

## ANTI-SANCTUARY & IMMIGRATION LOCALISM

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### ABSTRACT

*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, in this federal anti-sanctuary campaign, localities have mainly prevailed on federalism grounds, based in the Tenth Amendment's anti-commandeering and anti-coercion doctrines. In the past year, 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' SB 4, prohibit local sanctuary policies and impose severe punishments on the cities and officials that support them. This new state vs. local terrain creates doctrinal, political and normative implications for the future of local government resistance to immigration enforcement, which have thus far been under-theorized 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, both on the federal but also state government levels 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 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 localist claims and protect three distinct interests that concern local governments—structural integrity, accountability and local democracy. Third, as a normative matter, the Essay contends that immigration localism provides a more accurate descriptive and theoretical account of how current immigration enforcement operates and promotes community engagement on immigration enforcement. Specifically, the reorientation towards localism accounts for the powerful role that cities play in immigration enforcement and decenters the federal government's dominant role in immigration enforcement. To be sure, this Essay recognizes that casting our theoretical gaze towards 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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## TABLE OF CONTENTS

<b>ABSTRACT</b>	1
TABLE OF CONTENTS	2
INTRODUCTION	3
<b>I. THE DIVERGENCE OF FEDERAL AND STATE ANTI-SANCTUARY</b>	<b>ERROR!</b>
<b>BOOKMARK NOT DEFINED.</b>	
<i>A. The Rise and Fall of Federal Anti-Sanctuary</i>	<i>Error! Bookmark not defined.</i>
<i>B. The Rise of State Anti-Sanctuary</i>	<i>Error! Bookmark not defined.</i>
<i>C. The Legal Distinction between Federal and State Anti-Sanctuary</i>	<i>Error! Bookmark not defined.</i>
<b>II. STATE ANTI-SANCTUARY FROM A LOCALIST LENS</b>	<b>ERROR! BOOKMARK NOT</b>
<b>DEFINED.</b>	
<i>A. Localism and the Legal Standing of Localities</i>	<i>Error! Bookmark not defined.</i>
<i>B. The Localist Case against State Anti-Sanctuary</i>	<i>Error! Bookmark not defined.</i>
1. Home Rule as Anti-Commandeering	<b>Error! Bookmark not defined.</b>
2. Fiscal Accountability and Unfunded Mandates	<b>Error! Bookmark not defined.</b>
3. Local Democracy	<b>Error! Bookmark not defined.</b>
<b>III. THE PROMISE AND PERILS OF IMMIGRATION LOCALISM</b>	39
<i>A. The Promise of Immigration Localism</i>	40
1. Localism as a Descriptive and Theoretical Account	40
2. The Role of Local Civic Engagement in Immigration Discourse	45
<i>B. The Perils of Immigration Localism</i>	48
1. Empowering Restrictionist Localities?	48
2. Undermining State Sanctuary	53
CONCLUSION	58



## 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 immigration enforcement. Sheriff Hernandez won county office in Texas promising to reduce her county's cooperation with immigration enforcement authorities, stating "our 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 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 SB 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 non-cooperation policies on aiding federal immigration enforcement.<sup>6</sup>

Texas is not the only state to have passed such a law. In the last two years

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<sup>1</sup> Press Release, Travis County 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>.

<sup>2</sup> Julian Aguilar, *Travis County Sheriff Announces New "Sanctuary" Policy*, TEXAS TRIBUNE (Jan. 20, 2017, 5 PM), <https://www.texastribune.org/2017/01/20/travis-county-sheriff-announces-new-sanctuary-poli/>.

<sup>3</sup> Martin Kaste, *Trump Threatens 'Sanctuary' Cities with Loss of Federal Funds*, NPR (Jan. 26, 2017, 11:06 PM), <https://www.npr.org/sections/thetwo-way/2017/01/26/511899896/trumps-threatens-sanctuary-cities-with-loss-of-federal-funds>; Sedria Renee, *Texas Gov. Abbot Halts Travis County Funding Over Sanctuary Policy*, NBC NEWS (Feb. 2, 2017, 8:01 PM), <https://www.nbcnews.com/news/us-news/texas-gov-abbot-halts-travis-county-funding-over-sanctuary-policy-n716201>.

<sup>4</sup> Sedria Renee, *Texas Gov. Abbot Halts Travis County Funding Over Sanctuary Policy*, NBC NEWS (Feb. 02, 2017, 8:01 PM), <https://www.nbcnews.com/news/us-news/texas-gov-abbot-halts-travis-county-funding-over-sanctuary-policy-n716201>.

<sup>5</sup> S.B. 4, 85th Leg., Reg. Sess. (Tex. 2017).

<sup>6</sup> S.B. 4, 85th Leg., Reg. Sess. (Tex. 2017).

alone, six other states—Indiana,<sup>7</sup> Iowa,<sup>8</sup> Mississippi,<sup>9</sup> North Carolina,<sup>10</sup> Tennessee<sup>11</sup> and Virginia<sup>12</sup>—have passed similar laws. And, at least nineteen states have introduced similar bills.<sup>13</sup> This turn towards anti-sanctuary state 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’ SB 4. Referred to as “show me your papers” law,<sup>14</sup> SB 4 was challenged by the City of El Cenizo, arguing 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 holding, ruling that federal immigration laws do not preempt a state’s authority to compel *their* localities to comply with the federal government.<sup>17</sup> Instead, the court noted that SB 4 merely does on a state level

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<sup>7</sup> See Ind. Code § 5-2-18.2 (2017).

<sup>8</sup> See Iowa Code § 825.1 (2018).

<sup>9</sup> See Miss. Code Ann. § 25-1-119 (2017).

<sup>10</sup> See S.B. 145, Gen. Assemb., Reg. Sess. (N.C. 2017).

<sup>11</sup> See H.B. 2315, 110th Gen. Assemb., Reg. Sess. (Tenn. 2018).

<sup>12</sup> See Va. Code § 15.2-1409.1 (2018).

<sup>13</sup> See, e.g., ALA Code § 31-13-5 (2015); H.B. 205, 30th Leg., 2d Reg. Sess. (Alaska 2018); S.B. 1378, 53d Leg., 2d Reg. Sess. (Ariz. 2018); S.B. 14, 91st Gen. Assemb., Reg. Sess. (Ark. 2017); Cal. Gov’t Code § 7282 (2017); S.B. 18-220, 71st Gen. Assemb., 2d Reg. Sess. (Colo. 2018); H.B. 9, Gen. Assemb., Reg. Sess. (Fla. 2018); 5 Ill. Comp. Stat. 805/5 (2017); H.B. 501, Gen. Assemb., Reg. Sess. (Ky. 2018); H.P. 272, 128th Leg., 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, Gen. Assemb., Reg. Sess. (N.Y. 2018); H.B. 179, 132d Gen. Assemb., Reg. Sess. (Ohio 2017); H.B. 1804, 51st Leg., Reg. Sess. (Okla. 2007); S.B. 10, Gen. Assemb., Reg. Sess. (Pa. 2017); H.B. 1985, 65th Leg., Reg. Sess. (Wash. 2017); S.B. 275, Leg., Reg. Sess. (Wis. 2017); H.B. 105, 64th Leg., Budget Sess. (Wyo. 2018).

<sup>14</sup> See Manny Fernandez, *Texas Banned “Sanctuary Cities”: Some Police Departments Did Not Get the Memo*, N.Y. Times, at A 13 (March 15, 2018) available at <https://www.nytimes.com/2018/03/15/us/texas-sanctuary-sb4-immigration.html> (noting that Texas’ SB4 is colloquially referred to as a “show me your papers” law).

<sup>15</sup> See *City of El Cenizo v. Texas*, 264 F. Supp. 3d 744, 759-777 (W.D. Tex. 2017), *aff’d in part and vacated in part*, 890 F.3d 164 (5th Cir. May 8, 2018).

<sup>16</sup> See *City of El Cenizo*, 264 F. Supp. 3d at 812-813.

<sup>17</sup> See *City of El Cenizo v. Texas*, 890 F.3d 180 (5th Cir. 2018).

what local governments within the state have done—to regulate whether or not to cooperate with the federal government.<sup>18</sup> In one fell swoop, the Fifth Circuit’s decision to uphold SB4 simultaneously demonstrates the court’s recognition of local decision-making in immigration law and the power of the state to compel local governments to comply with federal immigration authorities.

Despite this significant swing towards state preemption, little attention has been paid thus far to this development in immigration law scholarship<sup>19</sup> and only recently has the local government literature begun to address the issue.<sup>20</sup> Instead, most legal scholarship has been primarily consumed with the constitutionality of so-called “sanctuary” cities.<sup>21</sup> These jurisdictions, all of which to differing degrees maintain policies that limit local cooperation and communication with federal immigration authorities,<sup>22</sup> became the centerpiece of then-candidate Donald Trump’s campaign,<sup>23</sup> and have remained a central

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<sup>18</sup> *See id.* (stating that in “its operation, SB4 is similar to one of the city [sanctuary] ordinances some plaintiff [cities] have themselves adopted”).

<sup>19</sup> To be sure, immigration legal scholars have analyzed the roles that states and local governments doctrinally and normatively play in the regulation and enforcement of immigration law. *See, e.g.*, Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 FLA. ST. U. L. REV. 965 (2004); Cristina Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567 (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 first to examine state anti-sanctuary laws and their implications for immigration law.

<sup>20</sup> *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, 1507 (2018). Our examination of state anti-sanctuary thus differs from these articles in significant ways in that, among other things, we consider how state anti-sanctuary laws are impacting the legal arguments that cities could bring against states and whether, as normative matter, the trend towards localism in immigration law itself should be supported.

<sup>21</sup> *See e.g.*, R. Linus Chan, Ingrid Eagly, Dina Francesca Haynes, Annie Lai, Elizabeth M. McCormick & Juliet Stumpf, *Understanding Sanctuary Cities*, 59 B.C. LAW REV. 1703 (2018) [hereinafter Chan, et. al., *Understanding Sanctuary Cities*]; David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U. L. REV. 583, 645 (2017) (noting that the anti-commandeering doctrine “play leading roles in the scholarship defending subfederal sanctuary policies....”).

<sup>22</sup> *See* Chan, et. al., *Understanding Standing Cities*, *supra* note 21, at 1705.

<sup>23</sup> Donald Trump, Presidential Campaign Speech at Rally in Phoenix, AZ (Aug. 31, 2016) (transcript available at <http://www.latimes.com/politics/la-na-pol-donald-trump-immigration->

obsession of both President Trump and U.S. Attorney General Jeff Sessions.<sup>24</sup> Accordingly, popular and scholarly energy has been devoted to the legality of federal crackdowns on non-cooperating jurisdictions and agencies.<sup>25</sup>

As it turns out, however, federal attempts to shut down sanctuary cities have largely been ineffective, as they have either lacked congressional support or have 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 affirmance of Texas's SB4 in *City of El Cenizo*<sup>28</sup> 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 are likely to ensue. More broadly, the upsurge in these state laws point 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 towards a new legal landscape—localism. This legal framework,

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[speech-transcript-20160831-snap-htmlstory.html](#)).

<sup>24</sup> Just this year, Attorney General Jeffrey Sessions filed a lawsuit against the state of California contending that its status as a sanctuary state violates congressional mandates. See Complaint, *United States v. California*, No. 18-254 (E.D. Cal. Mar. 06, 2018).

<sup>25</sup> See e.g., Vikram David Amar, *Federalism Friction in the First Year of the Trump Presidency*, 45 HASTINGS CONST. L.Q. 401 (2018) (assessing the federalism implications of the federal government's targeting against 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 (2018) (advocating for dissenting cities against the federal government's crackdown on sanctuary jurisdictions, specifically San Francisco, CA). Two of us have recently authored 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*, \_\_\_ MINN. L. REV. \_\_\_ (forthcoming 2018) (discussing potential partnerships between public and private entities to provide sanctuary to undocumented immigrants).

<sup>26</sup> See Part I, *infra* (explaining that federal efforts to quash sanctuary cities have been largely ineffective).

<sup>27</sup> See *id.*

<sup>28</sup> See *City of El Cenizo v. Texas*, 890 F.3d 180 (5th Cir. 2018).

which focuses on the relationship between states and localities,<sup>29</sup> is unchartered legal territory for immigration law in general and sanctuary cities in particular, which are more accustomed to federalism, anti-commandeering and anti-coercion principles.<sup>30</sup> Within the localism landscape, cities are considered creatures of the state<sup>31</sup> and thus traditionally viewed with limited local powers and, importantly, susceptible to state preemption.<sup>32</sup> Accordingly, at first glance, viewing anti-sanctuary laws through the lens of localism law shows sanctuary cities as vulnerable to being preempted by the state and compelled to enforce immigration law in ways that the federal government is constitutionally powerless to do so.

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 potentially powerful doctrinal and normative arguments grounded in local autonomy that sanctuary cities could use against state sanctuary laws.<sup>33</sup> These previously unexplored localist arguments—under what we refer to as “immigration localism”—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 on localist principles suggests that cities can and should have greater roles in immigration enforcement alongside federal and state governments. To be sure, we recognize that strengthening the power of local discretion in immigration law may end up supporting local anti-sanctuary policies. In the long run, however, individual rights and equality principles might mitigate the most exclusionary local impulses, while allowing local discretion to

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<sup>29</sup> See Su, *Localist*, *supra* note 19, at 1628-29 (describing localist framework as “legal, political and ideological structure that organizes the institution of local governments under the state level”); Nestor M. Davidson, *Cooperative Federalism: Federal-Local Collaboration in an Era of State Sovereignty*, 93 VA. L. REV. 959 (discussing relationship between federal and local governments through “cooperative localism”); Richard Briffault, “What about the ‘Ism?’” *Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303 (1994) (discussing the convergence of federalism and localism) (hereinafter Briffault, *What about the ‘Ism’*).

<sup>30</sup> See Part I.A., *infra*.

<sup>31</sup> *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”).

<sup>32</sup> See Briffault, *What about the ‘Ism’*, *supra* note 29, at 2005; Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1 (1990) (hereinafter Briffault, *Our Localism: Part I*); Scharff, *supra* note 20, at 1507.

<sup>33</sup> 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); Richard Briffault, *Our Localism: Part I*, *supra* note 32, at 8; Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 381 (1990) (hereinafter Briffault, *Our Localism: Part II*).

better serve the goals of civic engagement and inclusionary policies for noncitizens.

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 in the past, and how those past efforts differ from federal and state anti-sanctuary efforts today. As this Part explains, contemporary state anti-sanctuary laws are notable for their expansive scope and severe penalties. Moreover, they appear to be proliferating at precisely the same time that federal anti-sanctuary efforts have been stymied by anti-commandeering and anti-coercion arguments grounded on federalism principles. Against this wave of federal defeat, state anti-sanctuary laws have now emerged as the most significant challenge to local sanctuary policies.

Next, Part II examines the new legal landscape in which sanctuary cities must defend their policies and argues that, despite the presumption in favor of state preemption, developments in the law of localism demonstrate new legal arguments that these cities could use to challenge state anti-sanctuary laws. More specifically, this Part shows how many of these arguments may be possible specifically because the unique and highly punitive structure of contemporary state anti-sanctuary laws implicates localism concerns in ways that other state preemption statutes do not. As such, this Part suggests 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 argues that a genuine turn towards immigration localism may be worthwhile as a normative matter. 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> First, local discretion in immigration law may mean that anti-sanctuary cities may flourish, as focused policy activists may be able to capture municipalities to proliferate enforcement-minded policies. Second, a

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<sup>34</sup> Cf. Nestor M. Davidson, *The Dilemma of Localism in an Era of Polarization*, 128 YALE L.J. \_\_\_\_ (forthcoming 2018) (describing localism as a “double-edged” sword because conceptually, local autonomy can be used to advance progressive, conservative or other causes).

robust localist doctrine may strengthen the hand of anti-sanctuary localities in their challenge to sanctuary state laws like those in California. Although these are important concerns for those invested in the project of justice and fairness for immigrants, 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 non-citizens 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 that trend 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 convincingly the risks associated with this form of structural power allocation might be managed. Regardless, our hope is that this Essay spurs that 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. 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, we outline and explain why the recent wave of state anti-sanctuary laws are altogether more expansive, more punitive, and more effective than their federal counterparts. If the locus of the anti-sanctuary movement is shifting from the federal level to the states, the reason we argue is 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 of sanctuary cities at the center of his administration's immigration enforcement strategy. Yet his attack also follows a longstanding federal effort to gain local

cooperation in the enforcement of federal immigration law.<sup>35</sup> Historically, these efforts have included a mix of encouragement and prohibitions. In 1996, for example, Congress 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>36</sup> That same year, Congress also enacted a pair of laws, later codified in Section 1373, addressing what was then the most common local sanctuary policy.<sup>37</sup> More specifically, Section 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>38</sup> And to this day, Section 1373 remains the sole anti-sanctuary provision that has been enacted into federal law.

Despite the Congress’ strong desire to secure local cooperation in 1996,<sup>39</sup> the laws that it enacted were notably limited. Specifically, neither Section 287(g) nor 1373 *required* local involvement in federal immigration enforcement. 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, immigration enforcement strategies were increasingly designed around local participation starting in the mid-2000s.<sup>40</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 Section 1373, they also added new limitations not specifically barred by federal law, such as prohibitions against asking about immigration-related information, or

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<sup>35</sup> 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) (examining federal attempts to engage state and local cooperation in immigration enforcement).

<sup>36</sup> See 8 U.S.C. § 1357(g)(1) (2006).

<sup>37</sup> 8 U.S.C. § 1373 (2006).

<sup>38</sup> *Id.*

<sup>39</sup> See H.R. REP. NO. 104-725, at 313 (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, or activities of” undocumented immigrants); *Chicago v. Sessions*, 888 F.3d 272, 278 (7th Cir. 2018) (discussing the legislative history of 8 U.S.C. §1373).

<sup>40</sup> See Rick Su, *The States of Immigration*, 54 WM. & MARY L. REV. 1339, 1356-73 (2013) (hereinafter Su, *The States of Immigration*).

constraints on when local officials may detain individuals solely on the basis of an alleged immigration violation.<sup>41</sup> These two developments changed the way sanctuary began to be 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.

It was against this background that the Trump administration mounted the most significant federal anti-sanctuary campaign thus far. In dealing with local resistance or reluctance, past administrations largely focused on workarounds<sup>42</sup> and encouragements.<sup>43</sup> President Trump, however, has opted for a direct and punitive approach, and one based on an expansive interpretation of what is required and prohibited by federal law. 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 those that have “in effect a statute, policy, or practice that prevents or hinders the enforcement of Federal law.”<sup>44</sup> Attorney General Jeff Sessions promptly followed through by conditioning eligibility for a longstanding local law enforcement grant program—the Edward Byrne Memorial Justice Assistance Grant Program—on access and notice

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<sup>41</sup> See, e.g., Bernard W. Bell, *Sanctuary Cities, Government Records, and the Anti-Commandeering Doctrine*, 69 RUTGERS U. L. REV. 1553 (2017) (discussing how New York City changed its policy to comply with Section 1373); Orde F. Kittrie, *Federalism, Deportation, and Crime Victims Afraid to Call the Police*, 91 IOWA L. REV. 1449, 1455 (2006) (describing the local shift from “don’t tell” sanctuary policies barred by Section 1373, to “don’t ask” and “don’t enforce” policies that arguably do not).

<sup>42</sup> See, e.g., Julia Preston, *Deportation Program Sows Mistrust, U.S. Is Told*, N.Y. TIMES, Sept. 16, 2011, at A12 (describing the controversy over the Operation Secure Communities, which turned the FBI fingerprint database used by local law enforcement into an immigration screening program).

<sup>43</sup> See, e.g., Julia Preston, *Firm Stance on Illegal Immigrants Remains Policy Under Obama*, N.Y. TIMES, at A14 (describing the Obama administration’s decision to continue the Bush administration’s emphasis on expanding the 287(g) program).

<sup>44</sup> Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017). 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 it would publish a list of jurisdictions that “failed to honor any detainees” with respect to non-citizens who have committed certain crimes. *Id.*

requirements that go well beyond what is required under Section 1373.<sup>45</sup> All the while, political attacks against sanctuary cities continue to escalate.

But cities are also fighting back. And more importantly, they appear to be winning. Since the implementation of Trump's executive order, a number of cities and other localities—including Chicago, Philadelphia, and Santa Clara County—have gone to court to challenge federal efforts to defund sanctuary jurisdictions.<sup>46</sup> In turn, a number of federal courts have issued sweeping injunctions against not only Trump's defunding order, but also Attorney General Sessions's implementation.<sup>47</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>48</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 federal constitution and, more specifically, the prohibition against federal commandeering.<sup>49</sup>

Indeed, as the localities have broadened their legal challenge to include not only the legality of Trump's executive order, but also the federal law upon which it is based, there are signs that the constitutionality of Section 1373, the sole federal anti-sanctuary provision, is also in doubt on federal commandeering grounds.<sup>50</sup> Thus, although the Trump administration's political attacks on sanctuary cities continues apace, the federal government's anti-sanctuary policies

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<sup>45</sup> See *City of Chicago v. Sessions*, 888 F.3d 272, 279-80 (2018) (discussing Attorney General Sessions' imposition of new conditions on JAG Program recipients).

<sup>46</sup> See, e.g., Complaint, *County of Santa Clara*, No. 17-0054 (N.D. Cal., Feb. 3, 2017); Complaint, *City of Chicago v. Sessions*, 264 F. Supp. 3d 933 (N.D. Ill. 2017); Complaint, *City of Philadelphia v. Sessions*, 280 F. Supp. 3d 579 (E.D. Pa. 2017).

<sup>47</sup> *City & Cty. of San Francisco v. Trump*, 897 F.3d 1225 (9th Cir. 2018) (upholding the lower courts' national injunctions against the implementation of Exec. Order No. 13768, 82 Fed. Reg. 8799); *City of Chicago v. Sessions*, 264 F.Supp.3d 933, 951 (N.D. Ill. 2017) (issuing nationwide injunction against anti-sanctuary conditions on the Justice Assistance Grant program); *City of Philadelphia*, 280 F. Supp. 3d 579, 585 E.D. Pa. 2017) (same).

<sup>48</sup> See *City of Chicago*, 264 F. Supp. 3d at 945-46; *City of Philadelphia*, 280 F. Supp. 3d at 585.

<sup>49</sup> See *City & Cty. of San Francisco v. Trump*, 275 F. Supp. 3d 1196, 1214 (N.D. Cal. 2017).

<sup>50</sup> See *City of Chicago*, 264 F. Supp. 3d at 945-46; *City of Philadelphia*, 280 F. Supp. 3d at 585. The courts considered their earlier holding on the constitutionality of Section 1373 following the Supreme Court's decision in *Murphy v. National Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1478 (2018) (holding that for 10<sup>th</sup> Amendment purposes, the distinction between precluding versus affirmatively requiring state action was "empty").

have stalled. Not only have Trump's efforts to defund sanctuary cities largely been enjoined, but the administration's attempt to leverage and expand Section 1373 may have also backfired, with the law itself in constitutional jeopardy.

### B. *The Rise of State Anti-Sanctuary*

But even while federal anti-sanctuary efforts have stalled, a separate but parallel anti-sanctuary campaign is mounting. In the past three years, six states have enacted anti-sanctuary laws,<sup>51</sup> including SB 4 in Texas, which has been the subject of intense litigation and public scrutiny.<sup>52</sup> Meanwhile, similar laws have been introduced in at least nineteen states.<sup>53</sup> To be sure, state anti-sanctuary laws are not new.<sup>54</sup> Moreover, they have long been intertwined with anti-sanctuary efforts at the federal level.<sup>55</sup> But the most recent wave reveal some alarming trends. Their numbers are growing. Their scope is expanding. Their penalties more severe. Taken together, state anti-sanctuary laws today go beyond what has been attempted at the federal level. Indeed, they 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. There has never been a precise definition of what constitutes "sanctuary." Federal law prohibits policies that limit communication between local officials and federal authorities with respect to immigration-related information.<sup>56</sup> The recent trend at the state level, however, has been towards a much more expansive definition. States are

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<sup>51</sup> See Ind. Code § 5-2-18.2 (2017); Iowa Code § 825.1 (2018); Miss. Code Ann. § 25-1-119 (2017); S.B. 145, Gen. Assemb., Reg. Sess. (N.C. 2017); H.B. 2315, 110th Gen. Assemb., Reg. Sess. (Tenn. 2018); Va. Code § 15.2-1409.1 (2018).

<sup>52</sup> See S.B. 4, 85th Leg., Reg. Sess. (Tex. 2017); see also *City of El Cenizo v. Texas*, 890 F.3d 164 (5th Cir. 2018).

<sup>53</sup> See *supra* note 15.

<sup>54</sup> 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 SB 1070, enacted by the Arizona legislature in 2010. See Proposition 187 (Cal. 1994); Ariz. Sess. Laws Ch. 113 (2010). Arizona's SB 1070 also spawned similar anti-sanctuary legislation in other states. See, e.g., S.C. Code Ann. § 6-1-170 (2011); MO. REV. STAT. § 67.307 (2012); COLO. REV. STAT. § 29-29-101 (2012); GA. CODE ANN. § 36-80-23 (2012).

<sup>55</sup> See *infra* note (Part I.C.)

<sup>56</sup> See 8 U.S.C. § 1373.

increasingly turning to “catch-all” provisions to define the types of sanctuary measures that are prohibited. Indiana and Virginia, for example, prohibits cities from limiting or restricting their involvement in immigration enforcement to anything “less than the full extent permitted by federal law.”<sup>57</sup> States are also beginning to target local activities that fall short of formal policies. For example, Texas’ anti-sanctuary law applies to “patterns and practice[s],”<sup>58</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>59</sup> Similarly, Iowa’s law targets “informal, unwritten polic[ies],”<sup>60</sup> and local officials cannot “discourage” any other official from inquiring about immigration status or assisting in immigration enforcement.<sup>61</sup> Finally, a proposed bill in Florida covers “procedures and customs”<sup>62</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>63</sup>

The expanding scope of what is now prohibited by state anti-sanctuary laws is also 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>64</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>65</sup> In addition to this, Texas also requires local officials to notify federal authorities

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<sup>57</sup> Ind. Code § 5-2-18.2 (2017); Va. Code § 15.2-1409.1 (2018).

<sup>58</sup> S.B. 4, 85th Leg., Reg. Sess. (Tex. 2017) (codified in Tex. Gov’t Code 752.053(a)(1)).

<sup>59</sup> S.B. 4, 85th Leg., Reg. Sess. (Tex. 2017) (codified in Tex. Gov’t Code 752.051(a)(2)). 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, 182 (5th Cir. 2018).

<sup>60</sup> Iowa Code § 825.1 (2018).

<sup>61</sup> Iowa code § 825.4 (2018).

<sup>62</sup> H.B. 9, § 2, Gen. Assemb., Reg. Sess. (Fla. 2018).

<sup>63</sup> *See* H.B. 9, § 2, Gen. Assemb., Reg. Sess. (Fla. 2018).

<sup>64</sup> *See, e.g., Galarza v. Szalczyk*, 745 F.3d 634 (3d Cir. 2014)

<sup>65</sup> *See* Iowa Code § 825.1 (2018); Tenn. Code Ann. § 4-59-102(3)(D).

about the release of anyone suspected to be an unauthorized immigrant, and allow federal officials full access to local detention facilities.<sup>66</sup> Alabama's law goes even further to "subcontract" local officials to the federal government by requiring them to "fully comply with and . . . support the enforcement of federal [immigration] law."<sup>67</sup>

Penalties for violating the most recent wave of state anti-sanctuary laws have also 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. Nearly all of the new anti-sanctuary laws being considered or enacted denies state funding to any city or locality that violates their prohibitions or mandates.<sup>68</sup> In addition, states like Texas now authorizes fines, sometimes as high as \$25,000 a day, against cities that fail to comply.<sup>69</sup> States are also seeking to make local communities legally liable for the action of unauthorized immigrants. North Carolina, for example, strips cities that violate its anti-sanctuary statute of all governmental immunity in torts for any crime committed by an undocumented immigrant.<sup>70</sup> The proposed anti-sanctuary bill in Florida goes even further by allowing anyone to sue a sanctuary city for personal injuries or property damage committed by an unauthorized immigrant.<sup>71</sup>

Even more troubling than the various penalties imposed upon local governments and their residents are the escalating sanctions against local officials themselves. Local officials who violate Texas' anti-sanctuary law can be forced out of office, and those that fail to comply with a federal immigration detainer request can be charged with a crime.<sup>72</sup> In Alabama, fines are not levied against the community as a whole, but directly upon the local officials themselves.<sup>73</sup> Indeed, even if an official does not personally violate the anti-sanctuary law, he can still be charged with a crime in Alabama for failing to

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<sup>66</sup> See S.B. 4, 85th Leg., Reg. Sess. (Tex. 2017) (codified in Tex. Gov't Code § 772.0073).

<sup>67</sup> AL Code § 31-13-5(b) (2015).

<sup>68</sup> See, e.g., S.B. 4, 85th Leg., Reg. Sess. (Tex. 2017); Iowa Code § 825.9 (2018); H.B. 2315, 110th Gen. Assemb., Reg. Sess. (Tenn. 2018); S.B. 145, Gen. Assemb., Reg. Sess. (N.C. 2017); VA. CODE § 15.2-1409.1 (2018).

<sup>69</sup> See S.B. 4, 85th Leg., Reg. Sess. (Tex. 2017) (codified in Tex. Gov't Code 752.056).

<sup>70</sup> See S.B. 145, Gen. Assemb., Reg. Sess. (N.C. 2017).

<sup>71</sup> See H.B. 9, Gen. Assemb., Reg. Sess. (Fla. 2018).

<sup>72</sup> See S.B. 4, 85th Leg., Reg. Sess. (Tex. 2017) (codified in Tex. Gov't Code 752.0565 and Tex. Penal Code 39.07).

<sup>73</sup> See ALA Code § 31-13-5(d) (2015).

report a violation committed by someone else.<sup>74</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>75</sup>

In substance and in 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 aggressively and successfully challenging federal anti-sanctuary efforts in court, state anti-sanctuary laws have largely avoided judicial scrutiny. Among the six anti-sanctuary laws that were recently enacted, only one—SB 4 in Texas—has faced serious legal challenge. And while the cities and counties challenging SB 4 prevailed at the district court level, the injunction that was issued was largely overturned by the Fifth Circuit on appeal.<sup>76</sup>

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

Local sanctuary policies are under attack from two fronts: the federal government and the states. But while the two are politically intertwined and directed towards the same goal, their legal fortunes appear to be diverging. It is the federal government that is presumed to possess “plenary power” over immigration and exclusive authority over its enforcement.<sup>77</sup> Yet in the anti-sanctuary context, it is state law that appears to be succeeding where federal efforts have failed.

This outcome is not so peculiar, however, when viewed in light of the type of legal challenges localities can raise against these federal and state anti-

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<sup>74</sup> *See id.*

<sup>75</sup> *See* Iowa Code § 825.10 (2018).

<sup>76</sup> *See* City of El Cenizo v. Texas, 890 F.3d 164 (5th Cir. 2018). The challenging cities prevailed only on First Amendment grounds, with the court upholding the district court's injunction with respect to the law's prohibition against the “endorsement” of policies that materially limits immigration enforcement, but solely with respect to elected officials. *See id.* at 182.

<sup>77</sup> Chae Chan Ping v. United States, 131 U.S. 531 (1889) (upholding federal Chinese Exclusion Act); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 Sup. Ct. Rev. 255 (1984). For an argument that the plenary power doctrine still persists today despite attempts to undermine it, see David S. Rubenstein and Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 Nw. U.L. Rev. 583 (2017).

sanctuary efforts. Up 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. Cities can assume the legal standing of the state in arguing that federal anti-sanctuary laws impinge upon state sovereignty.<sup>78</sup> They can also assume the legal position of the federal government in asserting that state immigration laws are preempted by federal law.<sup>79</sup> But the structure of state anti-sanctuary laws, and their unique interaction with federal law, denies 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 this reason, we argue, that state anti-sanctuary laws are proliferating at precisely the same time that federal anti-sanctuary efforts are stalled.

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>80</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

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<sup>78</sup> See *supra* notes \_\_\_\_ (Part I.B.).

<sup>79</sup> 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 American Citizens v. Wilson*, 997 F. Supp. 1244, 1249 n.2, 1250 (C.D. Cal. 1997). In the federal government’s challenge against Arizona’s SB 1070, local officials provided declarations that the federal government included with its initial complaint, and Arizona cities later filed briefs as amici in support of the federal government’s preemption claim. See Declaration of Roberto Villasenor, *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010) (No. CV 10-1413-PHX-SRB); Declaration of Phoenix Police Chief Jack Harris, *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010) (No. CV 10-1413-PHX-SRB), <http://www.justice.gov/opa/documents/declaration-of-jack-harris.pdf> (arguing that the Arizona law would have a negative effect on police relations with the community); Declaration of Tony Estrada, *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010) (No. CV 10-1413-PHX-SRB); Amicus Curiae Brief of the Arizona Cities of Flagstaff, Tolleson, San Luis, and Somerton in Support of Plaintiff-Appellee, *United States v. Arizona*, 641 F.3d 339 (9th Cir. 2011), 2010 WL 5162523; Amicus Curiae Brief Submitted by the City of Tucson in Support of Plaintiff-Appellee, *United States v. Arizona*, 641 F.3d 339 (9th Cir. 2011), 2010 WL 516252).

<sup>80</sup> See *New York v. United States*, 505 U.S. 144 (1992); *Printz v. United States*, 521 U.S. 898, 900 (1997).

the state.”<sup>81</sup>

It is in large part because of the “anti-commandeering 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 the repeal of local sanctuary policies, but more specifically to compel the active participation of local governments in federal immigration enforcement. And while the anti-commandeering 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 state in contesting federal commandeering.<sup>82</sup> This is why the sole anti-sanctuary provision in federal law, Section 1373 of the INA, prohibits policies that limit federal-local communications, but does not require that such communications takes place.<sup>83</sup> Their ability to raise the anti-commandeering doctrine is also why cities have been so effective in blocking the Trump administration’s efforts to deny federal funding to local jurisdictions who refuse to comply with immigration detainers, provide notice of an immigrant’s release, or allow the federal government access to local facilities to assume his custody.<sup>84</sup> Moreover, the reason lower courts are now beginning to

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<sup>81</sup> See *Hunter v. Pittsburgh*, 207 US 161, 178-79 (1907). It is worth noting, however, that there have been competing formulations of the state-local relationship. See, e.g., Eugene McQuillan, *A Treatise on the Law of Municipal Corporations* § 190, 268 (1<sup>st</sup> ed. 1911) (arguing that the right to local self-government is a “private” right not subject to state supremacy); *People ex rel. Le Roy v. Hurlbut*, 24 Mich. 44, 93 (1871) (Cooley, J., concurring) (arguing that local government is an “absolute right” protected from the powers of the legislatures).

<sup>82</sup> 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, e.g., *Nat’l League of Cities v. Usery*, 426 U.S. 833 (1976) (suit brought by cities), *Garcia v. San Antonio Transit Auth.*, 469 U.S. 528 (1985) (suit brought by local transportation authority); *Printz*, 521 U.S. at 955-57 (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.” (emphasis in original)).

<sup>83</sup> See *City of New York v. United States*, 179 F.3d 29, 35 (2d Cir. 1999) (noting that Section 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”).

<sup>84</sup> Technically, the federal government possessess 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, 205-206, (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 *National Federation of Independent*

hold that Section 1373 is itself unconstitutional—as limited as it is—is because of the recent expansion of the anti-commandeering doctrine by the Supreme Court to cover not only federal mandates that a state or locality affirmatively do something, but also efforts to prohibit them from taking action.<sup>85</sup>

But if cities have been able to resist federal anti-sanctuary efforts on anti-commandeering grounds, state law preemption offers the federal government a legal workaround. The anti-commandeering 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>86</sup> The Constitution, however, accords no such status to cities in their dealings with the state. Indeed, the “state creature” idea that allows cities to become the state when contesting federal law actually cuts against them when the commandeering argument is directed against their own state.<sup>87</sup> After all, if localities are simply administrative subdivisions of the state, as the Supreme Court has at times described them,<sup>88</sup> then their “commandeering” by states may not only be constitutionally permitted, but might actually be 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. This is why threats of state defunding have not met the same fate as federal defunding. 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>89</sup> But localities do not have a federal constitutional right to be free from state commandeering. 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.

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*Business v. Sebelius*, 132 S.Ct. 2566, 2604-05 (2012). It is on this ground that courts have enjoined federal defunding efforts against sanctuary jurisdictions, namely it unconstitutionally compels localities to waive their right to be free from federal commandeering. *See, e.g., City of Philadelphia v. Sessions*, 280 F. Supp. 3d 579, 647-51 (E.D. Pa. 2017).

<sup>85</sup> *See* *Murphy v. NCAA*, 138 S.Ct. 1461, 1479-81 (2018).

<sup>86</sup> *See* *Murphy v. NCAA*, 138 S. Ct. 1461, 1479 (2018).

<sup>87</sup> *See* Richard Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163, 1218 (2018).

<sup>88</sup> *See* *Hunter v. Pittsburgh*, 207 US 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.”).

<sup>89</sup> *See, e.g.,* DAVID BERMAN, LOCAL GOVERNMENT AND THE STATES 92 (2015).

What all this means is that by turning to state law, anti-sanctuary advocates are able to compel local participation in ways that federal law cannot. But it is also because of federal anti-sanctuary efforts—however limited they have been—that state anti-sanctuary laws are not themselves preempted by federal law. Indeed, preemption was precisely what befell Proposition 187, adopted by California voters in 1994, and which included the first anti-sanctuary provision enacted into law.<sup>90</sup> A federal district court enjoined its implementation for infringing upon the federal government’s exclusive authority over immigration regulation and its enforcement.<sup>91</sup> Since Proposition 187, and perhaps in response to its defeat,<sup>92</sup> however, Congress amended federal law to encourage precisely the kind of local participation that states are now seeking to mandate. This included the addition of Sections 287(g) and 1373 in 1996.<sup>93</sup> Federal encouragement is also expressed in a separate provision in Section 1373 that specifically requires the federal government to respond to all inquiries about immigration status that it receives from local law enforcement.<sup>94</sup> These amendments and the increasing federal reliance on local cooperation are why when the Supreme Court was asked to rule on the constitutionality of a controversial immigration enforcement law enacted by Arizona in 2010, it upheld the law’s anti-sanctuary mandate even while it found the rest of the law preempted. 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>95</sup> It is also because of the various encouragements to local involvement in immigration enforcement found in federal law that the Fifth Circuit in *El Cenizo v. Texas* rejected the localities’ federal preemption argument against SB 4.<sup>96</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 strategy that they have employed in the

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<sup>90</sup> See Proposition 187 (Cal. 1994).

<sup>91</sup> See *League of United Latin American Citizens v. Wilson*, 908 F. Supp. 755 (C.D. Cal. 1995).

<sup>92</sup> See Rick Su, *The States of Immigration*, 54 WM. & MARY L. REV. 1339, 1373-78 (2013).

<sup>93</sup> See *supra* notes \_\_\_\_ (Part I.A).

<sup>94</sup> See 8 U.S.C. § 1373.

<sup>95</sup> *Arizona v. United States*, 567 U.S. 387, 412-13 (2012).

<sup>96</sup> See *City of El Cenizo v. State*, 890 F.3d 164, 182 (5th Cir. 2018).

past. If local sanctuary policies can 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 FROM A LOCALIST LENS

The Fifth Circuit's decision in *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 "Home Rule" arguments,<sup>97</sup> based in part on the Texas constitution, also suggests the possibility of a different frame of analysis and a separate line of attack. Thus far, our examination of the rise of state anti-sanctuary laws has largely been limited to how they deny cities and localities the federal constitutional claims on which they have come to rely. But by shifting the legal framework from federalism to localism, the proliferation of these state laws also calls attention to the need to examine in closer detail how they fit within the localism structure that governs the relation between states and their localities. This Part explores what such a localism analysis might look like. In addition, it shines light on the doctrinal insights and legal claims that such an analysis reveals.

Of course, to say that localism matters in the state anti-sanctuary context does not mean that localism arguments will guarantee legal victory for cities. Litigating in federal court, the local plaintiffs in *El Cenizo* had little choice but to frame their "Home Rule argument" through a federal constitutional lens—what the court described as a "hybrid Tenth Amendment and [federal] preemption claim."<sup>98</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, the court also dismissed the argument on substantive grounds. Because Texas law "prohibit[s] a city from acting in a manner inconsistent with the general laws of the state," the court explained, it clearly has the power "'commandeer' its municipalities in this way."<sup>99</sup>

But the indirect means by which "Home Rule" was raised in *El Cenizo*, and the cursory manner in which it was dismissed, also suggests 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? To answer these questions requires a closer look at how the localism relationship between states and their localities are legally defined, how they vary between states, and

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<sup>97</sup> *See id.* at 191.

<sup>98</sup> *See id.*

<sup>99</sup> *Id.* (quoting *Tyra v. City of Houston*, 822 S.W.2d 626, 628 (Tex. 1991)).

the complications and nuances connected with its legal development over time. Moreover, the particular features of state anti-sanctuary laws today might 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.” We must also consider how the state-local relationship is defined as a matter of state law. Here, we show that even as state creatures, the power of states over localities is not absolute. Indeed, like federalism, the development of localism in many states have been towards the expansion of local autonomy and increasing limits on state interference.

One area in which this expansion of local autonomy has taken place is with respect to the power of local governments. And this expansion is evident in the fact that the vast majority of states have moved their localism structure away from “Dillon’s Rule” and towards “Home Rule.”<sup>100</sup> To be sure, both doctrines presume that, as state creatures, cities and localities possesses only those powers that have been specifically delegated to them by the state.<sup>101</sup> Where 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 tend to be limited to a specific list of enumerated powers.<sup>102</sup> Moreover, courts are instructed to interpret the scope of such delegations narrowly, and presume

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<sup>100</sup> See JON C TEAFORD, *THE UNHERALDED TRIUMPH: CITY GOVERNMENT IN AMERICA, 1870-1900*, at 103 - 31 (1984); DALE KRANE, PLATON N RIGOS & MELVIN HILL, *HOME RULE IN AMERICA: A FIFTY-STATE HANDBOOK* 11-12 (2001) (noting that Home Rule had been adopted in some form in all but six states).

<sup>101</sup> 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.

<sup>102</sup> See, e.g., See J. DILLON, *TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS*, § 89 (5th ED. 1872, 1911)

against finding such delegation in close cases.<sup>103</sup> As a result, it reverses the ordinary presumption about the role of preemption and government regulation.<sup>104</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>105</sup> Under Dillon's Rule, however, that baseline presumption for local governments is reversed: they are assumed to have no power to do anything unless an express or implied state delegation of authority can be identified.

In contrast, localities in "Home Rule" states are granted a blanket delegation of power to their localities. This often includes the authority to enact local regulations without the need for further state authorization.<sup>106</sup> Another is the ability for localities to determine their own governmental structure through the adoption of a "Home Rule charter," through which the role and responsibilities of local officials are defined.<sup>107</sup> Of course, such broad delegations of Home Rule authority are not without constraints. In many states, the scope of a localities' Home Rule powers are limited to matters of "municipal" or "local affairs."<sup>108</sup> Furthermore, most states still require local laws to be consistent with state laws, preserving in the state the power to preempt.<sup>109</sup> Nevertheless, the widespread adoption of Home Rule itself reflects the legal trend among states towards expanding the power of local self-governance.<sup>110</sup>

Another area in which the localism relationship has evolved involves the protection of localities from state interference.<sup>111</sup> In the nineteenth century, state

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<sup>103</sup> See *id.*, at § 17

<sup>104</sup> See See GERALD E. FRUG, CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS 51 (2001).

<sup>105</sup> See *id.* at 18-19.

<sup>106</sup> See, e.g., CHESTER JAMES ANTINEAU, LOCAL GOVERNMENT LAW §§ 3.20 - .22 (1997).

<sup>107</sup> See David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2257, 2290 (2003); see also *infra* Part II.B.1.

<sup>108</sup> See FRUG, *supra* note \_\_\_\_, at 17.

<sup>109</sup> See, e.g., FLA. CONST. art. VIII, § 1 ("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).

<sup>110</sup> See Rick Su, *Have Cities Abandoned Home Rule?*, 44 FORDHAM URB. L. J. 181, 190-191 (2017); Barron, *supra* note \_\_\_\_, at 2277-88.

<sup>111</sup> See C. ANTINEAU, 1 MUNICIPAL CORPORATION LAW § 3.00 (1980). As a matter of law, Home Rule is not necessarily inconsistent with Dillon's Rule; if Dillon's Rule presumes that localities only possess those powers that have been delegated by state law, Home Rule serves as one form that such a delegation can be made. But because the Home Rule delegation is so

legislatures frequently meddled in local affairs.<sup>112</sup> In response, many state constitutions were amended to limit their ability to do so. Nearly all states now prohibit the state from enacting “local laws” or “special legislation” that targets or only applies to specific localities.<sup>113</sup> Indeed, in some states, Home Rule does not just empower localities to regulate on local affairs, it also grants such local laws immunity from state preemption.<sup>114</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 prohibits 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>115</sup>

Of course, the powers and protections a particular locality depends 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 sometimes also 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. Iowa and North Carolina have both adopted Home Rule, but in the former Home Rule was amended into the state constitution, while in the latter it exists purely as a statutory enactment subject to legislative exception. 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. 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 only in a few, such as Florida and Tennessee.

Moreover, how localism developments might translate in 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. We

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expansive, it is now common practice to classify states as either a Home Rule or Dillon’s Rule state. *See, e.g.,* KRANE, *supra* note 117. Moreover, within these broad classifications, variations exist with respect to how Home Rule or Dillon’s Rule is structured in any particular state.

<sup>112</sup> *See, e.g.,* Compare Nancy Burns & Gerald Gamm, *Creatures of the State State Politics and Local Government, 1871-1921*, 33 URBAN AFF. REV. 59 (1997); *see also* See Howard Lee McBain, *Home Rule for Cities*, 5 Proc. Acad. Polit. Sci. City N. Y. 263, 263 - 64 (1915).

<sup>113</sup> *See* Barron, *supra* note \_\_\_\_, at 2286-88.

<sup>114</sup> *See, e.g.,* Cal. Const. art. XI, § 5(a); Colo. Const. art. XX, § 6.

<sup>115</sup> *See* JOHN DINAN, STATE CONSTITUTIONAL POLITICS: GOVERNING BY AMENDMENT IN THE AMERICAN STATES 46-47 (2018).

must also recognize that 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.

### B. *The Localist Case against State Anti-Sanctuary*

This section illustrates how localism might be used to contest the rise of state anti-sanctuary legislation. We draw upon the localism structures outlined above, delving even deeper into some of the legal and doctrinal developments that we described. More importantly, we turn a close eye towards the unique legal structure of today's anti-sanctuary legislation, and more specifically the ways in which they differ from other state preemption statutes. Taken together, we suggest a number of legal claims—based on localism and state constitutional grounds—that might be raised against state anti-sanctuary legislation in court. The claims we discuss below is not meant to be exhaustive. Nor do we believe that such claims are possible in all state, or against every type of state anti-sanctuary legislation. Indeed, our goal here is simply to provide some examples of what a localist analysis might reveal. Moreover, we shed 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 Anti-Commandeering

By turning to states, cities and other localities are denied the ability to invoke the federal anti-commandeering doctrine in challenging state anti-sanctuary legislation. But something akin to a “state anti-commandeering” claim, we believe, might be raised in Home Rule states. Such a claim would not be based, of course, on the federal constitution.<sup>116</sup> Nevertheless, state constitutional provisions, especially those connected with the adoption of Home Rule, might serve as the basis for such an argument.

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<sup>116</sup> Though there have been some efforts to develop a state anti-commandeering doctrine based on the federal constitution. See Richard Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163, \_\_\_ (2018). Cf David J. Barron, *Promise of Cooley's City: Traes of Local Constitutionalism*, 147 U. PA. L. REV. 487 (1999) (arguing that despite not being mentioned in the federal constitution, localities have federal constitutional standing against their own states).

To our knowledge, no state court has explicitly adopted a state anti-commandeering 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>117</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 forcible state takeovers of municipal departments—such as fire and place—which were common in the nineteenth century.<sup>118</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 responsibility of its officials.<sup>119</sup> In this regard, the motivations behind Home Rule echo the same concerns behind the federal anti-commandeering doctrine: to preserve and protect the independence and structural integrity 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>120</sup> As a result, Missouri courts have struck down state laws requiring a city to create an arbitration board,<sup>121</sup> or mandating that local officials serve on a board of examiners created by the state.<sup>122</sup> In Ohio, courts have held that under its Home Rule amendment, the “internal government of a municipality, such as ...the powers, duties, and functions of municipal officers, are matters of local

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<sup>117</sup> 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 “directly . . .compel the states to require or prohibit those acts,” which it cannot).

<sup>118</sup> See, e.g., HOWARD LEE MCBAIN, *THE LAW AND THE PRACTICE OF MUNICIPAL HOME RULE* 35-39, 498 (1916).

<sup>119</sup> See supra \_\_\_\_.

<sup>120</sup> Mo. Const. Art. VI, § 22.

<sup>121</sup> See *State ex rel. Burke v. Cervantes*, 423 S.W.2d 791 (1968).

<sup>122</sup> See *State ex rel. Sprague v. City of St. Joseph*, 549 S.W.2d 873 (Mo. 1977).

government, which may not be influenced or controlled by [state] laws.”<sup>123</sup> Thus, the state cannot regulate how a city selects its police chief,<sup>124</sup> or otherwise control “the organization and regulation of its police force.”<sup>125</sup> Other states similarly protect the independence of localities in managing their personnel and how local officials are removed.<sup>126</sup> To be sure, not all Home Rule states have ruled against commandeering in this manner; in most states there are no decisions either way, in others courts have explicitly upheld the state’s ability to dictate the duties and responsibilities of local officials.<sup>127</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 anti-commandeering doctrine, perhaps state anti-sanctuary laws are similarly constrained as well. After all, even more so than federal anti-sanctuary efforts, the goal of state anti-sanctuary laws is not merely the repeal of 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. Anti-sanctuary penalties threaten local

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<sup>123</sup> State ex rel. Strain v. Huston, 65 Ohio App. 139, 142 (1940); *see also id.* (holding that the power to create local offices, and 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” are matters of local self-government immune from state control).

<sup>124</sup> State ex rel. Lynch v. City of Cleveland, 164 Ohio St. 437, 440 (1956) (holding that a city is not subject to state law in how it selects its police chief).

<sup>125</sup> Harsney v. Allen, Jr., 160 Ohio St. 36, 41 (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”).

<sup>126</sup> *See, e.g.,* Devlin v. City of Philadelphia, 580 Pa. 564 (2004) (holding that the granting domestic partnership benefits to employees in same-sex relationships is within locality’s power over personnel and administration, and not subject to the state’s power to regulate marriage or civil rights); State ex rel. City of St. Paul v. Oehler, 218 Minn. 290 (1944); Goodwin v. Oklahoma City, 1947 Ok. 200 (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.”); State ex rel. City of St. Paul v. Oehler, 218 Minn. 290 (1944); Goodwin v. Oklahoma City, 1947 Ok. 200 (1947) (same).

<sup>127</sup> *See* State v. Robinson, 101 Minn. 277, 283 (1907); State v. Linn, 49 Okla. 526 (1915). 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 supra* note \_\_\_\_.

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. The state 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 makes them, in effect, auxiliaries 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 § 1373 of the INA was written to avoid federal anti-commandeering concerns, many state anti-sanctuary laws also impose no affirmative requirements and simply forbid the enactment of local sanctuary policies.<sup>128</sup> But styling the anti-sanctuary law as a probation 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 than to permit or encourage such cooperation. Further, the escalating punitive measures strongly incentivize, if not directly compel, local officials to interpret such prohibition as affirmative mandates lest they risk losing state funding or personal sanctions. As noted earlier, federal courts are now reaching a similar conclusion in their analysis of 8 U.S.C. § 1373, which mirrors state anti-sanctuary in simply prohibiting local policies that limit local participation in immigration enforcement. As these courts are concluding, though literally written as a prohibition, § 1373 operates like a mandate in effect.<sup>129</sup> Given these developments, it may be that a state court may see anti-sanctuary prohibitions in the same way.

But even under a narrow view that anti-sanctuary prohibitions are just

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<sup>128</sup> See, e.g., e.g., H.B. 2315, 110<sup>th</sup> Gen. Assemb., Reg. Sess. (Tenn. 2018), MO. REV. STAT. § 67.307 (2012); see also H.B. 179, 132<sup>d</sup> Gen. Assemb., Reg. Sess. (Ohio 2017) (proposed bill). Interestingly, all three of these are also Home Rule states.

<sup>129</sup> See *Chicago v. Sessions*, 264 F.Supp.3d 933, 949 (2017) (noting that 1373 “imposes no affirmative obligation on local governments” by “effectively thwart policymakers' ability to extricate their state or municipality from involvement in a federal program”); see also *Philadelphia v. Sessions*, 280 F.Supp.3d 579, 651 (2017).

that—simply prohibition and not commandeering—it 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. But in doing so, state anti-sanctuary laws severely constrain the ability of local governments to oversee their workforce, control the use of municipal resources, and manage their internal administration. These laws effectively local officers from the local governments that employ them. Thus, even if the state does not specifically mandate their duties, anti-sanctuary prohibitions nevertheless interfere with the ability of local governments and residents to do so. 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 a local law enforcement employee 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” on cooperation with federal authorities.

In short, what the above shows is that, contrary to what the Fifth Circuit concluded in *City of El Cenizo*, the power to preempt is not necessarily synonymous with the power to commandeer.<sup>130</sup> And despite the different ways that states have drafted their anti-sanctuary measures—as mandates or prohibitions—it can be argued that commandeering concerns are raised. Of course, whether “state anti-commandeering” can be raised as a Home Rule claim is far from settled. We suspect that in states like Missouri and Ohio,<sup>131</sup> where the court’s interpretation of Home Rule echoes the federal anti-commandeering doctrine, a stronger case against anti-sanctuary might be made. Yet in states like Texas, where Home Rule is unevenly allocated,<sup>132</sup> and there has been no decision protecting the local government structure of Home Rule cities from state preemption, the prospects of such a case is less clear. As a result, the equivalence that the Fifth Circuit drew in *El Cenizo* between state preemption and state commandeering in the anti-sanctuary context may turn out to be the governing rule. 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

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<sup>130</sup> See *City of El Cenizo*, 890 F.3d at 176.

<sup>131</sup> See MO. REV. STAT. § 67.307 (2012);

<sup>132</sup> Recall that Texas accords Home Rule to cities, but not counties.

State anti-sanctuary laws do not just commandeer local officials. They also impose costs in a way that undermines fiscal accountability. Local governments have long complained about “unfunded mandates” where the state expands local responsibilities but does not provide the resources to carry it out, or authorize a new revenue source to fund it. For local officials, the concerns is the need to raise taxes or redirecting 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 its own policies, thus encouraging them to adopt “inefficient” laws that it would not otherwise.<sup>133</sup>

Again, fiscal accountability has some connections with the federal anti-commandeering doctrine. As the Supreme Court explained, if federal commandeering was 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 taxes.”<sup>134</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. 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>135</sup> Subsequent amendments have gone even further, including New Hampshire’s, which bars the state from mandating additional program or responsibilities “unless such programs or responsibilities are fully funded by the state,”<sup>136</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>137</sup>

Both the state and federal government tend to talk about anti-sanctuary laws as a law enforcement measure. But at the local level, it is widely seen as an “unfunded mandate” requiring local officials to carry out a federal responsibility. The kinds of activities that state anti-sanctuary laws are now mandating is expensive. Localities incur direct costs when they comply with federal detainer

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<sup>133</sup> See, e.g., Ernest A. Young, *The Rehnquist Court’s Two Federalisms*, 83 TEX. L. REV. 1, 35-38 (2004).

<sup>134</sup> *Printz v. United States*, 521 U.S. 898, 930 (1997).

<sup>135</sup> Tenn. Const. Art. II, § 24.

<sup>136</sup> N.H. Const., Part I, Art. 28-a.

<sup>137</sup> FLA. CONST. Art. VIII, § 18.

requests that are uncompensated by either the federal government making the request or by the state mandating compliance with the federal request.<sup>138</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.

In enacting anti-sanctuary legislation, states routinely tout the importance of local participation to the interest and welfare of the state.<sup>139</sup> But none of the anti-sanctuary laws provide state funds to cover their open-ended mandates. SB 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>140</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 are employing to write around their constraints. Florida's proposed law, for example, authorizes localities to seek reimbursement from the federal government and the detainees themselves.<sup>141</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 constitution requires.<sup>142</sup> Tennessee perhaps seeks to avoid the unfunded mandate problem altogether by prohibiting

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<sup>138</sup> Peter L. Markowitz, et. al., *Fiscal Impact of Civil Immigration Detainers on New York City*, (Oct. 2014) (documenting that New York City spends \$ 13.3 million subsidizing ICE's civil enforcement when it detains individuals at ICE's request) (memorandum on file with authors); *see also, e.g.*, The County of Santa Clara, *Civil Immigration Detainer Requests – Board Policy 3.54* (adopted Oct. 18, 2011) (requiring federal reimbursement of all costs before County complies with ICE detainer requests); The County of Santa Clara, *Minutes of Board of Supervisors Meeting*, Oct. 8, 2011 (Vice President of the Board noting that detainers are unlikely to be honored if dependent on federal reimbursement).

<sup>139</sup> *See, e.g.*, Tenn. Code Ann. § 4-59-101 ("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").

<sup>140</sup> *See* Tex. Gov't Code § 402.0241.

<sup>141</sup> *See* H.B. 9, Gen. Assemb., Reg. Sess. (Fla. 2018).

<sup>142</sup> FLA. CONST. art. VIII, § 18.

sanctuary policies but does not impose any specific mandates to participate in federal immigration enforcement.<sup>143</sup> But given our discussion about how sanctuary prohibitions like the one in Tennessee operate as implicit mandates in practice, a court might be convinced to reject such an effort to circumvent the state's unfunded mandate provision.

Yet even in states without an explicit ban on unfunded mandates, accountability concerns and localism considerations 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 more than a conscription of local officials, but also as 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 in other jurisdictions.”<sup>144</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, how local representatives serve, and how local agendas are set. In turn, this 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 they target political speech, especially those that expresses a dissenting views from that of the state legislature or executive authority.<sup>145</sup> SB 4 in Texas prohibits local officials from “endorsing” a policy

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<sup>143</sup> 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.”).

<sup>144</sup> *Johnson v. Bradley* 4 Cal. 4th 389, 407 (1992).

<sup>145</sup> The state attorney general is often tasked with prosecuting violations of state anti-sanctuary laws. See, e.g., S.B. 4, 85<sup>th</sup> Leg., Reg. Sess. (Tex. 2017) (codified in Tex. Gov’t Code 752.055).

that “prohibits or materially limits the enforcement of immigration laws,” irrespective of whether such a policy is adopted or enforced.<sup>146</sup> In Iowa, local officials are now prohibited from undertaking “any activity that discourages the enforcement of immigration.”<sup>147</sup> Florida is also seeking to prevent local officials from voting for a local sanctuary policy or voting against its repeal—even if such a vote is purely expressive in nature and does not actually lead to the implementation of a sanctuary policy. Understandably, the states are trying to foreclose any effort by localities to circumvent their anti-sanctuary legislation.<sup>148</sup> But in doing so, these laws 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 the personal interests of local officials, 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 his constituents, but because he fears his 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 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

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<sup>146</sup> See S.B. 4, 85th Leg., Reg. Sess. (Tex. 2017) (codified in Tex. Gov’t Code 752.051(a)(2)); see also *City of El Cenizo v. Texas*, 264 F. Supp. 3d 744, 781 (W.D. Tex. 2017) (“As the author of SB 4 noted, a “wink, wink” or a nod could be construed as an endorsement. Or simply standing in support of a group such as MALDEF or LULAC when that group is making a public statement against SB 4 or in support of the type of local policies that it bans.”). The State has argued that the “endorse” language should be interpreted narrowly and that the state has no intent of using it against officials that simply advocate or speak out on behalf of sanctuary policies. See *City of El Cenizo v. Texas*, 890 F. 3d 164, 182 (5th Cir. 2018). But whether the state intends 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.”

<sup>147</sup> Iowa Code § 825.4 (2018).

<sup>148</sup> H.B. 9, Gen. Assemb., Reg. Sess. (Fla. 2018).

context, like an inclusive zoning policy that makes available affordable housing 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 law like SB 4. It is whether local policymakers—irrespective 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 SB 4, at least with respect to elected officials.<sup>149</sup> Nevertheless, it is telling that the reason why elected officials are protected is not because of any immunity they might enjoy as democratic representatives, but rather because of their First Amendment right to free speech in their private capacity as individuals.<sup>150</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>151</sup> the effect of Texas’ 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 and 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 unprecedented and unconstitutional extension of the state’s traditional powers of preemption.<sup>152</sup> They argued that the personal sanctions provision violates the legislative immunity of local

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<sup>149</sup> *El Cenizo*, 890 F. 3d at 184-85.

<sup>150</sup> *See id.*

<sup>151</sup> Indeed, this is why the court refused to extend the “endorsement” injunction to non-elected officials. In the court’s eyes, their speech is governed by the government speech doctrine, which in this case means that the state can compel these local officials to speak in a particular way because they are simply mouthpieces of the state. *See id.* at 185. The Fifth Circuit did not make the same distinction that the district court did in arguing that the local officials targeted by SB 4 are not state employees, but elected local officials. *See El Cenizo*, 264 F. Supp. 3d at 790.

<sup>152</sup> 2015 WL 13612020 (Fla.Cir.Ct. 2015) (Final Summary Judgment), affirmed 212 So.3d 452 (Fla. 1st DCA 2017).

representatives, and that such immunity is an “inherent component of the constitutional guarantee of local representative democracy” contained in the Florida constitution.<sup>153</sup> The court ultimately held for the city on other grounds, and thus chose not to address its local democracy claim.<sup>154</sup> But the city’s argument in *Florida Carry* suggests that there are more at stake when it comes to personal sanctions against legislative activities than the free speech rights of local officials in their private capacity.

*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. As “creatures” of the state, it is commonly assumed that localities remain uniquely vulnerable to state preemption despite the many ways in which local autonomy has expanded. At the same time, because immigration is widely believed to be a national issue, it is difficult for many to see how local sanctuary policies might be considered a “local affair,” and thus within the sphere of authority that local power is presumed to be strongest in relation to the state. We address these and other concerns here. Moreover, we do so by highlighting the unique structure of state anti-sanctuary laws, and why it differs not only from other state preemption statutes, but also traditional immigration regulations more generally.

First, we do not believe that preemption is necessarily 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

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<sup>153</sup> Brief of Amicus Curiae, The Florida League of Cities, in Support of Appellees/Cross-Appellants, *Florida Carry v. City of Tallahassee*, 212 So.3d 452, at 4, *available at* <http://defendlocal.com/wp-content/uploads/2017/03/LeagueOfCitiesAmicus.pdf>; *see also* Brief of the Law Center to Prevent Gun Violence, et al., as amicus curiae in Support of Cross-Appellants, *id.*, *available at* <http://lawcenter.giffords.org/wp-content/uploads/2016/08/2016-05-16-Florida-Carry-v.-City-of-Tallahassee-Law-Center-Amicus-Brief.pdf>; Defendants’ Answer and Counterclaim for Declaratory Relief, *id.*, 2014 WL 12740968, at \*6.

<sup>154</sup> *See* 2015 WL 13612020, at \*6.

repealing local legislation on economic rights (minimum wage and paid family leave), civil rights (anti-discrimination for members of LGBTQ community), and environmental policies (Fracking and plastic bags).<sup>155</sup> But while state anti-sanctuary laws tend to be discussed today as part of this broader state preemption wave,<sup>156</sup> it deviates from those in that it seeks to compel specific local governmental action, rather than simply displacing local regulations of its resident 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>157</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 states courts have directly addressed this issue as a matter of local-state relations, and largely because there are 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>158</sup> such a construction does nothing to resolve the localism issue of whether sanctuary or anti-sanctuary is a matter of state or local concern. Sure, local sanctuary policies may now be a central issue in the national debate over immigration. Moreover, a court might reason that because the state higher up on the federal hierarchy than localities, that immigration is much more of a statewide issue than a local affair.<sup>159</sup> But

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<sup>155</sup> See, e.g., Briffault, *New Preemption*, *supra* note 20, at 2005.

<sup>156</sup> See *id.*

<sup>157</sup> See, e.g., *Murphy v. NCAA*, 138 S.Ct. 1461, 1476-77 (2018); see also *supra* \_\_\_\_.

<sup>158</sup> See, e.g., *Chae Chan Ping*, 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, in their relation to foreign countries and their subjects or citizens 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 throughout its entire territory.”).

<sup>159</sup> 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 issue of whether a Home Rule city could (1) require contractors on a public works project pay the prevailing wage, and (2) allow that contractor to hire noncitizens, both of which were prohibited by state law. *City of Pasadena v. Charleville*, 10 P.2d 745 (Cal. 1932). The

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 federal responsibility over immigration enforcement. In addition, sanctuary policies are often enacted in response to uniquely local concerns: trust between police and residents, the efficient allocation of scarce municipal resources, the need to clearly define the role and responsibilities of local officials.<sup>160</sup> Again, a state court may perhaps find some distinctive state interest that outbalances 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 we suggested above—tend to be untested and undeveloped should, in our view, be reasons for considering rather than dismissing them. We understand why localities have historically turned to federal constitutional claims: They have a proven track record on immigration matters, and federal courts have largely been receptive to their use to oppose federal anti-sanctuary. But given the extent to which state anti-sanctuary laws have shifted the legal terrain on which the battles over local sanctuary policies are fought, there is arguably no better time to begin cultivating localism claims as an alternative. If state anti-sanctuary laws are truly unprecedented, as we have argued, then it might be precisely the type of case for expanding or developing localism arguments that have not yet fully been explored. Moreover, just as cities draw upon legal victories by other cities in bolstering their own litigation efforts against federal anti-sanctuary, a successful localism claim in one state might have support legal challenges

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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 “all public works and all public property in the state in a broad sense belongs 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. 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.

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elsewhere. Despite the differences in localism structure from state to state, there are also many commonalities around which an inter-local litigation strategy can be built. Moreover, given the fact that localities today are facing state preemption on a host of policy matters in addition to anti-sanctuary, there might not be a better time to focus on localism claims as a way of protecting local policymaking more generally.

All of this suggest the need to take localism seriously in confronting state anti-sanctuary laws. Indeed, we believe localism might be even more important here given that localities cannot easily turn to the federal government for relief. The fact is 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>161</sup> it is unclear that such a law can insulate localities from state laws mandating their involvement. When it comes to immigration, federal law ordinarily preempts state laws. But because sanctuary and anti-sanctuary concern not how immigrants or immigration is regulated, but rather the role and responsibilities of local governments and officials, federalism constraints are also implicated. And given that, as noted earlier, localities are presumed to draw all their power and authority from the state, it is doubtful that the federal government can directly grant localities discretion, or otherwise interfere with how states regulate that discretion, without running afoul of the federal anti-commandeering doctrine or state sovereignty principles more generally.<sup>162</sup> What this means is that unless the federal government is willing to

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<sup>161</sup> In the litigation against SB 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 El Cenizo*, 890 F.3d at 180. Ironically, it is also what supporters of 287(g) agreements might have argued against the provision of California's SB 54 (the "state sanctuary law") that prohibits localities from entering into 287(g) agreements. *See* Cal. Gov. Code § 7284.6(F)-(G).

<sup>162</sup> The Supreme Court touched on some of these concern in *Nixon v. Missouri Municipal 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. 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 because "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

deny all state and local involvement in federal immigration enforcement, which we believe unlikely, 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, localities must turn to their own legal standing and the localism structure of their state.

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

A turn towards localism in immigration enforcement law requires thinking through more than whether and how a localist strategy might prove successful in litigation. Even if a move towards 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. Here, in Part III, we argue that it is and guardedly advance the normative case for immigration localism, at least as it pertains to participation in the federal enforcement regime.

Part III.A below argues that a localist reorientation on immigration enforcement is 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.

Yet, as we acknowledge in Part III.B, localism is perilous as well. As Nestor Davidson has argued in a recent Essay, although localism might serve many progressive ends, it can also be used as tool of exclusion, with local resources marshaled towards reinforcing social and economic inequalities.<sup>163</sup> This is of course evident with respect to how immigrants fare in local communities more generally,<sup>164</sup> and it might also be the case for immigration enforcement as well.

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create uniformity by empowering localities directly. *But see* Lawrence County v. Lead-Deadwood School District, 469 U.S. 256 (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 anti-commandeering concerns).

<sup>163</sup> See Davidson, *supra* note 37, at \_\_\_\_.

<sup>164</sup> See Rick Su, *Local Fragmentation as Immigration Regulation*, 47 HOUS. L. REV. 367 (2010); PRATHEEPAN GULASEKARAM & RAMAKRISHNAN, *THE NEW IMMIGRATION FEDERALISM* (2015) (showing that smaller size cities are more likely to propose or pass restrictionist immigration laws than more populous cities).

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 possibilities; we argue, however, that localism, on the balance, will better serve immigrant interest in the long run.

#### *A. The Promise of Immigration Localism*

As we explain below, localism advances at least two normative points. First, focusing on the city qua city produces a better descriptive account of how the current immigration enforcement regime currently 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 and then actually 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 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 towards 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 regulations have become increasingly local.<sup>165</sup> Enforcement activities once

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<sup>165</sup> 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).

largely limited to the borders are now pervasive in the country's interior.<sup>166</sup> Regulations once centered on criteria for admission and removal are increasingly intertwined with traditional spheres of state and local control—from employment<sup>167</sup> and housing,<sup>168</sup> to social services,<sup>169</sup> to policing, and prosecutorial decisions by local district attorneys.<sup>170</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 only because the federal government has steadily expanded the scope of "immigration" regulation into areas of local concern. Indeed, the fight over sanctuary has taken center stage in American politics 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>171</sup> The Secure Communities Program leverages noncitizens' interactions with local police officers;<sup>172</sup> detainer notices and hold requests are sent directly from federal officials to local sheriff's departments;<sup>173</sup> jail access policies for ICE are

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<sup>166</sup> As just one example, consider the expansion of "expedited removal" under 8 U.S.C. § 1225(b). Once limited to just arriving aliens 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 100-miles of both land and maritime borders, and now to possibly anywhere in the country. See Department of Homeland Security, Bureau of Customs and Border Protection, *Designating Aliens For Expedited Removal*, 69 FR 48877-01, 2004 WL 1776983, Aug. 11, 2004.

<sup>167</sup> See 8 C.F.R. § 274a.12 (setting forth classes of non-citizens that are eligible for employment in the United States).

<sup>168</sup> See generally 42 U.S.C. § 1436a(a)(1) (providing housing assistance to non-citizens who are legal permanent residents).

<sup>169</sup> See 8 U.S.C. § 1641(b) (defining who constitutes as a "qualified alien" for purposes of eligibility for certain federal, state and local public benefits).

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<sup>171</sup> See Ingrid V. Eagly, *Local Immigration Prosecution: A Study of Arizona Before SB 1070*, 58 UCLA L. Rev. 1749, 1787-88 (2011) (discussing federal-local immigration relationship).

<sup>172</sup> See U.S. Immigration & Customs Enft, *Secure Communities: A Comprehensive Plan to Identify and Remove Criminal Aliens* 1 (2009), available at [https://www.ice.gov/doclib/foia/secure\\_communities/securecommunitiesstrategicplan09.pdf](https://www.ice.gov/doclib/foia/secure_communities/securecommunitiesstrategicplan09.pdf) (explaining expanded federal-local relationship in enforcing immigration law).

<sup>173</sup> See Lasch, *supra* note \_\_\_\_ at 1733-34 (discussing detainer requests that the federal government sends to local officials).

negotiated directly with city and county level officials;<sup>174</sup> 287(g) agreements are mostly signed between municipal entities and the federal government.<sup>175</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>176</sup> The federal government and a growing number of states now criticize sanctuary localities for obstructing federal immigration enforcement.<sup>177</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 sanctuary state and local policies must be voided rests on a background expectation of local participation in immigration enforcement.<sup>178</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 we 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>179</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>180</sup> As we have argued here, the current debate over state anti-sanctuary laws focuses on similar attributes of sovereignty, with the

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<sup>175</sup> 8 U.S.C. § 1357(g) (explaining 287(g) agreements entered into between the federal and municipal governments).

<sup>176</sup> See Jessica Bulman-Pozen & Heather Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009) (discussing the "power of the servant" to influence federal policy).

<sup>177</sup> See Part I, *supra* (discussing federal and state governments' criticism of sanctuary cities' resistance to federal immigration enforcement).

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<sup>179</sup> See David Rubenstein and Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 Nw. U. L. Rev. 583, 594-99 (2017)

<sup>180</sup> See *Hawaii v. Trump*, 138 S. Ct. 1609 (2018); *Knauff v. Shaughnessy*, 338 U.S. 537 (1950); *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

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 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 towards recalibrating that centralized authority. In prior work, two of us have noted that the proliferation of non-governmental 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>181</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>182</sup> Even if uniformity in immigration enforcement is prized, however, it is worth asking whether it can be achieved once thousands of localities and 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 semi-autonomous 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 on immigration enforcement then, creates space for recognition of, and emphasis on, the intricate relationships between the federal enforcement scheme and local officers and institutions, and allows judicial consideration of why those 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-

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<sup>181</sup> Gulasekaram & Villazor *supra*, note 25, at \_\_\_; Pratheepan Gulasekaram and Rose Cuisson Villazor, *The Case for Non-Governmental Sanctuary*, L.A. TIMES, April 4, 2018.

<sup>182</sup> 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).

sanctuary states have the legal authority to displace local discretion, translating that authority into practice remains difficult. Anti-sanctuary laws can only go 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 or 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 inter-governmental relations often observe, negotiations and partnerships are often more effective in recruiting meaningful assistance than censure and sanctions.<sup>183</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 generally, sanctuary city policies have not withheld all local assistance. They often allow for local immigration enforcement in circumstances where local interests converge with that 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>184</sup> But their sanctuary policy exempts many individual cases, such as when an individual has an outstanding criminal warrant, has been charged or convicted of a felony, or has been identified as a gang member.<sup>185</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. What these examples reveal is that room for negotiation and finding common interest exists. Tilting our legal and theoretical gaze towards 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.

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<sup>183</sup> 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 (2014); Karen Tokarz & Leila Nadya Sadat, *Introduction*, 45 WASH. U. J.L. & POL'Y 1, 9 (2014).

<sup>184</sup> See *supra* Part I.A.

<sup>185</sup> City of Chicago, Mun. Code §§ 2-173-005 – 070.

## 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 might support certain types of decisions (i.e., 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 decision-making 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 is, effectively, the opportunity 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 its residents.<sup>186</sup> To the extent that any of these community well-being minded claims are in fact genuine,<sup>187</sup> it raises the question of who is in the best position to make that decision—the communities themselves or the state and federal government. It is after all, local coffers that will likely have to bear the personnel and facilities cost of choosing to aid in enforcement. And if, in fact, sanctuary policies led to increased crime and public safety threats, we might presume that local constituencies would be inclined to reject them or at least temper their non-cooperation stances.

To the extent national decision-making on immigration focuses on different concerns than local policymaking, only localism provides a conceptual and political space for those local consideration. National debates, by necessity, rely on aggregate statistics or generalized anecdotes to present competing narratives about the effect of immigration on the country. These broad narratives form

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<sup>186</sup> See, e.g., Marie Solis, *Trump Says Sanctuary Cities are 'Crime-Infested'-Research Suggests He's Wrong*, NEWSWEEK, April 18, 2018.

<sup>187</sup> See TOM K. WONG, THE EFFECTS OF SANCTUARY POLICIES ON CRIME AND THE ECONOMY, CENTER FOR AMERICAN PROGRESS 15, Jan. 26, 2017 (contradicting the Trump Administration's repeated claim that sanctuary city policies lead to crime and violence).

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 form the basis for decision-making.<sup>188</sup> And this applies to the consequences of immigration enforcement as well. Federal agencies fixate on removal numbers and net migration. Their effect on other aspects of community life are rarely factored into the equation.

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. Instead, they are more likely to be known as neighbors, colleagues, schoolmates, friends. Human interactions at the community level, of course, does not necessarily generate good impressions. Local controversy over immigration is as much spurred by “unneighborly” conduct—overcrowded houses, unkept lawns, loud music—as they are concerned about the security of our national borders. But it is also through these personal interactions that the divide between immigrant and native, old-timers and newcomers are bridged.

We may celebrate the cosmopolitan culture in American cities for their 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—interacted with 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,” but Carlos,<sup>189</sup> or Armando,<sup>190</sup> or Marcos—<sup>191</sup> residents and members of *their* community. If national politics is about what happens to those

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<sup>188</sup> See GULASEKARAM & RAMAKRISHNAN, *supra* note 203, 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).

<sup>189</sup> See Monica Davey, *He's a Local Pillar in a Trump Town. Now He Could be Deported*, N.Y. TIMES, A1, Feb. 27, 2017.

<sup>190</sup> See Marwa Eltagouri, *Conservative Indiana Town Rallies Around Immigrant Facing Deportation*, CHI. TRIB., May 17, 2017.

<sup>191</sup> 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.

people “out there,” local politics opens the opportunity to consider how those policies affect those who are “here.”

The inevitability of interaction at the local level makes them potential sites of immigrant integration.<sup>192</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, non-citizens 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 while the Chinese litigated effectively against the laws targeting them, their inability to naturalize foreclosed them from exercising political power. In the same vein, the partisan backlash against immigrants today also appear to be fueled less by the actual numbers of immigrants arriving here from Latin America, which has been falling in recent years, than perceived threat to an established racial and political order.<sup>193</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 integrative cities.

Perhaps most importantly, regardless whether local politics is based on uniquely local or personal considerations, it almost certain to be more accessible than either state or federal decision-making. In addition to providing a vehicle for immigrant integration and mobilization, local institutions’ 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 – of local constituencies entering 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 has become inextricably local, local preferences then, inexorably calibrate national policymaking.

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<sup>192</sup> See Rodriguez, *supra* note 19, at 207.

<sup>193</sup> See GULASEKARAM & RAMAKRISHNAN, *supra* note 203, at 92-118 (using qualitative empirical evidence to show that restrictionist local policies are fueled in part by white ethnic nationalism)

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. And not just because local power is 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 track political ideologies or partisan preferences. Thus, any structural power allocation or a strong focus on localism risks inviting dozens of enforcement-minded jurisdictions who share the political and ideological preferences of a restrictionist federal government, exercising their local discretion to recreate and amplify the federal government's enforcement regime

Indeed, the entrepreneurial and political forces that have successfully produced and proliferated state anti-sanctuary laws<sup>194</sup> can and are being directed

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<sup>194</sup> Texas SB 4, for example, is similar to proposals in Iowa, Georgia, Florida, and other

to the local level. As Professor Richard Schragger points out, local policy fights have increasingly been waged by national policy groups.<sup>195</sup> And, as media reports suggest, policy entrepreneurs have already found opportunities for pushing their vision at the local level.<sup>196</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.

The use of local policies to aid, rather than oppose, federal enforcement efforts is not new. Between 2005-2012, several states and localities passed varied anti-immigrant laws that created new penalties based on immigration status.<sup>197</sup> It was with these restrictionist examples in mind that immigration scholars 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>198</sup> In comparison, however, the current anti-sanctuary localism arguably seeks a more modest end, or at least one more within the

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places with h Republican-led state governments. Moreover, this copycat legislation in several red states is not mere happenstance; rather it is strategized proliferation. State lawmakers in Colorado actually initiated the recent state anti-sanctuary trend. In early 2017, Colorado state representative David Williams (R), introduced The Colorado Politician Accountability Act HB 17-1134, which would have created criminal and civil liability for local officials who implemented sanctuary type policies. Even as his proposal failed, state lawmakers in Ohio, Maine and Alaska all introduced bills that were based on Williams’ effort.

<sup>195</sup> See Schragger, *supra* note 131, at 460.

<sup>196</sup> *Id.* See also Cindy Carcamo, *Push to defy ‘sanctuary’ spreading across O.C.*, L.A. TIMES, Mar. 27, 2018 (reporting that the Federation of Americans for Immigration Reform (FAIR) had been “searching” who were interested in filing briefs against California’s state sanctuary law, SB 54); Jasmine Ulloa, *Cities’ Opposition to Law Show Signs of Being Orchestrated, Not Organic, Some Say*, L.A. TIMES, May 3, 2018.

<sup>197</sup>In the prior era of state and local restrictionism, from 2005-2012, several cities, including Hazelton, Pennsylvania, Fremont, Nebraska, Spring Valley, 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.

<sup>198</sup> 567 U.S. 387 (2012).

traditional boundaries of local control, cleverly crafted in ways expressly contemplated and permitted by federal statute. 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>199</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 what we have argued about the local concerns with immigration enforcement and the need for civic participation and debate on those issues, a strong case can be made for lodging some measure of discretion at the local level instead of elsewhere, despite the possibility of restrictionist outcomes.

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; but 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. 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 a majority Latino city, and the community dynamics have also evolved to become more tolerant and welcoming.<sup>200</sup> A similar dynamic unfolded in Farmer's Branch, where the Latino

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<sup>199</sup> See Davidson, *supra* note 37, at \_\_\_\_ (describing this view as “ecumenical” localism).

<sup>200</sup> See Michael Matza, *10 Years after immigration dispute, Hazleton is a different place*, *The Inquirer*,

population is now 45%, and their 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>201</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>202</sup>

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, anti-discrimination and anti-subordination 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 non-citizens.<sup>203</sup> Even though courts sometimes employ a higher standard of review—strict scrutiny—when examining claims of state or local government discrimination against some non-citizens,<sup>204</sup> state and local discrimination against undocumented immigrants does not receive that highest level of scrutiny.<sup>205</sup> Moreover, litigants would face an uphill battle trying to convince a court that local enforcement laws discriminate on racial, ethnic, or national

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April 4, 2016, available at [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)

<sup>201</sup> See Elvia Limon, *Farmers Branch still trying to move forward from shadow of controversial rental ordinance*, DALLAS MORNING NEWS, Aug. 2016, available at <https://www.dallasnews.com/news/farmers-branch/2016/08/26/farmers-branch-still-trying-move-forward-shadow-controversial-rentalordinance>

<sup>202</sup> See Ken Belson & Jill Capuzo, *Towns Rethink Laws Against Illegal Immigrants*, N.Y. TIMES, Sept. 26, 2007, A1.

<sup>203</sup> See Rose Cuison Villazor, *Rediscovering Oyama v. California: At the Intersection of Property, Race and Citizenship*, 87 WASH. U. L. REV. 979 (2010); Sofia D. Marcos, *Coded Codes: Discriminatory Intent, Modern Political Mobilization, and Local Immigration Ordinances*, 85 N.Y.U. L. REV. 2099 (2010).

<sup>204</sup> See *Graham v. Richards*, 454 U.S. 1152 (1982).

<sup>205</sup> See *Plyler v. Doe*, 457 U.S. 202 (1982) (striking down state law denying free public education to undocumented children, but declining to exercise strict scrutiny review). Discrimination by the federal government against non-citizens, by contrast, receives the court's very deferential rational basis review. See *Matthews v. Diaz*, 426 U.S. 67 (1967).

origin grounds. In challenging Arizona's SB 1070, for example, the federal government was forced to concede in oral argument that it was not making a claim of racial discrimination.<sup>206</sup> Indeed, the Court ultimately allowed SB 1070's anti-sanctuary provision to go into effect.<sup>207</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>208</sup> Although the Supreme Court declined to preempt SB 1070's provision mandating local officers inquire about immigration status, the Court left open the possibility that evidence of discriminatory application of the law might later be attained. And, eventually, after further litigation by advocacy groups, the Attorney General of Arizona settled, agreeing not to enforce § 2B of SB 1070. In addition, as Professor Hiroshi Motomura has argued, courts might obliquely recognize evidence of racial and national origin discrimination in assessing local legislation. In *Lozano v. Hazelton*, for instance, plaintiffs challenged a local ordinance that required landlords to inquire on the immigration status of potential tenants. Although the district court did not rule for plaintiffs on their equal protection claim, it struck down the law on preemption grounds.<sup>209</sup> According to commentators like Motomura, the evidence presented about discrimination may have subtly motivated the court's decision-making.<sup>210</sup> Moreover, relevant to our discussion of localism, advocates may look to state constitutional and statutory anti-discrimination protections to bolster claims against local anti-sanctuary legislation.<sup>211</sup>

Ultimately, anti-discrimination and equality norms may not provide an express and consistently reliable legal wedge to separate local sanctuary policies

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<sup>206</sup> See *Arizona v. United States*, 567 U.S. at 424-25.

<sup>207</sup> See *id.* at 439.

<sup>208</sup> As the Supreme Court recognized in *Graham v. Richardson*, immigrants "as a class are a prime example of a 'discrete and insular minority.'" *Graham v. Richardson*, 403 U.S. 365, 372 (1970) (citing *United States v. Carolene Products*, 304 U.S. 144, 152-153 n.4 (1938)); see also *Takahashi v. California*, 334 U.S. 410, 419-420 (1948) (applying equal protection principles to non-citizens); *Oyama v. California*.

<sup>209</sup> *Lozano v. City of Hazelton*, 496 F. Supp. 2d 477 (M.D. Pa. 1997).

<sup>210</sup> See Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 DUKE L. J. 1723, 1742-46 (2010) (noting the substantial evidence on race and ethnicity and its potential link to the court's preemption analysis).

<sup>211</sup> See Davidson, *supra* note 39, at \_\_\_\_.

from anti-sanctuary ones. But that does not mean that advocates should give up seeking to normatively inflect structural power doctrines.<sup>212</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 SB 54, sometimes referred to as the "state sanctuary law." In March 2018, the Trump Administration filed a complaint against the State of California regarding its state sanctuary laws.<sup>213</sup> Seeking injunctive relief enjoining the enforcement of these laws, the complaint specifically targets Assembly Bill 450 ("AB 450"),<sup>214</sup> Assembly Bill 103 ("AB 103"),<sup>215</sup> and Senate Bill 54 ("SB 54").<sup>216</sup> These laws, according to the United States, are preempted by federal law and impermissibly discriminate against the United States.<sup>217</sup> In other words,

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<sup>212</sup> *See id.*

<sup>213</sup> Complaint, *United States v. California*, No. 18-264 (E.D. Cal. Mar. 6, 2018).

<sup>214</sup> A.B. 450, 2017-2018 Leg., Reg. Sess. (Cal. 2017). AB 450 prohibits private employers from voluntarily cooperating with federal officials who seek information relevant to immigration enforcement in places of employment. Employers may not consent to an immigration agent to enter nonpublic areas of the workplace unless they provide a warrant. The United States argues that this provision interferes with the enforcement of INA and IRCA's prohibition on working without authorization. Complaint at 9, *United States v. California*, No. 18-264 (E.D. Cal. Mar. 6, 2018).

<sup>215</sup> 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. It permits an inspection of facilities and an examination of the due process provided to civil immigration detainees. It allows access to detainees, officials, personnel and records. The United States argues this is a "improper, significant intrusion into federal enforcement of the immigration laws," which California purportedly has no interest in doing so. Complaint at 13, *United States v. California*, No. 18-264 (E.D. Cal. Mar. 6, 2018).

<sup>216</sup> S.B. 54, 2017-2018 Leg., Reg. Sess. (Cal. 2017). SB 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. The provisions allow release of an individual or his or her information only if the United States provides a judicial warrant. The United States characterizes this law as creating "difficult and dangerous efforts to re-arrest aliens who were previously in state custody, endangering immigration officers, the alien at issue, and others...." Complaint at 16, *United States v. California*, No. 18-264 (E.D. Cal. Mar. 6, 2018).

<sup>217</sup> *See* Complaint at 2, *United States v. California*, No. 18-264 (E.D. Cal. Mar. 6, 2018).

by creating difficulties for federal immigration officers to enforce federal immigration law, California is obstructing laws that “Congress has enacted or to take actions entrusted to it by the [U.S.] Constitution.”<sup>218</sup>

Localities in California that have allied with the federal government’s enforcement vision will undoubtedly rely on the same forms of municipal empowerment that might inure to the benefit of sanctuary cities and counties against anti-sanctuary states like Texas. Despite the fact that California is home to the largest number of immigrants in the nation,<sup>219</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 selected cities and counties. Two prominent California counties, San Diego County<sup>220</sup> and Orange County,<sup>221</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 against the state.<sup>222</sup> In this regard, these localities are following the oft-use 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 SB 1070 in 2010. Thus far, however, the federal government challenge has not had much success. Ruling on its motion for preliminary injunction, a district court has mostly rejected the federal government’s argument that the laws were preempted or violated the intergovernmental immunities doctrine.<sup>223</sup>

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<sup>218</sup> *See id.*

<sup>219</sup> In 2016, the U.S. Census Bureau found that 27% of California’s population are foreign born persons. *California Quick Facts*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/CA/POP645216#viewtop> (last visited April 18, 2018).

<sup>220</sup> Jennifer McEntree, *San Diego County Backs Trump Challenge to California ‘Sanctuary’ Law*, REUTERS (Apr. 17, 2018, 11:49 AM), <https://www.reuters.com/article/us-usa-immigration-california/san-diego-county-backs-trump-challenge-to-california-sanctuary-law-idUSKBN1HO2XE>.

<sup>221</sup> Jeff Daniels, *Trump Throws His Support Behind Orange County in its War Against the California Sanctuary Law*, CNBC (Mar. 28, 2018, 3:35 PM), <https://www.cnbc.com/2018/03/28/trump-throws-support-behind-orange-county-in-fight-against-california-sanctuary-law.html>.

<sup>222</sup> Municipalities & Elected Officials Motion for Leave to File Amici Curiae Brief, and Amici Curiae Brief, *U.S. v. California*, 2:18-CV-00490-JAM-KJN (E.D. Cal. Apr. 6, 2018)

<sup>223</sup> Order re: The United States of America’s Motion for Preliminary Injunction, *United States v. California*, 2:18-CV-490-JAM-KJN (July 5, 2018). The court declined to preliminarily

Separately, however, the City of Huntington Beach filed a state constitutional challenge against SB 54 in state court. What makes this challenge interesting is that Huntington Beach's claim most directly invokes the kind of localism arguments that we have been suggesting 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 the "local affairs"). 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 SB 54 impermissibly meddles with that authority when it directs what localities can and cannot do with their personnel, facilities, or funds. 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 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. But its implications are also more direct. The outcome of this litigation—however it comes out—will likely affect localities both in and outside of California. On the one hand, if California state courts find that immigration enforcement is not a "municipal affair," then SB 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

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enjoin all the challenged provisions of SB 54 and AB 103, finding neither field nor obstacle preemption, and ruling that the intergovernmental immunities doctrine was not violated. With regards to AB 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.*

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 only preempt on matters of “local government affairs” if the it explicitly states its intent to override Home Rule authority, which Illinois’ sanctuary law does not do.<sup>224</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 one 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.

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 hyper-enforcement regime. Absent a state-wide standard, the largest and most populous localities in the state—Los Angeles County, Santa Clara County, San Francisco, and Oakland—still maintain local sanctuary policies that are just as, if not more, stringent than the state-wide rule. Meanwhile, localities that oppose

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<sup>224</sup> It is worth noting that if Illinois did explicitly express its intent to preempt Home Rule authority that would also mean 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’ sanctuary law does not. This still raises the question of whether localities or the state is in a better position to decide when and the degree to which local law enforcement involve themselves in immigration enforcement activities.

the SB 54 standards have already found ways to undermine key aspects of the law's attempt to shield noncitizens from federal enforcement.<sup>225</sup> Orange County and Contra Costa County, for example, began to publicize release dates for inmates in their custody on their website,<sup>226</sup> by making that information public, they were able to circumvent SB 54's prohibition 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 SB 54 and its suite of other integrationist measures, are remarkable legislative achievements that provide more state-wide protection for noncitizens than any other jurisdiction.<sup>227</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, sheriff's 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 raises for immigration advocates. And we readily admit that, like federalism, localism on its own has "no political valence."<sup>228</sup> In theory, at least, it may be used to support progressive or conservative policies—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, we believe that given the degree to which sanctuary historically 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

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<sup>225</sup> Jerome Ma & Nicholas Pavlovic, *California Divided: The Restrictions and Vulnerabilities in Implementing SB 54*, \_\_\_ ASIAN AM. L.J. \_\_\_ (forthcoming 2019) (discussing ways in which counties like Contra Costa and Orange County have undermined the intended protections of SB 54).

<sup>226</sup> *Id.*; see also, Roxana Kopetman, *In Response to California Sanctuary Law, Orange County Sheriff Makes Public Inmates Release Dates*, ORANGE COUNTY REGISTER, Mar. 26, 2018.

<sup>227</sup> Karthick Ramakrishnan, *Look to California's Model*, N.Y. TIMES, Sept. 1, 2016 ("Room for Debate: Is Immigration Really a Problem?"); Karthick Ramakrishnan and Allan Colbern, *The California Package: Immigrant Integration and the Evolving Nature of State Citizenship*, 6 POLY MATTERS (Spring 2015).

<sup>228</sup> Heather Gerken, *A User's Guide to Progressive Federalism*, 45 HOFSTRA L. REV. 1087, 1087 (2017).

process, some of which we outline earlier, makes greater local autonomy something 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 is 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 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.