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#### Recommended Citation

Pratheepan Gulasekaram, Rick Su & Rose C. Villazor, *Anti-Sanctuary and Immigration Localism*, 119 Colum. L. Rev. 837 (2019).

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# ESSAY

## ANTI-SANCTUARY AND IMMIGRATION LOCALISM

*Pratheepan Gulasekaram,\* Rick Su\*\* & Rose Cuison Villazor\*\*\**

*A new front in the war against sanctuary cities has emerged. Until recently, the fight against sanctuary cities has largely focused on the federal government's efforts to defund states like California and cities like Chicago and New York for resisting federal immigration enforcement. Thus far, localities have mainly prevailed against this federal anti-sanctuary campaign, relying on federalism protections afforded by the Tenth Amendment's anticommandeering and anticoercion doctrines. Recently, however, the battle lines have shifted with the proliferation of state-level laws that similarly seek to punish sanctuary cities. States across the country are directly mandating local participation, and courts thus far have upheld those state policies. These laws, like Texas's S.B. 4, prohibit local sanctuary policies and impose severe punishments on the cities and officials that support them. This new state-versus-local terrain has doctrinal, political, and normative implications for the future of local government resistance to immigration enforcement. These implications have thus far been undertheorized in immigration-law scholarship. This Essay seeks to change that.*

*This Essay is the first to focus on this emerging wave of state anti-sanctuary laws. In so doing, it makes three contributions. First, descriptively, the Essay documents the upsurge of anti-sanctuary laws that have appeared across the United States and explains how they differ from prior anti-sanctuary laws. Second, doctrinally, it argues that the passage of these laws nudges sanctuary cities to uncharted legal territory in immigration law—localism. Under conventional localism principles, state anti-sanctuary laws are in a position to more fully*

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The authors wish to thank Jamie Abrams, Andrew Ayers, Linda Bosniak, Richard Boswell, Ray Brescia, Anupam Chander, Nestor Davidson, Chris Elmendorf, Amanda Frost, Alan Hyde, Irene Joe, Kevin Johnson, Stephen Lee, Daniel Morales, Kathleen Morris, Huyen Pham, Michael Pollack, Leticia Saucedo, Ragini Shah, Darien Shanske, Peter Spiro, Kenneth Stahl, and Allison Brownell Tirres, as well as participants in faculty workshops and paper presentation series at Immigration Law Teachers Conference 2018, Fordham University School of Law, University of North Carolina School of Law, U.C. Davis Law School, University of Louisville Brandeis School of Law, Rutgers Law School, Santa Clara University School of Law, and University of Buffalo School of Law where we presented earlier versions of this Essay. We are grateful to Gin Smith and William Klein for their excellent research assistance. Lastly, we thank the editors of the *Columbia Law Review* for outstanding editorial assistance.

*quash local sanctuary policies and effectively conscript local officials into federal immigration enforcement. However, the draconian structure of state anti-sanctuary laws provides a unique context in which to advance what we call “immigration localism” claims and protect three distinct interests that concern local governments: structural integrity, accountability, and local democracy. Third, normatively, this Essay contends that immigration localism provides a more accurate descriptive and theoretical account of how current immigration enforcement operates and promotes community engagement with immigration enforcement. Specifically, the reorientation toward localism accounts for the powerful role that cities play in immigration enforcement and decenters the federal government’s dominant role in that enforcement. To be sure, this Essay recognizes that casting a theoretical gaze toward local discretion may end up emboldening the most exclusionary impulses of localities and supporting local anti-sanctuary policies. In the long run, however, local discretion in immigration enforcement is likely to better serve the interests of noncitizens and citizens alike.*

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## INTRODUCTION

Although she was elected on the same day as Donald Trump, Travis County Sheriff Sally Hernandez had a decidedly different take on the appropriate role of local law enforcement in matters of immigration. Sheriff Hernandez won county office in Texas promising to reduce her county's cooperation with immigration enforcement authorities, stating that "[o]ur community is safer when people can report crimes without fear of deportation."<sup>1</sup> In staking that position, Hernandez added Travis County to the number of sanctuary jurisdictions singled out by President Trump and then-Attorney General Jeff Sessions.<sup>2</sup> The President and his Attorney General, along with other key members of their political party, vowed to punish those jurisdictions, pressuring them with loss of funds and other sanctions.<sup>3</sup> Indeed, soon after Hernandez took office, Greg Abbott, the Republican governor of Texas, threatened to pull state funding from Travis County unless the Sheriff changed her stance on assisting federal immigration agents.<sup>4</sup> A few months later, Governor Abbot enthusiastically signed Texas S.B. 4, the state's anti-sanctuary law.<sup>5</sup> The law limits endorsement of sanctuary policies, cuts down on the discretion of local agencies to disentangle themselves from federal enforcement, and creates civil and criminal liability for officials who maintain certain types of noncooperation policies on aiding federal immigration enforcement.<sup>6</sup>

Texas is not the only state to have passed such a law. Since 2015, six other states—Alabama,<sup>7</sup> Indiana,<sup>8</sup> Iowa,<sup>9</sup> Mississippi,<sup>10</sup> North Carolina,<sup>11</sup>

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1. Press Release, Travis Cty. Sheriff's Office, Statement from Sheriff Sally Hernandez (Jan. 26, 2017), <https://www.tcsheriff.org/about/press-releases/2017/411-statement-from-sheriff-sally-hernandez> [<https://perma.cc/9C23-5V9H>].

2. Julián Aguilar, Travis County Sheriff Announces New "Sanctuary" Policy, *Tex. Trib.* (Jan. 20, 2017), <https://www.texastribune.org/2017/01/20/travis-county-sheriff-announces-new-sanctuary-poli/> [<https://perma.cc/Z48X-L765>].

3. Martin Kaste, Trump Threatens 'Sanctuary' Cities with Loss of Federal Funds, *NPR* (Jan. 26, 2017), <https://www.npr.org/sections/thetwo-way/2017/01/26/511899896/trumps-threatens-sanctuary-cities-with-loss-of-federal-funds> [<https://perma.cc/5T85-5CND>]; Sedria Renee, Texas Gov. Abbot Halts Travis County Funding over Sanctuary Policy, *NBC News* (Feb. 2, 2017), <https://www.nbcnews.com/news/us-news/texas-gov-abbot-halts-travis-county-funding-over-sanctuary-policy-n716201> [<https://perma.cc/5PGT-RC86>].

4. Renee, *supra* note 3.

5. S.B. 4, 85th Leg., Reg. Sess. (Tex. 2017) (codified at Tex. Gov't Code § 752.053(a)(1) (2017)).

6. See Tex. Gov't Code § 752.053(a)(1)–(3).

7. See Ala. Code § 31-13-5 (2018).

8. See Ind. Code § 5-2-18.2 (2018).

9. See S.F. 481, 87th Gen. Assemb., Reg. Sess. (Iowa 2018) (to be codified at Iowa Code § 825.1).

10. See Miss. Code Ann. § 25-1-119 (2018).

11. See N.C. Gen. Stat. §§ 153A-145.5, 160A-205.2 (2018). A more expansive anti-sanctuary measure, S.B. 145, passed the North Carolina Senate in 2017 but failed in the

and Tennessee<sup>12</sup>—have passed similar ones. And at least seventeen states have introduced or passed like-minded bills.<sup>13</sup> This turn toward state anti-sanctuary legislation marks a momentous shift in the debate over sanctuary cities, for they represent the most significant threat yet to conscript local officials and agencies into the federal immigration enforcement regime.

Consider Texas’s S.B. 4. Referred to as a “show me your papers” law,<sup>14</sup> S.B. 4 was challenged by the City of El Cenizo, which argued that the law—which prohibits local governments from adopting sanctuary policies—is preempted by federal immigration law and is unconstitutionally vague.<sup>15</sup> Although the district court in *City of El Cenizo v. Texas* agreed with the city’s preemption arguments and issued a preliminary injunction,<sup>16</sup> the U.S. Court of Appeals for the Fifth Circuit reversed much of the lower court’s decision, ruling that federal immigration laws do not preempt a state’s authority to compel its localities to comply with the federal government.<sup>17</sup> Instead, the court noted that S.B. 4 merely does on a state level what local governments within the state have done—regulate whether to cooperate with the federal government.<sup>18</sup> The Fifth Circuit’s decision simultaneously demonstrates the court’s recognition of local decisionmaking in immigration law and the power of the state to compel local governments to comply with federal immigration authorities.

Despite this significant swing toward state preemption, little attention has been paid thus far to this development in immigration law scholarship,<sup>19</sup>

House. See S.B. 145, 2017 Gen. Assemb., Reg. Sess. (N.C. 2017). The bill number was later reused for an entirely different issue. See Senate Bill 145/SL 2018-74, N.C. Gen. Assembly, <https://www.ncleg.gov/BillLookup/2017/SB%20145> [<https://perma.cc/W43C-D75Z>] (last visited Mar. 23, 2019).

12. See H.B. 2315, 110th Gen. Assemb., Reg. Sess. (Tenn. 2018).

13. See, e.g., Cal. Gov’t Code § 7282.5 (2018); 5 Ill. Comp. Stat. Ann. 805/5 (West 2019); S.B. 18-220, 71st Gen. Assemb., 2d Reg. Sess. (Colo. 2018); H.B. 9, 2018 Gen. Assemb., Reg. Sess. (Fla. 2018); H.B. 105, 64th Leg., Budget Sess. (Wyo. 2018); H.B. 205, 30th Leg., 1st Reg. Sess. (Alaska 2017); S.B. 14, 91st Gen. Assemb., Reg. Sess. (Ark. 2017); H.B. 501, 2017 Gen. Assemb., Reg. Sess. (Ky. 2017); H.P. 272, 128th Leg., 1st Reg. Sess. (Me. 2017); H.B. 4105, 99th Leg., Reg. Sess. (Mich. 2017); H.B. 611, 65th Leg., Reg. Sess. (Mont. 2017); S.O. 3698, 2017 Gen. Assemb., Reg. Sess. (N.Y. 2017); H.B. 179, 132d Gen. Assemb., Reg. Sess. (Ohio 2017); S.B. 10, 2017 Gen. Assemb., Reg. Sess. (Pa. 2017); H.B. 1985, 65th Leg., Reg. Sess. (Wash. 2017); S.B. 275, 2017–2018 Leg., Reg. Sess. (Wis. 2017); S.B. 1378, 52d Leg., 2d Reg. Sess. (Ariz. 2016).

14. See Manny Fernandez, Texas Banned ‘Sanctuary Cities.’ Some Police Departments Didn’t Get the Memo., *N.Y. Times* (Mar. 15, 2018), <https://www.nytimes.com/2018/03/15/us/texas-sanctuary-sb4-immigration.html> (on file with the *Columbia Law Review*).

15. See *City of El Cenizo v. Texas*, 264 F. Supp. 3d 744, 760–75 (W.D. Tex. 2017), *aff’d* in part and vacated in part, 890 F.3d 164 (5th Cir. 2018).

16. See *id.* at 812–13.

17. See *City of El Cenizo*, 890 F.3d at 180.

18. See *id.* at 178 (stating that “[i]n its operation, S.B. 4 is similar to one of the city [sanctuary] ordinances some plaintiff[] [cities] have themselves adopted”).

19. To be sure, immigration law scholars have analyzed the roles that state and local governments doctrinally and normatively play in the regulation and enforcement of

and only recently has the local-government literature begun to address the issue.<sup>20</sup> Instead, legal scholarship has been primarily consumed with the constitutionality of so-called “sanctuary cities.”<sup>21</sup> These jurisdictions, all of which maintain policies that limit local cooperation and communication with federal immigration authorities to differing degrees,<sup>22</sup> became the centerpiece of then-candidate Donald Trump’s campaign<sup>23</sup> and have remained a central obsession of President Trump.<sup>24</sup> Accordingly, much popular and scholarly energy has been devoted to the legality of federal crackdowns on these noncooperating jurisdictions and agencies.<sup>25</sup>

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immigration law. See, e.g., Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 Fla. St. U. L. Rev. 965, 970–71, 975–76 (2004); Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 Mich. L. Rev. 567, 581–90 (2008); Rick Su, *A Localist Reading of Local Immigration Regulation*, 86 N.C. L. Rev. 1619 (2008) [hereinafter Su, *Localist*]. To date, however, this Essay is the only to examine state anti-sanctuary laws and their implications for immigration law.

20. See, e.g., Richard Briffault, *The Challenge of the New Preemption*, 70 Stan. L. Rev. 1995, 2005 (2018) [hereinafter Briffault, *New Preemption*]; Erin Adele Scharff, *Hyper Preemption: A Reordering of the State–Local Relationship?*, 106 Geo. L.J. 1469, 1506–07 (2018). Our examination of state anti-sanctuary laws differs from these articles in significant ways in that we consider, among other things, how state anti-sanctuary laws are impacting the legal arguments that cities could bring against states and whether, as a normative matter, the trend toward localism in immigration law should itself be supported.

21. See, e.g., Christopher N. Lasch et al., *Understanding “Sanctuary Cities,”* 59 B.C. L. Rev. 1703, 1741–43 (2018) (discussing the “constitutional safeguards for administrative arrest warrants” in the immigration context); David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 Nw. U. L. Rev. 583, 645 (2017) (noting that “the anti-commandeering principle and related state sovereignty rationales play leading roles in the scholarship defending subfederal sanctuary policies”).

22. See Lasch et al., *supra* note 21, at 1705.

23. Donald Trump, *Presidential Campaign Speech at Rally in Phoenix, Arizona* (Aug. 31, 2016), <http://www.latimes.com/politics/la-na-pol-donald-trump-immigration-speech-transcript-20160831-snap-htmlstory.html> [https://perma.cc/599N-JQ2D].

24. In 2018, the Department of Justice filed a lawsuit against the state of California contending that its status as a sanctuary state violates congressional mandates. See *Complaint at 2, United States v. California*, 314 F. Supp. 3d 1077 (E.D. Cal. Mar. 6, 2018) (No. 18-254), 2018 WL 1181625 [hereinafter *California Complaint*].

25. See, e.g., Vikram David Amar, *Federalism Friction in the First Year of the Trump Presidency*, 45 Hastings Const. L.Q. 401, 402–15 (2018) (assessing the federalism implications of the federal government’s targeting of sanctuary jurisdictions and subsequent lower court decisions); Christine Kwon & Marissa Roy, *Local Action, National Impact: Standing Up for Sanctuary Cities*, 127 Yale L.J. Forum 715, 715–17 (2018), [https://www.yalelawjournal.org/pdf/KwonRoy\\_mtozyv98.pdf](https://www.yalelawjournal.org/pdf/KwonRoy_mtozyv98.pdf) [https://perma.cc/WXG4-49HR] (advocating for dissenting cities against the federal government’s crackdown on sanctuary jurisdictions, specifically San Francisco, California). Two of the authors of this Essay have recently written an article examining sanctuary cities, but as part of a broader network of private and public actions. See Rose Cuison Villazor & Pratheepan Gulasekaram, *Sanctuary Networks*, 103 Minn. L. Rev. 1209 (2018) [hereinafter Villazor & Gulasekaram, *Sanctuary Networks*] (discussing potential partnerships between public and private entities to provide sanctuary to undocumented immigrants).

As it turns out, however, federal attempts to shut down sanctuary cities have largely been ineffective, as they have either lacked congressional support or been rejected by federal and state courts.<sup>26</sup> In litigation, cities and counties have successfully defeated federal attempts to commandeer and coerce their participation.<sup>27</sup> By contrast, as the Fifth Circuit's decision to uphold Texas's S.B. 4 indicates, cities might not fare as well when challenging state anti-sanctuary laws. The proliferation of state anti-sanctuary laws and bills that seek to prohibit and penalize local dissent from immigration law suggests that, at minimum, more litigation between cities and states is likely to ensue. More broadly, the upsurge in these state laws points to the need to explore in depth the doctrinal, normative, and theoretical implications of this new development for immigration enforcement and the future of sanctuary cities.

This Essay is the first to focus on this new wave of state anti-sanctuary efforts and, in doing so, provides fresh legal avenues for advocates to engage in challenging state preemption of local sanctuary laws. At the outset, it argues that the passage of these laws nudges sanctuary cities away from federalism principles and toward a new legal landscape—what we term “immigration localism.”<sup>28</sup> This legal framework, which focuses on the relationship between states and localities,<sup>29</sup> is uncharted legal territory for immigration law in general and sanctuary cities in particular, which have mostly relied on federalism's anticommandeering and anticoercion principles.<sup>30</sup> Within the state–local dynamic, however, cities have traditionally been considered creatures of the state<sup>31</sup> and thus viewed as having limited local powers and as being susceptible to state preemption and commandeering.<sup>32</sup>

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26. See *infra* Part I.

27. See *infra* Part I.

28. One of us began using the term “immigration localism” more than ten years ago, and this Essay builds on some of the concepts argued then. See Su, *Localist*, *supra* note 19, at 1683 (using the term “immigration localism” and stating that it is “too early to predict what a localist approach to immigration will offer,” but “whatever immigration localism is or comes to be, it is certainly an approach worth exploring”).

29. See *id.* at 1628–29 (describing the localist framework as a “legal, political and ideological structure that organizes the institution of local governments under the state level”); see also Richard Briffault, “What About the ‘Ism’?” Normative and Formal Concerns in Contemporary Federalism, 47 *Vand. L. Rev.* 1303, 1307–17 (1994) (discussing the convergence of federalism and localism) [hereinafter Briffault, *What About the ‘Ism’?*]; Nestor M. Davidson, *Cooperative Federalism: Federal-Local Collaboration in an Era of State Sovereignty*, 93 *Va. L. Rev.* 959, 960–64 (2007) (discussing the relationship between federal and local governments through “cooperative localism”).

30. See *infra* section I.A.

31. *Coleman v. Miller*, 307 U.S. 433, 441 (1939) (referring to municipalities as “creatures of the state” that have no standing against “the will of their creator”).

32. See Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 *Colum. L. Rev.* 1, 1 (1990) [hereinafter Briffault, *Our Localism: Part I*]; Briffault, *What About the ‘Ism’?*, *supra* note 29, at 1309; Scharff, *supra* note 20, at 1507.

However, as this Essay points out, closer examination of localism demonstrates that state anti-sanctuary laws are not as ominous for the future of sanctuary cities as conventional thinking might suggest. Specifically, we contend that localism itself contains powerful doctrinal and normative arguments grounded in local autonomy that sanctuary cities could use to challenge state anti-sanctuary laws.<sup>33</sup> These previously unexplored localist arguments are significant for immigration law because they challenge the conventional descriptive and doctrinal view that the federal government dominates immigration regulation. Crucially, these arguments, grounded in localist principles, suggest that cities can and should have greater roles in immigration enforcement alongside federal and state governments.

The Essay proceeds in three parts. First, Part I provides a descriptive account of the rise in both federal and state anti-sanctuary laws, categorizing the ways in which they have evolved from previous immigration enforcement laws and how those past efforts differ from federal and state anti-sanctuary efforts today.

Next, Part II examines the new immigration localism landscape in which sanctuary cities must defend their policies. Despite the presumption in favor of state preemption, this Part argues that localism offers not only a new legal avenue for cities and other localities to push back against state anti-sanctuary laws but also a novel perspective for thinking about local sanctuary policies and anti-sanctuary efforts more generally.

Lastly, Part III turns to the normative case for immigration localism. Localism as an analytical lens allows for a better accounting of the way that current immigration enforcement *actually* operates. This descriptive reorientation in turn decenters the federal government's role in setting immigration enforcement policy. Additionally, it prompts an opportunity to explore the powerful role that cities can and should play in immigration regulation and enforcement. To be sure, this Part acknowledges that immigration localism is not without legal and political peril for immigration advocates.<sup>34</sup> While recognizing some of these important

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33. For discussion of the law of localism as grounds for local autonomy, see David J. Barron, *A Localist Critique of the New Federalism*, 51 *Duke L.J.* 377, 383 (2001) (arguing that central lawmaking authority can promote local autonomy “by altering the kinds of limits on local authority that are already, and necessarily, established by less visible provisions of central law”); Briffault, *Our Localism: Part I*, *supra* note 32, at 9–10 (describing two waves of constitutional amendments that states adopted after the Civil War in order to strengthen the autonomy of local governments); Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 *Colum. L. Rev.* 346, 381 (1990) [hereinafter Briffault, *Our Localism: Part II*] (discussing how state aid programs integral to funding newly emerging suburban school districts “allowed suburbs to be politically separate from the city and still enjoy high-quality municipal services without bearing unduly burdensome costs”).

34. Cf. Nestor M. Davidson, *The Dilemma of Localism in an Era of Polarization*, 128 *Yale L.J.* 954, 958–59 (2019) [hereinafter Davidson, *Dilemma of Localism*] (describing



concerns, we suggest that, in the balance, local discretion to disengage from immigration enforcement will better serve the goals of immigrant integration and civic engagement for both citizens and noncitizens alike.

In the end, the emerging federal and state anti-sanctuary trends are forcing reconsideration of the legal doctrines and theories that underlie efforts to protect state and local sanctuary policies. This Essay uses the advent of those trends to promote the thesis that localism and local autonomy make sense for immigration law, at least as it concerns enforcement efforts. At the same time, our defense of localism in the context of immigration enforcement is contingent and guarded. Whether immigration scholars and advocates are willing to fully embrace immigration localism may depend on how effectively those same scholars and advocates manage the risks associated with this form of structural power allocation. Regardless, our hope is that this Essay spurs an academic and practical conversation and provides readers with the tools to assess the costs and benefits of this legal and theoretical shift.

### I. THE DIVERGENCE OF FEDERAL AND STATE ANTI-SANCTUARY

A new front in the war against sanctuary cities is emerging. Local leaders have long contended with federal efforts to compel their participation in immigration enforcement.<sup>35</sup> In recent years, however, they are finding themselves facing a new and more formidable foe—their own states. This Part traces anti-sanctuary efforts at both the federal and state level. More importantly, this Part explains why the recent wave of state anti-sanctuary laws consists of statutes that are more expansive, more punitive, and more effective than their federal counterparts. The locus of the anti-sanctuary movement is shifting from the federal level to the states, we argue, because of the way that state anti-sanctuary laws circumvent many of the federal constitutional limitations that cities and other localities have used to challenge federal anti-sanctuary efforts thus far.

#### A. *The Plight of Federal Anti-Sanctuary*

More than any President before him, Trump has placed the crackdown on sanctuary cities at the center of his Administration's immigration enforcement strategy.<sup>36</sup> Yet his attacks also follow a long-standing federal

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localism as a “double-edged” sword because, conceptually, local autonomy can be used to advance progressive, conservative, or other causes).

35. See Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. Cin. L. Rev. 1373, 1381–84 (2006) [hereinafter Pham, *Local Sovereignty*] (examining federal attempts to engage state and local cooperation in immigration enforcement); *infra* section I.A.

36. Muzaffar Chisti & Jessica Bolter, *Trump Administration Ratchets Up Pressure on “Sanctuary” Jurisdictions*, Migration Policy Inst. (Feb. 22, 2018), <https://www.migrationpolicy.org/article/trump-administration-ratchets-pressure-sanctuary-jurisdictions>

effort to gain local cooperation in the enforcement of federal immigration law.<sup>37</sup> Historically, these efforts have included a mix of encouragement and prohibitions. In 1996, for example, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), which added section 287(g) to the Immigration and Nationality Act (INA), creating a federal program whereby local officials can be trained and “deputized” as federal agents for immigration enforcement purposes.<sup>38</sup> The IIRIRA also included a provision, now codified in 8 U.S.C. § 1373, addressing what was then the most common local sanctuary policy.<sup>39</sup> More specifically, § 1373 made it illegal for state or local governments to “prohibit, or in any way restrict, any government entity or official from sending to, or receiving from [federal immigration authorities] information regarding the citizenship or immigration status, lawful or unlawful, of any individual.”<sup>40</sup> And to this day, § 1373 remains the sole anti-sanctuary provision that has been enacted into federal law.

Despite Congress’s strong desire to secure local cooperation in 1996,<sup>41</sup> the laws that it enacted were notably limited. Specifically, neither section 287(g) nor § 1373 *required* local involvement in federal immigration enforcement.<sup>42</sup> As a result, political debates about sanctuary cities continued to escalate throughout the following decades as both federal and local policies evolved. On the federal front, starting in the mid-2000s, immigration enforcement strategies were increasingly designed around local participation.<sup>43</sup> At the same time, while many cities amended their local sanctuary policies to permit *voluntary* communications between local officials and federal immigration authorities in response to § 1373, they also added new limitations not specifically barred by federal

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[<https://perma.cc/HE92-S9KL>]; Sanctuary Cities and Trump’s Immigration Policy, Vox (Mar. 23, 2018), <https://www.vox.com/2018/3/23/17144378/sanctuary-cities-trumps-immigration-policy> [<https://perma.cc/U3WE-A7JS>].

37. See Pham, Local Sovereignty, *supra* note 35.

38. See Illegal Immigration Reform and Responsibility Act of 1996, Pub. L. No. 104-208, sec. 133, § 287(g)(1), 110 Stat. 3009-546, 3009-563 to -564 (codified at 8 U.S.C. § 1357(g)(1) (2012)).

39. Illegal Immigration Reform and Responsibility Act of 1996, Pub. L. No. 104-208, § 642, 110 Stat. 3009-546, 3009-707 (codified at 8 U.S.C. § 1373).

40. *Id.*

41. See H.R. Rep. No. 104-469, pt. 1, at 277 (1996) (Conf. Rep.) (explaining that Congress viewed apprehension of undocumented immigrants who remain undetected a high priority and intended to “give State and local officials the authority to communicate with the INS regarding the presence, whereabouts, and activities of” undocumented immigrants); see also *Chicago v. Sessions*, 888 F.3d 272, 278 (7th Cir. 2018) (discussing the legislative history of 8 U.S.C. § 1373).

42. See 8 U.S.C. §§ 1357(g), 1373.

43. See Rick Su, *The States of Immigration*, 54 Wm. & Mary L. Rev. 1339, 1356–73 (2013) [hereinafter Su, *The States of Immigration*] (examining the historical trajectory of state involvement in immigration policymaking and suggesting that “state involvement in the immigration context has long been driven by political actors seeking to reshape the federal policy-making process”).

law, such as prohibitions against inquiring about immigration-related information or constraints on when local officials may detain individuals solely on the basis of an alleged immigration violation.<sup>44</sup> These two developments began to change the way sanctuary was perceived in the political fight over immigration. No longer were sanctuary policies simply a limit on local assistance. Given the centrality of local participation in the new federal strategy, sanctuary policies were increasingly derided as an outright attack on federal immigration enforcement itself.

The limited scope of federal anti-sanctuary laws like § 1373 explains why past presidential administrations largely dealt with local resistance to federal immigration enforcement through workarounds<sup>45</sup> and encouragements.<sup>46</sup> The Trump Administration, however, has opted for a more direct and punitive approach. Within days of his inauguration, Trump issued Executive Order 13768, which, among other things, denies federal funds not only to “sanctuary jurisdictions” that “willfully refuse to comply with 8 U.S.C. 1373” but also to those that have “in effect a statute, policy, or practice that prevents or hinders the enforcement of Federal law.”<sup>47</sup> Attorney General Sessions promptly followed through by conditioning eligibility for a longstanding, Department of Justice-administered law enforcement grant program on compliance with access and notice requirements that go well beyond what is required under § 1373.<sup>48</sup> At the

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44. See, e.g., Bernard W. Bell, *Sanctuary Cities, Government Records, and the Anti-Commandeering Doctrine*, 69 *Rutgers U. L. Rev.* 1553, 1557–59 (2017) (discussing how New York City changed its policy to comply with § 1373); Orde F. Kittrie, *Federalism, Deportation, and Crime Victims Afraid to Call the Police*, 91 *Iowa L. Rev.* 1449, 1455 (2006) (describing a reason for the local shift from “don’t tell” sanctuary policies that are barred by § 1373 to “don’t ask” and “don’t enforce” policies that arguably are not).

45. See, e.g., Julia Preston, *Deportation Program Sows Mistrust, U.S. Is Told*, *N.Y. Times* (Sept. 15, 2011), <https://www.nytimes.com/2011/09/16/us/politics/deportation-program-draws-more-criticism.html> [<https://perma.cc/E5LJ-V6ML>] (describing the controversy over the Secure Communities program, which turned fingerprinting by local law enforcement into an immigration screening program).

46. See, e.g., Julia Preston, *Firm Stance on Illegal Immigrants Remains Policy*, *N.Y. Times* (Aug. 3, 2009), <https://www.nytimes.com/2009/08/04/us/politics/04immig.html> [<https://perma.cc/3WFN-L7ME>] (describing the Obama Administration’s decision to expand the 287(g) program, which “allows for cooperation between federal immigration agents and state and local police agencies”).

47. Exec. Order No. 13,768, 82 *Fed. Reg.* 8799, 8801 (Jan. 25, 2017) [hereinafter *Sanctuary Cities E.O.*]. More specifically, section 9(a) of the Executive Order stated that because it is the policy of the executive branch to ensure that a state and all its political subdivisions comply with 8 U.S.C. § 1373, those jurisdictions that refuse to comply with the statute would not be eligible to receive federal grants. See *id.* Further, section 9(b) explained that the Secretary of Homeland Security would publish a list of jurisdictions that “failed to honor any detainees” with respect to noncitizens who have committed certain crimes. *Id.*

48. See *City of Chicago v. Sessions*, 888 F.3d 272, 278–80 (2018) (discussing Attorney General Sessions’s imposition of new conditions on Edward Byrne Memorial Justice Assistance Grant Program recipients).

same time, the political attacks against sanctuary cities continued to escalate.<sup>49</sup>

Since the implementation of Trump's Executive Order and the DOJ's conditions, a number of localities—including Chicago, Philadelphia, and Santa Clara County—have gone to court to challenge these federal efforts to defund sanctuary jurisdictions.<sup>50</sup> In turn, a number of federal courts have issued sweeping injunctions against the Administration's policies.<sup>51</sup> Some courts held that as a matter of statutory delegation, the President lacks the power to deny federal funds to sanctuary jurisdictions without further Congressional authorization.<sup>52</sup> In addition, one court concluded that requiring cities to actively participate in federal immigration enforcement as a condition of receiving federal grants violates the Constitution's prohibition against federal commandeering.<sup>53</sup>

Indeed, localities have broadened their legal challenges to include not only the legality of these federal anti-sanctuary efforts but also the federal law upon which they are based. As a result, there are signs that § 1373, the sole federal anti-sanctuary provision, might be violating the anticommandeering doctrine.<sup>54</sup> Thus, although the Trump Administration's political attacks on sanctuary cities continue apace, the federal government's anti-sanctuary policies have stalled. Not only have Trump's efforts to defund sanctuary cities largely been enjoined, but the Administration's attempt to leverage and expand § 1373 may have also backfired, with the law itself in constitutional jeopardy.

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49. See, e.g., Katie Benner et al., *Mayors Cancel Meeting with Trump as Justice Dept. Squeezes Sanctuary Cities*, N.Y. Times (Jan. 24, 2018), <https://www.nytimes.com/2018/01/24/us/politics/sanctuary-cities-justice-department.html> (on file with the *Columbia Law Review*); see also *supra* note 36.

50. See, e.g., Amended Complaint for Declaratory, Injunctive & Mandamus Relief at 1, *City of Philadelphia v. Sessions*, 280 F. Supp. 3d 579 (E.D. Pa. 2017) (No. 2:17-cv-03894-MMB), 2018 WL 626280; Complaint for Injunctive & Declaratory Relief at 5, *City of Chicago v. Sessions*, 264 F. Supp. 3d 933 (N.D. Ill. 2017) (No. 1:17-cv-5720), 2017 WL 3386388; Complaint for Declaratory & Injunctive Relief at 3–4, *County of Santa Clara v. Trump*, 267 F. Supp. 3d 1201 (N.D. Cal. 2017) (No. 3:17-cv-00574-WHO), 2017 WL 412999.

51. *City of Philadelphia*, 280 F. Supp. 3d at 593 (issuing a nationwide injunction against anti-sanctuary conditions on the Justice Assistance Grant Program); *City of Chicago*, 264 F. Supp. 3d at 951 (same).

52. See *City of Philadelphia*, 280 F. Supp. 3d at 646; *City of Chicago*, 264 F. Supp. 3d at 943.

53. See *County of Santa Clara v. Trump*, 275 F. Supp. 3d 1196, 1215–16 (N.D. Cal. 2017).

54. See *City of Philadelphia*, 280 F. Supp. 3d at 651; *City of Chicago*, 264 F. Supp. 3d at 949. The courts reconsidered their earlier holdings on the constitutionality of § 1373 following the Supreme Court's decision in *Murphy v. NCAA*, which held that for Tenth Amendment purposes, the distinction between precluding and affirmatively requiring state action was "empty." 138 S. Ct. 1461, 1478 (2018); see also *City of Chicago v. Sessions*, 321 F. Supp. 3d 855, 866–73 (N.D. Ill. 2018); *City of Philadelphia v. Sessions*, 309 F. Supp. 3d 289, 329–31 (E.D. Pa. 2018).

B. *The Rise of State Anti-Sanctuary*

While federal anti-sanctuary efforts have stalled, a separate but parallel anti-sanctuary campaign is mounting. In the past four years, seven states have enacted anti-sanctuary laws,<sup>55</sup> including S.B. 4 in Texas, which has been the subject of intense litigation and public scrutiny.<sup>56</sup> Meanwhile, similar laws have been introduced or passed in at least seventeen states.<sup>57</sup> To be sure, state anti-sanctuary laws are not new.<sup>58</sup> Moreover, they have long been intertwined with anti-sanctuary efforts at the federal level.<sup>59</sup> But the most recent wave reveals some alarming trends. Their numbers are growing, their scope expanding, their penalties more severe. Taken together, state anti-sanctuary laws today represent the most significant effort thus far to conscript local officials into federal immigration enforcement.

The expanding scope of today's state anti-sanctuary laws is most apparent with respect to how sanctuary is defined. States are increasingly turning to catch-all provisions to define the types of sanctuary measures that are prohibited. Indiana and North Carolina, for example, prohibit cities from limiting or restricting their involvement in immigration enforcement to anything "less than the full extent permitted by federal law."<sup>60</sup> States are also beginning to target local activities that fall short of formal policies. For example, Texas's anti-sanctuary law applies to "patterns and practice[s]"<sup>61</sup> and forbids mere expressions of support for sanctuary policies by punishing local officials who "endorse" any limitations on their city's involvement in immigration enforcement.<sup>62</sup> Similarly, Iowa's

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55. See Ala. Code § 31-13-5 (2018); Ind. Code §§ 5-2-18.2-3-4 (2018); Miss. Code Ann. § 25-1-119 (2019); N.C. Gen. Stat. §§ 153A-145.5, 160A-205.2 (2018); Tenn. Code Ann. § 4-42-103 (2019); S.F. 481, 87th Gen. Assemb., Reg. Sess. (Iowa 2018) (to be codified at Iowa Code § 825.4).

56. S.B. 4, 85th Leg., Reg. Sess. (Tex. 2017) (codified at Tex. Gov't Code § 752.053 (2017)); see also *City of El Cenizo v. Texas*, 890 F.3d 164 (5th Cir. 2018) ("Before SB4 could go into effect, several Texas cities, counties, local law-enforcement and city officials, and advocacy groups challenged the law in three consolidated actions.").

57. See *supra* note 13.

58. Anti-sanctuary measures, for example, were included in two controversial state efforts to regulate immigration: Proposition 187, a voter initiative passed by California in 1994, and S.B. 1070, enacted by the Arizona legislature in 2010. See *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 786-87 (C.D. Cal. 1995) (upholding a preliminary injunction against California's Proposition 187); S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010). Arizona's S.B. 1070 also spawned similar anti-sanctuary legislation in other states. See, e.g., Colo. Rev. Stat. § 29-29-101 (2012) (repealed 2013); Ga. Code Ann. § 36-80-23 (2012); Mo. Ann. Stat. § 67.307 (West 2012); S.C. Code Ann. § 6-1-170 (2011).

59. See *infra* section I.C.

60. Ind. Code § 5-2-18.2-4; N.C. Gen. Stat. § 160A-205.2.

61. Tex. Gov't Code § 752.053(a)(2).

62. *Id.* § 752.051(a)(1). A preliminary injunction against this "endorsement" provision was recently upheld by a federal appellate court, but only with respect to elected local officials. See *City of El Cenizo v. Texas*, 890 F.3d 164, 185 (5th Cir. 2018).

law targets “informal, unwritten polic[ies],”<sup>63</sup> and local officials cannot “discourage” any other official from inquiring about immigration status or assisting in immigration enforcement.<sup>64</sup> Finally, a proposed bill in Florida covers “procedures” and “customs”<sup>65</sup> and prohibits local representatives from voting in favor of a sanctuary policy irrespective of whether such a policy is actually enacted or implemented.<sup>66</sup>

This expanding scope is being paired with new mandates with respect to what cities must do. Federal law does not require local officials to assist federal immigration enforcement efforts, much less actively engage in federal immigration enforcement themselves. Even the “immigration detainers” issued by the federal government are, as many courts have now held, simply requests that local law enforcement officials continue to maintain custody of an individual suspected of unauthorized entry, but not an order that they do so.<sup>67</sup> State anti-sanctuary laws, however, are now making mandatory what had long been discretionary. States like Iowa and Tennessee now require all local law enforcement agencies in the state to comply with federal detainer requests.<sup>68</sup> In addition, Texas also requires local officials to notify federal authorities about the release of anyone suspected to be an unauthorized immigrant and allow federal officials full access to local detention facilities.<sup>69</sup> Alabama’s law goes even further and subcontracts local officials to the federal government by requiring them to “fully comply with and . . . support the enforcement of federal [immigration] law.”<sup>70</sup>

Finally, penalties for violating the statutes in the most recent wave of state anti-sanctuary laws have become more severe. Traditionally, when a local policy is preempted by state law that policy is simply rendered unenforceable. In the anti-sanctuary context, however, states are imposing sanctions directly upon local residents and officials.<sup>71</sup> Nearly all of the

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63. S.F. 481, 87th Gen. Assemb., Reg. Sess. (Iowa 2018) (to be codified at Iowa Code § 825.1).

64. *Id.* § 825.4.

65. H.B. 9, 2018 Gen. Assemb., Reg. Sess. § 2 (Fla. 2018).

66. See *id.*

67. See, e.g., *Galarza v. Szalczyk*, 745 F.3d 634, 643 (3d Cir. 2014) (noting that “a conclusion that a detainer issued by a federal agency is an order that state and local agencies are compelled to follow, is inconsistent with the anti-commandeering principle of the Tenth Amendment”).

68. See Tenn. Code Ann. §§ 4-42-102(3)(D), 4-42-103 (2019); S.F. 481, 87th Gen. Assemb., Reg. Sess. (Iowa 2018) (to be codified at Iowa Code § 825.2).

69. Tex. Gov’t Code § 772.0073 (2017) (requiring that local entities “enforc[e] immigration laws” and “comply[] with, honor[], or fulfill[] immigration detainer requests” to receive funds from the Enforcement of Immigration Law Grant Program).

70. Ala. Code § 31-13-5(b) (2018).

71. See, e.g., Briffault, *New Preemption*, *supra* note 20, at 1997 (“Several states have adopted punitive preemption laws that do not merely nullify inconsistent local rules—the traditional effect of preemption—but rather impose harsh penalties on local officials or governments simply for having such measures on their books.”).

new anti-sanctuary laws being considered or enacted deny state funding to any city or locality that violates their prohibitions or mandates.<sup>72</sup> In addition, states like Texas now authorize fines, sometimes as high as \$25,000 a day, against cities that fail to comply.<sup>73</sup> States are also seeking to make local communities legally liable for the actions of unauthorized immigrants. A bill proposed in North Carolina, for example, strips cities that violate its anti-sanctuary statute of all governmental tort immunity for any crime committed by an undocumented immigrant.<sup>74</sup> The proposed anti-sanctuary bill in Florida goes even further by allowing anyone to sue a sanctuary city for personal injury or property damage committed by an unauthorized immigrant.<sup>75</sup>

Even more troubling are the escalating sanctions against local officials themselves. Local officials who violate Texas's anti-sanctuary law can be forced out of office, and those who fail to comply with a federal immigration detainer request can be charged with a crime.<sup>76</sup> In Alabama, fines are levied not against the community as a whole but rather directly against the local officials themselves.<sup>77</sup> Indeed, even if an official does not personally violate the anti-sanctuary law, she can still be charged with a crime in Alabama for failing to report a violation committed by someone else.<sup>78</sup> Iowa's anti-sanctuary law does not punish local officials directly. Nevertheless, it too threatens local officials with removal by allowing state funding to be restored earlier if the officials responsible for the anti-sanctuary violation leave their positions.<sup>79</sup>

In substance and scope, then, the recent wave of state anti-sanctuary laws is more expansive and punitive than what has been attempted thus far at the federal level, even by the Trump Administration. But whereas cities are successfully challenging federal anti-sanctuary efforts in court,<sup>80</sup> state anti-sanctuary laws have largely avoided judicial scrutiny. Among the seven anti-sanctuary laws that were recently enacted, only one—S.B. 4 in Texas<sup>81</sup>—has faced serious legal challenge. And while the cities and counties challenging S.B. 4 prevailed at the district court level, the injunction was largely overturned by the Fifth Circuit on appeal.<sup>82</sup>

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72. Tex. Gov't Code §§ 752.053, 752.056–.0565; Iowa S.F. 481; H.B. 2315, 110th Gen. Assemb., Reg. Sess. (Tenn. 2018); S.B. 145, 2017 Gen. Assemb., Reg. Sess. (N.C. 2017).

73. See Tex. Gov't Code § 752.056.

74. See N.C. S.B. 145.

75. See H.B. 9, 2018 Gen. Assemb., Reg. Sess. (Fla. 2018).

76. Tex. Gov't Code § 752.0565; Tex. Penal Code § 39.07 (2017).

77. See Ala. Code § 31-13-5(d) (2018).

78. See *id.* § 31-13-5(f).

79. See S.F. 481, 87th Gen. Assemb., Reg. Sess. (Iowa 2018) (to be codified at Iowa Code § 825.10).

80. See *supra* notes 50–54 and accompanying text.

81. S.B. 4, 85th Leg., Reg. Sess. (Tex. 2017) (codified at Tex. Gov't Code § 752.053(a)(1)).

82. See *City of El Cenizo v. Texas*, 890 F.3d 164, 191–92 (5th Cir. 2018). The challenging cities prevailed only on First Amendment grounds, with the court upholding the district

C. *The Legal Distinction Between Federal and State Anti-Sanctuary*

While both federal and state anti-sanctuary attacks are politically intertwined and directed toward the same goal, their legal fortunes appear to be diverging. Although it is the federal government that is presumed to possess plenary power over immigration and exclusive authority over its enforcement,<sup>83</sup> in the anti-sanctuary context it is state law that appears to be succeeding when federal efforts have failed.

This outcome is not so peculiar when viewed in light of the type of legal challenges localities can raise against these federal and state anti-sanctuary efforts. Until now, local governments have largely relied on exploiting the federalism divide between the federal government and the states in challenging federal anti-sanctuary efforts and state immigration laws.<sup>84</sup> Cities can assume the legal standing of the state in arguing that federal anti-sanctuary laws impinge upon state sovereignty.<sup>85</sup> They can also assume the legal position of the federal government in asserting that state immigration laws are preempted by federal law.<sup>86</sup> But the structure

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court's injunction with respect to the law's prohibition against the "endorsement" of policies that materially limit immigration enforcement, but solely with respect to elected officials. See *id.* at 185.

83. See *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 609–10 (1889) ("The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States, . . . the right to its exercise at any time . . . cannot be granted away or restrained on behalf of any one."); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 Sup. Ct. Rev. 255, 255 (explaining that the plenary power doctrine causes the Court to view federal immigration statutes permissively). For an argument that the plenary power doctrine still persists today despite attempts to undermine it, see Rubenstein & Gulasekaram, *supra* note 21, at 594.

84. See *supra* notes 48–52 and accompanying text.

85. See, e.g., *City of Chicago v. Sessions*, 264 F. Supp. 3d 933, 948 (N.D. Ill. 2017) (discussing the legal protections of state sovereignty in the context of a city directing its employees not to comply with a federal program).

86. The City of Los Angeles, for example, intervened as a plaintiff to argue that Proposition 187 was preempted by federal law. See *League of United Latin Am. Citizens v. Wilson*, 997 F. Supp. 1244, 1249 n.2, 1250 (C.D. Cal. 1997). In the federal government's challenge against Arizona's S.B. 1070, local officials provided declarations that the federal government included with its initial complaint. See Declaration of Tony Estrada at 2, *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010) (No. CV 10-1413-PHX-SRB), <https://www.justice.gov/sites/default/files/opa/legacy/2010/07/06/declaration-of-tony-estrada.pdf> [<https://perma.cc/UJ9T-5N5M>] (arguing that the Arizona law would shift scarce police resources away from "combating serious crime"); Declaration of Phoenix Police Chief Jack Harris at 1–2, *Arizona*, 703 F. Supp. 2d 980 (No. CV 10-1413-PHX-SRB), <http://www.justice.gov/opa/documents/declaration-of-jack-harris.pdf> [<https://perma.cc/Q9GG-XW7H>] (arguing that the Arizona law would have a negative effect on police relations with the community); Declaration of Roberto Villaseñor at 3, *Arizona*, 703 F. Supp. 2d 980 (No. CV 10-1413-PHX-SRB), <https://www.justice.gov/sites/default/files/opa/legacy/2010/07/06/declaration-of-roberto-villasenor.pdf> [<https://perma.cc/QMS5-32GK>] (arguing that the Arizona law would unwisely force local police to enforce immigration laws over serious crimes, such as drug trafficking). Arizona cities later filed briefs as amici in support of the federal government's preemption claim. See *Amicus Curiae*



of state anti-sanctuary laws and their unique interaction with federal law deny cities and other localities the ability to raise the same kind of federal constitutional claims that they have successfully used in the past. It is for this reason, this Essay argues, that state anti-sanctuary laws are proliferating at precisely the same time that federal anti-sanctuary efforts are stalling.

To see this requires us to recognize two features of our federal system. The first is that while the Constitution gives the federal government broad authority to preempt state and local laws, especially with respect to immigration, the federalism structure of the United States also prohibits the federal government from commandeering states to implement federal policies.<sup>87</sup> The second is that while cities and other localities often act as independent governments, as a matter of law they are largely understood to be nothing more than creatures of the state.<sup>88</sup>

It is in large part because of the anticommandeering doctrine that federal anti-sanctuary efforts thus far have been so limited. Here we have to remember that the federal interest in anti-sanctuary is not simply in repealing local sanctuary policies but more specifically in compelling the active participation of local governments in federal immigration enforcement. And while the anticommandeering doctrine is principally concerned about the sovereignty of states, as “creatures of the state,” cities and other localities have historically assumed the legal standing of their states in contesting federal commandeering.<sup>89</sup> This is why the sole

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Brief of the Arizona Cities of Flagstaff, Tolleson, San Luis, & Somerton in Support of Plaintiff-Appellee, *United States v. Arizona*, 641 F.3d 339 (9th Cir. 2011) (No. 10-16645), 2010 WL 5162523; Amicus Curiae Brief Submitted by the City of Tucson in Support of Plaintiff-Appellee, *Arizona*, 641 F.3d 339 (No. 10-16645), 2010 WL 5162524.

87. See *Printz v. United States*, 521 U.S. 898, 935 (1997) (holding that the federal government cannot circumvent the anticommandeering doctrine “by conscripting the States’ officers directly” or “those [officers] of their political subdivisions”); *New York v. United States*, 505 U.S. 144, 188 (1992) (“The Federal Government may not compel the States to enact or administer a federal regulatory program.”).

88. See *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178–79 (1907) (explaining that the power of the state to modify the privileges of, or repeal the charter of and destroy, municipalities is “unrestrained by any provision of the Constitution of the United States”). It is worth noting, however, that there have been competing formulations of the state–local relationship. See, e.g., *People ex rel. Le Roy v. Hurlbut*, 24 Mich. 44, 108 (1871) (Cooley, J., concurring) (arguing that local government is an “absolute right” protected from the powers of the legislatures); Eugene McQuillan, *A Treatise on the Law of Municipal Corporations* § 190, at 268 (1st ed. 1911) (arguing that the right to local self-government is a “private” right not subject to state supremacy); see also generally Gerald E. Frug, *The City as a Legal Concept*, 93 Harv. L. Rev. 1059, 1111–12 (1980) (describing and critiquing the emergence of the state creature conceptualization of cities in American law).

89. This is why so many of the seminal federalism decisions of the Supreme Court on state rights involve legal challenges from cities and counties, rather than states themselves. See generally *Garcia v. San Antonio Transit Auth.*, 469 U.S. 528 (1985) (brought by local transportation authority); *Nat’l League of Cities v. Usery*, 426 U.S. 833 (1976) (brought by cities). Justice Stevens remarked on this trend in his dissenting opinion in *Printz. Printz*,

anti-sanctuary provision in federal law, § 1373,<sup>90</sup> cannot and does not require local governments to communicate with federal authorities.<sup>91</sup> The anticommandeering doctrine also explains why cities have been so effective in blocking the Trump Administration’s efforts to deny federal funding to local jurisdictions that refuse to comply with immigration detainers, provide notice of an immigrant’s release, or allow the federal government access to local facilities to assume custody of detained immigrants.<sup>92</sup> Moreover, recent decisions by lower courts to hold that § 1373 is itself unconstitutional—as limited as it is—are based on the recent expansion of the anticommandeering doctrine by the Supreme Court to cover not only federal mandates for affirmative state or local action but also federal efforts to prohibit states and localities from taking specific actions.<sup>93</sup>

State law preemption, however, offers anti-sanctuary proponents a legal means of working around the constraints of the anticommandeering doctrine. The anticommandeering doctrine is derived from the federalism structure outlined by the U.S. Constitution and the independent sovereignty that it preserves in the several states.<sup>94</sup> The Constitution, however, accords no such status to cities in their dealings with the state.<sup>95</sup> Indeed, the “state creature” idea that allows cities to become the state when contesting federal law cuts against them when the commandeering argument is directed against their own state.<sup>96</sup> After all, if localities are

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521 U.S. at 955 n.16 (Stevens, J., dissenting) (“[T]hese cases do not involve the enlistment of *state* officials at all, but only an effort to have federal policy implemented by officials of *local* government.”).

90. 8 U.S.C. § 1373 (2012).

91. See *City of New York v. United States*, 179 F.3d 29, 35 (2d Cir. 1999) (noting that § 1373 does not commandeer local officials because it “prohibit[s] state and local governmental entities or officials only from directly restricting the *voluntary* exchange of immigration information” (emphasis added)).

92. Technically, the federal government possesses the “power of the purse” to condition federal funding on requirements that it cannot enact directly through federal law. See, e.g., *South Dakota v. Dole*, 483 U.S. 203, 205–06 (1987). But the Supreme Court has also held that when the condition is coercive and compels the relinquishment of a constitutional right, the federal government creates an “unconstitutional condition.” See *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 580–81 (2012). It is on this ground that courts have called into question federal defunding efforts against sanctuary jurisdictions. See, e.g., *County of Santa Clara v. Trump*, 275 F. Supp. 3d 1196, 1216 (2017) (enjoining the denial of federal funding because the anti-sanctuary conditions unconstitutionally coerce localities to adopt a federal regulatory program in violation of the Tenth Amendment prohibition against commandeering); *City of Philadelphia v. Sessions*, 280 F. Supp. 3d 579, 651 (E.D. Pa. 2017) (noting that anti-sanctuary conditions attached to federal funding “implicate the Tenth Amendment and its built-in anti-commandeering principles,” but granting a preliminary injunction on other grounds).

93. See *Murphy v. NCAA*, 138 S. Ct. 1461, 1479–81 (2018).

94. See *id.* at 1479.

95. See Richard C. Schragger, *The Attack on American Cities*, 96 *Tex. L. Rev.* 1163, 1217 (2018).

96. See *id.*

simply administrative subdivisions of the state, as the Supreme Court has at times described them,<sup>97</sup> then their “commandeering” by states may not only be constitutionally permitted, but constitutionally encouraged. And as creatures and subdivisions, it might also be constitutionally expected for states to be able to punish localities for noncompliance with state law in ways that the federal government cannot.

As a result, threats of state defunding have not met the same fate as federal defunding.<sup>98</sup> Cities may feel just as, if not more, coerced when the state conditions grant funding on the repeal of local sanctuary policies. In fact, cities tend to be far more reliant on state aid than they are on federal.<sup>99</sup> But localities do not have a federal constitutional right to be free from state commandeering.<sup>100</sup> Thus, while making all state funding contingent on local participation in federal immigration enforcement might be coercive, such conditions do not force cities and other localities to give up a federal constitutional right. By turning to state law, then, anti-sanctuary advocates are able to compel local participation in ways that federal law cannot.

Moreover, state anti-sanctuary laws have been able to avoid preemption themselves because of existing federal anti-sanctuary policies. Indeed, preemption was precisely what befell Proposition 187, which was adopted by California voters in 1994 and included the first anti-sanctuary provision enacted into law.<sup>101</sup> A federal district court enjoined its implementation for infringing upon the federal government’s exclusive authority over immigration regulation and its enforcement.<sup>102</sup> Since Proposition 187, and perhaps in response to its defeat,<sup>103</sup> however, Congress amended federal law to encourage precisely the kind of local participation that states are now seeking to mandate. This included the 1996 addition of section 287(g) and § 1373.<sup>104</sup> Federal encouragement is

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97. See *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907) (describing local governments as “political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them”).

98. See *supra* sections I.A–.B.

99. See, e.g., David Berman, *Local Government and the States: Autonomy, Politics, and Policy* 92 (Routledge 2015) (2003) (explaining that about thirty-five percent of cities’ total revenue comes from state governments, while only four percent comes from the federal government).

100. See Schragger, *supra* note 95, at 1217.

101. See *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 763 (C.D. Cal. 1995) (describing Proposition 187’s provisions, which required law enforcement and other local government personnel to check “the immigration status of persons with whom they come in contact,” report the individuals “to state and federal officials,” and “deny those persons social services, health care, and education”).

102. See *id.* at 786–87.

103. See Su, *The States of Immigration*, *supra* note 43, at 1373–78 (describing how “political actors . . . were able to leverage” Proposition 187’s defeat in court “into a national controversy that made federal reforms much more likely”).

104. See *supra* text accompanying notes 38–40.

also expressed in a separate provision of § 1373 that specifically requires the federal government to respond to all inquiries about immigration status that it receives from local law enforcement.<sup>105</sup> These amendments and the increasing federal reliance on local cooperation are why the Supreme Court, when asked to rule on the constitutionality of a controversial immigration enforcement law enacted by Arizona in 2010, upheld the law's anti-sanctuary mandate despite finding the rest of the law preempted.<sup>106</sup> As the Court noted, the "federal scheme" now in place "leaves room for a policy requiring state officials to contact ICE as a routine matter."<sup>107</sup> Similarly, in *City of El Cenizo v. Texas*, the Fifth Circuit rejected the localities' federal preemption argument against S.B. 4 because of the various encouragements of local involvement in immigration enforcement found in federal law.<sup>108</sup>

In short, state anti-sanctuary laws are proliferating precisely because of the legal advantages they possess over their federal counterparts. They are free from the federal constitutional constraints that have limited federal anti-sanctuary efforts thus far. Unlike other state immigration laws in the past, they also avoid federal preemption because of the extent to which they further federal interests and are intertwined with federal law. The consequence is that cities and other localities are denied the traditional legal strategies that have served them well in the past. If local sanctuary policies are to be defended against the rise of state anti-sanctuary laws, a new set of legal arguments will need to be developed.

## II. STATE ANTI-SANCTUARY THROUGH A LOCALIST LENS

The Fifth Circuit's decision in *City of El Cenizo v. Texas* illustrates the uphill legal battle that localities face in challenging state anti-sanctuary laws on federal constitutional grounds. But its treatment of an ancillary and largely overlooked local autonomy argument, based in part on the Texas constitution,<sup>109</sup> also suggests the possibility of a different frame of analysis and a separate line of attack. When viewed through a lens of localism rather than federalism, the proliferation of these state laws also calls attention to the need to examine in closer detail how they fit within the legal structure that governs the relation between states and their localities. This Part explores what an immigration localism analysis might look like. In addition, it shines light on the doctrinal insights and legal claims that such an analysis reveals.

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105. See 8 U.S.C. § 1373(c) (2012) ("[INS] shall respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information.").

106. See *Arizona v. United States*, 567 U.S. 387, 411–13, 416 (2012).

107. *Id.* at 412–13.

108. See 890 F.3d 164, 176–82 (5th Cir. 2018).

109. See *id.* at 191.

Of course, to say that localism matters in the state anti-sanctuary context does not mean that immigration localism arguments will guarantee legal victory for cities. Litigating in federal court, the local plaintiffs in *El Cenizo* chose to frame their local autonomy argument through a federal constitutional lens—what the court described as a “hybrid Tenth Amendment and [federal] preemption claim.”<sup>110</sup> And although the Fifth Circuit ultimately concluded that it need not address this argument because it was not raised at the district court level,<sup>111</sup> the court also dismissed the argument on substantive grounds. Because the Texas Constitution “prohibits a city from acting in a manner inconsistent with the general laws of the state,” the court explained,<sup>112</sup> the state clearly has the power to “‘commandeer’ its municipalities in this way.”<sup>113</sup>

But the indirect means by which localism was raised in *El Cenizo*, and the cursory manner in which it was dismissed, also suggest the need for further inquiry. Was the Fifth Circuit correct in concluding that the state’s power to preempt necessarily includes the power to commandeer? And if that is indeed the case in Texas, is it the same in other states? Answering these questions requires a closer look at how state constitutions and laws define the relationship between states and their localities, how that relationship varies between states, and the nuances connected with that legal development over time. Moreover, the particular features of state anti-sanctuary laws today could implicate localism concerns in ways that differ from other state preemption statutes. Ultimately, we conclude that localism makes possible a set of heretofore unrecognized legal claims and doctrinal considerations that certain localities might use to stem the coming tide of state anti-sanctuary legislation.

#### A. *Localism and the Legal Standing of Localities*

To understand the significance of localism in the anti-sanctuary context, we have to go beyond the fact that cities and other localities are mere “creatures of the state.”<sup>114</sup> It is also important to examine how the state–local relationship is defined as a matter of state law. Here, we show that the power of states over localities is not absolute. Indeed, like the trajectory of federalism, the development of localism in many states has been toward expanding local autonomy and increasing limits on state interference.

The power of local governments is one area that has seen this expansion of local autonomy. This expansion is evident in the fact that the vast majority of states have moved their localism structure away from

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110. See *id.*

111. See *id.*

112. *Id.* (quoting *Tyra v. City of Houston*, 822 S.W.2d 626, 628 (Tex. 1991)).

113. *Id.*

114. See *supra* text accompanying notes 31–32.

“Dillon’s Rule” and toward “home rule.”<sup>115</sup> To be sure, both doctrines presume that, as state creatures, cities and localities possess only those powers that have been specifically delegated to them by the state.<sup>116</sup> How they differ is in the extent of the state’s delegation and how courts are instructed to interpret them.

In “Dillon’s Rule” states, for example, the power of localities tends to be limited to a specific list of enumerated powers.<sup>117</sup> Moreover, the doctrine instructs courts to interpret the scope of such delegations narrowly and presume against finding such delegation in close cases.<sup>118</sup> For individuals, private corporations, and state governments, the standard view is that they have the power and freedom to act unless specifically prohibited by state or federal law.<sup>119</sup> Dillon’s Rule, however, reverses that baseline presumption for local governments: They are assumed to have no power to do anything unless an express or implied state delegation of authority can be identified.<sup>120</sup>

In contrast, localities in home-rule states are granted a blanket delegation of power. This often includes the authority to enact local regulations without the need for further state authorization.<sup>121</sup> Similarly, localities in home-rule states typically possess the ability to determine their own governmental structure through the adoption of a home-rule charter, in which the roles and responsibilities of local officials are defined.<sup>122</sup> Of course, such broad delegations of home-rule authority are not without constraints. In many states, the scope of a locality’s home-rule powers is limited to matters of municipal or local affairs.<sup>123</sup> Furthermore, most states still require local laws to be consistent with state

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115. See Dale Krane et al., *Home Rule in America: A Fifty-State Handbook* 14 (2001) (noting that home rule had been adopted in some form in forty-five states); Jon C. Teaford, *The Unheralded Triumph: City Government in America, 1870–1900*, at 103–31 (1984) (describing the origins of municipal home rule in the 1870s and its subsequent expansion).

116. This is not unlike our understanding of federal power under federalism—namely, that the federal government’s authority is largely limited to the “enumerated powers” that were ceded by the states when the Constitution was ratified.

117. See, e.g., John F. Dillon, *Treatise on the Law of Municipal Corporations* § 89 (1st ed. 1872).

118. See *id.* § 17.

119. See *id.* §§ 18–19.

120. See *City of New York v. Beretta U.S.A. Corp.*, 315 F. Supp. 2d 256, 270 (E.D.N.Y. 2004) (noting that Dillon’s Rule refers to the concept that “cities possess only those powers that can be traced to explicit delegations of authority from the state” and that “cities are powerless to act” in the absence of such delegations); see also Frug, *supra* note 88, at 1111–12.

121. See, e.g., 1 Chester James Antieau, *Antieau’s Local Government: Municipal Corporation Law* §§ 3.20–3.22 (1998).

122. See David J. Barron, *Reclaiming Home Rule*, 116 *Harv. L. Rev.* 2257, 2290 (2003) [hereinafter Barron, *Reclaiming Home Rule*]; see also *infra* section II.B.1.

123. See Frug, *supra* note 88, at 1117.

laws, preserving in the state the power to preempt.<sup>124</sup> Nevertheless, the widespread adoption of home rule itself reflects the legal trend among states toward expanding the power of local self-governance.<sup>125</sup>

Another area in which the localism relationship has developed involves the protection of localities from state interference.<sup>126</sup> In the nineteenth century, state legislatures frequently meddled in local affairs.<sup>127</sup> In response, many state constitutions were amended to limit their ability to do so. Nearly all state constitutions now prohibit the state from enacting “local laws” or “special legislation” that targets or applies only to specific localities.<sup>128</sup> Indeed, in some states, home rule does not just empower localities to regulate local affairs; it also grants such local laws immunity from state preemption.<sup>129</sup> Over time, further protections have been added as well. For example, since the 1970s, more than a dozen states have adopted constitutional amendments that prohibit the state from imposing “unfunded mandates” that expand the responsibilities of local governments but do not provide sufficient state funds to carry them out.<sup>130</sup>

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124. See, e.g., Fla. Const. art. VIII, § 1(g) (“Counties . . . shall have all powers of local self-government not inconsistent with general law . . .”); see also Paul Diller, *Intrastate Preemption*, 87 B.U. L. Rev. 1113, 1124–27 (2007).

125. See Barron, *Reclaiming Home Rule*, *supra* note 122, at 2277–88; Rick Su, *Have Cities Abandoned Home Rule?*, 44 *Fordham Urb. L.J.* 181, 190–91 (2017).

126. See Antieau, *supra* note 121, § 3.00 (describing home rule’s evolution from a Missouri constitutional amendment that was adopted in 1875). As a matter of law, home rule is not necessarily inconsistent with Dillon’s Rule; if Dillon’s Rule presumes that localities possess only those powers that have been delegated by state law, home rule serves as one form that such a delegation can take. But because the home rule delegation is so expansive, it is now common practice to classify states as either a home-rule or Dillon’s Rule state. See, e.g., Krane et al., *supra* note 115, at 14–15. Moreover, within these broad classifications, variations exist with respect to how home rule or Dillon’s Rule is structured in any particular state. *Id.*

127. See, e.g., Howard Lee McBain, *The Law and Practice of Municipal Home Rule* 263–64 (1916) (describing an 1899 lawsuit that challenged the ability of the California legislature to interfere with “municipal affairs”—in particular, local elections); Nancy Burns & Gerald Gamm, *Creatures of the State: State Politics and Local Government, 1871–1921*, 33 *Urb. Aff. Rev.* 59, 62 (1997) (compiling data from the Alabama, Massachusetts, and Michigan state legislatures between 1871 and 1921 to demonstrate the outsized influence that state governments wielded in local affairs).

128. See Barron, *Reclaiming Home Rule*, *supra* note 122, at 2286–88 (describing efforts to rein in states’ power to “enact ‘special legislation’ that would apply only to particular localities”).

129. See, e.g., Cal. Const. art. XI, § 5(a) (empowering charter cities to “make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws”); Colo. Const. art. XX, § 6 (“The people of each city or town of this state, having a population of two thousand inhabitants . . . are hereby vested with . . . power to make, amend, add to or replace the charter of said city or town, which shall . . . extend to all its local and municipal matters.”).

130. See John Dinan, *State Constitutional Politics: Governing by Amendment in the American States* 45–47 (2018) (describing state constitutional amendments that bar

Of course, the powers and protections of a particular locality depend on the specific localism structure in place in a given state. As such, the significance of localism in the state anti-sanctuary context varies not only between states but also sometimes between localities within a state. Consider, for example, some of the states that are now involved in the anti-sanctuary wave. Alabama, Georgia, and Virginia remain pure Dillon's Rule states, having never embraced the home-rule movement.<sup>131</sup> Iowa and North Carolina have both adopted home rule, but in the former home rule was adopted via constitutional amendment,<sup>132</sup> while in the latter it exists purely as a statutory enactment subject to legislative exception.<sup>133</sup> In Texas, home rule has been extended to major cities but specifically excludes counties, which leaves sanctuary jurisdictions like Travis County and its sheriff operating under Dillon's Rule.<sup>134</sup> And while nearly all states have some kind of prohibition on special legislation, including those now considered Dillon's Rule states, limitations on unfunded mandates exist in only a few, such as Florida and Tennessee.<sup>135</sup>

Moreover, how localism developments might translate into concrete legal claims requires further consideration. It is worth noting that many local-government-law scholars believe that the powers and protections that have been extended to localities often fail to live up to their promise—hobbled as they often are by narrow judicial constructions or creative state circumventions. Finally, localism claims remain, for the most part, untested and underdeveloped, especially in the context of immigration.

So what might cities and their advocates gain by turning to localism in the anti-sanctuary context? It is to this that we now turn.

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unfunded mandates outright or require states to shoulder at least some of the financial burden).

131. See, e.g., *Arrington v. Associated Gen. Contractors of Am.*, 403 So. 2d 893, 902 (Ala. 1981) (“The governmental entity involved here, a municipality, derives all of its power from the state, and no municipality can legislate beyond what the state has either expressly or impliedly authorized.”); *H.G. Brown Family Ltd. v. City of Villa Rica*, 607 S.E.2d 883, 885 (Ga. 2005) (“A municipality has no inherent power; it may only exercise power to the extent it has been delegated authority by the state. A municipality’s allocations of power from the state must be strictly construed.”); *City of Richmond v. Confrere Club*, 387 S.E.2d 471, 473 (Va. 1990) (“In determining the legislative powers of local governing bodies, Virginia follows the Dillon Rule of strict construction.”).

132. See Iowa Const. art. III, § 38A.

133. See N.C. Gen. Stat. § 160A-11 (2018).

134. See *Forwood v. City of Taylor*, 214 S.W.2d 282, 286 (Tex. 1948) (establishing home rule for cities and towns); George D. Braden et al., *The Constitution of the State of Texas: An Annotated and Comparative Analysis* 652 (1977), <https://www.sll.texas.gov/assets/pdf/braden/the-constitution-of-the-state-of-texas-an-annotated-and-comparative-analysis.pdf> [<https://perma.cc/8CYN-GHR6>] (describing the adoption and repeal of county home rule in Texas).

135. See Fla. Const. art. VII, § 18(a); Tenn. Const. art. II, § 24.



B. *The Localist Case Against State Anti-Sanctuary Legislation*

Drawing upon the localism structures outlined above, this section illustrates how localism might be used to contest the rise of state anti-sanctuary legislation. Doing so requires turning a close eye toward the unique legal structure of today's anti-sanctuary legislation and more specifically the ways in which those laws differ from other state preemption statutes. The claims discussed below are not meant to be exhaustive. Nor do we believe that such claims are possible in all states or against every type of state anti-sanctuary legislation. Indeed, our goal is simply to provide some examples of what a localist analysis might reveal. Moreover, this section sheds light on how localism might already be influencing the manner in which state anti-sanctuary laws are drafted and how it might be used to shape—both legally and politically—the development of state anti-sanctuary more generally.

1. *Home Rule as Anticommandeering.* — Cities and other localities cannot invoke the federal anticommandeering doctrine in challenging state anti-sanctuary legislation. But something akin to a “state anticommandeering” claim might be raised in home-rule states. Such a claim would not be based, of course, on the Federal Constitution.<sup>136</sup> Nevertheless, state constitutional provisions, especially those connected with the adoption of home rule, might serve as the basis for such an argument.

To our knowledge, no state court has explicitly adopted a state anticommandeering doctrine in name. Yet in many states, such a doctrine may already exist in effect. Just as federal law distinguishes between permissible federal preemption and unconstitutional federal commandeering,<sup>137</sup> state courts often do the same in interpreting the power of states in the context of home rule. A state may have broad authority to preempt local regulations. But, as we note below, courts have also held that states cannot direct the activities of local officials, or alter their duties and responsibilities, without running afoul of home rule. After all, home rule was adopted in many states in response to forcible state takeovers of municipal departments—such as fire and police—

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136. However, there have been some efforts to develop a state anticommandeering doctrine based on the Federal Constitution. See Schragger, *supra* note 95, at 1218–19 (proposing local anticommandeering principles as a tentative solution to efforts by the federal government to compel municipal officials to enforce federal immigration law); cf. David J. Barron, *Promise of Cooley's City: Traces of Local Constitutionalism*, 147 U. Pa. L. Rev. 487, 611 (1999) (arguing that despite not being mentioned in the Federal Constitution, localities have federal constitutional standing against their own states).

137. See, e.g., *Murphy v. NCAA*, 138 S. Ct. 1461, 1476–77 (2018) (describing the constitutional distinction between federal laws that regulate individuals directly by “requiring or prohibiting certain acts,” which Congress can do, and those that “directly . . . compel the States to require or prohibit those acts,” which it cannot).

which were common in the nineteenth century.<sup>138</sup> And as noted above, one of the central powers delegated by home rule was the ability of local residents to frame municipal charters defining the structure of their local government and the roles and responsibilities of its officials.<sup>139</sup> In this regard, the motivations behind home rule echo the same concerns behind the federal anticommandeering doctrine: to preserve and protect the independence and structural integrity of local governments.

Indeed, cases prohibiting “state commandeering” can be found in a number of different states. In Missouri, for example, the state constitution specifically bars the state from “creating or fixing the powers, duties, or compensation of any municipal office or employment” of a home-rule city.<sup>140</sup> As a result, Missouri courts have struck down state laws requiring a city to create an arbitration board<sup>141</sup> or mandating that local officials serve on a board of examiners created by the state.<sup>142</sup> In Ohio, courts have held that, under the state’s home-rule amendment, the “internal government of a municipality, such as . . . the powers, duties, and functions of municipal officers, are matters of local government, which may not be influenced or controlled by [state] laws.”<sup>143</sup> Thus, the state cannot regulate how a city selects its police chief<sup>144</sup> or otherwise control “the organization and regulation of its police force.”<sup>145</sup> Other states similarly protect the independence of localities in managing their personnel and how local officials are removed.<sup>146</sup> To be sure, not all

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138. See, e.g., *McBain*, supra note 127, at 35–39, 498 (describing, inter alia, an instance of “patent subterfuge,” in which the New York legislature co-opted local control of certain municipal police departments, and similar efforts by Colorado’s legislature).

139. See supra notes 121–122 and accompanying text.

140. Mo. Const. art. VI, § 22.

141. See *State ex rel. Burke v. Cervantes*, 423 S.W.2d 791, 794 (Mo. 1968).

142. See *State ex rel. Sprague v. City of St. Joseph*, 549 S.W.2d 873, 881 (Mo. 1977).

143. *Lorain St. R.R. Co. v. Pub. Utils. Comm’n*, 148 N.E. 577, 580 (Ohio 1925) (Marshall, C.J., concurring); see also *State ex rel. Strain v. Huston*, 29 N.E.2d 375, 376 (Ohio Ct. App. 1940) (holding that the power to create local offices, determine “when the performance of the duties of the office are distributed among subordinates,” and “prescribe rules and regulations to govern the time and manner of service by subordinates” is a matter of local self-government immune from state control).

144. *State ex rel. Lynch v. City of Cleveland*, 132 N.E.2d 118, 121 (Ohio 1956) (holding that a city is not subject to state law in how it selects its police chief).

145. *Harsney v. Allen*, 113 N.E.2d 86, 88 (Ohio 1953) (“The organization and regulation of its police force, as well as its civil service functions, are within a municipality’s powers of local self-government.”).

146. See, e.g., *State ex rel. City of St. Paul v. Oehler*, 16 N.W.2d 765, 769 (Minn. 1944) (holding that adoption of a home-rule charter granted a municipality general legislative powers, including the power to remove a municipal official); *Goodwin v. Oklahoma City*, 182 P.2d 762, 764 (Okla. 1947) (holding that the city charter provisions regarding the termination of “appointed officers or employees[] are solely matters of municipal concern and control over the general laws”); *Devlin v. City of Philadelphia*, 862 A.2d 1234, 1245–47 (Pa. 2004) (holding that granting domestic-partnership benefits to employees in same-sex relationships is within a locality’s power over personnel and administration and not subject to the state’s power to regulate marriage or civil rights).

home-rule states have ruled against commandeering in this manner; in most states there are no decisions either way, and in others courts have explicitly upheld the state's ability to dictate the duties and responsibilities of local officials.<sup>147</sup> But these decisions suggest that localism is not necessarily blind to the distinction between preemption and commandeering that federalism draws.

Just as federal anti-sanctuary efforts are limited by the federal anticommandeering doctrine, perhaps state anti-sanctuary laws are similarly constrained. After all, even more so than federal anti-sanctuary efforts, the goal of state anti-sanctuary laws is not merely to repeal local sanctuary policies but more specifically to fix the power and duties of local officials. Anti-sanctuary mandates direct local officials to take specific actions, including those that may not be authorized or approved by the local governments that they work for or the local residents that they serve.<sup>148</sup> Anti-sanctuary penalties threaten local officials with personal sanctions unless they choose to comply with the state's demand that they prioritize federal immigration enforcement efforts above all other local responsibilities.<sup>149</sup>

State anti-sanctuary laws may not be directly taking over municipal departments in the same way that they have done in the past. But the extent to which many state anti-sanctuary laws require localities to comply with all federal requests for assistance or action renders them, in effect, auxiliary departments of the federal government. In other words, if state preemption laws ordinarily concern what local governments can regulate, anti-sanctuary legislation targets how local governments are organized, structured, and managed.

But if anti-sanctuary mandates implicate commandeering under home rule, can the same be said about state anti-sanctuary laws that contain only prohibitions? Just as 8 U.S.C. § 1373 avoids federal anticommandeering concerns,<sup>150</sup> many state anti-sanctuary laws also impose no affirmative requirements and simply forbid the enactment of

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147. See *State ex rel. Young v. Robinson*, 112 N.W. 269, 270 (Minn. 1907) (explaining that when state laws operate within a municipality, "the municipality and its officers are . . . subject to the command and control[] of the state government at all times"); *State ex rel. Burns v. Linn*, 153 P. 826, 826 (Okla. 1915) (holding that the state of Oklahoma may impose duties and penalties upon local officers of the city of Tulsa). Interestingly, Minnesota and Oklahoma are the two states in which courts held that the *removal* of local officials is entirely a local affair not subject to state regulations. See *Robinson*, 112 N.W. at 270; *Linn*, 153 P. at 830.

148. See *supra* section I.B.

149. See *supra* section I.B.

150. See *City of New York v. United States*, 179 F.3d 29, 35 (2d Cir. 1999) (noting that § 1373 does not commandeer local officials because it "prohibit[s] state and local governmental entities or officials only from directly restricting the voluntary exchange of immigration information").

local sanctuary policies.<sup>151</sup> Styling the anti-sanctuary law as a prohibition, however, may not be enough to save it from a commandeering claim.

First, even if state anti-sanctuary laws rely entirely on prohibitions in theory, the breadth of those prohibitions may nevertheless constitute an implicit mandate in practice. By banning both formal policies and informal customs that limit cooperation with federal immigration authorities, local governments are essentially left with no alternative other than to permit or encourage such cooperation. Further, the escalating punitive measures<sup>152</sup> strongly incentivize, if not directly compel, local officials to interpret such prohibition as affirmative mandates lest they risk losing state funding or facing personal sanctions. As noted earlier, federal courts are now reaching a similar conclusion in their analysis of § 1373, which mirrors state anti-sanctuary in simply prohibiting local policies that limit local participation in immigration enforcement.<sup>153</sup> As these courts are concluding, § 1373, though literally written as a prohibition, operates like a mandate in effect.<sup>154</sup> Given these developments, a state court may see anti-sanctuary prohibitions in the same way.

But even under a narrow view that anti-sanctuary prohibitions are just that—simply prohibitions and not commandeering—they might still constitute an interference with the power of local self-government under home rule. The goal of anti-sanctuary prohibitions is to ensure that line-level officers have the irrevocable discretion, if they so choose, to participate in federal immigration enforcement.<sup>155</sup> But in doing so, state anti-sanctuary laws severely constrain the ability of local governments to

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151. See, e.g., Mo. Ann. Stat. § 67.307 (West 2018); H.B. 2315, 110th Gen. Assemb., Reg. Sess. (Tenn. 2018) (codified in scattered titles of the Tenn. Code Ann.) (prohibiting state and local governmental entities and officials from adopting sanctuary policies); see also H.B. 179, 132d Gen. Assemb., Reg. Sess. (Ohio 2017) (proposing to require “state and local authorities to cooperate with the federal government in the enforcement of immigration laws”). Interestingly, all three of these are also home-rule states. See *supra* section II.A.

152. See *supra* notes 72–79 and accompanying text.

153. See 8 U.S.C. § 1373 (2012); *supra* section I.A.

154. See *City of Chicago v. Sessions*, 264 F. Supp. 3d 933, 949 (N.D. Ill. 2017) (“The characterization of Section 1373 as a prohibition that requires no affirmative state action . . . does not accurately portray its practical import. Section 1373 mandates that state and city employees have the option of furnishing to the INS information on individuals’ immigration status while the employee is acting . . . as a state or local official.”). After the Supreme Court’s decision in *Murphy v. NCAA*, 138 S. Ct. 1461, 1478 (2018), courts have entirely rejected the prohibition versus mandate distinction in explicitly ruling Section 1373 unconstitutional. See *City of Chicago v. Sessions*, 321 F. Supp. 3d 855, 869 (N.D. Ill. 2018) (rejecting the “command-versus-proscription dichotomy” in assessing Section 1373); *City of Philadelphia v. Sessions*, 309 F. Supp. 3d 289, 329–31 (E.D. Pa. 2018) (holding that by “prohibiting certain conduct of government entities or officials,” Section 1373 violates the Tenth Amendment by “unequivocally dictat[ing] what a state legislature may and many not do” (internal quotation marks omitted) (quoting *Murphy*, 138 S. Ct. at 1478)).

155. See *supra* text accompanying notes 69–72.

oversee their workforces, control the use of municipal resources, and manage their internal administration. These laws effectively isolate local officers from the local governments that employ them. Indeed, anti-sanctuary prohibitions may affect local personnel management beyond the immigration enforcement context. Given how broadly state anti-sanctuary laws are now being written, simply requiring local law enforcement employees to adhere to the duties for which they are hired—murder investigation, neighborhood outreach, parking enforcement—may itself constitute less than full support for immigration enforcement or an impediment to cooperation with federal authorities.

In short, contrary to what the Fifth Circuit concluded in *City of El Cenizo*,<sup>156</sup> the power to preempt is not necessarily synonymous with the power to commandeer. Of course, whether state anticommandeering can be raised as a home-rule claim is far from settled. We suspect that in states like Missouri and Ohio,<sup>157</sup> where the courts' interpretation of home rule echoes the federal anticommandeering doctrine,<sup>158</sup> a stronger case against anti-sanctuary might be made. Yet, in states like Texas, where home rule is unevenly allocated and there has been no decision protecting the local government structure of home-rule cities from state preemption,<sup>159</sup> the prospects of such a case are less clear. As a result, the equivalence that the Fifth Circuit drew in *City of El Cenizo* between state preemption and state commandeering in the anti-sanctuary context may turn out to be the governing rule.<sup>160</sup> But reaching that definitive conclusion would require a state law challenge that squarely places this question before a state court.

2. *Fiscal Accountability and Unfunded Mandates.* — State anti-sanctuary laws also impose costs in ways that undermine fiscal accountability. Local governments have long complained about unfunded mandates, through which the state expands local responsibilities but does not provide the resources to carry them out or authorize a new revenue source to fund doing so.<sup>161</sup> For local officials, the concerns involve the need to raise taxes or redirect resources from other priorities. As a policy matter, the worry is that unfunded mandates allow states to shirk the need to internalize the cost of their own policies, thus encouraging them to adopt inefficient laws that they would not otherwise enact.<sup>162</sup>

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156. See *City of El Cenizo v. Texas*, 890 F.3d 164, 191 (5th Cir. 2018).

157. See Mo. Ann. Stat. § 67.307 (West 2018); H.B. 179, 132d Gen. Assemb., Reg. Sess. (Ohio 2017).

158. See *supra* notes 141–146 and accompanying text.

159. Recall that Texas accords home rule to cities, but not counties. See *supra* note 134.

160. See *City of El Cenizo*, 890 F.3d at 191.

161. See Berman, *supra* note 99, at 29, 32–35.

162. See, e.g., Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 Tex. L. Rev. 1, 35–38 (2004) (stating that “the purchase price undermines Congress’s ability to use commandeering to externalize the costs of its regulation”).

Again, fiscal accountability has some connections with the federal anticommandeering doctrine. As the Supreme Court explained, if federal commandeering were widely permitted, “[m]embers of Congress” would be able to “take credit for ‘solving’ problems without having to ask their constituents to pay for the solutions with higher federal taxes.”<sup>163</sup> But at the state level, the legal backlash against unfunded mandates has taken a more direct turn. As noted earlier, since the 1970s, more than a dozen states have adopted constitutional amendments limiting the states’ ability to impose unfunded mandates.<sup>164</sup> The first, ratified by Tennessee in 1978, states that “[n]o law of general application shall impose increased expenditure requirements on cities or counties unless the General Assembly shall provide that the state share in the cost.”<sup>165</sup> Subsequent amendments have gone even further, including New Hampshire’s, which bars the state from mandating additional programs or responsibilities “unless such programs or responsibilities are fully funded by the state,”<sup>166</sup> and Florida’s, which requires the state to provide funding for state mandates directly or authorize a new funding source that is capable of covering the additional costs.<sup>167</sup>

Federal and state officials tend to talk about anti-sanctuary laws as law enforcement measures.<sup>168</sup> But at the local level, they are widely seen as “unfunded mandates” requiring local officials to carry out a federal responsibility.<sup>169</sup> The kinds of activities that state anti-sanctuary laws are

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163. *Printz v. United States*, 521 U.S. 898, 930 (1997).

164. See *supra* note 130 and accompanying text.

165. Tenn. Const. art. II, § 24.

166. N.H. Const. pt. I, art. 28-a.

167. Fla. Const. art. VII, § 18.

168. See Gromer Jeffers Jr., Greg Abbot Defends Sanctuary Cities Law at Texas Sheriffs’ Meeting, *Dall. Morning News* (July 31, 2017), <https://www.dallasnews.com/news/texas-legislature/2017/07/31/greg-abbott-defends-sanctuary-cities-law-texas-sheriffs-meeting> (on file with the *Columbia Law Review*) (noting Texas Governor Abbot’s views that S.B. 4’s ban against sanctuary cities prevents human trafficking and other crimes); Kevin Johnson, Sessions Defends Sanctuary Cities Lawsuit Against California, *USA Today* (Mar. 7, 2018), <https://www.usatoday.com/story/news/politics/2018/03/07/sessions-defends-sanctuary-cities-lawsuit-against-california/402936002/> (on file with the *Columbia Law Review*) (describing then-Attorney General Sessions’s intent to punish California and sanctuary cities for frustrating federal law enforcement); see also *Sanctuary Cities E.O.*, *supra* note 47 (explaining that the purpose of the Executive Order is to enforce immigration law and ensure the security of the country).

169. See, e.g., Ilyse Hogue, Alabama Immigration Law Recalls Darkest Moments in History, *Guardian* (Oct. 18, 2011), <https://www.theguardian.com/commentisfree/cifamerica/2011/oct/18/alabama-immigration-law> (on file with the *Columbia Law Review*) (quoting a county official describing the state’s anti-sanctuary law as “another unfunded mandate to a county struggling to keep its head above water”); Yucel Ors, Federal Government Should Fix the Immigration System, Not Cities, *Nat’l League of Cities* (Jan. 30, 2017), <https://www.nlc.org/article/federal-government-should-fix-the-immigration-system-not-cities> [<https://perma.cc/J8ZB-P7TY>] (“NLC’s long-standing position is that measures requiring cities to use local law enforcement resources to enforce federal immigration laws are unfunded mandates that impose additional disproportionate responsibilities on local law enforcement, increase

now mandating are expensive. Localities incur direct costs when they comply with federal detainer requests that are uncompensated by both the federal government making the request and by the state mandating compliance with the federal request.<sup>170</sup> They also redirect manpower from other law enforcement priorities, such as when local police officers are allocated to immigration enforcement task forces at the request of the federal government.<sup>171</sup>

In enacting anti-sanctuary legislation, states routinely tout the importance of local participation to the interest and welfare of the state.<sup>172</sup> But none of the anti-sanctuary laws provide state funds to cover their open-ended mandates. S.B. 4 in Texas comes closest—by establishing a competitive grant program that cities can apply for and by agreeing to use state funds to indemnify localities for any liability incurred because of constitutional violations associated with federal detainer requests.<sup>173</sup> Yet even there, the state makes no attempt to cover all or even a meaningful proportion of the costs associated with local immigration enforcement.

Outsourcing like this seems to be precisely the kind of legislative distortion that state prohibitions on unfunded mandates were intended to cover, notwithstanding the creative ways that legislatures attempt to write around those constraints. Florida's proposed law, for example, authorizes localities to seek reimbursement from the federal government and the detainees themselves.<sup>174</sup> But there is little to suggest that these "revenue sources" are likely to "generate the amount of funds estimated to be sufficient to fund [the mandated] expenditure," as the state

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financial liability on local governments, and ultimately move us further from our foundational principles of federalism.").

170. See *Cty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 510–11 (N.D. Cal. 2017) (noting that the federal government neither reimburses local governments when they comply with detainer requests nor indemnifies them for liability incurred because of Fourth Amendment violations); *Cty. of Santa Clara, Civil Immigration Detainer Requests - Board Policy 3.54*, at 1 (2011), <https://www.sccgov.org/sites/scc/gov/CountyPolicies/Board-Policy-3.54-Civil-Immigration-Detainer-Requests.pdf> [<https://perma.cc/4MJJ-X8CF>] (requiring federal reimbursement of all costs before the County complies with ICE detainer requests); *Cty. of Santa Clara, Summary of Proceedings/Minutes of Board of Supervisors Meeting*, Oct. 18, 2011, at 4 (2011), <http://sccgov.iqm2.com/Citizens/FileOpen.aspx?Type=12&ID=1135&Inline=True> [<https://perma.cc/LL4D-M5E5>] (noting that detainees are unlikely to be honored if dependent on federal reimbursement).

171. Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. Pa. J. Const. L. 1084, 1087 (2004) (explaining that local enforcement of immigration law has been critiqued for "divert[ing] resources from local policing priorities").

172. See, e.g., *Tenn. Code Ann. § 4-59-101* (2018) ("Because the matters contained in this chapter have important statewide ramifications for compliance with and enforcement of federal immigration laws and for the welfare of all citizens in this state, these matters are of statewide concern.").

173. See *Tex. Gov't Code § 402.0241* (2017); *S.B. 4*, 85th Leg., Reg. Sess. (Tex. 2017) (codified at *Tex. Gov't Code § 752.055*).

174. See *H.B. 9*, 2017 Gen. Assemb., Reg. Sess. (Fla. 2017).

constitution requires.<sup>175</sup> Tennessee perhaps seeks to avoid the unfunded-mandate problem altogether by prohibiting sanctuary policies but does not impose any specific mandates to participate in federal immigration enforcement.<sup>176</sup> But given our discussion about how sanctuary prohibitions like the one in Tennessee operate as implicit mandates in practice,<sup>177</sup> a court might be convinced to reject such an effort to circumvent the state’s unfunded mandate provision.

Even in states without an explicit ban on unfunded mandates, accountability concerns loom large. One wonders whether states would be as eager as they are to enact anti-sanctuary legislation if they had to fund the additional costs themselves through state revenues—or if the practical effect of anti-sanctuary legislation is better understood as not only a conscription of local officials but also a conscription of local coffers. After all, courts have long recognized in the context of home rule that there is no “greater municipal concern than how a city’s tax dollars will be spent; nor anything which could be of less interest to taxpayers of other jurisdictions.”<sup>178</sup>

3. *Local Democracy.* — Finally, state anti-sanctuary laws threaten the long-standing fundamentals of American-style local democracy. The threat here is not simply that states are repealing local sanctuary policies. Rather, it is that the specific manner in which anti-sanctuary laws seek to compel local participation in federal immigration enforcement increasingly impinges upon democratic discourse, local political representation, and local legislative agenda setting. This, in turn, may subject certain state anti-sanctuary laws to claims based specifically on state constitutional guarantees of local representative democracy.

Indeed, what is striking about the most recent wave of state anti-sanctuary legislation is the extent to which it targets political speech, especially those laws that express dissenting views from the state legislature or executive authority.<sup>179</sup> S.B. 4 in Texas prohibits local officials from “endors[ing]” a policy that “prohibits or materially limits the enforcement of immigration laws,” in addition to prohibiting the adoption or enforcement of such a policy.<sup>180</sup> In Iowa, local officials are now prohibited

175. Fla. Const. art. VII, § 18.

176. See Tenn. Const. art. II, § 24 (“No law of general application shall impose increased expenditure requirements on cities or counties unless the General Assembly shall provide that the state share in the cost.”).

177. See *supra* text accompanying notes 152–154.

178. *Johnson v. Bradley*, 841 P.2d 990, 1002 (Cal. 1992).

179. The state attorney general is often tasked with prosecuting violations of state anti-sanctuary laws. See, e.g., Tex. Gov’t Code § 752.055 (2017) (“[The state] attorney general may file a petition for a writ of mandamus or apply for other appropriate equitable relief . . . to compel the entity or department that is suspected of violating Section 752.053[’s immigration enforcement law] to comply with that section.”).

180. S.B. 4, 85th Leg., Reg. Sess. (Tex. 2017) (codified at Tex. Gov’t Code § 752.053(a)(1)). As the district court noted in *City of El Cenizo*, the author of S.B. 4 suggested that “a ‘wink, wink’ or a nod could be construed as an endorsement,” as could “simply standing in support of a



from undertaking “any . . . action” that “discourages the enforcement of immigration laws.”<sup>181</sup> A Florida bill, which ultimately died in the State Senate, sought to punish local officials with suspension or removal from office for voting either for a local sanctuary policy or against its repeal—even if such a vote would have been purely expressive in nature and would not actually have led to the implementation of a sanctuary policy.<sup>182</sup>

Understandably, these states are trying to preclude any effort by localities to circumvent their anti-sanctuary legislation. But in doing so, they go beyond the local sanctuary policies themselves. They target the views of local officials and attempt to foreclose the various means by which those views might be expressed.

The personal nature of the penalties for violating state anti-sanctuary laws adds another layer to this attack on local democratic discourse. We ordinarily believe that local officials are elected to give voice to the views of their constituents and act upon them if possible. But by targeting local officials personally, the contemporary wave of state anti-sanctuary laws threatens to undermine this traditional connection between local officials and the people they are elected to represent. A city council member may, for example, refuse to speak out against a state’s immigration mandate not because that reflects the views of her constituents but because she fears her removal from office or other personal sanctions. This reluctance may serve the interest of the state, which seeks to ensure that only its view is expressed. The result, however, is to undermine the traditional role of local officials as democratic representatives of their constituents in enacting legislation and political advocacy.

Moreover, the broad and punitive scope of contemporary anti-sanctuary laws may even have an effect on local policy agendas outside of the immigration context, like an inclusive zoning policy that makes affordable housing available to city residents irrespective of immigration status. The issue is not whether a court will eventually hold that such a policy “materially limits the enforcement of immigration law,” as prohibited by anti-sanctuary laws like S.B. 4.<sup>183</sup> It is whether local

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group such as MALDEF or LULAC when that group is making a public statement against [S.B.] 4 or in support of the type of local policies that it bans.” *City of El Cenizo v. Texas*, 264 F. Supp. 3d 744, 781 (W.D. Tex. 2017). The State argued that the “endorse” language should be interpreted narrowly to mean “sanction” and be limited to official speech. See *City of El Cenizo v. Texas*, 890 F.3d 164, 182 (5th Cir. 2018). But whether the state intended to exercise its discretion in that manner does not change the fact that the state legislature included the word “endorse” alongside and in addition to “adopt” and “enforce.”

181. S. F. 481, 87th Gen. Assemb., Reg. Sess. (Iowa 2018) (to be codified at Iowa Code § 825.4).

182. See H.B. 9, Gen. Assemb., Reg. Sess. § 908.303(4) (Fla. 2018).

183. Tex. S.B. 4.

policymakers—regardless of their beliefs on sanctuary—would be willing to take the risk.

There are some signs that these democratic concerns are being addressed in federal anti-sanctuary litigation. As noted earlier, the Fifth Circuit upheld the district court’s injunction against the “endorsement” ban in S.B. 4, at least with respect to elected officials.<sup>184</sup> Nevertheless, it is telling that the reason elected officials are protected is not any immunity they might enjoy as democratic representatives but rather their First Amendment right to free speech in their private capacity.<sup>185</sup> The effect here is to protect local representatives engaged in democratic discourse and debate. But given the framing of the underlying federal litigation, and the court’s reluctance to separate the locality from the state in its federal constitutional analysis,<sup>186</sup> the effect of Texas’s law on local democracy is understood as irrelevant.

In comparison, a challenge founded specifically on localism arguments may prove just as effective and more to the point. Indeed, as punitive preemption statutes have become more popular, there have already been some efforts to translate these democratic concerns into concrete localism claims. In *Florida Carry, Inc. v. City of Tallahassee*, for example, the city, joined by several amici, challenged a Florida law that subjects local officials to personal fines and removal from office for their vote on gun-related measures as an unconstitutional extension of the state’s traditional powers of preemption.<sup>187</sup> They argued that the personal-sanctions provision violates the legislative immunity of local representatives and that such immunity is an “inherent component of the constitutional guarantee of local representative democracy” contained in the Florida constitution.<sup>188</sup> The district court chose not to address the city’s local-

184. *City of El Cenizo*, 890 F.3d at 184–85.

185. See *id.*

186. Indeed, this is why the court refused to extend the “endorsement” injunction to nonelected officials. Although the court found that the issue was not properly before it, it noted that the speech of nonelected officials would likely be governed by the government speech doctrine, which in this case would mean that the state can compel such local officials to speak in a particular way because they are simply mouthpieces of the state. *Id.* The Fifth Circuit did not make the same distinction that the district court did in arguing that the local officials targeted by S.B. 4 are not state employees but rather elected local officials. See *City of El Cenizo v. Texas*, 264 F. Supp. 3d 744, 779 (W.D. Tex. 2017).

187. No. 2014-CA-1168, 2015 WL 13612020, at \*6 (Fla. Cir. Ct. Nov. 3, 2015), *aff’d*, 212 So. 3d 452 (Fla. Dist. Ct. App. 2017).

188. Brief of Amicus Curiae, The Florida League of Cities, in Support of Appellees/Cross-Appellants at 4, *Florida Carry, Inc.*, 212 So. 3d 452 (No. 1D15-5520), <http://defendlocal.com/wp-content/uploads/2017/03/LeagueOfCitiesAmicus.pdf> [<https://perma.cc/ZAD3-UAYF>]; see also Defendants’ Answer and Counterclaim for Declaratory Relief at 11–12, *Florida Carry, Inc.*, No. 2014-CA-1168, 2014 WL 12740968; Brief of the Law Center to Prevent Gun Violence et al. as Amicus Curiae in Support of Cross-Appellants at 13–14, *Florida Carry, Inc.*, 212 So. 3d 452 (No. 1D15-5520), <http://lawcenter.giffords.org/wp-content/uploads/2016/08/2016-05-16-Florida-Carry-v.-City-of-Tallahassee-Law-Center-Amicus-Brief.pdf> [<https://perma.cc/4VVZ-25BR>].

democracy claim, finding that the individual defendants were not subject to the sanction provisions and thus did not present a case or controversy with respect to that claim.<sup>189</sup> But the city's argument in *Florida Carry* suggests that there is more at stake when it comes to personal sanctions against legislative activities than the free speech rights of local officials in their private capacities.

C. *Addressing the Limits of Localism*

Thus far, we have argued that localism provides not only an important doctrinal lens for assessing state anti-sanctuary laws but also legal claims that might be used to counter their expansion and proliferation. We admit, however, that the conventional view is far more pessimistic about localism's prospects, especially in the context of immigration. It is commonly assumed that localities, as "creatures" of the state, remain uniquely vulnerable to state preemption despite the many ways in which local autonomy has expanded.<sup>190</sup> At the same time, because immigration is widely believed to be a national issue, it is difficult for many to see how a given local sanctuary policy might be considered a "local affair," and thus within the sphere of authority in which local power is presumed to be strongest in relation to the state.<sup>191</sup> We address these and other concerns here. Notably, we do so by highlighting the unique structure of state anti-sanctuary laws and how it differs from not only the structure of other state preemption statutes but also that of traditional immigration regulations more generally.

As an initial matter, standard state preemption analysis is likely not the right framework for assessing state anti-sanctuary laws. Traditionally, when a state preempts, it replaces a local regulation with a state regulation; the goal is to mandate a uniform set of laws with respect to how private activity is regulated and what kind of individual rights are recognized. This is what states have done in repealing local legislation on economic rights (minimum wage and paid family leave), civil rights (antidiscrimination for members of the LGBTQ community), and environmental policies (fracking and plastic bags).<sup>192</sup> But while state anti-sanctuary laws tend to be discussed today as part of this broader state preemption wave,<sup>193</sup> they are unique insofar as they seek to compel specific local

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189. *Florida Carry, Inc.*, 2015 WL 13612020, at \*6. The Florida District Court of Appeals affirmed the district court's finding on this score. *Florida Carry, Inc.*, 212 So. 3d at 466.

190. See *supra* section I.C.

191. See Su, *The States of Immigration*, *supra* note 43, at 1372 (describing how focusing on public benefits and the fiscal cost of immigration could provide a lens through which "immigration could be sensibly understood as a matter of 'states' rights").

192. See, e.g., Briffault, *New Preemption*, *supra* note 20, at 1999–2002 (collecting examples of these and other areas of state preemption).

193. See *id.* at 2004–05 (citing anti-sanctuary legislation in Florida, Texas, and Arizona as examples of efforts to impose penalties on local governments for adopting laws subject to preemption).

governmental action, as opposed to simply displacing local regulations of residents and businesses.

In the federalism context, the Supreme Court draws precisely this distinction in holding that the federal government's power to preempt state legislation by regulating citizens directly does not encompass the power to commandeer the states.<sup>194</sup> Now, it may be that many states, including those with broad home-rule protections, do allow for state commandeering. But as we showed, whether the state can assume direct control of local officials is separate from whether it can preempt local laws or policies. The fact is, unlike general preemption, few state courts have directly addressed this issue as a matter of local–state relations, largely because there have been few state laws in recent history that aim to do what state anti-sanctuary laws are now attempting.

Second, even if one believes immigration enforcement is a uniquely national issue that should be immune from local interference,<sup>195</sup> such an understanding does nothing to resolve the issue of whether states should have special preeminence over localities in immigration matters. To be sure, local sanctuary policies may now be a central issue in the national debate over immigration. Moreover, a court might reason that because states rank higher in the federal hierarchy than localities, immigration is properly regarded as a statewide issue.<sup>196</sup> But under the plenary power doctrine, states should have no more standing with respect to immigration than localities. And unlike local immigration regulations, sanctuary policies are largely efforts by localities to remain in their traditional sphere of local authority and distance themselves from the exclusive

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194. See, e.g., *Murphy v. NCAA*, 138 S. Ct. 1461, 1476–77 (2018); see also *supra* note 53 and accompanying text.

195. See, e.g., *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 604 (1889) (“While under our constitution and form of government the great mass of local matters is controlled by local authorities, the United States . . . are one nation, invested with powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security . . .”).

196. Indeed, this sentiment appears to have contributed to a curious decision by the California Supreme Court in the early twentieth century. In *City of Pasadena v. Charleville*, the court was faced with the issues of whether a home rule city could (1) require a contractor on a public-works project to pay the prevailing wage and (2) allow that contractor to hire noncitizens, both of which were prohibited by state law. 10 P.2d 745, 746 (Cal. 1932). The resulting split decision illustrates the conceptual distortion of immigration. With respect to the prevailing-wage requirement, the court held that no issue was more local than how a city decides to spend its own money. Thus, under the home-rule immunity granted by the California Constitution, state law must give way to local discretion. Presumably the same reasoning should apply to the city's decision to use its own money to hire contractors that employed immigrants. But here, the court abruptly reversed course. In seeming contradiction with its earlier statements, the court argued here that “[a]ll public works and all public property in the state in a broad sense belong to all of the people of the state” and thus are statewide concerns, even when the public property in question is owned by a home-rule city. *Id.* at 750. Thus, unlike the prevailing-wage requirement, the employment of noncitizens on public works is not a local matter and is subject to preemption by state law.

federal responsibility over immigration enforcement. These policies are often enacted in response to uniquely local concerns: trust between police and residents, the efficient allocation of scarce municipal resources, and the need to clearly define the roles and responsibilities of local officials.<sup>197</sup> Again, a state court may find some distinctive state interest that outweighs the local concerns at stake with respect to sanctuary. But in our view, that is also a localism consideration separate from the legal view that immigration, as a whole, is a national issue.

Third, the fact that localism claims in general—and specific claims like those suggested above—tend to be untested and undeveloped should be reasons for considering rather than dismissing them. Localities' historical turn to federal constitutional claims makes sense: Such arguments have a proven track record on immigration matters, and federal courts have largely been receptive to their use to oppose federal anti-sanctuary policies.<sup>198</sup> But because state anti-sanctuary laws are shifting the legal terrain for battles over local sanctuary policies, there is arguably no better time to begin cultivating localism claims as an alternative. Indeed, if the result from the Texas S.B. 4 litigation is any indication, pressing immigration localism arguments might be necessary.

Finally, just as cities draw upon legal victories by other cities in bolstering their own litigation efforts against federal anti-sanctuary policies, a successful localism claim in one state might support legal challenges elsewhere. Despite the differences in localism structure from state to state, there are also many commonalities around which an interlocal litigation strategy can be built. Given the fact that localities today are facing state-level regulation on a host of policy matters, immigration localism claims can bolster the move to protect local policymaking more generally.

All of this suggests the need to take localism seriously in confronting state anti-sanctuary laws. Even if Congress were to pass a law granting localities the discretion to choose whether and to what extent they wish to participate in federal immigration enforcement,<sup>199</sup> it is unclear that such a law could insulate localities from state laws mandating their involvement. Given that localities draw all their power and authority from

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197. See, e.g., Gurbir S. Grewal, Office of the Att'y Gen., Attorney General Law Enforcement Directive No. 2018-6, at 1 (2018), <https://www.nj.gov/oag/dcj/agguide/directives/ag-directive-2018-6.pdf> [<https://perma.cc/2VTP-9BXH>] (explaining that the state's new directive clarifies the role of state law enforcement officers in enforcing "*state criminal law*" and not "*federal civil immigration law*").

198. See *supra* section I.A (examining local governments' successful litigation against the federal government's anti-sanctuary policies).

199. In the litigation against S.B. 4 in Texas, this was precisely the construction that supporters of local sanctuary policies sought to apply to existing federal law—namely section 287(g). See *City of El Cenizo v. Texas*, 890 F.3d 164, 180 (5th Cir. 2018). Ironically, it is also what supporters of 287(g) agreements might have argued against the provision of California's S.B. 54 (the "state sanctuary law") that prohibits localities from entering into 287(g) agreements. See Cal. Gov't Code § 7284.6(a)(1)(F)–(G) (2018).

the state, it is doubtful that the federal government could directly grant localities discretion, or otherwise interfere with how states regulate that discretion, without running afoul of the federal anticommandeering doctrine or state sovereignty principles more generally.<sup>200</sup> What this means is that unless the federal government is willing to deny all state and local involvement in federal immigration enforcement—an extremely unlikely scenario—cities and localities cannot depend on the federal government to protect local sanctuary policies from state laws through federal preemption. At some point, if states persist in pursuing anti-sanctuary policies, localities must turn to their own legal standing and the localism structure of their state.

### III. THE PROMISE AND PERILS OF IMMIGRATION LOCALISM

Even if a move toward considering local autonomy might be necessitated by contemporary state anti-sanctuary laws, fully embracing a localist stance means asking whether that litigation game is worth the candle. This Part argues that it is and guardedly advances the normative case for immigration localism, at least as it pertains to participation in the federal enforcement regime.

Section III.A below argues that a localist reorientation of immigration enforcement offers a better way to think about immigration policymaking and enforcement today. Defending sanctuary cities qua cities renders a more accurate description of the enforcement regime, allowing for immigration law theory to more fully account for the statutory and practical importance of municipal governments, local agencies, and city officials. In addition, acknowledging the significance of municipal empowerment on immigration facilitates the opportunity for local civic participation by communities to more effectively engage and influence the national discourse on immigration policy.

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200. The Supreme Court touched on some of these concerns in *Nixon v. Missouri Mun. League*, 541 U.S. 125, 129 (2004). The Court held that in enacting a law protecting the ability of “any entity” to provide telecommunication services from state restrictions, Congress did not intend to cover municipal governments like cities. *Id.* at 128–29. To support this finding, the Court documented the ways in which federal preemption would operate differently depending on whether prior authorization to provide telecommunication services like municipal broadband had been granted to localities by the state. See *id.* at 134–38. Noting the difficulty of achieving uniformity, Justice Souter concluded that “preempting state or local governmental self-regulation (or regulation of political inferiors) would work so differently from preempting regulation of private players that we think it highly unlikely that Congress intended to set off on such uncertain adventures.” *Id.* at 134. Nowhere did the Court suggest that federal law might create uniformity by empowering localities directly. But see *Lawrence Cty. v. Lead-Deadwood Sch. Dist.* No. 40-1, 469 U.S. 256, 261 (1985) (holding that a federal law providing for federal payments to a county that can be used for “‘any’ governmental purpose” preempted a state law specifying their particular use, but not discussing localism or anticommandeering concerns).

Yet, as we acknowledge in section III.B, localism is perilous as well. As Nestor Davidson argues in a recent essay, although localism might serve many progressive ends, it can also be used as a tool of exclusion, with local resources marshaled toward reinforcing social and economic inequalities.<sup>201</sup> This is evident with respect to how immigrants fare in local communities more generally,<sup>202</sup> and it might also be the case for immigration enforcement. We consider two such risks that might worry immigrant advocates and other progressives on immigration enforcement issues: Immigration localism (1) might encourage the expansion of local anti-immigrant policies and (2) might undermine state sanctuary efforts by providing legal heft to the defense of anti-sanctuary cities. Both are worrying possibilities; however, localism, on the balance, will better serve immigrant interests in the long run.

A. *The Promise of Immigration Localism*

Localism advances at least two normatively desirable ends. First, focusing on the city qua city produces a better descriptive account of how the current immigration enforcement regime operates. In so doing, it decentralizes the role the federal government has played in immigration theory and doctrine. Second, immigration localism promotes civic participation and engagement on immigration enforcement by allowing local communities to calibrate that enforcement through the democratic process.

1. *Localism as a Descriptive and Theoretical Account.* — A focus on local authority provides courts and policymakers with a more accurate accounting of what is actually at stake in the current fights over sanctuary and highlights the decentralized nature of the immigration enforcement regime on the ground. Indeed, localism may be precisely the kind of theoretical framework that we need today, not only to think through the current state of immigration regulations but also to wean us from an oversized judicial and theoretical reliance on federal sovereignty as the cornerstone of immigration law.

While immigration is a pressing national issue, turning our legal gaze toward localism calls attention to the role of local governments in our enforcement system, a role that is increasingly prominent in the construction and execution of federal enforcement policies. In recent decades, federal immigration enforcement has become more and more

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201. See Davidson, *Dilemma of Localism*, *supra* note 34, at 977.

202. See Rick Su, *Local Fragmentation as Immigration Regulation*, 47 *Hous. L. Rev.* 367, 370 (2010) [hereinafter Su, *Local Fragmentation as Immigration Regulation*] (“[T]he legal structure responsible for the fragmentation of our lived environment into segregated neighborhoods and differentiated communities can be understood as a second-order immigration regulation.”); see also Pratheepan Gulasekaram & S. Karthick Ramakrishnan, *The New Immigration Federalism* 81 (2015) (showing that smaller-size cities are more likely to propose or pass restrictionist immigration laws than more populous cities).

local.<sup>203</sup> Enforcement activities once largely limited to the borders are now pervasive in the country's interior.<sup>204</sup> Regulations that once centered on criteria for admission and removal are increasingly intertwined with traditional spheres of state and local control, including employment,<sup>205</sup> housing,<sup>206</sup> and social services.<sup>207</sup>

Anti-sanctuary proponents often complain that cities and other localities are intruding upon the federal government's plenary power over immigration in refusing to comply with federal policy on immigration enforcement. Yet the increased local influence on immigration has evolved precisely because federal immigration enforcement has become reliant on local participation. Since the early 2000s, nearly all federal enforcement innovations have revolved around a direct federal–local connection, in most cases bypassing the state entirely.<sup>208</sup> The Secure Communities Program leverages noncitizens' interactions with local police officers;<sup>209</sup> detainer notices and hold requests are sent directly from federal officials to local sheriffs' departments;<sup>210</sup> jail-access policies for ICE are negotiated directly with city- and county-level officials;<sup>211</sup> and

203. See Hiroshi Motomura, *The Discretion that Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 *UCLA L. Rev.* 1819, 1850–52 (2011) (discussing ways in which state and local governments have increasingly enforced immigration law).

204. As just one example, consider the expansion of expedited removal under 8 U.S.C. § 1225(b) (2012). Once limited to aliens arriving at a land border, executive and administrative rule changes over the past two decades have steadily increased its application to noncitizens found within 100 miles of the land border, then to within 100 miles of both land and maritime borders, and now to possibly anywhere in the country. See *Designating Aliens for Expedited Removal*, 69 *Fed. Reg.* 48877-01 (Aug. 11, 2004).

205. See 8 U.S.C. § 1324a (2012) (obligating employers to check work eligibility of employees, and penalizing employers for knowingly hiring unauthorized workers); 8 C.F.R. § 274a.12 (2019) (setting forth classes of noncitizens that are eligible for employment in the United States).

206. See generally 42 U.S.C. § 1436a(a)(1) (2012) (providing housing assistance to noncitizens who are legal permanent residents).

207. See 8 U.S.C. § 1641(b) (defining who constitutes a “qualified alien” for purposes of eligibility for certain federal, state, and local public benefits).

208. See Ingrid V. Eagly, *Local Immigration Prosecution: A Study of Arizona Before SB 1070*, 58 *UCLA L. Rev.* 1749, 1787–88 (2011) (discussing the federal–local immigration relationship).

209. See U.S. Immigration & Customs Enf't, *Secure Communities: A Comprehensive Plan to Identify and Remove Criminal Aliens 1* (2009), [https://www.ice.gov/doclib/foia/secure\\_communities/securecommunitiesstrategicplan09.pdf](https://www.ice.gov/doclib/foia/secure_communities/securecommunitiesstrategicplan09.pdf) [<https://perma.cc/N3ZK-WW6W>] (explaining the expanded federal–local relationship in enforcing immigration law).

210. See Lasch et al., *supra* note 21, at 1733–34 (discussing detainer requests that the federal government sends to local officials).

211. See e.g., Brenda Gazzar, *Less Cooperation with ICE? LA County's Sheriff Oversight Panel Is Considering It*, *L.A. Daily News* (Jan. 26, 2018), <https://www.dailynews.com/2018/01/25/la-county-sheriff-overpanel-wants-your-input-on-curbing-cooperation-with-ice/> [<https://perma.cc/T5YJ-PQHJ>] (explaining that local leaders are deciding whether to limit ICE's access to county jails).



section 287(g) agreements are mostly signed between municipal entities and the federal government.<sup>212</sup>

In turn, as a practical matter, this entanglement between federal and local spheres provides local officials with more influence over how federal enforcement is carried out.<sup>213</sup> The federal government and a growing number of states now criticize sanctuary localities for obstructing federal immigration enforcement.<sup>214</sup> But the goal of these attacks, both legal and political, is not to force localities to get out of the way so that federal agents can work unimpeded. Rather, it is to compel their participation, so that the federal enforcement regime can operate more cheaply and aggressively. Indeed, the federal government's legal argument as to why state and local sanctuary policies must be voided rests on a background expectation of local participation in immigration enforcement.<sup>215</sup> As such, any theory of immigration law that relies only on the talismanic invocation of federal or state sovereign status ignores the underlying dependence of the immigration enforcement structure on local governments, resources, and personnel. Advancing localist arguments, then, helps foreground this reality, forcing courts, the federal government, and anti-sanctuary states to forthrightly acknowledge and account for this on-the-ground reality.

Recognizing the integration of localities into core immigration enforcement functions necessarily forces a concomitant decentralization of the federal government's role in dictating immigration rules. As one of the authors of this Essay and others have argued in prior work, one of the cornerstones of "immigration exceptionalism" has been the categorical power accorded immigration actions by the federal government, both from Congress and the executive.<sup>216</sup> The federal courts' reliance on a broad federal power over immigration policy has immunized explicitly discriminatory immigration policies, and enforcement tactics, from searching judicial review.<sup>217</sup> The current debate

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212. See 8 U.S.C. § 1357(g) (explaining section 287(g) agreements between the federal and municipal governments).

213. See Jessica Bulman-Pozen & Heather Gerken, *Uncooperative Federalism*, 118 *Yale L.J.* 1256, 1265–71 (2009) (discussing the "power of the servant" to influence federal policy).

214. See *supra* Part I (discussing federal and state governments' criticism of sanctuary cities' resistance to federal immigration enforcement).

215. See *Sanctuary Cities E.O.*, *supra* note 47, § 8 (describing the level of state and local participation needed in order for the federal government to have an effective immigration enforcement policy).

216. See Rubenstein & Gulasekaram, *supra* note 21, at 594–99.

217. See *Trump v. Hawaii*, 138 S. Ct. 2392, 2408, 2423 (2018) (holding that the INA "exudes deference to the President in every clause" and thus would allow the suspension of entry for people from certain countries without contravening the Establishment Clause); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950) ("At the outset we wish to point out that an alien who seeks admission to this country may not do so under any claim of right. . . . Such privilege is granted to an alien only upon such terms as

over state anti-sanctuary laws focuses on similar attributes of sovereignty, with the constitutional recognition of plenary state authority over localities quashing dissent over immigration enforcement at the municipal level.

Accordingly, as localism shifts judicial and public focus to the now-indispensable role of local agencies and agents in immigration enforcement, it contributes to a general de-emphasis on the role that constitutionally recognized sovereign status should play in immigration regulation. Although we concede that the federal government is now, will likely always be, and perhaps should be a powerful voice in setting immigration policy, this Essay's defense of local autonomy is part of a larger theoretical move toward recalibrating that centralized authority. In prior work, two of us have noted that the proliferation of nongovernmental sanctuaries, in the form of universities, workplaces, religious organizations, and community groups, is already exerting pressure on that conventional view—repeated almost reflexively in judicial opinions and litigation briefs—that immigration enforcement is a purely federal concern.<sup>218</sup>

At times, judicial and political emphasis on an outsized role for the central government is justified by the alleged need for “uniformity” in immigration law.<sup>219</sup> Even if uniformity in immigration enforcement is prized, however, it is worth asking whether it can be achieved once thousands of localities, enforcement agencies, and officers are made integral parts of that system. At the very least, it has to be acknowledged that a desire for uniformity is in tension with a desire to implement immigration enforcement by conscripting and cajoling hundreds of unconnected agencies and officials, outside of DHS control, each answering to different constituencies, none of which were created for the purpose of immigration enforcement. The greater the reliance on this set of decentralized and semiautonomous actors, the less the probability of achieving uniformity. Thus, the very idea of uniformity as a jurisprudential conceit is in tension with the structure and practice of federal immigration enforcement law, which has actively sought to rely on localities to achieve its enforcement vision.

A localist reorientation of immigration enforcement, then, creates space for recognition of, and emphasis on, the intricate relationships

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the United States shall prescribe.”); *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 603–06 (1889) (holding the Chinese Exclusion Act of 1882 constitutional under the federal government’s broad powers to secure the nation against insurrection).

218. See Villazor & Gulasekaram, *Sanctuary Networks*, supra note 25, at 1232–38, 1242–49; Pratheepan Gulasekaram & Rose Cuison Villazor, *Opinion, The Case for Non-Governmental Sanctuary*, L.A. Times (Apr. 4, 2018), <http://www.latimes.com/opinion/oped/la-oe-gulasekaram-villazor-immigrant-sanctuary-network-20180405-story.html> [<https://perma.cc/9YXY-NZDZ>].

219. See *Villas at Parkside Partners v. City of Farmers Branch*, 726 F.3d 524, 548–49 (5th Cir. 2013) (noting cases that discussed the need for uniformity in immigration law enforcement).

between the federal enforcement scheme and local officers and institutions. This reorientation also allows judicial consideration of why local opinions matter. Once localities are made indispensable partners in the enforcement regime, any drive towards uniformity must be balanced against the tradeoffs inherent in genuine, uncoerced participation by local constituencies.

Even if the federal government and anti-sanctuary states have the legal authority to displace local discretion, translating that authority into practice remains difficult. Anti-sanctuary laws can go only so far to compel assistance, much less enthusiastic participation. Local elected officials have little incentive to carry out state or federal policies that are unpopular among their constituents. Moreover, the administrative independence of local governments means that neither the state nor federal government is well situated to ensure compliance through monitoring. These limitations are likely why the trend among state anti-sanctuary laws has been to increase penalties and target informal norms. But as scholars of intergovernmental relations often observe, negotiations and partnerships are often more effective than censure and sanctions in recruiting meaningful assistance.<sup>220</sup> Acknowledging the role of local governments, and engaging with them as potential partners, may ultimately be the most effective way to carry out immigration enforcement.

In this regard, it is worth remembering that sanctuary city policies have generally not withheld all local assistance. They often allow for local immigration enforcement in circumstances where local interests converge with those of federal authorities. Chicago, for example, has zealously defended its sanctuary policy against the federal government, even scoring major victories that threaten to undermine federal anti-sanctuary efforts far into the future.<sup>221</sup> But Chicago's sanctuary policy exempts many individual cases, such as when an individual has an outstanding criminal warrant, has been charged with or convicted of a felony, or has been identified as a gang member.<sup>222</sup> In fact, some counties that now refuse to honor immigration detainers do not consider themselves opponents of federal immigration enforcement. Rather, their concern is with the refusal of the federal government to compensate them for the cost that they are being asked to incur or to indemnify them for the mistakes that the federal government makes. These examples reveal that there is room for negotiation and finding common interest.

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220. See, e.g., Charles B. Craver, *How to Conduct Effective Transnational Negotiations Between Nations, Nongovernmental Organizations, and Business Firms*, 45 *Wash. U. J.L. & Pol'y* 69, 75–76 (2014) (suggesting that distrustful nations employ “confidence building” measures to restore mutual trust and move toward more overarching commitments); Karen Tokarz & Leila Nadya Sadat, *Introduction*, 45 *Wash. U. J.L. & Pol'y* 1, 2 (2014) (“Alternative Dispute Resolution . . . has emerged as a principle mode of legal practice in virtually every legal field in virtually every country in the world.”).

221. See *supra* section I.A.

222. Chi., Ill., Mun. Code § 2-173-042(c) (2018).

Tilting our legal and theoretical gaze toward localism begins to allow for these negotiations and calibrations instead of the all-or-nothing stakes of either federal plenary power or state-centered federalism.

2. *The Role of Local Civic Engagement in Immigration Discourse.* — Localism also calls attention to the democratic process through which sanctuary and other immigration-related policies are made. While it might also be true that localism supports certain types of decisions (that is, integrationist over restrictionist policies), that is not our point here. Rather, it is that there may be some qualitative differences in how policies are made at the local level—tailored, personal, accessible—that are worth defending on their own, even in the context of immigration. More broadly, local decisionmaking on immigration enforcement allows communities to more efficiently and effectively participate in the national discourse over immigration. Even if only Congress and the President retain authority over large questions of admissions, removals, and visa allocations, local engagement on enforcement at the agency, city, and county levels provides an accessible democratic vehicle for community residents to express their approval or disapproval of those national policies.

Somewhat ironically, both the federal government and the states rationalize anti-sanctuary and other interior enforcement strategies as beneficial to the local communities that they are targeting. They argue that zealous immigration enforcement makes communities safer and promotes the economic well-being of their residents.<sup>223</sup> To the extent that any of these community-well-being-minded claims are in fact genuine,<sup>224</sup> they raise the question of who is in the best position to make that decision—the communities themselves or state and federal governments. It is, after all, local coffers that will likely have to bear the personnel and facilities costs of choosing to aid in enforcement. And if, in fact, sanctuary policies lead to increased crime and public safety threats, we might presume that local constituencies would be inclined to reject them or at least temper their noncooperation stances.

To the extent national decisionmaking on immigration focuses on different concerns than does local policymaking, only localism provides a conceptual and political space for those considerations. National debates, by necessity, rely on aggregate statistics or generalized anecdotes to present competing narratives about the effect of immigration on the

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223. See, e.g., Marie Solis, Trump Says Sanctuary Cities are ‘Crime-Infested’—Research Suggests He’s Wrong, *Newsweek* (Apr. 18, 2018), <https://www.newsweek.com/trump-says-sanctuary-cities-are-crime-infested-research-shows-hes-wrong-891827> [<https://perma.cc/3M6L-KVZL>].

224. See Tom K. Wong, Ctr. for Am. Progress, *The Effects of Sanctuary Policies on Crime and the Economy* 14 (2017), <https://www.nilc.org/wp-content/uploads/2017/02/Effects-Sanctuary-Policies-Crime-and-Economy-2017-01-26.pdf> [<https://perma.cc/CS7Q-TZ26>] (contradicting the Trump Administration’s repeated claim that sanctuary city policies lead to crime and violence).

country. These broad narratives form the basis for the partisan divide that defines immigration negotiations at the federal level. When the scale is reduced, however, the details and diversity of immigration's impacts on different communities are revealed. In some instances, the effect of particular immigrant groups on discrete industries in specific communities forms the basis for decisionmaking.<sup>225</sup>

It is also almost certainly true that at the local level, immigrants are less likely to be defined entirely by their legal status under federal immigration law.<sup>226</sup> Instead, they are more likely to be known as neighbors, colleagues, schoolmates, friends.<sup>227</sup> Human interactions at the community level, of course, do not necessarily generate good impressions. Local controversy over immigration is as much spurred by "unneighborly" conduct—overcrowded houses, unkempt lawns, loud music—as concern about the security of our national borders.<sup>228</sup> But it is also through these personal interactions that the divide between immigrant and native, old-timers and newcomers is bridged.

We may celebrate the cosmopolitan culture in American cities for its tolerance and acceptance of immigrants. But this culture did not arise fully formed with the establishment of these cities; rather, it reflects a long, tortured, and ongoing process by which different groups of people—immigrant and otherwise—have interacted with one another at the neighborhood level. Even if smaller towns are more likely to be inhospitable to foreigners, and thus favor immigration enforcement at the national level, they are also often just as quick to rally against such enforcement when federal authorities come not for nameless "illegals"

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225. See Gulasekaram & Ramakrishnan, *supra* note 202, at 73–82 (showing that although GOP-majority localities are much more likely to enact restrictionist measures, the existence of large agricultural business interests in GOP-controlled areas is a consistent factor in disincentivizing the proposal, or defeating the enactment, of restrictionist local laws).

226. Cf. Megan Brenan, Record-High 75% of Americans Say Immigration Is Good Thing, Gallup (June 21, 2018), <https://news.gallup.com/poll/235793/record-high-americans-say-immigration-good-thing.aspx> [<https://perma.cc/3QVF-ZFR2>] ("A record-high 75% of Americans, including majorities of all party groups, think immigration is a good thing for the U.S.—up slightly from 71% last year. Just 19% of the public considers immigration a bad thing.").

227. Cf. Nina Shapiro, A Washington County that Went for Trump Is Shaken as Immigrant Neighbors Start Disappearing, *Seattle Times* (Nov. 9, 2017), <https://www.seattletimes.com/seattle-news/northwest/fear-regrets-as-pacific-county-residents-go-missing-amid-immigration-crackdown-police-chief-neighbors-kind-of-in-shock-after-immigration-arrests-in-pacific-county-immigration-crack/> [<https://perma.cc/AVK6-RYR3>] (describing a small Washington town where the conservative police chief lamented "neighbors just snatched" from their midst).

228. See, e.g., Thomas J. Vicino, *Suburban Crossroads: The Fight for Local Control of Immigration Policy* 68–69, 73–74 (2012) (describing the town of Farmers Branch, whose city council targeted immigration policy as a reason for the small community's continued decline); Su, *Local Fragmentation as Immigration Regulation*, *supra* note 202, at 368–69, 423–34 ("The intimate, local context where the effect of immigration is the most immediate and transparent . . . not only informs, but profoundly shapes how the issue and regulation of immigration is perceived.").

but rather for Carlos,<sup>229</sup> or Armando,<sup>230</sup> or Marcos<sup>231</sup>—residents and members of *their* community. If national politics is about what happens to those people “out there,” local politics opens the opportunity to consider how policies affect those who are “here.”

The inevitability of interaction between nationals and immigrants at the local level makes localities potential sites of immigrant integration.<sup>232</sup> Local spaces and institutions—schools, parks, agencies, neighborhoods—are where all residents, regardless of immigration status, encounter each other on a face-to-face basis. By necessity, noncitizens and citizens must mobilize and determine municipal policies. This dynamic, of course, is not new. Since the earliest waves of immigration, the political assimilation of immigrants in America has started at the local level. Immigrants were an integral part of the urban political machines that dominated local politics in the mid- to late-nineteenth century, through which they secured middle-class jobs in city government and eventually became leading figures in party politics. If the Irish of the nineteenth century ultimately fared better than the Chinese, it was in part because the Chinese were unable to naturalize, which foreclosed them from exercising political power even if they were able to effectively litigate against the laws targeting them. In the same vein, the partisan backlash against immigrants today also appears to be fueled less by the actual numbers of immigrants arriving here from Latin America, which has been falling in recent years, than by the perceived threat to an established racial and political order.<sup>233</sup> This seems to be especially true in the immigrant-receiving cities in traditionally “red states.” It is no surprise then that some of the most aggressive state anti-sanctuary efforts are centered in states like Texas and Florida, with large immigrant-receiving and immigrant-integrative cities.

Perhaps most importantly, regardless of whether local politics is based on uniquely local or personal considerations, it is almost certain to be more accessible than either state or federal decisionmaking. In addition

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229. See Monica Davey, *He’s a Local Pillar in a Trump Town. Now He Could Be Deported.*, N.Y. Times (Feb. 27, 2017), <https://www.nytimes.com/2017/02/27/us/immigration-trump-illinois-juan-pacheco.html> (on file with the *Columbia Law Review*).

230. See Marwa Eltagouri, *Conservative Indiana Town Rallies Around Immigrant Facing Deportation*, Chi. Trib. (May 17, 2017), <https://www.chicagotribune.com/news/immigration/ct-immigration-elkhart-indiana-trump-met-20170517-story.html> (on file with the *Columbia Law Review*).

231. See Jorge Rivas, *This Ohio Town Voted for Trump. Now They’re Fighting to Save a Mexican Man from Deportation*, Splinter News (June 21, 2017), <https://splinternews.com/this-ohio-town-voted-for-trump-now-theyre-fighting-to-1793857676> [<https://perma.cc/GQ6N-7A8Y>].

232. See Rodríguez, *supra* note 19, at 607 (naming in-state tuition as one issue in which some traditionally red states have extended benefits to illegal immigrants on fairness grounds).

233. See Gulasekaram & Ramakrishnan, *supra* note 202, at 92–118 (using qualitative empirical evidence to show that restrictionist local policies are fueled in part by white ethnic nationalism).

to providing a vehicle for immigrant integration and mobilization, local institutional debates on whether and how to enact sanctuary policies are part of a larger national conversation. While federal enforcement policies have effectively made national enforcement decisions into local concerns, the converse is also true. Local sanctuary policies are one vehicle—an especially effective one—that local constituencies can use to enter the national conversation over the proper level of immigration enforcement specifically and the legitimacy of federal immigration policies more generally. In other words, as the national immigration enforcement regime becomes inextricably local, local preferences inexorably calibrate national policymaking.

If local governments are an important platform for immigrants to become a part of America's political community and for all community members to engage in debates over immigration policy, then immigrant advocates and scholars should be highly concerned about the powers of local governments. They should be invested not just because local power is an important part of defending local sanctuary policies against the anti-sanctuary efforts but also because the scope of local power is important in determining the extent to which community attitudes on immigration and immigrants are meaningful in our national discourse.

#### B. *The Perils of Immigration Localism*

Undoubtedly, emphasizing local discretion is not without risks for immigrant advocates. Here, we discuss two obvious responses to our proposal that are likely to make immigrant advocates wary of this legal and theoretical shift: (1) Local discretion might lead to the proliferation of anti-sanctuary cities; and (2) a legal strategy bolstering local discretion will weaken powerful state-level sanctuary protections.

1. *Empowering Restrictionist Localities?*— Thus far, this Essay has been organized around the dynamic of state hostility to local sanctuary laws. Accordingly, our focus on localist possibilities has underscored the need to maintain discretion at the local level so that cities and counties can retain the authority to resist conscription into federal enforcement programs. But there is no guarantee that localism will always result in immigrant-friendly or integrationist policies. Neither state-level preemption nor local authority inherently tracks political ideologies or partisan preferences. Thus, any structural power allocation or strong focus on localism risks inviting dozens of enforcement-minded jurisdictions to exercise their local discretion in a manner that recreates and amplifies the federal government's enforcement regime.

Indeed, the entrepreneurial and political forces that have successfully produced and proliferated state anti-sanctuary laws can and are being

directed at the local level.<sup>234</sup> As Professor Richard Schragger points out, local policy fights have increasingly been waged by national policy groups.<sup>235</sup> And, as media reports suggest, policy entrepreneurs have already found opportunities for pushing their vision at the local level.<sup>236</sup> Indeed, local restrictionism even extends into “blue” states like California, where the overall policy climate at the state level is integrationist, with a suite of state laws seeking to mitigate federal enforcement efforts. In that overwhelmingly immigrant-friendly state environment, cities like Los Alamitos, Huntington Beach, and Santa Clarita, along with counties like Orange County, have voiced their displeasure with state sanctuary laws and announced their willingness to bolster federal enforcement efforts.<sup>237</sup>

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234. Texas S.B. 4, for example, is similar to proposals in Iowa, Kansas, North Carolina, Florida, and other places with Republican-led state governments. See Kelly Cohen, *State Lawmakers Move to Penalize ‘Sanctuary Cities,’* Wash. Examiner (Mar. 18, 2017), <https://www.washingtonexaminer.com/state-lawmakers-move-to-penalize-sanctuary-cities> [https://perma.cc/C9XU-2AWG]. Moreover, this copycat legislation in several “red” states is not mere happenstance; rather it is strategized proliferation. See *id.* State lawmakers in Colorado actually initiated the recent state anti-sanctuary trend. See Joey Bunch, *Colorado Springs Lawmaker’s Anti-Sanctuary City Bill Copied in Other States,* Gazette (Colo. Springs) (Feb. 6, 2017), [https://gazette.com/politics/colorado-springs-lawmaker-s-anti-sanctuary-city-bill-copied-in/article\\_a86e1c04-e773-5084-b86a-a4ef541249fb.html](https://gazette.com/politics/colorado-springs-lawmaker-s-anti-sanctuary-city-bill-copied-in/article_a86e1c04-e773-5084-b86a-a4ef541249fb.html) [https://perma.cc/7NHN-2R28]. In early 2017, Colorado state Republican Representative David Williams introduced the Colorado Politician Accountability Act, H.B. 17-1134, which would have created criminal and civil liability for local officials who implemented sanctuary-type policies. See Jesse Paul, *Immigration Debate Flares Up in Colorado as Lawmakers Weigh Bill Targeting Sanctuary Cities,* Denver Post (Feb. 22, 2017), <https://www.denverpost.com/2017/02/22/immigration-colorado-sanctuary-cities/> [https://perma.cc/Z4GY-B25U]. Even as his proposal failed, state lawmakers in Ohio, Maine, and Alaska all introduced bills that were based on Williams’s effort. See Bunch, *supra*.

235. See Schragger, *supra* note 95, at 1226 (“That the city has become a highly salient site for national battles over everything from fracking to LGBT rights to plastic bags is obvious from the long list of preemptive state legislation . . .”).

236. See *id.* at 1227 (using ALEC as an example of a national policy group that has influenced local policy fights by pushing a deregulatory agenda); see also Cindy Carcamo, *Orange County May Take Stand Against State’s ‘Sanctuary’ Laws,* L.A. Times (Mar. 27, 2018), <http://www.latimes.com/local/california/la-me-anti-sanctuary-movement-in-oc-20180327-story.html> (on file with the *Columbia Law Review*) (reporting that the Federation of Americans for Immigration Reform (FAIR), a national anti-immigration organization, had been “searching for California Cities and Counties” that were interested in filing briefs against California’s state sanctuary law, S.B. 54); Jazmine Ulloa, *Sanctuary State Fight at Local Level May Be More Orchestrated than Organic,* L.A. Times (May 2, 2018), <http://www.latimes.com/politics/la-pol-ca-gop-opposition-sanctuary-state-law-20180502-story.html> (on file with the *Columbia Law Review*) (reporting on the efforts by FAIR to combat California’s sanctuary law at the local level).

237. See, e.g., Nina Agrawal, *Santa Clarita Opposes California’s ‘Sanctuary’ Law, the First City in L.A. County to Do So,* L.A. Times (May 9, 2018), <http://www.latimes.com/local/lanow/la-me-ln-santa-clarita-sanctuary-20180508-story.html> (on file with the *Columbia Law Review*) (reporting on the opposition to California’s sanctuary law, S.B. 54, across various parts of California and the concomitant legal measures taken).



The use of local policies to aid, rather than oppose, federal enforcement efforts is not new. Between 2005 and 2012, several states and localities passed varied anti-immigrant laws that created new penalties based on immigration status.<sup>238</sup> It was with these restrictionist examples in mind that immigration scholars and advocates invoked the civil rights-era perception of local policymakers as uninformed, parochial, and prone to racist sentiments. These ideas fed into legal arguments against those local policies, which were almost uniformly struck down by federal courts, based on the preemption principles articulated by the Supreme Court in *Arizona v. United States*.<sup>239</sup> In comparison, however, the current anti-sanctuary localism arguably seeks a more modest end, or at least one more within the traditional boundaries of local control, cleverly crafted in ways expressly contemplated and permitted by federal statute.<sup>240</sup> Because they might be better insulated from legal attack, contemporary local anti-sanctuary laws are ripe for proliferation by policy entrepreneurs and national organizations.

Although it is possible that localism might encourage and empower an anti-sanctuary trend, that worry need not mean turning away from a localist strategy. First, it may be that localism will empower exclusionary and restrictionist cities, but one may yet believe that the benefits of localism will outweigh its potential to be parochial.<sup>241</sup> Indeed, any structural doctrine might be used by interested political forces to achieve anti-immigrant ends. But that concern is no different for localism than it is for favoring the central government or a state-centered federalism. Much will always depend on who maintains political control over those jurisdictions. Given this Essay's arguments about localized concerns with immigration enforcement and the need for civic participation and debate on those issues, a strong case can be made for lodging some

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238. In the prior era of state and local restrictionism, from 2005 through 2012, several cities—including Hazleton, Pennsylvania; Fremont, Nebraska; Valley Park, Missouri; Farmer's Branch, Texas; and Escondido, California—attempted versions and variations of immigration enforcement laws that included rental ordinances, work-solicitation bans, language policies, and other forms of local resistance to the presence of undocumented and other noncitizens. See, e.g., Muzaffar Chishti & Claire Bergeron, *Hazleton Immigration Ordinance that Began with a Bang Goes Out with a Whimper*, Migration Pol'y Inst. (Mar. 28, 2014), <https://www.migrationpolicy.org/article/hazleton-immigration-ordinance-began-bang-goes-out-whimper> [<https://perma.cc/78WJ-MUKX>] (analyzing the Supreme Court's refusal to review two federal appellate court decisions that struck down controversial local immigration enforcement ordinances in Hazleton, Pennsylvania, and Farmers Branch, Texas).

239. 567 U.S. 387, 400–15 (2012) (applying preemption principles to each of the four challenged provisions of the Arizona immigration law at issue).

240. See *supra* section I.C (discussing the legal distinction between federal and state anti-sanctuary strategies).

241. See Davidson, *Dilemma of Localism*, *supra* note 34, at 979–80 (describing this view as “ecumenical” localism).

measure of discretion at the local level instead of elsewhere, despite the possibility of restrictionist outcomes.<sup>242</sup>

Immigration enforcement might be a regulatory area that provides a hopeful outcome for immigrant advocates willing to live with the varied policy outcomes of an uncalibrated localist stance. Perhaps because of the visceral and immediate impact of local immigration policies, local enforcement policies tend to be more fluid and dynamic than those same policies at the state and national level. Local democracies do not always produce integrationist policies; however, local politics and policies also quickly change, either because of changing sentiment or changing demographics.

Hazleton's anti-immigrant ordinance may be the poster child for the parochial possibilities of local government involvement in immigration. But it is also an example of how quickly things can change.<sup>243</sup> Lou Barletta, the former mayor of Hazleton and the lead proponent behind its anti-immigrant ordinance, departed for Congress in 2011—leaving his city with the cost of litigation and the settlement agreement after the ordinance was struck down by courts. In the meantime, however, Hazleton has become close to a majority-Latino city, and the community dynamics have evolved to become more tolerant and welcoming.<sup>244</sup> A similar dynamic unfolded in Farmers Branch, Texas, where the population is now forty-five percent Latino.<sup>245</sup> The Latino community's political mobilization following the enactment of the city's anti-immigrant ordinance and its ensuing litigation has reshaped not only the face but also the tone of local politics.<sup>246</sup> Then there is Riverside, New Jersey—the township that nobody remembers. Though it was one of the first communities to enact an anti-immigrant ordinance in 2006, it was also among the first to repeal such an ordinance—a little more than a year after its enactment—when the community concluded that the ordinance did more to hurt the community than it did to help.<sup>247</sup>

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242. See *supra* section III.A.2.

243. See Michael Matza, 10 Years After Immigration Dispute, Hazleton Is a Different Place, *Inquirer* (Phila.) (Apr. 1, 2016), [http://www.philly.com/philly/news/20160403\\_10\\_years\\_after\\_immigration\\_disputes\\_Hazleton\\_is\\_a\\_different\\_place.html](http://www.philly.com/philly/news/20160403_10_years_after_immigration_disputes_Hazleton_is_a_different_place.html) [https://perma.cc/GF5F-XQHP] (explaining the evolution of public sentiment in Hazleton, following the invalidation of its anti-immigrant city ordinance).

244. See *id.*

245. Elvia Limon, Farmers Branch Still Trying to Move Forward from Shadow of Controversial Rental Ordinance, *Dall. Morning News* (Aug. 2016), <https://www.dallasnews.com/news/farmers-branch/2016/08/26/farmers-branch-still-trying-move-forward-shadow-controversial-rentalordinance> [https://perma.cc/Y396-WJCU].

246. See *id.* (reporting on the lingering effects of the battle over Farmers Branch's anti-immigration ordinance and how local politics have changed since).

247. See Ken Belson & Jill P. Capuzzo, Towns Rethink Laws Against Illegal Immigrants, *N.Y. Times* (Sept. 26, 2007), <https://www.nytimes.com/2007/09/26/nyregion/26riverside.html> (on file with the *Columbia Law Review*).

Second, if one is not willing to let local-government chips fall where they may, one might still embrace immigration localism if it can be calibrated to discourage or constrain restrictionist outcomes. On this view, antidiscrimination and antisubordination principles found in the Equal Protection Clause of the Fourteenth Amendment might be deployed to strike down the most egregious forms of local exclusion and restrictionism while preserving local sanctuary policies. To be sure, equal protection arguments have not been as successful in challenging local enforcement-minded policies against noncitizens.<sup>248</sup> Even though courts sometimes employ a higher standard of review—strict scrutiny—when examining claims of state or local government discrimination against some noncitizens,<sup>249</sup> state and local discrimination against undocumented immigrants does not receive that highest level of scrutiny.<sup>250</sup> Moreover, litigants would face an uphill battle trying to convince a court that local enforcement laws discriminate on racial, ethnic, or national origin grounds. In challenging Arizona’s S.B. 1070, for example, the federal government was forced to concede in oral argument that it was not making a claim of racial discrimination.<sup>251</sup> Indeed, the Court ultimately allowed S.B. 1070’s anti-sanctuary provision to go into effect.<sup>252</sup>

Nevertheless, there is some hope that a more fully developed constitutional jurisprudence regarding discrimination based on immigration status might be up to the task of differentiating between sanctuary and anti-sanctuary policies.<sup>253</sup> Although the Supreme Court declined to find

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248. See Sofia D. Martos, Coded Codes: Discriminatory Intent, Modern Political Mobilization, and Local Immigration Ordinances, 85 N.Y.U. L. Rev. 2099, 2108, 2113 (2010) (explaining the difficulties of challenging immigration-related quality of life ordinances on equal protection grounds); Rose Cuison Villazor, Rediscovering *Oyama v. California*: At the Intersection of Property, Race and Citizenship, 87 Wash. U. L. Rev. 979, 994 (2010) (explaining how the Supreme Court, in deciding challenges to local property laws that restricted the property rights of noncitizens, ignored equal protection arguments).

249. See *Graham v. Richardson*, 403 U.S. 365, 371–72 (1971) (“[T]he Court’s decisions have established that classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny.” (footnotes omitted)).

250. See *Plyler v. Doe*, 457 U.S. 202, 223–24, 230 (1982) (striking down a state law denying free public education to undocumented children because the state failed to show that the law “further[ed] some substantial state interest,” but declining to exercise strict scrutiny review). Discrimination by the federal government against noncitizens, by contrast, receives the Court’s very deferential rational basis review. See *Mathews v. Diaz*, 426 U.S. 67, 81–84 (1976).

251. See Transcript of Oral Argument at 33, *Arizona v. United States*, 567 U.S. 387 (2012) (No. 11-182), 2012 WL 1425227.

252. See *Arizona*, 567 U.S. at 414–15.

253. As the Supreme Court recognized in *Graham v. Richardson*, immigrants “as a class are a prime example of a ‘discrete and insular minority.’” 403 U.S. at 372 (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938)); see also *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410, 419–20 (1948) (applying equal protection principles to noncitizens); *Oyama v. California*, 332 U.S. 633, 650 (1948) (Murphy, J., concurring) (arguing that a state law that “prohibit[ed] all aliens ineligible for American citizenship

that S.B. 1070's section 2(B), the anti-sanctuary provision mandating that local officers inquire about immigration status upon a reasonable suspicion a suspect was in the country illegally, was preempted, the Court left open the possibility that the law may be challenged based on evidence of discriminatory application.<sup>254</sup> And, eventually, after further litigation by advocacy groups,<sup>255</sup> the Attorney General of Arizona settled, agreeing to substantially limit the enforcement of section 2(B) of S.B. 1070.<sup>256</sup>

In addition, as Professor Hiroshi Motomura has argued, courts might obliquely recognize evidence of racial and national origin discrimination in assessing local legislation.<sup>257</sup> In *Lozano v. Hazleton*, for instance, plaintiffs challenged a local ordinance that required landlords to inquire about the immigration status of potential tenants.<sup>258</sup> Although the district court did not rule for plaintiffs on their equal protection claim, it struck down the law on preemption grounds.<sup>259</sup> According to Motomura, the evidence presented about discrimination may have subtly motivated the court's decisionmaking.<sup>260</sup> Moreover, relevant to the discussion of localism, advocates may look to state constitutional and statutory antidiscrimination protections to bolster claims against local anti-sanctuary legislation.<sup>261</sup>

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from acquiring, owning, occupying, enjoying, leasing or transferring agricultural land" violated equal protection principles and thus "deserve[d] constitutional condemnation").

254. See *Arizona*, 567 U.S. at 415 (noting that the Court's opinion "does not foreclose . . . constitutional challenges to the law as interpreted and applied after it goes into effect").

255. See Press Release, Nat'l Immigration Law Ctr., Arizona Attorney General Issues Opinion Establishing Constitutional Standards for Enforcement of Key SB 1070 Provisions, Ending Lawsuit (Sept. 15, 2016), <https://www.nilc.org/2016/09/15/arizona-attorney-general-issues-opinion-establishing-constitutional-standards-enforcement-key-sb-1070-provisions-ending-lawsuit/> [https://perma.cc/KAT2-QCBQ].

256. See Joint Case Disposition at 1, *Valle del Sol v. Whiting*, No. CV-10-01061-PHX-SRB (D. Ariz. Sept. 15, 2016), <https://www.nilc.org/wp-content/uploads/2016/09/1297-Joint-Case-Disposition.pdf> [https://perma.cc/L9TC-MTLG]; Joint Case Disposition, exh. A at 2–5, *Valle del Sol*, No. CV-10-01061-PHX-SRB, <https://www.nilc.org/wp-content/uploads/2016/09/1297-1-Exhibit-A-Proposed-Attorney-General-Opinion.pdf> [https://perma.cc/N4GV-N3NM] (defining and limiting police officer conduct in relation to S.B. 1070 section 2(B)).

257. See Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 *Duke L.J.* 1723, 1728–29 (2010) [hereinafter Motomura, *The Rights of Others*] (summarizing the ways in which unauthorized migrants may indirectly assert their rights to equal protection when challenging government decisions).

258. 496 F. Supp. 2d 477, 484–85 (M.D. Pa. 2007).

259. *Id.* at 533, 542.

260. See Motomura, *The Rights of Others*, *supra* note 257, at 1742–46 (noting the substantial evidence on race and ethnicity and its potential link to the *Lozano* court's preemption analysis).

261. See Davidson, *Dilemma of Localism*, *supra* note 34, at 964–74 (outlining examples of different states asserting authority to constrain local laws in a variety of policy areas).

Ultimately, antidiscrimination and equality norms may not currently provide an express and consistently reliable legal wedge to separate local sanctuary policies from anti-sanctuary ones. But that does not mean that advocates should give up seeking to normatively inflect structural power doctrines.<sup>262</sup> Indeed, we see this as opportunity to develop new doctrinal approaches to equal protection in the immigration context.<sup>263</sup>

2. *Undermining State Sanctuary.* — A second and related concern is that a localist strategy will bolster the legal case for local resistance to state-level sanctuary laws. This dynamic is currently playing out in litigation against California's suite of sanctuary laws, including the California Values Act S.B. 54, sometimes referred to as the "state sanctuary law."<sup>264</sup> In March 2018, the Trump Administration filed a complaint against the State of California regarding its state sanctuary laws.<sup>265</sup> Seeking injunctive relief enjoining the enforcement of these laws, the complaint specifically targets Assembly Bill 450 (A.B. 450),<sup>266</sup> Assembly Bill 103 (A.B. 103),<sup>267</sup> and Senate Bill 54 (S.B. 54).<sup>268</sup> These laws, according to the United

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262. See *id.* at 984 ("While there is no simple way to resolve the dilemma [of localism], normative considerations undergirding the vertical allocation of power in the states should be more directly confronted . . .").

263. For instance, one might examine ways that evidence of animus against unauthorized immigrants may be used to demonstrate subordination of a particular group in violation of equal protection principles under the "animus doctrine." See, e.g., Alina Das, *Inclusive Immigrant Justice: Racial Animus and the Origins of Crime-Based Deportation*, 52 U.C. Davis L. Rev. 171, 176 (2018). Or one may explore how even the rational basis approach may be used to strike down current discriminatory treatment of immigrants. See Katie Eyer, *The Canon of Rational Basis Review*, 93 Notre Dame L. Rev. 1317, 1365-66 (2018) (arguing for the underappreciated potential role of rational basis to advance social movement goals).

264. S.B. 54, 2017-2018 Leg., Reg. Sess. (Cal. 2017).

265. *California* Complaint, *supra* note 24, at 2-3.

266. A.B. 450, 2017-2018 Leg., Reg. Sess. (Cal. 2017). A.B. 450 prohibits private employers from voluntarily cooperating with federal officials who seek information relevant to immigration enforcement in places of employment. *Id.* § 1. Employers may not consent to an immigration agent to enter nonpublic areas of the workplace unless the agent provides a warrant. *Id.* § 2. The United States argues that this provision interferes with the enforcement of the INA and Immigration Reform and Control Act's prohibition on working without authorization. *California* Complaint, *supra* note 24, at 7-9.

267. A.B. 103, 2017-2018 Leg., Reg. Sess. (Cal. 2017). AB 103 creates an inspection-and-review process requiring the California Attorney General to investigate enforcement efforts of federal agents. *Id.* § 12. It permits an inspection of facilities and an examination of the due process provided to civil immigration detainees. *Id.* It allows access to detainees, officials, personnel, and records. *Id.* The United States argues this is an "improper, significant intrusion into federal enforcement of the immigration laws" and that California lacks any lawful interest in such investigatory efforts. *California* Complaint, *supra* note 24, at 10, 12-13.

268. Cal. S.B. 54. S.B. 54 limits the ability of state and local law enforcement officers to provide federal agents with information about the individuals in custody and subject to federal immigration custody or to transfer these individuals to federal immigration custody. *Id.* § 3. The provisions allow release of an individual or her information only if the United States provides a judicial warrant. *Id.* § 2. The United States characterized this law as

States, are preempted by federal law and impermissibly discriminate against the United States.<sup>269</sup> In other words, by making it difficult for federal immigration officers to enforce federal immigration law, California is obstructing laws that “Congress has enacted . . . to take actions entrusted to it by the [U.S.] Constitution.”<sup>270</sup>

Localities in California allied with the federal government’s enforcement vision will undoubtedly rely on the same forms of municipal empowerment that could benefit sanctuary cities and counties in anti-sanctuary states like Texas. Despite the fact that California is home to the largest number of immigrants in the nation<sup>271</sup> and has passed the most integrative set of laws at the state level, the negative sentiment against the state’s protection of immigrants endures in select cities and counties. Two prominent California counties, San Diego County<sup>272</sup> and Orange County,<sup>273</sup> have backed President Trump’s challenge to the State’s sanctuary laws. Similarly, the cities of Yorba Linda, Hesperia, Escondido, Aliso Viejo, Mission Viejo, Fountain Valley, and Barstow have filed briefs in support of the federal government.<sup>274</sup> In this regard, these localities are following the oft-used tactic of aligning themselves with the federal government in raising preemption challenges against their state—mirroring what localities did in contesting California’s Proposition 187 in 1994 and Arizona’s S.B. 1070 in 2010.<sup>275</sup> Thus far, however, the federal government challenge has not had much success. Ruling on the federal government’s motion for preliminary injunction, a California district court has mostly rejected the federal government’s argument that the

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creating “difficult and dangerous efforts to re-arrest aliens who were previously in state custody, endangering immigration officers, the alien at issue, and others.” *California* Complaint, *supra* note 24, at 2–3, 16.

269. See *California* Complaint, *supra* note 24, at 2.

270. *Id.* at 3.

271. Hans Johnson & Sergio Sanchez, Just the Facts: Immigrants in California, Pub. Pol’y Inst. of Cal. (May 2018), <http://www.ppic.org/publication/immigrants-in-california/> [<https://perma.cc/V8F8-HPX6>]. In 2016, the U.S. Census Bureau found that 27% of California’s population are foreign-born persons. QuickFacts: California, U.S. Census Bureau, <https://www.census.gov/quickfacts/fact/table/CA/POP645216#viewtop> [<https://perma.cc/JZ5E-AU4K>] (last visited Nov. 1, 2018).

272. Jennifer McEntee, San Diego County Backs Trump Challenge to California ‘Sanctuary’ Law, Reuters (Apr. 17, 2018), <https://www.reuters.com/article/us-usa-immigration-california/san-diego-county-backs-trump-challenge-to-california-sanctuary-law-idUSKBN1HO2XE> [<https://perma.cc/BY6B-GAT2>].

273. Jeff Daniels, Trump Throws His Support Behind Orange County in Its War Against the California Sanctuary Law, CNBC (Mar. 28, 2018), <https://www.cnn.com/2018/03/28/trump-throws-support-behind-orange-county-in-fight-against-california-sanctuary-law.html> [<https://perma.cc/97KW-7GUP>].

274. Municipalities & Elected Officials Motion for Leave to File Amici Curiae Brief in Support of Plaintiff’s Opposition to Motion to Dismiss, *United States v. California*, 314 F. Supp. 3d 1077 (E.D. Cal. 2018) (No. 2:18-CV-00490-JAM-KJN); Municipalities & Elected Officials Amici Curiae Brief, *California*, 314 F. Supp. 3d 1077 (No. 2:18-CV-00490-JAM-KJN).

275. See *supra* note 86 and accompanying text.

laws were preempted or violated the intergovernmental immunities doctrine.<sup>276</sup>

Separately, however, the City of Huntington Beach filed a state constitutional challenge against S.B. 54 in state court.<sup>277</sup> What makes this challenge interesting is that Huntington Beach's claim most directly invokes the kind of localism arguments suggested in this Essay in the anti-sanctuary context. California is a home-rule state. In fact, it stands apart from other home-rule states in that it is one of the few that grants localities immunity from state legislative preemption on matters of municipal affairs (synonymous with local affairs).<sup>278</sup> Accordingly, Huntington Beach argues that home rule provides it the authority to control its municipal affairs, direct its resources, and contract directly with the federal government. In addition, it claims that S.B. 54 impermissibly meddles with that authority when it directs what localities can and cannot do with their personnel, facilities, or funds.<sup>279</sup> In short, Huntington Beach is raising a structural-integrity argument in its effort to free itself from state preemption, albeit in favor of immigration enforcement. As such, it seems clear that any argument we advance in favor of local discretion for cities, like El Cenizo, seeking to disentangle themselves from state-mandated cooperation with federal authorities will redound to the benefit of cities like Huntington Beach in their attempt to buck

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276. *California*, 314 F. Supp. 3d at 1086 (granting in part and denying in part a preliminary injunction). The court declined to preliminarily enjoin all the challenged provisions of S.B. 54 and A.B. 103, finding neither field nor obstacle preemption and ruling that the intergovernmental immunities doctrine was not violated. See *id.* at 1093, 1104, 1110. With regard to A.B. 450, the court declined to enjoin the provision requiring employers to provide notice to their employees of workplace audits by immigration authorities; however, the court found the provision that prohibited employers from consenting to searches of their workplaces to likely violate the intergovernmental immunities doctrine and therefore preliminarily enjoined that section. See *id.* at 1096–97.

277. See Kartikay Mehrotra, *Huntington Beach Sues California over Immigration Policy*, Bloomberg (Apr. 4, 2018), <https://www.bloomberg.com/news/articles/2018-04-04/surf-city-usa-lawyers-up-to-take-on-california-over-immigrants> (on file with the *Columbia Law Review*).

278. See Cal. Const. art. XI, § 5(a).

279. See, e.g., Mehrotra, *supra* note 277 (quoting a Huntington City attorney stating that “[t]he state can’t tell us what we can and cannot spend our money on” and asserting that “[t]he way that law is drafted is the definition of constitutional overreach in California” (internal quotation marks omitted)); Priscella Vega, *State Not Backing Down After Huntington Beach Wins in Court Challenge to ‘Sanctuary’ Immigration Law*, L.A. Times (Sept. 28, 2018), <http://www.latimes.com/socal/daily-pilot/news/tn-dpt-me-hb-sb54-folo-20180928-story.html> [<https://perma.cc/7KXY-75FV>] (describing the city’s argument that “the law violates its local control as a charter city”). A superior court in California has since ruled in Huntington Beach’s favor, but the state is appealing the decision. See *Order for Issuance of Peremptory Writ of Mandate, City of Huntington Beach v. State of California*, 30-2018-00984280-CU-WM-CJC (Cal. Sup. Ct. Oct. 5, 2018); Priscella Vega, *State Files Notice of Appeal Against O.C. Judge’s Ruling Exempting Huntington Beach from ‘Sanctuary’ Law*, L.A. Times (Nov. 10, 2018), <https://www.latimes.com/local/lanow/la-me-ln-huntington-beach-sanctuary-20181110-story.html> [<https://perma.cc/K6TG-6CS2>].

state-mandated limitations on their ability to participate in federal enforcement efforts.

For sanctuary advocates, Huntington Beach's lawsuit illustrates the double-edged sword in turning to localism and advancing local-autonomy claims. On the one hand, if California state courts find that immigration enforcement is not a municipal affair, then S.B. 54 preempts local policies and mandates sanctuary throughout the entire state. But such a finding will likely hamper efforts by localities in other states to raise structural-integrity or other localism claims based on their home-rule powers over local or municipal affairs. Indeed, if participation in federal immigration enforcement is not a municipal affair at all, then home-rule localities may be denied even the basic authority to enact sanctuary policies altogether, even in the absence of state anti-sanctuary.

On the other hand, a victory for Huntington Beach on the municipal affairs question may strengthen similar claims by localities in other states, either on the basis of home-rule immunity or other structural protections. But it might also undermine state sanctuary efforts in places like Illinois, where the state can preempt on matters of local government affairs only if it explicitly states its intent to override home-rule authority, which Illinois's sanctuary law does not do.<sup>280</sup> Of course, a California ruling does not bind other state courts. Moreover, home rule in California is particularly strong. But given the similar language concerning "local" and "municipal affairs," it is likely that any interpretation of its scope in the context of home rule will be influential elsewhere.

Now, it may be possible to argue that localism arguments in support of local sanctuary policies do not stand on the same footing as local anti-sanctuary policies. After all, if the foundation of the localism argument that Huntington Beach is raising is premised on a city's power over its own municipal affairs, it would appear that policies that separate localities from the federal immigration enforcement are more squarely within that sphere than is a policy that seeks to expand local entanglement with federal law enforcement. After all, a decade earlier, the central debate with respect to cities in immigration enforcement was whether they could participate at all, given the federal government's plenary power over immigration. It is only recently that the question has turned to whether they can refuse to participate.

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280. See Ill. Const. art. VII, § 6. It is worth noting that if Illinois did explicitly express its intent to preempt home rule authority, that would also mean that Chicago's "Welcoming Cities" ordinance would be preempted. While providing for sanctuary generally, Chicago's policy allows cooperation with federal authorities in cases that Illinois's sanctuary law does not. Compare 5 Ill. Comp. Stat. Ann. 805/15 (West 2019) (prohibiting enforcement of federal civil immigration laws), with Chi., Ill., Mun. Code of Chi. ch. 2-173-042 (2018) (allowing cooperation with federal immigration authorities in certain situations). This still raises the question of whether localities or states are in a better position to decide when and the degree to which local law enforcement should involve themselves in immigration enforcement activities.



But even assuming that some forms of state sanctuary legislation might be compromised by strengthening the hand of localities, it is not clear how detrimental this would be to the project of mitigating the federal hyperenforcement regime. Absent a statewide standard, the largest and most populous localities in the state—Los Angeles County, Santa Clara County, and San Francisco—still maintain local sanctuary policies that are just as, if not more, stringent than the statewide rule. Meanwhile, localities that oppose the S.B. 54 standards have already found ways to undermine key aspects of the law’s attempt to shield noncitizens from federal enforcement.<sup>281</sup> Orange County and Contra Costa County, for example, began to publicize release dates for inmates in their custody on their website;<sup>282</sup> by making that information public, they were able to circumvent S.B. 54’s prohibition on communicating certain information with federal immigration authorities.

Again, this is not to downplay how much state sanctuary laws like those in California are important landmarks with substantive protections for noncitizens. Undoubtedly, California’s S.B. 54 and its suite of other integrationist measures are remarkable legislative achievements that provide more statewide protection for noncitizens than any other jurisdiction.<sup>283</sup> And other states may follow suit. But given that the largest, most immigrant-heavy jurisdictions across the country are almost uniformly sanctuary jurisdictions, it is not clear that a weakened state ability to enact sanctuary legislation will necessarily be a worse outcome than weakening the ability of counties, sheriffs’ departments, police departments, and cities to enact integrationist policies.

In the end, though, we acknowledge the difficulty that cases like the one involving Huntington Beach raise for immigration advocates. Like federalism, localism on its own has no “political valence.”<sup>284</sup> In theory, at least, it may be used to support progressive or conservative policies—

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281. See Jerome Ma & Nicholas Pavlovic, *California Divided: The Restrictions and Vulnerabilities in Implementing SB 54*, 26 *Asian Am. L.J.* (forthcoming 2019) (manuscript at 37–40) (on file with the *Columbia Law Review*) (discussing ways in which different localities have implemented the state law).

282. *Id.* (manuscript at 31); see also Roxana Kopetman, *In Response to California Sanctuary Law, Orange County Sheriff Makes Public Inmates’ Release Dates*, *Orange County Reg.* (Mar. 26, 2018), <https://www.ocregister.com/2018/03/26/in-response-to-california-sanctuary-law-orange-county-sheriff-makes-public-inmates-release-dates/> [<https://perma.cc/78GLJF82>].

283. See, e.g., S. Karthick Ramakrishnan & Allan Colbern, *The California Package: Immigrant Integration and the Evolving Nature of State Citizenship*, *Pol’y Matters*, Spring 2015, at 1, 1–2 (arguing that the “California package” of integration laws protecting unauthorized immigrants “goes well beyond any benefits imagined in federal proposals on immigration reform”); Karthick Ramakrishnan, *Opinion, Look to California’s Model*, *N.Y. Times* (Sept. 1, 2016), <https://www.nytimes.com/roomfordebate/2015/09/03/is-immigration-really-a-problem-in-the-us/look-to-californias-model> (on file with the *Columbia Law Review*) (describing benefits given to undocumented immigrants in California).

284. Heather K. Gerken, *A User’s Guide to Progressive Federalism*, 45 *Hofstra L. Rev.* 1087, 1087 (2017).

sanctuary and anti-sanctuary alike. But that also means that there is no neutral position; eschewing localism or local-autonomy arguments has just as much of an effect on substantive policies like sanctuary and anti-sanctuary as embracing them.

On balance, given the degree to which sanctuary historically has been, and continues to be, spearheaded by local governments, greater local autonomy will promote rather than impede efforts to develop a more effective and humane immigration enforcement system. Even putting substantive policy outcomes aside, it may be that normative claims about localism and the local political process, some of which are outlined in this Essay, make greater local autonomy worthwhile. One thing is clear, though: It is no longer possible to ignore localism in how we think about immigration and immigration enforcement.

#### CONCLUSION

The battlegrounds for the nationwide fight over sanctuary cities are shifting. As federal efforts to coerce participation in immigration enforcement efforts have floundered, state legislatures have taken up the call. The state anti-sanctuary laws that have been proposed or passed threaten to quash local dissent on immigration enforcement policy more effectively than their federal counterparts. In turn, those interested in preserving local discretion to resist complicity and conscription into the federal immigration enforcement scheme must also embrace new legal and theoretical frameworks.

This Essay suggests that immigration advocates and commentators will benefit from embracing municipal authority in immigration enforcement law. The emerging anti-sanctuary trend, typified by punitive and draconian provisions, provides a ripe opportunity to test the limits of state control over local discretion. More broadly, recognizing municipal control over sanctuary policies is a recognition of the local nature of national immigration policies and, simultaneously, a recognition of the national implications of local policymaking. A localist lens broadens our understanding of where and how critical immigration enforcement governance decisions are made and provides the legal and theoretical space to preserve that control.

