SANCTUARY LOST?

EXPOSING THE REALITY OF THE "SANCTUARY-CITY" DEBATE & LIBERAL STATES-RIGHTS' LITIGATION

CARA CUNNINGHAM WARREN†

---

† Assistant Professor of Law, University of Detroit Mercy School of Law, LL.M. University of Toronto (2017). The author wishes to thank Christine Coughlin, Stephanie Fong, Deborah Gordon, Mark Gordon, the Legal Writing Institute, Andrew Moore, Sophie Nunnelley, John Radsan, David Schneiderman, and the wonderful colleagues from the Legal Writing Institute's Writing Workshop for sharing their expertise and encouragement.

ABSTRACT

The Trump Administration seeks to withhold federal funding from "sanctuary cities" and has returned to the Bush-era Secure Communities Program ("S-Comm"), which has led to a 150% arrest-rate increase of the non-criminal, undocumented migrants who would otherwise be integrated into "sanctuary" jurisdictions.

Liberal voices have responded in legal and academic terms, but they have not reframed the Administration's powerful anti-immigrant narrative. This rhetorical mismatch has obscured fundamental aspects of the debate—namely, the power of states and localities to make community policing decisions and the effectiveness of such integrationist policies. Moreover, the liberals' approach to states-rights' litigation is incomplete. The aspects of Executive Order No. 13,768 that are receiving the most attention (i.e., funding) can be rebuffed, yet the aspects that pose a serious threat to integrationist policies (i.e., S-Comm) are not being addressed.

Liberals should continue states-rights' litigation, as necessary, but consider it one of three specific tactics designed to prompt a return to immigration enforcement priorities. Specifically, liberals also should assert an integrationist counter-narrative and use litigation as a form of non-cooperation designed to prompt discourse about shared security concerns.

I. INTRODUCTION

Strategy without tactics is the slowest route to victory.
Tactics without strategy is the noise before defeat.—Unknown[1]

1. *Sun Tzu*, WIKIQUOTE (Oct. 29, 2017, 6:12 PM), https://en.wikiquote.org/wiki/Sun_Tzu (stating the quote is misattributed to Sun Tzu and is unattributed).

The President of the United States has accused "sanctuary" jurisdictions of causing "immeasurable harm to the American people and to the very fabric of our Republic."[2] This is a strong charge, to be certain, yet it is not unique in contemporary American politics. In fact, it reflects the status quo, as political divides are ossified, and rhetoric has replaced discourse.[3]

In 2014, the former Director of the Central Intelligence Agency and U.S. Secretary of Defense, Robert Gates, characterized this dysfunction as America's greatest national security threat.[4] The situation has obviously only worsened as his observation predates the legislative stalemates and violence of 2017.[5] His point also pertains to government dysfunction generally, whereas the "sanctuary-city" debate squarely animates national security and public safety issues that are not being addressed.

---

2. Exec. Order No. 13,768, 82 Fed. Reg. 8799, § 1, ¶ 2 (Jan. 25, 2017).

3. THOMAS E. MANN & NORMAN J. ORNSTEIN, IT'S EVEN WORSE THAN IT WAS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM xiii (2016) (noting that "[t]he parties have become ideologically polarized, tribalized, and strategically partisan. . . . These parties have become as vehemently adversarial as parliamentary parties but operate in a constitutional system that *makes it extremely difficult for majorities to act*."); *see also* Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1081 (2014) ("the rise of ideologically coherent, polarized parties means that partisanship matters more for the competition it generates than for the cooperation it inspires.").

4. In an interview, Secretary Gates stated the following: "I think the greatest national security threat to this country at this point is the two square miles that encompasses the Capitol building and the White House." *Face the Nation Transcripts May 11, 2014: Rogers, Gates, Warren*, CBS NEWS (May 11, 2014), www.cbsnews.com/news/face-the-nation-transcripts-may-11-2014-rogers-gates-warren/ [hereinafter *Face the Nation Transcripts*]. When asked to elaborate, he said:

> If we can't get some of our problems solved here at home, if we can't get our finances in a more ordered fashion, if we can't begin to tackle some of the internal issues that we have, if we can't get some compromises on the Hill that move the country forward, then I think these foreign threats recede significantly into, as far as being a risk to the well-being and the future of this country.

Id. See also BRUCE ACKERMAN, THE DECLINE AND FALL OF THE AMERICAN REPUBLIC 9 (2010) (predicting in 2010 the 2016 election of Donald Trump (although not by name)). Professor Ackerman opined that American dysfunction would produce:

> [T]he election of an increasing number of charismatic outsider types who gain office by mobilizing activist support for extremist programs on the left or the right; [who will use] streams of sound bites aimed at narrowly segmented micropublics, generating a politics of unreason that will often dominate public debate; [and] they will increasingly govern through their White House staff of superloyalists, issuing executive orders that their staffers will impose on the federal bureaucracy[.]

Id.

5. *See infra* Section II.A. (describing the turbulent state of affairs).

Truth be told, there are valid concerns on both sides of the issue. The Administration is focused on securing America's borders and national security.[6] For them, "sanctuary" jurisdictions stand as an obstacle; they frustrate immigration enforcement and may even promote undocumented migration and human trafficking.[7] Along these lines, there may be a correlation between a nearly 40% increase in immigration arrests under President Trump's stricter immigration enforcement approach and a 22% reduction in the number of attempted illegal border crossings.[8]

On the other hand, "sanctuary" jurisdictions have legitimate concerns about the impact their involvement in federal immigration efforts will have on policing within their communities, which are comprised of American citizens, legal residents, and undocumented migrants alike.

> Many law enforcement executives believe that state and local law enforcement should not be involved in the enforcement of civil immigration laws since such involvement would likely have a chilling effect on both legal and illegal aliens reporting criminal activity or assisting police in criminal investigations. They believe that this lack of cooperation could diminish the ability of law enforcement agencies to effectively police their communities and protect the public they serve.[9]

In fact, there is strong evidence offered by law enforcement agencies that local involvement in federal immigration efforts has a negative

---

6. Press Release, U.S. Dep't of Justice, Attorney General Sessions Announces Immigration Compliance Requirements for Edward Byrne Memorial Justice Assistance Grant Programs (July 25, 2017), https://www.justice.gov/opa/pr/attorney-general-sessions-announces-immigration-compliance-requirements-edward-byrne-memorial; Exec. Order No. 13,768, 82 Fed. Reg. 8799. *See* Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALA. L. REV. 179, 184–88 (2005) (describing how three of the four 9/11 terrorists who piloted the hijacked planes were in violation of U.S. immigration law and how some had been in contact with local authorities).

7. U.S. Dep't of Justice, *supra* note 6; Exec. Order No. 13,768, 82 Fed. Reg. 8799.

8. DEP'T. OF HOMELAND SEC., ICE ERO IMMIGRATION ARRESTS CLIMB NEARLY 40% (Nov. 2, 2017), https://www.ice.gov/features/100-days [hereinafter ICE-ERO REPORT]; Joseph Tanfani, *Trump Vowed to Hire 5,000 for Border Patrol. It Never Happened*, CHI. TRIB. (Aug. 20, 2017), http://www.chicagotribune.com/news/nationworld/ct-trump-border-patrol-20170818-story.html; Aria Bendix, *Immigrant Arrests are Up, but Deportation is Down*, THE ATLANTIC (May 17, 2017), https://www.theatlantic.com/news/archive/2017/05/under-trump-immigrants-arrests-are-up-but-deportation-is-down/527103/.

9. INT'L ASS'N OF CHIEFS OF POLICE, ENFORCING IMMIGRATION LAW: THE ROLE OF STATE, TRIBAL, AND LOCAL LAW ENFORCEMENT 1 (2004), http://www.theiacp.org/portals/0/pdfs/publications/immigrationenforcementconf.pdf.

impact on police-community relations, which makes it difficult to prevent, investigate, and prosecute crimes.[10] Increased involvement also impacts local resources, which already are challenged.[11] Finally, intense anti-immigrant rhetoric has triggered liberals' concern for the equality rights of all community members.[12] In this respect, it is critical to remember that immigration investigations, if not properly performed, target people based on their physical characteristics, which means that U.S. citizens, documented residents, and undocumented immigrants are vulnerable to profiling and negative treatment.[13]

---

10. *Id. See also* Memorandum from Matthew Piers, et al. to Tom Cochran, The U.S. Conference of Mayors, and Darrel W. Stephens, Major Cities Chiefs Ass'n., Legal Issues Regarding Local Policies Limiting Local Enforcement of Immigration Laws and Potential Federal Responses (Jan. 13, 2017), https://www.nilc.org/wp-content/uploads/2017/02/HSPRD-Memo-on-Local-Enforcement-of-Immigration-Laws-and-Federal-Resp.pdf [hereinafter Mayor Memorandum]; Letter from Lisa Madigan, Att'y Gen. for the State of Ill. to Governor Bruce Rauner 3–4 (Feb. 6, 2017), http://www.chicagoappleseed.org/wp-content/uploads/2017/02/Illinois-AG-to-Gov.-Rauner-Corrrespondence-2.6.17.pdf (noting the negative impact that local involvement has on agency resources and community trust and the risk of racial profiling) [hereinafter AG Madigan Letter]; David A. Harris, *The War on Terror, Local Police, and Immigration Enforcement: A Curious Tale of Police Power in Post-9/11 America*, 38 RUTGERS L.J. 1 (2006) (detailing the negative impact federal immigration efforts have on local community policing, both in terms of police effectiveness and various financial and personnel constraints); Orde F. Kittrie, *Federalism, Deportation, and Crime Victims Afraid to Call the Police*, 91 IOWA L. REV. 1449, 1475 (2006) (noting that "the predominant reason local officials give for sanctuary policies has been the desire to encourage unauthorized aliens to report crimes to which they are victims or witnesses.").

11. Harris, *supra* note 10 (discussing the changes in community policing after the terrorist attacks of September 11, 2001, and the multi-faceted responsibilities faced by these officers, which makes it difficult for localities to assume a greater role in federal immigration efforts).

12. HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW 11 (2014); AG Madigan Letter, *supra* note 10, at 3–4; Statement of Vanita Gupta Principal Deputy Assistant Att'y Gen., Civil Rights Div., U.S. Dep't of Justice *Before the Subcomm. on Immigration & Border Sec. Comm. on the Judiciary U.S. H.R. for a Hearing Concerning New Orleans: How the Crescent City Became a Sanctuary City*, 114th Cong. 24 (2016), https://www.justice.gov/opa/file/897651/download; Kittrie, *supra* note 10, at 1451. It should be noted here that this paper uses the word "liberals" in very general terms to refer to members of the American Democratic Party and to those on the political left. It also stands in contrast to the term "conservatives," which refers to members of the American Republican Party and to those on the political right.

13. MOTOMURA, *supra* note 12. *See also* Ming H. Chen, *Trust in Immigration Enforcement: State Noncooperation and Sanctuary Cities After Secure Communities*, 91 CHI.-KENT L. REV. 13, 33 (2016); Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. CINN. L. REV. 1373, 1400–01 (2006); Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PENN. J. CONST. L. 1084, 1102–15 (2004).

This brief discussion highlights the true nature of the debate that has been obfuscated by powerful conservative rhetoric. Section II is intended to sharpen our focus by identifying and debunking two fundamental misperceptions that have been perpetuated in the current rhetorical vacuum.

The first misperception is that the federal government can force "sanctuary" localities to adjust their internal laws regarding the treatment of individuals within state borders.[14] As a constitutional matter, this is a debate between two sovereign entities: the federal government and state governments.[15] In this new era of immigration federalism, state and local governments play a significant role in immigration enforcement, such that their contributions and their views should be valued.[16]

The second misperception relates to the term "sanctuary city." It is a misnomer. Jurisdictions that seek to balance their involvement in federal immigration enforcement with local policing interests are not attempting to "shield" criminals. In fact, they seek to do the exact opposite. These so-called "sanctuary" policies are characterized as "integrationist," and they seek to promote effective community policing by involving all community members in law enforcement. This means bringing undocumented immigrants out of the shadows and encouraging them to report crimes, serve as witnesses, and seek treatment for communicable diseases. In fact, in contrast to "restrictionist" policies, which seek to

14. The locality's actions are evaluated differently depending on whether it pursues a restrictionist or an integrationist approach, both of which are described fully below in Section II.B.1.iii. At this point, it suffices to say that restrictionist immigration regulations (i.e., ones that create conditions that prompt immigrants to "self deport") are evaluated by asking whether the regulations are preempted by federal law. In the context of integrationist or "sanctuary" policies, however, the question likely depends on statutory interpretation, namely, does the regulation's attempt at non-cooperation violate federal law? An additional question would inquire whether the federal government is overreaching in its efforts to induce local cooperation, either running afoul of anti-commandeering or Spending Clause limitations.

15. Federal law trumps state law pursuant to the U.S. Constitution's Supremacy Clause. U.S. CONST. art. VI, cl. 2. Moreover, the federal government is afforded the constitutional right to provide for the nation's common defense and general welfare. U.S. CONST. art. I, § 8, cl. 1. Nevertheless, as expressed in United States v. Morrison, "We can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims." 529 U.S. 598, 618 (2000).

16. *See infra* Section II.B.1 (discussing immigration federalism and the important cooperative role state and local law enforcement agencies play in federal immigration enforcement efforts).

encourage immigrants to "self-deport," integrationist policies are actually more effective policing models.[17]

If false narratives continue to guide the country, political divisions will continue to ossify and the legitimate, underlying security concerns of both sides will continue to be obscured. We cannot persist in this way. Former United Nations Secretary-General Kofi Annan discussed the relationship between knowledge and democracy in the context of education, but it is equally apropos in the current context of government dysfunction and misinformation: "Knowledge is power. Information is liberating. Education is the premise of progress in every society[.]"[18]

Along these lines, Section III details specific actions liberals should pursue to increase their effectiveness. Executive Order No. 13,768 threatens to withhold federal funding from jurisdictions that "willfully refuse to comply with" federal laws regarding immigration enforcement.[19] It also announces a return to the Bush-era Secure Communities Program ("S-Comm"),[20] which was discontinued in 2014 because of concerns regarding its legitimacy.[21] In response, liberals have pursued states-rights' litigation to protect federal funding.[22] Unfortunately, the approach is incomplete. Specifically, the aspect of the Executive Order that is receiving the most attention (i.e., withdrawal of federal funding) may actually pose the least threat to liberal policies, whereas liberals are not adequately addressing one of the most dangerous provisions (i.e., reinstating the Bush-era Secure Communities Program).

While states-rights' litigation can be used to preserve federal funding, S-Comm is indirectly dangerous to integrationist policies. It does not prioritize immigration arrests, and in the first months of its operation, there has been a 150% increase in arrests of undocumented, non-criminal migrants[23]—the same people integrationist policies seek to

17. *See infra* Section II.B.1.c (describing the two philosophical approaches to immigration and criminal law and noting the data that support the integrationist approach).

18. Kofi Annan, U.N. Sec'y. Gen., Address at the World Bank Conference: Information and Knowledge are Central to Democracy (Jun. 22, 1997), *in* THE COLLECTED PAPERS OF KOFI ANNAN: UN SECRETARY-GENERAL 1997–2006, 135 (Jean E. Rasno ed., 2012).

19. Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017).

20. *Id.*

21. Memorandum from Jeh Charles Johnson, Sec'y of the Dep't of Homeland Sec. to Thomas Winkowski, Acting Dir., U.S. Immigration & Customs Enf't, 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 [hereinafter Johnson Memorandum].

22. *See* County of Santa Clara v. Trump, 250 F. Supp. 3d 497 (N.D. Cal. 2017).

23. ICE-ERO REPORT, *supra* note 8.

integrate into their communities. If priorities are not reinstated, S-Comm will do indirectly what federal law could not do directly with respect to impacting local community policing regulations.

In this way, Section III urges liberals not to pursue funding-focused litigation alone. Instead, litigation (when deemed necessary) should be one tactic of a three-pronged approach designed to promote dialogue on enforcement priorities. As the second prong, litigation must be coupled with a significant effort to present an alternative immigration narrative. Litigation undertaken in the context of the current anti-immigrant and "harboring" narratives will only further fuel conservative politics and hinder future dialogue. Professor NeJaime's review of social-movement litigation is instructive and should inform the liberals' approach.[24] He evaluated both liberal and conservative social-movement litigation and concluded that the *losing* side in court actually may win the long-term battle. Specifically, litigation losses tend to mobilize supporters, publicize the cause, encourage new membership, capture the interest of elite decision-makers, and increase donations of time and money.[25] If liberals win these states-rights' lawsuits but fail to diffuse conservative rhetoric, dialogue may be put further out of reach politically as the current conservative narrative will be further empowered in the manner NeJaime describes.

As the third prong, liberals should use litigation as a form of non-cooperation intended to drive conservatives into dialogue regarding the broader security and policing questions raised by S-Comm. Professors Chen, Pozen, and Gerken have focused on liberals' use of non-cooperation and dialogue to change federal immigration policy in the past.[26] In fact, liberals used this tactic effectively to challenge and (temporarily) end S-Comm during President Obama's second term.[27] Now that the current Administration has shifted back to the Program, liberals should reinvigorate and recalibrate the approach—with states-rights' litigation as one tactic in a broader strategy to correct the pejorative narrative, and initiate a broader security and effective policing dialogue.

Realistically, achieving dialogue is no small task. Democrats are in the minority in all three branches of federal government, and at the state level Democrats control only thirty-one of the ninety-eight state

24. *See* Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941 (2011) (reviewing LGBT and Christian Rights cases and noting that the party that lost in the litigation gained in terms of political support and funding).

25. *Id.* at 981.

26. Chen, *supra* note 13; Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009).

27. Chen, *supra* note 13, at 50–51.

legislative bodies and only seventeen of fifty state governorships.[28] Moreover, both parties may be unwilling to appear "soft" on partisan immigration positions on the eve of the 2018 election cycle. But liberals do not come to the task empty-handed. Again, states and localities play a significant role in the federal government's "cooperative federalism" immigration model. Moreover, liberals have not yet successfully presented a counter-narrative to existing conservative immigration rhetoric. Doing so in a way that promotes dialogue about shared values and concerns may create an environment where the parties can make progress on this important national issue. Indeed, although pursuing *détente* will not be easy, the status quo poses a greater risk to liberals. In addition to the consequences described above, failing to take meaningful action today will be a lost opportunity for liberals to lead. Even if the attempt at dialogue is not successful, it may be an example of leadership capacity at a time when leadership is clearly needed, as noted by Secretary Gates.[29]

In short, the current approach should not be sustained. Liberals should pursue litigation, when necessary, but also pursue dialogue rooted in truth and focused on shared security concerns. The first step is to sharpen our focus—both on the rhetoric and the underlying dimensions of the "sanctuary" debate.

II. SHARPENING OUR FOCUS: THE RHETORIC & THE REALITY OF THE "SANCTUARY" DEBATE

This heated immigration debate is occurring in, and in part because of, a volatile political climate. In an effort to inform our conversation, Section II begins by describing the "sanctuary discourse." Conservatives have had the upper hand in this regard, hitting strong law-and-order tones that appeal to their base generally.[30] More recently, the Trump Administration has amplified their approach with militaristic, xenophobic, and dehumanizing rhetoric.[31]

---

28. Nicole Narea & Alex Shaphard, *The Democrats' Biggest Disaster: Forget Washington—The Party is Weaker at the State Level than It's Been in Nearly a Century*, NEW REPUBLIC (Nov. 22, 2016), https://newrepublic.com/article/138897/democrats-biggest-disaster.

29. *Face the Nation Transcripts*, *supra* note 4.

30. Conservatives began to take up the "sanctuary" debate in earnest after the July 2015 death of Kathryn Steinle at the hands of a five-times removed undocumented immigrant. *See infra* Section II.B.2.

31. Patrick Healy & Maggie Haberman, *95,000 Words, Many of Them Ominous, from Donald Trump's Tongue*, N.Y. TIMES (Dec. 5, 2015), https://www.nytimes.com/2015/12/06/us/politics/95000-words-many-of-them-ominous-from-donald-trumps-tongue.html.

One could argue that starting with this information, or discussing it at all, is itself inflammatory. Yet that is not the aim. Highlighting the differences between the rhetoric and the reality begins to prove the ultimate point of this paper—the need for more informed and responsible discourse.[32] It also serves two other important functions. First, in a comparative sense, the motivational power of the conservative position accentuates the absence of a compelling liberal narrative. To date, many liberal legal and academic voices have been raised in response to conservative action, yet they have not, and perhaps did not intend, to recast or reframe the issue. In light of this rhetorical mismatch, key misperceptions have been allowed to flourish. Section II.B seeks to dispel them. Second, once the rhetoric is put aside, the underlying legal foundations of the debate, namely immigration federalism and states' rights, can be revealed. Subsections within II.B will describe these legal principles so that Executive Order No. 13,768 and its impact on local integrationist policies can be discussed in an informed context in Section III.

A. Contemporary "Discourse"

It would be an understatement to say that this is a complicated time in American history. Some commentators have gone so far as to suggest that we are in the midst of a civil war.[33] While there is an obvious measure of hyperbole, the statements do express an underlying truth regarding political ossification and public volatility. Specifically, the American left perceives President Trump's election and governance as a direct assault on their core values,[34] and they have stated their intention

32. One cannot help but wonder how future generations will analyze this particular moment in history. The author hopes this description of the current state of affairs will assist these historians.

33. David Horowitz, *The Democrat's Second Secession & America's New Civil War: How to Look at the Bizarre Turn Our Political Life Has Taken*, FRONTPAGEMAG (May 26, 2017), http://www.frontpagemag.com/fpm/266812/democrats-second-secession-americas-new-civil-war-david-horowitz; Daniel Greenfield, *The Civil War is Here: The Left Doesn't Want to Secede. It Wants to Rule*, FRONTPAGEMAG (Mar. 27, 2017), http://www.frontpagemag.com/fpm/266197/civil-war-here-daniel-greenfield; *Horowitz: Dems Putting Gov't in 'A Civil War Situation' in Wake of Wiretap Allegations*, FOX NEWS INSIDER (Mar. 9, 2017), http://insider.foxnews.com/2017/03/09/david-horowitz-democrats-putting-government-civil-war-situation-trump-tower-wiretaps.

34. One example is equal rights. President Trump's election was celebrated by the Ku Klux Klan and the "Alt-Right." Feliks Garcia, *Ku Klux Klan Announces Donald Trump Victory Parade as White Supremacists Celebrate Nationwide*, THE INDEPENDENT (Nov. 10, 2016), www.independent.co.uk/news/world/americas/ku-klux-klan-parade-north-carolina-donald-trump-celebration-president-elect-white-supremacists-alt-a7410671.html. Indeed, during the August 2017 rally in Charlottesville, Virginia, which

to block his agenda whenever possible.[35] Likewise, conservatives feel embattled, and their positions also are entrenched.[36] The animosity is manifesting itself in instances of symbolic violence[37] and actual

---

resulted in the death of a young woman, the former imperial wizard of the Ku Klux Klan said his protestors were there to "fulfill the promises" of President Trump. Mary Schmich, *David Duke and Donald Trump and the Long Ties of History*, CHI. TRIB. (Aug. 12, 2017), http://www.chicagotribune.com/news/columnists/schmich/ct-david-duke-mary-schmich-20170815-column.html. President Trump was criticized on both sides of the aisle for arguing that there was a moral equivalence between the hate groups and counter-protestors in Charlottesville. Amanda Holpuch & Lauren Gambino, *Trump: Confederate Statue Removals 'Rip Apart' American History*, THE GUARDIAN (Aug. 17, 2017), https://www.theguardian.com/us-news/2017/aug/17/trump-neo-nazis-antifa-moral-equivalence-tweets-charlottesville.

35. Sam Frizell, *Congressional Democrats Have Closed Ranks Against Donald Trump*, TIME (Jan. 30, 2017), http://time.com/4654574/donald-trump-congress-democrats-reaction/.

36. In one poll, 98% of the President's supporters believe he is unfairly facing more resistance and is the victim of unfair and politically-motivated attacks. Anthony Salvanto et al., *Trump Supporters Dig in While Others Grow Nervous*, CBS (May 21, 2017), http://www.cbsnews.com/news/nation-tracker-poll-core-trump-supporters-dig-in-others-grow-nervous/. Moreover, these supporters identify strongly with the President; an attack on him is perceived as a personal attack on them, which solidifies the President's base regardless of his successes or failures. Indeed, scholars have noted that of the various affiliations a person maintains, the one under attack is the one with which a person will most closely align. MALCOM M. FEELEY & EDWARD RUBIN, FEDERALISM: POLITICAL IDENTITY & TRAGIC COMPROMISE 11–12 (2011); AMIN MAALOUF, IN THE NAME OF IDENTITY 26 (2003).

37. There have been multiple media images depicting the death of the President, including photographs of a comedienne holding a replica of his severed head; a Broadway play depicting the assignation of a Trump-like Julius Caesar; and a rap video showing the artist shooting the President with a toy gun. Peter Baker, *Trump Lashes Out at Kathy Griffin and Democrats*, N.Y. TIMES (May 31, 2017), https://www.nytimes.com/2017/05/31/us/politics/trump-kathy-griffin-comedian-democrats; Caitlin Gibson, *Delta Pulled Funding from a Trump-esque 'Julius Caesar' but Not from an Obama-like Version in 2012*, WASH. POST (June 12, 2017), https://www.washingtonpost.com/news/arts-and-entertainment/wp/2017/06/12/delta-pulled-funding-from-a-trump-esque-julius-caesar-but-not-for-an-obama-like-version-in-2012/?utm_term=.fd8260c99d16; Joe Coscarelli, *Donald Trump Criticizes Snoop Dogg on Twitter for Satirical Video*, N.Y. TIMES (Mar. 15, 2017), https://www.nytimes.com/2017/03/15/arts/music/snoop-dogg-trump-video-gun.html.

On the other hand, during the same time as the Portland murders described below, there was an upsurge in actions against African Americans, with several nooses being found hanging in Washington, D.C. and racist graffiti being painted on NBA superstar LeBron James's home during the NBA Championship series. *NAACP Denounces Recent Wave of Violence Against African-Americans*, NAACP.ORG (June 2, 2017), http://www.naacp.org/latest/naacp-denounces-recent-wave-vandalism-african-americans/; *Noose Found Hanging Near Elementary School in Washington D.C.*, CBS (June 3, 2017), http://www.cbsnews.com/news/noose-found-near-elementary-school-in-washington-d-c/; Bill Chappell, *Hate Is 'Alive Every Single Day' LeBron James Says*

bloodshed,[38] and the ongoing battles spark negative cycles of action and reaction from both sides.[39]

1. Powerful Conservative Narratives

The "sanctuary-city" debate is a microcosm of this broader political divide and is animated by deep-seated ideological triggers. Conservatives generally frame the issue as one of "law and order" and call for "punishments" against "sanctuary" jurisdictions.[40] The President takes this point further in three key respects. First, his comments take law and order to militaristic heights,[41] and the threat to withhold funds from these

---

After Racist Graffiti Incident, NPR (June 3, 2017), http://www.npr.org/sections/thetwo-way/2017/06 /01/531023588/.

38. Two people were stabbed to death and a third person was wounded in Portland, Oregon, after they came to the aid of two teenagers who were allegedly being accosted by a man shouting anti-Muslim sentiments. *Pro-Trump Rally in Portland is a Flash Point Between Opposing Groups*, NPR (Jun. 4, 2017), http://www.npr.org/2017/06 /04/531485455/ [hereinafter NPR Rally]. Just two weeks after the Portland murders came the June 2017 attack on Republicans at a baseball field in Virginia, which left the third-ranked House Republican grievously wounded along with several others. Although there were many calls for unity, partisan finger-pointing began just hours after the shooter was felled by law enforcement. Chris Cillizza, *The Steve Scalise Shooting has Already Become a Political Football*, CNN (June 14, 2017), http://www.cnn.com/2017/06/14 /politics/steve-scalise-shooting-political/index.html. Blood was spilled yet again in Charlottesville, Virginia, when a white supremacist drove his car into a group of counter-protestors, killing one young woman. Holpuch & Gambino, *supra* note 34.

39. For example, a free-speech rally was held in Portland days after the June 2017 murders. Counter-protestors chanted "Nazis, Go Home!" and waved anti-fascist flags while the local Republican Party chairperson called on the "Oath Keepers Militia" to provide extra security. One man "dressed in red, white and blue with a metal breastplate and helmet, said he was attending the rally as a 'defender,' accusing the other side of trying 'to take away the rights of people here.'" NPR Rally, *supra* note 38; Terray Sylvester, *Trump Supporters Confront Counter-Protesters in Portland, Oregon*, REUTERS (Oct. 14, 2017, 11:49 AM), https://www.reuters.com/article/us-oregon-protests/trump-supporters-confront-counter-protests-in-portland-oregon-idUSKBN18V0J0. Likewise, immediately after the August 2017 murder in Charlottesville, Virginia, white nationalists and other extremist groups vowed to hold more free-speech rallies across the country. Alan Feuer, *Far Right Plans Its Next Moves with a New Energy*, N.Y. TIMES (Aug. 14, 2017), https://www.nytimes.com/2017/08/14/us/white-supremacists-right-wing-extremists-richard-spencer.html?mcubz=0. One rally was held in Boston, Massachusetts the following week, and approximately 40,000 counter-protestors attended. Wesley Lowery & Christina Pazzanese, *Boston 'Free Speech' Rally Ends Early Amid Flood of Counterprotestors; 27 People Arrested*, WASH. POST (Aug. 19, 2017), https://www.washingtonpost.com/news/post-nation/wp/2017/08/19/thousands-expected-at-boston-free-speech-rally-and-counter-protest/?utm_term=.83dd9e026392.

40. County of Santa Clara v. Trump, 250 F. Supp. 3d 497, 497 (N.D. Cal. 2017).

41. Although President Trump's call for mass deportations has been retracted by other Administration officials, he continues to discuss his removal policies on a

jurisdictions has been characterized as a "weapon."[42] Second, the President is reaching out to xenophobic members of his base by targeting Mexicans, who account for the vast majority of those removed from the United States.[43] In his very first campaign speech, he referred to Mexicans generally as "drug dealers, criminals, and rapists."[44] He also has publicly attacked the capacity of an American-born federal judge because of the judge's name and Mexican heritage[45] and has proclaimed that the sovereign nation of Mexico will pay for a border security wall on American territory.[46]

Finally, the President has ratcheted-up the "sanctuary" rhetoric by dehumanizing immigrants. Under the President's current immigration enforcement policy, the most significant increase in immigration arrests has been among non-criminal aliens (i.e., a 150% arrest-rate increase of individuals who may have lived in the United States for a long time, are property owners, pay taxes, etc.).[47] Yet, in post-election campaign rallies and speeches to law enforcement, the President focuses on criminal aliens, referring to them as "animals."[48] No one should excuse the violence of MS-13 gang members or other dangerous criminal aliens. Indeed, these individuals are pursued by all law enforcement agencies—even in liberal "sanctuary" jurisdictions. The point is that the President is

---

militarized scale. Julianne Hing, *Trump Admits That His Deportation Agenda is a 'Military Operation,'* THE NATION (Feb. 24, 2017), https://www.thenation.com/article/trump-admits-that-his-deportation-agenda-is-a-military-operation/.

42. Michael A. Memoli, *Trump: 'California in Many Ways is Out of Control,'* L.A. TIMES (Feb. 5, 2017), http://www.latimes.com/politics/washington/la-na-essential-washington-updates-trump-bill-to-make-california-a-1486330796-htmlstory.html.

43. Specifically, aliens removed from the United States in 2015 were citizens of the following top five countries: Mexico (72.7%), Guatemala (10%), El Salvador (6.4%), Honduras (6.1%), and Dominican Republic (.06%). DEP'T OF HOMELAND SEC., *2015 Immigration Data & Statistics* (Aug. 4, 2017), https://www.dhs.gov/immigration-statistics/visualization/2015.

44. *'Drug Dealers, Criminals, Rapists': What Trump Thinks of Mexicans*, BBC NEWS (Aug. 31, 2016), http://www.bbc.com/news/av/world-us-canada-37230916/drug-dealers-criminals-rapists-what-trump-thinks-of-mexicans; Meg Wagner, *Twitter Jokes About, is Baffled by, Donald Trump's Bizarre 2016 Announcement*, N.Y. DAILY NEWS (June 16, 2015), http://www.nydailynews.com/news/politics/twitter-reacts-donald-trump-bizarre-2016-announcement-article-1.2259750.

45. Brent Kendall, *Trump Says Judge's Mexican Heritage Presents 'Absolute Conflict,'* WALL STREET J. (June 3, 2016), https://www.wsj.com/articles/donald-trump-keeps-up-attacks-on-judge-gonzalo-curiel-1464911442.

46. *'Drug Dealers, Criminals, Rapists,' supra* note 44.

47. Tanfani, *supra* note 8.

48. Graham Lanktree, *Trump Says Immigrant Gang Members 'Slice and Dice' Young Beautiful Girls*, NEWSWEEK (July 26, 2017), http://www.newsweek.com/trump-says-immigrant-gang-members-slice-and-dice-young-beautiful-girls-642046.

highlighting the few egregious cases, even though the Administration's policies are casting a much wider net, and he is blurring the distinction between peaceful and violent immigrants.[49] In this way, his public calls for law enforcement personnel to violate standard police procedures and to use force against immigration suspects[50] takes on new significance.[51]

The tone of Executive Order No. 13,768 matches both this general and amplified law-and-order rhetoric: "[Sanctuary] jurisdictions have caused *immeasurable harm to the American people and to the very fabric of our Republic*."[52] It also sets up a sharp contrast between tough-on-crime conservatives and liberal jurisdictions that are "*attempting to shield*"[53] immigrant "animals" and "criminals" from removal.[54] Indeed, the Executive Order wades unabashedly into state territory to make the point. The title itself suggests a connection to state police powers: "Enhancing *Public Safety* in the Interior of the United States."[55] And Attorney General Sessions has appeared to justify the federal action as a means to correct ill-conceived locality decisions about how best to protect their community members. He said: "I strongly urge our nation's

---

49. For example, ICE issued a statement noting without great fanfare that over 11,000 non-criminal aliens were arrested within a 100-day period. The same piece goes on to detail the names and crimes of five criminal aliens who were arrested in that same time period. ICE-ERO REPORT, *supra* note 8.

50. In a July 2017 speech to New York law enforcement personnel, the President noted with respect to the ICE Director, "I can only say to Tom [Homan]: Keep up the great work. He's a tough guy. He's a tough cookie. Somebody . . . saw him on television, and . . . they said, he looks very nasty, he looks very mean. I said, that's what I'm looking for." The audience then laughed. Philip Bump, *Trump's Speech Encouraging Police to be 'Rough,'* WASH. POST (Jul. 27, 2017), https://www.washingtonpost.com/news/politics/wp/2017/07/28/trumps-speech-encouraging-police-to-beroughannotated/?utm_term=.727f6defbf55. The President went on to say, "And when you see these thugs [MS-13 gang members and criminal aliens] being thrown into the back of a paddy wagon—you just see them thrown in, rough—I said, please don't be too nice." *Id.* After pausing for audience laughter, the President continued: "Like when you guys put somebody in the car and you're protecting their head, you know, the way you put their hand over? Like, don't hit their head and they've just killed somebody—don't hit their head. I said, you can take the hand away, okay?" *Id.* Again, the audience laughed and applauded. *Id.*

51. While some Americans may not object to such tactics being used against a violent criminal, would they be equally solicitous if such tactics were used against a young undocumented mother who is being arrested in front of her children? Or an American citizen who is mistakenly caught up in an immigration arrest? Unfortunately, the danger of the rhetoric is such that it "breaks the seal" on inappropriate conduct and jeopardizes everyone.

52. Exec. Order No. 13,768, 82 Fed. Reg. 8799, § 1, ¶ 2 (Jan. 25, 2017) (emphasis added).

53. *Id.* (emphasis added).

54. *See* Lanktree, *supra* note 48.

55. Exec. Order No. 13,768, 82 Fed. Reg. 8799 (emphasis added).

states and cities and counties to consider carefully the harm they are doing to their citizens by refusing to enforce our immigration laws and to *rethink these policies. . . . Such policies make their cities and states less safe*—public safety as well as national security are at stake—and put them at risk of losing federal dollars."[56]

2. The Need for a Public Integrationist Narrative

To date, liberals have not reframed these "shielding" and "faulty policing" narratives, although there certainly has been a liberal response. There have been dramatic images in the media of parents being arrested after dropping off their children at school,[57] and some jurisdictions have highlighted the economic and educational contributions immigrant populations make within their communities.[58] Others have highlighted the community policing aspect of local non-cooperation policies.[59] And still others have focused on defensive legal strategies. For example, New York issued a memorandum outlining the legality of local "sanctuary" policies and encouraged other localities to become sanctuaries.[60] Scholars have called on liberal states to embrace federalism and to pursue states-rights' litigation to "shield blue states against Trump."[61]

---

56. Julie Hirschfeld Davis & Charlie Savage, *White House to States: Shield the Undocumented and Lose Police Funding*, N.Y. TIMES (Mar. 27, 2017), https://www.nytimes.com/2017/03/27/us/politics/sanctuary-cities-jeff-sessions.html (emphasis added).

57. Andrea Castillo, *Immigrant Arrested by ICE After Dropping Daughter off at School, Sending Shockwaves Through Neighborhood*, L.A. TIMES (Mar. 3, 2017), http://www.latimes.com/local/lanow/la-me-immigration-school-20170303-story.html.

58. AG Madigan Letter, *supra* note 10, at 2; Complaint, City of Seattle v. Trump, No. 2:17CV00497, 2017 WL 1173703 5-6 (W.D. Wash. Mar. 29, 2017) [hereinafter Seattle Complaint].

59. Erwin Chemerinsky, *Embracing Federalism*, TAKE CARE BLOG (Mar. 16, 2017), https://takecareblog.com/blog/embracing-federalism (explaining the rationale behind community policing policies); Mayor Memorandum, *supra* note 10.

60. Memorandum from Eric T. Schneiderman to Local Law Enforcement Officers, titled: Guidance Concerning Local Authority Participation in Immigration Enforcement and Model Sanctuary Provisions (2017), https://ag.ny.gov/sites/default/files /guidance.concerning.local_.authority.particpation.in_.immigration.enforcement.1.19.17. pdf [hereinafter Schneiderman Memorandum]. *See also* IMMIGRANT LEGAL RES. CTR., SEARCHING FOR SANCTUARY AN ANALYSIS OF AMERICA'S COUNTIES & THEIR VOLUNTARY ASSISTANCE WITH DEPORTATIONS 8 (Dec. 2016), https://www.ilrc.org/sites/default/files/resources/sanctuary_report_final_1-min.pdf (noting that "sanctuary" policies would have a greater impact at the state and county levels).

61. Ilya Somin, *Trump, Federal Power, and the Left—Why Liberals Should Help Make Federalism Great Again*, WASH. POST (Dec. 5, 2016), https://www.washingtonpost.com /news/volokh-conspiracy/wp/2016/12/05/trump-

Yet, another focused specifically on the "sanctuary-city" debate, noting that conservatives established precedents that liberals could now use in their favor—if they were willing to pick up the states-rights' mantra.[62] Perhaps the strongest source of encouragement came from the noted constitutional law scholar, Erwin Chemerinsky, who used mandatory language to describe the states-rights' litigation approach that progressives "must" pursue in order to protect their interests.[63]

Beyond this editorial push, in March 2017, hundreds of high-profile law professors issued a public letter to the President, outlining the rights of "sanctuary cities."[64] From their perspective, the Order is a brazen attempt to coerce local jurisdictions and force them to change their laws and practices in unconstitutional ways. They said:

> When states, cities, and counties promulgate "sanctuary" policies, they are exercising their reserved constitutional authority under the Tenth Amendment to promote the health, safety, and welfare of their residents. At their core, "sanctuary" policies are decisions by state and local governments about state and local priorities, particularly law enforcement priorities.[65]

Several jurisdictions have taken up the mantra and have filed suit, first against President Trump regarding the Executive Order[66] and later against Attorney General Sessions regarding his implementation of the

---

federal-power-and-the-left-why-liberals-should-help-make-federalism-great-again/?tid=a_inl&utm_term=.8b5317bef839. *See also* William Mcgurn, *Make Blue States Great Again: How a Trump Presidency May Help Progressives Embrace Federalism*, WALL STREET J. (Mar. 13, 2017), https://www.wsj.com/articles/make-blue-states-great-again-1489445938 (urging liberal jurisdictions to become laboratories for equality rights); Jeffrey Rosen, *States' Rights for the Left*, N.Y. TIMES (Dec. 3, 2016), https://www.nytimes.com/2016/12/03/ opinion/sunday/states-rights-for-the-left.html?_r=2.

62. *See* Noah Feldman, *Sanctuary Cities Are Safe, Thanks to Conservatives*, BLOOMBERG VIEW (Nov. 29, 2016), https://www.bloomberg.com/view/articles/2016-11-29/sanctuary-cities-are-safe-thanks-to-conservatives.

63. Chemerinsky, *supra* note 59.

64. Letter from Law Professors to President Donald Trump, Re: Proposed Termination of Funding to "Sanctuary" Jurisdictions Under E.O. 13768 is Unconstitutional (Mar. 9, 2017), https://www.ilrc.org/letter-law-profs-1373 [hereinafter Law Professor Letter].

65. *Id.* at 1–2.

66. Complaint, City and County of San Francisco v. Trump, No. 17-cv-0085 DMR, 2017 WL 412999 (N.D. Cal. Jan 31, 2017) [hereinafter San Francisco Complaint]; Schneiderman Memorandum, *supra* note 60.

Order.[67] Their public filings note the contributions made by immigrants, the nature and purpose of their local policies, and the legal deficiencies of the Administration's approach.[68]

In this way, one can see that the liberal responses have been largely legal and academic statements meant to *defend* against President Trump's policies. Conservatives claim liberals are harboring criminals. Liberals respond that most immigrants are not criminals, they are law-abiding and contributing members of local communities. Or liberals claim they are not harboring criminals. Instead, they are making autonomous law enforcement decisions meant to promote public safety. While these arguments are necessary in the legal proceedings, they do not translate into the public domain. Thematically they have not recast conservatives' framing of the issue. Thus, there is a rhetorical mismatch.

As discussed below, liberals should address this deficiency as part of a broader strategy aimed at promoting dialogue. Before addressing that point, however, it is important to correct two foundational misperceptions that have been permitted to flourish in this lacuna.

B. Correcting Basic Misperceptions

The first misperception pertains to the image of an all-powerful federal government. While the federal government has exclusive authority regarding the entry and exit of immigrants, states have sovereign rights regarding the treatment of individuals within their borders and maintaining public safety. In addition, the federal government is limited in the ways in which it can seek to encourage local assistance. In this way, the federal government will not dictate the outcome of the "sanctuary" debate. The U.S. Constitution directs that it is a conversation between two sovereigns. Any legitimate dialogue will have to be based on this constitutional foundation.

The second misperception relates to the term "sanctuary city." It is a misnomer. There are jurisdictions, including cities, counties, *and* states, that limit their law enforcement agents' participation in federal immigration enforcement. Of these, some willingly embrace the "sanctuary" moniker,[69] while others resist it as an ill-defined and

67. Complaint, City & County of San Francisco v. Sessions et. al., No. 17-cv-4642 (N.D. Cal. Aug. 11, 2017); Complaint, California v. Sessions, et. al., No. 17-cv-4701 (N.D. Cal. Aug. 14, 2017); Complaint, City of Chicago v. Sessions, No. 17-cv-5720, 2017 WL 4784789, at *1 (N.D. Ill. Aug. 7, 2017).

68. *Id.*

69. San Francisco Complaint, *supra* note 66.

increasingly pejorative label.[70] In any event, the term does not accurately describe these state and local integrationist policies. These jurisdictions do not seek to "shield" criminals. Instead, in an approach noted by the International Association of Chiefs of Police, the U.S. Conference of Mayors, and the Major Cities Chiefs Association, these jurisdictions seek to promote effective policing of and for all residents within their communities.[71]

As evidenced by these organizations, while the political debate tends to fall along party lines, law enforcement officials do not follow suit. In fact, Rudolph Giuliani, a loyal Trump advisor and former mayor of New York City who is credited with being tough on crime, officially promoted New York's "sanctuary" stance while in office.[72] Indeed, the data supports Giuliani's preferred approach as "sanctuary" counties have lower crime rates and stronger indicia of community stability (e.g., higher employment rates, income rates, etc.) than non-"sanctuary" counties.[73] Further evidence that integrationist policies are focused on crime rather than shelter is the fact that most of the largest cities in the United States currently have some variation of a "sanctuary" policy.[74] This explains the situation of Houston, which is the fourth largest city in America.[75] It is a "sanctuary" jurisdiction in the heart of Texas, which borders Mexico and is one of the most ardent anti-sanctuary states.[76]

The sub-sections that follow address each correction in kind.

1. There Are Two Sovereigns

The force of the conservative rhetoric obscures a fundamentally federalist question: which level of government (i.e., federal or state) has

---

70. Rose Cuison Villazor, *What is a 'Sanctuary'?*, 61 SMU L. REV. 133, 136 (2008) (encouraging people to recognize the pejorative use of the term and the conflation of behavior that may violate federal law with other lawful, important programs); Mayor Memorandum, *supra* note 10 (noting that the authors purposefully did not use the term 'sanctuary' because it is not defined by federal law and actually detracts from the real issue presented by the topic—effective policing).

71. *See* INT'L ASS'N OF CHIEFS OF POLICE, *supra* note 9; Mayor Memorandum, *supra* note 10, at n. 1.

72. Kittrie, *supra* note 10, at 1471.

73. Tom K. Wong, *The Effect of Sanctuary Policies on Crime and the Economy*, CENTER FOR AMERICAN PROGRESS (Jan. 26, 2017), https://www.americanprogress.org/issues/immigration/reports/2017/01/26/297366/the-effects-of-sanctuary-policies-on-crime-and-the-economy/.

74. Kittrie, *supra* note 10, at 1456.

75. *About Houston: Facts and Figures*, CITY OF HOUSTON (Oct. 17, 2017, 1:28 AM), http://www.houstontx.gov/abouthouston/houstonfacts.html.

76. *See* S.B. 4, 85th Leg. (Tex. 2017).

the power to decide how undocumented immigrants will be policed within the territory of individual sovereign states? To help the reader understand the inherent powers with which each side of the debate is imbued, this section describes the constitutional and political dimensions of the question, namely immigration federalism principles, cooperative immigration enforcement, and constitutional limits on federal power (i.e., anti-commandeering, Spending Clause limitations).

a. Immigration Federalism

The first area of inquiry is the constitutional dimensions of federalism—namely, what powers are granted to the national government or reserved to the states?[77] The underlying premise of this question reflects federalism's duality—the founders' original idea[78] that there must be two separate and distinct spheres of control, with certain powers granted to the federal government and others reserved to the sovereign states.[79] However, the "Constitution is silent about the allocation of power between federal and state governments."[80] The Framers lauded this flexibility (i.e., the tug-of-war between federal and

77. Mark C. Gordon, *Differing Paradigms, Similar Flaws: Constructing a New Approach to Federalism in Congress and the Court*, 14 YALE L. & POL'Y REV. 187, 188 (1996).

78. "Original" in this context means "initial" rather than "novel." Some claim that Americans created federalism. While it certainly was a unique and extremely unorthodox approach at the time, other scholars qualify the American contribution to creating a form of "modern" federalism and note that the first documented federation dates back 3,200 years to ancient Israeli tribes. *See* RONALD WATTS, COMPARING FEDERAL SYSTEMS 2 (3d ed., 2008).

79. Federalism was a radical idea in the 18th century. Contemporary political theorists believed that sovereignty was indivisible. FORREST MCDONALD, STATES' RIGHTS AND THE UNION: IMPERIUM IN IMPERIO 1776–1876, at 1 (2000); GORDON S. WOOD, CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 345–46 (1989). Despite stern admonitions, Americans created modern federalism, where national and state systems of government exist and exercise power within a single sovereign country. ALISON L. LACROIX, THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM 1–2 (2010); WATTS, *supra* note 78, at 2. Scholars suggest that this approach was not a matter of divine inspiration but one of practical necessity. While a new central authority was required to meet the needs of the new country, the existence of robust, preexisting states meant that a unitary system was not feasible. ROBERT A. SCHAPIRO, POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDAMENTAL RIGHTS 33 (2009). In order to preserve the powers of these two sovereign entities, the framers devised a system of "dual federalism" where the federal and state governments would operate in separate and distinct spheres as to avoid conflict and tension between them. *Id.*

80. Erwin Chemerinsky, *Formalism and Functionalism in Federalism Analysis*, 13 GA. ST. U.L. REV. 959, 960 (1997).

local power) as a check on tyranny.[81] The flexibility also has proven invaluable to the nation itself.[82] Litigants invoke the judicial process to resolve the allocation question on an "*ad hoc*," issue-specific basis, and "[u]ltimately, the analysis must be about what is the most desirable division of authority between federal and state governments."[83] As this is a matter of interpretation that occurs over centuries, driven by diverse contemporary challenges, there are inevitable sea changes—even with respect to the nature of the Tenth Amendment itself.[84]

In the immigration context, Gulasekaram and Ramakrishnan posit that there have been three distinct phases of American "immigration federalism:" a state-dominated period from 1776 to 1875; a period of federal dominance or exclusivity from 1875 to 1965; and a new era of

---

81. Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) ("[J]ust as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.").

82. The pattern of nationalism during the Revolutionary War is a prime example. The states that were in closest proximity to British forces during the war tended to favor nationalism. Those that vigorously defended states' rights tended to be free from immediate threats of violence. MCDONALD, *supra* note 79, at 11. The same can be said of Abraham Lincoln, who, in the face of the American Civil War in 1861, sought to strike a strongly nationalist (albeit not entirely accurate) view in an attempt to keep the union together. *Id.* at 9. Likewise, in more recent times, the Great Depression and massive civil rights struggles have prompted strong central government action.

83. Chemerinsky, *Formalism and Functionalism, supra* note 80, at 960; *see also* Judith Resnik, *Afterword: Federalism's Options*, 14 YALE L. & POL'Y REV. 468 (1996).

84. Courts have inconsistently policed the line. For example, the Framers' debate regarding the Tenth Amendment focused on whether the amendment served as a reminder that Congress could only act pursuant to its express and implied powers, or did it carve out a "zone of state activities" that Congress may not intrude upon? The answer would shift between these two very different readings of the Constitution no less than five times. Gibbons v. Ogden, 22 U.S. (9 Wheat) 1 (1824), was the starting point. The Court concluded that the Tenth Amendment did not provide an affirmative right upon states; it serves as a reminder that Congress should not legislate beyond its constitutional authority. The *Gibbons* "reminder" position prevailed until the late 19th century, when it was replaced by a vigorous defense of the Tenth Amendment. *See* Hammer v. Dagenhart, 247 U.S. 251 (1918); Carter v. Carter Coal Co., 298 U.S. 238 (1936). The second shift occurred in 1937, when the Supreme Court began to embrace Roosevelt's New Deal legislation and returned to the "reminder" approach. United States v. Darby, 312 U.S. 100 (1941). This position would change again in the 1970s with respect to minimum wage. National League of Cities v. Usury, 426 U.S. 833 (1976). The fourth shift occurred just a decade later when, in the 1980's, the Court expressly overruled *League of Cities*, finding that it was impossible to identify this elusive "zone of protected state activities." Garcia v. San Antonio Metro. Transit Authority, 469 U.S. 528, 580 (1985). Within a decade, however, the fifth shift occurred in New York v. United States, 505 U.S. 144 (1992), where the Court invalidated on Tenth Amendment grounds a federal statute regulating nuclear waste.

state involvement in immigration that has been steadily coming of age, particularly since the attacks of September 11, 2001.[85]

i. Immigration Federalism's First Era: State Dominance

In general, "immigration federalism" explores the boundaries of state power over immigrants located within a state's territory. In the first phase of immigration federalism (1776–1875), which stands in sharp contrast to today's rhetoric, the states were powerful with only "timid" actions taken by the federal government. Recall that the Constitution was premised on dual sovereignty,[86] and while the Constitution enumerated the federal government's power over naturalization,[87] it did not speak directly to immigration (i.e., entry and exit of persons and terms and conditions for remaining).[88] In this vacuum, the federal government did not regulate the number of immigrants and did not have an enforcement system.[89] On the other hand, the states, which had distinct and robust legal traditions, including distinct Constitutions and Bills of Rights,[90] maintained their primary role in immigration regulation. States controlled the movement of persons in many respects. They excluded criminals and those with communicable diseases; required bonds; protected communities from immigrants who might not be self-supporting; ran sophisticated immigrant processing centers in the large port cities; and had taxation mechanisms in place to fund these immigration efforts.[91]

---

85. PRATHEEPAN GULASEKARAM & S. KARTHICK RAMAKRISHNAN, THE NEW IMMIGRATION FEDERALISM 8, 12–14 (2015).

86. Ableman v. Booth, 62 U.S. 506, 516 (1859) ("The powers of the General Government, and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other within their respective spheres.").

87. The Constitution affords the federal government power "[t]o establish a uniform Rule of Naturalization." U.S. CONST., art. I, § 8, cl. 4.

88. Immigration law "addresses which noncitizens can come to the United States and which must stay out or leave. More specifically, immigration law defines the procedures for admission and exclusion at the border, as well as the procedure for removal—also known as deportation—from the interior of the United States." Gabriel J. Chin & Marc L. Miller, *The Unconstitutionality of State Regulation of Immigration Through Criminal Law*, 61 DUKE L.J. 251, 263 (2011).

89. GULASEKARAM & RAMAKRISHNAN, *supra* note 85, at 14–15.

90. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 30–31 (1973). These local impulses were finely tuned and of long standing. Although these states varied in sophistication and development, they predated the new nation. "Virginia had existed for over 150 years before the Declaration of Independence; Massachusetts was only slightly younger." SCHAPIRO, *supra* note 79, at 33.

91. GULASEKARAM & RAMAKRISHNAN, *supra* note 85, at 15–17.

ii. Immigration Federalism's Second Era: Federal Exclusivity

Several significant events ushered in the second phase of immigration federalism: federal exclusivity (1875–1965). The American Civil War removed the slavery dynamic that had previously hindered progress on national immigration policy; it also prompted the creation of a national American identity that had been lacking[92] in the first era of immigration federalism.[93] America now began to assert itself on the international stage, and the courts interpreted its powers regarding naturalization, commerce, and war also to include the power over immigration.[94] At the same time, states lost the ability to finance their internal immigration regimes and looked to the federal government for assistance.[95]

This second era focused on exclusive federal power over immigrants,[96] and the federal government's plenary power in this field is

92. In 1776, the states were not united other than in their common goal of defeating Great Britain. Indeed, contemporary European pundits referred to the term "United States" as a comical oxymoron. JOSEPH J. ELLIS, THE QUARTET: ORCHESTRATING THE SECOND AMERICAN REVOLUTION 1783-1789, at 5 (2015). "Geographical isolation, the date and character of the several settlements, the degree of absence of outside supervision or control—all had their effect in ultimately developing thirteen separate legal systems." GEORGE LEE HASKINS, LAW AND AUTHORITY IN EARLY MASSACHUSETTS: A STUDY IN TRADITION AND DESIGN 6 (1960). They also had varied economies and economic structures; varied community structures; and varied ideas regarding labor and slavery. LAWRENCE M. FRIEDMAN, THE LAW IN AMERICA: A SHORT HISTORY 23–27 (2004). These divergent positions manifested themselves in a variety of ways, including divisions between North and South regarding slavery, divisions between large and small states, and divisions over the fundamental role of government. ELLIS, *supra*, at 13. It follows that the colonists did not have a shared "American" identity, or, at best, being American finished a far-distant second place to their local characters. *Id.*; EUGENE W. HICKOK, WHY STATES? THE CHALLENGE OF FEDERALISM 10 (2007). The strong local bent is understandable. The "vast majority" of these citizens lived, died, and were buried within a thirty-mile geographic radius. ELLIS, *supra*, at xii. They were driven by shared local concerns, and they perceived a distant central power as either irrelevant or as something to view with suspicion. *Id.* at xiv.

93. GULASEKARAM & RAMAKRISHNAN, *supra* note 85, at 16–17.

94. *Id.* at 16. As a matter of policy, immigration's wide-ranging impact on trade, the economy, diplomatic relations, and even the reciprocal treatment of Americans abroad has focused this power squarely in one central government rather than fifty individual and sovereign American states. Arizona v. United States, 567 U.S. 387 (2012). Indeed, the federal government's power to expel or exclude aliens is seen as a "fundamental sovereign attribute exercised by the Government's political departments[.]" Shaughnessy v. United States, 345 U.S. 206, 210 (1953); *see also* Kittrie, *supra* note 10, at 1458 (citing U.S. CONST. art. VI, cl. 2; art. I, § 8, cl. 4; & art. I, § 8, cl. 3, respectively).

95. GULASEKARAM & RAMAKRISHNAN, *supra* note 85, at 16–19.

96. *Id.* at 4.

"broad and undoubted."[97] It follows that state statutory schemes were preempted, even if they did not expressly conflict with federal enactments.[98] A three-part jurisprudential framework was created along these lines.

> First, states' inability to pass immigration legislation comes from a lack of authority, not mere preemption by conflicting federal law. Second, the police power of the states does not extend to regulating immigration. Third, both the establishment of substantive immigration laws and the responsibility for the manner of their execution, belong solely to the national government.[99]

Chin and Miller note that the force of this framework was so strong that "for more than 130 years, few scholars or state legislatures, and virtually no courts, imagined that states could develop their own immigration policies."[100]

Even in the face of this exclusive strength, there remained a small sliver of territory upon which states could operate: alienage law. In contrast to immigration law, which regulates exit and entry, alienage law regulates immigrants' everyday lives.[101] In this way, states had "no direct power to regulate immigration," but they retained "some limited direct power to regulate immigrants."[102]

iii. Immigration Federalism's Third Era: Immigration Cooperation

In the 1960's, the third era of immigration federalism—one of cooperation—was sparked by a confluence of events. In addition to the sliver of alienage territory occupied by the states, the federal government sought to devolve some authority to states via the Immigration and

---

97. *Arizona*, 567 U.S. at 394. Congress has plenary power over immigration. Chae Chan Ping v. United States 130 U.S. 581 (1889). Indeed, "by the late nineteenth century, the case law clearly established an absolute and largely unreviewable federal authority to enact through Congress, and enforce through the executive branch, the nation's immigration laws." Jennifer Chaćon, *The Transformation of Immigration Federalism*, 21 WM. & MARY BILL RTS. J. 577, 583 (2012).

98. Chaćon, *supra* note 97, at 583.

99. Chin & Miller, *supra* note 88, at 268 (citing Chy Lung v. Freeman, 92 U.S. 275 (1875)).

100. *Id.*

101. *Id.* at 263; David Rubenstein, *Immigration Structuralism: A Return to Form*, 8 DUKE J. CONST. L. & PUB. POL'Y 81, 118 (2013).

102. Chin & Miller, *supra* note 88, at 263.

Naturalization Act.[103] In addition, reductions in legal migration opportunities prompted a corresponding increase in undocumented migration and state motivation to impact immigration, alienage, and labor regulation.[104]

At this point the political dimensions of federalism become more relevant, with decision makers focused on the size of the national government, its devolution of power to the states, and the cooperative efforts between the two levels of government. Along these lines, Congress has pursued "cooperative federalism"[105] and "cooperative enforcement." As for the latter,

> Cooperative enforcement is a familiar idea throughout our federal system and a pervasive concept in American criminal justice. Whether the subject is the environment, health and safety, business regulation, or crime, the essential premise of cooperative enforcement is that the federal and state governments are either affirmatively working together or working in tandem, and that they do so under either explicit federal authority or independent state authority.[106]

There are four key forms of immigration enforcement cooperation. The first is information sharing. A locality may not prohibit or restrict communication between federal and local agencies.[107] Second, localities are urged to participate with federal immigration detainer requests pursuant to 8 C.F.R. § 287.7, whereby localities retain custody of an individual, even if the person is otherwise eligible for release from local custody, so that federal officials have an opportunity to bring him into

---

103. H.R. 2580, 89th Cong. (1968).

104. GULASEKARAM & RAMAKRISHNAN, *supra* note 85, at 40, 45–46.

105. Cooperative federalism describes the situation where the federal government sets national standards then devolves authority to states or private entities to implement and regulate performance of the federal standards. An example in the immigration context involves authorizing states to determine immigrant eligibility for Medicaid and other federal benefit programs. 8 U.S.C. § 1612(b)(1) (2012); *see also* Cara Cunningham Warren, *An American Reset—Safe Water & a Workable Model of Federalism*, 27 DUKE ENVTL. L. & POL'Y F. 51, 57–61 (2016) (detailing various forms of federal and state interactions and the Safe Drinking Water Act as an example of cooperative federalism).

106. Chin & Miller, *supra* note 88, at 255.

107. 8 U.S.C. §1373(a) (2012) ("[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.").

custody.[108] Third, localities may enter into a Memorandum of Understanding with the Department of Homeland Security by which their law enforcement agents are trained and supervised to act as federal immigration officers.[109] One final form of local cooperation is federal immigration officers' use of local facilities to conduct immigration enforcement activities. The Department of Homeland Security also may lease detention space.[110]

In terms of correcting false narratives, the important point here is that states, and through them, localities, dictate their level of involvement in federal immigration enforcement; the federal government does not dictate their cooperation other than to prohibit sub-federal officials from restricting communication between federal and sub-federal agencies.

The power of sub-federal agencies and the federal government's reliance on them becomes even more crystallized in the context of America's War on Terror, which was prompted by the attacks of September 11, 2001.

b. Terrorism's Impact on Immigration Cooperation

The four main cooperation opportunities described above began to take shape in the initial decades of this third era of immigration federalism, but the terrorist attacks of September 11th prompted the federal government to pursue cooperation more vigorously.[111] Indeed, the

108. 8 C.F.R. § 287.7(a) (2012) ("A detainer serves to advise another law enforcement agency that the Department seeks custody of an alien presently in the custody of that agency, for the purpose of arresting and removing the alien. The detainer is a request that such agency advise the Department, prior to release of the alien, in order for the Department to arrange to assume custody, in situations when gaining immediate physical custody is either impracticable or impossible."); *see infra* Section III.A. (describing the constitutional concerns raised by detainers).

109. 8 U.S.C. §1357(g)(1) (2012). Their new functions include the "investigation, apprehension, or detention of aliens in the United States (including the transportation of such aliens across state lines to detention centers)." *Id.*; Exec. Order No. 13,768, 82 Fed. Reg. 8799, § 8(b) (Jan. 25, 2017).

110. 8 U.S.C. § 1231(g)(2) (2012).

111. Harris, *supra* note 10, at 1; Claire Huntington, *The Constitutional Dimensions of Immigration Federalism*, 61 VAND. L. REV. 787, 799, 805 (2008); Chacón summarizes the shift in cooperation as follows:

> Following the last round of comprehensive immigration reform in 1986, scholarly, legal, and political consensus seemed to exist around the notion that states and localities would play a limited role in immigration enforcement; a role that was largely confined to making occasional arrests for immigration crimes and in some cases notifying federal enforcement agents of immigration violators in state or local custody. By 2010, an entirely different vision of state and local participation in immigration enforcement had replaced the older, more limited one.

federal government has an incentive to use immigration as a means to promote national security.

> Immigration law [is] an incredibly potent weapon, because it essentially gives the government the ability to incarcerate undocumented aliens preventively, without any proof of involvement in any criminal or terrorist action . . . Immigration law is also quite easy to violate, because of its many technical requirements. And police can use immigration law this way even if they actually have an interest not in immigration, but in terrorism, of which they have scant or no evidence.[112]

Moreover, enlisting the aid of local law enforcement personnel significantly increases the size of the country's immigration force. Some consider federal-local cooperation as the "quintessential force multiplier."[113] Attorney General Sessions himself advocated for this approach in earlier years,[114] as has former Secretary of Homeland Security and current Chief of Staff to President Trump, John Kelly.[115] It is simply a numerical necessity. For example, the Administration seeks 10,000 additional ICE agents.[116] This is essentially an 80% increase in ICE's force.[117] Former Secretary Kelly indicated that it will take several years before this number is reached.[118] In addition to funding questions, it takes significant time to identify, screen, and train these personnel.[119]

Chaćon, *supra* note 97, at 581.

112. Harris, *supra* note 10, at 6.

113. Kobach, *supra* note 6, at 183.

114. Jeff Sessions & Cynthia Hayden, *The Growing Role for State & Local Enforcement in the Realm of Immigration Law*,16 STAN. L. & POL'Y R. 323, 327–29 (2005).

115. Memorandum from John Kelly, Sec'y of the Dep't of Homeland Sec. to Kevin McAleeman, Acting Comm'r, U.S. Customs & Border Prot., Enforcement of the Immigration Laws to Serve the National Security 3 (Feb. 20, 2017), https://www.dhs.gov/publication/enforcement-immigration-laws-serve-national-interest [hereinafter Kelly Memorandum].

116. *Id.* at 5.

117. Josh Keefe, *How Many Immigration Border Officers Are There? Trump to Increase ICE Enforcement Agents by 80%*, INT'L BUS. TIMES (Feb. 21, 2017), http://www.ibtimes.com/how-many-immigration-border-officers-are-there-trump-increase-ice-enforcement-agents-2495482. Based on the fiscal year 2016 budget, there are approximately 12,000 agents currently serving: 5,800 Enforcement and Removal Operations (ERO) agents involved in deportation and immigration enforcement and 6,200 Homeland Security Investigations agents involved in criminal investigations. *Id.*

118. Brian Naylor, *Trump's Plan to Hire 15,000 Border Patrol and ICE Agents Won't be Easy*, NPR (Feb. 23, 2017), http://www.npr.org/2017/02/23/516712980/.

119. *Id.* (noting the one to two-year process of identifying, screening, and training border agents, which are in a different division than ICE).

Indeed, one report estimated that the agency would have to screen 750,000 people in order to fill 5,000 Border Patrol positions.[120] And, even if that many people were seeking employment, it is unclear whether federal immigration work would be a high priority. A 2016 job satisfaction survey indicated that Border Patrol and ICE employees were among the most dissatisfied with their jobs, ranking 291 and 299 of 305 federal agencies respectively.[121]

One could argue that the dissatisfaction rates in 2016 reflect the state-of-affairs during the Obama Administration; however, the fact remains that the number of Border Patrol vacancies has continued to decline under President Trump. Despite his calls for an increased force, there are 220 fewer agents employed as of August 2017 than when President Trump took office.[122] As a result, one can easily see the federal government's need for local law enforcement personnel to fill the significant gap between the Administration's increased enforcement goals and the numerical reality.

A final incentive to seek local involvement in federal immigration enforcement relates to information sharing. Sub-federal agencies have an "informational advantage."[123] The first reason, which carries over from the multiplier advantage above, is that local personnel historically have outnumbered federal immigration personnel nine to one.[124] "This larger network generates correspondingly larger volumes of data."[125] In addition, local personnel also have a tactical advantage over federal officers with respect to obtaining information given their knowledge of the community.[126]

c. The Reality and the Philosophy of Immigration Enforcement Today

In short, the federal government has been seeking a robust cooperative partnership with localities since the 1980s and 1990s, and the threat of terrorism has intensified this quest. In this latest era of immigration federalism, states are not limited to alienage regulation. They now have a firm hand in immigration enforcement and are an important partner in federal immigration efforts. In sharp contrast to

120. Tanfani, *supra* note 8.
121. *Id.*
122. *Id.*
123. Robert A. Mikos, *Can the States Keep Secrets from the Federal Government?*, 161 U. PA. L. REV. 103, 113 (2012).
124. *Id.*
125. *Id.*
126. *Id.*

conservative rhetoric, the Immigrant Legal Resource Center ("ILRC") analyzed 2,556 counties[127] in the United States and concluded that 98% of those reviewed use local resources for some measure of federal immigration enforcement. Specifically, 94% notify federal authorities when a person is being released from local custody, while 77% actually hold that individual based on an immigration detainer request (despite the risk that doing so violates the Fourth Amendment); 91% allow their law enforcement agents to inquire about a person's immigration status; and 98% place no limits on Immigration and Customs Enforcement personnel performing their federal functions within local jails.[128]

As described in the next section, this range of participation reflects how carefully localities calibrate their participation in order to balance local interests and priorities, but before moving to that point, it is important to note here the underlying philosophical dimension of immigration federalism. Participation decisions are instantiations of "restrictionist" and "integrationist" immigration policies (with "sanctuary" jurisdictions falling into this latter category).[129]

Restrictionist jurisdictions are generally hostile to undocumented immigrants and are likely to authorize local law enforcement officials to participate in federal immigration efforts and to impede undocumented immigrants' access to housing, employment, and education.[130] They may engage in direct immigration enforcement by entering into agreements (known as 287(g) agreements) by which local officers are "deputized" to engage in federal immigration enforcement or by requiring local officers to verify the immigration status of a person in their custody.[131] They also may engage in indirect immigration enforcement by penalizing

127. IMMIGRANT LEGAL RESOURCE CENTER, *supra* note 60, at 3. There are a total of 3,141 counties and county equivalents in the United States, with 3,007 entities technically considered counties. *How Many Counties are There in the United States?*, U.S. GEOLOGICAL SURVEY, https://www.usgs.gov/faqs/how-many-counties-are-there-united-states (last visited Nov. 11, 2017). The ILRC does not expressly state why their data is based on only 2,556 counties, but it does explain that it has been tracking local policies on a case-by-case basis and supplemented its research with a Freedom of Information Act request, which produced information in November 2016. IMMIGRANT LEGAL RESOURCE CENTER, *supra* note 60, at 3. One might assume that ILRC only had data for these 2,556 entities. However, even if all of the counties that were not considered were full-fledged "sanctuary" jurisdictions, there still would be an overwhelming number of jurisdictions participating in federal enforcement efforts.

128. IMMIGRANT LEGAL RESOURCE CENTER, *supra* note 60, at 11.

129. MOTOMURA, *supra* note 12, at 58–59, 80–81 (describing the two philosophical approaches).

130. David S. Rubenstein, *Black Box Immigration Federalism*, 114 MICH. L. REV. 983, 988 (2015).

131. Christina M. Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 591–92 (2008).

community members for interacting with undocumented immigrants.[132] Finally, they may limit immigrant access to benefits and services. The aim is "to deter new unauthorized migrants and to force those already present to 'self-deport.'"[133] These efforts "embody the 'attrition-through-enforcement' philosophy."[134]

In contrast, integrationist laws are either neutral or welcoming toward undocumented immigrants. Such laws may limit local law enforcement officers' involvement in federal immigration enforcement and may ease individuals' integration into the community.[135] In the "sanctuary" context, these jurisdictions are extremely unlikely to enter into 287(g) agreements. Instead, integrationist policies generally specify that the jurisdiction's law enforcement officers shall do one or more of the following: "(1) limit inquiries about a person's immigration status unless investigating illegal activity other than mere status as an unauthorized alien (don't ask); (2) limit arrests or detentions for violation of immigration laws (don't enforce); and (3) limit provision to federal authorities of immigration status information (don't tell)."[136] Although with respect to this latter category, jurisdictions must be careful not to run afoul of § 1373, which prohibits states and localities from restricting communications.[137]

This discussion further corrects the false impression of an all-powerful federal government directing local participation in federal immigration enforcement. The final point in this section discusses how there are even limits to the ways in which the federal government can encourage state and local participation.

---

132. *Id.* at 592–93 (discussing penalties assessed against landlords who rent to undocumented tenants).

133. MOTOMURA, *supra* note 12, at 11; Rodriguez, *supra* note 131, at 593. These communities also may seek to preserve their culture.

> Indeed, the fact that many of the local ordinances include official English declarations suggests that localities are concerned with more than illegal immigration. The declarations not only proclaim the need for commonality but also claim that "in today's modem society, [the city] may also need to protect and preserve the rights of those who speak only the English language."

Id. at 594 (internal citations omitted).

134. Rubenstein, *Immigration Structuralism, supra* note 101, at 119.

135. David S. Rubenstein, *Black Box Immigration Federalism*, 114 MICH. L. REV. 983, 988 (2015).

136. Kittrie, *supra* note 10, at 1455; *see also* IMMIGRANT LEGAL RESOURCE CENTER, *supra* note 60 (listing the various ways in which jurisdictions limit their participation in federal immigration enforcement, but also noting the vast majority of jurisdictions that participate in some fashion).

137. 8 U.S.C. § 1373 (2012).

d. States' Rights

The Constitution protects states' rights in various ways: anti-commandeering principles, Spending Clause restrictions, and state police powers, and the states have used these principles in the immigration context to ward against an overly intrusive federal government.[138]

i. Tenth Amendment and Anti-Commandeering

With respect to the Tenth Amendment and anti-commandeering rules, the Tenth Amendment reserves for the states all powers not granted to the federal government.[139] In this way, the Tenth Amendment preserves the sovereign powers of the states. States in their sovereign capacity may volunteer to participate in federal programs, but the federal government cannot command such participation.[140] This concept has been espoused by conservative justices in a line of Supreme Court cases, such as *New York v. United States*[141] (O'Connor, J.); *Printz v. United States*[142] (Scalia, J.); and *NFIB v. Sebelius*[143] (Roberts, C.J.).

In short, Congress can regulate individuals, not states.[144] "The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program."[145] For example, the federal government cannot compel states to enforce federal standards or expend state funds.[146] In this way, voters can hold the appropriate government entity responsible

138. *See* San Francisco Complaint, *supra* note 66.

139. U.S. CONST. amend. X.

140. San Francisco Complaint, *supra* note 66, at para. 104–07; Law Professor Letter, *supra* note 64, at 1, 4; Mayor Memorandum, *supra* note 10, at 12–14; Schneiderman Memorandum, *supra* note 60, at 3.

141. New York v. United States, 505 U.S. 144 (1992) (striking down federal law that required New York to enact legislation regarding the disposal of its radioactive waste or, in the absence of such enactments, take title to said waste).

142. Printz v. United States, 521 U.S. 898 (1997).

143. Nat'l Fed'n Independent Bus. v. Sebelius, 567 U.S. 519, 535–36 (2012) (although this case rests primarily on a Spending Clause analysis, it does discuss these general commandeering propositions in the context of the Affordable Healthcare Act impermissibly requiring states to expand Medicaid coverage).

144. *Printz*, 521 U.S at 920; *New York*, 505 U.S. at 164.

145. *Printz*, 521 U.S. at 935 (Brady Bill impermissibly required local law enforcement agencies to temporarily conduct background checks on gun purchases until the national database was available).

146. *New York*, 505 U.S. at 161.

for implementation and regulation, which promotes governmental accountability and democratic principles.[147]

ii. Spending Clause Limitations

Second, localities may challenge federal action as exceeding the limits placed on federal Spending Clause powers.[148] Congress may encourage state behavior pursuant to the Spending Clause.[149] The leading cases have been *Pennhurst State School & Hospital v. Halderman*[150] and *South Dakota v. Dole*,[151] both written by conservative Chief Justice William Rehnquist. The cases identify four limits on federal spending powers: Congress may incentivize localities to participate in federal programs by offering them access to federal funds; however, the spending conditions (1) must relate to the general welfare (thus connecting the spending to Congress's Constitutional authority pursuant to Article I, Section 8, Clause 1); (2) must be unambiguous and prospective so that the state may knowingly accept or reject the conditions; (3) must not be unrelated to the federal interest (i.e., cannot restrict funds that are unrelated to the behavior Congress seeks to incentivize);[152] and (4) there can be no independent constitutional bar to the federal statute.[153]

The more recent Affordable Healthcare Act case, *Sebelius*, adds an additional consideration—that of "economic dragooning."[154] The Act required states to expand Medicaid coverage to categories of people who were not covered under the previous Medicaid program.[155] The Act penalized states that did not complete this expansion by withholding federal funds that would support the expansion as well as cutting a non-compliant state's existing Medicaid funding.[156]

The Court found that this aspect of the Act violated limits placed on the Spending Clause powers in several respects. First, Congress could not threaten existing Medicaid funding for failing to implement a new

147. *Id.* at 168–69.

148. San Francisco Complaint, *supra* note 66; Law Professor Letter, *supra* note 64, at 1, 3; Mayor Memorandum, *supra* note 10, at 14–17.

149. U.S. CONST. art. 1, § 8, cl. 1 ("Congress shall have Power to Lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States[.]").

150. 451 U.S. 1 (1981).

151. 483 U.S. 203 (1987).

152. *Id.* at 207–08.

153. *Id.* at 207–11.

154. Nat'l Fed'n Independent Bus. v. Sebelius, 567 U.S. 519, 582 (2012).

155. *Id.* at 542.

156. *Id.*

health care plan that aimed to provide universal health care.[157] The funds were separate and independent, and attempting to link them to the expansion was an inappropriate means to pressure states to accept the policy changes.[158] Second, the Court evaluated the percentage of the states' annual budgets that were jeopardized by the threatened cuts.[159] In this case, the funds constituted approximately 10% of the states' annual budgets, whereas the threatened withdrawal of federal highway funds in *South Dakota v. Dole* represented less than half of 1% of the state's budget.[160] The *Sebelius* Court concluded that the 10% reduction amounted to a "gun to the head" that fundamentally altered the non-complying states' ability to accept or reject the federal spending conditions.[161]

iii. State Police Powers

Finally, to the extent federal authority inhibits the effectiveness of community policing, jurisdictions may argue that the federal government is interfering with the states' power regarding criminal law and the suppression of crime, which is broad and unquestioned.[162] For instance, some localities assert that the Executive Order on immigration is an attempt to coerce them to rescind their integrationist policies,[163] which is a direct interference with state autonomy.[164] Specifically, states have a constitutional right to assert their police power.

> The States thus can and do perform many of the vital functions of modern government—punishing street crime, running public schools, and zoning property for development, to name but a few—even though the Constitution's text does not authorize any government to do so. Our cases refer to this general power of

157. *Id.* at 585.
158. *Id.* at 580.
159. *Id.* at 581.
160. *Id.* at 581–82.
161. *Id.* at 581.
162. United States v. Morrison, 529 U.S. 598, 618 (2000) ("We can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.").
163. San Francisco Complaint, *supra* note 66, at para. 1; Law Professor Letter, *supra* note 64, at 1.
164. San Francisco Complaint, *supra* note 66, at para. 3.

> governing, possessed by the States but not by the Federal Government, as the "police power."[165]

This discussion reinforces the point that the "sanctuary" debate is between two sovereigns. We no longer live in an age of federal exclusivity. The federal government has devolved power to the states as a way to bolster the power and the efficacy of the federal enforcement system. In this way, however, the federal government is working with a sovereign entity—the state—and there are protections and powers afforded that entity.[166] A state may choose to become involved in federal immigration enforcement, or it may choose to limit cooperation.[167] Those in the latter category are not seeking to shield criminals; they are seeking to bring them to justice and to promote public safety within their communities.[168] This brings us to the second misperception that needs to be corrected.

2. The Term "Sanctuary City" is a Misnomer

The word "sanctuary" refers to sacred or consecrated spaces, including the holiest of areas within religious buildings, and the protection afforded in such places to those who are "hunted" or in "dangerous conditions."[169] In this context, the phrase "sanctuary city" was apt in the 1980s when American cities sought to protect Central American refugees and also addressed the unequal treatment Haitian refugees received at the hands of the U.S. Government during the Carter and Reagan Administrations.[170]

---

165. *Sebelius*, 567 U.S. at 519.

166. *See* U.S. CONST. amend. X.

167. *See, e.g.*, Law Professor Letter, *supra* note 64, at 5–6.

168. *See* Chen, *supra* note 13, at 18–19.

169. *Sanctuary*, CAMBRIDGE DICTIONARY ONLINE, http://dictionary.cambridge.org/dictionary/english/sanctuary (last visited Nov. 11, 2017); *Sanctuary*, MERRIAM-WEBSTER DICTIONARY ONLINE, https://www.merriam-webster.com/dictionary/sanctuary (last visited Nov. 11, 2017). Perhaps not surprisingly, it is this latter definition regarding the hunted that appears first in the list of meanings for those learning the English language. *See also Sanctuary*, MERRIAM-WEBSTER LEARNER'S DICTIONARY, http://www.learnersdictionary.com/definition/sanctuary (last visited Nov. 11, 2017).

170. Pratheepan Gulasekaram & S. Karthick Ramakrishnan, *The President and Immigration Federalism*, 68 FLA. L. REV. 101, 129–32 (2016). *See also* Rodriguez, *supra* note 131, at 600–01 (noting how "the sanctuary movement took shape in the 1980s, when churches and other affiliated private organizations began providing safe havens for nationals of El Salvador and Guatemala, who had fled brutal civil wars and were thought to have been denied asylum wrongfully." *Id.*).

More contemporary "sanctuary" policies serve a very different function. Although the protection of some immigrants is a tertiary result, the main goals are to pursue effective community policing and to ward against the federal government's attempted intrusion into this local sphere, which, as described above, began in the 1980s and 1990s but accelerated after the 9/11 terrorist attacks.[171] Specifically, "cities with no ties to the original sanctuary movement began [enacting] . . . legislative and administrative responses to the federal government's expanding efforts to enlist state and local police voluntarily in the enforcement of immigration laws in the years after the attacks of September 11, 2001."[172]

In contrast to the rhetoric, the integrationist approach taken by some communities is rooted in effective law enforcement principles and is not aimed at "shielding" undocumented migrants. Evidence indicates that as local participation in federal immigration action increases, so, too, does residents' fear of local authorities.[173] This in turn reduces residents' willingness to report crimes, to serve as witnesses, and to seek treatment for communicable diseases.[174]

Harris notes that isolating immigrant populations within a community is a "basic mistake," not because of "political correctness run amok, or of police officers mesmerized by cultural diversity training" but because officers using "community policing know that they can only make their communities safe—from criminals, from terrorists, or from any other threat—by working *with* communities, and

171. To be fair, not all "sanctuary" policies are purely instrumental. *See* Mikos, *supra* note 123, at 128–29. Localities "also care about how their labors are being put to use, and they strongly object to advancing federal policies they deem cruel or offensive." Some localities simply do not want to "advance what many perceive to be draconian federal immigration policies. . . . [L]ocal officials may think it unduly harsh to deport someone who has just become the victim of a crime, even if that person is in the country illegally." This stance is not a "touchy feely" position; it is a fundamental point regarding the rule of law. *Id.* at 129; Chen, *supra* note 13, at 16 (noting cooperation or non-cooperation is linked to people's perceptions of legitimacy, social values, and morality).

172. Rodriguez, *supra* note 131, at 601; *see also* Kittrie, *supra* note 10, at 1474–75.

173. Mayor Memorandum, *supra* note 10, at 2–3, n. 6.

174. *Id.* ("One study of Latinos in four major cities found that 70% of undocumented immigrants and 44% of all Latinos are less likely to contact law enforcement authorities if they were victims of a crime for fear that the police will ask them or people they know about their immigration status, and 67% of undocumented immigrants and 45% of all Latinos are less likely to voluntarily offer information about, or report, crimes because of the same fear."); Nik Theodore, *Insecure Communities: Latino Perceptions of Police Involvement in Immigration Reinforcement*, POLICY LINK, (May 2013), http://www.policylink.org/sites/default/files/INSECURE_COMMUNITIES_REPORT_FINAL.PDF.

decidedly *not* by instilling the type of fear that working as adjunct immigration agents will create."[175]

Anecdotal evidence supports this argument and indicates that trust plays an important role in community policing.[176] The Department of Justice presented a statement to Congress regarding crimes against immigrants, wherein one witness testified: "[T]hese are the most common problems within our community: That my purse was stolen, they assaulted me, they robbed me, and we simply stay quiet, we don't call the police because we are afraid to call them, we don't trust them."[177] Another person explained, "[o]ut of fear, we stay quiet."[178] This is problematic given the significant level of crimes committed *against* immigrants. It was estimated more than a decade ago that "approximately 200,000 violent crimes are committed against unauthorized aliens, and one million property crimes are committed against unauthorized alien households in the United States each year."[179]

These personal perceptions obviously implicate police effectiveness. The former "sanctuary" jurisdiction of Houston, Texas, is a prime example. After the enactment of a prominently anti-sanctuary statute, Senate Bill 4,[180] the number of violent crimes reported by the Hispanic community decreased dramatically (e.g., almost a 43% decrease in the number of sexual assaults reported),[181] even though crime rates were

175. Harris, *supra* note 10, at 7–8.

176. *See generally* Gupta, *supra* note 12; THE FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING 3 (May 2015), https://cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf [hereinafter FINAL TASKFORCE REPORT].

177. Gupta, *supra* note 12, at 4.

178. *Id.*

179. Kittrie, *supra* note 10, at 1455.

180. TEX. CODE ANN. § 752.051 *et. seq* (West 2017) (also known as S.B. 4, 85th Leg. (Tex. 2017)) (prohibiting entities within the state from adopting "sanctuary" laws or policies with respect to information and federal detainer requests); *id.* § 752.053(b) (as for information, an entity cannot restrict inquiry into the immigration status of people in custody pursuant to lawful detainers or arrest warrants, and the prohibition extends to the maintenance and dissemination of such status information); *id.* §752.053(b)(3) (entities also may not prohibit personnel from assisting in federal immigration enforcement); *id.* §752.056(a) (the statute "waives and abolishes" sovereign immunity and takes a two-pronged approach with respect to penalties); *id.* §752.056(a) & (b), §752.0565 (a violation of this portion of the statute gives rise to civil liability for entities, with each day of non-compliance considered a separate offense, and to forfeiture of public office for individuals).

181. *Houston MS-13 Gang Crimes Disproportionately Brutal Police Chief Says*, NPR (July 26, 2017, 4:35PM), http://www.npr.org/2017/07/26/539576156/houston-ms-13-gang-crimes-disproportionately-brutal-police-chief-says. This result is entirely predictable based on Congressional testimony offered almost fifteen years ago.

> Fear of being reported to the INS and of subsequent deportation is one of the most significant factors preventing immigrant victims of domestic violence

increasing overall because of a wave of MS-13 gang violence.[182] Houston's Chief of Police lamented the impact the new statute was having on investigative efforts:

> The truth of the matter is when you talk to cops, they're telling me story after story of crimes being committed, of being able to identify the victim, but then having victims not want to cooperate, not want to come forward, and having to work two, three, 10 times as hard to get other community members to try to convince people to cooperate.[183]

The chief went on to say, "When you see that chilling effect, when the victims and witnesses of crime are hesitant to come forward because of the ugliness of this political debate, that is an absolute loss for all of us. And we should all be concerned."[184]

If this were not enough, there is evidence to suggest that devolution of federal immigration enforcement to local law enforcement agents may prompt racial profiling and discrimination, particularly because local officers may not be trained in the nuances of immigration enforcement.[185] The great irony here is that "sanctuary" policies are designed to support law enforcement efforts to apprehend and prosecute criminals, not to shield them. On the other hand, tough-on-crime restrictionist policies are likely to shield criminals, against whom

---

> from seeking help from legal and social service systems. . . . Abusers of immigrant domestic violence victims actively use their power to control their wife's [sic] and children's immigration status together with fears about and threats of deportation as tools to keep their abused spouses and children from seeking help or from calling police to report the abuse.

Kittrie, *supra* note 10, at 1451 n. 8 (internal citations omitted).

182. *Houston MS-13 Gang Crimes Disproportionately Brutal Police Chief Says*, *supra* note 181. To highlight the complexity of the debate and also the potential "chicken and egg" aspect of the conflict, a restrictionist could argue that the spate of gang violence was attributable to the fact that Houston was a "sanctuary" jurisdiction serving as a "magnet" for undocumented immigrants. The statistics that directly compare the commission of crime within "sanctuary" and "non-sanctuary" jurisdictions would refute that point, Wong, *supra* note 73; however, the restrictionist narrative is easier to understand and to communicate to an audience in sound bites. This discrepancy proves the need for informed discourse.

183. *Houston MS-13 Gang Crimes Disproportionately Brutal Police Chief Says*, *supra* note 181.

184. *Id.*

185. Chaćon, *supra* note 97, at 577–78, 612–13 (noting "the distinction between trained agents acting within their sphere of expertise and sub-federal law enforcement making "reasonable suspicion" determinations based upon no particular training whatsoever." *Id.*). *See also* AG Madigan Letter, *supra* note 10, at 4; GULASEKARAM & RAMAKRISHNAN, *supra* note 85, at 189–90.

intimidated immigrants will not testify, and to subject all residents (citizens, lawful residents, and undocumented immigrants) to unconstitutional police behavior.

Continuing on the misnomer theme, the decision to enact "sanctuary" policies also is rooted in economic and general resource concerns. Participation in federal immigration efforts taxes local law enforcement agencies in unsustainable ways given the nature of 21st century policing.[186] Since 9/11, localities have seen a dramatic increase in local policing efforts and responsibilities, and the demands are expected to grow.[187] For example, state and local police have the added burden of protecting critical public infrastructure; installing personnel or surveillance equipment to monitor public transportation and transit networks; securing potentially dangerous structures such as chemical plants or nuclear-powered generating stations; and protecting soft targets such as concerts, sporting events, and tourist attractions.[188] In this context, the additional burden of federal immigration enforcement is seen as an "unfunded mandate."[189]

In this way, integrationist policies involve a careful balancing act. Again, these jurisdictions have incredibly high cooperation rates with federal immigration officials, but they must tailor their approach to meet local concerns and needs. Statistical evidence indicates that integrationist policies achieve their goals. Indeed, a recent study concluded that sanctuary counties that do not honor ICE detainers have 35.5 fewer crimes committed per 10,000 people "than counties that do honor the requests."[190] These counties also have higher median incomes, lower poverty and unemployment rates, and less reliance on public assistance programs.[191]

---

186. Harris, *supra* note 10, at 10–13.

187. FINAL TASKFORCE REPORT, *supra* note 176, at 3 ("Today's line officers and leaders must be trained and capable to address a wide variety of challenges including international terrorism, evolving technologies, rising immigration, changing laws, new cultural mores, and a growing mental health crisis.").

188. Harris, *supra* note 10, at 10–13.

189. Kittrie, *supra* note 10, at 1477.

190. Wong, *supra* note 73. Restrictionist jurisdictions would argue that high crime rates justify tougher immigration enforcement policies. *See* Arizona v. United States, 567 U.S. 387, 398 (2012) (noting high rates of crime in Maricopa County). While some jurisdictions will be harder hit than others by violent crimes, restrictionist policies might conversely exacerbate the problem. "Decades of research and practice support the premise that people are more likely to obey the law when they believe that those who are enforcing it have authority that is perceived as legitimate by those subject to the authority. The public confers legitimacy only on those whom they believe are acting in procedurally just ways." FINAL TASKFORCE REPORT, *supra* note 176, at 1.

191. Wong, *supra* note 73.

Rather than focus on these points, conservatives tend to highlight the case of Kathryn Steinle. The story is so unsavory that telling it once has more impact than describing all of the "small-town" victories that an integrationist jurisdiction could proffer. Ms. Steinle's assailant had been removed from the United States five times.[192] He was arrested and served a sentence in federal prison for his unauthorized re-entry.[193] Federal officials then transferred him to San Francisco's custody because of a decade-old charge involving the sale of $20 of marijuana.[194] The local prosecutor declined to prosecute, and the assailant was released rather than being transferred to ICE for deportation.[195] Several months after his release, Steinle's assailant found sleeping pills and a gun on the street.[196] He allegedly took the pills, became disoriented, and accidently discharged the gun into the pavement.[197] The bullet ricocheted and killed Steinle.[198]

Conservatives tend to use Steinle's death as a representative case that speaks to all of the inherent flaws and dangers of the integrationist approach.[199] Nevertheless, putting aside this terrible, isolated case reveals a different reality. As a general matter, "immigrants are *less* likely" to commit crimes, and less likely to be incarcerated, than native-born Americans.[200] In this way, crime rates decrease when immigration rates increase.[201] Even the ICE director has tacitly admitted this point.[202] Moreover, as noted above, integrationist counties have lower crime rates and stronger indicia of community stability (e.g., higher employment rates, income rates, etc.) than restrictionist counties.[203]

---

192. Christopher N. Lasch, *Sanctuary Cities and Dog-Whistle Politics*, 42 NEW ENGLAND J. ON CRIM. & CIV. CONFINEMENT 159, 165–66 (2016).

193. *Id.* at 165.

194. *Id.* at 165–66.

195. *Id.* at 166. As a "sanctuary" jurisdiction, San Francisco honors detainer requests only for dangerous felons or when a judicial officer authorizes detention. *Id.*

196. *Id.*

197. *Id.* at 167.

198. *Id.* at 165–67.

199. *Id.* at 173.

200. Water Ewing, Daniel E. Martinez, & Ruben G. Rumbaut, *The Criminalization of Immigration in the United States*, AMERICAN IMMIGRATION COUNCIL 4 (Jul. 13, 2015), https://www.americanimmigrationcouncil.org/research/criminalization-immigration-united-states.pdf.

201. *Id.*

202. Philip Bump, *The Director of ICE Just Declined to Support a Central Argument of Trump's Candidacy*, WASH. POST (June 28, 2017), https://www.washingtonpost.com/news/politics/wp/2017/06/28/the-director-of-ice-just-declined-to-support-a-central-argument-of-donald-trumps-candidacy/?utm_term=.1ed6c0c7edd8.

203. Wong, *supra* note 73.

In contrast to this objective data, there is a dearth of information offered to support the conservatives' "shielding" narrative. ICE has suspended the publication of its weekly "Declined Detainer Outcomes Report,"[204] which is mandated by Executive Order No. 13,768.[205] The report was supposed to identify jurisdictions with the highest volume of declined detainer requests and list sample crimes committed by released individuals.[206] ICE reports it "remains committed to publishing the most accurate information available regarding declined detainers across the country and continues to analyze and refine its reporting methodologies. While this analysis is ongoing, the publication of the DECLINED DETAINER OUTCOME REPORT will be temporarily suspended."[207] Likewise, VOICE—Victims of Immigration Crime Engagement—which was supposed to report crime statistics on a quarterly basis,[208] has not done so.[209] Instead, ICE has publicized its arrests of "egregious" criminals.[210] For example, a recent ICE report noted that 30,473 convicted criminal aliens had been arrested in 2017.[211] Of these, the report went on to name five individuals who had been arrested in "sanctuary" jurisdictions.[212] The stunning logical gap, however, is that the report does not link any of the crimes to integrationist policies. Indeed, the individuals were arrested in these localities.[213] And even if one were to assume that there was a link—just for the sake of argument—the evidence would suggest that integrationist policies were somehow implicated in 0.00016% of cases involving convicted criminal aliens.

---

204. U.S. IMMIGRATION & CUSTOMS ENF'T, DECLINED DETAINER OUTCOME REPORT (Apr. 13, 2017) https://www.ice.gov/declined-detainer-outcome-report [hereinafter Declined Detainer Outcome Report].

205. Exec. Order No. 13,768, 82 Fed. Reg. 8799, § 9(b) (Jan. 25, 2017).

206. DECLINED DETAINER OUTCOME REPORT, *supra* note 204. ICE did release at least one such report in March 2017, detailing activity from January 28 to February 3, 2017. The report indicates that over 3,000 detainer requests were issued and approximately 200 were declined. U.S. Immigr. & Customs Enforcement, *Weekly Declined Detainer Outcome Report for Recorded Declined Detainers for Jan. 23–Feb. 3 2017*, https://www.ice.gov /doclib/ddor/ddor2017_01-28to02-03.pdf.

207. DECLINED DETAINER OUTCOME REPORT, *supra* note 204.

208. Exec. Order No. 13,768, 82 Fed. Reg. 8799, § 13.

Noting that the "office shall provide quarterly reports studying the effects of the victimization by criminal aliens present in the United States." *Id.*

209. Dep't of Homeland Sec., Customs & Immigration Enf't, *Victims of Immigration Crime Engagement (VOICE) Office* (Sept. 18, 2017), https://www.ice.gov/voice.

210. ICE-ERO REPORT, *supra* note 8.

211. *Id.*

212. *Id.*

213. *Id.*

To be clear, the point here is not to diminish the harm that can be done by undocumented criminal immigrants; the point is to have an informed debate. Despite strong conservative rhetoric, which seeks to criminalize all immigrants and to blame integrationist policies for "shielding" criminals, the reality is something else. Immigrants are less likely to commit crimes than the native-born.[214] But when they do, conservatives have difficulty establishing a causal connection between the action and integrationist policies except in rare cases such as Kathryn Steinle's death.

This section has revealed the ways in which the current immigration "discourse" is inflaming political narratives and frustrating informed dialogue. Now that one can see the true power balance between federal and state sovereigns and the true purpose and achievements of integrationist jurisdictions, the next task is to peel back the layers even further to identify the need for a new integrationist approach.

III. A CALL FOR STRATEGIC ACTION

Part III seeks to prompt change by exposing the risks posed by the liberals' current approach to states-rights' litigation. Simply put, the strategy is incomplete. Subparts (A) and (B) argue that lawsuits designed to protect federal funding should proceed but should be coupled with a concerted effort to change the immigration narrative in order to ward against conservative backlash. In addition, the lawsuits alone will do nothing to adjust the Administration's immigration enforcement priorities, which are indirectly lethal to integrationist policies. To avoid these ramifications, subpart (C) urges that the suits be used as a form of non-cooperation designed to promote dialogue regarding enforcement priorities. As noted in subpart (D), *détente* will be difficult, but liberals must pursue it, not only for the reasons already proffered, but also because there is something even greater at risk. As Secretary Gates noted, America's government dysfunction is its greatest national security threat.[215] Liberals must seek to break the impasse.

A. The Need to Maintain Current Litigation Aimed at the Preservation of Federal Funds

First, states-rights' litigation has become increasingly necessary. The Trump Administration's approach is in its third iteration, and integrationists are correct to pursue litigation. On one hand, there could

214. Ewing, Martinez & Rumbaut, *supra* note 200.
215. *Face the Nation Transcripts*, *supra* note 4.

be a legitimate threat to federal funding, or, at the very least, declaratory action is a means to gain some stability in the midst of an evolving federal approach.

In terms of background, Executive Order No. 13,768 was issued on January 25, 2017,[216] just several days after the inauguration, and was coupled with Executive Order No. 13,769 ("Muslim Travel Ban").[217] President Trump signed it with great flourish and touted it as a campaign promise kept.[218] The Order authorizes the attorney general to withhold "federal funds" from jurisdictions that "willfully refuse to comply" with § 1373.[219] It goes on to authorize the attorney general to take 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"[220] (a/k/a "sanctuary cities"). Several integrationist jurisdictions filed states-rights' litigation to protect such funds.[221] The most relevant arguments urge that the Order runs afoul of the Tenth Amendment and anti-commandeering principles, Spending Clause limitations, and the states' police powers.[222] The localities also argue that President Trump is exceeding his Article II powers; only Congress can place conditions on federal spending via legislation.[223]

---

216. Exec. Order No. 13,768, 82 Fed. Reg. 8799, § 13 (Jan. 25, 2017).

217. Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017).

218. Sarah Posner, *Trump Makes Good on His Nativist Campaign Promises*, ROLLING STONE (Jan. 26, 2017), http://www.rollingstone.com/politics/features/trump-makes-good-on-his-nativist-campaign-promises-w463132.

219. Exec. Order No. 13,768, 82 Fed. Reg. 8799 § 9(a).

220. *Id.* (emphasis added).

221. San Francisco Complaint, *supra* note 66; County of Santa Clara v. Trump, 250 F. Supp. 3d 497 (N.D. Cal. 2017); Seattle Complaint, *supra* note 58.

222. San Francisco Complaint, *supra* note 66, at 60–63.

223. *Id.* The Executive Order raises an interesting legal question. "Determining the scope of the executive branch's preemptive power presents one of the most pressing questions in immigration law today. That is because the great bulk of contemporary immigration policymaking stems not from Congress, but rather from executive branch agencies and states." Catherine Y. Kim, *Immigration Separation of Powers and the Power of the President to Preempt*, 90 NOTRE DAME L. REV. 691, 692 (2014). In general, scholars have noted the rise of executive action in the immigration context and suggest a new paradigm:

> 1. The federal government can freely choose its lawmaking modes; 2. Non-binding enforcement policies may qualify as federal law; 3. In the event of possible conflict between Congress's law on the books and the 'law in action,' the latter takes presumptive precedence, at least for purposes of preemption; 4. Executive enforcement policies, which are not binding on the federal government, can nevertheless bind state and local actors; and 5. State and local restrictionist laws, but not sub-federal integrationist laws, should be presumptively preempted by incorporation of an 'equality norm' into preemption analysis.

The federal district court in the San Francisco/Santa Clara litigation has agreed thus far. In general, there are three main sources of federal funds available to localities that relate to immigration and local law enforcement.[224] Nevertheless, the Executive Order does not limit the withdrawal of funds to these sources.[225] In its Order Granting a Temporary Restraining Order, the court concluded that the Executive Order's threat to withhold federal funds was ambiguous and retrospective.[226] The court also concluded that there was a nexus concern because the Executive Order covered an overly broad class of federal funds and grants;[227] therefore, the threats were coercive given the percentage of the localities' budgets that might be affected.[228]

One month later, in May 2017, Attorney General Sessions issued a guidance memorandum that quietly reduced the Executive Order's scope.[229] Attorney General Sessions clarified that the Order applied to "federal grants administered by the Department of Justice or the Department of Homeland Security,[230] *and not to other sources of federal funding.*"[231] He also conditioned the receipt of federal funds on

---

Rubenstein, *Black Box Immigration Federalism*, *supra* note 135, at 990, summarizing MOTOMURA, *supra* note 12, at 133–135, 152; *see also* Gulasekaram & Ramakrishnan, *The President and Immigration Federalism*, *supra* note 170, at 112 (noting the increased power of executive action in the immigration context).

224. Mayor Memorandum, *supra* note 10, at 8. These are the Edward Byrne Memorial Justice Assistance Grants, State Criminal Alien Assistance Programs, and Office of Community Oriented Policing Services.

225. Exec. Order No. 13,768, 82 Fed. Reg. 8799, § 9 (referring generally to "federal funds.").

226. *County of Santa Clara*, 250 F. Supp. 3d at 532.

227. *Id.* at 532–33.

228. *Id.*

229. Memorandum from Jeff Sessions, Att'y Gen., on Implementation of Executive Order No. 13,768 'Enhancing Public Safety in the Interior of the United States,' at 1 (May 22, 2017), https://www.justice.gov/opa/press-release/file/968146/download [hereinafter Sessions Memorandum].

230. *Id.* at 2 (emphasis added). He specified that this included "any existing grant administered by the Office of Justice Programs and the Office of Community Oriented Policing Services that expressly contains this certification [of 1373 compliance] condition and to future grants for which the Department is statutorily authorized to impose such a condition." *Id.*

231. *Id.* at 1. Nevertheless, the document went on to state:

> Separate and apart from the Executive Order, statutes may authorize the Department to tailor grants or to impose additional conditions on grantees to advance the Department's law enforcement priorities. Consistent with this authority, over the years, the Department has tailored grants to focus on, among other things, homeland security, violent crime [including drug and gang activity], and domestic violence. Going forward, the Department, where authorized, may seek to tailor grants to promote a lawful system of immigration.

compliance with 8 U.S.C. § 1373, a provision with which states and localities are already required to comply (i.e., states and localities cannot prohibit their agents from communicating with federal immigration officials).[232] In this regard, he also signaled a withdrawal from the Executive Order's "prevent and hinder" language, which was seen as an expanded interpretation of § 1373 requirements.[233]

The third approach came in July 2017. After President Trump launched a week-long assault on his own attorney general, prompting Republicans and Democrats alike to publicly defend him,[234] Attorney General Sessions announced via press release that funding for one particular federal program will be linked to two other forms of cooperation: notifying federal officials forty-eight hours before individuals of interest are released from local custody and providing federal agents access to state and local detention facilities.[235] As with the initial guidance memorandum, which linked the receipt of funds to § 1373, a provision with which all states and localities already are required to comply, the overwhelming majority of counties already cooperate with respect to notification and the use of facilities. 94% notify federal authorities when a person is being released from local custody, although not within the new forty-eight hour requirement.[236] And 97% place no limits on federal officials performing immigration functions within local facilities.[237]

Id.

232. *Id.* at 2

> Any jurisdiction that fails to certify compliance with § 1373 will be ineligible to receive such awards. This certification requirement will apply to any existing grant administered by the Office of Justice Programs and the Office of Community Oriented Policing Services that expressly contains this certification condition and to future grants for which the Department is statutorily authorized to impose such a condition.

Id.

233. *Id.* The memorandum made clear that the Administration reserved the right to criticize "sanctuary" jurisdictions but that the interpretation of 1373 would not be expanded to include "hindering." It stated: "nothing in the Executive Order limits the Department's ability to point out ways that state and local jurisdictions are undermining our lawful system of immigration or to take enforcement action where state or local practices violate federal laws, regulations, or grant conditions." *Id.*

234. Editorial, *Donald Trump's Assault on Jeff Sessions*, N.Y. TIMES (July 26, 2017), https://www.nytimes.com/2017/07/26/opinion/donald-trumps-assault-on-jeff-sessions.html?mcubz=0.

235. Press Release, U.S. Dep't of Justice, *supra* note 6. "From now on, the Department will only provide Byrne JAG grants to cities and states that comply with federal law, allow federal immigration access to detention facilities, and provide 48 hours notice before they release an illegal alien wanted by federal authorities." *Id.*

236. IMMIGRANT LEGAL RES. CTR., *supra* note 60, at 11.

237. *Id.*

Nevertheless, these newer conditions certainly are a more meaningful imposition on local autonomy than simply requiring § 1373 compliance. In fact, the forty-eight hour notification requirement raises constitutional concerns to the extent it may become a *de facto* detainer request. Recall that a locality may detain a person who otherwise is eligible for release if federal officials have issued a detainer request as outlined in 28 C.F.R. § 287.7; however, the practice is challenged increasingly on constitutional grounds. Courts have concluded that detaining a person in these circumstances constitutes a "subsequent seizure of a former detainee," which triggers Fourth Amendment protections anew.[238] Yet federal immigration detainers are requests from ICE. They are not arrest warrants and are not issued by a judicial officer; therefore, they are likely to run afoul of Fourth Amendment probable cause requirements.[239] Moreover, localities bear the burden of these detentions in terms of the cost, use of personnel and space, and liability for constitutional violations (unless state law otherwise directs).[240]

To the extent the notification requirement has a specific temporal aspect, a locality may find itself unable to release an individual because the notification period has not yet expired. Thus, the July 2017 requirements for the Edward Byrne Memorial funds should be challenged. In addition, declaratory action is a means to obtain some

238. Miranda-Olivares v. Clackamas County, No. 3:12-cv-02317-st., 2014 WL 1414305, at *9 (D. Or. Apr. 11, 2014); *see also* Pierce v. Multnomah County, 76 F.3d 1032, 1042–43 (9th Cir. 1996); Austin v. Hamilton, 945 F.2d 1155, 1158–60 (10th Cir. 1991).

239. Morales v. Chadbourne, 235 F. Supp. 3d 388 (D. RI. 2017) (holding an individual beyond his release date is an arrest that must be supported by probable cause, which detainers do not provide), appeal docketed, No. 17-1300 (1st Cir. Mar. 31, 2017); Miranda-Olivares, 2014 WL 1414305 (county violated the Fourth Amendment when it held individual pursuant to a federal immigration detainer request after detainee was entitled to release on state charges; prolonged detention was not supported by probable cause); Galarza v. Szalczyk, 745 F.3d 634 (3d Cir. 2014) (stating detainer requests are voluntary, and the county can be held liable for unlawfully detaining an individual); Santos v. Frederick County Bd. Of Comm'rs, 725 F.3d 451 (4th Cir. 2013) (local deputies violated the Fourth Amendment when they detained a person who was the subject of a civil immigration warrant).

240. *See* Gunn v. Commonwealth, 78 N.E.2d 1143 (Mass. 2017) (determining that state court officers could not arrest and hold an individual solely on the basis of a federal civil immigration detainer, beyond the time that the individual would otherwise be eligible for release from local custody, unless state law provided such authority); S.B. 4, 85th Leg. § 3.01 (Tex. 2017) (directing the state attorney general to defend a locality for alleged constitutional violations related to actions taken as part of federal immigration enforcement and directing the state to assume all liability for same).

stability in light of the evolving federal position. Indeed, California, Chicago, and San Francisco have filed such suits.[241]

First, states and localities have strong constitutional arguments that they can pursue to protect their federal funding.[242] Anti-commandeering principles protect states and localities from compulsory compliance.[243] The federal government can only request performance, and the request cannot be a form of "economic dragooning," which these conditions could be.[244] (California alleges its expectation to receive $28.3 million from the Byrne Memorial Fund in fiscal year 2017.[245] Chicago alleges receipt of $2.33 million from the Byrne Memorial Fund in fiscal year 2016 alone and notes the extent to which the funds have been used to promote public safety in the city.[246]) Moreover, the receipt of federal funds cannot be conditioned on states and localities performing unconstitutional acts.[247] The notification requirement and corresponding Fourth Amendment concerns fit into this category.[248]

Moreover, pursuing declaratory action is a way to promote stability in light of the evolving federal approach, which does appear to have strong political, and thus destabilizing, dimensions. In fact, there appears to be a tug-of-war between President Trump and his Attorney General. For example, these latest conditions were only imposed after President Trump publicly pushed Attorney General Sessions to act.[249] The attorney general responded by adding requirements, but he targeted conditions that the vast majority of counties already meet (except the forty-eight hour requirement).[250] This same dance occurred with respect to the Executive Order itself. Recall how Attorney General Sessions's first guidance memorandum "walked back" the more expansive aspects of the Executive Order and linked funding to § 1373, a provision with which localities already were required to comply.[251] To the extent political

241. Complaint, City & County of San Francisco v. Sessions, et al., No. 17-cv-04642 (N.D. Cal. Aug. 11, 2017); Complaint, California v. Sessions, et. al., No. 17-cv-4701 (N.D. Cal. Aug. 14, 2017); Complaint, City of Chicago v. Sessions, No. 17-cv-5720 (N.D. Ill. Aug. 7, 2017).

242. *See supra* Section II.B.1.d. (detailing the states-rights' protections—anti-commandeering and Spending Clause limitations as well as state police powers).

243. *See* Printz v. United States, 521 U.S. 898, 935 (1997).

244. Nat'l Fed'n Independent Bus. v. Sebelius, 567 U.S. 519, 582 (2012).

245. Complaint at ¶ 2, California v. Sessions et al., No. 17-cv-4701.

246. Complaint at ¶ 41, City of Chicago v. Sessions, No. 17-cv-5720.

247. South Dakota v. Dole, 483 U.S. 203, 207–11 (1987).

248. *See, e.g.*, Miranda-Olivares v. Clackamas County, No. 3:12-cv-02317-st., 2014 WL 1414305, at *4 (D. Or. Apr. 11, 2014).

249. Editorial, *Donald Trump's Assault on Jeff Sessions*, *supra* note 234.

250. *See* Sessions Memorandum, *supra* note 229.

251. *See generally*, *id.*

calculations may be driving conservative policy, there is even greater instability for integrationists. Declaratory action could be a means of obtaining a settled answer, albeit only for one fiscal year of funding, in the midst of conservative changes.

In this context, states-rights' litigation has proven to be increasingly necessary—whether because of a legitimate threat to federal funding or the need to seek stability in the midst of an evolving federal approach. Nevertheless, litigation also will bolster the conservative narrative,[252] so it should be pursued in concert with an effort to recast the conservative narrative.

B. The Need to Promote a Public Narrative That Wards Against Conservative Backlash

Litigation undertaken in the absence of efforts to correct the anti-immigrant and "harboring" narratives will most likely further fuel conservative politics and hinder future dialogue, particularly as the 2018 and 2020 election cycles approach. Douglas NeJaime's review of social-movement litigation is instructive and should inform the liberals' approach.[253] He evaluated both liberal and conservative social-movement litigation and identified the "productive power" of litigation loss.[254] Specifically, litigation losses may help an entity in terms of building an organization's identity and message; mobilizing supporters; publicizing the cause; encouraging new membership; capturing the interest of elite decision makers; and increasing donations of time and money.[255] This backlash, in turn, supports efforts aimed at stalling implementation of the winning side's court judgment.[256]

In this way, there are movements and counter-movements, and the intensity of the backlash may vary depending on the extent to which the court's judgment departs from public opinion. If the change is significant, it can "inspire backlash that further complicates implementation of reform and makes additional advances unlikely. In

252. NeJaine, *supra* note 24, at 955.

253. *Id.* at 941. For an excellent resource regarding social movements and their impact on the law, *see* LAW AND SOCIAL MOVEMENTS (Michael McCann ed., 2006).

254. NeJaime, *supra* note 24, at 969–70.

255. *Id.* at 941.

256. *Id.* at 950 (describing how backlash stymied civil rights progress after Brown v. Board of Education, 347 U.S. 483 (1954), which is the seminal U.S. Supreme Court decision that rejected the "separate but equal" approach to public education of white and black students). NeJaime notes the view of some scholars that, "[a]bsent action by other governmental branches, implementation and enforcement surfaced as significant problems that severely limited the effectiveness of the Court's decision." *Id.*

this view, court decisions ordering reform disrupt the natural evolution of social change, thereby provoking backlash that puts new and substantial obstacles in a social movement's path."[257]

Arguably the same impact that flows in the judicial arena would flow in the political sphere, as both involve social movements, and both have winners and losers. The impact of social-reform politics may even exceed the potential to drive constituents via litigation. Unlike litigation, which is resource intensive and removes constituents from direct participation,[258] political action does not have the same financial requirements and keeps constituents directly engaged.[259] This is important to bear in mind because "sanctuary" is a political debate being litigated before judicial officers *and* the court of public opinion.

In any event, an outright victory for, or even just direct action by one side, is likely to raise awareness of the issues, drive fundraising, influence the political elite, etc.[260] Each instance of progress by one side is likely to create a backlash in favor of the other side, thus the cycle of raising awareness, fundraising, influencing the elite, etc. continues. Therefore, at the very least, liberals must present a counter-narrative to address the current rhetorical mismatch. This would be necessary in order to sustain momentum in light of the backlash that will occur as a result of a states-rights' litigation victory. An even stronger approach, however, would be to recast the entire conversation so as to avoid winners and losers. While litigation may be necessary, the public focus could be on dialogue regarding shared concerns—such as public safety and community policing. This brings us to the second way in which the current litigation approach is incomplete.

---

257. *Id.* at 952.

258. *Id.* at 951–52.

259. Indeed, NeJaime's theory bears out in American politics. The same connections can be made to our earliest political battles. *See* LEE WARD, THE POLITICS OF LIBERTY IN ENGLAND AND REVOLUTIONARY AMERICA 331, 328 (2004). The enactment and later repeal of the Stamp Act is a prime example. The British attempt to assert parliamentary sovereignty over the colonists created significant backlash, which, in turn, mobilized them into a unified front of resistance that had never been seen before. These thirteen independent colonies came together with a common purpose. They rallied the common people to action. Large public demonstrations occurred in cities such as Boston and Charleston, and crown-appointed stamp distributors were systematically intimidated by organized groups. The colonial assemblies also went into action to repudiate the Stamp Act. *Id.*

260. NeJaime, *supra* note 24, at 944–54.

C. The Need for Dialogue to Reinstate Enforcement Priorities

As noted above, the Executive Order reinstates the Bush-era Secure Communities Program,[261] which expands the range of people subject to removal and seeks to increase the number of local law enforcement agents who are deputized as federal immigration officers via 287(g) agreements.[262] This approach is likely a greater threat to integrationist policies today than the threat to withhold funding, which can be rebuffed. Indeed, reaching deep into immigrant communities to remove non-criminal aliens is likely to have a chilling effect on the trust that is necessary for any successful integrationist policy.[263] Yet the current litigation does not address directly this aspect of the Order.[264] This paper urges liberals to use the pending states-rights' litigation as a form of non-cooperation designed to drive conservatives into a dialogue on immigration enforcement priorities.

1. The Impact of the Secure Communities Program

The Secure Communities Program is an ambitious program initiated during the Bush Administration as part of the federal government's push for increased cooperation between federal and local agencies.[265] It was touted as "the largest expansion of local involvement in immigration enforcement in the nation's history."[266] At its core, it is an information-sharing platform whereby "every single person arrested by a local law enforcement official anywhere in the country" [267] has his or her fingerprints uploaded to a central database that federal officials screen for immigration violations.[268] It was described as "the future of immigration enforcement [as it] dramatically lowers the information cost of identifying immigration violators, accelerates the ongoing convergence of the immigration and criminal bureaucracies in the United States, and reshapes the structure of immigration federalism."[269]

---

261. Exec. Order No. 13,768, 82 Fed. Reg. 8799, § 16 (Jan. 25, 2017).

262. *See id.* at § 10.

263. FINAL TASKFORCE REPORT, *supra* note 176, at 3.

264. *See, e.g.*, San Francisco Complaint, *supra* note 66.

265. Adam B. Cox & Thomas J. Miles, *Policing Immigration*, 80 U. CHI. L. REV. 87, 93 (2013).

266. *Id.* at 93.

267. *Id.*

268. *Id.* at 94–95; Margaret Hu, *Big Data Blacklisting*, 67 FLA. L. REV. 1735, 1770–73 (2015) (discussing the ways in which S-Comm facilitates data sharing and database screening protocols between various federal and local agencies).

269. Cox & Miles, *supra* note 265, at 87. With respect to the criminal law comment, the authors note further: "There is a growing convergence between the enforcement

Despite these accolades, S-Comm has a darker side. It does not distinguish between those who have been convicted and those who have only been charged with criminal offenses. It also covers people who have not been involved in any criminal activity.[270] Ultimately S-Comm was replaced by the Priorities Enforcement Program ("PEP") because localities increasingly were concerned about S-Comm's underlying legitimacy.[271]

Under PEP, which was in effect from 2015 to 2017,[272] local law enforcement continued to submit criminal defendants' fingerprints to federal officials for a determination of whether the individual was a priority for removal.[273] The key here was the identification of priorities: highest priority was given to those who presented a danger to national security, border security, or public safety; second priority was given to new immigrants or those with multiple or serious misdemeanor violations; third priority was given to all other immigrants.[274] Under this regime, ICE no longer sought transfer for those with only civil immigration offenses or those who had been charged but not convicted of criminal offenses.[275] In other words, ICE did not actively seek to arrest non-criminal aliens who were integrated into communities via "sanctuary" or integrationist policies. Now the Executive Order and a February 2017 guidance memorandum from Department of Homeland Security Secretary Kelly have made clear that this is no longer the case. The memorandum states that "[e]xcept as specifically noted above, the

---

systems for immigration law and criminal law. This convergence is at odds with an old, conventional view about these regulatory domains. According to this old view, criminal law is the province of the states while immigration law is exclusively within the control of the federal government. The old view was really never quite right." *Id.* at 91.

270. *Priority Enforcement Program*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, (June 22, 2017), https://www.ice.gov/pep [hereinafter *Priority Enforcement Program*].

271. Johnson Memorandum, *supra* note 21. Indeed even implementation of S-Comm suggests that it was premised on racial profiling. It took four years to bring S-Comm technology to every county. Scholars identified the executive's priorities based on the implementation order. Cox & Miles, *supra* note 265, at 90, 96–97, 128, 134. The results were telling. Although one would assume priority would be given to counties with high crime rates and high rates of immigration violators, this was not the case. Priority was given to areas with high concentrations of Hispanics, regardless of crime rates and immigration violations. *Id.* at 89–90.

272. *Priority Enforcement Program*, *supra* note 270.

273. *Id.*

274. Johnson Memorandum, *supra* note 21; *Priority Enforcement Program*, *supra* note 270.

275. *Priority Enforcement Program*, *supra* note 270.

Department no longer will exempt classes or categories of removable aliens from potential enforcement."[276]

The impact of reinstating S-Comm and expanding the range of people subject to arrest and removal, including non-criminal migrants, is likely to reduce significantly the effectiveness of any integrationist policy.[277] For example, ICE arrest rates of non-criminal aliens (i.e., the peaceful people "sanctuary" jurisdictions seek to integrate into the community) increased 150% in the first 100 days after Executive Order No. 13,768 was signed.[278] To highlight the difference between S-Comm and PEP, this 150% increase is in contrast to a 37.6% increase in arrests overall and only a 20% increase in criminal alien arrests during the same time period.[279] In total, 41,000 people were swept up in this massive 100-day operation, and almost 11,000 of these individuals were non-criminal aliens[280] who most likely would not have been arrested under PEP. This trend has continued, with the combined total now in excess of 22,000 non-criminal aliens being arrested as of August 2017.[281]

The significant threat of deportation will undercut the effectiveness of any "sanctuary" policy. The power of any written policy, no matter how well crafted, will pale in comparison to the reality on the ground, and any doubt or confusion about the status of a particular policy is likely to be resolved against participation in the justice system because the risk of removal is so great.[282] In short, non-criminal aliens will not risk exposure to local police in light of this increased risk of removal.[283] Along these lines, California's Chief Justice has asked ICE to stop "stalking" immigrants at local courthouses in California.[284] The state also

276. Kelly Memorandum, *supra* note 115, at 2. The memorandum goes on to identify an expansive list of the classes of people subject to removal. *Id.*

277. *See generally* Gupta, *supra* note 12; FINAL TASKFORCE REPORT, *supra* note 176.

278. ICE-ERO REPORT, *supra* note 8; Bendix, *supra* note 8.

279. ICE-ERO REPORT, *supra* note 8; Bendix, *supra* note 8.

280. ICE-ERO REPORT, *supra* note 8.

281. Tanfani, *supra* note 8.

282. Kittrie, *supra* note 10, at 1483–84 (noting that confusion can occur when policies conflict or are not well publicized).

283. This point is reinforced by local crime reporting statistics in Houston, Texas, a "sanctuary" jurisdiction that has seen almost a 43% decrease in reports of sexual assault from members of the Hispanic community. The chief of police does not attribute the reduction to reduced crime but to decreased willingness to report crimes for fear of interaction with police. *Houston MS-13 Gang Crimes Disproportionately Brutal Police Chief Says*, *supra* note 181.

284. Letter from Cantil-Sakauy, Chief Justice, Cal. Supreme Court to Jeff Sessions, Att'y Gen. (Mar. 16, 2017), http://newsroom.courts.ca.gov/news/chief-justice-cantil-sakauye-objects-to-immigration-enforcement-tactics-at-california-courthouses; Kristine Phillips, *California's Chief Justice to ICE: 'Stop 'Stalking' Immigrants at Courthouses*, WASH. POST (Mar. 17, 2017), https://www.washingtonpost.com/news/post-

has asked ICE to stop identifying themselves as police when they conduct immigration raids[285] and has discussed "safe zone" legislation for hospitals and schools.[286] In other words, California perceives the need to ward against the negative impact the new enforcement actions will have on integrated immigrants.

Attorney General Sessions himself appears to have helped prove the point of this section. He recently reported that crime rates appear to be higher in "sanctuary" jurisdictions.[287] If this report is accurate, it demonstrates the negative impact anti-"sanctuary" rhetoric and expanded enforcement are having on integrationist communities. Recall that FBI statistics indicate that immigrants are less likely to commit crimes than native-born residents, and integrationist communities tend to have more favorable crime and social welfare statistics.[288] Thus, if there is an increase, it likely reflects the fact that localities are having a more difficult time policing now that integrationist policies have come under attack.[289]

This negative impact on integrationist policies also is likely to increase as additional communities accept the Executive Order's invitation to enter into 287(g) agreements.[290] Again, these agreements deputize state and local law enforcement to act as federal immigration officers.[291] In 2012, the Department of Homeland Security concluded that sub-federal authorities were abusing their authority and terminated 287(g) agreements.[292] These arrangements raise the specter of the

---

nation/wp/2017/03/17/california-chief-justice-to-ice-stop-stalking-immigrants-at-courthouses/?utm_term=.549ad9fe1b67.

285. *Los Angeles Officials Urge ICE to Stop Identifying Themselves as Police*, L.A. TIMES (Feb. 24, 2017), http://ktla.com/2017/02/24/los-angeles-officials-urge-ice-agents-to-stop-identifying-themselves-as-police/.

286. Patrick McGreevy, *California Considers Prohibiting Immigration Enforcement at Public Schools and Hospitals*, L.A. TIMES (Dec. 7, 2016, 12:57 PM), http://www.latimes.com/politics/essential/la-pol-ca-essential-politics-updates-senate-leader-proposes-safe-zones-at-1481144070-htmlstory.html.

287. Press Release, U.S. Dep't of Justice, *supra* note 6.

288. Ewing et. al., *supra* note 200.

289. Again, this impact is corroborated by the situation in Houston, Texas. *Houston MS-13 Gang Crimes Disproportionately Brutal Police Chief Says*, *supra* note 181.

290. Exec. Order No. 13,768, 82 Fed. Reg. 8799, § 8 (Jan. 25, 2017) ("It is the policy of the executive branch to empower State and local law enforcement agencies across the country to perform the functions of an immigration officer in the interior of the United States to the maximum extent permitted by law.").

291. Rodríguez, *supra* note 131, at 591–92.

292. Chacón, *supra* note 97, at 602 (citing Michael Biesecker, *Feds Block NC Sheriffs Access to ICE Database*, VA PILOT (Sept. 19, 2012), http://hamptonroads.com/2012/09/feds-block-nc-sheriffs-access-ice-database); Statement by Secretary Napolitano, Dept. of Homeland Sec., "Department of Justice's Findings of Discriminatory Policing in

restrictionist policy instantiated in Arizona's Senate Bill 1070.[293] In addition, the impact of having a 287(g) community neighboring an integrationist community will further the confusion and the likelihood that immigrants will not seek out law enforcement in their own integrationist community.

In light of the indirect yet significant impact S-Comm and 287(g) agreements will have on integrationist policies, action must be taken to change the enforcement priorities. This paper urges that the states-rights' funding litigation can be a form of non-cooperation that prompts dialogue on the subject.

2. The Use of Litigation as a Form of Non-Cooperation to Prompt Dialogue

As noted above, the current era of immigration federalism is rooted in partnerships.[294] As state and local governments have increased their role in immigration enforcement, so too have they increased the opportunity to impact immigration policy.[295] Dissent has been described as "an attempt to contest and alter national policy."[296] In this way, a state's dissent or non-cooperation can have a powerful influence.[297]

Maricopa County" (Dec. 15, 2011); *see also* Michele Waslin, *ICE Scaling Back 287(g) Program*, IMMIGR. IMPACT (Oct. 19, 2012), http://www.immigrationimpact.com /2012/10/19/ice-scaling-back-287g-program.

293. *Arizona v. United States*, 567 U.S. 387, 392 (2012). In 2010, Arizona went beyond providing mere assistance to federal officers and enacted legislation aimed at tackling immigration concerns at the local level, making it official state policy to promote "attrition through enforcement." *Id.* Although aspects of the legislation were struck down by the U.S. Supreme Court, it is important to see the lengths to which localities will go to restrict immigrant migration. The state statute sought to provide local law enforcement with additional arrest and investigative tools. *Id*

294. Bulman-Pozen & Gerken, *supra* note 26, at 1258 (identifying two competing views of federalism: states as autonomous actors outside of the federal system and states as servants of the federal government carrying out its mandates). *But see* Cunningham Warren, *supra* note 105 (suggesting that there is a third option—one of collaborative federalism, in which the state is autonomous but works in partnership with the federal government). Cunningham Warren discussed this approach as an option to resolve the current crisis in drinking water management where the burdens placed on localities outstrip their capacity to deliver safe water. *Id.* Indeed, the current state of affairs more aptly fits within this framework than one of cooperative federalism. States, as sovereign entities, determine their level of participation in federal immigration enforcement and are not subject to federal standards. This is unlike a cooperative federalism relationship where the federal government sets standards and leaves it to the states to implement and regulate achievement of the standards.

295. GULASEKARAM & RAMAKRISHNAN, *supra* note 85, at 143.

296. Bulman-Pozen & Gerken, *supra* note 26, at 1272.

297. Bulman-Pozen, *supra* note 3, at 1089

States and localities have power in this context because the federal government depends on them[298] and because they are integrated into the system. As a member of the structure, they can assert their voices from within.[299]

This assertion has in fact already occurred in the context of immigration enforcement priorities. Integrationist jurisdictions used resistance in the form of their "sanctuary" policies to urge the federal government to identify immigration enforcement priorities rather than pursue the open-ended approach of S-Comm.[300] When S-Comm was altered in 2014 to include priorities, the DHS Secretary specifically mentioned the impact jurisdictional resistance had on the Administration's decision.[301] Moreover, the Administration embraced the dissent to the extent that some aspects of PEP mirrored these local policies.[302]

In the context of today's inflamed debate, integrationist policies alone will no longer serve as sufficient forms of non-cooperation. As noted with respect to the first misperception about the "sanctuary-city" debate, the Trump Administration does not appear to recognize that it is in partnership with sovereign entities. Thus liberals need to change the dynamic and assert their rightful position. The power of litigation may prove to be an important tactic in the broader strategic plan to promote dialogue.

As with any negotiations, the key is to begin from a position of strength. With respect to the Constitution, states have the "general power of governing" or the "police power," which is possessed by the states, not by the federal government.[303] Moreover, the states and localities have legitimate states-rights' arguments that have and will continue to be

---

> While . . . the literature usually focuses on how states may stop the federal government from overreaching, it recognizes the force of states' affirmative challenges as well. States, on this view, check the federal government not only by obstructing its actions but also by formulating opposing policies and putting them into practice.

Id.

298. Bulman-Pozen & Gerken, *supra* note 26, at 1266.

299. *Id.* at 1268–69.

300. Chen, *supra* note 13, at 50–51. For example, they enacted policies by which they would honor detainers, but only for violent criminals. *Id.*

301. Johnson Memorandum, *supra* note 21 (maintaining that S-Comm was a legitimate program but acknowledging that the localities' resistance to it warranted a shift in policy).

302. GULASEKARAM & RAMAKRISHNAN, *supra* note 85, at 146.

303. Nat'l Fed'n Independent Bus. v. Sebelius, 567 U.S. 519, 535–36 (2012).

raised to block implementation of the Executive Order and the Administration's subsequent implementation memoranda.[304]

As for narratives, the Administration has been winning the rhetorical war, but integrationists have not yet fully taken the field. There will be a different dynamic once liberals create and articulate a compelling public narrative. It should not be defensive or simply responsive to the Trump Administration. It should recast the conversation in pro-active terms that are focused on shared values, and the theme should incorporate the public safety strengths of the integrationist approach.

In addition to the strength of this new narrative, integrationists also will gain ground when the falsities of the conservative narrative come to light. Liberals should not attack, as this will only generate a counter-attack, but the false narratives can be corrected indirectly by the power of a truth-based theme. A key point is that the new liberal narrative and comprehensive approach must not foster further dysfunction and finger pointing. It must be a demonstration of true and responsible leadership that genuinely seeks to bring people together to resolve shared concerns. In other words, now that the current Administration has shifted back to S-Comm, it is time for liberals to recalibrate their approach, with states-rights' litigation as one tactic in a broader strategy to correct the pejorative narrative and initiate a broader security and effective policing dialogue.

Some might argue that the issue is best left to the states and localities to decide on an *ad hoc* basis given the range of inter-state and intra-state approaches (i.e., the true state laboratory approach touted as one of federalism's great advantages). There certainly are divergent policies, and it is equally clear that they reflect conscious decisions that are rooted in the authority afforded to sovereign states to provide for the health, welfare, and safety of their local communities.[305] For example, with respect to immigration status information, conservative localities are more likely to have laws that *require* their agents to provide status information to federal immigration officials. Texas enacted legislation to this effect in May 2017.[306] Michigan's House of Representatives just passed such a measure out of committee that will now go to the full

304. *See* County of Santa Clara v .Trump, 250 F. Supp. 3d 497 (N.D. Cal. 2017).

305. *See* Law Professor Letter, *supra* note 64, at 1–2 (citing U.S. CONST. amend. X); Sligh v. Kirkwood, 237 U.S. 52, 58–60 (1915); Kelley v. Johnson, 425 U.S. 238, 247 (1976) ("The promotion of safety of persons and property is unquestionably at the core of the State's police power.").

306. S.B. 4, 85th Leg. (Tex. 2017). The statute has been challenged in federal court on preemption and other grounds. The point here, however, is simply to note the approach taken by some jurisdictions.

chamber for consideration.[307] On the other hand, integrationists are likely to *prohibit* their agents from collecting the status information in the first instance.[308] California is considering such a statewide measure, with a bill just passed in the Senate and now before the state assembly.[309]

Similar policy differences exist with respect to federal detainer requests. Some states, such as Texas, require localities to honor detainer requests, and personnel who fail to comply are subject to criminal liability.[310] In turn, the statute provides for indemnification of local entities and the assistance of the attorney general in the event such localities are sued for violations of the law related to the detention.[311] Other localities choose not to honor detainer requests or do so only in certain circumstances.[312] For example, some jurisdictions honor immigration detainers when the detainee is being held for felony crime or poses a threat to the community. Other jurisdictions will only honor the detainer if there has been a judicial determination supporting probable cause or a warrant. Still others require a written agreement whereby the federal government reimburses the locality for all detainer costs.[313]

There even are vigorous intra-state debates. For example, Texas enacted its anti-"sanctuary city" statute, yet major metropolitan cities in the jurisdiction, namely Houston and Dallas, are strong proponents of integrationist policies. The same situation is occurring in Michigan between state legislators and Wayne County, which includes the city of Detroit, which hosts a major American/Canadian border crossing.[314] Even California has disagreement about its pending legislation. Although notable "sanctuary cities" and counties are within its territory, and they have successfully blocked enforcement of Executive Order No. 13,768, the bill in support of "sanctuary cities" did not pass through the Senate

307. H.B. 4105, 99th Leg. (Mich. 2017).

308. *See* Seattle Complaint, *supra* note 58.

309. S.B. 54, 84th Leg. (Cal. 2016).

310. S.B. 4, 85th Leg. § 772.0073 (Tex. 2017).

311. *Id.*

312. *See* IMMIGRANT LEGAL RES. CTR., *supra* note 60, at 8; *Wayne County Will Not Engage in 'Borderline Profiling' to Hold Unauthorized Immigrants for ICE*, MICHIGAN PUB. RADIO (May 18, 2017), http://michiganradio.org/post/wayne-county-will-not-engage-borderline-profiling-hold-unauthorized-immigrants-ice.

313. Mayor Memorandum, *supra* note 10, at 5.

314. *Wayne County Will Not Engage in 'Borderline Profiling' to Hold Unauthorized Immigrants for ICE*, *supra* note 312.

unscathed; the California Senate vote proceeded along party lines and garnered significant resistance from Republicans.[315]

In this context, the state laboratory approach sounds promising. Huntington has noted,

> A system that allows states and localities to express divergent views on the benefits and costs of immigration would permit the development of a variety of policies, rather than a single, national policy, creating the proverbial laboratories from which the national government (or states and localities) can learn. This devolution also would allow for greater tailoring of immigration policy.[316]

Nevertheless, Gulasekaram and Ramakrishnan note with concern that in this third era of immigration federalism, the capacity for organic, purely local experimentation has been significantly curtailed because nothing is truly local anymore.[317] This certainly is true with respect to "copycat" legislation and regulations drafted and urged upon communities across the country—liberal and conservative communities alike—by advocacy groups and issue promoters.[318] Moreover, having a "hodgepodge" of local policies, sometimes between neighboring towns or counties, likely decreases the impact of integrationist policies. In this way, dialogue rather than contradictory experimentation may be the best course of conduct. The point will be to start with a few shared values and concerns. This will be no small task, but there are important reasons to pursue this path.

D. The Need for Dialogue to Promote Effective Governance

Almost ten years ago, Rodriguez noted that that all levels of government were dominated by the immigration debate.[319] Yet, to date, there has been no resolution. If anything, the problem has deteriorated because heated rhetoric has become a substitute for informed discourse. Indeed, many scholars have lamented the shift. Pozen notes that social policy positions are determined based on the political parties' stated

---

315. Kate Steinmatz, *California Senate Passes 'Sanctuary State' Bill*, TIME (Apr. 3, 2017), http://time.com/4724121/california-sanctuary-state-bill-passes-senate-immigration/.

316. Huntington, *supra* note 111, at 832.

317. See GULASEKARAM & RAMAKRISHNAN, *supra* note 85, at 157.

318. *See, e.g.*, *supra* notes 66, 67 (the various integrationist law suits filed to block enforcement of the Executive Order are clearly coordinated).

319. Rodriguez, *supra* note 131, at 590.

positions, even if these positions contradict an individual's ideological beliefs.[320] This is consistent with the observations of Mann and Ornstein, who note that the "parties have become ideologically polarized, tribalized, and strategically partisan . . . [and] have become as virulently adversarial as parliamentary parties but operate in a constitutional system that makes it extremely difficult for majorities to act."[321]

In turn, political attacks (or even legal or political victories, as noted above) drive a further wedge between the parties. Indeed, of the various affiliations a person maintains, the one under attack is the one with which a person will most closely align.[322] This phenomenon is reinforced in today's political climate because Republicans and Democrats alike "tend to seek out information that confirms their preexisting political opinions, but ignore, evade, and reject out of hand evidence that contradicts or disconfirms their preexisting opinions."[323]

In this context, there must be healthy skepticism about whether conservative-liberal dialogue is possible. Yet this state of ossification cannot persist. It may be the case that voters simply refuse to tolerate it moving forward. Indeed, if the 2016 election has proven anything, it stands as a testament to the lengths people will go to bring about change. Or it might be the case that Secretary Gates' dire 2014 observation about government dysfunction being America's greatest national security threat becomes a tangible reality. In any event, liberals should be incentivized to seek *détente* now to avoid the latter circumstance and to be situated in a proactive and prepared stance if voters refuse to accept the status quo.

Taking a purely obstructionist approach reinforces the public's belief that our government is broken, and, in this context, Democrats will remain part of the problem. And simply attacking the current Administration and its policies is not the same thing as offering affirmative leadership. (Indeed, conservative strategists are hoping that liberals will continue to focus on President Trump, since they took this approach in the 2016 presidential election and lost.[324]) This is not to

---

320. Bulman-Pozen, *supra* note 3, at 1088. "We cannot fully understand our federal system today without taking account of partisan competition." *Id.* at 1078.

321. MANN & ORNSTEIN, *supra* note 3, at xiv.

322. FEELEY & RUBIN, *supra* note 36, at 11–12; MAALOUF, *supra* note 36, at 26.

323. JASON BRENNAN, AGAINST DEMOCRACY 5 (2016).

324. *Face the Nation August 20 Transcript: Tim Scott, Tim Kaine*, CBS (Aug. 20, 2017, 5:36 PM), https://www.cbsnews.com/news/face-the-nation-august-20-transcript-tim-scott-tim-kaine/ (discussing the political fallout after the August 2017 white supremacist rally in Charlottesville, Virginia). Political commentator Julie Pace of the Associated Press noted that Democrats

> recognize that in 2016 they ran on an anti-Trump message, they focused on these questions of morality, in some cases they focused on these questions of

suggest by any means that Democrats should accept antithetical conservative positions; however, it is to suggest that Democrats should offer solutions and promote dialogue. While it is the most effective way to protect integrationist policies, dialogue and leadership also fill a void.

Finally, there is a stirring on the other side of the aisle, suggesting that Democrats may find a partner or that Republicans are coming to the same conclusion as this author that action needs to be taken. The prescient, yet embattled, conservative Senator Jeff Flake of Arizona launched his short-lived 2018 senatorial re-election campaign with a message to fellow conservatives—urging action rather than avoidance and leadership rather than heated rhetoric.[325] His words ring true to this author:

> We cannot claim to place the highest premium on character, then abruptly suspend the importance of character in the most vital civic decision that we make. When we excuse on our side what we attack on the other, then we are hypocrites. If we do that as a practice, then we are corrupt. If we continually accept this conduct as elected officials, then perhaps we shouldn't be elected officials.[326]

IV. CONCLUSION—SANCTUARY LOST?

As noted, the word "sanctuary" refers to sacred or consecrated spaces and the protection afforded in such places to those who are hunted or in danger.[327] The willingness and ability of conservatives to convert this religiously based concept into a pejorative is representative of today's discourse. In terms of the two major American political parties, conservatives should be moved by the term and its religious connotations as they are much more likely to associate with organized religion than

---

> race and they lost. And they really feel like the party needs to get an economic message, that this—focusing on this is not going to be enough next year.

Id.

Moderator John Dickerson continued, "Steve Bannon said as long as the Democrats are talking about race, that's great for us because they're not talking about bread and butter economic issues." *Id.*

325. Alexander Burns, *Senator Jeff Flake, Facing Twin Threats, Is Said to Take on G.O.P. Rift in New Book*, N.Y. TIMES (July 25, 2017), https://www.nytimes.com /2017/07/25/us/jeff-flake-gop-trump-book.html.

326. JEFF FLAKE, CONSCIENCE OF A CONSERVATIVE: A REJECTION OF DESTRUCTIVE POLITICS AND A RETURN TO PRINCIPLE 109 (2017).

327. See *Sanctuary*, CAMBRIDGE DICTIONARY ONLINE, *supra* note 169.

their Democratic counterparts.[328] Yet conservative religious affiliations are overwhelmed by the power of the "law-and-order" immigration rhetoric. What is at risk if unfounded rhetoric continues to drive national "discourse?" A fundamental truth, an opportunity for knowledge to guide national discourse, lost.

Likewise, the nature of the current debate obfuscates the fact that integrationist policies are more effective public safety models than their restrictionist counterparts. It is, in fact, the restrictionist policies that are more likely to "shield" criminals when community members are too afraid to report crimes or to serve as witnesses. And, in reported instances, restrictionist policies tend to engender racial profiling, meaning that law enforcement officers actually harm the community they are empowered to protect, for racial profiling affects all community members—citizens, lawful residents, and undocumented immigrants alike. Nevertheless, integrationists run the real risk that their policies will become ineffectual if their litigation approach also does not include a concerted effort to recast immigration narratives and to promote dialogue regarding immigration enforcement priorities. What is at risk if liberals do not change course? A constitutional power, an opportunity to police in a manner that is most effective and consistent with local needs, lost.

Pursuing dialogue in this turbulent time will not be an easy task. It is a path strewn with hurdles, not the least of which is political ossification and an unwillingness to pursue *détente*. Yet liberals must make the attempt. America's national security is at risk, and not just because of our inability to reform immigration. We are in danger in the way Secretary Gates noted—endangered by our own institutional dysfunction. What is at risk if we fail to act at a time that cries out for results rather than short-term political gains? A democracy, an opportunity to enable our dysfunctional government institutions, lost.

328. Michael Lipka, *U.S. Religious Groups and Their Political Leanings*, PEW RES. CTR. (Feb. 23, 2016), http://www.pewresearch.org/fact-tank/2016/02/23/u-s-religious-groups-and-their-political-leanings/. In 2012, 70% of religiously unaffiliated voters voted for President Obama. *Id.* Agnostics and atheists followed the same pattern with 64% and 69%, respectively, voting Democratic. *Id.*