

# CONSTITUTIONAL CITIES: SANCTUARY JURISDICTIONS, LOCAL VOICE, AND INDIVIDUAL LIBERTY

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## ABSTRACT:

*The United States is deeply divided on matters that range from immigration to religion to fracking. “Blue” states resist “red” federal policies, and intra-state disputes pit state legislatures against recalcitrant local governments. One of these intergovernmental policy flare-ups involves so-called “sanctuary jurisdictions”—government actors that object to more aggressive immigration enforcement by slow walking their voluntary compliance or denying it altogether. In some cases, they have filed lawsuits to voice their dissent.*

*This Article analyzes the recent wave of sanctuary jurisdiction lawsuits in detail and identifies ways in which they undermine claims that local governments are powerless in the face of federal or state authority. Structural and civil liberty constitutional rights may protect local governments from some state and federal mandates. Local residents too may have resistance options beyond the voting booth and the moving van.*

*This should matter to all sides of the immigration debate: those who support the federal government’s strict immigration policies, those who favor state-federal cooperation in enforcement, and those who believe local jurisdictions should be given room to resist on policy grounds. But local governments’ right to dissent goes beyond immigration law. The sanctuary jurisdiction controversy may guide local officials in many other areas and help illuminate how and when they may assert local rights.*

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*This Article outlines the contours of potential local rights and makes three descriptive claims. First, respect for local power is on the firmest ground when it fortifies constitutionally sound government, top to bottom. Second, these tools of local resistance are quite limited. They work only in cases where upper level government mandates are beyond the constitutional pale or debatably so, and where courts can and should play a role in calling the lines. Third, they are available to all local government actors, not merely to progressive urban actors. The Article also makes the following normative claim: preserving constitutional breathing room for local dissent is critical to a healthy interchange between and among federal, state, and local governments. Above all, it promotes fundamental liberty values.*

*This is not a “city power” manifesto; it is a “constitutional city” manifesto. This Article maintains that the articulation and enforcement of constitutional ground rules is particularly critical in the current moment of hyper-partisanship and centrifugal forces that undermine union and intergovernmental cooperation. A call to these basic principles may offer Americans the hope of a fair game, however intensely and politically the game is fought.*

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“We must consider that we shall be A City Upon a Hill, the eyes of all people upon us.”

—John Winthrop, speaking to his Pilgrim community on the journey to found the Massachusetts Bay Colony.

## INTRODUCTION

How much legal power should local jurisdictions in the United States have to become a “city on a hill” despite competing laws imposed by national and state authorities? Put simply, must local law variations succumb to *e pluribus unum*—out of many, one? Or should the *pluribus* of cities and counties be granted room to resist the *unum*?

This issue has arisen anew as local jurisdictions seek to protect undocumented residents despite state or federal laws that impose strict anti-immigration policies.<sup>1</sup> This tension, however, goes well beyond the immigration law and policy debate. Whether there is such a thing as local government autonomy also implicates non-conforming state, city, and county policies about religion,<sup>2</sup> privacy,<sup>3</sup> the environment,<sup>4</sup> marijuana,<sup>5</sup> libertarianism,<sup>6</sup> historical monuments

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1. See generally Emily Tucker, *Protecting Immigrant Communities: Municipal Policy to Confront Mass Deportation and Criminalization*, CTR. FOR POPULAR DEMOCRACY (March 2017), [https://populardemocracy.org/sites/default/files/Sanctuary-Cities-Toolkit\\_web.pdf](https://populardemocracy.org/sites/default/files/Sanctuary-Cities-Toolkit_web.pdf) [<https://perma.cc/EQ7A-KC8G>] (discussing the advantages of implementing local policies that prevent the federal government from using local resources to incarcerate people on behalf of federal immigration officials).

2. Rose Hackman, *The Michigan Town Where Only Christians Are Allowed to Buy Houses*, GUARDIAN (Feb. 9, 2018), [https://www.theguardian.com/us-news/2018/feb/09/christians-only-town-bay-view-michigan?CMP=share\\_btn\\_link](https://www.theguardian.com/us-news/2018/feb/09/christians-only-town-bay-view-michigan?CMP=share_btn_link) [<https://perma.cc/VJQ3-M2ZT?type=image>] (discussing a lawsuit challenging the enforceability of a restrictive covenant that requires prospective homeowners to provide proof from a Christian minister of their active participation in a church); see Complaint and Demand for Jury Trial at 15, *Bay View Chautauqua Inclusiveness Grp. v. Bay View Ass'n of the United Methodist Church*, No. 1:17-cv-00622 (W.D. Mich. July 10, 2017).

3. Ira Rubinstein, *Privacy Localism*, N.Y.U., Public Law Research Paper No. 18-18 (May 2018), <https://ssrn.com/abstract=3124697> [<https://perma.cc/K5MR-JT5Z>].

4. Terry Gross, *From Fracking to Paid Sick Leave: How States Are Overruling Local Laws*, FRESH AIR: NPR (Apr. 6, 2016), <https://www.npr.org/2016/04/06/473244707/from-fracking-bans-to-paid-sick-leave-how-states-are-overruling-local-law> (on file with the Columbia Human Rights Law Review) (discussing local resistance to state policies, including environmental objections to

that cause civil unrest and other harms,<sup>7</sup> alternative versions of American history,<sup>8</sup> gun policies,<sup>9</sup> LGBTQ rights,<sup>10</sup> the minimum wage,<sup>11</sup> and many other matters of public concern.<sup>12</sup> There are several

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fracking); see also Richard Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163 (2018) (discussing the proliferation of federal preemptive legislation overriding state laws and municipal ordinances) [hereinafter Schragger, *The Attack on American Cities*].

5. For an especially insightful analysis of the constitutional issues implicated by the marijuana legalization debate, see David S. Schwartz, *High Federalism: Marijuana Legalization and the Limits of Federal Power to Regulate States*, 35 CARDOZO L. REV. 567 (2013); see also Sam Kamin, *Medical Marijuana in Colorado and the Future of Marijuana Regulation in the United States*, 43 MCGEORGE L. REV. 147 (2012) (discussing how the medical marijuana industry in Colorado has grown since 2008 and how local medical marijuana laws interact with federal laws).

6. James McCandless, *The Rise and Fall of the “Freest Little City in Texas,”* TEX. OBSERVER (July 31, 2017, 9:46 am), <https://www.texasobserver.org/the-rise-and-fall-of-the-freest-little-city-in-texas> [<https://perma.cc/5YER-MFR3>] (describing the demise of Von Ormy, Texas when “no taxes” and “liberty city” deregulation resulted in a lack of basic services as well as other political and governance problems).

7. David A. Graham, *Local Officials Want to Remove Confederate Monuments—but States Won’t Let Them*, ATLANTIC (Aug. 25, 2017), <https://www.theatlantic.com/politics/archive/2017/08/when-local-officials-want-to-tear-down-confederate-monuments-but-cant/537351/> [<https://perma.cc/7T6L-7V6C>].

8. See *González v. Douglas*, 269 F. Supp. 3d 948 (D. Ariz. 2017) (holding that state officials violated the First and the Fourteenth Amendment by targeting Mexican American studies programs in the Tucson Unified School District).

9. See *State ex rel. Brnovich v. City of Tucson*, 399 P.3d 663, 673 (Ariz. 2017) (holding that state law preempted local law regarding the destruction of seized weapons).

10. In *Romer v. Evans*, the Court struck down a state measure that prohibited local jurisdictions from adopting anti-discrimination laws that included sexual orientation as a prohibited classification on equal protection grounds. *Romer v. Evans*, 517 U.S. 620, 626 (1996).

11. Richard Florida, *City vs. State: The Story So Far*, CITYLAB (June 13, 2017), <https://www.citylab.com/equity/2017/06/city-vs-state-the-story-so-far/530049/> [<https://perma.cc/K5RB-FJHJ>]; see also *Lewis v. Governor of Alabama*, 896 F.3d 1282, 1290 (11th Cir. 2018) (ruling that plaintiffs stated a claim that a state statute nullifying city’s minimum wage ordinance violated their equal protection rights).

12. See Josh Kron, *Red State, Blue City: How the Urban-Rural Divide Is Splitting America*, ATLANTIC (Nov. 30, 2012), <https://www.theatlantic.com/politics/archive/2012/11/red-state-blue-city-how-the-urban-rural-divide-is-splitting-america/265686/> [<https://perma.cc/FYZ4-7X55>] (describing the impact of the growing political divide between cities and the countryside in the United States).

major considerations in this debate, which makes it difficult to describe fully, let alone absorb. First are the constitutional basics.

Federal and state laws rein in local government conduct as a matter of preemption.<sup>13</sup> The general answer to the question of whether local governments may defy these higher powers is “no.” Nothing here disrupts that general premise.

Federal measures draw strength from the Supremacy Clause of the U.S. Constitution and broad constructions of federal constitutional power.<sup>14</sup> A lawful federal act prevails over a state or local law that conflicts with, poses an obstacle to, or invades its field of enforcement.<sup>15</sup> The caveats are as follows: the federal act must be constitutional, federal laws may only preempt state or local laws that regulate private behavior,<sup>16</sup> and the federal government may not cross anti-commandeering<sup>17</sup> or anti-coercion<sup>18</sup> lines. This is structural Constitutional Law 101.<sup>19</sup>

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13. See *infra* Part II.

14. U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).

15. The matter becomes more complex when the analysis of the federal intent to preempt state law involves executive versus legislative action. See Ernest A. Young, “The Ordinary Diet of the Law”: *The Presumption Against Preemption in the Roberts Court*, 2011 SUP. CT. REV. 253, 280–81; Ernest A. Young, *Executive Preemption*, 102 NW. U. L. REV. 869, 881–900 (2008); Nina A. Mendelson, *Chevron and Preemption*, 102 MICH. L. REV. 737, 737–39 (2004). See also, generally, Annie Decker, *Preemption Conflation: Dividing the Local From the State in Congressional Decision Making*, 30 YALE L. & POL’Y REV. 321 (2012) (discussing the often unexplored difference between federal preemption of state versus local laws).

16. *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1480 (2018) (stating that preemption occurs when “Congress enacts a law that imposes restrictions or confers rights on private actors; a state law confers rights or imposes restrictions that conflict with the federal law; and therefore the federal law takes precedence and the state law is preempted.”).

17. See, e.g., *Printz v. United States*, 521 U.S. 898 (1997) (overturning a federal law requiring local law enforcement officers to administer background checks to prospective handgun purchasers due to commandeering concerns); *New York v. United States*, 505 U.S. 144 (1992) (declaring that it is unconstitutional commandeering to require a state legislature to enact and enforce federal regulations); cf. *Reno v. Condon*, 528 U.S. 141 (2000) (holding that a federal law regulating a state’s ability to sell information obtained from DMV records is constitutional and not commandeering).

State measures are even more likely to prevail over conflicting local policies. Local governments often are treated as “mere creatures of the states” with virtually no legal capacity to forge state-defiant policy paths for their residents.<sup>20</sup> Even “Home Rule” jurisdictions, which reserve some local power to set policy that departs from state mandates,<sup>21</sup> have limited autonomy. They may be disciplined by threats of funding shutdowns among other state-level preemption strategies.<sup>22</sup> Exercise of this state preemption power has recently ballooned with some state legislatures adopting “hyper preemption” measures designed to bring local governments to heel.<sup>23</sup> State supreme courts thus far have supported these measures.<sup>24</sup> This is Local Government Law 101.

In short, both federal and state scissors presumptively cut local paper when it comes to local control over local government conduct. Mayors are not presidents or governors, and city councils and county boards of supervisors are not legislatures.

Second are the legal counterpoints to this constitutional hierarchy, which are of increasing importance. Several structural and civil liberty constitutional principles militate against the assumption that local governments *never* may defy conflicting state or federal

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18. See Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519, 575–88 (2012) (holding the Affordable Care Act’s Medicaid expansion scheme impermissibly coercive of the states).

19. Decentralization in some contexts may produce normatively worse outcomes. For example, it may ill serve economic efficiency. See, e.g., Malcolm M. Feeley & Aniket Kesari, *Federalism as Compared to What? Sorting Out the Effects of Federalism, Unitary Systems, and Decentralization*, JUS POLITICUM (2015), <http://juspoliticum.com/article/Federalism-as-Compared-to-What-Sorting-out-the-Effects-of-Federalism-Unitary-Systems-and-Decentralization-1120.html> [https://perma.cc/5SBU-958V] (finding that unitary systems out-perform federal systems on almost all measures of government effectiveness and efficiency, and citizen well-being); ERIK WIBBELS, FEDERALISM AND THE MARKET: INTERGOVERNMENTAL CONFLICT AND ECONOMIC REFORM IN THE DEVELOPING WORLD (2005) (arguing that problems of ethnic balkanization, urbanization, and economic disparities may be more easily mitigated in unitary systems).

20. See *infra* Part III.

21. See *infra* Part III.

22. See *infra* Part III.

23. See generally Erin Scharff, *Hyper Preemption? A Reordering of the State-Local Relationship*, 106 GEO. L. J. 1469 (2018) (describing the phenomenon of “hyper preemption” and discussing legal and institutional limits on the model). See *infra* Part III.

24. See *infra* Part III.

policy, or that local residents' *only* remedy lies in the voting booth or the moving van.

The civil liberties principles derive from the Bill of Rights, which constrains the federal government directly and, in nearly all respects, the states through the Due Process Clause of the Fourteenth Amendment. Freedom of speech, freedom of religion, equal protection, due process, and the Fourth Amendment impose critical curbs on federal power.<sup>25</sup>

Structural limits include basic federalism principles, which curb some forms of federal authority. Federal laws that commandeer or unreasonably coerce state or local lawmakers are unenforceable.<sup>26</sup> State and local law enforcement officers also cannot be dragooned into enforcing federal policy because the anti-commandeering mandate is an absolute, not relative, limit on federal power.<sup>27</sup>

This Article applies these constitutional principles to the context of sanctuary jurisdictions. It then goes beyond the settled law to explore intra-state principles that determine the power that states hold over local government and how that power too may have structural and liberty limits derived from the federal Constitution. Specifically, it asks whether states can order their localities to jump to the federal immigration tune where the melody violates the anti-commandeering mandate or otherwise invades liberty. In doing so, we note that the line between unconstitutional commandeering and legitimate consent to federal authority or adoption of federal standards as state law can be hazy.<sup>28</sup> This complicates questions about whether and when the preemptive power of the federal or even state governments is legitimate. But we conclude that where anti-commandeering principles are violated, local governments should be

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25. See *infra* Part II. The Due Process Clause of the Fourteenth Amendment has been interpreted to incorporate most, but not all, of the Bill of Rights. The Seventh Amendment right to trial by jury in civil cases is one of the few exceptions. Due process also includes certain unenumerated rights, such as the right to early term abortion. See *McDonald v. City of Chicago* for a relatively recent discussion of the process of incorporation and of rights that have been deemed to be fundamental to ordered liberty. 561 U.S. 742, 764–768 (2010).

26. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 577–78 (2012).

27. Thus, state officials may not consent to federal mandates that commandeer local government officials. See *New York v. United States*, 505 U.S. 144, 182–83 (1992), though the line between state cooperation and commandeering is vague.

28. See Schwartz, *supra* note 5, at 622–35 (discussing these subtleties in context of marijuana regulation). See also *infra* note 149.



insulated from preemption moves. This aspect of anti-commandeering recently was emphatically reinforced by the Supreme Court of the United States.<sup>29</sup>

The anti-commandeering mandate also protects individual liberty interests, not just rights of state or local government per se.<sup>30</sup> This means that local government officials and local residents might be able to raise anti-commandeering objections to federal laws even if state officials order local governments to comply with these federal mandates.<sup>31</sup> In other words, state officials may not waive the commandeering objection.

Even the mighty spending power of the federal government has limits. In the recent case of *National Federation of Independent Business v. Sebelius*, seven justices of the Court agreed that new conditions on federal Medicaid money violated the Constitution because they were unduly coercive—a “gun to the head.”<sup>32</sup> Nor can spending conditions induce violations of other constitutional rights.<sup>33</sup>

These structural and liberty limits answer some—though hardly all—fundamental questions about whether any “city power” exists in the face of federal or state commands. Some power does exist. These established principles also are the struts of our normative take on limited city power. Cities should reserve limited powers, both as extensions of these constitutional principles and as worthy expressions of local voice and liberty.

Theoretical foundations of federalism typically include descriptive claims that states are closer to the people, more responsive to local concerns, and able to invigorate law and policy as laboratories for experimentation.<sup>34</sup> The normative root of these federalism arguments typically is respect for individual autonomy

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29. See *Murphy v. National Collegiate Athletic Ass’n*, 138 S. Ct. 1461 (2018) (holding that a federal law that prohibited New Jersey from modifying or repealing its laws prohibiting sports gambling was unlawful commandeering).

30. See *infra* text accompanying note 148.

31. See *infra* text accompanying note 149.

32. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 581 (2012).

33. See *South Dakota v. Dole*, 483 U.S. 203, 207–09 (1987) (holding that spending power is subject to certain restrictions). See *infra* text accompanying notes 108–20.

34. See, e.g., Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1498–99 (1994) (noting that state government may be closer to the people); Michael W. McConnell, *Federalism: Evaluating the Founders’ Design*, 54 U. CHI. L. REV. 1484, 1509 (1987) (stating that the framers believed that representatives in smaller units of government would be closer to the people).

and democratic self-determination, which may be threatened by more-removed authorities. It follows from these normative principles that even when preemption power exists, its indiscriminate exercise may compromise healthy dynamism and a genuine “we the people” democracy.

Lack of respect for local voices as expressed through local elections and governance, too, can corrode community, compromise the assumed virtues of federalism, and foster cynicism about democratic institutions. The risk of imperiling these virtues of local voice is ever-present, but especially worrisome in this moment when city versus state and federal government lines are more salient than ever. Dangers of higher government overreaching are compounded when state authorities link arms with federal officials to repress local resistance. “Polyphonic federalism”<sup>35</sup> may flatten into a monophonic, even menacing plainsong.

Mounting concern about federal and state combined power over cities, enhanced by aggressive new state-level “hyper preemption” measures that are designed to bring cities to heel by threatening local governments with loss of massive state funding should they defy state laws, has prompted important conversations about the value and nature of local dissent.<sup>36</sup> Local dissent, of course, can manifest itself in multiple ways. It may include open defiance of federal or state law, but it may also take the form of low-level public official intransigence where federal or state implementation seeks or commands cooperation.<sup>37</sup> The controversy over how strictly and by what methods local officials enforce immigration laws has included both forms of resistance. Moreover, various courts have sided with local governments in some cases.<sup>38</sup>

We use the sanctuary city controversy—that is, whether local jurisdictions may resist some state and federal immigration demands—as the terrain for investigating these constitutional and normative issues. But this debate is part of a larger immigration law and policy mosaic. Separation of immigrant parents from their

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35. *See generally* ROBERT A. SCHAPIRO, POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDAMENTAL RIGHTS (2009) (introducing term of “polyphonic federalism”).

36. *See infra* Part III.

37. *See* Heather K. Gerken, *Dissenting by Deciding*, 56 STAN. L. REV. 1745 (2005) (discussing embedded official actors’ means of covert dissent).

38. *See infra* Part II.

children,<sup>39</sup> detention of minors on military bases,<sup>40</sup> and exclusion of tens of thousands of immigrants and asylum seekers, sometimes

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39. Sari Horwitz & Maria Sacchetti, *Sessions Vows to Prosecute All Illegal Border Crossers and Separate Children From Their Parents*, WASH. POST (May 7, 2018), [https://www.washingtonpost.com/world/national-security/sessions-says-just-ice-dept-will-prosecute-every-person-who-crosses-border-unlawfully/2018/05/07/e1312b7e-5216-11e8-9c91-7dab596e8252\\_story.html?utm\\_term=.0b698bf53a86](https://www.washingtonpost.com/world/national-security/sessions-says-just-ice-dept-will-prosecute-every-person-who-crosses-border-unlawfully/2018/05/07/e1312b7e-5216-11e8-9c91-7dab596e8252_story.html?utm_term=.0b698bf53a86) [https://perma.cc/KE2D-YAMU]; Brandon Carter, *ACLU Files Class-Action Lawsuit on ICE, DHS Separating Asylum-Seeking Families*, THE HILL (Mar. 9, 2018), <http://thehill.com/regulation/court-battles/377635-aclu-files-class-action-lawsuit-over-trump-admin-separating-asylum> [https://perma.cc/4MVS-HW74]; see Trial Pleading, *Ms. L and Ms. C. v. U.S. Immigration and Customs Enforcement (“ICE”)*, Case No. 18-cv-00428-DMS-MDD, Memorandum in Support of Motion for Class Certification (S.D. Cal. Mar. 9, 2018). The issue of family separation sparked a national debate and considerable outrage during June of 2018, with accusations across the political aisle regarding the provenance and legality of federal action separating parents from children. See Katie Benner & Charlie Savage, *Due Process for Undocumented Immigrants, Explained*, N.Y. TIMES (June 25, 2018), <https://www.nytimes.com/2018/06/25/us/politics/due-process-undocumented-immigrants.html?rref=collection/sectioncollection/politics&action=click&contentCollection=politics&region=rank&module=package&version=highlights&contentPlacement=2&pgtype=sectionfront> (on file with the Columbia Human Rights Law Review) (discussing controversy of child separation policy and its constitutional implications). The bipartisan political blowback prompted the Trump administration to retreat via an Executive Order. Exec. Order No. 13841, *Affording Congress an Opportunity to Address Family Separation*, 83 Fed. Reg. 29435 (June 20, 2018), <https://www.whitehouse.gov/presidential-actions/affording-congress-opportunity-address-family-separation/> [https://perma.cc/TJW7-WHTK]. A federal district court entered the fray by granting a request for an injunction on behalf of a class of immigrants whose children were separated from them by the Department of Homeland Security. *Order Granting Plaintiffs’ Motion for Classwide Preliminary Injunction, Ms. L. v. U.S. Immigration and Customs Enforcement (“ICE”)*, No. 3:18-cv-00428 DMS MDD, Doc. 83, \_\_\_ F. Supp. 3d \_\_\_ (S.D. Cal. June 26, 2018); see also Michael D. Shear, Abby Goodnough, & Maggie Haberman, *Trump Retreats On Separating Families, But Thousands May Remain Apart*, N.Y. TIMES (June 20, 2018), <https://www.nytimes.com/2018/06/20/us/politics/trump-immigration-children-executive-order.html> (on file with the Columbia Human Rights Law Review); Charlie Savage, *Explaining Trump’s Executive Order on Separation*, N.Y. TIMES (June 20, 2018), <https://www.nytimes.com/2018/06/20/us/politics/family-separation-executive-order.html> (on file with the Columbia Human Rights Law Review).

40. Nick Miroff & Paul Sonne, *Trump Administration Preparing to Hold Immigrant Children on Military Bases*, WASH. POST (May 15, 2018), [https://www.washingtonpost.com/world/national-security/trump-administration-preparing-to-shelter-migrant-children-on-military-bases/2018/05/15/f8103356-584e-11e8-b656-a5f8c2a9295d\\_story.html?noredirect=on&utm\\_term=.a239d7b25167](https://www.washingtonpost.com/world/national-security/trump-administration-preparing-to-shelter-migrant-children-on-military-bases/2018/05/15/f8103356-584e-11e8-b656-a5f8c2a9295d_story.html?noredirect=on&utm_term=.a239d7b25167) [https://perma.cc/9Q6A-L6YK]; Horwitz & Sacchetti, *supra* note 39; Maria Sacchetti, *Top Homeland Security Officials Urge Criminal Prosecution of Parents Crossing*

based on discriminatory justifications and dubious factual assertions<sup>41</sup> deployed to support round-ups of non-citizens,<sup>42</sup> have divided the country.<sup>43</sup> When local officials have questioned or resisted these types of federal mandates, they have been threatened with loss of federal and state funding and, in some cases, even criminal

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*Border With Children*, WASH. POST (April 26, 2018), [https://www.washingtonpost.com/local/immigration/top-homeland-security-officials-urge-criminal-prosecution-of-parents-who-cross-border-with-children/2018/04/26/a0bdcee0-4964-11e8-8b5a-3b1697adcc2a\\_story.html?utm\\_term=.b466b32f4da5](https://www.washingtonpost.com/local/immigration/top-homeland-security-officials-urge-criminal-prosecution-of-parents-who-cross-border-with-children/2018/04/26/a0bdcee0-4964-11e8-8b5a-3b1697adcc2a_story.html?utm_term=.b466b32f4da5) [https://perma.cc/TD9M-DPYS]; Amy B. Wang, *The U.S. Lost Track of 1,475 Migrant Children Last Year. Here's Why People Are Outraged Now*, WASH. POST (May 29, 2018), [https://www.washingtonpost.com/news/post-nation/wp/2018/05/27/the-u-s-lost-track-of-1500-immigrant-children-last-year-heres-why-people-are-outraged-now/?utm\\_term=.a62a1a5c02bf](https://www.washingtonpost.com/news/post-nation/wp/2018/05/27/the-u-s-lost-track-of-1500-immigrant-children-last-year-heres-why-people-are-outraged-now/?utm_term=.a62a1a5c02bf) [https://perma.cc/3MXQ-S86C].

41. Alex Nowrasteh, *Mexico Is Not Sending Its Murderers: Homicide Rates on the Mexican Border*, CATO AT LIBERTY, CATO INSTITUTE (July 31, 2018, 4:43 PM), <https://www.cato.org/blog/mexico-not-sending-its-murderers-homicide-rates-mexican-border> [https://perma.cc/3TB8-WB3M]; Sahil Chinoy et al., *MS-13 Is Far From the 'Infestation' Trump Describes*, N.Y. TIMES (July 3, 2018), <https://www.nytimes.com/interactive/2018/06/27/opinion/trump-ms13-immigration.html> (on file with the Columbia Human Rights Law Review); Lisa Daniels et al., *Trump Repeats His Lies About Terrorism, Immigration and Justice Department Data*, LAWFARE (Jan. 16, 2018, 10:30 PM), <https://lawfareblog.com/trump-repeats-his-lies-about-terrorism-immigration-and-justice-department-data> [https://perma.cc/8UYP-9PKN]; Anna Flagg, *The Myth of the Criminal Immigrant*, N.Y. TIMES (Mar. 30, 2018), <https://www.nytimes.com/interactive/2018/03/30/upshot/crime-immigration-myth.html> (on file with the Columbia Human Rights Law Review); Alex Nowrasteh, *Another Confusing Federal Report on Immigration Incarceration*, CATO AT LIBERTY, CATO INSTITUTE (June 12, 2018, 11:54 AM), <https://www.cato.org/blog/another-confusing-federal-report-immigrant-incarceration> [https://perma.cc/H6U5-23BJ]; Salvador Rizzo, *Fact-Checking Trump's Weekly Address on Immigrants, Crime and Sanctuary Cities*, WASH. POST (March 15, 2018), [https://www.washingtonpost.com/news/fact-checker/wp/2018/03/15/fact-checking-trumps-weekly-address-on-immigrants-crime-and-sanctuary-cities/?noredirect=on&utm\\_term=.3e1bd678a0a8](https://www.washingtonpost.com/news/fact-checker/wp/2018/03/15/fact-checking-trumps-weekly-address-on-immigrants-crime-and-sanctuary-cities/?noredirect=on&utm_term=.3e1bd678a0a8) [https://perma.cc/4AZQ-NMU3]; Jonah Engel Bromwich, *ICE Spokesman Resigns, Saying He Could No Longer Spread Falsehoods for Trump Administration*, N.Y. TIMES (Mar. 13, 2018), <https://www.nytimes.com/2018/03/13/us/california-ice-spokesman-resigns.html> (on file with the Columbia Human Rights Law Review).

42. Horwitz & Sacchetti, *supra* note 39; *The Deported: Immigrants Uprooted from the Country They Call Home*, HUMAN RIGHTS WATCH (Dec. 5, 2017), <https://www.hrw.org/report/2017/12/05/deported/immigrants-uprooted-country-they-call-home> [https://perma.cc/63WZ-B8GH].

43. *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (upholding travel ban despite evidence of discriminatory animus against Muslims evidenced by statements by Donald Trump as candidate and as President of the United States).

prosecution.<sup>44</sup> On the one hand, the struggle over tighter enforcement of immigration law may one day be seen as a lamentable era of political overreaction, irrationality, and bias toward non-citizens, all greatly strengthened by cooperative federalism. On the other hand, it may be seen as an era in which muscular immigration enforcement was viewed as an essential step to preserving the rule of law, American jobs, national sovereignty, and public safety. Viewed in the latter light, sanctuary jurisdictions are rogue localities that defy legitimate national and state law enforcement goals. Such assertions of city power may be seen as unlawful, disloyal, and even treasonous.

Whether they are viewed as heroes or villains, some local governments are taking legal action against federal and state governments on immigration matters. Specifically, jurisdictions have challenged the federal Executive Order aimed at punishing so-called “sanctuary jurisdictions” issued in early 2017, the related Department of Justice actions, and sympathetic state measures aimed at compelling them to either enforce federal immigration laws or lose substantial federal funding.<sup>45</sup>

Where the courts have upheld the arguments against full enforcement of the 2017 Order, the decisions demonstrate that local governments are not impotent in the face of constitutionally abusive federal and state power. There *are* judicially enforceable limits, even

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44. Nicole Rodriguez, *Trump Administration Wants to Arrest Mayors of ‘Sanctuary Cities’*, NEWSWEEK (Jan. 16, 2018), <http://www.newsweek.com/trump-administration-wants-arrest-mayors-sanctuary-cities-783010> [https://perma.cc/UNF4-BLZP].

45. Order on Petition for Writ of Habeas Corpus, *La Croix v. Junior*, No. F17-376, F17-1770 (Fla. Cir. Ct. Mar. 3 2017); Complaint for Declaratory and Injunctive Relief, *State of N.Y. v. U.S. Dep’t of Just.*, No. 1:18-cv-06471 (S.D.N.Y. July 18, 2018); Complaint for Declaratory, Injunctive, and Mandamus Relief, *City of N.Y. v. Sessions*, No. 1:18-cv-06474 (S.D.N.Y. July 18, 2018). *See, e.g.*, *City & County of San Francisco v. Trump*, No. 17-16886, No. 17-16887, 2018 WL 1401847, at \*1 (9th Cir. Jan. 4, 2018) (granting motions to dismiss appeals as moot); *City of Chicago v. Sessions*, No. 17C-5720, 2018 WL 3608564 (N.D. Ill. July 27, 2018) (granting stay of the nationwide scope of the permanent injunction); *County of Santa Clara v. Trump*, 250 F. Supp. 3d 497 (N.D. Cal. Nov. 20, 2017) (granting preliminary injunction preventing enforcement of the 2017 Executive Order); *City of San Francisco v. Trump*, 897 F.3d 1225, 1234, 1245 (9th Cir. 2018) (upholding summary judgment but remanding on issue of nationwide scope of injunction); *City of Phila. v. Sessions*, 309 F. Supp. 3d 289 (E.D. Pa. 2018) (holding the DOJ decision to impose narrower conditions on DOJ grants to sanctuary jurisdictions was arbitrary and capricious); *City of Chicago v. Sessions*, 888 F.3d 272, 277 (7th Cir. 2018) (holding that the 2017 Executive Order, even narrowly construed, was unconstitutional).

in the zone of immigration law where federal power is described as plenary and linked to national security, and even as against state power that is sometimes enthusiastically aligned with this federal authority. The significance of these judicial rulings cannot be overstated: if local governments have enforceable rights to resist federal and state power in the immigration context, then they may have enforceable constitutional rights in areas where federal and state power are less fortified and local power is more easily presumed.

The sanctuary jurisdiction cases also underscore our normative thesis: local voice matters. They are superb examples of what Dean Heather Gerken calls “dissenting by deciding.”<sup>46</sup> That is, when local governments push against limits of federal or state laws, they may compel dialogue about the boundaries of power, closer examination of the underlying values at stake, and social change. Even litigation losses can contribute meaningfully to democratic engagement, round off the sharpest edges of strong-arm enforcement efforts, and advance core free speech values. Litigation also may help to educate the public about how federal-state immigration partnerships actually operate.

To be sure, local power is extremely limited. Deference to higher levels of government, especially to the home state, remains the judicial norm. The tools of resistance described herein work only when an upper level government mandate is beyond the constitutional pale.

This Article accepts this limited role for local voice. It is not a “city power” manifesto; it is a “constitutional city” manifesto that insists on constitutional ground rules to govern the interplay of local, state, and federal authority and to police blatant abuse of power by federal and state authorities. These ground rules offer assurance of a fair game—that is, a constitutional order that respects local power as an expression of local voice and liberty in which higher levels of government must defend their authority on sound constitutional principles.

Part I sets forth the sanctuary jurisdiction controversy and details how local power has collided with the exercise of federal and state authority. Part II outlines constitutional objections that have been asserted by local governments to the federal executive order, the developing case law that engages these objections, and arguments

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46. Gerken, *supra* note 37, at 1748 (discussing “dissenting by deciding” as a strategy for institutionalizing channels for dissent within the democratic process).

that might be asserted by other local jurisdictions to resist federal mandates. Part III discusses the legal status of cities, the history of local government power, and the inherently political nature of struggles for municipal autonomy. It takes as an example the city of Tucson, Arizona, which is a Home Rule city located sixty miles north of the Mexican border that diverges politically from the state in many ways, including on aspects of immigration enforcement. It also discusses beefed-up state efforts to defund or otherwise punish recalcitrant cities and counties that resist federal and state enforcement priorities, and it explains why state preemption poses a much more powerful limitation on local autonomy than does federal power. The issue is of increasing importance given that some states have passed new hyper preemption laws that are extremely restrictive of local power.<sup>47</sup> Yet even here, the Constitution may limit the ability of states to crush local dissent. Part III explains how and why. Finally, Part IV discusses the underlying norms at stake when allocating or denying power to local governments. It defends local government power when local officials invoke their *pluribus* in service of a constitutionally compelling *unum*. Local authorities may not call for “secession” from any and all state or federal policies with which they disagree, even if they offer sound economic, safety, aesthetic, health, or other reasons for their local resistance. They may, however, invoke fundamental constitutional principles as brakes on abusive federal and state power. Doing so gives voice to local governments and their residents, checks irrational and abusive government power, and promotes healthy democratic engagement.

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47. Scharff, *supra* note 23, at 1473.

## I. SANCTUARY JURISDICTIONS AND EXECUTIVE ORDER 13768

“We will end the sanctuary cities...Cities that refuse to cooperate with federal authorities will not receive taxpayer dollars, and we will work with Congress to pass legislation to protect those jurisdictions that do assist federal authorities.”

—Donald J. Trump, Phoenix, Arizona Rally, August 31, 2017

“Here we are again. . . . Our responsibility as people of faith, here on a border, is to learn from that history and to protect the victims as much as we can.”

—Rev. John Fife, former Pastor, Southside Presbyterian Church, Home of the Sanctuary Movement, Tucson, Arizona, November 17, 2017

So-called “sanctuary jurisdictions” seek to limit local enforcement of federal and state immigration policies and practices. The genesis of the current legal and political resistance to federal and state mandates regarding local immigration enforcement policies was Executive Order 13768, “Enhancing Public Safety in the Interior of the United States.”<sup>48</sup> In this Part, we describe Executive Order 13768 in detail and the legal arguments that have been advanced against it.

### A. What Is a Sanctuary Jurisdiction?

“Sanctuary jurisdiction” is a non-legal term often invoked to describe a jurisdiction that offers a range of benefits and protections to all residents, including undocumented immigrants. It harkens back to the 1980s church-centered response to the influx of Central American refugees—especially El Salvadorans and Guatemalans—who fled violence but were denied asylum in the United States.<sup>49</sup> Religious institutions sought to provide these asylum seekers with refuge to stem their repatriation because they feared

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48. Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017) [hereinafter Exec. Order 13768].

49. Nick O’Gara, *Southside Presbyterian, Birthplace of Sanctuary Movement, Honors Former Pastor*, ARIZ. PUB. MEDIA, (Nov. 17, 2017), <https://news.azpm.org/p/news-topical-border/2017/11/17/120185-southside-presbyterian-birthplace-of-sanctuary-movement-honors-former-pastor/> [https://perma.cc/VMH5-YZRA].



persecution of the asylum seekers in their countries of origin. This became known as the Sanctuary Movement.<sup>50</sup>

Unlike the Sanctuary Movement, so-called sanctuary jurisdictions operate within established legal boundaries. The details of their ordinances differ, but all limit the use of local resources to implement and enforce federal immigration laws.<sup>51</sup> Yet they all permit the assistance of the federal government with criminal law enforcement in other respects.<sup>52</sup> What they generally prohibit is local enforcement of federal civil immigration laws such as civil Immigration and Customs Enforcement (“ICE”) detainer requests or requests to act as immigration officials. Sanctuary jurisdictions stress that local law enforcement’s cooperation with civil detainer requests is, by statute, voluntary. The relevant congressional measures ask, but do not command, local law enforcement officers to give ICE advance notice of a person’s release from local jail. Sanctuary jurisdictions decline cooperation with these requests because they believe the mandates undermine the trust local police have worked hard to develop within communities, entail

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50. See Michael Barbaro, *The Daily: Tracing the Origin of the Sanctuary City*, N.Y. TIMES (Mar. 9, 2017), <https://www.nytimes.com/2017/03/09/podcasts/the-daily/sanctuary-cities.html> (on file with the Columbia Human Rights Law Review); Ignatius Bau, *Cities of Refuge: No Federal Preemption of Ordinances Restricting Local Government Cooperation with the INS*, 7 LA RAZA L.J. 50, 50 (1994).

51. For example, San Francisco’s administrative code limits when city employees and agencies may assist with the enforcement of federal immigration law and prohibits employees from using city funds or resources to do so unless required by federal or state law. San Francisco Administrative Code, Chapter 12H, 12I. The San Francisco Board of Supervisors found that public safety is “founded on trust and cooperation of community residents and local law enforcement.” *Id.* at Section 12I.1. The Board determined that cooperating with federal immigration law enforcement efforts would compromise those interests. See also *City of Chicago v. Sessions*, No. 17C-5720, 2018 WL 3608564, at \*2 (N.D. Ill. July 27, 2018) (stating that “though Chicago’s policy and others like it are commonly referred to as ‘sanctuary city policies,’ the Seventh Circuit has recognized the inaptness of that term” and has noted that the term is “commonly misunderstood and does not accurately describe the effect of such policies.”) (citation omitted).

52. As the discussion of the specific cases shows, the jurisdictions that have challenged the Order either claim that they do not violate Section 1373—the statutory predicate for the Order—because it does not mandate compliance, or that it is unconstitutional. None claims the ability to resist a valid federal mandate, and all otherwise provide cooperation with federal officials in criminal law enforcement. See cases cited *supra* note 45; see also *infra* text accompanying notes 70–73.

expenditure of local resources, and invade legitimate local policy-making power.<sup>53</sup>

Many sanctuary jurisdictions are located in border regions where the adverse impacts of strict immigration enforcement are concrete. The potential deportees are colleagues, students, neighbors, friends, and family. The spillover effects of harsh rhetoric about foreign nationals and sweeping enforcement measures also may be felt directly by documented residents, whose presence and citizenship may be questioned. Sanctuary jurisdictions' sense of proper immigration policies thus diverges radically from that of strict enforcement advocates, who point to the alleged adverse economic effects of illegal migration<sup>54</sup> and incidents of crime involving undocumented persons.<sup>55</sup> Both sides accuse each other of invoking falsehoods and hyperbole in defense of their positions.

Today there are many "sanctuary jurisdictions" across the nation, including at least 37 cities.<sup>56</sup> Some states also have adopted

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53. Researchers at the University of Illinois report that several counties across the country concluded that the cooperation of the police with ICE's Secure Communities policy had created fear of local law enforcement among some Latinos, further undercutting trust. See NIK THEODORE, UNIV. OF ILL., *INSECURE COMMUNITIES: LATINO PERCEPTIONS OF POLICE INVOLVEMENT IN IMMIGRATION ENFORCEMENT* (May 2013), [http://www.policylink.org/sites/default/files/insecure\\_communities\\_report\\_final.pdf](http://www.policylink.org/sites/default/files/insecure_communities_report_final.pdf) [<https://perma.cc/E2WQ-Y3VZ>]; ANITA KHASHU, POLICE FOUND., *THE ROLE OF LOCAL POLICE: STRIKING A BALANCE BETWEEN IMMIGRATION ENFORCEMENT AND CIVIL LIBERTIES* (Apr. 2009), <https://www.policefoundation.org/wp-content/uploads/2015/07/Khashu-2009-The-Role-of-Local-Police.pdf> [<https://perma.cc/7GVD-A5R5>]; see also Orde F. Kittrie, *Federalism, Deportation, and Crime Victims Afraid to Call the Police*, 91 IOWA L. REV. 1449, 1475 (2006) (stating that the "predominant reason local officials give for sanctuary policies has been the desire to encourage unauthorized aliens to report crimes to which they are victims or witnesses.").

54. See, e.g., THE NAT'L ACADEMIES OF SCI., ENG'G, AND MED., *THE ECONOMIC AND FISCAL CONSEQUENCES OF IMMIGRATION* (Francine D. Blau & Christopher Mackie eds., The National Academies Press 2007) (discussing economic and fiscal impacts in detail and finding net benefits of immigration in some contexts, but also finding significant costs due to benefits allocations that may not be offset by taxes paid by immigrants).

55. In particular, advocates point to examples like Kathryn Steinle, who died from a ricocheting bullet discharged by a gun in the possession of an undocumented person who had been released, rather than deported, by San Francisco officials. Christopher N. Lasch, *Sanctuary Cities and Dog-Whistle Politics*, 42 NEW ENG. J. CRIM. & CIV. CONFINEMENT 159, 165–67 (2016).

56. *What is a sanctuary city? And what happens now?*, CBS NEWS (Jan. 26, 2017, 11:23 PM), <https://www.cbsnews.com/news/what-is-a-sanctuary-city-and-what-happens-now/> [<https://perma.cc/8MMB-VLBK>]. See Ming Hsu Chen, *Sanctuary*

similar measures. For example, California passed legislation to become a “sanctuary state” in September of 2017.<sup>57</sup>

Other states, however, favor vigorous immigration enforcement and demand that all cities and counties comply. For example, Texas adopted sweeping legislation that prevents any local government from becoming a so-called sanctuary jurisdiction, and others are considering following suit.<sup>58</sup>

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*Networks and Integrative Enforcement*, Colo. L. Leg. Studies Research Paper No. 18-11 (2018). Cf. James M. Rice, *Looking Past the Label: An Analysis of the Measures Underlying “Sanctuary Cities,”* 48 U. MEMPHIS. L. REV. 85 (2017) (seeking to distinguish among so-called sanctuary city policies and discussing implications of the variations among them).

57. S.B. 54, 2017 S., Reg. Sess. (Cal. 2017). The law limits cooperation with federal immigration officials but does not bar all assistance. It allows federal immigration authorities to work with state corrections officials and enter county jails to question immigrants. It also allows law enforcement to share information and transfer persons to immigration authorities if they have been convicted of a crime from a list of over 800 crimes outlined in the California Trust Act. The DOJ nevertheless filed a lawsuit seeking to enjoin this and related California acts on preemption grounds. *See United States v. California*, No. 18-264, 2018 WL 1181625 (E.D. Ca. Mar. 6, 2018). The federal district court entered a preliminary injunction as to parts of the act that restricted private employers from cooperating with the federal government, but denied the plaintiffs’ request to enjoin the other sections of the act. Order Re: The United States of America’s Motion for Preliminary Injunction at 1112, *United States v. California*, 314 F. Supp. 3d 1077 (E.D. Ca. July 5, 2018). Illinois likewise has adopted state-wide legislation to limit police involvement in immigration enforcement. Illinois TRUST Act, 5 ILCS 805/1 et seq. (2017). The state has filed an action against the federal government in federal district court, objecting to the threat to its federal funding based on this Act. *State of Illinois v. Sessions*, No. 18 C 4791 (N.D. Ill. filed July 12, 2018).

58. *See* TEX. GOV’T CODE ANN. § 752.053 (2017), *invalidated in part by City of El Cenizo v. Texas*, 890 F.3d 164 (5th Cir. 2018); *id.* at § 752.0565; TEX. CODE CRIM. PROC. ANN. Art. 2.251 (West 2017). Under Texas law, failure to comply with an immigration detainer is a Class A misdemeanor punishable by up to one year of imprisonment. *See* TEX. PENAL CODE § 39.07(a)–(b) (2017); S.B. No. 4, 85th Leg. Reg. Sess. (Tex. 2017). Texas law also requires that communities “comply with, honor, and fulfill” ICE detainer requests; imposes civil penalties for locales that do not comply; and bars the adoption of policies that would limit officers’ ability to ask arrested individuals about their immigration status. TEX. CODE CRIM. PROC., ANN. ART. 2.251; TEX. GOV’T CODE ANN. §§ 752.056, 752.053. It also calls for jail time and the removal from office for elected officials who violate the statute. TEX. GOV’T CODE ANN. §§ 752.056, 752.0565. In late August of 2017, Chief U.S. District Judge Orlando Garcia halted several major provisions of the bill based on preemption, as well as First and Fourth Amendment grounds. *City of El Cenizo v. Texas*, 264 F. Supp. 3d 744 (W.D. Tex. 2017). On appeal, the Fifth Circuit maintained the district court’s injunction of a provision penalizing local officials and employees who criticize immigration enforcement. *City of El*

## B. What Is Executive Order 13768?

Executive Order 13768 was signed by newly-elected President Donald Trump in January of 2017.<sup>59</sup> The Order invoked the executive's constitutional and statutory authority to "ensure the public safety of the American people in communities across the United States as well as to ensure that our Nation's immigration laws are faithfully executed."<sup>60</sup>

Sanctuary jurisdictions were targeted by the Order, which claims they "willfully violate Federal law in an attempt to shield aliens from removal from the United States"<sup>61</sup> or have a statute, policy, or practice that prevents or hinders the enforcement of federal law.<sup>62</sup> The Order refers to 8 U.S.C. Section 1373, which states that "a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any governmental entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual."<sup>63</sup>

Asserting that these jurisdictions cause immeasurable harm "to the very fabric of our Republic,"<sup>64</sup> the Order readjusted federal enforcement priorities,<sup>65</sup> authorized the hiring of 10,000 additional immigration officers,<sup>66</sup> empowered state and local enforcement agencies "to perform the functions of an immigration officer in the interior of the United States to the maximum extent permitted by law,"<sup>67</sup> and declared that sanctuary jurisdictions—which the

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*Cenizo v. Texas*, No. 17-50762, 2017 WL 4250186, at \*2 (5th Cir. Sept. 25, 2017). The appeals court also continued to block language targeting municipalities with policies that "materially limit" immigration enforcement, noting that the government itself had admitted that the phrasing "may need clarifying as to what kinds of government actions would be improper limitations," according to the decision. *Id.* But it lifted the remaining parts of the injunction. *Id.* at \*2–3. The appeals court noted that the law "does not require detention pursuant to every ICE detainer request," but rather that local law enforcement "cooperate according to existing ICE detainer practice and law, which are matters of voluntary compliance." *Id.* at \*2. *See infra* Part III.

59. Exec. Order 13768, *supra* note 48.

60. *Id.* at 8799.

61. *Id.*

62. *Id.*

63. 8 U.S.C. § 1373 (1996).

64. Exec. Order 13768, *supra* note 48, at 8799.

65. *Id.* at 8800.

66. *Id.*

67. *Id.*

Secretary of Homeland Security was given authority to designate “in his discretion”<sup>68</sup>—would become ineligible “to receive Federal grants, except as deemed necessary for law enforcement purposes by the Attorney General or the Secretary [of Homeland Security].”<sup>69</sup> The Order did not specify which federal grants might be imperiled.

The Order elicited an immediate outcry and several—still unfolding—lawsuits.<sup>70</sup> Plaintiffs argued that to condition federal funds on compliance with the Order unlawfully conscripted local officials into performing federal duties, violated constitutional limits on federal spending measures, and violated separation of powers principles.<sup>71</sup> The Order also was attacked for allegedly inducing state and local officials to violate individual rights including due process, equal protection, and Fourth Amendment rights.

Whether the scattershot Order did any of these things, though, was unclear given its fuzzy terms. The government itself argued in one case that the Order was mere rhetoric. It maintained that the Order was merely an exhortation—the President’s “bully

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68. *Id.* at 8801.

69. *Id.*

70. *LaCroix v. Junior*, Nos. F17-376, F17-1770, 2017 WL 837477 (Fla. Cir. Ct. 11th Dist. Mar. 3, 2017) (Order on Petition of Writ of Habeas Corpus); Complaint for Declaratory and Injunctive Relief, *State of N.Y. v. U.S. Dep’t of Justice*, No. 1:18-cv-06471 (S.D.N.Y. July 18, 2018); Complaint for Declaratory, Injunctive, and Mandamus Relief, *City of N.Y. v. Sessions*, No. 1:18-cv-06474 (S.D.N.Y. July 18, 2018); *see e.g.*, *City & County of San Francisco v. Trump*, No. 17-16886, No. 17-16887, 2018 WL 1401847 (9th Cir. Jan. 4, 2018) (granting motion to dismiss appeals as moot); *County of Santa Clara v. Trump*, 250 F. Supp. 3d 497 (N.D. Cal. 2017) (enjoining Order nationwide); *City of San Francisco v. Trump*, 897 F.3d 1225 (9th Cir. 2018) (upholding summary judgment but remanding on issue of nationwide scope of injunction); *City of Phila. v. Sessions*, 309 F. Supp. 3d 289 (E.D. Pa. 2018) (holding that the Attorney General’s decision to impose narrower conditions on DOJ grants to sanctuary jurisdictions was arbitrary and capricious); *City of Chicago v. Sessions*, 888 F.3d 272, 277 (2018) (holding that the Order, even as narrowly construed, was unconstitutional); *see also* Ilya Somin, *Why Trump’s Executive Order on Sanctuary Cities is Unconstitutional*, WASH. POST (Jan. 26, 2017), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/26/constitutional-problems-with-trumps-executive-order-on-sanctuary-cities/?noredirect=on&utm\\_term=.486fa025149c](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/26/constitutional-problems-with-trumps-executive-order-on-sanctuary-cities/?noredirect=on&utm_term=.486fa025149c) [https://perma.cc/6PP6-MJVX] (arguing that unless narrowly interpreted, the Order is “both unconstitutional and [sets] a very dangerous precedent.”).

71. *County of Santa Clara v. Trump*, 275 F. Supp. 3d 1196, 1211 (N.D. Cal. 2017); *City & County of San Francisco v. Trump*, 897 F.3d 1225, 1234, 1245 (9th Cir. 2018) (upholding summary judgment but remanding on issue of nationwide scope of injunction).

pulpit,” used to broadcast his enforcement priorities.<sup>72</sup> Moreover, all of the so-called sanctuary jurisdictions claimed they complied with the immigration laws on which the Order relied, even if the laws were valid. The Order’s failure to define “sanctuary” further muddied the compliance issues, given that only a sanctuary jurisdiction designated as such by federal officials would violate the Order.<sup>73</sup>

Sensing these vulnerabilities, the executive branch pivoted. It insisted that the many doubts about the enforceability and scope of the Order made any pre-enforcement legal challenge non-justiciable. It also claimed that the sweeping and vague Order was susceptible to a narrow construction that would make it a constitutional exercise of executive power.<sup>74</sup>

Sanctuary jurisdictions responded that the ambiguities of the Order already had caused injury: the Order had prompted significant and concrete apprehension about the imminent suspension of vast amounts of federal funding, and cast a shadow over fiscal planning. Consequently, the Order was facially unconstitutional and immediately subject to challenge.<sup>75</sup>

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72. *City & County of San Francisco*, 897 F.3d at 1238 (quotation omitted). The federal judge in *County of Santa Clara* stated that the federal government argued for the first time at the preliminary injunction hearing that the Executive Order “was meant to be far more narrow than [he] interpreted it, a mere directive to the Department of Homeland Security (“DHS”) and the Department of Justice (“DOJ”) that does not seek to place any new conditions on federal funds.” *County of Santa Clara*, 275 F. Supp. 3d at 1201. Judge Orrick then concluded “that this interpretation was not legally plausible in light of the Executive Order’s plain language, as confirmed by the administration’s many statements indicating the Executive Order’s expansive scope.” *Id.*

73. Section 3 of the Executive Order, titled “Definitions,” incorporated the definitions listed in 8 U.S.C. § 1101. Exec. Order 13768, *supra* note 48. Section 1101 does not define “sanctuary jurisdiction.” The term is not defined anywhere in the Executive Order. Similarly, neither section 1101 nor the Executive Order defined what it means for a jurisdiction to “willfully refuse to comply” with 8 U.S.C. § 1373 or for a policy to “prevent[] or hinder[] the enforcement of Federal law.” *Id.* at 8801.

74. *See, e.g., County of Santa Clara*, 275 F. Supp. 3d at 1204 (“The AG Memorandum purports to clarify the scope of the Executive Order to a narrower interpretation than what its plain meaning allows.”).

75. *Id.* Public identification of allegedly non-compliant jurisdictions began in March of 2017, but was suspended in April of 2017 due to errors in the reports. *See* Michelle Mark, *The Trump Administration Has Started Naming and Shaming “Sanctuary Cities,”* BUS. INSIDER (Mar. 21, 2017), <http://www.businessinsider.com/trump-administration-releases-report-on-sanctuary-cities-2017-3> [<https://perma.cc/XNY6-6UZZ>]; Alan Gomez, *Errors Prompt Trump to Halt*

A federal district court judge agreed. He entered a preliminary injunction against the government<sup>76</sup> and suspended enforcement of the Order nationwide.<sup>77</sup>

Attorney General Sessions then issued a Memorandum interpreting the Order to apply narrowly to DOJ grants.<sup>78</sup> The Memorandum stated that the Order did not “purport to expand the

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*Reports Shaming Sanctuary Cities*, USA TODAY (April 12, 2017), <https://www.usatoday.com/story/news/world/2017/04/11/trump-halt-reports-shaming-sanctuary-cities/100319964/> [https://perma.cc/JZ4W-53TP]. Measures to draw public attention to recalcitrant jurisdictions continued, however, in publicly available DOJ messages denying that these jurisdictions were in compliance with federal law. See Press Release, Dep’t of Justice, Dep’t of Justice Reviewing Letters from Ten Potential Sanctuary Jurisdictions, No. 17-736 (July 6, 2017), <https://www.justice.gov/opa/pr/department-justice-reviewing-letters-ten-potential-sanctuary-jurisdictions> [https://perma.cc/F6YX-5WYZ]. At risk were billions of federal dollars in DOJ grants.

76. On April 25, 2017, the federal judge in *County of Santa Clara* entered a preliminary injunction against Section 9(a) of Exec. Order No. 13768, “Enhancing Public Safety in the Interior of the United States.” *County of Santa Clara v. Trump*, 250 F. Supp. 3d 497 (N.D. Cal. 2017). He concluded that the County of Santa Clara and the City and County of San Francisco had pre-enforcement standing to protect “hundreds of millions of dollars in federal grants” from the unconstitutionally broad sweep of the Executive Order. *Id.* at 508. In response to the government’s argument that the Order was not justiciable, the judge stated as follows:

The Government attempts to read out all of Section 9(a)’s unconstitutional directives to render it an ominous, misleading, and ultimately toothless threat. It urges that Section 9(a) can be saved by reading the defunding provision narrowly and ‘consistent with law,’ so that all it does is direct the Attorney General and Secretary to enforce existing grant conditions. But this interpretation is in conflict with the Order’s express language and is plainly not what the Order says.

*Id.* at 516 (“Order Granting the County of Santa Clara and City of San Francisco’s Motions to Enjoin Section 9(a) of Exec. Order 13768”).

77. The preliminary injunction became final in November of 2017. *County of Santa Clara v. Trump*, 275 F. Supp. 3d 1196, 1196 (N.D. Cal. 2017). The Ninth Circuit Court of Appeals affirmed the grant of summary judgment in favor of San Francisco and the County of Santa Clara, but it remanded on the issue of the application of the injunction nationwide given the absence of specific findings. *City and County of San Francisco v. Trump*, 897 F.3d 1225 (9th Cir. 2018).

78. ATTORNEY GENERAL JEFFREY SESSIONS, IMPLEMENTATION OF EXECUTIVE ORDER 13768, “ENHANCING PUBLIC SAFETY IN THE INTERIOR OF THE UNITED STATES” (2017), <https://www.justice.gov/opa/press-release/file/968146/download> [https://perma.cc/6U4M-54WX].

existing statutory or constitutional authority of the Attorney General and the Secretary of Homeland Security in any respect” and instead instructed officials to take action “to the extent consistent with the law.”<sup>79</sup> The government further stated that the defunding provision of the Order would be applied “solely to federal grants administered by the [DOJ] or the [DHS]” and to grants that require the applicant to “certify . . . compliance with federal law, including 8 U.S.C. Section 1373, as a condition for receiving an award.”<sup>80</sup> Finally, DHS and DOJ could only impose these conditions pursuant to “existing statutory or constitutional authority,” and only where “grantees will receive notice of their obligation to comply with section 1373.”<sup>81</sup>

In July of 2017, the government added conditions on the Edward Byrne Memorial Justice Access Grant Programs (“Byrne JAG”) to include a requirement that grantees notify federal officials within 48 hours before releasing persons of interest from local jails and provide federal immigration officials access to state and local detention facilities.<sup>82</sup>

Despite these efforts to tailor the Order, the administration continued to act on the threats implicit in the enjoined original Order. The DOJ issued memoranda aimed at jurisdictions that had expressed opposition to strict anti-immigration policies.<sup>83</sup> It also

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79. *Id.* at 2.

80. *Id.* at 1–2.

81. *Id.* at 2. The judge concluded that the Memorandum purporting to narrow the Order amounted to “nothing more than an illusory promise to enforce the Executive Order narrowly.” *County of Santa Clara v. Trump*, 267 F. Supp. 3d 1201, 1211 (N.D. Cal. 2017).

82. Press Release, U.S. Department of Justice, Attorney General Sessions Announces Immigration Compliance Requirements for Edward Byrne Memorial Justice Assistance Grant Programs (July 25, 2017), <https://www.justice.gov/opa/pr/attorney-general-sessions-announces-immigration-compliance-requirements-edward-byrne-memorial> [<https://perma.cc/7A4F-4689>]. These new conditions would require recipients to (1) detain residents and others at federal immigration officials’ request, in order to give the federal government a 48-hour notice window prior to an arrestee’s release; and (2) give federal immigration officials unlimited access to local police stations and law enforcement facilities in order to interrogate any suspected non-citizen held there, effectively federalizing all of the City’s detention facilities. The Department further demanded another certification of compliance with Section 1373. The FY 2017 Byrne JAG applications required compliance with Section 1373. However, a preliminary injunction against the notice and access conditions was affirmed by the Seventh Circuit. *See City of Chicago v. Sessions*, 888 F.3d 272 (7th Cir. 2018).

83. In October 2017, the Justice Department sent letters to jurisdictions identified in a 2016 OIG report, informing them that they appeared to violate



sent warning letters to specific jurisdictions—which included San Francisco, California; Lawrence, Massachusetts; Albany, New York; Illinois; Vermont; and Oregon—stating that the government had preliminarily concluded their practices may violate Section 1373.<sup>84</sup>

Many of the same jurisdictions that challenged the original Order brought new lawsuits against the narrowed Order. In Illinois, a federal district judge entered a nationwide preliminary injunction against the federal government’s placement of two new conditions on the Byrne JAG grant.<sup>85</sup> Specifically, he enjoined the conditions that

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Section 1373. Similar letters were sent to 29 other jurisdictions in November of 2017. The letters also questioned policies directing employees not to respond to ICE requests for notification of detainees’ release dates and asked jurisdictions to certify that their policies complied with Section 1373. They threatened to rescind FY 2016 Byrne JAG funding and withhold FY 2017 funding. *See* Muzaffar Chishti & Jessica Bolter, *Trump Administration Ratchets Up Pressure on “Sanctuary Jurisdictions,”* MIGRATION POL’Y INST. (Feb. 22, 2018), <https://www.migrationpolicy.org/article/trump-administration-ratchets-pressure-sanctuary-jurisdictions> [<https://perma.cc/5KF5-EDRB>].

84. *Id.*

85. *City of Chicago v. Sessions*, 264 F. Supp. 3d 933 (N.D. Ill. 2017) (entering a national preliminary injunction as to the new notice and access conditions on Byrne grants on constitutional grounds). The City of Chicago objected to the modified requirements, alleging they were inconsistent with the Byrne JAG statute itself, with the limitations imposed by the Constitution’s Spending Clause and the Fourth Amendment, and with basic separation of powers principles. Compliance with the conditions also allegedly would require Chicago to violate Illinois law, undermine public safety and effective policing in the City, and upend Chicago’s Welcoming City policy. *Id.* The district court judge agreed and entered a nationwide injunction enjoining enforcement of the modified conditions. A panel of the Seventh Circuit affirmed the district court decision, stating that “the country’s founders established the separation of powers to counter the danger the country faced if control was concentrated in one branch” and that “[i]f the executive branch can determine policy, and then use the power of the purse to mandate compliance with that policy by the state and local governments, all without the authorization or even acquiescence of elected legislators, that check against tyranny is forsaken.” *City of Chicago v. Sessions*, 888 F.3d 272, 277 (7th Cir. 2018). The court later agreed to hear the case en banc, solely as to the issue of whether the injunction should apply beyond the City of Chicago. Order Granting Petition for Reh’g En Banc In Part, Case No. 17-2991, *City of Chicago v. Sessions*, 1:17-cv-05720, 2018 WL 1963679, at \*1 (7th Cir. Apr. 24, 2018). The federal government then sought review by the United States Supreme Court, seeking a partial stay of the preliminary injunction pending the review of the matter en banc by the Seventh Circuit Court of Appeals. *Sessions v. City of Chicago*, \_\_\_ S. Ct. \_\_\_, No. 17A-\_\_\_ (filed June 18, 2018). On July 27, 2018, Judge Leinenweber granted the plaintiffs’ motion for summary judgment, but he stayed the permanent injunction pending the en banc hearing of the Seventh

required local officials to inform federal authorities of scheduled release from local jails of persons believed to have immigration

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Circuit. *City of Chicago v. Sessions*, No. 17C-5720, 2018 WL 3608564 (N.D. Ill. July 27, 2018). Thereafter, the Seventh Circuit canceled the en banc hearing, on the ground that the entry of a permanent injunction by the district court judge required the appellate process to restart. Judge Leinenweber then entered the final judgment. His permanent injunction barred the Department of Justice from using conditions on funding to deny funding to grant recipients nationwide, but he stayed the order as applied to anyone outside of the City of Chicago. Consequently, as of this writing, the operative scope of the injunction is limited to Chicago.

The State of Illinois also has filed an action against the federal government in federal district court, objecting to the threat to its federal funding based on this Act. *State of Illinois v. Sessions*, Case No. 18 C 4791 (N.D. Ill. July 12, 2018). The issue in the certiorari petition described above is whether a “nationwide injunction” can be issued by a district court. *Sessions v. City of Chicago*, \_\_\_ S. Ct. \_\_\_, No. 17A-\_\_\_ (filed June 18, 2018). These nationwide injunctions were invoked to block actions by President Obama, as well as President Trump. *See United States v. Texas*, 579 U.S. \_\_\_ (2016) (letting stand, in 4-4 vote, lower court decision blocking Executive Order issued by President Obama). *See also City of Phila. v. Sessions*, 280 F. Supp. 3d 579, 659 (E.D. Pa. 2017) (noting that a national preliminary injunction applied regarding two of the conditions on the Byrne grants and entering a preliminary injunction as to the third—certification of compliance with Section 1373—because Philadelphia was substantially complying with Section 1373). A permanent injunction was later entered. *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015) (as revised Nov. 25, 2015), *aff’d*, 136 S. Ct. 2271 (2016) (affirming with a similarly divided Court). The question of whether federal district courts have such power also arose in *Hawaii* but was not resolved by the majority. *Trump v. Hawaii*, 138 S. Ct. 2392 (2018). For a particularly influential and compelling analysis of the injunction scope issues, *see* Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417 (2017). For responses to Bray, *see, e.g.*, Amanda Frost, *In Defense of Nationwide Injunctions*, 93 NYU L. REV. (2018) (defending nationwide injunctions); Kate Huddleston, *Nationwide Injunctions: Venue Considerations*, 127 YALE L.J. F. (2017), <https://www.yalelawjournal.org/forum/nationwide-injunctions-venue-considerations> [<https://perma.cc/NM4A-JZTX>] (arguing that the debate over nationwide injunctions must consider effect of changes on venue choice and scope of injunctive relief in federal litigation); Suzette M. Malveaux, *Class Actions, Civil Rights, and the National Injunction*, 131 HARV. L. REV. F. 56, Dec. 31, 2017, <https://harvardlawreview.org/2017/12/class-actions-civil-rights-national-injunction/> [<https://perma.cc/DJ6T-HG7G>] (responding directly to Samuel Bray). *See also City of Phila. v. Sessions*, 309 F. Supp. 3d 289 (E.D. Pa. 2018) (enjoining portions of the modified Order). For recent decisions challenging the revised Order on separation of powers and Tenth Amendment grounds, *see* Complaint for Declaratory and Injunctive Relief, *City of Los Angeles v. Sessions*, No. 2:18-cv-07347 (C.D. Cal. Aug. 23, 2018); Complaint for Declaratory and Injunctive Relief, *City & County of San Francisco v. Sessions*, No. 3:18-cv-05146 (N.D. Ca. Aug. 22, 2018).

violations and the requirement that they provide ICE access to city detention centers.<sup>86</sup> He did not enjoin the condition that requires recipients of these grants to submit a certificate of compliance with federal immigration law, which bars jurisdictions from limiting information sharing with the federal government regarding a person's citizenship. However, in a later decision he concluded that intervening Supreme Court case law doomed this provision as well.<sup>87</sup>

In support of its stepped-up enforcement efforts, the federal government claimed that sanctuary jurisdictions were experiencing spikes in criminal activity and pointed to studies that it claimed supported this assertion.<sup>88</sup> These assertions about immigration-fueled crime were denied by the studies' authors,<sup>89</sup> but the rhetoric increased political pressure on sanctuary jurisdictions to abandon efforts to resist cooperation. The federal government also named jurisdictions that allegedly were not in compliance with federal law but narrowed its regulatory focus to specific programs where the executive felt it had surer power to suspend the funds.<sup>90</sup>

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86. *City of Chicago v. Sessions*, 264 F. Supp. 3d 933, 951 (N.D. Ill. 2017).

87. *Id.* at 952. *See City of Chicago v. Sessions*, No. 17C-5720, 2018 WL 3608564, at \*9 (N.D. Ill. 2018) (extending this ruling enjoining the enforcement of conditions on funding to include the section on provision of information, citing *Murphy v. National Collegiate Athletic Ass'n*, 138 S. Ct. 1461 (2018)). *See infra* text accompanying notes 157–159.

88. Attorney General Jeffrey Sessions delivered a speech in which he stated the following: "According to a recent study from the University of California, Riverside, cities with these policies have more violent crime on average than those that don't." Nick Roll, *Correcting Jeff Sessions*, INSIDE HIGHER EDUC., (July 17, 2017), <https://www.insidehighered.com/news/2017/07/17/academics-push-back-against-attorney-generals-misrepresentation-their-study> [https://perma.cc/VR8U-FRGW]. The study, however, did *not* make these findings, but rather found that "[t]here wasn't actually any relationship between the passage of a sanctuary policy and that city's crime rate . . . [because] [a]ll of the data to date suggests that either there's no relationship, which is what [the] study found, or there's an inverse relationship." *Id.* (citations omitted); *see also City of Chicago v. Sessions*, 2018 WL 3608564, at \*15 (N.D. Ill. 2018) (stating approvingly that "Chicago points out that not only are there no peer-reviewed studies supporting the AG's proposed correlation [between sanctuary cities and crime], the scholarship on the subject actually suggests that such policies do not affect, and might even lower, crime rates.").

89. Roll, *supra* note 88.

90. On January 24, 2018, Attorney General Sessions issued letters to several jurisdictions seeking additional information to determine whether they complied with Section 1373. *See, e.g.*, Letter from Jon Adler, Director, Bureau of Justice Programs, Department of Justice, to Elizabeth Glazer, Director, New York City Mayor's Office of Criminal Justice (Jan. 24, 2018), <https://assets.document>

Amidst this regulatory chaos, some jurisdictions simply caved to federal pressure to withhold funds rather than resist.<sup>91</sup> The mere threat of lost government funding was enough to prompt them to abandon their objections to the Order.<sup>92</sup> Anxious local officials—especially ones located in states that favored federal policies—sought to remain under the federal radar.<sup>93</sup> Among their concerns was that unsympathetic state officials might write stricter laws demanding that local officials abandon any “immigrant friendly” policies and require local enforcement of immigration laws beyond federal law mandates. State preemption of local power, they realized, was more powerful than federal preemption, for reasons we explain in Part III.<sup>94</sup>

The fear was hardly baseless. Some receptive states, such as Texas, looked to Arizona’s notorious “SB 1070” law as a blueprint to adopt more draconian measures aimed at local Texas jurisdictions that sought to comply minimally with federal demands, or that refused to enforce immigration policies on anti-commandeering grounds.<sup>95</sup> For cities like Austin that objected to strict immigration policies, the “uncooperative federalism”<sup>96</sup> option all but disappeared.

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cloud.org/documents/4358953/Letter-DOJ-Sanctuary-City-New-York.pdf [https://perma.cc/J4RB-X53B].

91. See Jeff Karoub & David Eggert, *After Trump threats, Michigan capital rescinds calling itself ‘sanctuary city,’* CHI. TRIBUNE, (April 13, 2017), <http://www.chicagotribune.com/news/nationworld/midwest/ct-lansing-michigan-sanctuary-city-20170412-story.html> [https://perma.cc/95KR-FALW].

92. The fiscal and political weakness of some American cities makes this unsurprising but very troublesome. See Michelle Anderson, *Dissolving Cities*, 121 YALE L.J. 1364, 1401–03 (2012) (discussing how municipalities have lost political power, and suggesting that their fiscal problems may even lead to their dissolution).

93. Others, such as those in Chicago; California; County of Santa Clara; San Francisco; Tacoma Park, Maryland; Philadelphia; Boston; Seattle; New York City; and New York State openly embraced immigrant-friendly policies, but most of these were cities located in “blue” states or were blue states themselves.

94. See *infra* Part III.

95. See *supra* note 58.

96. See Jessica Bulman-Pozen & Heather Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009) (discussing potential benefits of state-centered dissent from federal policies and its implications for preemption and anti-commandeering doctrines); see also Matthew C. Porterfield, *State and Local Foreign Policy Initiatives and Free Speech: The First Amendment as an Instrument of Federalism*, 35 STAN. J. INT’L L. 1 (1999); Ernest A. Young, *Welcome to the Dark Side: Liberals Rediscover Federalism in the Wake of the War on Terror*, 69 BROOK. L. REV. 1277, 1288–91, 1295–1301 (2004).

Local officials elsewhere who strongly objected to federal policy took heed. They recognized they had limited ability to promote their local vision of a better approach to immigration law and policy when their states were of a different mind.<sup>97</sup>

Yet in other jurisdictions, local officials refused to cede the legal ground. They continued to challenge the Order, even as narrowly construed. Part II outlines their primary constitutional arguments.

## II. CONSTITUTIONAL OBJECTIONS

Some recalcitrant jurisdictions persisted despite the fear of lost funding, and several asserted their objections in court.<sup>98</sup> Their constitutional arguments against the Order took two forms: structural objections and individual liberty objections. The structural objections focused on the limited nature of federal executive power, separation of powers, and the Tenth Amendment. The individual liberty objections focused on the Bill of Rights and the Fourteenth Amendment.

### A. Sources of Federal Power

Local jurisdictions' first step was to analyze whether the federal government had enumerated, implied, or properly delegated power over the subject matter. Absent a valid source of power, the

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97. Congress also began efforts to fortify the executive branch crackdown. See Casey Tolan, *House Immigration Bill Threatens to Undermine Sanctuary City Policies*, MERCURY NEWS (June 18, 2018), <https://www.mercurynews.com/2018/06/15/house-immigration-bill-threatens-to-undermine-sanctuary-city-policies/> [https://perma.cc/D7NN-GHLB]. As of this writing, the fate of these beefed-up federal immigration enforcement measures is unclear, but even the shadow of them looms large over local officials exploring resistance options, but fearing retaliation.

98. Remarkably, some began turning down lucrative federal funds rather than comply with the mandates. See Simon Romero, *All Over U.S., Local Officials Cancel Deals to Detain Immigrants*, N.Y. TIMES (June 28, 2018) <https://www.nytimes.com/2018/06/28/us/migrant-shelters-ice-contracts-counties.html> (on file with the Columbia Human Rights Law Review). New lawsuits challenging denial of funding also continue to be filed. See Complaint for Declaratory, Injunctive, and Mandamus Relief, *City of New York v. Sessions*, No. 1:18-cv-06474 (S.D.N.Y. July 18, 2018); Complaint for Declaratory and Injunctive Relief, *State of New York v. United States Dep't of Justice*, No. 1:18-cv-06471 (S.D.N.Y. July 18, 2018).

federal government may not dictate policy to state or local officials; it has no general police power.<sup>99</sup>

### 1. Enumerated Power: Immigration and Naturalization

The sanctuary jurisdiction cases involve the immigration and naturalization power of the federal government, which is enumerated<sup>100</sup> and extensive. Indeed, this power has been described as plenary<sup>101</sup> and linked to federal national security power, where federal authority is likewise extensive.<sup>102</sup> The federal government

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99. See *McCulloch v. Maryland*, 17 U.S. 316, 325 (1819).

100. Congress has enumerated power to “establish a . . . uniform Rule of Naturalization.” U.S. CONST., art. I, § 8, cl. 4.

101. The plenary power doctrine as applied to immigration traces back to *Chae Chan Ping v. United States*, 130 U.S. 581 (1889) (known as “The Chinese Exclusion Case”). It has been criticized by many scholars, but persists. See, e.g., Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 124–34 (2002) (finding numerous twentieth century cases relying on *Chae Chan Ping* to support the plenary power doctrine); Adam B. Cox, *Citizenship, Standing, and Immigration Law*, 92 CALIF. L. REV. 373, 378–90 (2004) (finding that the Supreme Court has cited these cases to “reject constitutional challenges to wide-ranging policies.”); Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 858–63 (1987) (same); Berta Esperanza Hernández-Truyol, *Nativism, Terrorism, and Human Rights—The Global Wrongs of Reno v. American-Arab Anti-Discrimination Committee*, 31 COLUM. HUM. RTS. L. REV. 521, 538–46 (2000) (analyzing the way that recent *American-Arab Anti-Discrimination Committee* decision “transports the language and spirit of The Chinese Exclusion Case back from the past.”); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 255–57 (finding these cases are used as justification for the plenary power doctrine); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 550–54 (1990) (same); Margaret H. Taylor, *Detained Aliens Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine*, 22 HASTINGS CONST. L.Q. 1087, 1127–29 (1995) (same). Some have argued the doctrine is on the wane, post-9/11. See Michael Kagan, *Plenary Power is Dead! Long Live Plenary Power!*, 114 MICH. L. REV. FIRST IMPRESSIONS 21 (Sept. 2012); Peter J. Spiro, *Explaining the End of Plenary Power*, 16 GEO. IMMIGR. L.J. 339 (2002).

102. See, e.g., *Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015) (holding the President has exclusive power to recognize foreign governments); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring opinion) (examining the balance of power between the legislative and executive branches); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) (holding the President has plenary power over foreign policy). See generally Curtis

therefore may require that state and local officials comply with valid federal immigration laws, provided they do so in a manner that complies with other constitutional and statutory requirements.

Valid federal immigration laws also may preempt otherwise valid state or local laws that conflict with or otherwise pose an obstacle to enforcement of these federal laws,<sup>103</sup> but only insofar as those laws seek to regulate private conduct and do not commandeer state or local government.<sup>104</sup> Again, to the extent that federal immigration laws advance national security—which often is simply assumed—they receive exceptional deference by the courts.<sup>105</sup>

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Bradley & Jack Goldsmith, *Presidential Power Over International Affairs*, 131 HARV. L. REV. 1201 (2018) (providing a descriptive account of the rise of presidential control over international law and presenting a range of normative claims about the legality and legitimacy of the practice).

103. *Arizona v. United States*, 567 U.S. 387 (2012) (striking down provisions of Arizona law that posed an obstacle to enforcement of federal immigration laws).

104. *Murphy v. National Collegiate Athletic Ass'n*, 138 S. Ct. 1461 (2018).

105. *See Trump v. Hawaii*, 138 S. Ct. 2392, 2409 (2018) (discussing the vast federal power over immigration and the history of judicial deference to executive authority in this realm, particularly when the President relies on statutory authority from Congress). For a discussion of the intersection of these interests and the alleged erosion of the plenary power doctrine in the immigration context, *see* Shawn E. Fields, *The Unreviewable Executive?: National Security and the Limits of Plenary Power*, 84 TENN. L. REV. 731, (2017). *See also* Gabriel J. Chin, *Is There a Plenary Power Doctrine? A Tentative Apology and Prediction For Our Strange But Unexceptional Constitutional Immigration Law*, 14 GEO. IMMIG. L.J. 257, 259 (2000) (arguing that “[i]f a case arises which challenges discrimination on a ground that violates contemporary constitutional norms, the Court will be faced with a new situation.”); Cristina M. Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 571–72 (2008) (arguing that the assumption that federal exclusive power is justified by national security concerns “has become a formal doctrine without strong constitutional justification.”); Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignities*, 35 VA. J. INT’L L. 121, 167 (1994) (asserting that the foreign policy rationales articulated to justify many immigration decisions are invalid). For a call that the plenary doctrine be abandoned in the immigration arena, *see* Ilya Somin, *Why Trump’s Refugee Order is Unconstitutional*, WASH. POST (Feb. 5, 2017), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/02/05/why-trumps-refugee-order-is-unconstitutional-discrimination-on-the-basis-of-religion/?utm\\_term=.1ef799e5e5d4](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/02/05/why-trumps-refugee-order-is-unconstitutional-discrimination-on-the-basis-of-religion/?utm_term=.1ef799e5e5d4) [<https://perma.cc/4QYT-K94Z>]. For an argument that the doctrine is likely to persist, *see* David A. Martin, *Why Immigration’s Plenary Power Doctrine Endures*, 68 OKLA. L. REV. 29, 40–41 (2015) (noting that immigration law is inherently tied to foreign affairs in ways that push against meaningful judicial review). For a discussion of local power to defy even foreign affairs-based assertions of federal power, *see* Jean Galbraith, *Cooperative and*

## 2. Enumerated Power: Spending

Congress may tax and expend funds when doing so promotes “the general welfare.”<sup>106</sup> It enjoys almost unreviewable discretion to determine what ends satisfy this threshold criterion. This is an independent power not tied to the substantive limits of other congressional enumerated powers.<sup>107</sup>

Congress may condition its funding on compliance with stated requirements, which need not track its other enumerated powers. Spending power thus allows Congress to exact concessions from grantees that Congress could not demand directly. Where federal funds go to state or local governments, however, the leading case of *South Dakota v. Dole* requires that conditions on the funds must be unambiguous, germane, non-coercive, and otherwise constitutional.<sup>108</sup>

The Executive Order invoked federal spending power in support of its restrictions on sanctuary jurisdictions, but it did so in a manner that arguably violated these limits. First, the ambiguities of the Order, as written, were profound. It did not clarify the following:

- whether it applied to violations of federal immigration laws other than Section 1373
- which jurisdictions might be defined as “sanctuary” pursuant to DHS Secretary “discretion”
- which federal funds might be suspended.

The conditions stated in the Order thus triggered the first *Dole* limitation on spending power.<sup>109</sup> The clarification of the Order through the AG Memorandum provided greater guidance but arguably was still deficient. Moreover, it imposed new conditions on funding retrospectively, which conditions were not foreseeable when the funding programs were initiated.<sup>110</sup>

Second, the funding conditions were not linked to a specific federal program or mandate. On its face, the Order ostensibly linked

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*Uncooperative Foreign Affairs Federalism*, 130 HARV. L. REV. 2131 (2017) (reviewing MICHAEL J. GLENNON & ROBERT D. SLOANE, FOREIGN AFFAIRS FEDERALISM: THE MYTH OF NATIONAL EXCLUSIVITY (2016)).

106. U.S. CONST. art. I, § 8, cl. 1.

107. *United States v. Butler*, 297 U.S. 1 (1936) (holding the taxing power is independent).

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

109. See *County of Santa Clara v. Trump*, 275 F. Supp. 3d 1196, 1216 (N.D. Cal. 2017) (discussing the due process argument).

110. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 584 (2012).



a potentially huge financial penalty—loss of all federal funding—with compliance with all federal immigration laws.

The government attempted to rescue the Order by promising narrowing and clarifying interpretations. But, as the district court held in *County of Santa Clara*, grant recipients should not be required to depend on the mercy of executive “noblesse oblige.”<sup>111</sup> Moreover, even after DOJ clarifications did narrow the Order’s scope, courts held that these clarifications did not cure the Order’s flaws.<sup>112</sup>

Third, funding conditions may not be unconstitutionally coercive. As written, the Order may have violated this principle given the vast sums it imperiled. Though, again, the ambiguities and limited case law on when a condition on funding is unduly coercive make this difficult to determine.

In earlier decisions on the limits of federal power over states, the Court suggested that conditional spending measures are, by definition, not unduly coercive.<sup>113</sup> After all, the grantees may “just turn down the money” and thus are not commandeered into enforcement of federal law. This implied that there may be no enforceable “anti-coercion” limits on federal funding conditions, despite *Dole*.

In *National Federation of Independent Business v. Sebelius* (*NFIB*), however, seven justices agreed that grants to states are unconstitutionally coercive when they amount to a “gun to the head” and, in practical effect, a bait-and-switch shift in the conditions placed on a pre-existing program that the recipients could not have foreseen.<sup>114</sup> Funding conditions on state grants thus are subject to outer coercion limits. In *NFIB*, states would have lost all Medicaid funds if the states did not comply with the new conditions, and

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111. See *County of Santa Clara*, 275 F. Supp. 3d 1196 (discussing, throughout the opinion, why the Order was a threat); see also *United States v. Stevens*, 559 U.S. 460, 480 (2010) (striking down a federal statute on First Amendment over-breadth grounds despite federal government assurances that it would not be applied in such an unconstitutional manner, and despite a presidential signing statement indicating it would not be so applied, and stating that the parties did not have to rely on “noblesse oblige” of government).

112. See, e.g., *City of Phila. v. Sessions*, 309 F. Supp. 3d 289, 323 (E.D. Pa. June 6, 2018) (holding the DOJ decision to impose narrower conditions on DOJ grants to sanctuary jurisdictions was arbitrary and capricious); *City of Chicago v. Sessions*, 888 F.3d 272, 277 (7th Cir. 2018) (holding that the Order, even as narrowly construed, was unconstitutional).

113. *New York v. United States*, 505 U.S. 144, 167 (1992).

114. *Sebelius*, 567 U.S. at 581.

these funds comprised over ten percent of states' overall budgets. In *Dole*, only 5% of federal highway funding would be lost if states did not comply with the new condition. Not clear is when a condition on federal funding slides from *Dole* (permissible) to *NFIB* (impermissible), given that *NFIB* is the only case thus far to hold that a condition landed over the coercion line.

As applied to local governments, a "gun-to-the-head" coercion objection to funding conditions might succeed where comparably large percentages of their overall budgets are threatened with the loss of federal funds under preexisting programs and where they might claim *NFIB*-style unforeseeability. Most local governments have fewer means than do states of taxing their way around such losses. Urban or rural communities with many low-income residents and few alternative tax-revenue options in particular might be unable to "just turn down the money," even after narrowing constructions of the conditions.<sup>115</sup> Even in fiscally strong municipalities and counties, however, the amount of federal grant money at risk may be large enough to hobble officials' ability to make truly voluntary decisions.

The Executive Order arguably qualified as such an impermissible "gun to the head," per *NFIB*.<sup>116</sup> For example, the

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115. Think, for example, of beleaguered cities like Flint, Michigan, where conditions became so dire that the state placed the city under the thumb of emergency managers. See Toni M. Massaro & Ellen Elizabeth Brooks, *Flint of Outrage*, 93 NOTRE DAME L. REV. 155 (2017). If federal funds directed at relieving their contaminated water crisis were conditioned on compliance with even very onerous conditions, Flint officials likely would have little recourse but to comply. See also Anderson, *Dissolving Cities*, *supra* note 92 (discussing the financial plight of many American cities).

116. According to one report, Justice Department federal grants issued to some "sanctuary jurisdictions" as of March 2016 were quite significant. See Memorandum from Michael E. Horowitz, Inspector Gen. to Karol V. Mason, Assistant Att'y. Gen. for the Office of Justice Programs (Sept. 23, 2016), <https://oig.justice.gov/reports/2016/1607.pdf> [<https://perma.cc/76X5-TSH2>]. Over 60 percent of the funding went to the following ten jurisdictions in the amounts that follow:

Connecticut: \$69,305,444  
California: \$132,409,635  
Orleans Parish, Louisiana: \$4,737,964  
New York, New York: \$60,091,942  
Philadelphia, Pennsylvania: \$16,505,312  
Cook County, Illinois: \$6,018,544  
Chicago, Illinois: \$28,523,222  
Miami-Dade County, Florida: \$10,778,815  
Milwaukee, Wisconsin: \$7,539,572

Mayor of Miami-Dade County bowed immediately to the Executive Order based on the *mere threat* of losing this funding.<sup>117</sup> Other jurisdictions challenged the Order on similar coercion grounds.<sup>118</sup>

Thus, the door opened in *NFIB* is profoundly important. It offers local jurisdictions a plausible means of blocking federal use of purse strings power to bring them to heel if they can match *NFIB*'s strict coercion conditions. This may be so even in matters that involve compelling national interests, and even where the federal government is willing to pay for compliance.<sup>119</sup>

## B. Separation of Power Restraints

In exercising their enumerated powers, the federal government branches also must respect separation of powers principles. Federal power over immigration is no exception. For example, using the power of the purse to advance immigration policies is a congressional, not presidential, prerogative.<sup>120</sup>

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Clark County, Nevada: \$6,257,951

117. See *LaCroix v. Junior*, Nos. F17-376, F17-1770, 2017 WL 837477, at \*2 (Fla. Cir. Ct. 11th Dist. Mar. 3, 2017) (Order on Petition of Writ of Habeas Corpus).

118. See Complaint for Declaratory and Injunctive Relief at 3, *County of Santa Clara v. Trump*, 275 F. Supp. 3d 1196 (N.D. Cal. 2017) (No. 3:17-cv-00574); Complaint for Declaratory and Injunctive Relief at 1, 12, 18, *City & County of San Francisco v. Trump*, 275 F. Supp. 3d 1196 (N.D. Cal. 2017) (No. 4:17-cv-00485); Complaint for Declaratory Relief at 30, *City of Seattle v. Trump*, No. 17-cv-497-RAJ (W.D. Wash. filed Mar. 29, 2017). Note that the court in *City of Seattle* ultimately ruled in favor of the City. Cf. *City of Seattle v. Trump*, No. 17-cv-497-RAJ (W.D. Wash. filed Oct. 24, 2018) (holding that the Executive Order improperly tied funding to compliance with 8 U.S.C. § 1373). The judge relied on the holding by the Court of Appeals for Ninth Circuit in *City and County of San Francisco v. Trump*, 897 F.3d 1225, 1231 (9th Cir. 2018) (striking down the Executive Order on separation of powers grounds and noting that only Congress holds the power of the purse).

119. See *City of Chicago v. Sessions*, 888 F.3d 272, 277 (7th Cir. 2018) (holding that the Order, even as narrowly construed, was unconstitutional). See also *supra* note 85 (discussing procedural history of this case).

120. U.S. CONST. art I, § 9, cl. 7 (“No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.”); U.S. CONST. art I, § 8, cl. 1 (“The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.”). See *City & County of San Francisco v. Trump*, 897 F.3d 1225, 1231 (9th Cir. 2018) (striking down the Order on separation of powers grounds and noting that only Congress holds the power of the purse).

Modern analysis of separation of executive and congressional powers proceeds from Justice Jackson's iconic concurrence in *Youngstown Sheet & Tube v. Sawyer*.<sup>121</sup> Jackson stated that the President has the most power when he acts with congressional authorization. This is "zone one" presidential power. The President's power is at its "lowest ebb" when Congress has forbidden a particular action that does not otherwise lie within exclusive presidential power.<sup>122</sup> This is "zone three" presidential power. In between these poles is a "zone of twilight" of uncertain presidential power.<sup>123</sup>

Executive Order 13768 arguably fell into zone three and violated separation of power limits. First, it added new federal funding penalties for non-compliance with Section 1373 that were not authorized by Congress.<sup>124</sup> This infirmity led the Ninth Circuit Court of Appeals to uphold the lower court decision striking down the Order on separation of powers grounds.<sup>125</sup> Second, although the Order invoked national security interests, it operated domestically.

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121. 343 U.S. 579 (1952).

122. *Id.* at 634–55 (Jackson, J., concurring).

123. *Id.* at 637 (Jackson, J., concurring).

124. Exec. Order 13768, *supra* note 48, at 8801.

125. *City & County of San Francisco v. Trump*, 897 F.3d 1225, 1231 (9th Cir. 2018) (upholding district court order of summary judgment based on separation of powers grounds). One source lists only three federally funded programs, each administered by the Department of Justice, which arguably could be blocked without congressional approval: The Edward Byrne Memorial Justice Assistance Grant Program (JAG); the Community Oriented Policing Services (COPS); and the State Criminal Alien Assistance Program (SCAAP). *See Trump's Threat to Take Federal Funding Away from Sanctuary Cities May Have Started a Fight He Can't Win*, KTLA (Jan. 27, 2017), <http://ktla.com/2017/01/27/trumps-threat-to-take-federal-funding-away-from-sanctuary-cities-may-have-started-fight-he-cant-win/> [https://perma.cc/FBR2-2Y4H]. Thus, it is significant that Sessions's April 21 announcement of possible suspension or denial of funds for any non-compliant jurisdictions identifies Byrne funds in particular. Yet, as noted above, lawsuits filed in response to the new conditions on Byrne funds triggered injunctions on the grounds that the conditions imposed impermissible new conditions on prior funds and violated separation of powers principles. *See City of Chicago v. Sessions*, 888 F.3d 272, 277 (7th Cir. 2018); *City of Phila. v. Sessions*, 309 F.Supp.3d 289 (E.D. Pa. 2018) (holding that Attorney General's grant conditions violated 10th Amendment); *City of Chicago v. Sessions*, 264 F. Supp. 3d 933 (N.D. Ill. 2017). Congress has also limited presidential power to impound appropriated funds without congressional approval and without complying with specific procedures. *See Impoundment Control Act of 1974*, 2 U.S.C.A. 683 (2018). Finally, Congress has refused to broadly condition federal funds or grants on compliance with Section 1373 or other federal immigration laws. *See County of Santa Clara v. Trump*, 250 F. Supp. 3d 497 (N.D. Cal. 2017).

Inherent presidential power over national security is weaker—absent congressional authorization—when the presidential power applies internally.<sup>126</sup>

Finally, the Order’s many ambiguities and sweeping delivery of enforcement discretion to the Secretary of DHS arguably rendered it an unconstitutionally vague and arbitrary exercise of government power. Presidential power to pen executive orders is well established,<sup>127</sup> but the orders must rest on legitimate and articulable executive powers.

The government nonetheless argued that the Order was authorized by Congress under Section 1373 and other immigration laws, and entailed a matter of urgent national security.<sup>128</sup> If the Order was authorized by Section 1373—a point on which the parties strongly disagreed—then it could be viewed as a zone one exercise of power, where executive authority is at its peak. Presidential power also depended on whether Section 1373 itself was constitutional. This too is debatable.

As noted above, Attorney General Sessions attempted to narrow the scope of the Order to bring it into closer compliance with Section 1373.<sup>129</sup> Specifically, he indicated that only particular DOJ funds were imperiled.<sup>130</sup> Some jurisdictions responded that the

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126. This was the situation in *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579 (1952), where the Court held that President Truman lacked power to end a strike during the Korean War despite invoking a national security interest in assuring non-interruption of steel production.

127. See KENNETH MAYER, *WITH THE STROKE OF A PEN: EXECUTIVE ORDERS AND PRESIDENTIAL POWER* (2002) (outlining the history of executive orders). Unlike congressional measures, executive orders operate outside the framework of bicameralism and presentment. This does not render them unlawful; their use dates back to President Washington. But it is an additional reason for courts to regard ones as poorly drafted and punitive as this Order with special constitutional skepticism. The Order was not carefully composed executive “law-making” or “taking care” that federal laws be faithfully executed. As written, it was a dangerously open-ended overreach by the President.

128. See *County of Santa Clara*, 250 F. Supp. 3d 497, 509 (N.D. Cal. 2017).

129. See *supra* note 78 and accompanying text.

130. Byrne JAG Program, FY Local Solicitation. Three conditions to participation in this funding program are as follows:

[1] A State statute, or a State rule, regulation, -policy, or -practice, must be in place that is designed to ensure that, when a State (or State-contracted) correctional facility receives from DHS a formal written request authorized by the Immigration

narrowed conditions too were unconstitutional, because suspension of these funds was not authorized by Congress.<sup>131</sup>

A federal district court judge agreed. He preliminarily enjoined the enforcement of the notice and access conditions to federal funding though let the certification of compliance condition stand.<sup>132</sup> In his view, the certification of compliance with Section 1373 was authorized by Congress and was a valid exercise of congressional power.<sup>133</sup> He concluded that mandatory sharing of information with the federal government does not constitute impermissible commandeering of state or local governments.<sup>134</sup>

This analysis of commandeering principles, though, since has been called into serious question by a recent U.S. Supreme Court decision, *Murphy v. National Collegiate Athletic Association*.<sup>135</sup> We

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and Nationality Act that seeks advance notice of the scheduled release date and time for a particular alien in such facility, then such facility will honor such request and—as early as practicable (see para. 4.B. of this condition)—provide the requested notice to DHS.

[(2)] A State statute, or a State rule, -regulation, -policy, or -practice, must be in place that is designed to ensure that agents of the United States acting under color of federal law in fact are given to access any State (or State-contracted) correctional facility for the purpose of permitting such agents to meet with individuals who are (or are believed by such agents to be) aliens and to inquire as to such individuals' right to be or remain in the United States.

[(3)] The applicant local government must submit the required 'Certification of Compliance with 8 U.S.C. 1373' (executed by the chief legal officer of the local government).

Bureau of Justice Assistance, Byrne JAG Program Grant Award for County of Greenville, Special Conditions ("Byrne Conditions"), ¶¶ 52, 55–56 (2017).

131. See, e.g., *City of Chicago v. Sessions*, 264 F. Supp. 3d 933, 941 (N.D. Ill. 2017) (finding no basis in the Byrne JAG statute for the suspension of funds upon these conditions).

132. *Id.* See *supra* text accompanying notes 85–87. He did not reach the question of whether the notice and access conditions might be unconstitutional even if Congress had authorized them.

133. *Id.*

134. Cf. *Ochoa v. Campbell*, 266 F. Supp. 3d 1237, 1256 (E.D. Wash. 2017) (stressing the distinction between sharing of information and detention).

135. 138 S. Ct. 1461, 1481 (2018) (holding that federal law disallowing state authorization of sports gambling violated the anti-commandeering doctrine by issuing a direct command to the states).

analyze *Murphy* and the commandeering case law more generally in the following section.

### C. Anti-Commandeering

Whether the Order—and in turn, Section 1373—constituted impermissible commandeering of state and local officials is a complex question of structural limits on federal power linked to the Tenth Amendment.<sup>136</sup> Four cases in particular—especially *Murphy*<sup>137</sup>—define the anti-commandeering principles and, taken together, now cast doubt on the constitutionality of aspects of Section 1373.

In *New York v. United States*, the Court held that the “take title” provision of the federal Radioactive Waste Act violated the Constitution because it offered states no meaningful choice between taking title to radioactive waste produced within their borders or enacting laws to control the disposition of the waste according to federal requirements.<sup>138</sup> Had the Congress simply enacted a law that transferred ownership of the material to the states, this would have been unconstitutional. It could not achieve the same unlawful result by giving the states the “option” of enacting legislation, essentially dragooning state legislators into the performance of the inherently sovereign act of legislating.<sup>139</sup>

Congress could have deployed other, theoretically non-coercive options, such as incentivizing regulation with federal funding, advising the states that if they did not regulate the material according to government specifications then the federal government would do so directly, or simply passing laws that regulated the waste directly and preempted any conflicting state or local law regarding the disposal of radioactive waste.<sup>140</sup>

This passage suggests that conditional spending measures like the Executive Order cannot be deemed unduly coercive: recipients may just “turn down the money.” Yet in *NFIB*, discussed above, the Court more recently held that federal coercion can occur

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136. U.S. CONST. amend. X.

137. *Murphy*, 138 S. Ct. at 1475–81 (analyzing the Professional and Amateur Sports Protection Act under anti-commandeering principles, and holding that the law violated those principles).

138. 505 U.S. 144, 176 (1992).

139. *Id.*

140. *Id.* at 167.

when funding conditions are so onerous that they become a “gun to the heads” of state governments.<sup>141</sup> That is, even spending measures may trigger anti-commandeering, Tenth Amendment concerns.

In *Printz v. United States*, the Court applied the anti-commandeering principle to federal laws aimed at state and local executive officials.<sup>142</sup> The Court concluded that interim provisions of the Brady Handgun Violence Protection Act impermissibly demanded that state law enforcement officers assist in administering the federal act.<sup>143</sup> The provisions directed local law enforcement officers to perform background checks on gun buyers and determine, insofar as possible, whether they were eligible for relief from the five day waiting period.<sup>144</sup> The Court in *Printz* also voiced concerns about political accountability. When state and local officials are required to adopt or enforce federal laws, private persons may mistake their federally mandated actions as state and local decisions. Voters thus may wrongly hold state and local officials accountable.<sup>145</sup>

The Court in *Printz* stated as follows:

Congress cannot . . . conscript[] the State’s officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. *It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.*<sup>146</sup>

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141. See *supra* text accompanying notes 32, 114–118.

142. 521 U.S. 898, 935 (1997).

143. *Id.*

144. *Id.* at 903–05

145. *Id.* at 920, 929–30.

146. *Id.* at 935 (emphasis added). For important critiques of *Printz*, see Matthew D. Adler & Seth F. Kreimer, *The New Etiquette of Federalism: New York, Printz, and Yeskey*, 1998 SUP. CT. REV. 71; Evan H. Caminker, *Printz, State Sovereignty and the Limits of Formalism*, 1997 SUP. CT. REV. 199; Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle*, 111 HARV. L. REV. 2180 (1997); Neil S. Siegel, *Commandeering and Its Alternatives: A Federalism Perspective*, 59 VAND. L. REV. 1629 (2006). For thoughtful defenses,



*Printz* thus indicates that the anti-commandeering principle is *absolute and categorical*. No balancing of federal versus state or local interests is involved. As applied to the Executive Order and Section 1373, it should not matter that the federal compliance mandates may be based on compelling national interests, or may trigger national security concerns.

Moreover, neither state nor local officials may waive a Tenth Amendment objection or consent to such a violation.<sup>147</sup> Commandeering not only offends state sovereignty, but also individual liberty.<sup>148</sup> Consequently, local officials can resist federal commandeering moves even if their home states do not object to them.

Yet these ostensibly bright line rules blur quickly in application. A main reason is that the line between involuntary commandeering and voluntary state or local cooperation with federal authorities is elusive.<sup>149</sup> Cooperative federalism is a common and essential feature of efficient law enforcement. Impermissible commandeering thus is not easily distinguished from valid federal preemption, cooperative federalism, and direct regulation of state and local activities. These complexities mount when immigration laws are involved, given the courts' traditional deference to the federal government in this arena.

Still another wrinkle was introduced in *Reno v. Condon*, which stated that if the federal government adopts comprehensive legislation that regulates *both* state and private actors alike, regulates the states only as owners of a data bank, and does not

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see Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813, 901–06 (1998); Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 35, 127–28 (2004).

147. *New York v. United States*, 505 U.S. 144, 182–83 (1992).

148. *See Bond v. United States*, 564 U.S. 211, 221 (2011) (noting that “[f]ederalism secures the freedom of the individual.”).

149. Several thoughtful scholars have noted this problem. *See, e.g.*, Adler & Kreimer, *supra* note 146, at 95–101 (discussing coercion risks in both); Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1054–55 (1995) (noting parallels between commandeering and preemption); Jackson, *supra* note 146, at 2201–02 (remarking on political visibility risks shared by preemption and commandeering); Schwartz, *supra* note 5 (discussing ambiguous line between coercion and cooperation in context of marijuana laws, as well as between preemption and commandeering).

compel the state to adopt or enforce regulations that apply to private parties, then the law does not constitute commandeering of a sovereign.<sup>150</sup> The Court thus rejected a challenge to the Driver's Privacy Protection Act of 1994 (DPPA), which regulated the disclosure of personal information by state DMVs, sometimes prohibiting disclosure, sometimes requiring it. The statute did not commandeer state officials because it did not require state legislatures "to enact any laws or regulations, and it d[id] not require state officials to assist in the enforcement of federal statutes regulating private individuals."<sup>151</sup> Federal statutes that regulate the state's own activities arguably are permissible, whereas ones that seek "to control or influence the manner in which States regulate private parties," are not.<sup>152</sup> The DPPA fell on the former side of that line.<sup>153</sup>

Not clearly resolved in *Condon* was whether the federal government can command the production of information.<sup>154</sup> Nor did the Court's earlier cases resolve this issue.

In *Printz*, for example, the Court noted as follows regarding information sharing:

The Government points to a number of federal statutes enacted within the past few decades that require the participation of state or local officials in implementing federal regulatory schemes. Some of these are connected to federal funding measures, and can perhaps be more accurately described as conditions upon the grant of federal funding than as mandates to the States; others, which require only the provision of information to the Federal Government, do not involve the precise issue before us here, which

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150. *Reno v. Condon*, 528 U.S. 141, 151 (2000).

151. *Id.* at 151.

152. *Id.* at 150 (quoting *South Carolina v. Baker*, 485 U.S. 505, 514–15 (1988)).

153. *Condon* is not easily squared with *Printz*. The Court in *Printz* prevented conscription of state and local executive branch officials in the enforcement of a federal regulation, even though the regulation presumably did not involve these officials' regulation of private parties. Regardless of these potential conflicts, however, federal conscription of state or local law enforcement officials in the task of making arrests or imposing detainers for violations of federal laws clearly violates the *Printz* form of commandeering.

154. See Robert A. Mikos, *Can the States Keep Secrets from the Federal Government?*, 161 U. PA. L. REV. 103, 159–64 (2012).

is the forced participation of the States' executive in the actual administration of a federal program. We of course do not address these or other currently operative enactments that are not before us; it will be time enough to do so if and when their validity is challenged in a proper case.<sup>155</sup>

In her concurring opinion, Justice O'Connor noted that some information provisions would be merely ministerial, such as where the information relates to research ends, or tracking whether the state or local governments themselves are complying with valid federal mandates.<sup>156</sup>

And again, the Court in *Condon* upheld the mandate that states not release confidential information covered by the Act to third parties,<sup>157</sup> but the opinion also made clear that the Act covered *both* government and private parties, and did not require the government to adopt regulations that affected private parties.<sup>158</sup>

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155. *Printz v. United States*, 521 U.S. 898, 917–18 (1997) (emphasis added). In footnote 17, Justice Scalia elaborated on the commandeering of information point:

The dissent observes that 'Congress could require private persons, such as hospital executives or school administrators, to provide arms merchants with relevant information about a prospective purchaser's fitness to own a weapon,' and that 'the burden on police officers [imposed by the Brady Act] would be permissible if a similar burden were also imposed on private parties with access to relevant data.' . . . That is undoubtedly true, but it does not advance the dissent's case. The Brady Act does not merely require CLEOs to report information in their private possession. It requires them to provide information that belongs to the State and is available to them only in their official capacity; and to conduct investigation in their official capacity, by examining databases and records that only state officials have access to. In other words, the suggestion that extension of this statute to private citizens would eliminate the constitutional problem posits the impossible.

*Id.* at 932, n.17.

156. *Id.* at 936 (O'Connor, J., concurring) (citing 42 U.S.C. § 5779(a) (2012)).

157. *Condon*, 528 U.S. at 143.

158. *Id.* at 146.

Thus, whether the federal government can mandate that state and local governments provide information was unclear after *Condon* and *Printz*. This ambiguity obviously matters to the constitutionality of Section 1373, parts of which involve mandatory information sharing. If this congressional mandate is constitutional, then the Executive Order that requires local jurisdictions to share information as a condition of DOJ funding may be constitutional as well.

In 2018, however, the Court clarified anti-commandeering law in ways that likely render Section 1373's information production mandate unconstitutional. In *Murphy*, the Court held that the Professional and Amateur Sports Protection Act ("PASPA") did not preempt state law and constituted unconstitutional commandeering.<sup>159</sup> Writing for the Court, Justice Alito stated that the federal government *may not prohibit state or local legislative bodies from passing particular legislation or adopting particular policies*, and he noted that preemption is an exception to that rule only insofar as Congress has regulated the rights or obligations of *private parties*, not government actors.<sup>160</sup> The PASPA provision at issue could not be construed as legitimate preemption because "there is no way in which this provision can be understood as a regulation of private actors."<sup>161</sup> It also was impermissible commandeering because it required states to regulate themselves in federally directed ways rather than independently. Information sharing mandates directed solely at state and local actors arguably cross the *Murphy* line.

#### D. 8 U.S.C. Section 1373 Commandeering, Post-*Murphy*

The anti-commandeering cases post-*Murphy* thus suggest that even the information sharing aspects of Section 1373 may be unconstitutional. This casts doubt on lower court cases to the

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159. *Murphy v. National Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1466–67 (2018).

160. The opinion made clear that "in order for the PASPA provision to preempt state law," it must: (1) "represent the exercise of a power conferred on Congress by the Constitution; pointing to the Supremacy Clause will not do," and (2) "be best read as [a provision] that regulates private actors," not States. *Id.* at 1479. Thus, "every form of preemption ["express," "conflict," and "field"] is based on federal law that regulates the conduct of private actors, not the States. *Id.* at 1481.

161. *Id.*

contrary, including an influential decision that upheld Section 1373 on a facial challenge.<sup>162</sup>

The Second Circuit Court of Appeals in 1999 ruled that “states do not retain under the Tenth Amendment an untrammelled right to forbid all voluntary cooperation by state or local officials with particular federal programs.”<sup>163</sup> It emphasized that because the case involved a facial challenge, it was not required to locate the line between “invalid federal measures that seek to impress state and local governments into the administration of federal programs, and valid federal measures that prohibit states from compelling passive resistance to particular federal programs.”<sup>164</sup>

This conclusion was defensible when made,<sup>165</sup> but it may be invalid post-*Murphy*. In particular, *Murphy* undercuts the federal government’s argument that Section 1373—on which the Executive Order was premised—is lawful because it imposes no affirmative command, i.e. that it merely prevents state and local governments from promulgating laws that prohibit voluntary information sharing with the federal government by their officials.<sup>166</sup>

Commandeering, post-*Murphy*, is not limited to federal laws that compel state or local government to assist affirmatively in the

162. See *City of New York v. United States*, 179 F.3d 29 (2d Cir. 1999) *cert. denied*, 528 U.S. 1115 (2000). See also *City of Chicago v. Sessions*, 264 F. Supp. 3d 933 (N.D. Ill. 2017) (concluding Section 1373 itself is constitutional, pre-*Murphy*).

163. *City of New York*, 179 F.3d at 35.

164. *Id.*

165. But see Spencer E. Amdur, *The Right of Refusal: Immigration Enforcement and the New Cooperative Federalism*, 35 YALE L. & POL’Y REV. 87, 134 (2016) (describing Section 1373 as a “double negative” prohibition). Amdur notes that:

[t]his double negative is not the same as a single positive—it does not *mandate* any communication; it simply preserves the ability to communicate. The few scholars and lower courts to consider these statutes have generally concluded that they comply with the Tenth Amendment, though their reasoning has varied. After [*National Federation of Independent Business v. Sebelius*], this inducement strategy may be on thin ice.

*Id.*

166. *Murphy v. National Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1465 (2018) (rejecting the activity/inactivity distinction as an “empty” one and treating federal laws that compel a state to enact legislation and federal laws that prohibit a state from enacting legislation the same for anti-commandeering purposes).

implementation of a federal regulation. Commandeering also occurs when federal law prohibits adoption of state and local laws to govern state and local conduct.<sup>167</sup> *Murphy* bars the federal government from using its preemption powers to regulate state and local officials.<sup>168</sup>

This should doom parts of Section 1373 that violate these principles.<sup>169</sup> Specifically, the provision of Section 1373 that prohibits state and local governments from regulating the conduct of their own employees—rather than private parties—is commandeering under the logic of *Murphy*.<sup>170</sup> It also is not a permissible form of federal preemption.<sup>171</sup>

Post-*Murphy*, the administration's interpretation of its executive power based on these sections of Section 1373 therefore faces brisk doctrinal headwinds. The Justice Department Office of Inspector General (OIG) issued a report in May of 2016 in which it read the phrase “in any way restrict” in Section 1373 to deny state and local government power to pass laws that *affect* federal information gathering, not just ones that authorize direct interference with that federal function.<sup>172</sup> It noted that grant

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167. *See id.* at 1465.

168. *Id.* at 1481 (“In sum, regardless of the language sometimes used by Congress and this Court, every form of preemption is based on a federal law that regulates the conduct of private actors, not the States.”).

169. *Id.* Pre-*Murphy*, in *City of Chicago v. Sessions*, 264 F. Supp. 3d 933 (N.D. Ill. 2017), the court concluded that the information-sharing provision of Section 1373 did not violate the Constitution because only affirmative demands on states were improper. Post-*Murphy*, the court held that the information-sharing requirements of Section 1373 likely were unconstitutional for two reasons: the language in prior cases that suggests there may be an information-sharing exception was dicta, and Section 1373 actually demands more than mere information sharing; it prohibits certain rule-making by state policymakers. As such, it crosses the commandeering line as clarified in *Murphy*. *See City of Chicago v. Sessions*, 321 F.Supp.3d 855 (N.D. Ill. 2018).

170. *See* 138 S. Ct. at 1465.

171. *Id.* at 1480 (emphasis added) (noting that *Condon* did not “up[h]old the constitutionality of a federal statute that commanded state legislatures to enact or refrain from enacting state law.”). The Court in *Murphy* did acknowledge it had upheld a provision explicitly prohibiting a “State or political subdivision” from “enact[ing] or enforc[ing]” laws relating to air carrier rates. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992) (upholding the Airline Deregulation Act as preempting state guidelines for airfare advertising). *Morales*, however, related to express preemption. Express preemption principles are not applicable to Section 1373.

172. Michael E. Horowitz, *Department of Justice Referral of Allegations of Potential Violations of 8 U.S.C. § 1373 by Grant Recipients*, U.S. DEP'T OF JUST., 1,

recipients may be violating Section 1373 in various sanctuary jurisdictions, and stated that a violation would threaten these funds. In footnote nine, the report further stated as follows:

A reasonable reading of Section 1373, based on its “in any way restrict” language, would be that it applies not only to the situation where a local law or policy specifically prohibits or restricts an employee from providing citizenship or immigration status information to ICE, **but also where the actions of local officials result in prohibitions or restrictions on employees providing such information to ICE.**<sup>173</sup>

This is likely improper. Telling local officials what laws they may not pass to prevent *their own employees* from producing information likely crosses the line into hijacking their regulatory sovereignty, post-*Murphy*. If local officials can refuse to *provide* information on non-commandeering grounds, then they should be allowed to command all within their employ to act accordingly. Nor does preemption save this provision. The preemption exception to the anti-commandeering principle only applies when Congress regulates the rights or obligations of private parties, not state or local government actors.<sup>174</sup>

In sum, *Murphy* clarifies that local governments may resist federal mandates that compel information sharing where they constitute commandeering, which renders Section 1373 unconstitutional; indeed, several lower courts have so indicated.<sup>175</sup>

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3 (May 31, 2016), <https://culberson.house.gov/uploadedfiles/doj.lig.sanctuarycities.memo.public.pdf> [<https://perma.cc/2TRG-WCX4>].

173. *Id.* at 9. (emphasis added).

174. *See Murphy*, 138 S. Ct. at 1465.

175. At least three federal courts have addressed this issue and concluded that the constitutionality of Section 1373 is suspect. *See City of Chicago v. Sessions*, No. 17C-5720, 2018 WL 3608564, at \*1, \*16 (N.D. Ill. July 27, 2018) (entering a permanent injunction against suspension of Byrne funds and stating that Section 1373 constitutes unlawful commandeering, post-*Murphy*); *United States v. California*, 314 F. Supp. 3d 1077, 1101 (E.D. Ca. 2018) (noting that the constitutionality of Section 1373 was “highly suspect,” post-*Murphy*, but finding it unnecessary to resolve the question and observing it is complicated by the dicta in *Printz* regarding permissible information-sharing); *City of Phila. v. Sessions*, 309 F. Supp. 3d 289, 296–97 (E.D. Pa. 2018) (concluding Section 1373 was unconstitutional, post-*Murphy*, but finding the City substantially complied with

*Printz* and *New York* stated that the anti-commandeering mandate is absolute and unwaivable. *NFIB* added that a law may violate federalism principles even where the government tries to induce cooperation with cash.<sup>176</sup> State and local consent, therefore, must be truly voluntary, even when national stakes are high, even when federal power over the subject matter is plenary, and even when the spending power is deployed.<sup>177</sup>

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the statutory conditions). And most recently, a federal district court ruled that Section 1373 is unconstitutional, post-*Murphy*. *New York v. Dep't of Justice*, No. 1:18-cv-06471-2018 (ER), 2018 WL 6257693 (S.D.N.Y. Nov. 30, 2018). See generally *Printz v. United States*, 521 U.S. 898, 917–18 (1997) (noting that statutes that “require only the provision of information to the Federal Government . . . do not involve the precise issue before us here, which is the forced participation of the States’ executives in the actual administration of a federal program.”).

176. Indeed, even if local officials do cooperate, this may arguably constitute unconstitutional commandeering. The Court in *New York v. United States*, 505 U.S. 144, 182–83 (1992) made clear that states may not consent to Tenth Amendment violations. The Court has also held that individuals harmed by commandeering laws may have standing to object to them; the liberty interest weighing against commandeering is not the states’ alone. See *Bond v. United States*, 564 U.S. 211, 221 (2011) (noting that “[f]ederalism secures the freedom of the individual.”) The Court has also suggested, however, that this prohibition on waivers of Tenth Amendment violations does not apply when local or state officials voluntarily cooperate with the federal government. *Printz*, 521 U.S. at 936 (O’Connor, J., concurring); see also *Lomont v. O’Neill*, 285 F.3d 9, 14 (D.C. Cir. 2002) (“Nothing in *Printz* forbids cooperation between state and federal governments.”). This likely means that officials may not consent where the law is *facially* commandeering, but they can arguably agree to identical mandates where the law gives them a genuine and upfront choice to comply. Thus, they are not *waiving* a Tenth Amendment objection; there is none. Section 1373 provides no such choice.

177. Most decisions that have upheld Section 1373 predate recent Supreme Court developments that may have made facial challenges easier to assert in cases involving fundamental rights. See Toni M. Massaro, *Chilling Rights*, 88 U. COLO. L. REV. 33 (2017) (discussing easing of limits on facial challenges to laws that violate fundamental rights). A caveat: in *Condon*, the Court stated that the fact that a federal law imposes costs on state or local governments, or prompts them to adopt regulations to assist in compliance with a valid federal law, does *not* make the law impermissible commandeering. 528 U.S. 141, 142 (2000); cf. *City of New York v. United States*, 179 F.3d 29, 31 (2nd Cir. 1999) (holding, pre-*Condon* and pre-*Murphy*, that the federal government did not unlawfully commandeer local officials where federal law nullified an order that forbade City employees from engaging in voluntary cooperation with federal immigration officials with respect to non-confidential information). In other words, not all local rule-making decisions may be insulated from federal encouragement or discouragement. Say, for example, that the federal government wished to prevent



Four caveats are in order. First, as we already have noted, the line between voluntary cooperation and commandeering is hazy.<sup>178</sup> When government engages in thinly veiled threats—as opposed to direct coercion—the anti-commandeering principles arguably still apply. However, they may be overcome by re-characterizing the federal command as a mere request to which the state has chosen to accede. Also, some cooperation between federal, state, and local officials in immigration enforcement occurs regularly, even in sanctuary jurisdictions.<sup>179</sup> This may prompt some courts to view any coercion problems as chimerical.

The questions raised by sanctuary jurisdictions thus relate to *how far* the government may go in eliciting local cooperation before the cooperation will be seen as involuntary. Sanctuary jurisdictions might argue that when a federal law teeters on the edge of commandeering, federal norms that drive commandeering jurisprudence should prompt courts to construe the law narrowly to give state and local governments proper breathing room.<sup>180</sup> The

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state or local interference with federal equal education regulations. Could it prohibit adoption of regulations with this purpose and effect, as well as other conduct that restricted federal enforcement efforts? Also, state and local rule-making that sanctions open defiance of federal policy or poses a significant obstacle to its implementation should be unenforceable. This follows from the Supremacy Clause and principles of preemption. U.S. CONST. art. VI, § 2. State and local government in general may not take action that frustrates federal laws and regulatory schemes in this manner. *See, e.g.*, *Barnett Bank of Marion County v. Nelson*, 517 U.S. 25, 31 (1996) (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). But *Murphy* casts doubt on some means of achieving these preemption objectives.

178. *See supra* note 149 and accompanying text.

179. *See* Lena Graber & Nikki Marquez, *Searching for Sanctuary: An Analysis of America's Counties & Their Voluntary Assistance with Deportations*, IMMIGRANT LEGAL RESOURCE CENTER (Dec. 2016), [https://www.ilrc.org/sites/default/files/resources/sanctuary\\_report\\_final\\_1-min.pdf](https://www.ilrc.org/sites/default/files/resources/sanctuary_report_final_1-min.pdf) [<https://perma.cc/Z74G-SJWK>] (describing a range of cooperation policies across jurisdictions); *see also* Adam B. Cox & Thomas J. Miles, *Policing Immigration*, 80 U. CHI. L. REV. 87, 93 (2013) (discussing cooperation pursuant to the Bush Administration's Secure Communities Program and its successor, the Priorities Enforcement Program); *see also* Christina M. Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567 (2008) (discussing local cooperation in the form of 287(g) agreements and through other means).

180. Indeed, prior to *Murphy*, sanctuary jurisdictions challenging the Order asserted that they were in compliance with 1373 by arguing that the plain language of the statute was far narrower in scope than implied by the Order. *See, e.g.*, *City of Phila. v. Sessions*, 309 F. Supp. 3d 289, 297 (E.D. Pa. 2018) (challenging U.S. Attorney General Sessions' imposition of immigration-related

federal government may respond that the local governments are complying voluntarily, and that the law serves compelling national interests.

A second important caveat relates to pure information sharing mandates versus other forms of state and local cooperation. The Court's earlier cases suggest that mandatory information sharing may be an exception to the general anti-commandeering rules. As a result, it is very difficult to make firm predictions about the application of *Murphy* to immigration laws that compel or request information. When confronted directly with the question, the Court may bend the logic of *Murphy* to permit such mandates as anti-commandeering exceptions.

Third, where a state chooses to comply with federal immigration laws but a local jurisdiction resists, this implicates state level preemption powers. That is, the mandate may no longer be analyzed as coming from federal law, but from state law. If the state mandate is not preempted by federal law or is not otherwise unlawful, it may be within the state police power and thus evade anti-commandeering principles altogether. We discuss the intricacies of how the state preemption power may affect sanctuary jurisdictions in Parts III and IV.

Finally, the Court often defers to the federal government in immigration matters.<sup>181</sup> Faced with the consequences of state or local defiance of federal requests for cooperation, the Court may back-pedal on *Murphy* in order to carve out ample space for federal enforcement in this arena.

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conditions on the receipt of federal funding); see also *Guidance Regarding Compliance with 8 U.S.C. Section 1373*, Office of Justice Programs (July 7, 2016), <https://www.bja.gov/funding/8uscsection1373.pdf> [<https://perma.cc/SQ9A-FUDD>]. Section 1373 addresses only the exchange of information regarding immigration status among federal, state, and local agencies and officials, and it is not a proper basis for withholding funds from jurisdictions that refuse to cooperate with federal authorities in other ways. For this reason, the Seventh Circuit concluded that the access and notice conditions imposed by Attorney General Sessions on jurisdictions as a condition of receipt of DOJ funds exceeded the authority delegated by Congress under Section 1373. *City of Chicago v. Sessions*, 888 F.3d 272, 293 (7th Cir. 2018); see also *City of Phila.*, 309 F. Supp. 3d at 320–21 (summarizing the Seventh Circuit's *City of Chicago* decision).

181. See U.S. CONST. art. I, § 8, cl. 1.

### E. Other Constitutional Rights

In addition to the foregoing structural limits on federal power, there are important individual liberties limits. Federal law may not compel or induce state or local officials to violate the constitutional liberties of persons covered by the Bill of Rights or the Fourteenth Amendment, which include non-citizens.<sup>182</sup>

In the immigration arena, however, significant caveats to this general statement apply. Again, judicial review of federal power in immigration matters is extremely deferential to the government.<sup>183</sup> Moreover, the constitutional rights of non-citizens—particularly individuals who are seeking entry into the United States rather than persons who are already present in the country or who have entered illegally—are often mere shadows of the constitutional rights possessed by persons lawfully residing in the United States.<sup>184</sup>

For example, non-citizens who are found within 100 miles of the border and who entered the United States within the last fourteen days may be subject to expedited removal without a hearing.<sup>185</sup> Usually, an immigration official is supposed to review the

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182. See, e.g., *Plyler v. Doe*, 457 U.S. 202 (1982) (plurality opinion) (striking down state law denying access to public education to undocumented children on equal protection grounds).

183. See, e.g., *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (finding that the president lawfully exercised his discretion in suspending the entry of aliens into the United States); *Kleindienst v. Mandel*, 408 U.S. 753 (1972) (finding that the U.S. Attorney General has the authority to deny entry into the United States).

184. Judicial deference to federal power in the arena of immigration was on vivid display in *Hawaii*, 138 S. Ct. 2392, which upheld an executive proclamation that banned entry to immigrants from selected jurisdictions on the ground that their countries did not provide the United States with adequate information relevant to immigration. That the ban applied to persons seeking entry, as opposed to persons already present in the United States, mattered to the Justices. See George Rutherglen, *The Rights of Aliens Under the United States Constitution: At the Border and Beyond*, VA. PUB. L. & LEGAL THEORY RES. PAPER, No. 2017-14, Apr. 2017, <https://ssrn.com/abstract=2951114> [<https://perma.cc/LR3F-TFSR>].

185. Illegal Immigration and Immigrant Responsibility Act of 1996, Pub. L. 104-208 (1996), 110 Stat. 3009 § 302. The Act was significantly expanded thereafter. Designating Aliens For Expedited Removal, 69 Fed. Reg. 48877-01 (Aug. 11, 2004). Prior to the Trump administration, this law was applied primarily against persons with histories of criminal or immigration offenses or who were traveling through Mexico or Canada from other countries. See AM. IMMIGRATION COUNCIL, A PRIMER ON EXPEDITED REMOVALS (Feb. 2017), [https://www.americanimmigrationcouncil.org/sites/default/files/research/a\\_primer\\_on\\_expedited\\_removal.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/a_primer_on_expedited_removal.pdf) [<https://perma.cc/X744-PQL6>].

claims of non-citizens seeking asylum in order to determine whether the applicant has a credible fear of persecution.<sup>186</sup> Non-citizens are also supposed to have the opportunity to appeal an adverse determination to an immigration judge.<sup>187</sup> Recently, however, the Trump administration has interpreted these rules narrowly. As a result, many are concerned that some asylum seekers will be removed without an opportunity to have their claims reviewed and/or without a chance to appeal the immigration official's determination.<sup>188</sup>

Undocumented persons who fall outside the scope of the expedited removal process and who are ordered to leave the United States are entitled to a hearing before an immigration judge, overseen by the Department of Justice. They are entitled to counsel at their own expense and can present evidence and testimony. They also have a right of appeal to the Board of Immigration Appeals, as well as under the Department of Justice. If they lose on appeal, they may challenge the deportation ruling in federal court.<sup>189</sup> Thus, there are procedural constraints on the immigration process.<sup>190</sup> However,

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186. Specifically:

To be eligible for asylum or refugee status, the alien must establish in part that he or she was persecuted or has a well-founded fear of persecution on account of one of the protected grounds, is unable or unwilling to avail himself or herself of the protection of his or her country of nationality (or, if stateless, country of last habitual residence), and does not fall within one of the grounds for ineligibility. Second, if eligibility is established, the USCIS officer must then consider whether or not to exercise discretion to grant the application.

Policy Memorandum from U.S. Dep't Homeland Sec. on Guidance for Processing Reasonable Fear, Credible Fear, Asylum, and Refugee Claims in Accordance with *Matter of A-B-*, PM-602-0162 (July 11, 2018), <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-18-PM-602-0162-USCIS-Memorandum-Matter-of-A-B.pdf> [<https://perma.cc/X5AD-J5ZE>].

187. *Id.*

188. Will Weissert & Emily Schmall, '*Credible Fear*' for U.S. Asylum Harder to Prove Under Trump, CHIC. TRIBUNE (July 16, 2018), <http://www.chicagotribune.com/news/nationworld/ct-credible-fear-asylum-20180716-story.html> (on file with the Columbia Human Rights Law Review).

189. *Id.*

190. *See, e.g.*, *Sessions v. Dimaya*, 138 S.Ct. 1204, 1215 (2018) (striking down the term "crime of violence" on vagueness grounds in immigration removal proceedings context); *Zadvydas v. Davis*, 533 U.S. 678, 679 (2001) (noting that

these constraints depart from the fuller due process rights that apply in other contexts, even though similarly powerful private interests are at stake. Moreover, the right to counsel for indigent non-citizens may be more theoretical than real.

The enforcement of immigration laws against undocumented persons, though, often intersects with the rights of lawful residents in ways that may limit regulatory power more significantly. Laws that inspire racial or ethnic profiling, for example, can adversely affect lawful residents who are minorities. Laws aimed at aliens without documentation also may adversely affect resident aliens lawfully within the United States. Families of aliens, religious and other institutions such as universities, counties, and municipalities, too, have an enforceable interest in the fair treatment of non-citizens. In these and other ways, immigration enforcement thus has spillover effects that may implicate fuller-blown constitutional rights.

The focus here is on enforcement of constitutional rights by local governments. The cases display the power of what we have termed “constitutional cities.” We survey, although do not exhaust, possible constitutional defenses to preemption of local government decision-making power. Each issue obviously requires deeper examination—analysis that we encourage—and other possible defenses could be added to the list. The point for purposes of this discussion is that the Constitution curbs federal and even state demands on local jurisdictions, and local governments have standing to assert some of these constitutional objections. Given the exceptional power of the federal government in the realm of immigration, as well as some states’ active cooperation in the enforcement of immigration laws, these cases are particularly telling examples of how local governments retain vestiges of autonomy when they seek to enforce constitutional principles. We turn now to specific constitutional defenses that have been raised in cases addressing the authority of sanctuary jurisdictions.

### 1. Fourth Amendment

Key to the Executive Order was its requirement that, as a condition of federal funding, local jurisdictions must participate in the

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once a non-citizen enters the United States, the Due Process Clause protects him or her, because it applies to “persons” regardless of whether their presence is lawful, unlawful, temporary, or permanent).

enforcement of immigration detainers.<sup>191</sup> The goal was to encourage local cooperation with federal immigration law enforcement officials. In addition to raising commandeering concerns, though, local enforcement of the immigration detainers may trigger Fourth Amendment issues. Understanding this potential objection requires a dip into the weeds of immigration law, which law remains in flux as the Trump administration continues to adjust its policies, and as the sanctuary cases wend their way through the lower courts. It also entails an examination of how state officials may enforce federal criminal laws, an understanding of the warrant requirement, and an appreciation of the difference between civil and criminal offenses as it relates to state and local enforcement of federal laws.

#### a. Immigration Detainers

At present, an “immigration detainer” is a request by ICE to a federal, state, or local law enforcement agency that the law enforcement agency provide notice of release or maintain custody of an individual, based on an alleged violation of immigration law.<sup>192</sup> This is not a command; it is only a request.<sup>193</sup> These detainer requests are not issued by judges or judicial officers, instead, in some cases they are issued by ICE officers themselves.<sup>194</sup>

#### b. Unlawful Presence and Criminal versus Civil Liability

Being in the United States unlawfully currently is not, by itself, a criminal offense.<sup>195</sup> For example, a person who originally lawfully entered may overstay a visa. This is not a crime. Federal law provides that any alien who:

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191. Exec. Order 13768, *supra* note 48, at 8801.

192. Detainer Provisions Under Section 287(d)(3) of the Act, 8 C.F.R. § 287.7 (2011).

193. *Id.*

194. See Christopher N. Lasch, *Enforcing the Limits of the Executive’s Authority to Issue Immigration Detainers*, 35 WM. MITCHELL L. REV. 164, 164 (2008) (describing detainer procedures and arguing that the practice may exceed statutory authority).

195. *Arizona v. United States*, 567 U.S. 387, 402 (2012). A significant caveat is that pending congressional measures aimed at sanctuary jurisdictions may alter this.

(1) enters or attempts to enter the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or (3) attempts to enter or obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact, shall, for the first commission of any such offense, be fined under title 18 or imprisoned not more than 6 months, or both, and, for a subsequent commission of any such offense, be fined under title 18, or imprisoned not more than 2 years, or both.<sup>196</sup>

The past practice of the government has been not to seek criminal enforcement of these violations in routine cases, though the Trump administration has announced a “zero-tolerance” policy.<sup>197</sup>

### c. Removal Proceedings

Historically, removal proceedings to deport non-citizens from the United States largely have been treated as a civil, not criminal, process. As such, local law enforcement officers—who enforce state and local laws, and in particular criminal laws—do not have the authority to arrest or detain non-citizens for civil violations of federal immigration law or to hold them post-release pursuant to an ICE detainer.

The Trump administration, however, adopted a change in policy to step up criminal prosecutions of immigration violations in general; in June of 2018, the administration sought to detain and

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196. 8 U.S.C. § 1325(a) (2018).

197. The status of the “zero-tolerance” policy is, as of this writing, unclear. Its invocation to separate immigrant parents from their children has made it both visible and extremely controversial. See Ron Nixon, Erica L. Green & Michael D. Shear, *Border Officials Suspend Handing Over Migrant Families to Prosecutors*, N.Y. TIMES (June 25, 2018), <https://www.nytimes.com/2018/06/25/us/politics/border-officials-suspend-handing-over-migrant-families-to-prosecutors.html> (on file with the Columbia Human Rights Law Review). For an exceptionally helpful overview of the legal rights of immigrant parents and their children under current law, see David Bier, *Defenses of Separating Children from Parents—And Why They’re Wrong*, CATO AT LIBERTY, CATO INSTITUTE (June 28, 2018), <https://www.cato.org/blog/defenses-separating-children-parents-why-theyre-wrong> [https://perma.cc/NKS9-G454].

prosecute all parents crossing the border illegally with their children until public outcry prompted a reversal of this draconian step.<sup>198</sup>

#### d. Warrants and the Fourth Amendment

The ICE detainer request itself is not a formal warrant. When a person is suspected of being removable, the federal government may issue a Notice to Appear. This document does not authorize an arrest; it merely provides information about “the proceedings, including the time and date of the removal hearing . . . If an alien fails to appear, an *in absentia* order may direct removal.”<sup>199</sup>

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198. See Liam Brennan, *Sessions is Criminalizing Immigration Violations. That Upends Centuries of History*, WASH. POST, (May 10, 2018), [https://wapo.st/2wy0reu?tid=ss\\_mail&utm\\_term=.b8d7422c3c41](https://wapo.st/2wy0reu?tid=ss_mail&utm_term=.b8d7422c3c41) [<https://perma.cc/R34F-5UWZ>]; Maria Sacchetti, *Top Homeland Security Officials Urge Criminal Prosecution of Parents Crossing Border with Children*, WASH. POST, (Apr. 26, 2018), [https://wapo.st/2r3GKfp?tid=ss\\_mail&utm\\_term=.3e4c21656739](https://wapo.st/2r3GKfp?tid=ss_mail&utm_term=.3e4c21656739) [<https://perma.cc/4VQE-86H5>]. Also, the federal government has implemented Operation Streamline, which funnels men and women who have illegally crossed into the U.S. directly into the federal criminal court system, rather than the civil immigration system. For an excellent overview of the “criminalization” of immigration enforcement, see Christopher N. Lasch et al., *Understanding “Sanctuary Cities,”* 58 B.C. L. REV. 1703, 1703 (2018).

199. *Arizona*, 567 U.S. at 407. Under current procedures, ICE automatically receives an electronic version of jail booking requests when a person is booked in state or local law enforcement custody. ICE may conduct an initial investigation to determine if the person is undocumented or has overstayed his or her visa. It then may send a “detainer,” which requests that the law enforcement agency maintain custody of an individual until ICE arrives.

ICE may issue detainers based solely on booking, even when no criminal conviction results from the arrest. If, for example, an undocumented person is arrested on probable cause for an underlying state criminal offense, then he or she will make an initial appearance before a state court judge. If the judge releases the person on his or her own recognizance, and if there is an ICE detainer in place, then the state or local official will notify ICE that it has two hours to come and take the person into ICE custody. ICE typically does so in most cases. See *Immigration Detainers: An Overview*, Am. Immig. Council (Mar. 21, 2017), <https://www.americanimmigrationcouncil.org/research/immigration-detainers-overview> [<https://perma.cc/AM8Z-JJS8>]. Importantly, however, this federal request to hold an individual longer is likely not a valid warrant because ICE detainers are issued only after review of evidence by ICE, CBP, or other law enforcement officers, but no judge is involved. See *Miranda-Olivares v. Clackamas County*, No. 3:12-cv-02317-ST., 2014 WL 1414305, at \*1 (D. Or. Apr. 11, 2014). The most recent statement of federal detainer policy follows this pattern and is likely vulnerable to Fourth Amendment objections. See U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT POLICY NO. 10074.2, ISSUANCE OF IMMIGRATION DETAINERS BY ICE IMMIGRATION OFFICERS (March 24, 2017), <https://www.ice.gov>



Thus, conditioning federal funding on local cooperation that veers into detainers of individuals may violate the Fourth Amendment.<sup>200</sup> If local law enforcement officers choose to comply with an ICE detainer request and hold an individual beyond his or her normal release date, this arguably constitutes a new “seizure” under the Fourth Amendment.<sup>201</sup> That new seizure likely must meet all requirements of the Fourth Amendment, including a showing of probable cause that the individual committed a criminal offense.<sup>202</sup>

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/sites/default/files/documents/Document/2017/10074-2.pdf [https://perma.cc/JY7K-RUP6].

200. For a discussion of the potential constitutional problems of compliance with immigration detainers, see Michael Kagan, *Immigration Law’s Looming Fourth Amendment Problem*, 104 GEO. L. J. 125, 125 (2015).

201. A recent Arizona district court ruling on a motion for preliminary injunction, however, calls into question whether prolonging a state law arrest pursuant to an ICE detainer request constitutes an additional seizure, as argued by proponents of the Fourth Amendment. In its order denying injunctive relief, the court stated that it “sees at least some meaningful difference between a unilateral arrest by a sheriff’s officer and continued detention on the basis of a federal warrant.” *Tenorio-Serrano v. Driscoll*, No. CV-18-08075-PCT-DGC (BSB), 2018 WL 3329661, at \*1 (D. Ariz. July 6, 2018).

202. See *Illinois v. Caballes*, 543 U.S. 405, 420 (2005) (noting that a legitimate seizure “can become unlawful if it is prolonged beyond the time reasonably required” to achieve its purpose). See also *Dunaway v. New York*, 442 U.S. 200, 213 (1979) (noting that “Fourth Amendment seizures are ‘reasonable’ only if based on probable cause”); *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975) (holding that “the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest”). Cf. *Lunn v. Commonwealth*, 78 N.E.3d 1143, 1160 (Mass. 2017) (per curiam) (holding that local law enforcement lacked power to detain pursuant to ICE detainers as a matter of state law). Arrests for civil offenses, though, are not per se precluded by the Fourth Amendment, at least for offenses where there is a historical tradition of arrest authority. See, e.g., *United States v. Phillips*, 834 F.3d 1176, 1181 (11th Cir. 2016) (concluding that a “writ of bodily attachment” for civil contempt could be treated as an arrest warrant supported by probable cause within the meaning of the Fourth Amendment). But see Orin Kerr, *Does the Fourth Amendment Allow Arrest Warrants for Civil Offenses?*, WASH. POST: VOLOKH CONSPIRACY (Aug. 24, 2016), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/08/24/does-the-fourth-amendment-allow-arrest-warrants-for-civil-offenses> [https://perma.cc/HSE3-ARQN] (arguing against extending civil arrest authority to warrantless arrests for civil offenses not substantially similar to criminal offenses). Accordingly, several courts have held that it is a violation of the Fourth Amendment for local jurisdictions to hold suspected or actual removable aliens subject to civil detainer requests, because those requests are often not supported by an individualized determination of probable cause that a crime has been committed. See *Morales v. Chadbourne*, 793 F.3d 208, 215–17 (1st Cir. 2015); *Miranda-Olivares*, 2014 WL 1414305, at \*9–11; *Santos v.*

Moreover, state and local entities that cooperate voluntarily with federal detainer requests may face liability for constitutional violations if their officials interpret these agreements as permission to detain immigrants without a warrant.<sup>203</sup>

#### e. Application to the Order

Perhaps because the executive branch recognized the limits of its constitutional authority, the Executive Order limited sanctions for failure to honor detainers to “name and shame” sanctions. Section 9(b) states as follows:

To better inform the public regarding the public safety threats associated with sanctuary jurisdictions, the Secretary shall . . . on a weekly basis, make public a comprehensive list of criminal actions committed by aliens and any jurisdiction that ignored or otherwise failed to honor any detainers with respect to such aliens.<sup>204</sup>

The Executive Order tried to induce compliance that it could not demand directly. It authorized periodic public reports on jurisdictions that have released immigrants into the community who later committed crimes or who have serious criminal records.<sup>205</sup>

As noted above, however, some jurisdictions complied willingly. Several entered into Section 287(g) agreements, which are agreements by state and local law enforcement to affirmatively cooperate with federal immigration officials in enforcing federal law where no such duty otherwise exists.<sup>206</sup> The federal government claims that properly trained 287(g) officers are authorized to question aliens as to their immigration status and removability, serve warrants for immigration violations, and issue immigration detainers for state and local detention facilities to hold aliens for a short time

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Frederick Cty. Bd. of Comm’rs, 725 F.3d 451, 464–65 (4th Cir. 2013). *But see Tenorio-Serrano*, 2018 WL 3329661, at \*1 (indicating that ICE detainer warrants may be properly based on probable cause of a civil offense).

203. ICE does not reimburse local jurisdictions for the costs of detaining individuals in response to a civil detainer request. *See* 8 C.F.R. § 287.7(e) (2011).

204. Exec. Order 13768, *supra* note 48, at 8801.

205. *Id.*

206. Authority to enter into such agreements is found in 8 U.S.C. § 1357(g). *See Lasch*, *supra* note 194 (Part II (c) describing 287(g) program).

after completing their sentences.<sup>207</sup> Section 287(g) officers may prepare charging documents for ICE agents' signature that are used in immigration courts, in processing aliens for removal, and in transporting aliens to ICE detention facilities. Many officers are also authorized to arrest aliens attempting to unlawfully enter the United States as well as aliens already unlawfully present.<sup>208</sup>

But constitutional problems remain even with voluntary compliance. First, as we have seen, the line between true cooperation and indirect coercion can be blurry. For instance, federal efforts to publicly denounce non-compliant jurisdictions undermine the claim that even formal entry into a 287(g) agreement is truly voluntary.<sup>209</sup>

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207. Lasch, *supra* note 194.

208. *Id.*

209. Pursuant to the Executive Order, then-Secretary Kelly demanded that the ICE Director publicize weekly the names of non-federal jurisdictions that release aliens from their custody, along with the citizenship and immigration status of the alien, the arrest, charge or conviction for which the alien was in custody, the date on which an ICE detainer or similar request for custody was served on the jurisdiction by ICE, an explanation of why the detainer request was not honored, and all arrests, charges, or convictions occurring after the alien's release from custody of that jurisdiction. See Memorandum from John Kelly to Kevin McAleenan, Thomas D. Homan, Lori Scialaba, Joseph B. Maher, Dimple Shah, Chip Fulghum concerning, "Enforcement of the Immigration Law to Serve the National Interest" (Feb. 20, 2017), AILA Doc. No. 17021830, <https://www.aila.org/infonet/leaked-dhs-memo-implementing-president-trump> [<https://perma.cc/JF6N-UNN6>]. See also Summary and Analysis of DHS Memorandum, Enforcement of the Immigration Laws to Serve the National Interest, AILA Doc. No. 17022000 (April 25, 2017), <https://www.aila.org/infonet/analysis-of-dhs-memorandum-on-interior-enforcement>, <https://www.dhs.gov/news/2017/02/21/secretary-kelly-issues-implementation-memoranda-border-security-and-interior> [<https://perma.cc/FJ3X-3WRW>]. Several reports were issued before the reporting was suspended due to issues about accuracy and methodology. See Akilah Johnson, *We Know ICE Asks Local Police To Make Arrests: But We Don't Know A lot More Because Data Is Hidden*, BOSTON GLOBE (July 5, 2018), <https://www.bostonglobe.com/metro/2018/07/04/debate-rages-over-immigration-detainers-data-their-efficacy-sparse/MV9DG5Bn9RHmFDN5UivcCP/story.html> (on file with the Columbia Human Rights Law Review). The first such report was issued on March 20, 2017. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, *Declined Detainer Outcome Report*, (2017), <https://www.ice.gov/declined-detainer-outcome-report> [<https://perma.cc/AQ77-3JV6>]. In addition, the DOJ has publicized efforts to extract assurances from targeted jurisdictions that they comply with federal law. The threat of such public reports may be a form of federal government shaming of sanctuary jurisdictions designed to trigger political fallout that may prompt local officials to enter into 287(g) agreements. *Id.* This shaming may be evidence of clear purpose to induce "consent" to a 287(g) agreement. In *NFIB*, the Chief Justice discussed the coercion factor after observing that the termination of Medicaid funding threat "serve[d] no

Second, the voluntary programs require that local law enforcement officers first receive appropriate federal training and then function under the supervision of sworn ICE officers. ICE provides state and local law enforcement officers with the training and authorization to identify, process, and—when appropriate—detain immigration offenders they encounter during their regular, daily law enforcement activity. If untrained officials are allowed to function in these federally sanctioned capacities, this would fall outside the scope of the program and congressional intent. Third, voluntary cooperation does not insulate local governments from constitutional violations.<sup>210</sup>

What is critical here is that even where 287(g) agreements exist, local law officials must respect constitutional law. If they detain an undocumented person beyond the time allowed for the underlying state or local offense, they may violate the Fourth Amendment, for which violation they may be liable.<sup>211</sup> Indeed, some federal courts have held that honoring ICE civil detainer requests will expose local law enforcement agencies to liability under the Fourth Amendment.<sup>212</sup>

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purpose other than to force unwilling States to sign up for the dramatic expansion.” *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 580 (2012). Consequently, the ICE shaming measures may be a suspect form of inducement.

210. Other problems have arisen under these voluntary cooperation programs. Many jurisdictions may interpret the program merely to instruct their local law enforcement officers to advise ICE of suspected undocumented persons detected during the course of other, regular duties. Interview with Former Pima County Sheriff Dep’t Official (April 28, 2017). But other jurisdictions may use the designation more aggressively. The most vivid example of this is Maricopa County, Arizona, which fervently pursued enforcement of federal immigration laws under Sheriff Joe Arpaio and triggered a Department of Justice investigation that concluded that the Sheriff’s Office had engaged in a pattern and practice of constitutional violations, including racial profiling. *See* U.S. DEP’T OF JUSTICE, RE: UNITED STATES’ INVESTIGATION OF THE MARICOPA COUNTY SHERIFF’S OFFICE 2 (2011), [https://www.justice.gov/sites/default/files/crt/legacy/2011/12/15/mcso\\_findletter\\_12-15-11.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2011/12/15/mcso_findletter_12-15-11.pdf) [<https://perma.cc/M2S6-9WY6>].

211. A class action alleging that the Fourth Amendment is violated by voluntary local enforcement of ICE detainer requests was filed in late July of 2018. Complaint at 2, *C.F.C. v. Miami-Dade County* (No. 1:18-cv-22956) (S.D. Fla. July 20, 2018).

212. *See, e.g.*, *Morales v. Chadbourne*, 793 F.3d 208, 223 (1st Cir. 2015) (affirming denial of qualified immunity on Fourth Amendment claim related to immigration detainees); *Miranda-Olivares v. Clackamas County*, No. 3:12-cv-02317-ST, 2014 WL 1414305, at \*11–12 (D. Ore. 2014) (finding liability against county for Fourth Amendment claim).

Counterarguments against this conclusion nevertheless prevailed in two recent cases. In *Roy v. County of Los Angeles*, a federal district court judge concluded that the form signed by an ICE employee—labeled a “warrant”—that accompanies ICE detainees may suffice for a civil immigration offense arrest.<sup>213</sup> According to this judge, the requirement that a detached and neutral magistrate issue a warrant applied only to criminal findings of probable cause.<sup>214</sup> The *Roy* case has placed the law regarding Fourth Amendment viability of ICE detainees in flux.

Likewise, the Fifth Circuit Court of Appeals recently upheld a state law that mandated compliance with ICE detainees against a facial challenge.<sup>215</sup> The court reasoned as follows:

It is undisputed that *federal* immigration officers may seize aliens based on an administrative warrant attesting to probable cause of removability. It is also evident that current ICE policy requires the Form I-247A to be accompanied by one of two such administrative warrants. On the form, an ICE officer certifies that probable cause of removability exists. Thus, an ICE-detainer request evidences probable cause of removability in every instance.

Under the collective-knowledge doctrine, moreover, the ICE officer’s knowledge may be imputed to local officials even when those officials are unaware of the specific facts that establish probable cause of removability. . . . Compliance with an ICE detainer thus constitutes a paradigmatic instance of the collective-knowledge doctrine, where the detainer request itself provides the required “communication between the arresting officer and an officer who has knowledge of all the necessary facts.”<sup>216</sup>

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213. Nos. CV 12-09012 BRO (FFMx), CV 13-04416-BRO (FFMx), 2017 WL 2559616, at \*7, \*10 (C.D. Cal. 2017).

214. *Id.* at \*10. A district court judge in Arizona sympathized with this argument, albeit without deciding the issue. See *Tenorio-Serrano v. Driscoll*, No. CV-18-08075-PCT-DGC (BSB), 2018 WL 3329661 (D. Ariz. 2018) (indicating that ICE detainer warrants properly may be based on probable cause of a civil offense).

215. *City of El Cenizo v. Texas*, 890 F.3d 164, 190 (5th Cir. 2018).

216. *Id.* at 187 (emphasis in original) (citing *Abel v. United States*, 362 U.S. 217, 233–34 (1960); *United States v. Zuniga*, 860 F.3d 276, 283 (5th Cir. 2017); and *United States v. Ibarra*, 493 F.3d 526, 530 (5th Cir. 2007)).

Until a definitive ruling emerges, the Fourth Amendment argument against ICE “warrants” and detainers based on these “warrants” remains debatable.<sup>217</sup> This may prompt local officials facing threats of defunding or state preemption measures to ignore the Fourth Amendment concerns and risk judicial challenges. More to the point here, however, is that local jurisdictions have standing to raise these Fourth Amendment objections, and courts in some cases have ruled in their favor.

## 2. Procedural Due Process

As discussed in the context of *Dole*,<sup>218</sup> the Order was extremely vague. Grant recipients had neither a clue as to what conduct would be deemed to violate the Order, nor what consequences would flow from a violation.

This implicated the *Dole* requirement that grant conditions be unambiguous. But it also raised a concern that Justice Kennedy has identified, one that lies beyond traditional due process yet is no less critical and enforceable: liberty may be compromised if federal powers are exercised in a way that is not subject to “traditional constitutional constraints.”<sup>219</sup> In *County of Santa Clara*, the district court judge concluded that the plaintiffs had established that they were likely to prevail on the merits of their claim. This ruling included the plaintiffs’ assertion that their due process rights were violated by

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217. In *Abel*, the Court did not reach the question of whether federal immigration detainers violated the Fourth Amendment because the party raising it failed to do so earlier in the litigation. *Abel v. United States*, 362 U.S. 217, 230–34 (1960). The Court noted, however, that administrative immigration arrests had the “sanction of time.” *Id.* at 230. Federal immigration enforcement has always incorporated detention. *See, e.g., Wong Wing v. United States*, 163 U.S. 228, 235 (1896) (“We think it clear that detention, or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens would be valid.”). *See also Fong Yue Ting v. United States*, 149 U.S. 698, 711 (1893) (“The right to exclude or to expel all aliens . . . [is] an inherent and inalienable right of every sovereign and independent nation . . . .”); *Kleindienst v. Mandel*, 408 U.S. 753, 769–70 (1972) (“[P]lenary congressional power to make policies and rules for exclusion of aliens has long been firmly established.”); David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U. L. REV. 583, 584 (2017) (describing the Court’s “special immigration doctrines that depart from mainstream constitutional norms”).

218. *See supra* text accompanying notes 108–19.

219. *Clinton v. New York*, 524 U.S. 417, 451 (1998) (Kennedy, J., concurring).

the Executive Order.<sup>220</sup> The local government was thus permitted to assert this due process defense against the federal government.

This point is critical because the question of whether local governments have due process rights vis-à-vis federal or state governments is extremely murky.<sup>221</sup> Due process normally refers to the relationship between the government and a private person or entity, though courts have recognized due process rights of local governments against the federal government in certain contexts.<sup>222</sup>

Building on these sanctuary cases and on *Dole*, if the proper notice condition—as one of the valid conditions on federal funding—requires a minimum level of transparency and clarity, then cities and counties should be able to assert a due process right against the federal government on behalf of themselves. The line-drawing will be difficult in some contexts, but the minimum requirements must surely be violated when local jurisdictions have to guess at the scope of the mandate, when they cannot tell who is actually bound, or when they are unsure about what funds are at risk. Government grant recipients may also argue that vagueness problems compel them to violate the due process rights of others.<sup>223</sup>

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220. *County of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 540 (N.D. Cal. 2017) (enjoining Order nationwide). *But see* *City of San Francisco v. Trump*, 897 F.3d 1225, 1234, 1245 (9th Cir. 2018) (upholding summary judgment but remanding on issue of nationwide scope of injunction);

221. *See generally* Michael A. Lawrence, *Do “Creatures of the State” Have Constitutional Rights?: Standing for Municipalities to Assert Procedural Due Process Claims Against the State*, 47 VILL. L. REV. 93 (2002) (arguing that municipal corporations have limited procedural due process rights vis-à-vis their states).

222. States and municipalities can assert a Takings Clause claim against the federal government. *See* *United States v. 50 Acres of Land*, 469 U.S. 24, 31 (1984) (stating that “it is most reasonable to construe the reference to ‘private property’ in the Takings Clause of the Fifth Amendment as encompassing the property of state and local governments when it is condemned by the United States.”). Also, the federal district court in *County of Santa Clara* concluded the grant recipients did have due process rights vis-à-vis the federal government. *County of Santa Clara*, 250 F. Supp. 3d at 536 (discussing due process argument).

223. They may draw from the recent powerful statement of the Court that “the most exacting vagueness standard should apply in removal cases.” *Sessions v. Dimaya*, 138 S. Ct. 1204, 1209 (2018) (striking down term “crime of violence” on vagueness grounds); *see also* *Johnson v. United States*, 135 S. Ct. 2551, 2557 (2015) (striking down term “violent felony” on vagueness ground). This statement makes clear the Court’s view that procedural due process should not be watered-down in the immigration context, at least not for those present in the United States (as opposed to those seeking entry). Even asylum seekers may have

In severe cases, ambiguity and attendant over-breadth problems may undermine the federal government's claim that an act is a legitimate exercise of government power. For example, immigrants affected by the Order may have no means of determining what actions the government might take pursuant to it. At a minimum, these individuals should be entitled to proper notice of the charges brought against them and to due process rights when officials seek to detain them or otherwise abridge their liberties.<sup>224</sup>

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important procedural due process rights, however limited. *See* *Damus v. Nielsen*, 313 F. Supp. 3d 317, 343 (D.D.C. 2018) (entering preliminary injunction blocking blanket detention of asylum seekers and requiring individualized assessments); Miriam Jordan, *Court Blocks Trump Administration From Blanket Detention of Asylum Seekers*, N.Y. TIMES (July 2, 2018), <https://www.nytimes.com/2018/07/02/us/asylum-court-ruling-detention.html> (on file with the Columbia Human Rights Law Review). *But see* *Jennings v. Rodriguez*, 138 S. Ct. 830, 834, 851 (2018) (upholding federal statutes that permit indefinite civil detention of non-citizens without a bond hearing, but not reaching the question of whether these laws violate the Constitution).

224. *See, e.g.,* *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001) (asserting that Congress's broad power to create immigration law is subject to constitutional limitations, and that "Congress must choose 'a constitutionally permissible means of implementing' that power") (quoting *INS v. Chadha*, 462 U.S. 919, 941–42 (1983)). Whether and when the constitutional rights of non-citizens in immigration proceedings fully parallel those of citizens in other contexts remains contested and is a serious matter of fundamental liberty. *See* *Kerry v. Din*, 135 S. Ct. 2128, 2128–29 (2015) (U.S. citizen brought action alleging violation of due process rights, arguing government refused to explain reasons for denying her non-citizen husband's visa application; Court held that, assuming she had procedural due process right to an explanation, that right was satisfied by explanation given by the consular officer); *Kleindienst v. Mandel*, 408 U.S. 753 (1972) (Attorney General refused to grant temporary nonimmigrant visa to Belgian journalist who had been invited by U.S. citizens to participate in academic conferences in the U.S.; the Court held where Attorney General denies waiver for a legitimate and bona fide reason, "courts will not look behind his decision or weigh it against the First Amendment interests of those who would personally communicate with the alien"); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 209, 215 (1953) (Lower court had held that to "continue an alien's confinement beyond that moment when deportation becomes patently impossible is to deprive him of his liberty," but Supreme Court reversed, stating, "we do not think that respondent's continued exclusion deprives him of any statutory or constitutional right"). *See also* Matthew J. Lindsay, *Symposium on Kerry v. Din: Due Process and Plenary Power*, IMMIG. PROF. BLOG (Jun. 22, 2015), <http://lawprofessors.typepad.com/immigration/2015/06/symposium-on-kerry-v-din-due-process-and-plenary-power-by-matthew-j-lindsay.html> [<https://perma.cc/D9B X-LS76>] (discussing *Kerry v. Din*'s impact on the vitality of federal plenary power). Regardless of this debate over the scope of due process, some local



Local governments should be allowed to invoke these due process and government legitimacy concerns in refusing to implement federal laws. Both arguments should be available even for use against a state, if a state government demanded that local governments must cooperate in enforcing the offending federal laws.

### 3. Rationality

The federal government is subject to constitutional and, in many cases, statutory baseline requirements of rationality. As applied to executive conduct,<sup>225</sup> actions that utterly lack an adequate

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jurisdictions have stepped up to assure it is fully satisfied. For example, the New York Attorney General issued the following Guidelines:

[The LEA] shall not delay bail and/or release from custody upon posting of bail solely because of (i) an individual's immigration or citizenship status, (ii) a civil immigration warrant, or (iii) an ICE or CBP request—for the purposes of immigration enforcement—for notification about, transfer of, detention of, or interview or interrogation of that individual.

(b) Upon receipt of an ICE or CBP detainer, transfer, notification, interview or interrogation request, [the LEA] shall provide a copy of that request to the individual named therein and inform the individual whether [the LEA] will comply with the request before communicating its response to the requesting agency.

(c) Individuals in the custody of [the LEA] shall be subject to the same booking, processing, release, and transfer procedures, policies, and practices of that agency, regardless of actual or suspected citizenship or immigration status.

*See* N.Y. OFFICE OF THE ATTY. GEN., GUIDANCE CONCERNING LOCAL AUTHORITY PARTICIPATION IN IMMIGRATION ENFORCEMENT AND MODEL SANCTUARY PROVISIONS (Jan. 2017), [https://ag.ny.gov/sites/default/files/guidance.concerning.local\\_authority.participation.in\\_immigration.enforcement.1.19.17.pdf](https://ag.ny.gov/sites/default/files/guidance.concerning.local_authority.participation.in_immigration.enforcement.1.19.17.pdf) [<https://perma.cc/CTM4-FASY>]. The Maryland Attorney General has issued similar guidance. *See* MARYLAND OFFICE OF THE ATTY GEN., GUIDANCE MEMORANDUM, LOCAL ENFORCEMENT OF FEDERAL IMMIGRATION LAW: LEGAL GUIDANCE FOR MARYLAND STATE AND LOCAL LAW ENFORCEMENT OFFICIALS (May 2017), [http://www.marylandattorneygeneral.gov/Reports/Immigration\\_Law\\_Guidance.pdf](http://www.marylandattorneygeneral.gov/Reports/Immigration_Law_Guidance.pdf) [<https://perma.cc/DB4R-KTAQ>].

<sup>225.</sup> *See* Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 NYU L. REV. 461, 499–500 (2003) (“[The] separation of powers was intended not merely to require Congress and the President to act independently of one another, but also to act in a nonarbitrary,

factual basis or that “shock the conscience” may be deemed arbitrary and capricious, and thus may be found to be unconstitutional exercises of executive power. Admittedly, however, this is a minimal limitation at best and is easily overcome.<sup>226</sup>

Courts are especially loath to second-guess the rationality of presidential acts on separation of powers grounds.<sup>227</sup> Yet increasing concerns about excesses of executive power and false statements made in support of executive actions may prompt courts to overcome that resistance. Concerned scholars have begun to examine more deeply the contours and textual provenance of a rational basis requirement as applied to the President. For example, Shalev Roisman has argued that the “Take Care Clause” of the Constitution expressly demands that executive power be “faithfully” exercised, which may impose an implicit rationality.<sup>228</sup> Such scholarship may make its way to litigants and judges faced with exceptionally weak or infirm justifications for executive action.

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public-regarding manner.”); Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1533–34 (1991) (“[T]he doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power.”) (quoting *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting)).

226. *United States v. Salerno*, 481 U.S. 739, 746 (1987) (“[S]ubstantive due process’ prevents the government from engaging in conduct that ‘shocks the conscience’”) (quoting *Rochin v. California*, 342 U.S. 165, 172 (1952)); *Whitley v. Albers*, 475 U.S. 312, 327 (1986) (quoting *Rochin*, 342 U.S. at 172–73 with approval); *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (“[T]he Due Process Clause, like its forbear in the Magna Carta, was ‘intended to secure the individual from the arbitrary exercise of the powers of government.’” (citation omitted) (quoting *Hurtado v. California*, 110 U.S. 516, 527 (1884))). *See generally* Jane R. Bambauer & Toni M. Massaro, *Outrageous and Irrational*, 100 MINN. L. REV. 281 (2015) (describing the “outrageousness test” and the “irrationality test,” identifying the tests’ potential to manage certain types of particularly egregious government conduct, though noting the tests are difficult to flunk). *Cf.* *Rosales-Mireles v. United States*, 138 S. Ct. 1897 (2018) (holding that “plain errors” in sentencing should be corrected by appellate courts even when they do not “shock the conscience”).

227. *See, e.g., Trump v. Hawaii*, 138 S. Ct. 2392, 2420 (2018) (upholding a travel ban based on national security grounds despite arguments that foreign nationals from the affected countries did not contribute to the number of terrorist acts in the United States and discussing limited judicial review of presidential actions in sensitive matters).

228. Shalev Roisman, *Presidential Factfinding*, 72 VAND. L. REV. (forthcoming 2019) (arguing that “when Presidents lie or act arbitrarily they violate their duty to find facts honestly and with reasonable inquiry.”).

Federal administrative law already prohibits agencies from taking arbitrary action.<sup>229</sup> In such cases, judicial deference to government action can be overcome. Indeed, a federal district court judge recently concluded that the DOJ conditions on grants to so-called sanctuary cities were arbitrary and capricious.<sup>230</sup> This is a difficult test to flunk, the court recognized, but the government did so in this case.<sup>231</sup>

As to legislative conduct, the rational basis floor of substantive due process applies.<sup>232</sup> That is, lawmakers may not act utterly without reason or with animus toward a powerless group.<sup>233</sup> This is arguably so even when no fundamental right is at stake.

Judicial deference to lawmakers under this due process floor test is extremely strong,<sup>234</sup> but it should not be insurmountable. Here again, the admonition of Justice Kennedy about maintaining “traditional constitutional constraints” is relevant.<sup>235</sup> Indeed, when basic constitutional norms are cast aside by the legislative and executive branches of government, courts may have little choice but to assert this due process emergency defense. Local governments thus may draw on both procedural and substantive due process cases in challenging irrational government mandates, though they should expect resistance to their claims by judges wary of overstepping their power to second guess the wisdom of government policy.

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229. Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2012). This section provides that courts may invalidate any agency action found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” Courts can overturn agency rules if they find the underlying rationale or factual assertions to be unreasonable.

230. *City of Phila. v. Sessions*, 309 F. Supp. 3d 289, 325 (E.D. Pa. 2018). Also, a district court judge recently ruled that the plaintiffs had alleged sufficient facts to support the claim that the government’s alleged practice of separating migrant parents and their children met the high bar of the “shocks the conscience” test. *Ms. L. v. U.S. Immigration & Customs Enf’t*, 302 F. Supp. 3d 1149, 1167 (S.D. Cal. 2018) (granting in part and denying in part defendants’ motion to dismiss).

231. See *City of Phila.*, 309 F. Supp. 3d at 322–23.

232. See *Bambauer & Massaro*, *supra* note 226 (discussing the rational basis floor at length). See generally, Katie R. Eyer, *The Canon of Rational Basis Review*, 93 NOTRE DAME L. REV. 1317 (2018) (analyzing the importance of rational basis review in the modern era).

233. *Bambauer & Massaro*, *supra* note 226, at 297–306.

234. *Id.* For a recent discussion of the rational basis test that emphasizes how difficult it is to flunk, see *Trump v. Hawaii*, 138 S. Ct. 2392, 2420–23 (2018).

235. *Clinton v. City of New York*, 524 U.S. 417, 450–51 (1998) (Kennedy, J., concurring).

#### 4. Equal Protection

The equal protection clause protects persons, not merely citizens,<sup>236</sup> and has been held to protect undocumented persons from irrational and intentional discrimination.<sup>237</sup> Local law enforcement thus may not engage in unconstitutional racial or ethnic profiling, though the line between unlawful profiling and legitimate police practices is disputed.<sup>238</sup>

Federal law requires that any agency that is a direct or indirect recipient of federal funds must ensure meaningful or equal access to its services or benefits, regardless of a person's ability to speak English.<sup>239</sup> Federal law also protects disabled persons from the

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236. "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV.

237. *Plyler v. Doe*, 457 U.S. 202, 220 (1982) (holding states cannot deny foreign born children who were not "legally admitted" access to free public education).

238. The scope of what constitutes unlawful racial profiling in immigration is contested. See Kevin R. Johnson, *The Case Against Race Profiling in Immigration Enforcement*, 78 WASH. U. L.Q. 676, 693 (2000). Johnson notes that:

[i]n *United States v. Brignoni-Ponce*, the Supreme Court applied the Fourth Amendment reasonable suspicion standard used in police investigatory stops and held that Border Patrol officers on roving patrols may stop persons 'only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country.' In so doing, the Court found that the stop in question violated the Fourth Amendment because Border Patrol officers relied *exclusively* on 'the apparent Mexican ancestry' of the occupants in the automobile. The Court further stated, however, that '[t]he likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor, but standing alone it does not justify stopping all Mexican Americans to ask if they are aliens.'

*Id.* (citing and quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975)).

239. See 42 U.S.C. § 2000d (1964); see also *Lau v. Nichols*, 414 U.S. 563, 566 (1974) (holding that a San Francisco school system violated federal law by discriminating against Chinese students, many of whom spoke little English, by

adverse impact of government enforcement methods, which could be invoked in immigration matters.<sup>240</sup>

To the extent that the Executive Order encourages the foregoing prohibited discriminatory conduct, this Order's implementation could violate federal constitutional and statutory law. Note, however, that the Order facially does not mandate such conduct. The concern would be that overzealous or incautious enforcement of the Order could create these consequences, and thereby subject local officials to potential liability. In cases where evidence of such effects can be mustered, local governments may invoke that evidence in their efforts to resist enforcement of federal or state mandates.

Still another equal protection limit on federal regulation aimed at suppressing local authority may be derived from *Romer v. Evans*.<sup>241</sup> *Romer* involved Colorado Amendment 2, which banned the adoption of local legislation protecting LGBT persons from discrimination. The Court held that by preventing local gay-friendly majorities from adopting anti-discrimination legislation, the Amendment failed to withstand even rational basis scrutiny.<sup>242</sup>

The Court stated that the Amendment “withdraws from homosexuals, but no others, specific legal protections from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies.”<sup>243</sup> The Amendment applied only to a small, traditionally disfavored group and did so with legislation that was both overbroad and under-inclusive. Moreover, it required a constitutional amendment to allow local governments to adopt gay-friendly anti-discrimination measures. Only LGBTQ persons had to resort to state political processes to seek the same kinds of protections afforded to other non-suspect groups, “no matter how local

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not providing adequate English courses while receiving federal financial assistance).

240. See Americans With Disabilities Act of 1990, 42 U.S.C. § 12101 (2009).

241. *Romer v. Evans*, 517 U.S. 620 (1996). For critiques of *Romer*, see Lino A. Graglia, *Romer v. Evans: The People Foiled Again by the Constitution*, 68 U. COLO. L. REV. 409 (1997); John C. Jefferies, Jr. & Daryl J. Levinson, *The Non-Retrogression Principle in Constitutional Law*, 86 CALIF. L. REV. 1211, 1226–31 (1998); Louis Michael Seidman, *Romer's Radicalism: The Unexpected Revival of Warren Court Activism*, 1996 SUP. CT. REV. 67; Mark Strasser, *From Colorado to Alaska by Way of Cincinnati: On Romer, Equality Foundation, and the Constitutionality of Referenda*, 36 HOUS. L. REV. 1193 (1999).

242. *Romer*, 517 U.S. at 634–35.

243. *Id.* at 627.

or discrete the harm, no matter how public and widespread the injury.”<sup>244</sup>

Richard Schragger has suggested that *Romer* may imply “that there may be circumstances under which the Constitution requires that localities be free from state preemption. Because the Equal Protection Clause bars the state from acting to override local decisions under certain instances, localities may enjoy a form of constitutionally-mandated ‘Home Rule’ that is incidental to the protection of constitutional rights.”<sup>245</sup> By Home Rule, Schragger means local laws that provide for greater city self-rule power to determine local policy than non-Home Rule cities enjoy.

On the other hand, Schragger adds, *Romer* may not imply anything about constitutional Home Rule protection. As he notes:

[c]onventional constitutional doctrine has always treated localities as instrumentalities of their states, without independent constitutional status. To the extent that *Romer* departs from this background assumption, it only holds that in those states where local governments are generally permitted to adopt anti-discrimination legislation, the state cannot take away local authority to adopt such legislation for gays and lesbians.<sup>246</sup>

Thus, *Romer* may protect local governments “only when the state has already allowed the locality to regulate.”<sup>247</sup>

A more expansive interpretation of *Romer* has been suggested by Judge David Barron.<sup>248</sup> He argues that greater local political autonomy may help to vindicate substantive constitutional

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244. *Id.* at 631.

245. Richard C. Schragger, *Cities as Constitutional Actors: The Case of Same-Sex Marriage*, 22 J.L. POL. 147, 172 (2005) [hereinafter Schragger, *Cities as Constitutional Actors*]. See also *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 483 (1982) (striking down Washington state constitutional initiative that prevented local school districts from adopting voluntary desegregation plans involving intra-district busing on the grounds that it restructured the political process by taking authority away from local school districts to remedy racial imbalances and by “lodging decision-making authority over the question at a new and remote level of government”).

246. Schragger, *Cities as Constitutional Actors*, *supra* note 245, at 173.

247. *Id.*

248. David Barron, *The Promise of Cooley's City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 586–94 (1999).

norms, in particular those “constitutional rights [that are] partially dependent upon local political action.”<sup>249</sup> Barron thus reads *Romer* as a step towards judicial recognition of localities as politically and constitutionally salient institutions. As such, *Romer* respects the role of local governments in advancing and protecting constitutional norms more generally, at least when recognition of local autonomy “would serve some independent substantive constitutional value.”<sup>250</sup> In other words, local governments may defend against state and federal preemption of local measures where the measures advance constitutional rights.

*Romer* does not expressly so hold, of course, and the argument that it violates equal protection to require a group to prevail in a state-wide political process versus secure protection at a local level is tenuous.<sup>251</sup> Nevertheless, the case involved a successful local government effort to expand individual rights despite conflicting state laws.

This matters for all of the constitutional arguments outlined in the foregoing sections and for the normative claim we set forth in Part IV that local governments should possess meaningful and enforceable rights to resist some assertions of federal and state power based on structural and liberty constitutional norms.<sup>252</sup> The

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249. *Id.* at 603.

250. *Id.* at 607. See Part IV, *infra*, which advances a cognate claim about the role of local governments and their right to defy state and federal measures that preempt their policymaking autonomy where local governments seek to advance constitutional norms.

251. The political-process doctrine is derived from *Hunter v. Erickson*, 393 U.S. 385 (1969), and *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982). These cases prohibit subjecting legislation benefiting racial minorities to a more burdensome political process than that imposed on other legislation. In *Schuette v. Coal. to Defend Affirmative Action*, 572 U.S. 291 (2014) (plurality opinion), the Supreme Court upheld a state constitutional amendment that, *inter alia*, prohibited public universities from using race as a factor in the admissions process. A three-Justice plurality abandoned the political-process doctrine and introduced a new test—whether the law “had the serious risk, if not purpose, of causing specific injuries on account of race.” *Id.* at 305. In his concurring opinion, Justice Scalia expressly rejected the notion that it matters whether decision-making power is lodged at a higher level of government. Striking down laws on that basis invaded the “near-limitless sovereignty of each State to design its governing structure as it sees fit.” *Id.* at 327 (Scalia, J., concurring).

252. Again, all assertions of limits on government power in the immigration context must overcome the government tendency to invoke national security as a rationale for the stricter immigration policies. Finding a proper path between the Scylla of abandonment of judicial review and the Charybdis of undue intrusion

spirit of *Romer*, if not the holding itself, suggests that where local governments urge constitutional arguments that seek to advance liberty, their power may be construed more generously even as against state preemptive moves.<sup>253</sup>

### 5. Freedom of Speech

Federal and state mandates may not abridge expressive rights and, in particular, individuals' abilities to communicate dissent and speak up on urgent matters of public concern.<sup>254</sup> This constitutional requirement is uncontroversial as applied to government mandates that restrict private expression, but egregious efforts to silence persons acting in official capacities or even the local government itself arguably may cross the free speech line as well. In many respects, the free speech interest in allowing room for local government expression, and its link to individual liberty and meaningful democratic engagement among government institutions, is the heart of our call for "constitutional city" rights.<sup>255</sup> As with other constitutional arguments, of course, a threshold difficulty with a claim asserted by the local government itself lies in establishing that a government entity as such, rather than a private individual or a public official, may assert a free speech claim against another government actor. No case holds so directly, and the United States Supreme Court cast doubt on the premise in *Ysursa v. Pocatello Educ. Association*.<sup>256</sup>

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into sensitive matters of federal prerogative is obviously complex. See JAMES E. PFANDER, *CONSTITUTIONAL TORTS AND THE WAR ON TERROR* at xviii (2017) ("[T]he federal courts should focus on the narrow . . . task of evaluating the legality of official conduct. Once that understanding of the judicial role has been accepted, existing law furnishes ample tools with which to reach the merits of misconduct claims . . . . One way to accomplish such a return to the merits would be to allow litigants to limit themselves to a claim for nominal damages. Such nominal claims would enable the court to reach the constitutional issue in a world of legal uncertainty without confronting the officer with a threat of personal liability and triggering the qualified immunity defense.").

253. See *infra* Parts III and IV.

254. See, e.g., *Pickering v. Board of Educ.*, 391 U.S. 563, 574 (1968) (discussing the right of a public employee to speak on matters of public concern).

255. See *infra* Part IV.

256. *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 362–64 (2009). See Richard Briffault, *The Challenge of the New Preemption*, 70 *STAN. L. REV.* 1995 (2018).



*Ysursa* distinguished a state law that applies to private corporations—which triggers free speech scrutiny—from one that applies to a municipal corporation. The Court noted that a:

political subdivision . . . is a subordinate unit of government created by the State to carry out delegated governmental functions. A private corporation enjoys constitutional protections, but a political subdivision, ‘created by a state for the better ordering of government, *has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator.*’<sup>257</sup>

This suggests that a local government could not assert a free speech claim against the state. As applied to claims against the federal government, however, the matter is less clear.

Courts already have concluded that state and local entities possess certain Fifth Amendment rights and are protected from unduly vague conditions on federal funding.<sup>258</sup> This arguably suggests free speech claims too may be made by local government entities against the federal government, under certain conditions. Moreover, when the federal government exceeds its legislative powers, both states’ rights under the Tenth Amendment and the liberty interests of affected individuals are intruded upon.<sup>259</sup> More fundamentally, the structural limits on federal power support the most basic due process principle: legitimate government may not assert rudderless and unauthorized force over individuals. If due process applies to local governments vis a vis the federal government, then the First Amendment may too.

Accordingly, if local governments possess due process rights against their states, then free speech defenses to state action likewise may be available here. Freedom of speech constrains state

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257. *Ysursa*, 555 U.S. at 363–64 (citations omitted) (emphasis added).

258. See *Clinton v. New York*, 524 U.S. 417, 451 (1998) (Kennedy, J., concurring). Whether state and local entities have rights other than due process—such as freedom of expression—is unclear. See, e.g., Meir Dan-Cohen, *Freedoms of Collective Speech: A Theory of Protected Communications by Organizations, Communities, and the State*, 79 CAL. L. REV. 1229, 1258–66 (1991) (discussing conceptions of the state and government speech); David Fagundes, *State Actors as First Amendment Speakers*, 100 NW. U. L. REV. 1637 (2006).

259. See *Bond v. United States*, 564 U.S. 211, 221 (2011) (noting that “[f]ederalism secures the freedom of the individual.”).

government only as a function of the Due Process Clause of the Fourteenth Amendment, not under the First Amendment per se.<sup>260</sup> This common artery may imply that all rights that flow from it be treated similarly, though again, the question is unresolved.

Freedom of expression values, if not judicially enforceable rights, surely are implicated when local government policymaking is severely repressed, particularly in ways that veer into commandeering or “gun-to-the-head” funding conditions. Local government is elected and thus may express local voter will; consequently, silencing local government rings free expression alarms.

In any event, local officials—versus local governments as such—clearly retain some speech rights when acting in their *private* capacities as against federal or state authority, provided the speech does not impair their ability to engage in official acts within the scope of their duties or disrupt the government workplace. Even when acting as employer, government cannot conscript public employees into mandatory messaging on matters of public concern where this burdens employees’ private expressive rights.<sup>261</sup> Public officials at the local level—whether elected, appointed, or otherwise employed—thus do not relinquish First Amendment rights that they otherwise enjoy as private citizens to speak on matters of public concern.<sup>262</sup> They do not, however, enjoy these same broad free speech rights when speaking as government employees or agents on matters that involve their official duties.<sup>263</sup> In that capacity, they may be required to sing the government’s tune.

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260. Freedom of speech formally was incorporated into the Fourteenth Amendment via the Due Process Clause in 1925. *Gitlow v. New York*, 268 U.S. 652 (1925).

261. *Pickering v. Board of Educ.*, 391 U.S. 563, 574 (1968).

262. *Lane v. Franks*, 134 S. Ct. 2369, 2374 (2014).

263. See *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) (holding that “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline”); see also *City of San Diego v. Roe*, 543 U.S. 77, 80 (2004) (“A governmental employer may impose certain restraints on speech of its employees that would be unconstitutional if applied to the general public.”). Nevertheless, as the Court in *Garcetti* noted, “[s]o long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively.” 547 U.S. at 419.

The foregoing principles may apply to the Executive Order and to state efforts to preempt local officials to obey it as follows. Despite injunctions that suspended its enforcement, the Order—along with federal and state efforts to implement it, and official statements by President Trump, Attorney General Sessions, and other public officials—likely had a silencing effect on undocumented persons, as well as on their families and supporters. President Trump described some immigrants as “animals,”<sup>264</sup> and more generally made numerous disparaging comments about them and jurisdictions that he claimed protected them.<sup>265</sup>

The Order’s overbreadth and vagueness, its explicit “name and shame” features, its ambiguity with respect to who may be scooped up into the “sanctuary jurisdiction” category, and its threat of defunding and otherwise punishing these ill-defined actors, may have chilled the political expression of local and state governments, and of their political leaders acting in their official and even their private capacities. As we have seen, some jurisdictions immediately backtracked on pro-immigrant friendly statements and policies. Indeed, the presidential “bully pulpit” Order likely was aimed at silencing competing views about a matter of undeniable public concern.

So, too, with some state preemption actions. These likewise can muzzle local officials, perhaps even more effectively than can federal mandates given the vast and direct regulatory and funding power states have over local entities.

Thus, free speech claims arguably may be raised by local governments in contexts where state or federal power is wielded with the purpose and effect of restricting local dissent through words, not just deeds. The claims face strong headwinds, but in rare cases these may be overcome.

Indeed, arguments against especially speech-hostile state preemption laws already have prevailed in at least one immigration case. In *City of El Cenizo v. Texas*,<sup>266</sup> plaintiffs challenged the

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264. Elise Foley, *Trump Refers to Immigrants as “Animals” Again.*, HUFFPOST (May 16, 2018, 6:55 PM, updated May 17, 2018), [https://www.huffpost.com/entry/trump-calls-immigrants-animals-again\\_us\\_5afca15fe4b0779345d59e2a#](https://www.huffpost.com/entry/trump-calls-immigrants-animals-again_us_5afca15fe4b0779345d59e2a#) [https://perma.cc/PS5F-RZPB].

265. Christianna Silva, *Trump’s Full List of ‘Racist’ Comments About Immigrants, Muslims, and Others*, NEWSWEEK (Jan. 11, 2018), <http://www.newsweek.com/trumps-full-list-racist-comments-about-immigrants-muslims-and-others-779061> (on file with the Columbia Human Rights Law Review).

266. 264 F. Supp. 3d 744 (W.D. Tex. 2017).

constitutionality of a sweeping new state preemption law, S.B. 4,<sup>267</sup> which restricted local governments from refusing to cooperate with immigration officials.<sup>268</sup> The law included a blanket prohibition against any local government official or employee even “endorsing” a policy that would materially limit immigration law. One jurisdiction objected to this requirement on three grounds: over-breadth, vagueness, and viewpoint discrimination. The district court judge agreed and enjoined this provision of SB4.<sup>269</sup>

One scholar described the potential chilling consequences of the preemption statute at length:

Imagine an immigrant who seeks legal advice from a law school that offers free representation to indigent clients [facing] immigration issues. If the potential client is afraid to even enter onto the campus given the existence of SB-4 and its mandate and that location is the only place where the person can obtain legal aid then the right to access to counsel has been violated . . .

Imagine a student at a university who expresses concern or speaks out in a classroom setting about an immigration issue or their own immigration issue. If it becomes known from that exchange that the person is undocumented will they be frustrated from getting an education in that university if they are deservedly worried about another classmate notifying campus police that they are undocumented. Will they stop going to classes? . . .

Imagine an undocumented immigrant seeking care at a local hospital. . . . If it is a child seeking care, would their undocumented parents be afraid to set foot in

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267. See TEX. GOV'T CODE ANN. § 752.053 (2017).

268. See *City of El Cenizo*, 264 F. Supp. 3d at 805–06.

269. *Id.* at 812–13. The Fifth Circuit affirmed the district court injunction, though “only as it prohibits elected officials from ‘endors[ing] a policy under which the entity or department prohibits or materially limits the enforcement of immigration laws.’” *City of El Cenizo, Texas v. Texas*, 890 F.3d 164, 185 (5th Cir. 2018).

the hospital for fear of being asked about their immigration status[?]<sup>270</sup>

These potential silencing effects abridge speech integral to the exercise of basic rights. Indeed, few things likely strike more directly at the core of the First Amendment.<sup>271</sup> Local residents, officials, and governments thus can, in appropriate cases, identify plaintiffs with litigable free speech injuries.<sup>272</sup>

This argument, though, must overcome the vast room allotted to the federal and state governments to engage in their own government speech. The Court has held that government expression is not subject to ordinary free speech constraints<sup>273</sup> and may express a particular viewpoint. Indeed, government expression often is inherently content and viewpoint specific, insofar as government is elected to advance particular goals. Thus, President Trump’s anti-sanctuary city rhetoric, too, is entitled to protection, even when it cajoles or disparages local government officials who embrace contrary views about immigration policy.

Yet even presidential speech may have limits, including truth-based limits. Helen Norton has written extensively and eloquently on government speech. She explores whether speech based on pure falsehoods that harm others is insulated.<sup>274</sup> She concludes

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270. Geoffrey Hoffman, *Constitutional Problems with Texas SB-4*, IMMIG. PROF. BLOG (May 9, 2017), <http://lawprofessors.typepad.com/immigration/2017/05/constitutional-problems-with-texas-sb-4-by-geoffrey-a-hoffman.html> [https://perma.cc/82KE-E98N].

271. Again, Heather Gerken has noted the First Amendment value served in “dissenting by deciding”—that is, governance decisions, not just individual actions, may further the right of free speech. Gerken, *supra* note 37; see also Heather K. Gerken, *Foreword: Federalism All the Way Down, The Supreme Court 2009 Term*, 124 HARV. L. REV. 4, 60–65 (2010) (discussing freedom of speech values in federalism “all-the-way-down” to include sub-state and sub-local government institutions).

272. See *Creek v. Village of Westhaven*, 80 F.3d 186, 193 (7th Cir. 1996) (Judge Richard Posner observing that “[t]here is at least an argument that the marketplace of ideas would be unduly curtailed if municipalities could not freely express themselves on matters of public concern”).

273. See, e.g., *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2253 (2015) (holding that “Texas’s specialty license plate designs constitute government speech and that Texas was consequently entitled to refuse to issue plates featuring SCV’s proposed design”).

274. See, e.g., Helen Norton, *Government’s Lies and the Press Clause*, 89 U. COLO. L. REV. 453 (2018) [hereinafter Norton, *Government Lies*]; Helen Norton, *Government Speech and The War on Terror*, 86 FORDHAM L. REV. 543 (2017)

that multiple constitutional provisions may offer potential guardrails against overt lies by governments that impose harms on others, threatens speech by private parties, or otherwise undermine democratic integrity.<sup>275</sup> Further, government religious speech may not violate the Establishment Clause.<sup>276</sup>

Finally, government may not compel private persons acting as such to carry the government's preferred messages.<sup>277</sup> By extension,

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(exploring range of constitutional limits on government fear-mongering in wartime speech); Helen Norton, *The Government's Lies and the Constitution*, 91 IND. L.J. 73, 89–107 (2015) (exploring possible Due Process and Free Speech Clause constraints on certain government speech); Helen Norton, *The Equal Protection Implications of Government's Hateful Speech*, 54 WM. & MARY L. REV. 159, 183–87 (2012) (exploring possible Equal Protection Clause limits on certain government speech); Helen Norton, *The Government's Manufacture of Doubt*, 16 FIRST AMEND. L. REV. 342 (2018) (discussing how government may seek to undermine factual claims that threaten government interests); Helen Norton, *Remedies and the Government's Constitutionally Harmful Speech*, 9 CONLAWNOW 49 (2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3097190](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3097190) [<https://perma.cc/QPD4-KPXE>] (discussing obstacles to judicial redress for government harmful speech). Cf. Katherine Shaw, *Beyond the Bully Pulpit: Presidential Speech in the Courts*, 96 TEX. L. REV. 71 (2017) (discussing the special case of presidential speech); Katherine Shaw, *Speech, Intent, and the President*, 104 CORNELL L. REV. (forthcoming 2018) (discussing complexities of determining whose intent controls when evaluating executive action, including in areas of immigration and sanctuary city order, and whether presidential statements should be considered when determining what an executive order actually does).

275. Norton, *Government's Lies*, *supra* note 274, at 453–54.

276. See, e.g., *McCreary County v. ACLU*, 545 U.S. 844, 881 (2005) (striking down government display of Ten Commandments where the displays had a predominantly religious purpose).

277. For example, the Court in *Walker* stated as follows:

Our determination that Texas's specialty license plate designs are government speech does not mean that the designs do not also implicate the free speech rights of private persons. We have acknowledged that drivers who display a State's selected license plate designs convey the messages communicated through those designs. And we have recognized that the First Amendment stringently limits a State's authority to compel a private party to express a view with which the private party disagrees. But here, compelled private speech is not at issue. And just as Texas cannot require SCV to convey 'the State's ideological message,' SCV cannot force Texas to include a Confederate battle flag on its specialty license plates.

some compulsion of local public officials' speech, and even perhaps of local governments, may violate the First Amendment.

Again, however, there is much more uncertainty about whether compulsion of local public officials' speech violates the First Amendment when that compulsion comes from the state. As *Ysursa* shows, when a state compels local government speech, the state may claim that it is simply crafting its *own* speech.<sup>278</sup> Leading local government scholar Richard Briffault puts the issue bluntly: "Local governments have no constitutional rights against their states, and local residents have no federal constitutional claim to the rights, powers, boundaries, or even the very existence of their local governments."<sup>279</sup> If they are mere creatures of the state, then local governments may be required to billboard messages authorized by the state as part of the state's self-messaging discretion.

The counterargument to this "we created you; we are you; we control you" approach to local rights is advanced throughout this Article: local governments are not merely instruments of the states that create them—they also are instruments of the individuals who live there. These individuals retain a liberty interest in directing their local government's function and in preserving room for its voice.<sup>280</sup>

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135 S. Ct. 2239 at 2252–53 (citations omitted) (quoting *Wooley v. Maynard*, 430 U.S. 705, 715 (1977)). The Court recently doubled down on this argument, holding that a California law that required private pregnancy-related service clinics to post state-sponsored information for potential clients was an unjustified and unduly burdensome restriction on speech. *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018). *See also* *Okwedy v. Molinari*, 333 F.3d 339, 344 (2d Cir. 2003) (per curiam) (stating that "the fact that a public-official defendant lacks direct regulatory or decision-making authority over a plaintiff, or a third party that is publishing or otherwise disseminating the plaintiff's message, is not necessarily dispositive . . . A public-official defendant who threatens to employ coercive state power to stifle protected speech violates a plaintiff's First Amendment rights, regardless of whether the threatened punishment comes in the form of the use (or, misuse) of the defendant's direct regulatory or decisionmaking authority over the plaintiff, or in some less-direct form."); *See also* *Backpage.com, LLC v. Dart*, 807 F.3d 229 (7th Cir. 2015) (holding sheriff's campaign to pressure credit card companies to cut ties to website violated free speech rights of the website owners).

278. *Ysursa v. Pocatello Education Association*, 555 U.S. 353, 362–64 (2009).

279. Briffault, *supra* note 256, at 2008.

280. *See infra* Part IV. This also is illustrated by the fact that anti-commandeering objections may be asserted by an individual, not just by the state. *See* *Bond v. United States*, 564 U.S. 211, 221 (2011) (noting that "[f]ederalism

Viewed in this light, even state control of local government has limits. States may not repress local government expression in ways that go beyond the contours of state authority or the need for policy-making discretion. State control may not veer into illiberal coercion or viewpoint-suppressive silencing.<sup>281</sup> This concept also has a proportionality component. Demanding compliance with a valid state mandate is one thing—punishing vocal resistance with threats of massive defunding or some other draconian penalty is quite another, or it should be.<sup>282</sup>

Even if these free speech claims are ultimately denied by courts on separation of powers or other grounds, the airing of these claims may force the underlying substantive debate into the public eye. This could enable local policymakers to express their views on why a challenged state or federal policy lacks reason or thwarts legitimate local policy ends. As applied to sanctuary jurisdictions, one thing is irrefutable: local government policy on the enforcement of immigration laws is a matter of legitimate and urgent public concern.<sup>283</sup> Viewpoint-sensitive measures aimed at silencing local voices on these issues thus trigger serious free speech concerns, even where they may not trigger legally enforceable rights.

#### *The Constitutional Argument for City Power*

Local governments have successfully invoked multiple constitutional arguments in the sanctuary jurisdiction cases. Yet even

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secures the freedom of the individual.”). *See also* Briffault, *supra* note 256, at 2008.

281. *See infra* Part IV (developing further the argument for limited “city power” where it promotes normatively sound ends).

282. It also implicates Gerken’s “dissenting by deciding” values. *See generally* Gerken, *supra* note 37. *See also infra* Part IV.

283. The Supreme Court has stated that:

Speech deals with matters of public concern when it can ‘be fairly considered as relating to any matter of political, social, or other concern to the community,’ *Connick v. Myers* 461 U.S. 138, 146 (1983) or when it ‘is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public,’ *San Diego v. Roe*, 543 U.S. 77, 83-84 (2004) (per curiam).

*Snyder v. Phelps*, 562 U.S. 443, 453 (2011).



when they do not succeed, these cases belie the claim that local governments are powerless, non-sovereign agents that must defer to federal authority, or exist solely at the whim of state authorities. Substantive brakes on federal and even state power may be derived from structural limits on the federal government, as well as the liberty limits on both. Where states exercise authority, local resistance power becomes much weaker, but it does not disappear altogether. Parts III and IV analyze this state versus city dimension in more detail and explain why state power over cities is so formidable, though not limitless.

### III: WHAT IS THE LEGAL STATUS OF A CITY?

Understanding the limits of local power vis-a-vis their home states, as well as the roots of the “mere creature of the state” approach to city rights, requires a closer look at the legal status of local governments, including their constitutional status. Although states receive explicit textual attention in the Constitution, cities and counties receive none. Municipal “sovereignty” thus is not a well-established—or perhaps even coherent—constitutional concept.<sup>284</sup>

Yet a great deal hinges on whether or not local governments may defy higher levels of government power. In 1984, 70 percent of Americans lived in urbanized areas.<sup>285</sup> In 2010, that figure climbed to a whopping 80.7 percent.<sup>286</sup>

Given the salience of local communities as enclaves of dissent from homogenous national and state norms, the Constitution’s silence on local governments is remarkable. All of the federal law on point is judge-made and reflects often under-theorized and partisan reactions to past assertions of municipal power. As Professor Joan Williams wrote over two decades ago, “the history of cities’ legal status is a startlingly pure example of politics as black letter law.”<sup>287</sup>

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284. See generally Gerald Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057 (1980).

285. Joan C. Williams, *The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law*, 1986 WIS. L. REV. 83, 86 (1986) (citing BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, NATIONAL DATA BOOK AND GUIDE TO SOURCES, STATISTICAL ABSTRACT OF THE UNITED STATES 19, 26).

286. U.S. DEPT OF COMMERCE BUREAU OF THE CENSUS, 2010 CENSUS URBAN AREA FACTS, <https://www.census.gov/geo/reference/ua/uafacts.html> [<https://perma.cc/8PD6-EFNT>].

287. Williams, *supra* note 285, at 86.

States' sovereignty and states' right to defy at least some federal authority, in contrast, are central to the constitutional design and textually undeniable. States' rights have been vigorously defended as a check on federal tyranny.<sup>288</sup> These rights are derived

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288. See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452 (1991) (holding that a state law requiring judges to retire at age 70 did not violate the federal Age Discrimination in Employment Act because Congress did not intend to intrude on states' traditional power to create qualifications for state officers); *New York v. United States*, 505 U.S. 144, 175 (1992) (finding that Congress cannot act too coercively when trying to get states to dispose of low-level radioactive waste); *Printz v. United States*, 521 U.S. 898, 898 (1997) (finding that the federal government cannot commandeer state officials or executive power without particularized constitutional authorization, specifically to mandate background checks for gun purchasers). The sprawling literature on the constitutional roots, scope, and impact of states' rights is beyond the scope of this Article. At stake here is the role of sub-state federalism—i.e. whether local governments may advance interests typically associated with state-level federalism and whether the Constitution supports assertion of such local interests. For a sampling of the literature as it relates to the sub-state themes discussed herein, see BENJAMIN R. BARBER, *IF MAYORS RULED THE WORLD: DYSFUNCTIONAL NATIONS, RISING CITIES* 5–13 (2013) (arguing that mayors and cities may respond to the failures of nation states); ALISON L. LACROIX, *THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM* (2010) (showing the rich complexities of the concept of federalism throughout history); ANDREW GELMAN ET AL., *RED STATE, BLUE STATE, RICH STATE, POOR STATE: WHY AMERICANS VOTE THE WAY THEY DO* 5 (2009) (arguing that statistics do not support many myths about economic voting patterns); JAMES G. GIMPEL & JASON E. SCHUKNECHT, *PATCHWORK NATION: SECTIONALISM AND POLITICAL CHANGE IN AMERICAN POLITICS* 17 (2004) (arguing that today, the most obvious regional political conflict is intrastate rather than interstate); MALCOLM M. FEELEY & EDWARD RUBIN, *FEDERALISM: POLITICAL IDENTITY AND TRAGIC COMPROMISE* 12–29, 26–28 (2009) (offering an historical, constitutional and political perspective on federalism); ERIN RYAN, *FEDERALISM AND THE TUG OF WAR WITHIN* (2011) (arguing that conflicts between and among governments should be understood as tug of war over federalism's core principles, not just as battle over original intent or judicial constraints and the political process); ROBERT A. SCHAPIRO, *POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDAMENTAL RIGHTS* 5–9 (2009) (arguing that federalism should be conceptualized as valuable because it involves multiple independent governing voices, not because it protects local government from centralized government); David J. Barron, *Why (and When) Cities Have a Stake in Enforcing the Constitution*, 115 *YALE L.J.* 2218, 2225–32 (2006) [hereinafter Barron, *Cities Have a Stake*] (discussing city-level resistance to a state ban on same-sex marriages); Joseph Blocher, *Firearm Localism*, 123 *YALE L.J.* 82 (2013) (discussing federalism controversy as it plays out in realm of gun control); Jessica Bulman-Pozen, *Our Regionalism*, 166 *U. PA. L. REV.* 377 (2018) (analyzing regionalism's relationship to federalism); Kirsten Engel, *State and Local Climate Change Initiatives: What is Motivating State and Local Governments to Address a Global Problem and What Does This Say About Federalism and Environmental Law?* 38 *URB. LAW* 1015,

from the structure of the United States Constitution and the Tenth Amendment. The latter reserves all power “not delegated to the United States by the Constitution, nor prohibited by it to the States, . . . to the States respectively, or to the people.”<sup>289</sup> This structural design is the basis for the anti-commandeering principles described above. Less clear is whether it supports “city rights” per se.

But as Heather Gerken has asked, “[w]hy . . . do federalism scholars stop with states?”<sup>290</sup> Correlatively, why should federalism’s brakes on government stop there? To ignore local governments in this assessment of federal power renders the last clause of the Tenth Amendment, “or to the people,” superfluous. States’ rights vis-à-vis the federal government are not the states’ alone; rather, these rights flow from an individual liberty interest possessed by the ultimate sovereigns, “we the people.”<sup>291</sup> In this sense, we argue that cities are not missing from the Constitution but are implied by it and operate in a zone of retained individual liberty.

From this last observation follows another that is central to our argument herein about limited local government “rights.” Insofar as local government assertions of sovereignty are premised on objections to incursions into the residual sovereignty of *their residents*, they arguably deserve constitutional protection regardless

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1015 (2006) (discussing sub-national action in face of federal passivity on climate change); Heather K. Gerken, *Federalism 3.0*, 105 CALIF. L. REV. 1696, 1703 (2017) (arguing that we need to rethink process federalism in light of political and administrative integration); Gerken, *supra* note 268, at 8–9 (adding to the federalism lexicon juries, prosecutors’ offices, zoning commissions, administrative agencies and other institutions that may enable minority rule without sovereignty); Roderick M. Hills, Jr., *Dissecting the State: The Use of Federal Law to Free State and Local Officials from State Legislatures’ Control*, 97 MICH. L. REV. 1201 (1999) (discussing the limited power of federal government to bestow upon institutions of state and local government powers that contravene the will of state legislatures); Harold Myerson, *The Revolt of the Cities*, AM. PROSPECT (Apr. 22, 2014), <http://prospect.org/article/revolt-cities> [<https://perma.cc/YZ3B-LVDB>] (discussing how demographics and progressive mayors of urban centers are transforming American cities); Dave Owen, *Cooperative Subfederalism*, 9 U.C. IRVINE L. REV. 177 (2018) (discussing cooperative federalism at state and local levels); Huyen Phaum, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. CINN. L. REV. 1373, 1382–84 (2006) (discussing sanctuary jurisdiction resistance).

289. U.S. CONST. amend. X.

290. Gerken, *supra* note 271, at 22. Gerken goes further and asks, “why stop with cities?” *Id.* at 23. School boards and other sub-city entities also matter in her analysis.

291. *Bond v. United States*, 564 U.S. 211, 221 (2011).

of whether this sovereignty is threatened by the federal government or the state itself. In other words, as a matter of constitutional law, cities should not be understood as mere creatures of the state; they more properly should be seen as creatures of the people who live there and vote for the people who govern them at that level.<sup>292</sup> The doctrinal and policy implications of this insight, though, have yet to be fully worked out. The law at present generally presumes that cities are legally subordinate to states and enjoy only the powers provided to them by state law.<sup>293</sup> This general presumption holds but is not unassailable.

#### A. A Peek at Local Government Doctrine

The powers provided by state law to local governments vary. Some offer only narrow governing authority to cities, as defined in state constitutions and statutes. Others provide broad, so-called Home Rule, governing authority.<sup>294</sup> But in all cases, local jurisdictions are subordinate to and governed by their states.

Where states provide narrow power to local governments, they often are called Dillon's Rule jurisdictions. Dillon's Rule, traced to court decisions written by Iowa judge and scholar John F. Dillon, holds that if there is a reasonable doubt whether a power has been conferred to a local government, then the power has not been conferred.<sup>295</sup> It is a rule of statutory and constitutional construction under which courts grant state legislatures broad authority to

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292. Nearly thirty years ago, Richard Briffault made the point that the notion of local lack of autonomy is overstated. Home Rule and other state constitutional and statutory measures, as well as local market power, afford local jurisdictions room for self-governance in many important areas. See Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1 (1990); Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346 (1990).

293. As Richard Schragger has observed, “[t]here is no individual federal constitutional right to an elective municipal government—or to any local government at all.” RICHARD SCHRAGGER, CITY POWER: URBAN GOVERNANCE IN A GLOBAL AGE 79 (2016) [hereinafter SCHRAGGER, CITY POWER].

294. See, e.g., *id.* (discussing Home Rule).

295. *City of Clinton v. Cedar Rapids & Missouri River R.R.*, 24 Iowa 455 (1868); *Merriam v. Moody's Ex'r*, 25 Iowa 163 (1868). For an earlier statement of this principle, see *Stetson v. Kempton*, 13 Mass. 272, 284 (1816) (observing that towns are “creatures of the legislature” and may exercise only the powers expressly granted to them).

control local government structure, methods of financing activities, procedures, and the authority to make and implement policy.<sup>296</sup>

Until the early twentieth century, the doctrine was applied to permit states to strictly limit the power of local governments to undertake any independent action without a specific delegation of authority. As local government scholar Richard Schragger has noted, “[t]he original animating purpose of Dillon’s Rule was to prevent the city from overinvesting in private enterprise, privileging certain private enterprises over others, or distributing franchises or monopolies to particular ‘insider’ commercial interests.”<sup>297</sup> The goal was, in short, to prevent capture and corruption and to limit government regulation of the private market.<sup>298</sup>

Due to the rigidity of this system and in response to the rise of industrialization and other socio-economic forces that affected the salience and power of cities, some states began to adopt “Home Rule” provisions in the early 1900s. Home Rule generally reverses the Dillon presumption against local autonomy. Home Rule jurisdictions are given broader, but by no means unlimited, regulatory and spending authority. Home Rule limits the degree of state interference in local affairs and delegates some power from the state to local governments, but only in specific fields and subject to ongoing judicial interpretation. Today, over forty states delegate Home Rule authority to local governments.<sup>299</sup> Yet the ultimate decision about the contours of local power is determined by the state. It holds the preemption keys and determines the existence and scope of local power.

The available case law tracks these principles. In *Hunter v. City of Pittsburgh*,<sup>300</sup> for example, the United States Supreme

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296. See generally GERALD E. FRUG & DAVID J. BARRON, CITY BOUND: HOW STATES STIFLE URBAN INNOVATION (2008) (analyzing how state governments have shaped their cities’ legal structures); SCHRAGGER, CITY POWER, *supra* note 293 (stating that “[a]s a constitutional matter, states exercise plenary power over their political subdivisions”); Paul A. Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1140 (2007) (observing that businesses frequently turn to the state legislature to fight local legislation); Hugh D. Spitzer, ‘Home Rule’ vs. ‘Dillon’s Rule’ for Washington Cities, 38 SEATTLE U. L. REV. 809, 813–24 (2015) (explaining the various interpretations of the Home Rule on state and local power relations).

297. SCHRAGGER, CITY POWER, *supra* note 293, at 61.

298. *Id.* at 62.

299. See Richard Briffault et al., *The Troubling Turn in State Preemption: The Assault on Progressive Cities and How Cities Can Respond*, AM. CONST. SOC’Y FOR L. & POL’Y, Sept. 2017, at 3, 4.

300. 207 U.S. 161 (1907).

Court stated that “[m]unicipal corporations are political subdivisions of the state . . . ,”<sup>301</sup> and therefore lack the power to object to state authority and define “[t]he number, nature and duration of the powers conferred upon [them]. . . .”<sup>302</sup> The state has “absolute discretion . . . unrestrained by any provision of the . . . United States.”<sup>303</sup> Accordingly, the City of Allegheny and its residents could not block the merger of Pittsburgh and Allegheny, Pennsylvania, on due process grounds in which they objected to the tax consequences of the merger.<sup>304</sup>

The implications of this notion of state preemption power for sanctuary jurisdictions are as follows. In red states, blue cities arguably must follow state-level mandates that demand strict compliance with federal laws and maximum cooperation with federal immigration officials. In blue states, red cities may not deviate from state-level mandates that prohibit local law enforcement from offering voluntary compliance to federal officials. The “mere creatures of the state” principle expressed in *Hunter* so dictates.

#### B. Are Home Rule Cities Different? (Yes, But Not Much)

Home Rule cities have modestly greater political autonomy. As noted above, the contours of such Home Rule autonomy vary by jurisdiction but in any event can easily be overstated.

Arizona offers a useful, albeit sobering, example. The Arizona Constitution states that a city of more than 3,500 people may “frame a charter for its own government consistent with, and subject to, the Constitution and the laws of the state.”<sup>305</sup> The Arizona Supreme Court’s cases regarding this provision date back to the late 1930s and early 1940s. In 2011, the court recognized that the Home Rule provision of Arizona’s Constitution undermines the general principle that cities and towns are “subordinate to and dependent on the state’s legislature for governmental authority.”<sup>306</sup> The court stated that Arizona’s constitutional framers included a Home Rule provision in the Arizona Constitution “. . . to render the cities adopting such

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301. *Id.* at 178.

302. *Id.* at 178.

303. *Id.* at 178–79.

304. *Id.* at 177–79.

305. ARIZ. CONST. art. 13, § 2.

306. *City of Tucson v. State*, 273 P.3d 624, 625–26 (Ariz. 2011).

charter provisions as nearly independent of state legislation as was possible.”<sup>307</sup>

Nevertheless, in 2017, the court veered sharply away from its previously more generous construction of Home Rule power<sup>308</sup> when a local law was challenged under a new “hyper preemption” statute passed by Arizona’s conservative legislature.<sup>309</sup> The court acknowledged that Home Rule jurisdictions may defy conflicting state law when local laws concern purely local interests.<sup>310</sup> But it noted that “[m]any municipal issues will be of both local and state concern,’ . . . [and] differentiation is ‘problematic in application’ because ‘it often involves case-specific line drawing,’ and ‘[t]he concepts of ‘local’ versus ‘statewide’ interest do not have self-evident definitions.”<sup>311</sup> When this occurs, the court held that whether a matter is of state or local concern “depends on whether the *subject matter* is characterized as of statewide or purely local interest.”<sup>312</sup> The

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307. *Id.* (quoting *Axberg v. City of Lincoln*, 2 N.W.2d 613, 614–15 (Neb. 1942)).

308. By 2017, the makeup of the Arizona Supreme Court had also greatly changed. Republican Governor Doug Ducey directed a court-packing plan that increased the number of Arizona Supreme Court justices from five to seven and enabled him to nominate two new judges. Yvonne Wright Sanchez, *Gov. Doug Ducey signs legislation to expand Arizona Supreme Court*, *azcentral.com* (May 18, 2016), <https://www.azcentral.com/story/news/politics/arizona/2016/05/18/gov-doug-ducey-signs-legislation-expand-arizona-supreme-court/84544008/> [<https://perma.cc/6UFH-7WB4>].

309. *State ex rel. Brnovich v. City of Tucson*, 399 P.3d 663 (Ariz. 2017). For an analysis of how courts distinguish matters of state versus local concern in Home Rule states see Lynn A. Baker & Daniel B. Rodriguez, *Constitutional Home Rule and Judicial Scrutiny*, 86 DENV. L. REV. 1337, 1364–71 (2009).

310. See *Brnovich*, 399 P.3d at 673–74.

311. *Brnovich*, 399 P.3d at 674 (quoting *City of Tucson*, 273 P.3d at 628). The court nevertheless found the case before it unambiguous: “[u]nlike municipalities, which have ‘no inherent police power,’ the state has broad police power including ‘[t]he protection of life, liberty, and property, and the preservation of the public peace and order, in every part, division, and subdivision of the state.’” *Id.* at 675 (quoting *Luhrs v. City of Phoenix*, 83 P.2d 283, 286 (1938)).

312. *Brnovich*, 399 P.3d at 676 (citations omitted). The court in *Brnovich* stated that “[m]atters involving the police power generally are of statewide concern,” and that “Arizona case law recognizes the statewide interest in subjects even tangentially connected to the work of public safety officers and criminal justice.” *Id.* at 675 (citations omitted). In only two instances has subject matter been found by Arizona courts to be of purely local concern. Those subject matters are the method and manner of conducting city elections and disposing of city real estate. *Id.* at 677 (citations omitted).

court concluded that all legislation that comes within the broad “police powers” of the state is properly within the preemptive power of the state,<sup>313</sup> even though a primary function of local jurisdictions is to regulate public safety.<sup>314</sup>

The upshot for Arizona was that even Home Rule cities face brisk headwinds when they resist state authority: again, state power typically prevails. Moreover, all Home Rule parameters are set by the state. Where a state chooses to retract Home Rule authority or revert back to Dillon’s Rule governance, it may do so. This suggests a “greater includes lesser” power over local governments that often controls judicial thinking. Again, this means that local governments’ ability to pass so-called sanctuary laws—or resist becoming 287(g) cooperating jurisdictions—is controlled by their state legislatures.

### C. Ultimate Hammers: Hyper Preemption Measures

Resistance to the federal Order also may trigger beefed up state-level preemption measures.<sup>315</sup> State imperatives here, as in

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313. The court refused to consider whether the legislature had shown that its law actually furthered the state’s interest in public safety. *Id.*

314. As bad for Tucson’s effort to assert municipal independence as the *Brnovich* opinion was, it stopped short of adopting the concurring opinion of Justice Clint Bolick (a former Goldwater Institute lawyer) that “a [constitutionally valid] state statute on any particular topic will always trump and invalidate a political subdivision’s conflicting ordinance, even if the topic indisputably is solely and purely one of local concern.” *Id.* at 674. In rejecting this argument, the *Brnovich* majority asked rhetorically, “[u]nder that view, one must wonder what is left of charter cities’ authority under article 13, section 2.” *Id.*

315. See NICOLE DUPUIS ET AL., NAT’L LEAGUE OF CITIES, CITY RIGHTS IN AN ERA OF PREEMPTION: A STATE-BY-STATE ANALYSIS, 2018 UPDATE (2018), <http://nlc.org/sites/default/files/2017-03/NLC-SML%20Preemption%20Report%202017-pages.pdf> [<https://perma.cc/8BQJ-EXRZ>] (discussing state preemption of local policies); see also Briffault, *The Challenge of the New Preemption*, *supra* note 256 (describing the rise of hyper preemption, noting it is primarily aimed at progressive innovations, but that it is problematic regardless of the partisan motivation for such preemption). We note that the rise of hyper preemption statutes obviously cannot be disentangled from questions about electoral politics more generally, especially gerrymandering that cracks and packs districts and distorts voter voice and may allow the victors of the rigged game, armed with the hyper preemption hammer, to exert exceptional power that bears little relationship to actual voter preferences. The United States Supreme Court seems unwilling to address these democratic distortions, and may be even less likely to wade in now that Justice Anthony Kennedy has resigned. See, e.g., *Benesik v. Lamon*, 138 S. Ct. 1942, 1946 (2018) (concluding district court did not abuse its discretion in denying preliminary injunction motion claiming Maryland



other areas, pose an even greater potential threat to local autonomy than do federal directives. Although blue city San Francisco's resistance to the Order would not provoke blue state California lawmakers to shut the city down, for other blue cities (e.g. Austin or Tucson) located in red states (e.g. Texas or Arizona), triggering state ire is another, very risky, matter. Moreover, sanctuary movements are politically unpopular,<sup>316</sup> even in states that are politically diverse. Thus, resistance on this issue in particular may be potentially quite costly, both economically and politically.

The early news on local resistance to state (versus federal) power is discouraging for local power advocates. As discussed above, the Texas state legislature passed sweeping legislation to bring Austin and other blue cities to heel.<sup>317</sup> The act exceeded even Arizona's notorious SB 1070 in its scope and harsh imposition of penalties. It prohibits local jurisdictions from adopting any rules, ordinances, or policies that prohibit enforcement of state and federal immigration laws, denies state grants for offending jurisdictions, makes local officials subject to misdemeanor convictions if they fail to cooperate with federal authorities as directed, permits questioning of people detained—versus arrested—about their immigration status, makes it unlawful to “endorse” non-cooperation measures, and

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congressional district was gerrymandered); *Gill v. Whitford*, 138 S. Ct. 1916 (2018) (remanding case raising partisan gerrymandering claims on standing grounds). Even in cases that present significant evidence of racial bias in districting, the Court has upheld gerrymandering. *See Abbott v. Perez*, 138 S. Ct. 2305 (2018); *Shelby County v. Holder*, 570 U.S. 2 (2013).

316. Jonathan Easley, *Poll: Americans Overwhelmingly Oppose Sanctuary Cities*, THE HILL (Feb. 21, 2017), <http://thehill.com/homenews/administration/320487-poll-americans-overwhelmingly-oppose-sanctuary-cities> [https://perma.cc/P9YR-GVH3]. The polls, though, may be misleading and based in part on confusion about what, exactly, sanctuary cities actually do to protect local residents. More refined studies also suggest that Americans may have more complex and sympathetic views on immigration policy than some public discourse reveals, at least where immigrants are here lawfully. *See PEW RESEARCH CENTER, SHIFTING PUBLIC VIEWS ON LEGAL IMMIGRATION INTO THE U.S.* (2018), <http://assets.pewresearch.org/wp-content/uploads/sites/5/2018/06/02164131/06-28-2018-Immigration-release.pdf> [https://perma.cc/K426-VP9F].

317. § 12.21.S.B. No. 4, 85th Leg. Reg. Sess. (Tex. 2017). SB 4 allows state officials to remove from office any elected or appointed official who prohibits or “materially limits” enforcement or cooperation with federal immigration officials. Uncooperative sheriffs, police chiefs, constables or jail administrators could face Class A misdemeanor charges. Defiance could mean fines of between \$1,000 to \$1,500 for the first violation and \$25,000 to \$25,500 for each one after that.

more.<sup>318</sup> Although parts of the act were enjoined, most of it was upheld by the Fifth Circuit.<sup>319</sup> Few things show more vividly what Richard Schragger has described as an “[a]ttack on American Cities,”<sup>320</sup> or the stakes of state versus local power, than this Texas law.

Texas is not alone.<sup>321</sup> In Arizona, conservative-state-versus-progressive-city tensions likewise flared, and the legislature flexed its preemption muscles.<sup>322</sup> As in Texas, the state’s actions have direct implications for the modern sanctuary movement.

In December 2016, the Tucson City Council voted to reaffirm its status as an “immigrant-friendly” city.<sup>323</sup> After that vote, Tucson Mayor Jonathan Rothschild said Tucson will not use the term “sanctuary city” because “[i]t’s a term that has no definition and is being used to inflame passions on both sides.”<sup>324</sup> What is important, he said, “is to let our citizens know, and . . . the citizens of Mexico know that this is a place that they are welcome.”<sup>325</sup> The Council has

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318. *Id.*

319. *City of El Cenizo v. Texas*, No. SA-17-CV-404-OLG, 2017 WL 3763098 (W.D. Tex. Aug. 30, 2017) (order granting preliminary injunction), *injunction partially stayed by City of El Cenizo v. State of Texas*, No. 17-50762 (5th Cir. Sept. 25, 2017). *See also City of Austin v. Texas*, 2017 WL 4250186 (5th Cir. 2017) (order denying preliminary injunction to the City of Austin).

320. Schragger, *The Attack on American Cities*, *supra* note 4. *See also* Briffault, *The Challenge of the New Preemption*, *supra* note 256, at 1997; Jessica Bulman-Pozen, *Preemption and Commandeering Without Congress*, 70 STAN. L. REV. 2029 (2018); Scharff, *supra* note 23, at 1471–72; Kenneth Stahl, *Preemption, Federalism and Local Democracy*, 44 FORD. URB. L.J. 133 (2017); DUPUIS ET AL., *supra* note 315.

321. *See, e.g.*, 2017 MISS. LAWS CH. 383 (S.B. 2710). *See generally*, NAT’L COUNCIL OF STATE LEGISLATURES, STATE SANCTUARY BILLS (May 8, 2017), [http://www.ncsl.org/Portals/1/Documents/immig/StateSanctuaryBills\\_050817.pdf](http://www.ncsl.org/Portals/1/Documents/immig/StateSanctuaryBills_050817.pdf) [<https://perma.cc/ZXC6-EWVT>] (reporting that state preemption has overall stymied local and citywide efforts to pass laws promoting social and economic welfare).

322. ARIZ. REV. STAT. ANN. § 41-194.01 (2018) (permitting reporting of alleged municipal violations of state law by state legislators, and authorizing the attorney general to investigate and prosecute such violations, including the imposition of harsh monetary penalties upon municipalities that were found to be in non-compliance with state law).

323. Nancy Montoya, *Tucson ‘Immigrant Friendly,’ But Not ‘Sanctuary,’ Mayor Says*, ARIZ. PUB. MEDIA (Dec. 21, 2016), <https://news.azpm.org/p/news-articles/2016/12/21/103296-tucson-immigrant-friendly-but-not-sanctuary-mayor-says/> [<https://perma.cc/687E-ZKM9>].

324. *Id.*

325. *Id.*

yet to elaborate on what it might mean for Tucson to be an “immigrant friendly” city.

Because Tucson has passed no laws or policies limiting enforcement of civil immigration laws, it is unlikely that Tucson would be considered a “sanctuary jurisdiction” under the Executive Order. Nevertheless, the significant confusion about the current and future scope of the Executive Order affected city officials. In the early days after adoption of the Order, worries that the DHS Secretary conceivably could construe “sanctuary jurisdiction” so capaciously that it would sweep up Tucson in its mandate caused officials to avoid using the term “sanctuary.”

Tucson also faces significant state law constraints given SB 1070.<sup>326</sup> Although the United States Supreme Court invalidated most of the provisions of SB 1070 on preemption grounds in *Arizona v. United States*,<sup>327</sup> several provisions survived. On their face, these limit Tucson’s ability to protect residents’ health, safety, and constitutional rights by limiting local enforcement of civil immigration laws.

Accordingly, Arizona *state* law likely could require Tucson to provide information covered by Section 1373 to federal officials even if Section 1373 itself is invalid. Tucson would risk state—not federal—penalties if the city restricted officials from sending, receiving, or maintaining information covered by 1373. Indeed, state law already requires greater cooperation from local officials than does Section 1373 insofar as it compels them to inquire into immigration status in certain situations.

Arizona’s hyper preemption statute looms large here. It threatens localities with the withholding of state shared revenue monies if localities enact policies that conflict with state laws.<sup>328</sup> At the request of any single state legislator, the Arizona Attorney General must “investigate any ordinance, regulation, order or other official action adopted or taken by the governing body of a county, city or town that the member alleges violates state law.”<sup>329</sup> If the Attorney General determines that there *is* a violation, the locality must resolve the violation or risk losing its *entire* allotment of state shared monies

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326. ARIZ. REV. STAT. ANN. § 11-1051 (effective July 29, 2010) (S.B. 1070).

327. *Arizona v. United States*, 567 U.S. 387 (2012).

328. ARIZ. REV. STAT. ANN. § 41-194.01 (2018).

329. *Id.* at § 41-194.01(A).

and revenues.<sup>330</sup> If the Attorney General concludes that the local law *may* violate state law, then the Attorney General must file a petition for special action in the Arizona Supreme Court to resolve the matter.<sup>331</sup> Even under this scenario, the locality must post a bond equivalent to six months' worth of state shared revenues.<sup>332</sup> This may be impossible for a cash-strapped city like Tucson to do.<sup>333</sup>

The Arizona Supreme Court recently upheld those portions of the hyper preemption statute that: 1) permit a single legislator to require the Attorney General to investigate a local ordinance allegedly in violation of state law, and 2) direct the Attorney General to file a special action in the state supreme court upon finding that the local law *may* violate state law.<sup>334</sup> The court declined to rule on all other portions of the statute, including the requirements for posting bond and withholding of state shared monies because neither of those provisions were invoked in that case.<sup>335</sup> The Arizona Supreme Court, however, has yet to rule on the constitutionality of these portions of the statute.<sup>336</sup>

The Arizona example, like local government law more generally, shows why state preemption measures pose an even more serious threat to localism than do federal measures. We turn now to whether and when local governments may be entitled to push back against aggressive preemption.

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330. *Id.* at § 41-194.01(B)(1).

331. *Id.* at § 41-194.01(B)(2).

332. *Id.*

333. *State ex rel. Brnovich v. City of Tucson*, 399 P.3d 663, 667–71 (Ariz. 2017). Tucson stated that the bond requirement would exceed the sum total of the City's available reserves by nearly \$5 million. The court, however, did not rule on the bond requirement or on the provision that requires defunding 30 days after the Attorney General determines that a local law is preempted, because the Attorney General did not invoke these provisions of the law. It is tempting to speculate that the Attorney General did not do so out of a concern that these provisions would not pass constitutional muster. Indeed, the Arizona Supreme Court stated in dicta that the bond requirement of Arizona's hyper preemption statute likely violates separation of powers because ultimate authority for determining a conflict of laws lies with the courts and a prohibitive bond amount would de facto remove decision-making from the judicial branch.

334. *Id.* at 666.

335. *Id.* at 672.

336. The court stated in dicta, however, that "even if the Attorney General were to conclude . . . that a local law violates state law, the offending municipality has a cure period and (as the State concedes) may file an action challenging the conclusion and any withholding of funds." *Id.* at 669.

#### D. Pushing Back on State Preemption

There are important doctrinal and constitutional objections to the “mere creature” approach to local power and to these hyper preemption measures. State preemptive power is not, or should not be, absolute.

First, as Josh Bendor has persuasively argued, cases like *Hunter* are anachronistic.<sup>337</sup> Later cases like *Gomillion v. Lightfoot*<sup>338</sup> suggest that the unqualified language of *Hunter* is outdated insofar as it fails to consider how individual rights limit state power even as asserted against local governments.<sup>339</sup> These limits should depend upon “the particular prohibitions of the Constitution” considered in each case.<sup>340</sup>

To be sure, the Court continues to intone the *Hunter*-like power of states over municipalities, on the ground that local governments are mere sub-units of the state.<sup>341</sup> Nevertheless, to the extent that *Hunter* can be read as a rule of substantive constitutional law (versus a rule of municipal standing),<sup>342</sup> Bendor argues, the rule is overbroad. Municipalities should be allowed to challenge state directives in three circumstances:

- (1) when state action regarding municipalities violates individual rights . . . ;
- (2) when state action regarding municipalities oversteps the state’s authority in relation to federal power, either in terms of the Supremacy Clause or the dormant Commerce Clause; and
- (3) when recognizing a truly municipal

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337. Josh Bendor, *Municipal Constitutional Rights: A New Approach*, 31 YALE L. & POL’Y REV. 389, 406 (2012). See also Kathleen S. Morris, *The Case for Local Constitutional Enforcement*, 47 HARV. CIV. RTS. CIV. LIB. L. REV. 1 (2012) (collecting scholarly criticism of *Hunter*, arguing that *Hunter* was undermined by *Erie v. Tompkins*, and arguing against *Hunter* on logical and policy grounds).

338. 364 U.S. 339 (1960) (holding a complaint stated a cause of action by alleging a local act violated due process and equal protection of the Fourteenth Amendment and the right to vote under the Fifteenth Amendment when the act reshaped city boundaries effectively removing all but four or five out of 400 African American voters while keeping all of the white voters within city limits).

339. Bendor, *supra* note 337, at 407–08.

340. *Gomillion*, 364 U.S. 339, 344 (1960).

341. See Bendor, *supra* note 337, at 410.

342. *Id.* at 411.

constitutional right would not overly limit state policy flexibility.<sup>343</sup>

This argument seems right. It gains force when one considers the Court's analysis of federalism principles more generally. The Court has recognized, well after *Hunter*, that federalism constraints on the federal government derive from an individual liberty interest.<sup>344</sup> The ultimate sovereign therefore is not the state as such, but "we, the people." This suggests that the "people" may cede aspects of their autonomy to various branches of government, but they do not thereby cede *all* sovereignty to *either* federal or state authority.<sup>345</sup> Instead, there is a residual liberty interest that belongs to individuals and may be asserted by them directly.<sup>346</sup>

Most critical to this liberty interest is that people vote on local government matters and understand themselves to be exercising democratic power in such elections. Indeed, their local political engagement may be more meaningful to them than any state or national affiliation. In other words, individuals have a reasonable, directly-experienced expectation of local political power. An individual liberty argument thus can be made that states do not have limitless leverage over local governments.

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343. *Id.* at 419. See also Barron, *Cities Have a Stake*, *supra* note 288, at 2232 (2006); Schragger, *Cities as Constitutional Actors*, *supra* note 245, at 152–53 (2005).

344. *Bond v. United States*, 564 U.S. 211, 221 (2011) (noting that "[f]ederalism secures the freedom of the individual.>").

345. See *McCulloch v. Maryland*, 17 U.S. 316, 403 (1819). As Chief Justice Marshall stated:

The [federal] government proceeds directly from the people; is 'ordained' and 'established,' in the name of the people; and is declared to be ordained, 'in order to form a more perfect union, establish justice, ensure domestic tranquility, and secure the blessings of liberty to themselves and to their posterity.' The assent of the states, in their sovereign capacity, is implied in calling a [constitutional] Convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it; and their act was final.

*Id.* The Court continued: "[t]he powers delegated to the State sovereignties were to be exercised *by themselves, not by a distinct and independent sovereignty, created by themselves.*" *Id.* at 404 (internal citations omitted, emphasis added).

346. *Bond*, 564 U.S. at 221.

Moreover, post-Reconstruction constitutional law requires that local governments, not merely the states as such, respect due process, equality, and other individual liberty interests. Any modern theory of “city power” must take these later developments and their structural and normative implications into account.

As shown in Part II, the federal government may not commandeer local law enforcement officials into enforcement of federal law just as it may not commandeer state law enforcement officials.<sup>347</sup> Less clear is whether a state order demanding that local governments comply with a federal mandate that would otherwise be commandeering can bind local officials.

As we have seen, cities are not “sovereigns” in a constitutionally relevant sense. Thus, it may not be sensible to claim that their residents have retained sovereignty as expressed through their local governments. If the local governments are indeed mere creatures of the state, then all that is retained by the people is whatever the state allows, full stop. The state giveth, and the state may taketh away. The *federal* government may not, per the anti-commandeering mandate, conscript local governments in enforcement of federal programs,<sup>348</sup> but the *state* surely may do so. There arguably is no constitutional structural impediment here, and thus, no substantive impediment.

Yet, as we also have seen, something fundamental and substantive is missing in this account. Moreover, local officials, including sheriffs, are locally *elected*. They are not appointed by the state legislature. Also, a “greater power includes the lesser” argument may have superficial appeal,<sup>349</sup> but it has the same deeper problems that have been recognized in other settings.<sup>350</sup> Simply stated, there

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347. See *New York v. United States*, 505 U.S. 144 (1992).

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

349. It also has a distinguished provenance, given its association with Justice Holmes. See *Western Union Tel. Co. v. Kansas ex rel. Coleman*, 216 U.S. 1, 53 (1910) (Holmes, J., dissenting) (“Even in the law the whole generally includes its parts. If the State may prohibit, it may prohibit with the privilege of avoiding the prohibition in a certain way.”). Chief Justice Rehnquist also invoked this principle on occasion. See, e.g., *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 345–46 (1986) (stating that given the state’s greater power to ban gambling altogether, it necessarily has the lesser authority to forbid advertising of legal gambling).

350. For a sampling of the rich literature on the many problems with this argument, which includes the bedeviling “unconstitutional conditions” puzzle, see Lynn A. Baker, *The Prices of Rights: Toward a Positive Theory of Unconstitutional*

are many things a state need not do at all; however, this does not mean that the way in which it exercises its discretionary powers is immune from constitutional analysis. For example, the state need not open its property to provide a public forum, but if it does so, the First Amendment limits its power to adopt viewpoint-specific access rules.<sup>351</sup> Likewise, the state need not provide playground supplies to local schools, but if it does so, it may not limit access to the funds solely to non-religious schools.<sup>352</sup> Correlatively, a state may limit or even abolish local governments, but it may not regulate them into silence on matters of public concern or to the point of democratic oblivion. Indeed, the Court has indicated that anti-commandeering is rooted in liberty and may not be waived.<sup>353</sup>

That said, the Court has not yet confronted directly the constitutional intricacy of just how the anti-commandeering principle intersects with states' willing enforcement of federal mandates. For example, it is unclear when a state has impermissibly waived an anti-commandeering objection versus permissibly opting to complement federal law with its own enforceable anti-immigration mandates.

Federal preemption too may confine state-level choices where federal interests are in play, but it does not remove all state legislative options.<sup>354</sup> State power to enforce immigration-related measures may increase if the federal government continues to step up

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*Conditions*, 75 CORNELL L. REV. 1185, 1185 (1990); Richard A. Epstein, *The Supreme Court, 1987 Term-Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 4 (1988); Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1293 (1984); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1413 (1989); William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1439 (1968); Peter Westen, *The Rueful Rhetoric of "Rights,"* 33 UCLA L. REV. 977, 977 (1986); *Unconstitutional Conditions Symposium*, 26 SAN DIEGO L. REV. 175 (1989).

351. See, e.g., *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 37 (1983) (engaging in First and Fourteenth Amendment constitutional analysis of a union's preferential access to a school district's mail system).

352. *Trinity Lutheran Church of Columbia v. Comer*, 137 S. Ct. 2012, 2025 (2017).

353. See *Murphy v. National Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1467 (2018) ("Adherence to the anti-commandeering principle is important for several reasons, including, as significant here, that the rule serves as 'one of the Constitution's structural safeguards of liberty'" (quoting *Printz v. United States*, 521 U.S. 898, 921 (1997))).

354. *Arizona v. United States*, 567 U.S. 387, 416 (2012).



criminalization of immigration offenses. As David Schwartz has noted in his astute analysis of the intersection of preemption and commandeering in marijuana law enforcement, the constitutional status of state police's power to arrest for federal crimes is not a matter of federal command, but rather a state decision to accept the federal invitation to authorize its officers to arrest for federal crimes. This is one of the kinds of voluntary cooperation identified in *Printz* as the only clearly ascertainable precedent for state enforcement of federal law.<sup>355</sup> That is, the state may write its own immigration enforcement laws where federal law does not prohibit it from doing so.

Yet this point now must be placed against *Murphy's* recently announced constraints on federal preemption of state law. Again, the Court stated that preemption exceptions to the anti-commandeering mandate apply only when Congress regulates *private* behavior.<sup>356</sup> Also, the federal anti-commandeering mandate undermines unlimited state preemption power over local jurisdictions, insofar as states may not waive commandeering objections. Local jurisdictions therefore retain some power to object to unconstitutional federal laws, even where their states did not do so and even where the states consent to federal power. State "decisions" to "accept the federal invitation" to punish local jurisdictions for failure to comply with federal immigration laws should not apply in cases where the federal laws *themselves* are unconstitutional.

But none of this is doctrinally inevitable, and the tough question is whether the laws states accept become *theirs* versus the federal government's. The Court must clarify for local jurisdictions how to square the internally antagonistic features of the doctrines of cooperative federalism, preemption, state power over local units, and anti-commandeering. It almost certainly will balk at a rule that forbids states from voluntarily cooperating in federal criminal law enforcement altogether; states already do so to a significant degree and national and state interests support this cooperation. The Court likewise is unlikely to impose new constitutional constraints on state power to regulate *its own* subdivisions beyond what preemption law requires. But "voluntary" must be better defined, and the zone of voluntary cooperation may not violate structural and non-waivable limits on federal power.

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355. Schwartz, *supra* note 5, at 583.

356. *Murphy*, 138 S. Ct. at 1478.

These ambiguities are foundational and inescapable: either anti-commandeering is an absolute rule, grounded in individual liberty, or it is not. If it is the former, which the Court has expressly stated, then local governments should have room to object to commandeering even when the state is a willing participant. They also should have room to object to state law preemption moves aimed at punishing local jurisdictions for refusing to play federal ball where the ball is a form of commandeering.

Furthermore, the Court must confront the more general and fundamental question raised here and by others—is there such a thing as “retained local sovereignty” derived from individual liberty, and if so, what does this mean for rights of local governments vis-à-vis their states?

One thing is clear: state-level mandates may not abridge the specific constitutional rights described in Part II. Less clear is whether there are constitutional limits on *intrastate*, local commandeering or coercive funding conditions that become “guns to local heads.” If state mandates are viewed as *self*-regulation, then the coercion arguments fail. If local governments have an independent political existence, once they are authorized by the state, then a notion of anti-commandeering and the anti-coercion principle that animated *NFIB* may not be exclusive to the federal-state realm. This is especially so if one views both as a species of the due process prohibition on arbitrary government. That is, local jurisdictions arguably may invoke *Dole/NFIB*-type arguments when faced with unreasonable state regulations or conditions on state funding, not just unreasonable federal measures. State hyper preemption statutes push this question to the fore as local jurisdictions battle such measures on constitutional and other grounds.<sup>357</sup>

Playing out Tucson’s options should it decide to become a sanctuary city is instructive. First, Tucson could argue that any state preemption mandate applied to sanctuary cities is simply a federal law—Section 1373—dressed in state law clothing, and that section 1373 itself is unconstitutional. Thus, it is not a proper basis for state

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357. Finally, local governments may invoke the Supremacy Clause to resist state laws that conflict with federal law. For example, in *Arizona*, the Court held that preemption principles precluded Arizona from adopting immigration laws that conflicted with federal mandates and noted there are “limited circumstances in which state officers may perform the functions of an immigration officer.” 567 U.S. at 408.

preemption penalties premised on its enforcement.<sup>358</sup> Critical to the argument would be distinguishing state power to enforce its *own* laws from state power to insist on compliance with *federal* laws.

In doing so, it might rely on *LaCroix v. Junior*, which concerned a habeas petition for an inmate who, due to an ICE detainer request, was detained in the county jail without being charged with or sentenced for a crime.<sup>359</sup> The county had complied with the detainer because after the Executive Order targeting so-called sanctuary cities, the mayor of Miami-Dade reversed long-time county policy and ordered county jails to comply with federal immigration detainer requests.<sup>360</sup>

In its analysis, the court stated, “the federal government is without power to compel state authorities to house and maintain federal prisoners—even if the federal government offers to pay a fair price for that housing and maintenance.”<sup>361</sup> The court viewed the detainer as “a demand that the federal government is constitutionally prohibited from enforcing, and . . . a demand with which the local government is constitutionally prohibited from complying.”<sup>362</sup> Moreover, the court stated that “[s]tates cannot cede their reserved powers to the federal government—*no, not even if they wish to do so*. They must retain and exercise those fundamental governmental powers that enable them to act as a counterweight to the exercise of federal governmental powers.”<sup>363</sup>

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358. See Adler & Kreimer, *supra* note 146, at 71; Caminker, *supra* note 146, at 199; Jackson, *supra* note 146, at 2180; Siegel, *supra* note 146, at 1629; Hills, *supra* note 146, at 901–06; Young, *supra* note 146, at 35, 127–28.

359. *LaCroix v. Junior*, Nos. F17-376, F17-1770, 2017 WL 837477, at \*2, 7 (Fla. Cir. Ct. 11th Dist. Mar. 3, 2017) (Order on Petition of Writ of Habeas Corpus) (noting that Miami-Dade County mayor abandoned policy due to threat of loss of funding, and granting petition for habeas corpus brought by an immigrant unlawfully detained by the correctional system).

360. *Id.* at \*2.

361. *Id.* at \*4.

362. *Id.* (citing *Prigg v. Pennsylvania*, 41 U.S. 539, 541 (1842) (“It might well be deemed an unconstitutional exercise . . . to insist that the states are bound to provide means to carry into effect the duties of the national government, nowhere delegated or intrusted [sic] to them by the Constitution.”)).

363. *Id.* at \*4 (emphasis added) (citing *Ashton v. Cameron County Water Improvement District*, 298 U.S. 513, 531 (1936) (“Neither consent nor submission by the States can enlarge the powers of Congress; none can exist except those which are granted. . . . The sovereignty of the State essential to its proper functioning under the Federal Constitution cannot be surrendered.”)).

The *LaCroix* court affirmed the anti-commandeering principle that localities must refuse to comply with federal edicts that the federal government does not have the constitutional power to issue.<sup>364</sup> If a city adopts policies that restrict local agencies beyond what federal law can lawfully command, these policies should be struck down as a violation of the Tenth Amendment.

It is worth noting, however, that while anti-commandeering prohibits the federal government from invading the sovereignty of state and local governments through coercion, it does not prohibit states from ordering their own local jurisdictions to heed *state* law.<sup>365</sup> States may voluntarily enact or interpret state statutes to the same effect as federal law and require local enforcement agencies to observe them.

The constitutionality of a state order may depend on how the state structures its demand. Orders that a state gives voluntarily are exempt from anti-commandeering concerns. However, if the state specifically invokes failure to comply with a federal mandate as the reason for punishing a local jurisdiction, a court is unlikely to regard the state action as a voluntary adoption of federal law. Moreover, if a

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364. *Id.* at \*5 (“No doubt the limitations imposed by the Tenth Amendment, like so many limitations imposed by the Constitution, are a source of frustration to those who dream of wielding power in unprecedented ways or to unprecedented degrees. But America was not made for those who dream of power. America was made for those with the power to dream.”); *but see* Carolina Bolado, *Fla. Court Skeptical of Fed Coercion in County’s ICE Policy*, LAW 360 (Sept. 27, 2018), <https://www.law360.com/articles/1083312/fla-court-skeptical-of-fed-coercion-in-county-s-ice-policy> [http://perma.cc/J8S4-SDUZ] (stating that the Third District Court of Appeal of Florida “voiced skepticism” during oral arguments in the appeal of the lower court’s decision in *LaCroix v. Junior*, pointedly asking “[i]f there is a legal right for this individual to be held by the federal government, and the county has voted and agreed voluntarily to assist the federal government, then where is the illegality?”).

365. *See* Schwartz, *supra* note 5, at 569–70. Even this power, though, may have limits. In a recent case in California, the City of Huntington Beach successfully argued that its status as a charter city insulated it from enforcement of aspects of the SB 54 “California Values Act” as a matter of state constitutional law, and that the state law impermissibly intruded into its authority over municipal affairs. This is an example of a “red city” asserting autonomy in a “blue” state. *See* Oral Ruling, *City of Huntington Beach v. California et. al*, No. 30-2018-00984280-CU-WM-CJC (Cal. Sup. Ct., Orange Cty Sept. 28, 2018).

state exceeds federal mandates on immigration, it risks a viable preemption lawsuit.<sup>366</sup>

If Tucson decides to become a sanctuary city, it may argue that state hyper preemption penalties impermissibly induce it to violate the constitutional rights of individuals. For example, if officials interpret state law to require local agents to comply with federal detainer requests absent a warrant, or to provide information in ways implicating local agents in the enforcement of federal immigration laws, then the state law might be subject to the federal constitutional challenges outlined in Part II.

Tucson might also argue that its power to override state law arises from Tucson's powers as a Home Rule city under Arizona Constitution Article 13, Section 2.<sup>367</sup> But again, the limits on Home Rule jurisdiction autonomy are difficult to overcome.

The Home Rule status of a sanctuary city is a thin reed. Public safety is a broad concept that covers most, if not all, immigration enforcement if one takes national security and public safety justifications at face value. Nevertheless, Home Rule status, at the least, may prompt a narrow construction of state mandates that intrude into local authority.<sup>368</sup>

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366. *Arizona v. United States*, 567 U.S. 387, 400 (2012) (holding that federal law preempted an Arizona state law that intruded “on the field of alien registration, a field in which Congress has left no room for States to regulate.”).

367. The Arizona Supreme Court's decision in *Brnovich* has significantly reduced the likelihood of prevailing on this argument. *See State ex rel. Brnovich v. City of Tucson*, 399 P.3d 663 (Ariz. 2017). *Cf. Oral Ruling, City of Huntington Beach v. California et. al*, No. 30-2018-00984280-CU-WM-CJC (Cal. Sup. Ct., Orange Cty Sept. 28, 2018).

368. *Brnovich* arguably left a sliver of space for Home Rule cities to argue that a conflict of laws exists within “the doubtful or twilight zone separating those matters that are clearly of municipal concern from those that are not.” 399 P.3d at 675 (citing *Clayton v. State*, 38 Ariz. 135, 148 (1931)). The court in *Brnovich* also failed to properly investigate the case law upon which the court relied. Each case that involved the so-called state police powers concerned situations in which the statewide interest in question was either the provision of adequate police protection and public safety for citizens or the protection of citizens from local laws criminalizing conduct state law had not deemed to be criminal activity. For example, in *Luhrs*, the Supreme Court of Arizona held that the statewide interest in public safety officer wages and pensions trumped local interest in the same issue because “the preservation of order and the protection of life and property and the suppression of crime are primary functions of the state; [and] the entire state is interested in these matters.” *Luhrs v. City of Phoenix*, 83 P.2d 238, 288 (Ariz. 1938). Importantly, the court found a statewide interest because the state statute in question *enhanced* public safety whereas the local statute threatened to

Moreover, some states may take a more respectful view of Home Rule authority. Courts have allowed statewide interests to override local interests in cases where the state's interest either enhanced public safety by supporting local law enforcement, or enhanced individual protections by limiting conduct that can be criminalized.<sup>369</sup> The protection of local residents may have tipped the balance in favor of preemption in these cases. In other words, when state preemption favors the liberty interests of residents and lends support to local law enforcement, it may be enforceable in ways safety—and liberty—defeating preemption measures are not.<sup>370</sup> Context matters, as does the strength of the conflicting government interests at stake. In Home Rule cases in particular, some courts may take seriously the obligation to scrutinize these interests closely, rather than deferring uncritically to state arguments.

*The Preemption Argument and Its Limits*

Sanctuary jurisdictions may argue that their immigrant-friendly policies strive to protect all residents from abusive law enforcement practices as a matter of safety and individual liberty. Sanctuary cities with Home Rule status may further argue that their policies fall within the doubtful or twilight zone, which separates matters that are clearly municipal concerns from those that are not. A strict construction of state power over Home Rule cities may tip the scales in cities' favor, especially in cases where state authority infringes on individual liberties.

In other words, these cases turn on what *kind* of preemption states seek to impose on recalcitrant cities. It is one thing to secure local cooperation through carefully crafted laws directed at specific state-level problems with well-documented justifications; it is another to threaten local jurisdictions with staggering financial and legal

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*diminish* it. *Id.* at 286. Likewise, in *City of Scottsdale v. State*, the Court of Appeals of Arizona ruled in favor of the statewide interest to allow sign walkers on sidewalks because it found that the state had an interest in protecting its citizens from criminalization when they engaged in public activities on public walkways. *City of Scottsdale v. State*, 352 P.3d 936, 940 (Ariz. Ct. App. 2015); *see also State v. Coles*, 324 P.3d 859, 860 (Ariz. Ct. App. 2014) (holding that a local law criminalizing public intoxication violated and was preempted by a state statute prohibiting local ordinances that penalize or impose sanctions for intoxication).

369. *See* cases cited *supra* note 368.

370. *See infra* Part IV.

consequences to compel obedience without evidence of a compelling state concern. At some point, as *NFIB* shows in the federal context, a state defunding threat becomes a “gun to the head” and should prompt a court to utter: *enough*. This is particularly true in the context of immigration enforcement, because the real hammer does not belong to the states as it does with most law enforcement matters; it is a matter of federal power.

True, cities are not sovereigns in the way that states are. True, their legal existence is determined by state law. True, states have vast police powers. But a constitutional and normative baseline may require states to respect democratic principles and may limit scorched-earth versions of state preemption.<sup>371</sup> Part IV identifies the elements of this baseline. It then outlines how sanctuary city case law animates the baseline.

#### IV. MOVING FORWARD: CONSTITUTIONAL CITIES

The story of local government power remains, in significant respects, strictly political.<sup>372</sup> The legal rights of local governments are subject to the formidable preemptive muscle of federal and state authorities. There are limits, as we have shown, but they exist at the outer boundaries of tremendous zones of higher government power. Cynicism about the favorable prospects of healthy localism informed by higher constitutional values is therefore justified.

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371. Assaults on local government autonomy are hardly new. Jane Jacobs wrote an early, clear-eyed analysis of how city policies have divested residents of power. JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* (1961) [hereinafter JACOBS, *DEATH AND LIFE*]. She later wrote an illuminating analysis of how cities were the primary economic engines that challenged older, agriculture-centered models of economic development. JANE JACOBS, *THE ECONOMY OF CITIES* (1969); See, e.g., STEVEN CONN, *AMERICANS AGAINST THE CITY: ANTI-URBANISM IN THE TWENTIETH CENTURY* (2014) (describing anti-government sentiments in twentieth century America and their impact on modern-day policies).

372. Richard Schragger captures this well when he states that courts and legislatures “are not at all interested in defending some entrenched form of intergovernmental relations. Legislative actions are driven by political need and fiscal expediency. And courts tend to defer to legislatures in large part because of the judges’ inability to settle on nonpolitical principles for dividing up authority.” SCHRAGGER, *CITY POWER* *supra* note 293, at 70.

But a new day of greater local power may be dawning. As Naomi Schoenbaum has quipped, “[p]lace is having a moment.”<sup>373</sup> This “moment” may be ripe for a wave of local government revolts, which can open the door to a reexamination of the structural and normative features of local government power. Constitutional silence on the legal status of local governments may even become a boon. Case law that interprets how local government *should* fit into the constitutional design may be easier to dislodge than case law based on constitutional text that specifically dictates such treatment of local government.<sup>374</sup>

Local political activism also may be inspired by aggressive state and federal refusals to allow local dissent to flourish. To be sure, preemptive moves of federal and state officials may cow some local officials and their constituents into compliance, but others may be roused into local organizing and open defiance. Consequently, under-theorized constitutional limits on preemptive, commandeering, and otherwise coercive power over local government may be more widely expressed, debated, and litigated than they were in past decades. On occasion, these limits may even be judicially enforced. As these limits become more visible, the actual impact of local power can be better measured and evaluated. We do not assume here—it would be premature to do so—that the impact will be benign in all contexts. Rather, we note the ascendance of “city power” and identify as a preliminary matter why local voice may be valuable in fostering democratic engagement and advancing individual liberties. Such power has yet to be fully realized; so too, the possible downsides of such power, should one city’s version of liberty conflict with others’ viewpoints.

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373. Naomi Schoenbaum, *Stuck or Rooted?: The Costs of Mobility and the Value of Place*, 127 YALE L.J. FORUM 458, 458 (2017). See also Naomi Schoenbaum, *Mobility Measures*, 2012 BYU L. REV. 1169 (analyzing the barriers to mobility, including economic and relationship costs).

374. There is, for example, an organization named the Institute for Local Self-Reliance, which works “to promote an equitable, sustainable, democratic and prosperous future from the bottom up. We call this vision local self-reliance.” INST. FOR LOCAL SELF-RELIANCE, <https://ilsr.org/about-the-institute-for-local-self-reliance/approach/> [https://perma.cc/9423-JR3B]. The Institute further states that it “largely, although not exclusively, targets urban areas. That is where 80 percent of Americans (and half the world’s population) live and work, and where significant political and financial authority resides.” *Id.* Such organizations may swell in numbers and importance as more people work to transform towns into places that match their political and other personalities.



### A. Normative Benefits of Localism

Pro-localism outcomes are normatively desirable, within limits. First, to the extent that the assumed benefits of states' rights hold, these benefits logically are greater as applied to local governments.<sup>375</sup> As others have observed, local governments are closer still to the people and arguably more closely and easily observed and monitored.<sup>376</sup> That is, the putative benefits of federalism that support "states' rights" may support some local rights. Indeed, even writers who are skeptical about some of federalism's benefits in state versus federal controversies laud the public participation benefits of local democracy.<sup>377</sup>

Second, local policies may matter more to residents because they are more apparent. They directly and visibly affect roads, schools, taxes, law enforcement—variables that impact daily quality of life. People thus may understand from direct experience how local

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375. See Rick Su, *Intrastate Federalism*, 19 J. CONST. L. 191, 251–55 (2016) (discussing whether the rise of intrastate controversies and the significance of local communities may play a more important role in advancing federalism interests than states).

376. *Id.* (discussing the importance of localities as better representing "socio-cultural communities" than states). States also may not promote federalism's perceived values as well as local governments can. See, e.g., Jerry Frug, *Decentering Decentralization*, 60 U. CHI. L. REV. 253 (1993) (rejecting the traditional account of decentralized government in the U.S.); Matthew J. Parlow, *Progressive Policy-Making on the Local Level: Rethinking Traditional Notions of Federalism*, 17 TEMP. POL. & CIV. RTS. L. REV. 371 (2008) (discussing the importance of local governments in the federal system and the preemption doctrine's limitations of local government power); Richard C. Schragger, *Reclaiming the Canvassing Board: Bush v. Gore and the Political Currency of Local Government*, 50 BUFF. L. REV. 393, 423–4 (2002) (discussing the benefits of local governments). See also Richard Briffault, "What about the 'Ism'?" *Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303, 1305–6 (1994) [hereinafter Briffault, "What about the 'Ism'?"] (distinguishing states from localities and discussing formal features of the state); Christine Kwon & Marissa Roy, *Local Action, National Impact: Standing Up for Sanctuary Cities*, 127 YALE L.J. FORUM 715 (Jan. 20, 2018) ("In some respects, the norms that justify federalism may apply with even greater strength to cities than to states. Cities are even closer to the 'People,' so they can adopt policy approaches that more accurately reflect their microcosms' interests.").

377. See FEELEY & RUBIN, *supra* note 288, at 31 ("While federalism . . . does not necessarily increase public participation, local democracy does, because elections, the defining feature of local democracy, are a form of participation.").

government actually treats problems like immigration, public safety, and civil liberties, rather than relying on media and political rhetoric.

Third, local government may express individual and local collective interests and preserve democratic voice in a way states or the federal government do not. People can “vote with their feet”<sup>378</sup> more easily when choosing their cities than when choosing their states or their nation—though all mobility claims must be adjusted to consider ways in which choices are constrained even at this level.<sup>379</sup> People choose locations for a complex set of reasons,<sup>380</sup> but local politics and like-minded neighbors are part of this location preference mix.<sup>381</sup>

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378. See ILYA SOMIN, *DEMOCRACY AND POLITICAL IGNORANCE: WHY SMALLER GOVERNMENT IS SMARTER*, 136–51 (2016) (arguing that the virtues of local government may include foot-voting based on less ignorance about local policy than many voters possess about state or national policy).

379. See Carol M. Rose, *The Ancient Constitution v. the Federalist Empire: Anti-Federalism From the Attack on “Monarchism” to Modern Localism*, 84 NW. U. L. REV. 74, 100 (1989) (suggesting that mobility may decrease the seriousness of “localized oppression” of political minorities, who can more easily leave the jurisdiction); Gerken, *supra* note 271, at 46–50 (arguing that “federalism all-the-way-down” can benefit racial and ethnic minorities, but recognizing that localism can be a double-edged sword in this area). *But see* ROBERT J. SAMPSON, *GREAT AMERICAN CITY: CHICAGO AND THE ENDURING NEIGHBORHOOD EFFECT* 327 (2012) (arguing that “neighborhoods choose people”); David Schleicher, *Stuck! The Law and Economics of Residential Stagnation*, 127 YALE L.J. 78 (2017) (analyzing whether law can constrain interstate mobility); *But see* Naomi Schoenbaum, *Stuck or Rooted?: The Costs of Mobility and the Value of Place*, 127 YALE L.J. FORUM 458 (Oct. 30, 2017) (discussing how mobility interacts with human relationships in ways that undermine some assumptions about economics and mobility).

380. Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 418 (1956).

381. Political predilections are geographically sensitive. Richard Schragger notes that the United States’s transition from being a rural nation, “has not prevented large segments of the population from defining themselves in opposition to those city dwellers who do not appear to share small-town, suburban, or rural values.” Schragger, *The Attack on American Cities*, *supra* note 4, at 1154 (footnotes omitted). Considering the 2016 election, he notes that Hillary Clinton won a total of 489 counties, including 88 of the 100 most populous, while Donald Trump, running as a right-wing populist, won a total of 2,623 counties. *Id.* “Clinton won the popular vote on the votes of the most urban citizens; Trump won the presidency on the votes of everyone else. Additionally, Clinton’s counties constituted 64% of America’s economic activity . . . while Trump’s added up to only 36%.” *Id.*

Another undeniably important factor that influences many geographical decisions is the relative economic opportunities. Working people tend to live within reasonable commuting distance of their workplaces. This draws many to

On occasion, what residents see may prompt “uncooperative federalism,” as Jessica Bulman-Pozen and Heather Gerken expressed.<sup>382</sup> That is, local experiences may trigger local dissent from, or resistance to, top-down approaches to policy issues. Although Bulman-Pozen and Gerken’s focus in their influential 2009 article was state-centered dissent from federal law and policy, many of the values of state dissent can likewise be advanced by local government dissent. Relying on works by Young and Porterfield, Bulman-Pozen and Gerken noted that states as dissenters may promote First Amendment rights among others.<sup>383</sup> These potential values include policy experimentation, democratic participation, promotion of liberty and equality, and a sense of choice and belonging.<sup>384</sup> So, too, for local governments as dissenters.<sup>385</sup>

Local room to maneuver and deviate is being forcefully contracted in the arena of immigration enforcement, which makes

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urban centers because a huge percentage of available in-state jobs are often located in the densest urban centers. Other factors, though, surely affect in-state geographical decisions. These include cultural opportunities, school and housing options, cost of living, family, friends, co-workers, other community ties, religion, race, weather, recreational options, traffic, water and air quality, affordable health insurance, quality medical care, natural beauty, ambient light, demographics, sports teams, local history, family history, and countless other local features that contribute to one’s perceived quality of life and sense of belonging.

382. Bulman-Pozen & Gerken, *supra* note 96, at 1263–64 (arguing that state non-cooperation occurs and does so even when states lack policymaking autonomy).

383. *Id.* at 1261–63. See Mathew C. Porterfield, *State and Local Foreign Policy Initiatives and Free Speech: The First Amendment as an Instrument of Federalism*, 35 STAN. J. INT’L L. 1 (1999); Young, *supra* note 96, at 1288–91, 1295–1301. See generally COMPETITION AMONG STATE AND LOCAL GOVERNMENTS: EFFICIENCY AND EQUITY IN AMERICAN FEDERALISM, (Daphne A. Kenyon & John Kincaid, eds. 1991). Cf. Roderick M. Hills, Jr., *Against Preemption*, 82 NYU L. REV. 1, 21 (noting that “[s]tate and local politicians . . . are natural policy entrepreneurs who can significantly influence what sorts of conditions are publicly recognized as problems.”).

384. Bulman-Pozen & Gerken, *supra* note 96, at 1261.

385. Bulman-Pozen and Gerken further observe that dissent and pure legal autonomy need not go hand in hand; on the contrary, where federal and state actors are interdependent, the states actually may have more room to express dissatisfaction and exercise leverage over the federal government. *Id.* So, too, for local governments when states that depend on them to police and otherwise govern themselves. State laws may require local actors—cities, counties, school boards, sheriffs—to implement state policy, and they may grant discretion in that implementation. In these zones, local spins on the policies may flourish.

dissent within the enforcement scheme less feasible.<sup>386</sup> But the point remains that even within a model that emphasizes higher government power over lower levels, non-cooperation may erupt to promote worthy ends.

Indeed, there may be a lesson here in particular for blue cities in red states: where they are forced into immigration enforcement, they may at least assure that their actions are implemented as humanely and respectfully as possible. They also can disambiguate the source of the authority compelling them. Nothing prevents them from declaring: “We are *not* the federal or state government, which demand that we detain you. But we are here to help, insofar as we as your local officials are allowed to do so.” Local resistance thus may occur overtly or more subtly.

Fourth, in all of these ways—overt and covert—local officials thus may promote what Dean Heather Gerken calls “dissenting by deciding.”<sup>387</sup> Simply stated, Gerken’s elegant analysis of subnational decisionmaking states that “[*dissenting by deciding* occurs when would-be dissenters—individuals who hold a minority view within the polity as a whole—enjoy a local majority on a decision-making body and can thus dictate the outcome.”<sup>388</sup> This local dissent promotes values that can “contribute to the marketplace of ideas, engage[] electoral minorities in the project of self-governance, and facilitate[] self-expression.”<sup>389</sup> Importantly, local dissent may advance these free speech values even if there is no formal free speech right possessed by local governments *per se*.<sup>390</sup>

Such democratic dynamism advances core constitutional values and is an inherent, if underexplored, feature of a political system that relies on multiple layers of government and officials. Where the policy rubber hits the local roads, it is subject to interpretations, deviations, and occasional defiance.

Fifth, these benefits of localism are bipartisan. The political left has, as Ernest Young says, come to the “dark side” when it comes

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386. See, e.g., *State ex. rel. Becerra v. Sessions*, 284 F. Supp. 3d 1015 (N.D.C.A. 2018) (exemplifying federal attempts to enforce uniformity in immigration enforcement).

387. Gerken, *supra* note 37, at 1747.

388. *Id.* at 1748 (emphasis in original). Her analysis is both descriptive and normative; she does not support local dissent without substantive brakes.

389. *Id.* at 1749 (emphasis omitted).

390. See *supra* text accompanying note 283.

to its appreciation of federalism and localism.<sup>391</sup> This may hasten a shift in judicial thinking about what local autonomy should mean as a matter of law, in a moment in which past restraints on higher government power are being tossed aside. They may be more willing to intervene when they are asserting legal fences for all, regardless of party affiliation.

Finally, localism promotes citizen education. Visibility regarding the federal and state preemption provenance of policies that outrage or repulse local voters—think of public outcries over the separation of immigrant parents and their children or deportation of law-abiding Dreamers—may illuminate how federal and state partnerships work, and how state governments control local power. It also may prompt citizen political engagement and objections.

Consequently, a call for “city power” in the unfolding 21<sup>st</sup> century—at least as to some issues—may not be as quixotic as it was in the 20<sup>th</sup> century.<sup>392</sup> Seattle, San Francisco, Philadelphia, New York, and Chicago are already flexing their municipal muscles. Federal judges have given them reason to believe their resistance has legal legs. Their constituents may give them reason to think resistance has political legs even where the law runs out.

## B. Normative Limits on Localism

Not all local resistance is worthy of legal or political respect as the civil rights movement proved. The phrase “worthy of respect” thus must be capable of definition and enforcement.<sup>393</sup> As Charles

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391. Young, *supra* note 96. See also Glenn Reynolds, *Splitsylvania: State Secession and What to Do About It*, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3130497](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3130497) [<https://perma.cc/GNR9-ZCDK>] (discussing the plight of small, urban governments in states where state governments legislate in ways deeply antithetical to their local values).

392. Again, however, the insights of leading scholars on local government give one pause. Richard Schragger, for example, reminds us that anti-city, anti-urbanism may be embedded in our constitutional structure, such that the most one can hope for is some limited forms of local autonomy—not city power per se. See Schragger, *The Attack on American Cities*, *supra* note 4, at 1200. See also Paul A. Diller, *Reorienting Home Rule: Part I—The Urban Disadvantage and State Lawmaking*, 77 LA. L. REV. 287, 291 (2016).

393. In arguing that some of the conventional arguments in favor of decentralization of power are inaccurate, Richard Schragger further observes as follows: “That does not mean that city power is undesirable; only that it should be desired for the right reasons.” SCHRAGGER, CITY POWER, *supra* note 293, at 77. He cautions that city power often is “manipulated in the pursuit of particular

Black once said to his Yale law students, “I’d be all for States’ rights if it weren’t for States’ wrongs.”<sup>394</sup> So, too, with city rights.

A purely structural or procedural approach to local government power cannot supply that definition. The urgent question thus is not the airy one of whether “cities on a hill” can depart from some state or national mandates because local voices matter. It is defining *which* voices are normatively appropriate ones to respect in the face of competing state and federal policies. As James Madison anticipated, with decentralized power comes the risk of heightened factionalization, which can mean illiberal and undemocratic factions.<sup>395</sup> Political capture of smaller units of government also may be easier and make them less responsive to their constituents.<sup>396</sup> Put starkly, today’s sanctuary city could become tomorrow’s sundown town.<sup>397</sup>

Consequently, as Gerald Frug and Judge David Barron have said, “[i]f there is to be a revision of local government law in the United States, the last thing one should want is a uniform model

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substantive ideological and policy goals.” *Id.* This dynamic likely is inescapable and is starkly apparent in the sanctuary city context. Both sides of the local power debate are pursuing a vision of municipal power that matches their substantive goals. By itself, this is no reason to condemn either side.

394. I thank my Yale-trained colleague John Swain for this anecdote about Professor Black.

395. See THE FEDERALIST No. 10 (James Madison).

396. See, e.g., Mirian Seifter, *Further From the People?: The Puzzle of State Administration*, 93 NYU L. REV. 107 (2017) (arguing that state agencies, which have grown substantially in recent decades, may suffer from three deficiencies that undermine claims that they are “closer to the people”: they are less transparent than federal agencies, less closely monitored by watch dog groups, and less aggressively tracked by state-level media). *But see* Vicki Been, “Exit” as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 COLUM. L. REV. 473 (1991) (discussing how allowing free market competition amongst local governments would provide a more satisfactory and efficient approach to remedying community issues, as opposed to allowing the judiciary to police those relationships through the unconstitutional conditions doctrine); Lynn A. Baker, *Should Liberals Fear Federalism?*, 70 U. CINN. L. REV. 433 (2002); Stephen Clark, *Progressive Federalism? A Gay Liberationist Perspective*, 66 ALB. L. REV. 719 (2003); SOMIN, *supra* note 378, at 100. ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINES IN FIRMS, ORGANIZATIONS, AND STATES (1970).

397. JAMES W. LOEWEN, SUNDOWN TOWNS: A HIDDEN DIMENSION OF AMERICAN RACISM (2005) (discussing history of explicit race discrimination by some American cities referred to as “sundown towns,” that warned African Americans to leave town by nightfall).

for how it is organized.”<sup>398</sup> The model must anticipate how current issues for some cities may look less compelling in other times, in other settings, when asserted by other cities.

Thus, advancing the normative values of localism in a way that is mindful of the normative downsides is a complex process. Yet, it is already occurring in the sanctuary city cases. These cases suggest that four principles, among others that may be illuminated in future local power conflicts, should guide the normative inquiry.

The first principle is that government preemption of local government power must respect constitutional rights—structural and substantive. Richard Briffault, among other local government scholars, has argued that the new, aggressive forms of preemption may violate federal free speech mandates, federalism-based norms, and state law limits.<sup>399</sup> As shown above, we concur. These scholars are sounding an alarm that is based on fundamental principles of self-governance and constitutional rights. Some courts are heeding that alarm.

Second is that the word “sovereignty” should be avoided in demarcating the relevant assignments of government power. This has become a political fighting word, rather than the repository of complex ideas about how to balance liberalism and democracy, national versus subnational public safety interests, and local self-determination versus national self-preservation.<sup>400</sup> We are not “losing our sovereignty”; we are in a constant process of defining it. The word hobbles efforts to see this clearly.

Third is that no one-size-fits-all answer to the constitutional dilemmas faced by local governments will do. No theory can fully inventory or determine the normative features of local government

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398. FRUG & BARRON, *supra* note 296, at 231–32.

399. See Briffault, *supra* note 256, at 2026–27; see also Scharff, *supra* note 23, at 1498–1507 (discussing how hyper preemption limits both local policymaking and also the ability to challenge those limitations); Schragger, *The Attack on American Cities*, *supra* note 4, at 1184.

400. In any event, it is possible and in some ways desirable to advance local government claims without the fraught term “sovereignty” doing the work. As Richard Briffault has stated, “[L]ocalism suggests [that] subordinate units can do quite well in the political scheme of things . . . without a claim to sovereignty, and without a claim to constitutional protection against upper-level governments.” Briffault, “*What About the ‘Ism’?*” *supra* note 376, at 1318; see also Gerken, *supra* note 37, at 1783–85 (discussing expanding federalism beyond sovereignty).

power across all legal contexts.<sup>401</sup> As Richard Schragger has observed, “constitutional localism suffers from a vulnerability that afflicts most attempts to create spheres of political authority: the difficulty in arriving at a plausible or workable principle for allotting some powers to one level of government and some to others.”<sup>402</sup> He also muses that scale may matter as to whether and to what extent constitutional substance should change depending on the level of government at issue.<sup>403</sup> In other words, the benefits of local government power will depend on the specific constitutional right at stake as well as on the

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401. The literature on local government is vast and extremely complex, insofar as it grapples with the enormous differences among local communities, how these differences play out in complex ways depending on the specific issues at stake, and the challenges they face as they seek to govern themselves. *See, e.g.*, GERALD E. FRUG, *CITY MAKING: BUILDING CITIES WITHOUT BUILDING WALLS* (1999) (exploring how the legal system empowers or disempowers cities); FRUG & BARRON, *CITY BOUND*, *supra* note 296; JACOBS, *DEATH AND LIFE*, *supra* note 371; DONALD J. KIRP, JOHN P. DWYER, & LARRY A. ROSENTHAL, *OUR TOWN: RACE, HOUSING, AND THE SOUL OF SUBURBIA* (1997) (studying implications of local power in New Jersey affordable housing policy); SCHRAGGER, *CITY POWER*, *supra* note 293; David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255 (2003) (arguing that Home Rule should be conceptualized as a mixture of state and local power); Richard Briffault, *Our Localism: Part I – The Structure of Local Government Law*, 90 COLUM. L. REV. 1 (1990) (studying legal power of range of local governments); Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346 (1990) (exploring local difference and normative accounts of local power); Williams, *supra* note 285. For a recent look at the rich variation among American towns see JAMES FALLOWS & DEBORAH FALLOWS, *OUR TOWNS: A 100,000-MILE JOURNEY INTO THE HEART OF AMERICA* (2018). For an eloquent discussion of the rural/urban divide in America, and how it arguably affects national politics, *see* J.D. VANCE, *HILLBILLY ELEGY: A MEMOIR OF A FAMILY AND CULTURE IN CRISIS* (2017). For an earlier examination of “visionary” communities in the United States, *see* FRANCES FITZGERALD, *CITIES ON A HILL* (1986 ed.).

402. Schragger, *Cities as Constitutional Actors*, *supra* note 245, at 178. *See also* FRUG & BARRON, *supra* note 296, at 43 (noting that democratic theory offers no answer to the question of which level of government has the stronger claim to authority over a given matter, but that “decision-making power has to be lodged *somewhere*”) (emphasis in original). *See also* ROBERT A. DAHL, *WHO GOVERNS? DEMOCRACY AND POWER IN AN AMERICAN CITY* (1961) (exploring the question of who in a democratic but unequal society actually has decision-making power). *Cf.* Bulman-Pozen, *supra* note 288, at 381 (noting that “[r]egions captivate other disciplines in part because they lack precise institutional form. Without fixed boundaries, regions may seem more “real” than the artificial states, and the common tally of between three and twelve regions offers a more manageable way to parse the country than a fifty-state division. But without fixed boundaries, regions are hard places for law.”).

403. *See* Schragger, *Cities as Constitutional Actors*, *supra* note 245, at 189.



government interests with which it may conflict. Whether anti-fracking ordinances can defy state preemption may entail a different weighing of interests than would preemption of local mandates that indigent immigrants receive free legal counsel in immigration proceedings, preemption of local minimum wage laws, or preemption of local gun safety measures. Courts and local government scholars should not turn to developing more robust means of conducting the analysis. They should be buoyed by evidence of judicial willingness to support some local power in sanctuary city cases, where federal and state power is so formidable.

Finally, the normative brakes should be capable of judicial enforcement: there must be judicially manageable principles with guideposts that can be cited and applied. Pure balancing tests that ask courts to weigh the costs versus benefits of alternative public policies are inadequate.

The final two conditions risk stopping theorizing in its tracks. A sufficiently contextualized theory of local power that also is judicially manageable is not easy to craft. But again, the sanctuary jurisdiction cases offer preliminary guideposts for defining what normatively sound, judicially enforceable limits look like, and prove that defining them is feasible. To be sure, the path of local power to defy preemption is narrow, but it is not unmarked. Pursuing and pruning this path, we maintain here, are tasks worth undertaking in order to preserve local voice and individual liberty.

#### *Local Voice and Individual Liberty*

Liberty and structural limits on preemption—federal and state—are viable and normatively desirable. The structural limits might be derived from constitutional cases, including the federal anti-commandeering and anti-coercive funding cases. These cases are not solely about “sovereignty” per se, but about imposing limits on how government can treat individuals and how legitimate official power operates in a liberal democratic order. The limits thus should affect how cities are governed and bode ill for the “gun to the head” and bully pulpit threats cities now face in some contexts.

Implementation of the liberty principles should track the arguments outlined in Part II, in which local governments have insisted that fundamental rights limit the ways in which the federal and state governments may command them to act in immigration enforcement. An important point is that these are not objections to garden-variety socioeconomic regulation of city or county prerogatives. In those areas, courts properly play a very restricted

role. Rather, the sanctuary cases all involve assertions of fundamental rights: Fourth Amendment, procedural and substantive due process, equal protection, and freedom of expression.

Cities and counties also should insist on a careful and narrow reading of federal and state statutes that authorize intrusion into state and local powers, and urge a presumption against preemption where it becomes unduly coercive or disproportionate. Home Rule jurisdictions in particular should demand this. Finally, local governments should argue that separation of powers principles must be judicially enforced, even against the President of the United States.

In short, core principles preserved by due process should be respected: that government not be arbitrary or irrational; that government act in the public interest; that government respect the limits of its powers; and that government not invade areas basic to human liberty.

## CONCLUSION

As the United States continues to stratify and segregate, driven in part by ideological preferences,<sup>404</sup> the notion of protecting local communities likely may become more fraught in ways that will make the conventional assumptions about local government power highly problematic. The right tools for allowing greater local autonomy in constitutionally salient matters, but not necessarily in other matters of local policy, will not be easily designed or implemented.

This Article argues that many of the tools are familiar and workable. Government mandates may not defy structural limits on their power or basic, national constitutional liberties. This applies to all levels of government. As Justice Cardozo famously observed, we “sink or swim together.”<sup>405</sup> All must swim *toward* liberty, not *against*. This is a one-way ratchet.

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404. The range of sources of these divides is complex, contested, and beyond the scope of this Article. For one look at how political differences may derive from the different moral universes inhabited by liberals and conservatives, see JONATHAN HAIDT, *THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION* (2012).

405. *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935) (noting in context of commerce regulation that “the Constitution was . . . framed upon the

This liberty ratchet is judicially manageable,<sup>406</sup> as the constitutional struggles of sanctuary jurisdictions prove. These jurisdictions' resistance has been lawful, waged in the courts, based on well-honed doctrine and underlying principles, and expressive of our most fundamental moral and constitutional norms. The most normatively compelling aspect of the sanctuary jurisdiction claims thus lies here: they seek inclusion under the banner of the Constitution rather than contraction into balkanized enclaves. That is, they are constitutional cities.

Their justifications are constitutionally compelling: public safety, liberty, equal protection, due process, freedom of political expression, respect for criminal and civil order, rationality, and human dignity. If there is a hierarchy of worthy government ends, these lie at the apex. If there is a model of normatively grounded political leadership, mayors and other local government actors who defend these ends display it.

Taking local resistance seriously in such contexts therefore is critical in a constitutional order that takes democratic participation and rights seriously. No matter how complicated the power line-drawing may be in theory or in general, the sanctuary jurisdiction controversy shows that lines do exist, that some officials are willing to draw them, and that some judges are willing to police them. This is good news for “[a]n anxious world [that] must know that our Government remains committed always to the liberties the Constitution seeks to preserve and protect, so that freedom extends outward, and lasts.”<sup>407</sup>

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theory that the peoples of the several states must sink or swim together, and that, in the long run, prosperity and salvation are in union, and not division.”)

406. This is hardly the only area in which courts may be called upon to identify a baseline for decision-making where guideposts are not always plain. *Cf.* Baker & Rodriguez, *supra* note 309, at 1364–71 (discussing judicial role in distinguishing between local and state level concerns, for Home Rule jurisdictions). Moreover, the stakes are higher than in many arenas, and include well-established fundamental rights.

407. *Trump v. Hawaii*, 138 S. Ct. 2392, 2424 (2018) (Kennedy, J., concurring).