wealth, development of resources and increase of . . . nations, should be fostered and encouraged by a liberal and just policy."[16] However, sentiment across the country was beginning to change and political candidates riding on anti-immigrant platforms were finding much success.[17] By 1882, Congress reversed course and enacted the Chinese Exclusion Act, which effectively blocked the entry of Chinese immigrants and began a crackdown on "illegal immigration."[18]

The Act to Encourage Immigration was repealed in 1868.[19]

III. IMMIGRATION ENFORCEMENT

The consolidation of immigration law authority within the federal government began in the mid-nineteenth century.[20] Though Article I of the U.S. Constitution provided the federal legislative branch with the power to determine the rules for citizenship, states maintained control over ports of entry, including setting requirements for the entry of arriving immigrants.[21]

The famous *Passenger Cases* decided by the U.S. Supreme Court in 1849 were instructive in highlighting the superiority of federal over state control of immigration-related matters.[22] At the time of these cases, states—

14. President Abraham Lincoln, Annual Address to Congress (Dec. 8, 1863), https://www.presidency.ucsb.edu/documents/third-annual-message-9.

15. An Act to Encourage Immigration, Pub. L. No. 38-246, 13 Stat. 385 (July 4, 1864) (repealed 1868), https://www.loc.gov/law/help/statutes-at-large/38th-congress/session-1/c38s1ch246.pdf.

16. REPUBLICAN PARTY PLATFORM OF 1864 (June 7, 1864), *available at* https://www.presidency.ucsb.edu/documents/republican-party-platform-1864.

17. *See* Kevin J. Fandl, *Taxing Migrants: A Smart and Humane Approach to Immigration Policy*, 3 NW. INTERDISC. L. REV. 127, 140 (2014) (discussing the rise of California democratic governor John Bigler and his anti-immigrant agenda).

18. The Chinese Exclusion Act, Pub. L. No. 47-126, 22 Stat. 58 (1882) (repealed 1943).

19. An Act Making Appropriations for the Consular and Diplomatic Expenses of the Government for the Year Ending Thirtieth June, Eighteen Hundred and Sixty-Nine, and for Other Purposes, Pub. L. No. 40-38, 15 Stat. 56 (1868).

20. *See* Fandl, *supra* note 17, at 141 (discussing the rise of the Chinese Exclusion Act).

21. *See* Zolberg, *supra* note 11.

22. *See generally* Smith v. Turner, 48 U.S. 283 (1849).

especially coastal states—saw a significant increase in the number of arriving immigrants.[23] And although the U.S. Constitution was clear about the federal regulation of naturalization, foreign commerce, and federal law provided rules for rejecting arriving immigrants,[24] it was ultimately up to the states to take care of these individuals. In an effort to offset the costs of doing so, New York and Massachusetts levied head taxes on arriving immigrants. These two cases—one in each state—sought to curb those taxes as unconstitutional. The result was a divided Supreme Court that ultimately held 5–4, with eight separate opinions, that state laws attempting to levy a head tax on arriving passengers were beyond the purview of state power.[25]

The *Passenger Cases* failed to conclusively end the argument about whether states had any power to regulate arriving immigrants. To answer that question, the Court took up a case from the opposite coast. The *Chy Lung* case came to the Court in 1876.[26] In that case, California state law enabled the California Immigration Commissioner to determine the bond to charge arriving immigrants. With this authority, the Commissioner charged a group of arriving Chinese immigrant women with debauchery and forced each to pay a $500 bond before being allowed to enter the United States.[27] The Court ultimately released the women from detention, but the case proved an excellent opportunity to challenge the idea that states could regulate the entry of immigrants.[28] The California Supreme Court upheld the power of the Commissioner to take these actions,[29] and the women appealed to the U.S. Supreme Court.

The Supreme Court in *Chy Lung* was decisive in consolidating immigration regulation within the federal government. Expressing concern over the actions of a state in front of foreign powers, they held that, "if citizens of our own government were treated by any foreign nation as subjects of the Emperor of China have been actually treated under this law, no administration could withstand the call for a demand on such government for redress."[30] Finding the risk of allowing states to engage in immigration regulation too great to the nation as a whole, the Court concluded that the national government "has the power to regulate commerce with foreign nations: the responsibility for the character of those regulations, and for the manner of their execution, belongs solely to the national government. If it be otherwise, a single State can, at her pleasure, embroil us in disastrous quarrels with other nations."[31]

In a second case heard along with *Chy Lung*, the *Henderson* Court noted:

23. *See* TONY ALLEN FREYER, THE PASSENGER CASES AND THE COMMERCE CLAUSE: IMMIGRANTS, BLACKS AND STATES' RIGHTS IN ANTEBELLUM AMERICA (Peter Charles Hoffer & N.E. H. Hull eds., 2014).

24. U.S. CONST. art. I.

25. *See Smith*, 48 U.S. at 283.

26. Chy Lung v. Freeman, 92 U.S. 275 (1876). Note that this case was heard in tandem with Henderson v. Mayor of New York, 92 U.S. 259 (1876).

27. *Chy Lung*, 92 U.S. at 278.

28. *Id*. at 277.

29. *Id*. at 276–81.

30. *Id*. at 279.

31. *Id*. at 280.

> [Immigration] belongs to that class of laws which concern the exterior relation of this whole nation with other nations and governments. . . . The laws which govern the right to land passengers in the United States . . . ought to be the same in New York, Boston, New Orleans, and San Francisco. [Accordingly,] if there be a class of laws which may be valid when passed by the States until the same ground is occupied by a treaty or an act of Congress, this statute is not of that class.[32]

Shortly after these decisions, the public pushed congress to enact more immigration regulations. Congress responded with a number of significant immigration statutes. Several of these statutes included enforcement provisions that turned immigration offenses into criminal offenses. These included the designation of deportable offenses within immigration law in 1917,[33] and the many subsequent additions to that initial list of offenses.[34] These laws made it possible to deport an alien who was convicted of certain crimes.

The U.S. Supreme Court made plain that inconsistent and uncertain state regulations toward immigrants are contrary to the intent of Article I of the Constitution and to the foreign policy priorities of the United States. "It is hardly possible to conceive a statute more skilfully [sic] framed, to place in the hands of a single man the power to prevent entirely vessels engaged in a foreign trade, say with China, from carrying passengers, or to compel them to submit to systematic extortion of the grossest kind."[35] The Court went on to establish that immigration laws, from entry to exit, are within the exclusive purview of the federal government: "The passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the States."[36]

Shortly following the *Chy Lung* case, Congress enacted the Immigration Act of 1891, which created the first Federal Bureau of Immigration.[37] Yet rather than encouraging immigration as the last act of Congress had done, this act had the opposite effect; it created procedures for the deportation for unlawful immigrants.[38] A congressionally-mandated investigation into immigration and its effects on the United States was ordered in 1907. This investigation, "The Dillingham Commission" was created to investigate "the

32. Henderson v. Mayor of New York, 92 U.S. 259, 268 (1876).

33. Kari Hong, *The Absurdity of Crime-Based Deportation*, 50 U.C. DAVIS L. REV. 2067, 2085 (2017) (explaining the designation of crimes involving moral turpitude (CIMT), which would be bars to entry and grounds for removal).

34. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009–546 (1996); Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988) (codified as amended in scattered sections of the U.S. Code); Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (1952) (amended 1965) (codified as amended in scattered sections of 8 U.S.C.).

35. 92 U.S. at 279.

36. *Id.* at 280.

37. Immigration Act of 1891, Pub. L. No. 51-551, 26 Stat. 1084 (1891). The previous "bureau" was created using executive discretion and not an act of Congress.

38. *See* Fandl, *supra* note 17, at 143.

general effect, in a broad sense, of the new immigration movement upon the people, the industries and the institutions of the United States."[39]

The Dillingham Commission was a turning point in U.S. immigration law and policy. It reflected the research-focused public policy approach of the burgeoning progressive era while simultaneously highlighting the growing discrimination toward certain classes of immigrants.[40] The Dillingham Commission lasted four years and resulted in a report of 29,000 pages of data and analysis collected from commission investigations across Europe.[41] That report argued that immigrants—especially those from poorer European countries—would have harmful effects on the U.S. economy and society and should be restricted.[42]

The Dillingham Commission report served as a justification for a restrictionist period in U.S. immigration law. While Chinese immigrants had already been largely blocked from entry into the U.S. due to the Chinese Exclusion Act of 1882,[43] restrictions on immigrants from Italy to Ireland were at the heart of the 1921 Quota Law.[44] That law attempted to freeze the cultural makeup of the United States as captured by the 1910 census and to allow immigration only in proportion to those existing distributions. This law fed into the 1952 Immigration and Nationality Act ("INA"), which to a large extent remains the primary immigration law utilized today.[45] The INA established the systems for monitoring and controlling the immigrant population in the United States, including deportation procedures and immigration law enforcement guidelines. Quotas were finally eliminated in a 1965 revision to the INA.[46]

The 1980s introduced a much stricter regime of immigration law enforcement. The Immigrant Reform and Control Act of 1986 ("IRCA"), which granted amnesty to a large swath of unlawful aliens already present in the United States, began to designate certain acts committed by immigrants as criminal in and of themselves.[47] Illegal entry into the United States became a misdemeanor punishable by six months in prison (in addition to the subsequent removal), and illegal re-entry following a prior removal became

39. Immigration Act of 1907, Pub. L. No. 96-1134, §39, 34 Stat. 898, 909 (1907).

40. *See, e.g.*, KEVIN J. FANDL, LAW AND PUBLIC POLICY 6–7 (2019) (explaining the growth of the progressive era and its impact on policymaking). *See generally* KATHERINE BENTON-COHEN, INVENTING THE IMMIGRATION PROBLEM: THE DILLINGHAM COMMISSION AND ITS LEGACY (2018).

41. BENTON-COHEN, *supra* note 40, at 5–6 (explaining that the report provided extensive data on everything from comparisons between "races" of different countries to head size and female fecundity).

42. *See* Fandl, *supra* note 17, at 144–45.

43. Chinese Exclusion Act of 1882, Pub. L. No. 47-126, 22 Stat. 58 (1882). *See generally* Fandl, *supra* note 17, at 140–42 (providing a deeper explanation of the rise of Anti-Chinese sentiment in the United States leading to the Act).

44. Emergency Quota Act of 1921, Pub. L. No. 67-5, § 2(a), 42 Stat. 5, 5 (1921).

45. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (1952) (amended 1965).

46. *See* Immigration and Nationality Act of 1965, Pub. L. No. 89-236, sec. 1, § 201(b), 79 Stat. 911, 911 (1965).

47. Immigrant Reform and Control Act, Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified as amended in scattered sections of 8 U.S.C.).

an aggravated felony punishable by up to twenty years in prison.[48] This change meant that the act of entering the United States without permission became a criminal offense.

The criminalization of immigration, beginning with the deportable offense list in 1917 and substantially expanding under the IRCA in 1986, has overwhelmed the federal court system with criminal cases involving illegal entry and re-entry.[49] Illegal re-entry is by far the largest category of "criminal aliens" deported by the executive.[50]

IV. MODERN IMMIGRATION ENFORCEMENT APPROACHES

Enforcement of immigration laws has primarily been in the purview of federal law enforcement officers—principally today U.S. Customs and Border Protection ("CBP") and U.S. Immigration and Customs Enforcement ("ICE"). State and local officers, however, play a role in enforcing immigration laws in two ways: first, through federal delegations of authority, and second, through the enforcement of state and local laws that bear on immigrants.[51]

Though many agencies are involved in some aspect of immigration law enforcement, the two principal agencies involved in these actions on a daily basis are ICE and CBP. Each of these agencies is part of the larger U.S. Department of Homeland Security ("DHS"), which was created largely to consolidate overlapping enforcement missions and prevent the "silo effect" of agencies cordoned off from one another.

ICE is responsible for most of the interior immigration and customs enforcement operations in the United States. The agency was created in 2003 by combining the enforcement operations of the former Immigration and Naturalization Service and U.S. Customs Service.[52] ICE is primarily publicly associated with immigrant apprehension, detention, and removal; however, their mission is far broader in scope.

The two branches of ICE are Enforcement and Removal Operations ("ERO") and Homeland Security Investigations ("HSI"). ERO includes all aspects of unlawful alien apprehension, detention, and removal. The geographical scope of ERO's work includes the interior of the United States and, in collaboration with INTERPOL, in countries where fugitive aliens have been located. HSI investigates a range of cross-border criminal activity, from human trafficking to money laundering to cybercrime.[53] With over

48. *See* JOANNA LYDGATE, THE CHIEF JUSTICE EARL WARREN INST. ON RACE, ETHNICITY & DIVERSITY, ASSEMBLY-LINE JUSTICE: A REVIEW OF OPERATION STREAMLINE 3 (2010), https://www.law.berkeley.edu/files/Operation_Streamline_Policy_Brief.pdf.

49. *See Policing Immigrant Communities*, 128 HARV. L. REV. 1771, 1775 (2019) (explaining that in many districts, more than half of the criminal cases heard by federal judges are about entry and re-entry crimes).

50. 2011 – 2013 U.S. DEP'T OF HOMELAND SEC. ANN. PERFORMANCE REP., https://www.dhs.gov/sites/default/files/publications/cfo_apr_fy2011.pdf.

51. *Policing Immigrant Communities*, *supra* note 49, at 1775–77.

52. The Immigration and Naturalization Service is now defunct, and most aspects of U.S. Customs transferred to CBP in 2003.

53. *Who We Are*, U.S. IMMIGR. & CUSTOMS ENF'T, https://www.ice.gov/about (last updated Dec. 14, 2018).

6,500 Special Agents and 700 Intelligence Analysts, HSI is the principal investigative component of DHS.[54]

CBP has triple the personnel[55] and double the budget of ICE.[56] The principal mission of CBP is to safeguard the U.S. borders against threats posed by dangerous trade, counterfeit goods, and unlawful aliens. CBP manages all ports of entry in the United States by screening cargo and individuals prior to entry to the United States.[57] Unlike ICE, CBP primarily works along the borders and interior ports of entry. Accordingly, immigration enforcement away from the border is largely outside the purview of CBP.

Each of these agencies recognize the limitations of their authorities and resources to carry out their mission. Even with the vast budget and personnel, CBP is, from a practical standpoint, incapable of preventing all unlawful aliens, drugs, and other threats from entering the United States. Moreover, ICE cannot possibly identify and remove every unlawful alien from the country. Recognizing these limitations, ICE began, in 2006, to partner with state and local law enforcement agencies in an effort to create a "force multiplier" for its enforcement authorities. By enlisting the assistance of non-federal law enforcement authorities and enhancing their technology, ICE had the potential to substantially expand its enforcement capabilities.

The partnership programs implemented by ICE in 2005 were categorized under an umbrella named Agreements of Cooperation in Communities to Enhance Safety and Security ("ICE ACCESS").[58] Several of these efforts involve state and local cooperation on gang and related criminal activity[59]; information and asset sharing between federal, state, and local authorities[60]; or in some cases between different federal law enforcement authorities.[61] But a number of these initiatives involve more broad-based law enforcement authority sharing and merit discussion.[62] Below, I will discuss the 287(g) program, Secure Communities program, Criminal Alien program ("CAP"), and National Fugitive Alien Operations program ("NFOP").

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54. *Id*.

55. ICE has 20,000 staff members. *Id.* CBP has 60,000 staff members. *About CPB*, U.S. CUSTOMS & BORDER PROT., https://www.cbp.gov/about (last modified Feb. 21, 2016).

56. CBP was appropriated $16.4 billion in fiscal year 2018 and ICE was appropriated $7.9 billion. U.S. DEP'T OF HOMELAND SEC., BUDGET-IN-BRIEF FISCAL YEAR 2018 11, https://www.dhs.gov/sites/default/files/publications/DHS%20FY18%20BIB%20Final.pdf (last visited Feb. 10, 2019).

57. *About CBP*, *supra* note 55.

58. The twelve programs under ICE Access include: Asset Forfeiture, Border Enforcement Security Task Force ("BEST"), the Criminal Alien Program ("CAP"), Customs Cross-Designation, 287(g), Document and Benefit Fraud Task Force ("DBFTF"), Fugitive Operation Teams, Intellectual Property Rights, the Law Enforcement Support Center ("LESC"), Community Shield, Operation Firewall, Operation Predator, and the Secure Communities program.

59. These efforts are covered by the following programs: DBFTF, Operation Community Shield, Firewall, and Predator.

60. These efforts are covered by the following programs: Asset Forfeiture, BEST, and LESC.

61. The International Intellectual Property Rights Center ("IPR Center") brings together such federal law enforcement authorities. *Intellectual Property Rights*, U.S. IMMIGR. & CUSTOMS ENF'T, https://www.ice.gov/iprcenter (last visited May 7, 2019)

62. Such initiatives include Secure Communities, 287(g), Customs Cross-Designation, CAP, and Fugitive Operations.

A. THE 287(G) PROGRAM

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") created the 287(g) program, which effectively deputizes state or local law enforcement officers to serve as pseudo-immigration officers.[63] The program operates by partnering ICE with state and local law enforcement jurisdictions through memoranda of understanding ("MOU") and is part of ICE's larger Criminal Alien Program, which I discuss below. Those MOUs authorize a limited number of state and local officers to conduct, under ICE supervision, limited immigration enforcement. Such enforcements include, *inter alia*: asking individuals about their immigration status, accessing federal databases to confirm status, issuing a notice to appear ("NTA") (the immigration charging document), and detaining immigrants pending transfer to ICE custody.[64]

At its peak, ICE had more than seventy MOUs in place and budgeted over $68 million annually to train state and local officers to perform such enforcement. A number of problems, however, besieged the program. First, some jurisdictions abused the power, using it to engage in broad-based immigration arrests without following the priorities set forth by ICE.[65] Second, the Secure Communities program, discussed below, largely replaced the need for state and local personnel to identify criminal aliens. Third, law enforcement officers in many jurisdictions objected to carrying out immigration functions when their departments bore the costs of the additional work and their officers lost the trust of community members. The impact on community policing was particularly troubling.

Community policing refers to the traditional "beat cop" model of law enforcement where police officers work closely with members of their communities to better understand and investigate crime through open information exchange. Fear that a state or local police officer could arrest or report an immigrant community member to federal authorities is thought to prevent community members from speaking about crimes that occurred to them or others.[66] This was emphasized in a statement by the International Association of Chiefs of Police:

> Local police agencies depend on the cooperation of immigrants, legal and [otherwise], in solving all sorts of crimes and in the maintenance of public order. Without assurances that they will not be subject to an immigration investigation and possible deportation, many immigrants

63. 8 U.S.C. § 1357(g)(5) (2018).

64. *Id*.

65. A frequently cited example comes from Maricopa County, where Sheriff Joe Arpaio violated the terms of the agreement and had his authority revoked by DHS in 2011. *See generally* Ray Stern, *Feds Pull 287(g) Authority from Maricopa County Jails Because of Civil Rights Violations*, PHX. NEW TIMES (Dec. 15, 2011, 1:00 PM), https://www.phoenixnewtimes.com/news/feds-pull-287-g-authority-from-maricopa-county-jails-because-of-civil-rights-violations-6631025.

66. *See generally* ANITA KHASHU, THE ROLE OF LOCAL POLICE: STRIKING A BALANCE BETWEEN IMMIGRATION ENFORCEMENT AND CIVIL LIBERTIES (2009), https://www.policefoundation.org/wp-content/uploads/2015/06/The-Role-of-Local-Police-Narrative.pdf; NIK THEODORE, INSECURE COMMUNITIES: LATINO PERCEPTIONS OF POLICE INVOLVEMENT IN IMMIGRATION ENFORCEMENT (2013), https://www.policylink.org/sites/default/files/INSECURE_COMMUNITIES_REPORT_FINAL.PDF.

> with critical information would not come forward, even when heinous crimes are committed against them or their families.[67]

By the end of the Obama Administration in 2016, the 287(g) program had dwindled to thirty-seven MOUs and a budget of $24 million.[68] President Trump, however, signed an Executive Order in January 2017 expanding the 287(g) program in an attempt to dramatically enhance the number of 287(g) partners.[69]

B. SECURE COMMUNITIES

The Secure Communities program arose out of a desire to avoid the need for reliance on state and local jurisdictions in order to find out when an immigrant was taken into custody. The program was a DHS initiative enacted in March 2008 initially, like with 287(g), by partnering with local jurisdictions. But unlike the former program, Secure Communities utilized technology to identify criminal aliens.[70] Traditionally, when a local jurisdiction processed a criminal suspect, they would send that individual's fingerprints to an FBI criminal database to check for records of other crimes, warrants, and so forth. Under the Secure Communities program, that fingerprint data would automatically be shared with ICE, who would check them against the U.S. Visitor and Immigrant Status Indicator Technology Program ("US-VISIT") and the Automated Biometric Identification System ("IDENT") systems to determine the individual's immigration status. If the systems matched the fingerprints to those belonging to an immigrant, and they were determined to be of interest to ICE, ICE would issue a detainer to the local jail, asking them to hold the individual while a final determination was made as to whether ICE wanted to take custody of the individual upon release.

In August 2011, ICE rescinded its MOUs with local jails and asserted its authority to broadly implement the Secure Communities program anywhere it wished without prior authorization.[71] Since no additional effort was required by the local jurisdiction, ICE believed the formal partnerships were no longer needed.[72] Initially, jurisdictions could opt-out of this information-sharing; ICE, however, later eliminated that option thereby causing some jurisdictions to take steps to avoid cooperation with ICE. In some cases, jurisdictions would refuse to honor ICE detainers and instead release an

67. Matthew Feeney, *Trump Looking to Local Police for Immigration Enforcement*, CATO INST. (Jan. 30, 2017, 5:16 PM), https://www.cato.org/blog/trump-looking-local-police-immigration-enforcement (quoting a statement made by the International Association of Chiefs of Police).

68. WILLIAM A. KANDEL, CONG. RESEARCH SERV., R44627, INTERIOR IMMIGRATION ENFORCEMENT: CRIMINAL ALIEN PROGRAMS 17 (2016).

69. *See* Feeney, *supra* note 67.

70. AARTI KOHLI ET AL., THE CHIEF JUSTICE EARL WARREN INST. ON L. & SOC. POL'Y, SECURE COMMUNITIES BY THE NUMBERS: AN ANALYSIS OF DEMOGRAPHICS AND DUE PROCESS (2011), https://www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf.

71. Kirk Semple & Julia Preston, *Deal to Share Fingerprints Is Dropped, Not Program*, N.Y. TIMES (Aug. 6, 2011), https://www.nytimes.com/2011/08/06/us/06immig.html?r=1&scp=1&sq=secure%20communities&st=cse.

72. *Id*.

individual before ICE made a custody determination.[73] In others, they would avoid submitting the individual's fingerprints to the FBI, even though that would mean lack of access to the criminal record on that individual.

Failure of state and local jurisdictions to cooperate with ICE under the Secure Communities program led them to be designated "sanctuary jurisdictions," a term previously associated with churches housing refugees in the 1980s.[74] According to the Pew Charitable Trusts, nearly 300 jurisdictions were defying detainer requests by 2014.[75]

The Secure Communities program was terminated by the Obama Administration in 2014 and replaced with the CAP program (discussed below).[76] However, it was "reactivated" by the Trump Administration on January 25, 2017 by executive order.[77] As of the drafting of this article, ICE reports 100% implementation and active use of Secure Communities nationwide today.[78]

C. THE CRIMINAL ALIEN PROGRAM

The CAP is considered to be the largest component of ICE removals, yielding as much as ¾ of all alien removals from the United States.[79] ICE achieves this high level of removals primarily through collaboration with state and local jails. Those jails are often visited by ICE ERO officers who interview potential criminal aliens and, in some cases, ICE maintains an office within the jail to screen incoming criminals.

A "criminal alien" is any noncitizen who has ever been convicted of a crime in the United States.[80] Criminal aliens may or may not be removable from the United States, depending on the offense. If they have been convicted of an aggravated felony, regardless of their legal status, aliens are removable. If they have been convicted of a removable offense, they may be either removed or, depending on their legal status, may be offered relief from removal.[81] Though no accurate data exists on the size of the criminal alien

73. Kate Groetzinger, *Trump's Temporary Immigration Ban Was Cover for His Order to Defund Sanctuary Cities*, QUARTZ (Feb. 2, 2017), https://qz.com/899563/trump-executive-order-reinstates-bushs-secure-communities-policy-which-may-have-serious-impact-on-immigrants-in-sanctuary-cities/ (explaining that these jurisdictions found the costs too high and the legality of the ICE detainers questionable).

74. Susan Gzesh, *Central Americans and Asylum Policy in the Reagan Era*, MIGRATION POL'Y INST. (Apr. 1, 2006), https://www.migrationpolicy.org/article/central-americans-and-asylum-policy-reagan-era.

75. Tim Henderson, *More Jurisdictions Defying Feds on Deporting Immigrants*, PEW CHARITABLE TRUSTS (Oct. 31, 2014), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2014/10/31/more-jurisdictions-defying-feds-on-deporting-immigrants.

76. *Obama Ends Secure Communities Program That Helped Hike Deportations*, NBC NEWS (Nov. 21, 2014, 12:47 PM), https://www.nbcnews.com/storyline/imommunitiesreform/obama-ends-secure-communities-program-helped-hike-deportations-n253541.

77. Exec. Order No. 13,768, 82 Fed. Reg. 8,799 (Jan. 25, 2017).

78. *Secure Communities*, U.S. IMMIGR. & CUSTOMS ENF'T, https://www.ice.gov/secure-communities (last updated Mar. 20, 2018) (reporting implementation in all 3,181 jurisdictions across all 50 states).

79. IMMIGRANT LEGAL RES. CTR., ICE'S CRIMINAL ALIEN PROGRAM (CAP): DISMANTLING THE BIGGEST JAIL TO DEPORTATION PIPELINE (2016) https://www.ilrc.org/sites/default/files/resources/cap_guide_final.pdf.

80. KANDEL, *supra* note 68, at 2.

81. *Id.* at 3.

population, in 2013, ICE estimated that there were 1.9 million removable criminal aliens in the United States.[82]

Criminal aliens became the focus of the Obama Administration, thanks to a memorandum issued in November 2014 directing ICE to prioritize enforcement resources on the most significant threats to American communities.[83] It read:

> Priority #1: Threats to national security, border security and public safety
>
> Priority #2: Misdemeanants and new immigrant violators[84]
>
> Priority #3: Aliens issued final orders of removal after January 1, 2014

Given the sheer size of the unlawful immigrant population in the United States, the Obama Administration sought to target the most significant areas of concern rather than attempting to identify, capture and remove all unlawful aliens. Using this focused approach, ICE began to employ the CAP to solicit data on potential criminal aliens falling within these priority categories that were being held in local, state and federal jails and prisons. The CAP utilizes both physical presence and technology to screen for potentially removable criminal aliens. Approximately 1,300 CAP Officers work within mostly state and federal jails and prisons and screen inmates at over 4,300 facilities.[85]

In addition to the CAP officers, ICE employs the Priority Enforcement Program (PEP), which uses interoperability to share data between correctional facilities (Department of Justice) and ICE (Department of Homeland Security) to identify potentially removable criminal aliens in custody. With PEP, when a criminal is booked into the facility, their fingerprints are registered with an FBI database and automatically checked against the DHS automated biometric identification system (IDENT). When a criminal alien is identified, the information is sent to the Law Enforcement Support Center (LESC) to determine removability based upon the priorities listed above.

When a criminal alien is identified as being housed by a local, state, or federal jail or prison and that alien falls within one of the priority categories, ICE may either issue a *request for notification* to alert ICE to the release of the alien and potentially take them into custody at that point, or an *immigration detainer,* which directs the facility to hold the alien pending transfer to ICE custody upon their release.[86] ICE then places them into

82. *Id.* at 4.

83. Memorandum from Jeh Charles Johnson, Sec'y of Homeland Sec., U.S. Dep't of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigr. and Customs Enf't, et al., Policies for the Apprehension, Detention and Removal of Undocumented Immigrants (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf.

84. This category captures the immigrant population of recent border-crossers with few roots in the United States.

85. KANDEL, *supra* note 68, at 10.

86. *Id.* at 11–12.

removal proceedings or, if a final order of removal has been issued, removes them from the United States.

D. NATIONAL FUGITIVE OPERATIONS PROGRAM

The National Fugitive Operations Program (NFOP) was created by ICE in 2003 as a separate program to target fugitive aliens—aliens who have been issued a final order of removal but who have avoided apprehension. This program expanded substantially under the Obama Administration in 2009 to focus on serious threats to communities, members of transnational gangs, child sex offenders, and aliens with prior convictions for violent crimes.[87]

NFOP teams operate in all 24 ERO field offices and work in consort with local, state, federal and international law enforcement authorities. Unlike the CAP program, which operates largely through information-sharing and physical presence in a controlled environment, NFOP conducts operations at worksites, residential and commercial settings.[88] Due to the priority enforcement memo issued in 2014, the NFOP's focus has shifted away from all fugitive aliens and onto only those who fall within the three priority categories discussed above.

V. A NEW ERA IN IMMIGRATION LAW ENFORCEMENT

The enforcement priorities laid out in the Obama-era PEP memo in 2014 were rescinded by the Trump Administration in 2017. In a January 2017 Executive Order, President Trump expressly terminated the PEP prioritization[89] and instead identified the following categories for priority enforcement by ICE and CBP for a removable alien who:[90]

- has been convicted of any criminal offense;
- has been charged with any criminal offense, where the charge has not been resolved;
- has committed acts that constitute a chargeable criminal offense;
- has engaged in fraud or willful misrepresentation in connection with any official matter or application before a government agency;
- has abused any program related to the receipt of public benefits;
- is subject to a final order of removal, but has not departed; or

87. *Fugitive Operations*, U.S. IMMIGR. AND CUSTOMS ENF'T, https://www.ice.gov/fugitive-operations (last updated June 7, 2017).

88. KANDEL, *supra* note 68, at 13–14.

89. Exec. Order No. 13,768, 82 Fed. Reg. 8,799, 8,801 (Jan. 25, 2017) ("The Secretary shall immediately take all appropriate action to terminate the Priority Enforcement Program (PEP) described in the memorandum issued by the Secretary on November 20, 2014, and to reinstitute the immigration program known as 'Secure Communities' referenced in that memorandum.").

90. *Id.* at 8,800.

- otherwise poses, in the judgment of an immigration officer, a risk to public safety or national security.

The Order effectively removes the prioritization of resources in place since 2014 and directs ICE and CBP "to employ all lawful means to ensure the faithful execution of the immigration laws of the United States against all removable aliens."[91] The following section, entitled *Enforcement Priorities*, recites the categories set forth above, which are far broader and more general than the former enforcement priorities categories. The Order also discusses sanctuary cities, which I will explore in the following section.

A. IMMIGRATION FEDERALISM AND LOCAL/ STATE RESISTANCE

To date, the most significant battle between federal and state authorities over immigration regulation has been over whether states have the power to take immigration enforcement upon themselves. As we have seen through a series of cases starting in 1849, states are largely prohibited from engaging in the area of immigration enforcement. Courts have been loathe to allow states to conduct mirror-image enforcement, in which states model federal laws and carry them out with their own resources.[92]

Today, we face a different dynamic in this federalism debate. Recent policy actions and cases have been questioning whether states can refuse to cooperate at all with federal immigration authorities. In other words, does a state have the option to abstain from requests for cooperation from federal enforcement authorities, and if they do, can those federal authorities retaliate against the states in order to incentivize cooperation?

The first and most obvious question to ask here is whether states are obligated to enforce federal laws. While the Supremacy Clause of the U.S. Constitution prevents states from conflicting with federal laws, and while states can be incentivized to cooperate in the enforcement of federal laws, there is no legal obligation for a state to enforce a federal law.

B. SANCTUARY CITIES

The term "sanctuary cities" was coined in the 1980s in response to a number of state and local efforts to protect Central American refugees in the United States. It is today often used to refer to any lack of cooperation by local or state authorities with federal immigration authorities. However, no legal definition of *sanctuary cities* yet exists. According to one source looking at this term, *sanctuary cities* are cities that have enacted:

- Policies or laws that limit the extent to which law enforcement will go to assist the federal government on immigration matters.[93]

91. *Id.*

92. *See* Gabriel J. Chin & Marc L. Miller, *The Unconstitutionality of State Regulation of Immigration Through Criminal Law*, 61 DUKE L. J. 251, 258–59 (2011).

93. *Sanctuary Cities (With Updated FAQs on Litigation)*, JUSTICE FOR IMMIGRANTS, https://justiceforimmigrants.org/wp-content/uploads/2018/03/sanctuary-cities-backgrounder-3_7_2018.pdf (quoting Michael Pearson, *What's a 'Sanctuary City,' and Why Should You Care?*, CNN (July 8, 2015)).

- Policies that disregard requests from ICE to hold indefinitely immigrant inmates beyond their detention dates (commonly known as "detainers").[94]
- Policies that bar local police from asking for proof of citizenship and from arresting immigrants who lack documentation unless they are suspected of other criminal offenses.[95]

The Trump Administration's foray into sanctuary cities began with Executive Order No. 13,768 issued a few days after he took office in January 2017.[96] In section 9 of that Order, the President stipulates that:

> It is the policy of the executive branch to ensure, to the fullest extent of the law, that a State, or a political subdivision of a State, shall comply with 8 U.S.C. 1373.
>
> (a) In furtherance of this policy, the Attorney General and the Secretary, in their discretion and to the extent consistent with law, shall ensure that jurisdictions that willfully refuse to comply with 8 U.S.C. 1373 (sanctuary jurisdictions) are not eligible to receive Federal grants, except as deemed necessary for law enforcement purposes by the Attorney General or the Secretary. The Secretary has the authority to designate, in his discretion and to the extent consistent with law, a jurisdiction as a sanctuary jurisdiction. The Attorney General shall take appropriate enforcement action against any entity that violates 8 U.S.C. 1373, or which has in effect a statute, policy, or practice that prevents or hinders the enforcement of Federal law.
>
> (b) To better inform the public regarding the public safety threats associated with sanctuary jurisdictions, the Secretary shall utilize the Declined Detainer Outcome Report or its equivalent and, on a weekly basis, make public a comprehensive list of criminal actions committed by aliens and any jurisdiction that ignored or otherwise failed to honor any detainers with respect to such aliens.
>
> (c) The Director of the Office of Management and Budget is directed to obtain and provide relevant and responsive information on all Federal grant money that currently is received by any sanctuary jurisdiction.[97]

The principal legal authority used by the Trump Administration to counter the rise of "sanctuary cities" is rooted in 8 U.S.C. § 1373, which regulates

94. *Id.* (quoting Maxwell Tani, *A Chilling Alleged Murder Has Thrown a Major New Wrinkle Into An Already Complicated Debate*, BUS. INSIDER (July 20, 2015)).

95. *Id.*

96. Exec. Order No. 13,768, 82 Fed. Reg. 8,799 (Jan. 25, 2017).

97. *Id.* at 8,801.

communication between state and local jurisdictions and DHS.[98] That statute prohibits those state and local jurisdictions from enacting any law that would restrict communication with DHS about the citizenship status of any individual.[99] That statute stipulates the following:

> (a) In general
>
> Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.
>
> (b) Additional authority of government entities
>
> Notwithstanding any other provision of Federal, State, or local law, no person or agency may prohibit, or in any way restrict, a Federal, State, or local government entity from doing any of the following with respect to information regarding the immigration status, lawful or unlawful, of any individual:
>
> (1) Sending such information to, or requesting or receiving such information from, the Immigration and Naturalization Service.
>
> (2) Maintaining such information.
>
> (3) Exchanging such information with any other Federal, State, or local government entity
>
> (c) Obligation to respond to inquiries
>
> The Immigration and Naturalization Service shall respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information.[100]

That section of the Executive Order effectively requires states and localities to cooperate with requests for information by federal law enforcement officials with respect to immigration law enforcement or face economic consequences. The central problem with this Order, and the statute that it relies upon, is that it conflates the powers of the Executive and Legislative

98. 8 U.S.C. § 1373, *invalidated* by States of New York v. Dep't of Justice, 343 F. Supp. 3d 213 (S.D.N.Y. 2018).

99. *Id.* at § 1373(a). *See generally FAQ on 8 USC § 1373 and Federal Funding Threats to "Sanctuary Cities"*, IMMIGRANT LEGAL RES. CENTER, https://www.ilrc.org/sites/default/files/resources/8_usc_1373_and_federal_funding_threats_to_sanctuary_cities.pdf (explaining 8 USC § 1373 requirements).

100. 8 U.S.C. § 1373.

branches of the federal government. The Legislative branch is, among other things, tasked with funding federal government initiatives (such as supporting state and local law enforcement). The Executive branch is tasked with executing laws. As the cases below demonstrate, extensive precedent and related legislation support the conclusion that the President is not permitted "to enact, to amend, or to repeal statutes."[101] Chief Judge Thomas of the Ninth Circuit Court of Appeals in no uncertain terms noted, "Simply put, 'the President does not have unilateral authority to refuse to spend the funds.'"[102]

The basis for the numerous challenges to the Executive Order has been the effort by the federal government to try and prevent states from passing legislation, which has been found to violate the Tenth Amendment to the U.S. Constitution.[103] As of the time of this article (January 2019), the statute has been found unconstitutional by at least two jurisdictions—Philadelphia and Chicago.[104]

Santa Clara and San Francisco were the first to sue the Trump Administration over the Executive Order. These counties would be directly affected by the Order if the federal government chose to withhold funding on account of their sanctuary policies. Santa Clara enacted an ordinance that directed its employees not to communicate to ICE any information collected in the course of providing critical services or benefits.[105] San Francisco likewise enacted an ordinance prohibiting its city and county employees from using city or county resources to assist or provide information to federal immigration law enforcement authorities.[106]

The Executive Order suspending funding for jurisdictions that failed to comply with federal requests for assistance in immigration law enforcement was challenged by the cities of San Francisco and Santa Clara, which had roughly $1.2 and $1.7 billion, respectively, in federal funds at stake.[107]

By April of 2017, the Order was suspended by U.S. District Judge William H. Orrick in San Francisco, who stipulated that only Congress can tie funding to state or local actions, such as cooperating with federal law enforcement.[108]

> There are two serious constitutional problems with conditioning federal grants to sanctuary cities on compliance with Section 1373. First, long standing Supreme Court precedent mandates that the

101. City & County of San Francisco v. Trump, 897 F.3d 1225, 1232 (9th Cir. 2018) (citing Clinton v. City of New York, 524 U.S. 417, 438 (1998)) ("There is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes.").

102. *Id.* (quoting *In re* Aiken County, 725 F.3d 255, 261 n.1 (D.C. Cir. 2013)).

103. *See* Murphy v. NCAA, 138 S. Ct. 1461 (2018) (striking down a federal law that prohibited states from enacting licensing of sports gambling schemes).

104. *See* City of Philadelphia v. Sessions, 309 F. Supp. 3d 289, 330 (E.D. Pa. 2018); City of Chicago v. Sessions, 264 F. Supp. 3d 933 (N.D. Ill. 2017) (holding that the city did not meet its burden to show the statute's constitutionality).

105. Resolution No. 2010-316: Advancing Public Safety and Affirming the Separation Between County Services and the Enforcement of Federal Civil Immigration Law, Cty. of Santa Clara Bd. of Supervisors (2010).

106. S.F. ADMIN. CODE § 12H.2 (2016).

107. City & County of San Francisco v. Trump, 897 F.3d 1225, 1235 (9th Cir. 2018).

108. *Id.* at 1225.

> federal government may not impose conditions on grants to states and localities unless the conditions are "unambiguously" stated in the text of the law "so that the States can knowingly decide whether or not to accept those funds." Few if any federal grants to sanctuary cities are explicitly conditioned on compliance with Section 1373. Any such condition must be passed by Congress, and may only apply to new grants, not ones that have already been appropriated. The executive cannot simply make up new conditions on its own and impose them on state and local governments. Doing so undermines both the separation of powers and federalism. Even aside from Trump's dubious effort to tie it to federal grants, Section 1373 is itself unconstitutional. The Supreme Court has repeatedly ruled that the federal government may not 'commandeer' state and local officials by compelling them to enforce federal law. Such policies violate the Tenth Amendment.[109]

The District Court issued a temporary injunction enjoining the Administration from implementing § 9 of the *sanctuary city* Executive Order. That injunction was applicable to all jurisdictions deemed *sanctuary cities* by the Administration.[110]

The 9th Circuit Court of Appeals ruled 2–1 in August 2018 that the Executive Order violated the Spending Clause and the Separation of Powers doctrine by refusing to disperse monies allocated by the U.S. Congress in retaliation for state or local failure to cooperate with federal law enforcement authorities.[111] In an opinion by Chief Judge Thomas, the court said:

> [U]nder the principle of Separation of Powers and in consideration of the Spending Clause, which vests exclusive power to Congress to impose conditions on federal grants, the Executive Branch may not refuse to disperse the federal grants in question without congressional authorization. Because Congress has not acted, we affirm the district court's grant of summary judgment to the City and County of San Francisco and the County of Santa Clara.[112]

The court concluded that the disbursement of funding for these grants was in the hands of Congress, not the President, and because Congress had not taken any steps to restrict such funding, the President was not authorized to do so. However, the decision did not vacate the injunction—rather, it remanded it back to the District Court to assess the need for a nationwide injunction.

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109. Ilya Somin, *Why Trump's Executive Order on Sanctuary Cities Is Unconstitutional*, WASH. POST: VOLOKH CONSPIRACY (Jan. 26, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/26/constitutional-problems-with-trumps-executive-order-on-sanctuary-cities/?utm_term=.0014c0d5b8dd.

110. *City & County of San Francisco*, 897 F.3d at 1240.

111. *Id*. at 1230 (affirming the District Court's finding that under the principle of separation of powers, "the Executive Branch may not refuse to disperse the federal grants in question").

112. City of San Francisco v. Trump, 897 F.3d 1225, 1231 (9th Cir. 2018).

In his July 2018 ruling on the federal government's challenge to SB 54, District Court Judge Mendez noted, "The laws make enforcement more burdensome than it would be if state and local law enforcement provided immigration officers with their assistance. But refusing to help is not the same as impeding."[113] The judge refused the federal government's request for a preliminary injunction that would have stopped implementation of the bill. In response to the ruling, the California state lawmaker that introduced the bill said, "We cannot stop his mean-spirited immigration policies, but we don't have to help him, and we won't."[114] The Trump Administration appealed the decision to the 9th Circuit Court of Appeals.

The Administration appealed the District Court's decision to the 9th Circuit Court of Appeals. In that decision, U.S. Federal District Judge John Mendez told the U.S. Justice Department that "[r]efusing to help is not the same as impeding . . . . Standing aside does not equate to standing in the way."[115] The California District Court did not find it necessary to rule on the constitutionality of the statute, finding instead that California's laws were not in conflict with the statute and thus were not in violation of the law.[116]

In June 2018, the U.S. District Court for the Eastern District of Pennsylvania ruled that the federal government could not withhold already approved law enforcement grants from the City of Philadelphia based upon its designation as a *sanctuary city*.[117] In that case, the court found that the DOJ had, among other things, violated the Administrative Procedures Act by acting *ultra vires* and without congressional authorization.[118] Also that year, the Seventh Circuit Court of Appeals in Chicago granted an injunction against the Trump Administration preventing the Executive Order from taking effect.[119]

While other lawsuits on *sanctuary cities* have been against (or by) cities and counties, *United States v. California* is the first federal case to address a statewide *sanctuary* policy. California enacted its statewide Senate Bill (SB) 54, the *California Values Act,* in October 2017.[120] That bill makes the state of California a *sanctuary state* by limiting the ability of local jurisdictions from sharing information about immigrants with federal law enforcement agencies. Because the bill expressly requires state law enforcement authorities not to help federal immigration enforcement authorities, it would appear to violate the Executive Order. Thus, the Trump Administration began its implementation of Executive Order No. 13,768 with a challenge to California's SB 54.

113. United States v. California, 314 F. Supp. 3d 1077, 1104 (E.D. Cal. 2018).

114. Taryn Luna, *California Beats Trump in Sanctuary State Battle's First Round*, SACRAMENTO BEE (July 5, 2018, 10:51 PM), https://www.sacbee.com/news/politics-government/capitol-alert/article214374659.html.

115. *United States v. California*, 314 F. Supp. 3d, at 1104 (upholding two California laws challenged by the U.S. Justice Department as obstructing enforcement of immigration laws).

116. *Id*. at 1096.

117. City of Philadelphia v. Sessions, 309 F. Supp. 3d 289 (E.D. Pa. 2018).

118. *Id*. at 320–21.

119. City of Chicago v. Sessions, 264 F. Supp. 3d 933 (N.D. Ill. 2017).

120. California Values Act, CAL. GOV. CODE § 7284 (West 2018).

VI. IMMIGRATION AND FEDERALISM—AN ASSESSMENT

The United States was founded on the concept of a republic that divides power not only between a centralized national government and decentralized sub-entities, but also between three distinct branches of government. In each of these situations, certain powers are shared and certain powers are consolidated almost exclusively within one branch or the other. These two concepts are referred to as federalism and separation of powers, respectively.

Federalism is the concept of balancing state and federal power. The Constitution creates this concept through the 10th Amendment, which in effect ensures that only powers identified in the U.S. Constitution as federal powers are in fact powers that the federal government is endowed with. Practically, this means that the U.S. Congress could not enact a law mandating that every citizen purchase health insurance as that is not identified in the Constitution as a federal power (however, they can create taxes that are levied upon those without insurance).[121] However, a state legislature would be free to enact such a law for its own residents.

Likewise, the federal government was endowed with certain powers that states do not have. The U.S. Constitution gives the federal government the authority to establish rules for naturalization to U.S. citizenship,[122] for instance, or for declaring bankruptcy.[123] These powers are exclusively federal and allow no state conflict due to the Supremacy Clause found in Article VI of the U.S. Constitution. Other federal powers, such as the tax power, are shared with the states.

Separation of Powers, on the other hand, refers to the division of labor and responsibility between the legislative,[124] executive,[125] and judicial[126] branches of government at both the state and federal level. The Constitution endowed each of those branches with a distinct set of powers, some that require action among more than one branch[127] and others that allow for unilateral action.[128] In some instances, judicial interpretation is required to assess the scope of the powers of the legislature and executive branches.

A relevant example of the gray areas within the separation of powers doctrine might be the U.S. economic embargo on Cuba. Foreign relations powers have historically been housed within the executive branch of government; however, the U.S. Constitution split that power between the executive and the legislative branches.[129] The executive branch has the power to impose an economic embargo on a foreign country in pursuit of

121. *See* King v. Burwell, 135 S. Ct. 2480 (2015).

122. U.S. CONST. art. I, § 8.

123. *Id*.

124. *Id.* art. I.

125. *Id*. art. II.

126. *Id*. art. III.

127. Such as the enactment of treaties, which require the authorization of the President and the consent of the Senate.

128. Such as the enactment of legislation with a super-majority or impeachment of a sitting President by the Congress.

129. *See generally* Kevin J. Fandl, *Adios Embargo: The Case for Executive Termination of the U.S. Embargo on Cuba*, 54 AM. BUS. L. J. 293 (2017) (arguing that the executive branch does not require congressional approval to end the Cuban embargo and mend the United States' relationship with Cuba).

foreign policy goals. The executive branch also has the power to negotiate a trade agreement with that country, though the agreement would have to be ultimately approved by the legislative branch. In the case of the economic embargo on Cuba, the executive branch established the embargo and renewed it in some form in each administration. But fearing that the executive branch might terminate the embargo, the legislature enacted a law that effectively blocked the president from terminating the embargo unless certain conditions were met.[130] President Obama struggled with this legislation when he attempted to dilute the effects of the embargo during his administration.

With respect to immigration, the separation of powers doctrine is relevant because recent actions by the Trump Administration to restrict federal funding to states and localities that do not cooperate with federal law enforcement create a similar problem as the embargo. The power of the purse is undoubtedly with the legislative branch—it is for Congress to decide how much to fund the federal government, how to fund it, and when to fund it. And though the Executive has the power to prevent that funding from reaching much of the government by failing to approve appropriation bills, the President cannot withhold funding already authorized by law.[131]

The federal government has in the past used the promise of federal funding to convince states to enact certain types of legislation.[132] The Highway Trust Fund of 1956, for instance, was used to incentivize states to enact speed limits, limits on drunk driving, motorcycle helmet laws, and texting and driving restrictions.[133] The law withstood challenge as a valid application of legislative spending power under Article I of the U.S. Constitution.[134] The key takeaway for recent immigration cases is that the funding restrictions used to incentivize state compliance with federal policies were laid out by congress, not the president.

The distinction between past cases of federal incentives to extract state action and Executive Order 13,768 is that the Order violates the principle of Separation of Powers by stemming not from congress, but from the president. The monies in question under the recent cases have already been authorized by congress and are not being restricted or withheld by congress. Thus, as noted above, the power of the president to prevent the delivery of approved funds is nil.

But it is worth noting that this situation goes even further beyond a Separation of Powers or federalism matter. *Sanctuary city* policies are just that—policies. They are not legal actions preventing federal authorities from carrying-out their law enforcement duties. As noted by Judge Andrew

130. *See generally* Helms–Burton Act, 22 U.S.C. §§ 6021–6091 (1996) (continuing the oil embargo against Cuba).

131. City of Philadelphia v. Sessions, 309 F. Supp. 3d 289 (E.D. Pa. 2018).

132. *See* Brian Resnick & Emma Roller, *Four Times the Government Held Highway Funding Hostage*, THE ATLANTIC (July 16, 2014), https://www.theatlantic.com/politics/archive/2014/07/four-times-the-government-held-highway-funding-hostage/454167/ (explaining how the Highway Trust Fund allowed the federal government to entice states to enact speed limits, drunk driving laws, motorcycle helmet laws, and texting and driving laws).

133. 23 U.S.C. § 158 (Supp. III 1982).

134. South Dakota v. Dole, 483 U.S. 203 (1987).

Napolitano, designation as a *sanctuary city* is not a legal designation, but a policy one.[135]

Judge Napolitano explained on his blog that the federal government is free to enact immigration enforcement legislation and that federal law enforcement authorities are permitted to enforce those laws. However, those federal laws cannot compel state and local law enforcement or administrations to enforce those laws using their own tax dollars and resources to do so.[136] Similarly, the federal government can offer incentives to states and localities, such as funding, with strings attached, such as cooperation with federal law enforcement authorities. However, they cannot take away incentives for noncompliance with other federal mandates if those were not part of the original incentive agreement.[137]

The actions of Philadelphia, Chicago, California, and a few other jurisdictions to assert their rights to disobey federal orders to share information about potentially unlawful immigrants in their communities has a tinge of the civil disobedience acts that took place in the 20th century. Sit-ins at textile factories in the 1930s or the Woolworth's lunch counter in the 1960s, for instance, brought attention to issues of importance to society at the time. These private actions might be compared to the acts of the American colonies that dumped tea into the Boston harbor to protest British taxes in the 18th century.

The initiatives outlined in this article that create information sharing through technology or partnerships between federal, state, and local law enforcement, provide immigration law enforcement entities with a pipeline of information regarding the unlawful immigrant population in the United States. The sheer size of that population, however, overwhelms the resources of those very law enforcement agencies. This is why partnerships have been beneficial to the agencies—they expand manpower with minimal exertion of resources.

However, it is a state's prerogative to decide whether to join the efforts of federal law enforcement. Doing so may compromise the relationship between local law enforcement and the communities that they police. A police chief in Aurora, Colorado highlighted the risks posed to law enforcement when federal immigration enforcement efforts interfere with their community relationships: "Our policy is not based on politics or personal philosophy. It is based on public safety. It is our goal to ensure that all individuals within Aurora feel safe in reporting emergencies and working closely with the APD to ensure our city remains a safe place for all".[138]

A key example of the risk to community policing comes from Arizona, where the state sought to strengthen their role in assisting federal immigration law enforcement with the enactment of Senate Bill 1070, which

135. Andrew P. Napolitano, *Sanctuary Cities and the Rule of Law*, CREATORS (Aug. 10, 2017), https://www.creators.com/read/judge-napolitano/08/17/sanctuary-cities-and-the-rule-of-law.

136. *Id*.

137. *Id.* at 6.

138. Brandon Johansson, *Sanctuary City? Aurora Police Chief Says Cops Won't Go After Illegal Immigrants*, AURORA SENTINEL (Nov. 15, 2016), http://www.aurorasentinel.com/news/aurora-police-chief-says-local-cops-arent-going-immigrants/.

mirrored the authorities that federal immigration officers had. The U.S. Supreme Court struck down most of the law under federalism principles; however, they permitted the controversial section 2(b)—the "Show me Your Papers" clause that requires police officers to inquire into immigration status if they suspect the person to be unlawfully present, to go into effect. However, anecdotal reports suggest that the provision is not being widely utilized, largely because it interferes with community policing and the relationships state and local officers have built over years with their communities.[139] They rely on community members to provide them with valuable information; inquiring into immigration status may interfere with this very valuable relationship.

The *sanctuary city* policies adopted by some states and localities are a legitimate exercise of state power under the 10th Amendment to the U.S. Constitution. The Constitution does not permit the federal government to force states to comply with federal law enforcement efforts: "Federalism thus offers a vehicle for interest groups and political parties to advance concrete agendas and to turn political ideas into law."[140]

Federalism essentially protects states against federal overreach by allowing states to enact and enforce their own laws and policies, and if those laws conflict with federal laws, establishing a clear remedy—a preemption lawsuit.[141] A state is not obligated to carry-out the duties of federal law enforcement. Heather Gerkin called federalism the "new nationalism," arguing that it provides the "tool[s] for improving national politics, strengthening a national polity, bettering national policymaking, entrenching national norms, consolidating national policies, and increasing national power. State power, then, is a means to achieving a well-functioning national democracy."[142]

Accordingly, the mechanism that has traditionally worked well to encourage states to assist with federal policy objectives is the use of incentives, most often economic ones. However, if those economic incentives have been authorized by the legislature, and not tied to compliance with those policy goals, the executive is powerless to threaten termination of those incentives. This is the heart of the Separation of Powers doctrine and this is at the core of the legal fights over *sanctuary cities* today.

VII. CONCLUSION

In many ways, states and localities are the laboratory for what works and what does not in public policy. *Sanctuary city* policies are experimental in that they are assertions of power by the state or local government to resist federal government demands. And while states have historically acted to

139. Cristina Rodríguez, *Law and Borders*, YALE L. SCH. FAC. SCHOLARSHIP SERIES, Summer 2014, at 52, 59.

140. *Id*. at 57.

141. *See*, *e.g.*, United States v. Arizona 567 U.S. 387 (2012) (concerning a federal lawsuit against the state of Arizona over their enactment of immigration legislation that conflicted with federal immigration law). Additionally, consider recreational marijuana legalization, which is prohibited by federal law in the Controlled Substances Act but allowed under conflicting state laws.

142. Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 YALE L.J. 1889, 1893 (2014).

prevent the enforcement of federal laws through the enactment of conflicting legislation, such as Jim Crow laws to prevent the protection of the 15th Amendment,[143] or abortion restrictions to prevent the enforcement of the *Roe v. Wade* decision.[144] In the case of *sanctuary cities*, states are continuing to comply with federal immigration laws; however, they are adopting policies of non-cooperation with the authorities responsible for enforcing those laws—civil disobedience. These methods had long been the province of the private sector.

The result that we have seen as of the publication of this article is that states have largely succeeded in shrugging-off efforts to force cooperation. And while some jurisdictions have actively sought to cooperate with federal immigration efforts, those that have chosen to direct their law enforcement resources elsewhere have found an advocate in the courts. I suspect that the *sanctuary city* model is only the first of many future efforts to assert state and local power against federal encroachment, from criminal investigations to regulatory enforcement. And though the long-term effects are yet to be realized, there can be no doubt that the founding doctrines of federalism and separation of powers will be at the heart of many cases to come.

143. *See*, *e.g.*, Smith v. Allwright, 321 U.S. 649 (1944) (holding that a state law restricting primary election voting to whites was unconstitutional).

144. *See*, *e.g.*, Planned Parenthood v. Casey, 505 U.S. 833 (1992) (applying stare decisis and Roe v. Wade, the Court held that certain state abortion restrictions imposed an undue burden on women's abortion rights and were therefore invalid).