The New "Sanctuary State": United States v. California and Lessons for Comprehensive Immigration Reform

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THE NEW “SANCTUARY STATE”: UNITED STATES V. CALIFORNIA AND LESSONS FOR COMPREHENSIVE IMMIGRATION REFORM

Rebecca Brown*

The Trump Administration waged war on so-called “sanctuary” policies. The Administration targeted localities and states that refused to subscribe to the Administration’s enforcement goals. The battle was most potent in the fight with California, culminating in the federal case United States v. California over California’s recently enacted “sanctuary laws.” The fight brought questions of federalism, separation of powers and national identity to the forefront of legal and political debate. This Note examines the historical underpinnings of sanctuary policies, California’s transition from sanctuary cities to sanctuary state, and recommendations for immigration reform.

* J.D. Candidate, May 2022, Loyola Law School, Los Angeles; B.A. International Relations, Franklin University Switzerland, May 2011. This Note is dedicated to Anne Pilsbury, the heroes sin capas at Central American Legal Assistance, and the brave immigrants who inspired it. Thanks to the editors and staff of the Loyola of Los Angeles Law Review for their help in editing this Note. Thanks, also, to Dean Kathleen Kim for her unwavering guidance and support. Lastly, thanks to Cecile, Paul, and Susan Glasner for their sacrifices and immigrant stories that first sparked this journey.
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I. INTRODUCTION

In December 2018, two versions of the American immigrant story splashed across the front page of national newspapers. First Lady Melania Trump, a Slovenian immigrant granted a rare visa, celebrated the holiday season in the White House among red Christmas trees. Meanwhile, news of the death of seven-year-old Guatemalan Jakelin Caal Maquin shocked the national conscious. Jakelin crossed the U.S.-Mexico border just two days prior, and while in U.S. custody died from dehydration and shock. The immigrant experience can end as an American dream or an American nightmare.

Like the dichotomous experiences of Jakelin and Melania, different states’ policies towards immigrants have polar effects. The United States is divided into a checkerboard of immigration policies: in one state a traffic stop leads to deportation, while across the state border the encounter ends with a ticket. The deepening divide over immigration policies has led to questions over America’s identity, the power of the executive branch, and federalism.

Over the last fifteen years, Congress has been unable to enact comprehensive immigration reform, “even though it regularly picks at it with a reform here and a reform there.” Efforts over the years have focused on immigration enforcement or certain groups of immigrants, rather than broad reform. The Trump Administration’s various executive actions—including the “Muslim ban,” “zero tolerance policy,” and “Buy American Hire American,” shone a bright light on the malleability of immigration law and the President’s broad power over it. While what Trump accomplished in his immigration platform can

5. Id.
largely be undone with the stroke of a pen, thousands of immigrants are boomeranged in and out of quasi-legal status.

One particularly potent fight over federalism and immigration law is over “sanctuary” policies. The Trump administration repeatedly sued the states over sanctuary policies. California has been at the center of this tension between the federal government and the states, most recently in United States v. California.

California recently enacted three sanctuary laws to protect immigrants from federal immigration authorities: Assembly Bill (AB) 450, AB 103 and Senate Bill (SB) 54. AB 450 prohibits private employers from providing consent to immigration agents to enter private areas of employment. AB 103 provided for inspection of detention facilities. SB 54 prohibits California law enforcement agencies from inquiring about an arrestee’s immigration status and bars them from acting as an arm of immigration enforcement. The United States sought a preliminary injunction to stop the state from enacting certain provisions of the three sanctuary laws, claiming they violated the Supremacy Clause. The District Court found that the United States was unlikely to succeed on the merits of many of its claims and denied its motion for a preliminary injunction. The government appealed, and the Ninth Circuit affirmed in part, reversed in part, remanded, and


7. For the purposes of this Note, “sanctuary” policies are those that limit state and local cooperation with federal immigration authorities. The most common “sanctuary” policy is one that does not assist federal immigration enforcement by holding people beyond their criminal charge release date to allow for immigration authorities to pick the person up based on immigration detainers.


9. 921 F.3d 865 (9th Cir. 2019), cert. denied, 141 S. Ct. 124 (2020).


14. Id. at 1111.
dismissed in part. The Supreme Court denied certiorari last summer. With that decision, California became the nation’s first “sanctuary state.”

The power to regulate immigration is exclusively federal. However, state and local governments play important roles in enforcing the nation’s immigration laws. The degree that state and local governments play is one of constant debate. Sanctuary policies seek to limit that federal role through local laws, ordinances, regulations, resolutions, or other practices “either by refusing to or prohibiting agencies from complying with ICE detainers, imposing unreasonable conditions on detainer acceptance, denying ICE access to interview incarcerated aliens, or otherwise impeding communication or information exchanges between their personnel and federal immigration officers.”

This Note will outline California’s transition from host to individual sanctuary cities to “sanctuary state” by examining United States v. California and will argue that sanctuary policies should inform comprehensive immigration reform. Comprehensive immigration reform would “marry increased border enforcement with legalization for [undocumented] immigrants and the ability to bring in future workers needed by the U.S. labor market. . . . [It] would touch virtually every

15. United States v. California, 921 F.3d at 894–95, 878 n.5.
18. U.S. CONST. art. I, § 8, cl. 4; Huyen Pham, The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power, 74 U. CIN. L. REV. 1373, 1381 (2006) (also suggesting the power could derive from the Foreign Affairs Clauses, the Commerce Clause, and the nation’s inherent power as a sovereign). See also THE FEDERALIST No. 3 (John Jay) (observing that federal power would be necessary in part because “bordering States . . . under the impulse of sudden irritation, and a quick sense of apparent interest or injury” might take action that would undermine foreign relations).
20. The word “alien” is a legal term of art in the Immigration and Nationality Act. Where “alien” is used, it is a direct reference to the legal use of alien. Otherwise, throughout the article the term “non-citizens” is used to refer to immigrants who have not naturalized and “undocumented immigrants” to refer to those without lawful immigration status.
facet of the U.S. immigration system.” Comprehensive immigration reform should consider balancing humanitarian and regulatory norms and state and federal interests, therefore mindful of sanctuary policy goals. Part II will discuss the national political and legal immigration background that influenced California’s policy change. Part III will analyze California’s transition from sanctuary cities to sanctuary state. Part IV will discuss the arguments for and against sanctuary policies, and the validity of each. Part V argues that the sanctuary policies California has enacted should inform comprehensive immigration reform. Lastly, this Note offers specific recommendations for comprehensive immigration reform that reflect sanctuary policies including repealing sections of the current law, increasing access to counsel for undocumented immigrants, and decreasing barriers to asylum.

II. BACKGROUND

A. Sanctuary Is a Closely Held Normative Value, Rising from Ancient Tradition and Influencing the Nation’s Laws

In examining sanctuary policies in particular and immigration laws in general, the famous Justice Holmes quote “a page of history is worth a volume of logic” proves true. The nation’s immigration laws are the hodgepodge product of historical, political, economic, and normative forces. The term “sanctuary cities” derives its name from the Sanctuary Movement that occurred thirty years ago. The Sanctuary Movement was a grassroots effort that sheltered Central American refugees from federal immigration authorities in churches and other houses of worship in the 1980s. The Movement provided legal services, left water in the desert for travelers, social services, and evasion from the long arm of the federal government.

26. Id. at 12–13.
Yet, the concept of sanctuary has deep moral origins stretching back millennia. Pre-seventeenth century England, ancient Greece and Rome, pre-colonized Polynesia, and Hanseatic Germany all employed versions of sanctuary policies. There are numerous references to sanctuary in the Judeo-Christian Bible. For example, the Bible mentions at least six Levitical “Cities of Refuge” and that Moses established three sanctuary cities for unintentional killers.

Likewise, the normative value of being hospitable to strangers runs deep through human history. The Greeks held sacred the moral notion of xenia (hospitality). For example, the myth of Baucis and Philemon tells of an elderly couple rewarded in death for providing hospitality to a deity that came to their door as a stranger, while the rest of the town that denied the stranger hospitality was burned to the ground. The Judeo-Christian Bible contains numerous parables and commands relating to the treatment of “ger” or “gur,” which translates to “stranger,” “newcomer,” or “alien.” For instance, the Book of Deuteronomy contains provisions for treating “strangers” with active support. And, of course, the Israelites were strangers in Egypt, and in the New Testament, Jesus is the stranger.

In the United States, sanctuary has long been a part of the country’s moral and political fiber. For one, the Pilgrims came to the colonies seeking refuge from religious and political persecution, and the myth that they were welcomed and provided for in a strange new land is celebrated each year with the Thanksgiving holiday. In the 19th century, runaway slaves were given sanctuary along the Underground Railroad, at risk of arrest and a return to bondage. However, in contrast
with that history and ethos, it remains a federal felony today to hide, harbor, or shield any alien “not lawfully entitled to reside within the United States.”

B. The Undocumented Immigrant Is a Relatively New Concept

Article I, Section 8, Clause 4 of the U.S. Constitution gives the federal government power over immigration and naturalization. The first immigration statute was passed in 1790 and made naturalization an option only for “free white persons.” The Fourteenth Amendment in 1866 granted citizenship to former slaves and states that “[a]ll persons born or naturalized in the United States . . . are citizens of the United States.” Yet, the question of who was a U.S. citizen remained racially motivated and perpetuated a caste system based on race. In the Supreme Court’s landmark 1898 decision United States v. Wong Kim Ark, the question before the Court was whether a child born on U.S. soil to Chinese immigrant parents was in fact a U.S. citizen. The Court ultimately interpreted the Citizenship Clause of the Fourteenth Amendment to grant citizenship to children born on U.S. soil to parents of foreign nationality.

Beginning in the 1920s, restrictions on immigration created the category of the “illegal alien”: “someone whose inclusion in the nation was ‘simultaneously a social reality and a legal impossibility.’” Despite a significant influx of East Asian immigration in the 19th and early 20th centuries, the naturalization laws had not yet been amended to include Asians. In fact, naturalization laws at the time focused on allowing only white immigrants to become citizens.

41. 169 U.S. 649 (1898).
42. Id. at 653.
44. The term “illegal alien” is misleading and reflects the false blending of criminality and immigration in public discourse.
46. MOTOMURA, supra note 39, at 34–37.
Who qualified as “white” was a Kafkaesque legal question. In 1922, the U.S. Supreme Court heard the case of Takao Ozawa.\(^{48}\) Mr. Ozawa was a Japanese national who had lived in the United States for more than 20 years and sought to nationalize under the Nationalization Act of 1906.\(^{49}\) The Act only allowed “free white persons” and “aliens of African nativity and . . . persons of African descent” to naturalize.\(^{50}\) Mr. Ozawa argued that he was white and therefore eligible to naturalize.\(^{51}\) The Court disagreed.\(^{52}\) The Court unanimously held that “white” did not mean skin color, but “Caucasian,” and concluded the Japanese were not Caucasian.\(^{53}\) “No matter which route a borderline applicant took to gain acceptance, the caste system shape-shifted to keep the upper caste pure by its own terms.”\(^{54}\) Two years later, the legislature continued the emphasis on white immigrants. The 1924 Johnson-Reed Act first enacted national quotas aimed at keeping the United States predominately white, with an emphasis on immigrants from northern and western European stock.\(^{55}\)

In response to anti-Mexican sentiment and job scarcity caused by the Great Depression, Mexican nationals living in the U.S. and U.S. citizens of Mexican descent were “repatriated” in the 1930s, causing further labor shortage.\(^{56}\) The 1940s saw the advent of the \textit{bracero} program, an agricultural guest worker program designed to reverse the 1930s Mexican repatriation and solve anticipated labor shortages caused by World War II.\(^{57}\) The \textit{bracero} program arguably filled the

\begin{footnotes}
\footnote{48. Ozawa v. United States, 260 U.S. 178 (1922).}
\footnote{49. \textit{Id.} at 189–90.}
\footnote{50. \textit{Id.} at 190.}
\footnote{51. \textit{Id.} at 182.}
\footnote{52. \textit{Id.} at 198.}
\footnote{53. \textit{Id.}}
\footnote{57. The 1965 Hart-Cellar Act abolished the quota system. Abrams, supra note 45, at 429.}
\end{footnotes}
same economic need that slaves, coolies, and convicts served in decades past. However, *braceros* were “theoretically ‘free’.” The *bracero* program also included safeguards for workers, but in reality ended with exploitation and eventually wage deprivation for farm workers in the coming decades. When the *braceros* quit working under the program, they then became “illegal aliens.”

C. The 1980s Sanctuary Movement: Moral and Legal Responsibilities

While for many present-day Americans the ancient values of sanctuary and hospitality still ring true, the debate over sanctuary policies has been divided along the lines of legalism and liberalism. This battle first came to the political forefront in the United States over the civil strife in Central America in the 1980s. During the 1970s and 1980s, the small nations of Central America were engulfed in civil wars. Death squads raged across El Salvador and Guatemala, killing thousands, disappearing hundreds, and displacing millions. Meanwhile, in another hemisphere, Vietnamese people flooded onto Southeast Asian shores in search of refuge from oppression. In response to public sympathy, President Jimmy Carter signed the Refugee Act...
of 1980. The Refugee Act raised the annual ceiling for the number of refugees and changed the definition of “refugee” to a person with a “well-founded fear of persecution” in accordance with United Nations protocols. Over the course of the summer of that same year, thirteen migrants died of dehydration attempting to cross the U.S.-Mexico border. Then, in December 1980, four American churchwomen were unearthed from shallow graves in El Salvador. Their deaths brought national attention to the plight of war-torn Central America and ignited religious institutions to act.

1. The War on Communism: Reagan’s Involvement in Central America Caused the Political and Humanitarian Immigration Issues Faced Today

Amidst the front-page headlines of the murder of the four churchwomen, the new Reagan Administration insisted that the thousands crossing the southern border were “economic migrants” fleeing poverty, not refugees fleeing oppression or political persecution. It was later revealed that the Reagan Administration was aware of the human rights abuses in Central America and acted contrary to international and domestic law. The Reagan Administration justified its
involvement to push back on encroaching communism in Central America because of its geographic proximity. At the time, Reagan told Congress that “El Salvador is nearer to Texas than Texas is to Massachusetts,” as justification for ignoring the humanitarian crisis on America’s doorstep.

Out of the human rights abuses in Central America, and the American government’s funneling of funds to the leaders that caused those abuses, the Sanctuary Movement was born. Between 1981 and 1990, an estimated one million Salvadorans and Guatemalans fled their homelands and clandestinely entered the United States. The vast majority of asylum claims by these refugees were denied. The asylum approval rate for Salvadoran and Guatemalan asylum cases in 1984 was under 3 percent. That same year, the approval rate for Iranians was 60 percent. "Lawyers representing refugees [were] co-opted into spending vast amounts of effort debating technicalities rather than fighting for an expanded definition of political refugee or for a determination process that would give the promise of political asylum more substantive reality." In response to and in defiance of the federal government’s immigration policies, houses of religious worship offered housing to Central American refugees, and even assisted migrants to cross the

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73. Id.

74. See, e.g., Iran-Contra Affair, BRITANNICA, https://www.britannica.com/event/Iran-Contra-Affair[https://perma.cc/HH82-WR2W] (“In the early 1980s the U.S. government provided military aid and financial support for the warring Nicaraguan opponents of the Sandinista regime, the contras, whom Reagan referred to as “the moral equal” of the Founding Fathers of the United States.”); Ross, supra note 71 (reporting that Congress sent $6 billion to the Salvadoran government during the country’s bloody civil war).

75. Gzesh, supra note 70.


77. Gzesh, supra note 70.

78. Id.

79. Pirie, supra note 27, at 392. While this quote is in the past tense, it rings true today.
Ministers, priests, rabbis, imams, and many religious lay people built a grassroots network to support the refugees. They then enlisted attorneys to assist with the refugees’ immigration claims. While they saw their efforts as complying with divine law, they recognized the need for advocates for man-made law. Still, the leaders of the Sanctuary Movement framed the cause as a moral, rather than political impetus. One of the founders of the Movement, Reverend John M. Fife, said at the time, “Sometimes you cannot love both God and the civil authority. Sometimes you have to make a choice.” While the Movement had spiritual and religious roots, the Movement was wholeheartedly political. Public support of the Movement soon gained hold because the activists framed the issue as a humanitarian and moral cause. By the mid-1980s, over 150 congregations openly defied the federal government by offering humanitarian and legal assistance to Central American refugees. Another thousand congregations of all faiths endorsed the practice. Colleges and universities soon followed suit. Then cities did, too.

The Reagan Administration responded to the Sanctuary Movement by arresting and prosecuting its leaders. Like the government’s...

80. This “underground railroad” was “anything but underground.” Sanctuary workers displayed signs viewable to the public and the authorities that they were transporting and housing unauthorized immigrants. Id. at 398–99.
83. See id. at 395.
84. See id. at 413.
85. Gzesh, supra note 70.
86. Id.
87. Id. supra note 25, at 12 n. 8.
89. Pirie, supra note 27, at 407.
actions during COINTELPRO91 just a few years prior, the Reagan Administration organized infiltration and surveillance of the Sanctuary Movement to build its case against it.92 The government authorized an undercover investigation, named “Operation Sojourner,” to bug church services and Bible services and infiltrate Sanctuary worker meetings.93 The government then brought suit against leaders of the Sanctuary Movement alleging they committed conspiracy to violate immigration law.94 Eight of the eleven defendants were found guilty in United States v. Aguilar.95

Much of the government’s case against the Sanctuary leaders in Aguilar relied on the court’s grant of its motion in limine to exclude the defendants’ defenses or claims that they were acting morally and that their conduct was not criminal.96 Specifically, the motion asked to

exclude defense arguments that the Refugee Act of 1980 or any international treaty confers refugee status on any of the undocumented people named in the indictment; that defendants’ conduct was justified by their religious faith; that defendants had any good motives or beliefs that negated criminal intent; and that necessity compelled defendants to act as they did.97

The court’s grant of the motion stripped the defendants of any argument that may have justified or explained the leaders’ actions and arguably violated their constitutional rights.98 The arrest and prosecution of the Sanctuary leaders showed the public that resistance to federal

91. “COINTELPRO” is short for the Counterintelligence Program conducted by the FBI starting in the 1950s and sanctioned by Director J. Edgar Hoover. It was a series of illegal covert actions by the FBI to infiltrate and disrupt domestic political organizations, including the anti-Vietnam War and civil rights movements. See S. REP. NO. 94-755, at 10–11 (1976).
93. Bezdek, supra note 92, at 902–03.
94. Colbert, supra note 92, at 6
95. United States v. Aguilar, 883 F.2d 662, 709 (9th Cir. 1989). The defendants were found guilty of conspiracy to violate section 1324(a) of the Immigration Act of 1990, which provides criminal penalties for bringing in and harboring aliens. Colbert, supra note 92, at 6 & n.1.
96. Colbert, supra note 92, at 8
97. Bezdek, supra note 92, at 951.
98. Colbert, supra note 92, at 6–7; see also Pirie, supra note 27, at 410 (a motion in limine is “unusual for the prosecuting side to use in the United States—except in ‘political trials’”).
immigration enforcement would not be tolerated. That stance would soon be codified.

2. IRCA Extends Federal Immigration Enforcement to Private Actors

In 1986, Congress passed the Immigration Reform and Control Act (IRCA), making it illegal for the first time to knowingly hire undocumented immigrants and establishing civil and monetary penalties for employers who hired undocumented immigrants. IRCA effectively deputized employers as immigration agents, “transferring immigration-enforcement functions to the workplace.” As a consequence, some employers hire undocumented immigrants and then threaten to report them to immigration authorities if they demand better working conditions. Thus, undocumented workers are caught in a Catch-22: work in unacceptable conditions, or be deported. Dean Kathleen Kim explains:

[E]ven when employers do not engage in abusive conduct, IRCA’s de facto deputization of employers as immigration enforcers creates an implicit coercive choice set for undocumented workers: comply with exploitation or reject and risk deportation. In this way, undocumented workers may be structurally coerced—our immigration laws maintain a general atmosphere of coercion, causing undocumented workers to submit to unfair labor practices.

IRCA also granted amnesty to 2.7 million immigrants, and led to an influx of legal immigration. Additionally, against the backdrop of the War on Drugs, the Criminal Alien Program was created “to identify, arrest, and deport ‘priority’ noncitizens encountered in federal, state, and local prisons and jails.” As a result, many of the

100. Id.
101. Id.
102. Id. at 472.
Salvadorans who arrived to the United States as impoverished youth seeking refuge from the violent civil war and later joined criminal gangs in the U.S.\textsuperscript{106} were deported back to El Salvador.\textsuperscript{107} Politically, IRCA was heralded as striking a balance between humanitarian concerns for undocumented people already within the nation’s borders while meeting enforcement goals.

\textit{D. The War on Drugs Continued: Clinton Strengthens the Tie Between Criminal and Immigration Enforcement: IRAIRA and Crimmigration}

The Sanctuary Movement faded considerably from the public discourse in the 1990s.\textsuperscript{108} However, during that time, the Supreme Court laid the foundation for current sanctuary policies in \textit{New York v. United States}\textsuperscript{109} and \textit{Printz v. United States}.\textsuperscript{110} Neither case involved immigration, but both had consequences for immigration at the state and federal level. \textit{New York v. United States} struck down a federal mandate requiring states to take possession of low-level radioactive waste.\textsuperscript{111} \textit{Printz} involved the Brady Handgun Violence Protection Act, which would have required state and local law enforcement officials to conduct background checks on individuals attempting to purchase handguns.\textsuperscript{112} As discussed \textit{infra}, the two cases articulated the “anti-commandeering principle” and held that the federal government may not compel or coerce local officials to enforce, enact, or administer federal programs.\textsuperscript{113}

In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).\textsuperscript{114} IIRIRA strengthened the
criminal law and immigration connection ("crimmigration"). Before 1996 and the enactment of IIRAIRA, internal immigration enforcement was not very significant. IIRAIRA contained stronger immigration consequences for undocumented immigrants who commit crimes within the United States and reflected President Clinton’s law and order platform. Section 287(g) of IIRAIRA allows the Department of Homeland Security (DHS) to enter into formal written agreements with state or local law enforcement and deputize officers to perform federal immigration agent functions. IIRAIRA also included a provision that prohibits state and local governments from enacting laws or policies that limit communication with federal immigration enforcement agencies about “information regarding the immigration or citizenship status, lawful or unlawful, of any individual.” Further, in response to the Oklahoma City bombings, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which “required the mandatory detention of non-citizens convicted of a wide range of offenses, including minor drug offenses.”

E. The War on Terror: 9/11 Drastically Changed the Immigration System and Lessened Due Process for Immigrants

The terrorist attacks on September 11, 2001, prompted stricter enforcement of immigration laws and established the trilogy of immigration enforcement branches under the Department of Homeland Security (DHS) in force today: U.S. Citizenship and Immigration Services (USCIS), Immigration and Customs Enforcement (ICE), and Customs


119. 8 U.S.C. § 1373. “[O]ver time restrictionist bills were passed at an increasingly rapid pace. In the 30 years from 1965 to 1995, for example, only six major immigration bills were enacted, whereas in the decade from 1996 to 2006, eight pieces of legislation were signed into law. . . . [Sixteen] named enforcement operations [were] launched between 1993 and 2010.” Massey & Pren, supra note 104, at 6.

and Border Patrol (CBP). Additionally, the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act authorized deportation of noncitizens without due process and expanded the executive branch’s authority over immigration. With stricter enforcement, and new immigration consequences realized by the USA PATRIOT Act, deportations rose to unprecedented numbers. The public backlash followed Bush through most of his second term, and even followed him on his trip abroad to Guatemala. While none of the perpetrators of the 9/11 terrorist attacks were Mexicans and none of the terrorists entered through Mexico, “Mexicans nonetheless bore the brunt of the deportation campaign launched in the name of the war on terrorism, comprising 72 percent of those removed in 2009.” At the end of President Bush’s term, Congress directed ICE to develop a plan to “identify every criminal alien, at the prison, jail, or correctional institution in which they are held” and prioritize for deportation “criminal aliens convicted of violent crimes”. In response, ICE set forth Secure Communities (“S-Comm”), an unprecedented program coordinating local and federal governments that allows local governments on agreement to share data with ICE. By the end of the Bush administration, over seventy section 287(g) agreements had been signed. By that time, the Sanctuary Movement resurged with a new mission to protect undocumented immigrants present in the country from deportation.


123. Massey & Pren, supra note 104, at 8.


125. Massey & Pren, supra note 104, at 8.


128. Id.
F. Who’s in Charge?: Obama Reacts to Public Outcry over Immigration Policies, Demonstrates the Unfettered Power of the Executive Branch over Immigration, and the States Respond

Soon after his inauguration, President Obama became known as “Deporter-in-Chief.”129 The Obama Administration quickly outpaced the prior administration in removals.130 In the Administration’s first term, over three million immigrants were returned or removed from the country.131 By 2011, President Obama expanded S-Comm to enroll 1,600 jurisdictions.132 By 2013, S-Comm was operational in every jail and prison across the United States.133 In Obama’s second term, the Administration reformed its priorities to focus on immigrants convicted of criminal offenses, and returns and removals decreased to two million.134

1. Arizona and SB 1070

Despite the Obama Administration’s record level of deportations (or maybe because of it, creating an impression that unauthorized immigration status and criminality were one and the same), anti-immigrant sentiment steadily grew in popularity. The advent of state immigration enforcement legislation, initiated by Arizona’s SB 1070’s “attrition through enforcement”135 and self-deportation policy goals led to the constitutional framework and political motivation for sanctuary policies. Current sanctuary type laws are an opposite form of state police powers under the Tenth Amendment intended to protect immigrant residents.136 SB 1070 and copycat laws were also enacted

129. Id.
130. Id.
131. Id.
133. Chishti et al., supra note 127.
pursuant to state police powers under the Tenth Amendment, but that constitutional defense against federal preemption has largely failed.\footnote{Somin, supra note 136, at 1247–48, 1252; see Arizona v. United States, 567 U.S. 387 (2012).}

in Arizona was also condemned by the dissenting conservative justices at the time as an erosion of states’ rights, but the decision left an uncertain landscape for future liberal sanctuary policies.

2. How Much Power Does the Executive Have?: Obama and DACA

The same month that the Supreme Court issued its Arizona decision, the Obama Administration enacted the Deferred Action for Childhood Arrivals (DACA) program, one of the most important and hotly contested executive memoranda of recent times. Obama signed the Executive Order in response to Congress’s failure to enact comprehensive immigration reform. Specifically, its repeated failure to pass the Development, Relief, and Education for Alien Minors (DREAM) Act. The DREAM Act would have given approximately three million undocumented immigrants who entered as minors a path to permanent residency, and then citizenship. DACA ultimately granted deferred action from removal and work authorization to over 800,000 undocumented immigrants. It does not provide a path to permanent status. In 2014, President Obama sought to extend deferred action to include undocumented parents to U.S. citizens and

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<td>146</td>
<td>Each of the three partial dissents were written by conservative justices: Justice Scalia, Justice Thomas, and Justice Alito. Arizona v. United States, 567 U.S. at 416–59.</td>
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<td>152</td>
<td>See The Dream Act, supra note 150.</td>
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| 153              | Deferred Action predates DACA in the immigration system. Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 483–84 (1999) ("At each stage [of the removal process] the Executive has discretion to abandon the endeavor, and at the time [the Illegal Immigration Reform and Immigrant Responsibility Act of 1996] was enacted the INS had been engaging in a regular practice (which had come to be known as ‘deferred action’) of exercising that discretion for
permanent residents and to expand DACA.\textsuperscript{154} The Order was met with legal battles, and ultimately the 2014 expansion was halted by the Supreme Court.\textsuperscript{155}

\textbf{G. Trump’s War on Immigrants Transforms the Immigration System}

In 2015, San Francisco woman Kathryn Steinle was murdered. An undocumented immigrant was charged with her death.\textsuperscript{156} Steinle’s murder became a national rallying cry for hardline immigration policies against undocumented immigrants.\textsuperscript{157} In response to Steinle’s death, then-candidate Trump vowed to “end the sanctuary cities.”\textsuperscript{158} Trump’s focus on immigration enforcement greatly helped him win the election.\textsuperscript{159} It was a familiar narrative: lawless predators were seeping through the porous border.\textsuperscript{160} Trump and anti-sanctuary policy


\textsuperscript{155} See United States v. Texas, 136 S. Ct. 2271 (2016).

\textsuperscript{156} The alleged perpetrator’s conviction was later overturned, but nevertheless the myth that he was responsible continued. Dennis Romero, \textit{California Appeals Court Overturns Conviction in Kate Steinle Death}, NBC NEWS (Aug. 30, 2019, 8:04 PM), https://www.nbcnews.com/news/us-news/california-appeals-court-overturns-conviction-kate-steinle-death-n1048551 [https://perma.cc/J9AX-67YR].


\textsuperscript{160} See John Fritze, \textit{Trump Used Words Like ‘Invasion’ and ‘Killer’ to Discuss Immigrants at Rallies 500 Times: USA Today Analysis, USA TODAY} (Aug. 21, 2019, 10:18 AM),
sympathizers believe that sanctuary cities are fertile grounds for crime committed by undocumented immigrants. Trump promised to make the banishment of “bad hombres” one of his first priorities.

Trump selected Jeff Sessions as his Attorney General, who called for immigration changes to “end this lawlessness that threatens the public safety [and] pulls down the wages of working Americans.” Within a week of being in office, President Trump signed Executive Order 13768, seeking to punish and withdraw federal funds from Sanctuary jurisdictions. That directive also effectively made any undocumented immigrant an immigration enforcement priority, not just those convicted of certain crimes as previous administrations had done. Section 5 of Executive Order 13768 prioritizes the removal of aliens who:

[h]ave been convicted of any criminal offense; . . . [h]ave been charged with any criminal offense, where such charge has not been resolved; . . . [h]ave committed acts that constitute a chargeable criminal offense; . . . [h]ave engaged in fraud or willful misrepresentation in connection with any official matter or application before a governmental


162. Lizzy Gurdis, Trump: ‘We Have Some Bad Hombres and We’re Going to Get Them Out,’ CNBC (Oct. 19, 2016, 11:21 PM), https://www.cnbc.com/2016/10/19/trump-we-have-some-bad-hombres-and-were-going-to-get-them-out.html [https://perma.cc/Q8QU-JWMD]; see also César Cuauhtémoc García Hernández, supra note 115, at 212 (“[E]arly in his presidency, President Trump instructed the Justice Department to prioritize ‘prosecutions of offenses having a nexus to the southern border.’”).


The order represented the first display of the new administration’s “zero tolerance” policy.166

1. The Caravan: Framing Immigration as a Crisis

Immigration has long been framed as a crisis.167 There is fear of a tidal wave of immigrants storming the gates.168 Despite stricter enforcement policies at the border and higher deportation rates within the country, a 2018 migrant caravan reportedly broke the immigration system.169 In a tweet, Trump declared a national emergency170 and deployed troops to defend the border in response to the “monstrous caravans”171 of groups of Central American migrants, including women and children, traveling to the United States in hopes of refuge. The thousands of migrants arriving on foot172 played nicely into Trump’s

165. Exec. Order No. 13,768, supra note 164, at 8,800 (emphasis added).


167. For example, in 1976, the INS Commissioner published an article in Reader’s Digest entitled “Illegal Aliens: Time to Call a Halt!” in which he told readers that “[w]hen I became commissioner [of the INS] in 1973, we were out-manned, under-budgeted, and confronted by a growing, silent invasion of illegal aliens. Despite our best efforts, the problem—critical then—now threatens to become a national disaster.” Meagan Flynn, An ‘Invasion of Illegal Aliens’: The Oldest Immigration Fear-Mongering Metaphor in America, WASH. POST (Nov. 2, 2018), https://www.washingtonpost.com/nation/2018/11/02/an-invasion-illegal-aliens-oldest-immigration-fear-mongering-metaphor-america/ [https://perma.cc/X7E3-A9Q6].

168. See, e.g., OTTO SANTA ANA, BROWN TIDE RISING: METAPHORS OF LATINOS IN CONTEMPORARY AMERICAN PUBLIC DISCOURSE (2002).


call to build a border wall and fell within the narrative that the asylum system was so overrun with fraud that only Trump could fix it. Trump soon brokered a deal with Mexico to allow migrants to “remain in Mexico” for the duration of their immigration proceedings.173 While border apprehensions substantially dropped due to Trump’s Migrant Protection Protocols (MPP), otherwise known as the “Remain in Mexico” program,174 it was at the expense of international law commitments, humanitarian values, and immigrant lives.175 Immigrants waiting across the border for a determination on their asylum application were subject to abject poverty, increased rates of crime, and ultimately increased exposure to COVID.176 MPP raised serious due process concerns as there is no public funding for counsel for asylum applicants, and representation is almost impossible to find along the border.177

Much of Trump’s enforcement actions were announced as a reaction to perceived increased immigration. Immigration policy,
however, often has little to do with “waves” of immigration and more to do with economic circumstances and political ideologies. In times of relative economic certainty, the United States has opened its borders to increased immigration; while in times of economic uncertainty, the doors close. The same is true of political ideologies—when leaders are liberal, so are immigration policies.

2. Identity Politics: Framing Immigrants as Criminals

Throughout his time in office, President Trump made undocumented immigrants the focus of his ire and frustration. In his second State of the Union address, Trump again placed the national spotlight on victims of crimes allegedly committed by undocumented immigrants, and falsely claimed that “countless Americans” were murdered by undocumented immigrants. Trump even scapegoated individual immigrants for crimes and glorified victims of immigrant crime. Trump’s rhetoric reflected a prominent enforcement-oriented ideology among Americans. So, like the political landscape during the original Sanctuary Movement, part of America believes that immigration reform and control rests on legalism and crime enforcement, while a majority of the country believes reform and control should take a normative and liberalist approach.

179. See Massey, supra note 178, at 307.
180. See id.
As has been detailed in innumerable news reports and by President Trump himself, sanctuary cities were again at the forefront of public discourse as President Trump sermonized anti-immigrant rhetoric and hardnosed (or plainly inhumane) policies.\textsuperscript{185} Trump painted immigration control as legalism; a matter of law and order.\textsuperscript{186} This was evident during Trump’s “zero tolerance” family separation policy, which detained children in separate facilities from their parents so the parents could be criminally prosecuted for entering the United States without legal authorization.\textsuperscript{187} Amid global outrage against the policy, Trump used language reminiscent of criminal justice to justify the order: “When you prosecute the parents for coming in illegally—which should happen—you have to take the children away.”\textsuperscript{188} Additionally, as a subset\textsuperscript{189} of the new Sanctuary Movement, a grassroots effort to abolish ICE emerged.\textsuperscript{190} The effort to abolish ICE focuses on the


\textsuperscript{186} Sanctuary Cities Undermine Law Enforcement and Endanger Our Communities, supra note 161.


\textsuperscript{190} Is “abolish ICE” a subset of mainstream liberal or progressive discourse? See Angelica Chávez-Ríos, The End of Deportation, 68 UCLA L. REV. (forthcoming) (manuscript at 67–72) (on file with author).
restructuring or eliminating the enforcement agency and sees the agency as instrumental in family separation.\textsuperscript{191}

The Trump Administration has been sued more times over immigration policies than any other presidential administration.\textsuperscript{192} Professor Somin, a scholar with the conservative CATO Institute, has separated the sanctuary-focused litigation against the Administration into three categories: challenges to Executive Order 13768; “challenges to then-Attorney General Jeff Sessions’s July 2017 policy of conditioning federal law enforcement grants on state and local government cooperation with federal efforts to deport undocumented immigrants”; and \textit{United States v. California}.\textsuperscript{193}

The Trump Administration’s attacks on sanctuary jurisdictions relied primarily on its dubious interpretation of 8 USC § 1373. The Administration argued that sanctuary jurisdictions were unlawful because § 1373 \textit{requires} local jurisdictions to comply with ICE requests.\textsuperscript{194} Yet, this is (1) incorrect, and (2) runs afoul of the anticommandeering rule. In a strange twist for both sides of the political spectrum, Trump’s attacks on sanctuary jurisdictions have unwittingly strengthened federalism.\textsuperscript{195}

III. FEDERALISM, THE ANTIMANDEERING RULE AND SECTION 1373

The anticommandeering doctrine is relatively new. First announced in 1992 by the Supreme Court in \textit{New York v. United States},\textsuperscript{196} the doctrine directs that “[t]he federal government may not directly compel state governments to enact or administer federal regulatory programs, even in areas where Congress has enumerated power to legislate.”\textsuperscript{197} The rule “is not derived from the text of the

\textsuperscript{191} Godfrey, supra note 189.


\textsuperscript{193} Somin, supra note 136, at 1248. For an example of a challenge to Sessions’s policy, please see Oregon v. Trump, 406 F. Supp. 3d 940 (D. Or. 2019).


\textsuperscript{195} Somin, supra note 136, at 1284–94.

\textsuperscript{196} 505 U.S. 144 (1992).

\textsuperscript{197} AARON H. CAPLAN, AN INTEGRATED APPROACH TO CONSTITUTIONAL LAW 437 (2d ed. 2018).
Tenth Amendment itself,” but arose from the overall structure of the U.S. Constitution, which includes sovereign states as part of the design. In 1997, the Court revisited the doctrine in Printz v. United States. While Printz examined the Brady Act, which mandated federal background checks on firearm purchases and had nothing to do with immigration, the Court looked to the history of Congressional action toward citizenship and naturalization, finding that “the Constitution was originally understood to permit imposition of an obligation on state judges to enforce federal prescriptions. . . . [W]e do not think the early statutes imposing obligations on state courts imply a power of Congress to impress the state executive into its service.” Further, the Court held “[t]he power of the Federal Government would be augmented immeasurably if it were able to impress into its service—and at no cost to itself—the police officers of the 50 states.”

In 2018, the Supreme Court in Murphy v. National Collegiate Athletic Association struck down a federal law banning state government “authorization” of sports gambling under their own state law, citing the anticommandeering rule. The NCAA argued that the law was not requiring the states to do something, but that it was just telling them what not to do. The Court rejected this distinction: “It is as if federal officers were installed in state legislative chambers and were armed with the authority to stop legislators from voting on any offending proposals. A more direct affront to state sovereignty is not easy to imagine.”

Like the contested law in Murphy, section 1373 tells the states not to do something. Cases confronting section 1373 after Murphy have

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199. Id. at 156–57.
201. Id. at 907.
202. Id. at 922.
205. Murphy, 138 S. Ct. at 1478.
206. “Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.” 8 U.S.C. § 1373(a) (2018).
ruled against it. So far, at least three federal courts have found section 1373 unconstitutional under the Tenth Amendment.\textsuperscript{207} And in United States v. California, the District Court found section 1373 to be “highly suspect.”\textsuperscript{208} These decisions have important implications for jurisdictions who wish to adopt sanctuary policies against aiding the federal government in deporting immigrants.\textsuperscript{209}

IV. United States v. California Confirmed California as a Sanctuary State

California has a long history of enacting local sanctuary measures, in part because of its large Latinx population,\textsuperscript{210} and in part because of its left-leaning population.\textsuperscript{211} The City of Berkeley became the first sanctuary city in 1971.\textsuperscript{212} In 1979, the Los Angeles Police Department filed a Special Order prohibiting officers from initiating “police action with the objective of discovering the alien status of the person” and from arresting persons found to be in violation of 8 U.S.C. § 1325 (illegal entry).\textsuperscript{213} Since then, local jurisdictions across California have enacted sanctuary policies.\textsuperscript{214} More recently, as is the focus


\textsuperscript{208} United States v. California, 314 F. Supp. 3d 1077, 1101 (E.D. Cal. 2018), aff’d in part, rev’d in part, 921 F.3d 865 (9th Cir. 2019). However, the court did not make a ruling on the constitutionality of section 1373 because it found that California’s laws did not conflict with the statute anyway. Id. at 1104; 8 U.S.C. § 1373 (2018).


\textsuperscript{212} Sanctuary, CITY OF BERKELEY, CAL., MAYOR’S OFF., https://www.cityofberkeley.info/Mayor/Home/Sanctuary_City.aspx [https://perma.cc/Z4HB-M5CA].

\textsuperscript{213} L.A., CAL., OFF. CHIEF POLICE, SPECIAL ORD. 40 (Nov. 27, 1979).

of this Note, California has shifted from local sanctuary policies to state-wide sanctuary measures. For example, in 2014, California enacted the 2014 TRUST Act (AB 4), which limits local jails from holding people for the purpose of deportation. In 2018, California’s newest sanctuary measures were taken to court.

United States v. California addressed three new sanctuary laws: AB 450, AB 103, and SB 54—the California Values Act. The three laws sought to protect immigrants from the long arm of the federal government. The U.S. Government argued that the three laws encroached too far on the federal power over immigration.

AB 450 imposes penalties on employers based on their interactions with federal immigration authorities, including prohibiting “voluntary consent to [an] immigration enforcement agent to enter any nonpublic areas of a place of labor.” The Ninth Circuit upheld AB 450, finding that it did “not treat the federal government worse than anyone else” nor did it regulate any federal operations.

AB 103 authorizes the California Attorney General to inspect detention facilities that house civil immigration detainees. California amici argued that federal detention facilities lack adequate access to counsel, medical care and mental health services, which leads to increased rates of suicide. The Court upheld the inspection provision of the law, but struck down another portion of the law that requires examination of the circumstances surrounding apprehension and transfer of immigrant detainees. The court found one subsection of AB 103 “discriminate[d] against and impermissibly burdened the


216. United States v. California, 921 F.3d 865 (9th Cir. 2019), cert. denied, 141 S. Ct. 124 (2020).

217. Id. at 875–76.

218. CAL. GOV’T CODE § 7285.1(a) (West 2019).

219. United States v. California, 921 F.3d at 881.

220. CAL. GOV’T CODE § 12532(a).

221. “[T]he suicide rate is more than triple that of the general prison population.” Brief of Amici Curiae Immigrant Legal Resource Center et al. in Support of Defendant’s Opposition to Plaintiff’s Motion for Preliminary Injunction at 2, 14, United States v. California, 314 F. Supp. 3d 1077 (E.D. Cal 2018) (No. 18-cv-00490).

222. United States v. California, 921 F.3d at 873.
federal government” as a “novel requirement, apparently distinct from any other inspection requirements imposed by California law.”

SB 54, known as the California Values Act, passed in 2017, prohibits state and local law enforcement agencies from sharing immigrants’ personal information with immigration authorities and transferring an individual to immigration authorities unless authorized by a judicial warrant or judicial probable cause determination. It is the most expansive law of its kind in the country—affecting 350 local institutions—police departments, state law enforcement, school and university police departments, and sheriff’s departments. At least fourteen Californian cities protested SB 54, with some voting to opt out of the law. The Ninth Circuit upheld the California Values Act, holding that:

SB 54 may well frustrate the federal government’s immigration enforcement efforts. However, whatever the wisdom of the underlying policy adopted by California, that frustration is permissible, because California has the right, pursuant to the anticommandeering rule, to refrain from assisting with federal efforts. The United States stresses that, in crafting the INA, Congress expected cooperation between states and federal immigration authorities. That is likely the case. But when questions of federalism are involved, we must distinguish between expectations and requirements. In this context, the federal government was free to expect as much as it wanted, but it could not require California’s cooperation without running afoul of the Tenth Amendment.

223. Id.
224. Id. at 885.
226. Id.
228. United States v. California, 921 F.3d at 890–91
With that holding, the California Values Act made California a sanctuary state.\(^{229}\)

In response to the court’s holding, President Trump pushed forward with his agenda and attacked California by organizing a “sanctuary op.\(^{230}\)” Circumventing cooperation with local law enforcement and directly targeting immigrant communities, ICE made 128 arrests over five days in three California “sanctuary jurisdictions” in late September and early October 2020.\(^{231}\)

V. THE NEED FOR SANCTUARY POLICIES

A. Sanctuary Policies Are Part of the National Identity and Should Be Reflected in the Law

Then-Presidential candidate Joe Biden said the 2020 election was a battle for the “soul of America.”\(^{232}\) The soul of America is an immigrant one. The immigrant story is deeply rooted in the American identity. The United States brandishes itself aswelcomers of the tired, the hungry, the poor.\(^{233}\) American mythology and U.S. history books tout American heritage of departing from foreign shores to the New World. Even where sanctuary policies are not formally enacted, communities are engaging in sanctuary protections.\(^{234}\) Yet federal laws and policies do not reflect this. A society comprised of millions of quasi-legal and “illegal”\(^{235}\) people is not a “melting pot” or even a salad. It is a class

\(^{229}\) See Raphelson et al., supra note 227.


\(^{231}\) Miroff, supra note 230.


\(^{235}\) As noted supra, the term “illegal” is delusive. As José Mendoza put it, “the notion of illegality plays a large role in constructing, perpetuating, and solidifying whiteness. . . . [I]Illegality, like race, has historically functioned as a signifier of nonwhiteness and thereby marks entire
system with profound effects on societal relations, family affairs, and the human psyche. For undocumented immigrants, the experience of being undocumented has profound psychological effects. If a child loses a parent to deportation, the experience can result in anxiety, depression, and social isolation. Additionally, children who lose a parent to deportation are at risk of being put into foster care, which risks increased psychological damage. When the child becomes an adult, the cycle of poverty continues. Beyond reflecting normative values, sanctuary policies are good business. America needs sanctuary policies because sanctuary policies do not increase unauthorized migration, they are good for the economy, and are good for law enforcement.

B. Sanctuary Policies Do Not Increase Unauthorized Migration

Approximately eleven million undocumented people live in the United States. An estimated 40 percent are visa overstays and are seldom the people in sanctuary; indeed, most are so integrated into society, their neighbors would be surprised to learn they are “illegal.” There is no evidence that sanctuary policies encourage unauthorized migration. Bad foreign policy does that. The United States’ involvement in foreign countries’ affairs is almost directly correlated to waves of unauthorized migration. The starkest example is

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238. Id. at 3–4.
240. Id.
243. Id.
244. See supra note 89, at 10–11.
that of Central America during the 1980s, described above, where the United States funded the Salvadoran military to the tune of millions of dollars a day as it killed unarmed civilians.\textsuperscript{246}

C. Sanctuary Policies Are Good for the Economy

Where enacted, sanctuary policies lead to higher household income, less reliance on public assistance, and create the ability to generate inter-generational wealth.\textsuperscript{247} Unauthorized immigrants make up 4.4 percent of the U.S. workforce.\textsuperscript{248} In California, the nation’s largest economy, DACAs alone contribute almost 200 million in tax revenue.\textsuperscript{249}

D. Sanctuary Policies Are Good for Law Enforcement

Sanctuary policies have always sought to encourage cooperation between unauthorized immigrants and local law enforcement. The Supreme Court has stated that “[t]he promotion of safety of persons and property [has been] unquestionably at the core of the [s]tate’s police power.”\textsuperscript{250} The rationale behind sanctuary policies is that when a city promises not to act as immigration agents, its undocumented immigrants will report crimes without fear of immigration consequences, police can then respond to crime reports, and overall crime will decline.

\textsuperscript{246} See Bedolla, supra note 245, at 55.


Numerous studies have proved this hypothesis true. Yet, in California, there are already violations of SB 54. Local law enforcement say that they are not actively trying to defy SB 54, it is just too complicated for them to enforce. For example, Edgar Torres Gutierrez was arrested by Laguna Beach police on suspicion of a DUI. Mr. Gutierrez had no criminal record but was held for 15 hours at the request of ICE. Under SB 54, the police should not have entertained the request to hold Mr. Gutierrez. It was later discovered by immigration officials that Mr. Gutierrez held DACA, and was released. Laguna Beach entered into a settlement with Mr. Gutierrez and are now required to train officers on SB 54 for the next two years.

Further, the global protest movement in response to the murder of George Floyd and others shows that community policing is in desperate need of reform. Amidst a global pandemic, a global outcry for police reform reached a fever pitch. The Black Lives Matter movement includes calls for abolishing the police and for stripping police funding. As the immigration system and law enforcement are codependent, any comprehensive immigration reform must address this.

E. There Is a Constitutional Duty to Broaden Sanctuary Policies on the National Level: Race and the Thirteenth Amendment

Some commentators argue that the Constitution does not provide support for sanctuary policies, as immigration and naturalization are within the exclusive authority of the federal government. Yet, the

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253. Id.
256. Id.
257. See supra note 115 and accompanying text.
policies for immigration reform is even more compelling if one reads the Thirteenth Amendment. Passed in 1865 as part of the Reconstruction Amendments, the Thirteenth Amendment states that no person shall be subject to slavery or involuntary servitude, except for punishment of a crime. Immigrants held in detention facilities are subject to below-cost labor. The Supreme Court has repeatedly stated that being detained for immigration violations is not criminal punishment.

The Thirteenth Amendment “represented the Union’s deep seated commitment to end the ‘badges and incidents of servitude,’ [and] was an unadulterated call to abandon injustices that had made blacks outsiders in the country they helped build and whose economy they helped sustain.” Section Two of the Thirteenth Amendment empowers Congress to enforce the abolition of slavery. In Jones v. Alfred H. Mayer Co., the Supreme Court construed the Amendment as not only abolishing African chattel slavery, but also empowering Congress to “pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.” William M. Carter, Jr. argues that the Thirteenth Amendment’s framers intended to dismantle the lingering vestiges of the slave system and that those vestiges extend beyond African-Americans. The immigration detention complex is arguably a vestige of that system. AB 103 sought inspection of detention facilities, and another law, AB 32, went into

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258. U.S. CONG. amend XIII.
263. Id. at 439 (emphasis omitted) (quoting Civil Rights Cases, 109 U.S. 3, 20 (1883)).
effect on January 1, 2020. AB 32 prohibits the operation of private detention facilities within California.

“The successful creative uses of the Thirteenth Amendment in support of progressive arguments demonstrate not that the Amendment’s definition of slavery is limitless, but rather that its broad empowerment of Congress lends constitutional support to political imagination.” The United States is confronted today, perhaps more than in any other era, with the structural racism that befalls this country. Congress must consider the role of race in making new immigration policy. At the risk of being overly optimistic about Thirteenth Amendment expansion, there may be hope for Thirteenth Amendment protection in the immigration context.


267. Bruno, supra note 266. While a step in the right direction, the law may have adverse consequences for immigrant detainees. Farida Jhabvala Romero, Will California’s Ban on For-Profit Immigration Detention and Prisons Succeed Biden Opposition?, KQED (July 9, 2021), https://www.kqed.org/news/11880745/will-californias-ban-on-for-profit-immigration-detention-and-prisons-survive-biden-legal-challenge [https://perma.cc/FRN4-GA6S]. Immigration and Customs Enforcement is at risk of losing several privately-run detention facilities in California. If ICE loses the facilities, they may simply move the detainees to other states, forcing families to travel and limiting access to representation. See Lucas Anderson, Kicking the National Habit: The Legal and Policy Arguments for Abolishing Private Prison Contracts, 39 PUB. CONT. L.J. 113, 115 (2009). See generally Doe v. United States, 831 F.3d 309, 321–22 (5th Cir. 2016) (holding female immigrant detainees assaulted by a private prison officer were unable to assert section 1983 claims against the privately run prison even though prison had contracted to provide services for ICE); Ryan S. Marion, Prisoners for Sale: Making the Thirteenth Amendment Case Against State Private Prison Contracts, 18 WM. & MARY BILL RTS. J. 213 (2009) (discussing the development of the private prison industry and some of the negative effects it has had on detainees); Clifford J. Rosky, Force, Inc.: The Privatization of Punishment, Policing, and Military Force in Liberal States, 36 CONN. L. REV. 879 (2004) (discussing the trend towards privatization of prisons); Menocal v. GEO Grp., Inc., 113 F. Supp. 3d 1125 (D. Colo. 2015) (detainee challenge to below minimum wage compensation at private prison).


VI. SANCTUARY POLICIES MUST INFORM COMPREHENSIVE IMMIGRATION REFORM

Since the original Sanctuary Movement, Congress has attempted to stem the tide of “illegal” migration and expel “dangerous criminal aliens,” while trying to solve the million-dollar question of what to do with the undocumented already within the country’s borders.271 The punitive and piecemeal executive and legislative immigration policies have not effectively ceased or even curbed illegal immigration. When Congress passed IRCA in 1986, there were five million unauthorized immigrants living in the United States.272 Of those five million, 2.7 million were ultimately granted legal status under IRCA.273 Today the United States is home to over eleven million undocumented immigrants.274 This is not just because more people have come undocumented; it is also due to the fact that Congress’s changes in IIRAIRA made it almost impossible for lower income immigrants to become legal even if, for example, they married a U.S. citizen.275 Over 300 local jurisdictions in eleven states across the nation276 have sanctuary laws in place today.277 Shifting enforcement priorities every few years depending on whoever is in the White House is like punishing the marionettes and letting the organ grinder go on his way.278 While the judiciary has so far partially answered the question regarding the legality of sanctuary policies, comprehensive immigration reform must answer the political question of the nation’s identity.279

272. Id.
273. Plumer, supra note 103.
274. Plumer, supra note 271. This figure does not include the over one million immigrants living in the United States with quasi-immigrant status under Temporary Protected Status and Deferred Action for Childhood Arrivals.
276. See Vaughan & Griffith, supra note 19.
278. In fact, by concentrating on the border, we have increased the number of undocumented immigrants here. “The massive increase in border enforcement . . . had the unintended and unexpected result not of deterring departures from Mexico but of reducing returns.” Massey & Pren, supra note 104, at 13.
279. See Kathleen Kim, Introduction: Perspectives on Immigration Reform, 44 LOY. L.A. L. REV. 1323, 1328 (2011) (introducing five student authors’ articles on addressing the “perplexing legal and normative dilemmas that key aspects of immigration reform present”).
Without substantive reform, undocumented immigrants face a cycle of poverty, irreversible psychological effects, and denial of free labor rights. The Supreme Court vested that plenary power in the political branches. Yet, “[t]he pervasiveness of federal regulation does not diminish the importance of immigration policy to the States.” Congressional inaction to reform immigration has left the states in murky waters, having to answer to constituents hungry for reform by imposing laws that chip away at Congress’s federal power over reform. Ultimately, having a checkerboard system of states that impose their own immigration consequences will lead to incongruous results. Immigrants will concentrate in one part of the country at the economic and social peril of the other. This furthers the divide in Congress and impedes comprehensive immigration reform, leaving Congress to chase its own tail every political cycle.

To end the cycle, Congress should enact comprehensive immigration reform that reflects a majority of the nation’s values encompassed in sanctuary policies. This paper is limited to sharing insights gleaned from the Sanctuary Movement and California’s transition to sanctuary state. Of course, there are many more recommendations outside the scope of this paper. The following recommendations are compelled by the Sanctuary Movement values examined.

Congress must: (1) enact a pathway to citizenship for DACA and TPS holders; (2) repeal section 287(g) and section 1373; (3) provide

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281. See Ping v. United States, 130 U.S. 581, 603 (1889). Naturalization, not immigration, is in the Constitution. U.S. Const. art. I, § 8, cls. 1, 4, 18 (“The Congress shall have Power . . . [t]o establish an uniform Rule of Naturalization . . . [and] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . . ”).


284. See Michael B. Sauter & Evan Comen, 10 Best States for Immigrants, 24/7 Wall St. (Jan. 12, 2020, 12:27 PM), https://247wallst.com/special-report/2017/05/02/10-best-states-for-immigrants/ [https://perma.cc/8XAV-MHYC].


free access to optional counsel at immigration proceedings;\(^{287}\) (4) enumerate enforcement priorities;\(^{288}\) and (5) decrease barriers to applying for asylum.\(^{289}\)

First and foremost, there are nearly 700,000 DACA recipients in the United States.\(^{290}\) There are 300,000 TPS holders.\(^{291}\) These individuals have lived in the U.S. for many years and have undergone strenuous background checks multiple times. Any comprehensive immigration reform must provide a pathway to citizenship for them. Allowing these individuals to fully participate in society and live without fear of deportation will strengthen the economy and social relations. A majority of the country supports this proposal and any reform without it would be incomplete.

Recent years have demonstrated the danger of 287(g) and section 1373. As explained above, 287(g)\(^{292}\) has been the focus of local sanctuary policies. 287(g) allows DHS to deputize state and local law enforcement officers to enforce federal immigration law. 287(g) leads to workplace and civil rights violations and racial profiling, as seen in Arizona’s “show me your papers” law.\(^{293}\) Likewise, section 1373’s


287. While proponents of universal access to representation raise valid Sixth Amendment and humanitarian reasons for mandatory universal representation, it should remain optional given strategic advantages within the current asylum framework.

288. The author acknowledges that enforcement policies must change given national security concerns but argues Congress could provide a default baseline.


293. Duara, supra note 140. Section 287(g) agreements also place an enormous burden on state and city budgets. See Wesley Tharpe, Voluntary Immigration Enforcement a Costly Choice for Georgia Communities, GA. BUDGET & POL’Y INST. 4 (July 2018), https://gbpi.org/wp-content/uploads/2020/05/Voluntary-Immigration-Enforcement-a-Costly-Choice-for-Georgia-Communities.pdf [https://perma.cc/5K82-MXHU].
constitutional validity is questionable, at a minimum, and runs contrary to federalism and sanctuary principles.294

Without recognizing that the Sixth Amendment extends to immigration deportation proceedings,295 Congress can provide free access to optional counsel at immigration proceedings for indigent immigrants by removing the Legal Services Corporation Act (LSC) restriction on non-citizens.296 LSC currently excludes funding for organizations representing undocumented immigrants. Removing the restriction would increase access to counsel for indigent immigrants and identify applicants eligible for a path to citizenship. Increased access to funding would also serve as a barrier to future due process violations in the immigration context.297

The executive branch currently identifies enforcement priorities, but there is no law prohibiting Congress from enacting its own. While it may be so that enforcement priorities must be flexible to adapt to changing need, a congressional list would serve as a guiding hand to the Executive’s power over immigration and limit the President’s almost unfettered authority to enact enforcement priorities inconsistent with those of Congress and the people it represents.

294. See Section III, supra.
295. Since “[r]emoval is a civil, not criminal matter,” it is largely outside the purview of the Sixth Amendment’s right to counsel. Arizona v. United States, 567 U.S. 387, 396 (2012). Courts have repeatedly declined to find that indigent individuals in removal proceedings have a Sixth Amendment right to counsel at the government’s expense in removal proceedings. See, e.g., Tang v. Ashcroft, 354 F.3d 1192, 1196 (10th Cir. 2003); United States v. Ramos, 623 F.3d 672, 682 (9th Cir. 2010); Romero v. U.S. Immigr. & Naturalization Serv., 399 F.3d 109, 112 (2d Cir. 2005); Al Khouri v. Ashcroft, 362 F.3d 461, 464 (8th Cir. 2004); Goonsuwan v. Ashcroft, 252 F.3d 383, 385 n.2 (5th Cir. 2001); Hernandez v. Reno, 238 F.3d 50, 55 (1st Cir. 2001); Stroev v. Immigr. & Naturalization Serv., 256 F.3d 498, 500–01 (7th Cir. 2001); Xu Yong Lu v. Ashcroft, 259 F.3d 127, 131 (3d Cir. 2001); Mejia Rodriguez v. Reno, 178 F.3d 1139, 1146 (11th Cir. 1999); Mustata v. U.S. Dep’t of Justice, 179 F.3d 1017, 1022 n.6 (6th Cir. 1999); Gandarillas-Zambrana v. Bd. of Immigr. Appeals, 44 F.3d 1251, 1256 (4th Cir. 1995); Mantell v. U.S. Dep’t of Just., Immigr. & Naturalization Serv., 798 F.2d 124, 127 (5th Cir. 1986); see also Padilla v. Kentucky, 559 U.S. 356, 366 (2010) (In the context of deportation proceedings triggered by criminal conduct, "advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel."); United States v. Garcia-Villa, No. 14CR1481WQH, 2014 WL 4955703, at *4 (S.D. Cal. Sept. 30, 2014) ("No statutory or regulatory provision of the expedited removal proceedings [under Section 235 of the INA] provides a right to consult with counsel.").
297. The Sixth Amendment requires the existence of public-defender systems, but civil legal-aid programs have no such constitutional mandate.
Thirty-five percent of the world’s countries acknowledge the right to asylum within their domestic laws or constitutions.\textsuperscript{298} Several Circuit Courts have acknowledged that the right to asylum resides within the due process rights of non-citizens.\textsuperscript{299} It is unlikely the Supreme Court will recognize such a right anytime soon.\textsuperscript{300} Section 208 of the INA governs asylum.\textsuperscript{301} Currently, an individual is barred from applying for asylum if they fail to do so within the first year of entry.\textsuperscript{302} Congress must eliminate the one year filing deadline.\textsuperscript{303} There are potentially thousands of immigrants that face cognizable persecution if returned to their country of origin but are prohibited from stating that claim because of the one year filing deadline. While lesser relief is still available under the Convention Against Torture to those who miss the one-year filing deadline, in a strange result, the lesser relief has a higher standard of proof.\textsuperscript{304} Additionally, relief under the Convention Against Torture does not lead to permanent residence or citizenship. Moreover, currently if an individual is denied asylum based on a safe third country option, has exceeded the one-year deadline, was previously denied asylum, or fails to demonstrate changed circumstances, there is no judicial review of the decision. Congress must also eliminate the prohibition on judicial review.\textsuperscript{305}

VII. CONCLUSION

Academics, practitioners, politicians on both sides of the aisle,\textsuperscript{306} the public, and immigrants caught in the wheels of the immigration machine all acknowledge that the immigration system is broken.\textsuperscript{307}

\begin{itemize}
\item \textsuperscript{298} Meili, supra note 289, at 148.
\item \textsuperscript{299} Id. at 149.
\item \textsuperscript{300} Id.
\item \textsuperscript{301} 8 U.S.C. § 1158(a)(1) (2018).
\item \textsuperscript{302} Id. § 1158(a)(2)(B) (an alien must “demonstrate[] by clear and convincing evidence that the application has been filed within 1 year after the date of the alien’s arrival in the United States”). Exceptions to the rule are provided in 8 U.S.C. § 1158(a)(2) and 8 C.F.R. § 208.4(a) (2011).
\item \textsuperscript{303} Admirably, President Biden’s proposed bill includes this. Press Release, supra note 286.
\item \textsuperscript{305} Dep’t of Homeland Sec. v. Tharaissigiam, 140 S. Ct. 1959, 2008 (2020) (Sotomayor, J., dissenting).
\item \textsuperscript{306} See LOU DOBBS, WAR ON THE MIDDLE CLASS: HOW THE GOVERNMENT, BIG BUSINESS, AND SPECIAL INTEREST GROUPS ARE WAGING WAR ON THE AMERICAN DREAM AND HOW TO FIGHT BACK 131 (2007).
\item \textsuperscript{307} “To say that US immigration policies have failed is an understatement. From 1970 to 2010 the population born in Latin America increased more than 11 times. . . . If the goal of such actions was to limit immigration from Latin America and prevent the demographic transformation of the
However, if there is ever to be an honest effort at comprehensive immigration reform, we must look to the grassroots movement that brought us here. Like the Sanctuary Movement of the 1980s, today’s sanctuary policies test the limits of federalism, presidential supremacy over the realm of immigration, and the nation’s moral compass. *United States v. California* provides an illustration of the current state of the battle over federal immigration law and invites Congress to enact comprehensive reform—a matter well within its purview. This Note proposes answering that call by reforming immigration law to conform to sanctuary policies, for the sake of the nation’s unity, its identity, and its interests.

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United States, they achieved the opposite. . . . The crux of the problem is that Congress routinely makes consequential policy decisions with scant consideration of the underlying dynamics of the social processes involved.” Massey & Pren, *supra* note 104, at 14; Rubenstein, *supra* note 285, at 128–29 (explaining the cycle of blame that leads to inaction).