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Enforcement, Integration, and the Future of Immigration Federalism

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Executive Summary

The federal government has a monopoly over the terms of immigration law, and it superintends the nation's singular immigration enforcement bureaucracy. But our federalism nonetheless provides a vital playing field for sharp debates over the status of immigrants in American life. The forms of state and local involvement in immigration policy are varied, but they fall into two basic categories of mutually dependent and re-enforcing policies: enforcement federalism and integration federalism. Whereas enforcement federalism concerns the extent to which localities should assist or resist federal removal policies, integration federalism encompasses measures designed to assist immigrants, regardless of status, to plant roots and acculturate to life in the United States.

Both forms of immigration federalism take shape through a wide variety of intergovernmental relations, not only between the federal government on the one hand and states and localities on the other, but also between states and the cities within them — an increasingly important dimension of immigration federalism today. These relations have important legal characteristics, and constitutional and statutory law bring them into being and mediate them. But the nature of any given intergovernmental dynamic will be shaped just as much by a combination of ideology and institutional imperatives. These elements can either unite the center and the periphery in common cause or produce the sort of conflict that has made immigration federalism a high-profile issue for decades.

Given the density of the intergovernmental dynamics that shape the country's immigration policy, developing a comprehensive strategy for immigration federalism requires more than a predilection toward or away from centralization of government authority. It requires a clear view on the appropriate metes and bounds of immigration enforcement, as well as a set of beliefs about the proper place in the social order of immigrants with different legal statuses. While this essay remains largely (though not entirely) agnostic on these questions, it offers four basic principles to frame any future federalism agenda.

First, when it comes to enforcement federalism, the federal government ought to acknowledge the reasons that localities might resist federal enforcement efforts, at least as a matter of politics, and if only to ensure that

federal policy is subjected to accountability checks by competing, external pressures. Second, whatever the value of resistance to enforcement, a federalism agenda should include efforts by all levels of government to identify a manageable equilibrium that reconciles the federal government's constitutional and statutory responsibilities for maintaining an enforcement regime with the local politics of immigration and the lived realities of immigrant communities. Third, when it comes to integration federalism, the problem of illegal immigration must be solved, and only the federal government can do so decisively. Federalism can only mediate the political conflict over status and help set the terms for its ultimate resolution. And yet, the structural reasons that have given rise to integration federalism should re-enforce the country's commitment to locally driven integration policy, supported by a national-level commitment to information sharing, coordination, and resource support. Finally, because both enforcement and integration policy require systemic flexibility, it is important not to confuse arguments on the merits of immigration policy with structural claims. In other words, scholars, advocates, or policymakers should exercise humility and circumspection when developing conversation-stopping claims that a certain intergovernmental relation is required by law, especially in a context as charged as immigration policy.

Introduction

Conventional wisdom has it that immigration law is an exclusive federal domain governed by uniform rules and policies. And yet, American federalism has meant that states and localities have helped shape immigration policy throughout history, often through deliberate resistance to the federal government. During the Obama years, the Arizona model of federalism drew the spotlight, as the state legislature and other like-minded jurisdictions enacted sweeping immigration enforcement measures with great fanfare, in part to rebuke the more tempered federal policy of the day. In a highly unusual response, the Obama administration sued the states, and the Supreme Court eventually vindicated the federal government's exclusive authority to set enforcement priorities.[1] Today, the preeminent intergovernmental script has flipped to what we might call the California model. Pro-immigration states and localities are directly challenging a presidential administration bent on ever-tougher enforcement justified with alarmist rhetoric about immigration's dangers. But even as resistant localities force the federal government to defend its policies in court, the Trump administration finds itself buttressed by yet a third model, according to which states like Texas and North Carolina enact legislation to disable their own pro-immigration cities from resisting federal enforcement. Immigration federalism is in constant flux.

Though these high-profile contretemps keep immigration federalism a part of public discourse, state and local governments long have been de facto immigration policymakers in myriad and more mundane ways. The complexity of intergovernmental relations in our federalist system sets a crucial framework for immigration policymaking. Though the Immigration and Nationality Act (INA) and related statutes span hundreds of pages in the

1 Arizona v. United States, 567 U.S. __, 132 S.Ct. 2492 (2012).

US Code, the secular expansion of the federal immigration machinery over the last century has not displaced immigration federalism, for one simple reason common to many spheres of regulation. Immigrant settlement and immigration enforcement are fundamentally spatial and territorial, thus implicating the politics and bureaucracies of our federal system. Our national immigration policy is, in fact, debated and set through various intergovernmental relationships — mostly between the federal government and cities and counties, but also between the federal government and states, between states and the cities within them, and by each of these jurisdictions acting autonomously.[2]

At any given time, immigration federalism simultaneously re-enforces and resists federal policy, and the political valence of immigration is often in flux. The ideological diversity in government that federalism produces ensures this state of tension, as does the fact that the institutional interests of federal and local actors do not always align, regardless of partisan affiliation. For example, even as the current Department of Homeland Security (DHS) finds itself in conflict with certain state and local officials who seek to provide immigrants with "sanctuary,"[3] the administration and allies in Congress aspire to recruit still other local officials in an affirmative push to amplify federal enforcement efforts. Republicans in charge of the federal government have not given on up on federalism — they simply want it to serve their ends.

To understand the metes and bounds of immigration federalism, it will be useful to break the concept down into two categories: enforcement federalism and integration federalism. The legal, institutional, and political conditions governing each variant of federalism differ. The former entails the local relationship to federal removal policy and its many tools of coercion, and it is dominated by debates over legal authority and intergovernmental relations. The latter implicates affirmative strategies to either promote or prevent immigrant incorporation into the body politic and may have little if anything to do with federal policy, which is itself limited in scope and ambition. Though legal questions arise, integration primarily raises questions of political will and bureaucratic capacity, and states and localities long have taken the lead in devising our nation's affirmative integration agenda. And so even as we might seek to control or temper local involvement in immigration enforcement, any integration agenda ought to have states and localities at its center.

On some level, this enforcement-integration dichotomy is too stark. Enforcement policy heavily affects immigrants' prospects for integration. Enforcement policy *is* integration policy. Enforcement federalism encompasses local refusal to assist federal enforcement in order to protect immigrants in the community, as well as federal-state cooperation to deport immigrants, or otherwise create incentives for immigrants to leave. In addition, affirmative integration policies, or the lack thereof, can influence immigrant movement, either attracting immigrants to welcoming jurisdictions, or driving them away by creating inhospitable climates for settlement. Whether a locality creates a receptive climate for

2 For ease of exposition, when invoking states and county and local governments at once, I use the terms "localities" and "local jurisdictions." But where it makes a material difference to the analysis to refer to states versus cities, I use these more specific terms.

3 As discussed in more detail below, the term "sanctuary" is an evocative yet somewhat misleading label for a set of policies that really ought to go by the more pedestrian term "noncooperation," because they limit the extent to which local police and other officials assist federal immigration enforcement efforts.

integration can help shape the size and nature of the enforcement domain in any given local setting. But as with any overly reductive dichotomy, this one can help us organize the debate over the state and local role in immigration.[4]

The intergovernmental dynamics and politics that shape immigration federalism are certainly governed by ongoing debates concerning legal authority. The extent to which localities can establish immigration priorities that diverge from federal policy, and the scope of federal authority to reign localities in, set the ground rules for intergovernmentalism. But even if these legal lines were crystal clear, defining an actual agenda for immigration federalism requires answering far more contested questions. Should our default assumption be that immigration ought to be controlled? Or, should our animating objective be that immigrant communities be allowed to flourish? When and how do these objectives conflict?

In this paper, I remain largely agnostic on these policy questions, focusing instead on how federalism provides a framework for answering them. But this framework ultimately points to four very basic goals for a federalism strategy. First, when it comes to enforcement federalism, it will be important to acknowledge the reasons for local resistance to federal enforcement, at least as a matter of politics, and if only to ensure that federal policy is subject to checks by competing, external pressures. Second, the value of resistance to enforcement notwithstanding, a federalism agenda should include efforts to identify a manageable equilibrium that reconciles the federal government's constitutional and statutory responsibilities for maintaining an enforcement regime with the local politics of immigration and the lived realities of immigrant communities. Third, when it comes to integration federalism, the structural reasons that have given rise to it should re-enforce a commitment to locally driven integration policy, supported by a national-level commitment to information sharing, coordination, and resource support. Finally, to preserve the systemic flexibility that immigration policy requires, scholars, advocates, and policymakers should be circumspect about launching hard-edged legal claims concerning the scope of power held by any one level of government, mindful that structural doctrines that advance one's preferred policy objectives in one context might do the opposite in another.

To develop these conclusions, I explore three sets of issues. I begin with and devote the bulk of the discussion to enforcement federalism — the most legally and politically contested domain of immigration federalism with the sharpest intergovernmental conflict. I establish the legal parameters of enforcement federalism and identify the institutional considerations that should inform any strategic thinking about federalism's future. I then briefly explore the role that federalism plays in immigrant integration. Finally, though the federal-local relationship has dominated immigration federalism, that should change. The future of immigration federalism is likely to be shaped significantly by another intergovernmental dynamic — the state-local relationship. I thus conclude by highlighting how tensions between states and their localities reflect and define the national debate over immigration.

4 The dichotomy is useful as a way of separating those policies that are specifically concerned with intergovernmental relations between Washington and the periphery (enforcement federalism) and those that arise largely through autonomous state action (immigrant integration), even as they might present preemption concerns or involve coordination with federal actors through grant programs and the like.

I. Enforcement Federalism: A Tale of Legal and Political Flux

Formally speaking, immigration enforcement constitutes an exclusive federal domain. In contrast to the criminal justice system, states and localities do not operate parallel immigration laws, police, prosecutors, and judges. Congress defines the exclusive grounds for entry and removal, and the executive branch enforces those provisions through an extensive federal bureaucracy.

But federalism helps shape immigration enforcement policy for two primary reasons. First, criminal convictions under state law constitute many of the grounds of removal set out in the US Code. Accordingly, state criminal justice systems feed the immigration bureaucracy (Motomura 2011). Second, though the federal enforcement bureaucracy is vast, it has certain crucial limitations. It consists of few "beat cops" who interact on a regular basis with the regulated immigrant community, and its investigative resources tend to be used for large operations rather than ordinary policing. To identify, apprehend, and remove noncitizens, DHS depends on the local, county, and state police and corrections officials who come into contact with noncitizens through arrests and other means. Our immigration enforcement regime is thus best characterized as vertically integrated, even though immigration law itself is defined exclusively at the federal level (Rodriguez 2012).

Enforcement federalism, as I define it, is thus expressly about intergovernmental relations between the periphery and the center. The character and extent of the system's integration has been in flux in recent years. The system is never fully coherent at any moment in time, because federalism's many agents inevitably create intergovernmental friction and pockets of tension between Washington and the local. Federalism actually consists of myriad intergovernmental relations rather than a singular federal-local dynamic. Ideological and partisan considerations, as well as institutional factors, shape these many relations.

Ideologically speaking, the mayors and police of large, immigrant-heavy cities such as New York are more likely to end up in conflict with a Republican executive than with a Democratic one. Pro-enforcement states such as Arizona are more likely to challenge or resist the enforcement policy of a federal government in Democratic hands and embrace or re-enforce the policies of a Republican executive. But the logistics of federalism can also transcend or stymie these partisan alignments. The institutional interests of the center and periphery sometimes diverge, regardless of partisan alignment. Even as it sought to advance pro-immigration politics, for example, the Obama administration maintained a robust enforcement and removals agenda, precipitating local resistance from Democratic governors and mayors that complicated (but did not necessarily undermine) DHS enforcement. In addition, despite efforts by the Obama-era DHS to centralize enforcement policy, it could not eschew reliance on state and local cooperation altogether.

Because of this intergovernmental complexity, enforcement will entail a mix of centralization and diffusion, regardless of the ideology or party in charge of the federal government. Indeed, it would be difficult to identify an optimal level of centralization for enforcement policy in any objective sense. Instead, the extent of federal control is always likely to be contested and contingent.

The range of intergovernmental possibilities for enforcement policy can be conceptualized through a simple two-by-two matrix. The x-axis describes the orientation of local jurisdictions to the federal government, with the strategies of "resistance to federal priorities" on the one hand and "cooperation with federal priorities" on the other. The y-axis describes the inclinations of local jurisdictions toward immigration enforcement, with "enforcement skepticism" on the one hand and "zealous enforcement" on the other.

Each of the combinations thus identified reflects both ideological positions on immigration policy and power relationships between the periphery and the center. Different legal parameters and policy possibilities define each type of enforcement federalism, and each should be considered in turn. In so doing, it remains important to keep in mind that resistance and cooperation dynamics will operate under any given presidential administration, even as the locations of resistance and cooperation change. But because of institutional considerations, tensions can arise between the periphery and the center, even when they are ideologically aligned. To varying degrees, the federal government will use the legal tools at its disposal to bring local jurisdictions in line with its own policy preferences.

To see how these combinations might play out, I first examine how a pro-enforcement agenda at the local level might inform the federalism dynamic and then consider how local enforcement skepticism might take shape.

A. The Pro-Enforcement Agenda

A pro-enforcement agenda at the local level can take a number of forms and be advanced by a range of actors, including state lawmakers, governors, mayors, and police chiefs. In the last decade, the pro-enforcement agenda has found its highest profile in state laws and local ordinances that would directly regulate employers, landlords, and even immigrants themselves, in service of eliminating unauthorized immigration and often as a rebuke to perceived federal under-enforcement. But the local pro-enforcement agenda can also be enacted through the day-to-day decisions of state, county, and local police departments working to accommodate federal enforcement requests.

Regardless of their orientation toward the federal government, enforcement enthusiasts

often employ rule of law rhetoric, defining unauthorized immigrants in particular as law breakers or public safety risks. This pursuit of enforcement might reflect recognition by local officials of the basic legitimacy of an immigration enforcement regime, which would make enforcement cooperation a matter of systemic integrity. But as some commentators have argued, the pro-enforcement agenda is also animated in some quarters by more populist and even malign motivations, such as resistance to the cultural change and racial diversity that immigration produces (Gulasekaram and Ramakrishnan 2013, 2130-36; Guttentag 2013).

Federal local-conflict. Once the exemplar of immigration federalism, Arizona's Senate Bill 1070 (SB 1070) — the Support our Law Enforcement and Safe Neighborhoods Act — embodied a staunch local enforcement mentality cum critique of federal enforcement policy.[5] It created state-level penalties for violations of certain immigration laws, sanctioned unauthorized workers directly, and directed local police to inquire into immigration status.[6] Signed by a Republican governor during the Obama administration, the law crystallized a partisan split on immigration policy writ large, with Republicans at the local level calling for maximal enforcement in the face of a Democratic White House that sought legislative legalization and priorities-driven enforcement. SB 1070 represented a kind of culmination of widespread disquiet with the extent of federal enforcement.[7] Similar laws had been percolating around Republican statehouses and local city councils since at least 2006, drafted, sponsored, and advanced by networks of restrictionists and policy entrepreneurs who sought to push their agenda throughout the country. This timing complicates a strictly partisan story of immigration federalism, because it reflects the local, Republican divergence from even Bush-era enforcement policy.[8] But with SB 1070, Arizona refined the "attrition through enforcement" narrative, using the Obama administration as its perfect foil.

In 2012, the Obama administration answered Arizona's challenge in an unprecedented manner by filing a preemption lawsuit against Arizona and other states that had enacted

5 Ariz. S.B. 1070, 49th Leg., 2d Reg. Sess. (2010).

6 California's Proposition 187, enacted by voters in 1994, might also fit into this category, though it differs in important respects from SB 1070-style laws in ways that reflect how immigration federalism has evolved in the federal government's shadow. Proposition 187 sought to deny unauthorized immigrants a range of state and local services, including public schooling, but it did not purport to enlist local officials in direct immigration enforcement or create parallel immigration offenses to mirror federal law. The immigration restrictionism it embodied was also of a piece with the rise of anti-immigrant sentiment among the newly ascendant congressional Republicans of that era.

7 SB 1070 itself begins with a statement of intent declaring the state's "compelling interest in the cooperative enforcement of federal immigration laws," as well as its intent to make "attrition through enforcement the public policy of all state and local agencies in Arizona." The provisions of the Act were "intended to work together to discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States" (Ariz. S.B. 1070, 49th Leg., 2d Reg. Sess. (2010)). In public statements, lawmakers expressly called out the federal government's failure to enforce the INA as justification for their own laws. After signing SB 1070, for example, Governor Jan Brewer declared that it "represents another tool for our state to use as we work to solve a crisis we did not create and the federal government has refused to fix" (Archibold 2010).

8 As I explain in more detail below, the federal government's institutional imperatives, which include running an efficient and effective immigration bureaucracy, can lead to federal-local divergence, even when party lines would suggest otherwise. In the case of the Bush-era DHS, officials likely preferred something less than the sort of maximal, "attrition through enforcement" policy embodied in the predecessor laws to SB 1070 — a divergence re-enforced by the Bush administration's support of (ultimately failed) legislative overhauls in 2006 and 2007.

similar laws, complementing and overshadowing suits brought by private litigants and the American Civil Liberties Union (ACLU). The lawsuit served both political and bureaucratic purposes. It provided a means for the administration to retake control of the immigration policy debate, using legal tools with the potential to stop in their tracks the restrictionist forces operating through local and state governments. By offering a robust defense of federal supremacy in immigration enforcement, the government also reasserted the authority of DHS and Department of Justice (DOJ) to determine the scope of the national enforcement agenda and to control the extent of the enforcement assistance local officials could provide. To that end, during litigation, the government produced a guidance document defining the sorts of intergovernmental cooperation permitted by the INA (DHS 2012),[9] which expressly contemplates state and local assistance in federal enforcement. The memo listed a range of concrete examples that were notably far narrower and contained than what SB 1070 promised.[10] Even as this document highlighted the federal government's dependency on local police, in particular in pursuing its enforcement mission, it rejected autonomous state lawmaking as a viable strategy.

In *Arizona v. United States*, the Supreme Court issued its first opinion in 30 years on the subject of immigration federalism and substantially curtailed (without eliminating) autonomous local enforcement measures that diverged from the federal agenda. In striking down four of the five core provisions of SB 1070, the Court handed the federal government a resounding and arguably novel victory in two ways. First, in invalidating the provision that would have made it a state misdemeanor for an unauthorized immigrant to apply for work, the Court acknowledged that the state sought to advance one of the core objectives of federal law — the deterrence of unauthorized employment. It concluded, however, that federal law embodied a range of compromises among competing values, and the state's adoption of a different means of achieving the same objective therefore thwarted federal law.[11] Even more significant, the Court articulated a theory of preemption that could be understood as treating federal enforcement priorities, and not just congressional statutes, as federal law: "a principal feature of the removal system is the broad discretion exercised by immigration officials . . . [the Executive] must decide whether it makes sense to pursue removal at all."[12] In other words, even if state enforcement provisions precisely mirror federal law, the latter would still be invalid because the federal executive necessarily uses its discretion in deciding to what extent to enforce the law.

Arizona effectively eliminated localities' ability to adopt an enforcement agenda expressly and clearly more robust than the federal government's agenda. The extent of enforcement federalism thus remains largely a function of federal policy. That said, the Court did leave in place SB 1070's section 2(B), which became known during the public debate as the "show me your papers" provision. It requires local police to inquire into the immigration

9 "In light of laws passed by several states addressing the involvement by state and local law enforcement officers in federal enforcement of immigration laws, DHS concluded that this guidance would be appropriate to set forth DHS's position on the proper role of state and local officers in this context" (DHS 2012).

10 Examples listed by DHS include participation in formal cooperative ventures, such as joint law enforcement task forces or deputization schemes where the federal government retains supervisory control, and lending direct assistance to federal officials by helping to execute warrants or providing equipment and facilities to federal officials (ibid., 13-15).

11 *Arizona*, 567 U.S. __, at 403-07.

12 Id. at 2498-99.

status of those with whom they come into contact, and its ongoing validity leaves localities with a measure of independence.

At the time of the decision, many commentators framed the survival of section 2(B) as a hollow victory for the state, in large part because the Court framed its analysis skeptically and left open the possibility of as-applied challenges alleging civil rights violations (Martin 2012). The Court's decision also seemed to have punctured political momentum for local immigration policing, highlighting the truly political character of SB 1070. The distaste for the law held by some pragmatic local police officials loathe to entangle ordinary policing and immigration enforcement may also have deflated its promise as an enforcement tool (Rodriguez 2015, 17). For reasons I discuss in part III, however, this element of the Court's decision may have contemporary consequences by providing legal support for new state laws, recently passed in Texas, North Carolina, Georgia, and Alabama, that would require local compliance with federal immigration requests.

The legal lines the Court drew in *Arizona* certainly advanced constitutional doctrine after a decade of uncertainty. But the most important outcome of *Arizona v. United States* was arguably political. Even at the height of the conflict between Arizona and the federal government, the distance between the federal and state positions on enforcement policy was in large measure rhetorical rather than actual. Even a federal government with an immigration reform agenda, like the Obama administration, must run an enforcement bureaucracy and utilize the resources appropriated to it by Congress. The Obama administration's efforts to shape removals according to certain priorities appears to have borne fruit by shifting focus to high-value targets and away from the interior and to the border (Rosenblum and Meissner 2014, pp. 19-40). But the absolute numbers of removals remained high and the machinery of deportation in operation.

As with much of immigration federalism, pro-enforcement local resistance was as much about creating a rhetorical frame for the immigration debate — that immigration should be controlled and the law enforced to the extent possible — as about the merits of particular enforcement policies. The alternative federal narrative — of humane but consistent enforcement — set a far different agenda for the larger debate. Enforcement was to create confidence in the system in order to build political will for legislation that would include a legalization program and expand opportunities for lawful immigration. *Arizona v. United States* helped ensure that the federal narrative prevailed.

Federal-local cooperation. As the most recent change in presidential administration has made vivid, the federal immigration narrative can change quickly. When the local desire to enforce the immigration laws meets an administration that actively seeks local cooperation as a means of multiplying its enforcement capacities and rhetoric, what does immigration federalism look like?

Even if *Arizona v. United States* has largely displaced autonomous state regulation, the domain of immigration federalism has not so much disappeared as shifted. Zealous localities, aligned with a pro-enforcement federal government, can in theory play a significant role in immigration enforcement. Even the Obama administration emphasized the importance of local cooperation in enforcement, in part because the INA itself expressly accepts it and

creates vehicles for it.[13] Most immigration legislation sponsored by Republicans in Congress in recent years seeks to solidify or augment the local role, and even the comprehensive reform bill passed by the Senate in 2013 with Democratic leadership would have involved border state governors in enforcement decision-making.[14]

The most obvious vehicle for this brand of immigration federalism is the so-called "287(g)" agreement, which Congress added to the INA in 1996.[15] Pursuant to this provision, state and local police can opt to become quasi-immigration agents by entering into agreements with the federal government to receive training and subsequently perform certain immigration functions, with ultimate supervision coming from local Immigration and Customs Enforcement (ICE) officials.[16] Whereas the Obama administration actively sought to curtail the agreements that existed when it came into office (ICE 2014), the Trump-led DHS has touted its interest in expanding the program, including by bringing back the so-called "task force" model jettisoned by its predecessor, which enables local police to perform immigration functions while engaged in policing on the streets and in the community.[17]

The political conditions today might seem ideal for an expansion of the program, and yet certain institutional considerations are likely to mean that this form of immigration federalism will remain marginal. Even during the Bush administration, when agreements began to proliferate in number, the program remained small. At its peak in 2011, only 72 agreements existed, despite the thousands of eligible state, local, and county law enforcement agencies. Simply put, there is very little to be gained for sheriffs and police chiefs in the 287(g) arrangement. Even in pro-enforcement states and localities, the perceived costs of intertwining policing with immigration enforcement — the impact on community trust and relations and the diversion of resources away from the core mission of police departments — will restrain voluntary participation. In addition, the concrete benefits to local jurisdictions are likely to be minimal; though some local agents may welcome the opportunity to participate in higher-prestige federal law enforcement functions, the program is unlikely to yield actual law enforcement or public safety gains. As one scholar has described the program, it amounts to "a solution in search of a problem" (Coonan 2013, 283).

The cooperative terrain over the last decade has shifted instead to the Secure Communities program, which was launched by the Bush administration, continued and then redesigned under another name by the Obama-led DHS, and then fully resurrected by Trump

13 8 U.S.C. §1373(b) (requiring the federal government to accept inquiries from state and local police into the immigration status in the custody of the latter).

14 See Border Security, Economic Opportunity, and Immigration Modernization Act of 2013, S. 744, 113th Cong., s. 4 (2013). The bill would have created a commission that included border state governors and given it the responsibility to certify that the border had been "secured" before a legalization program could have been fully implemented.

15 8 U.S.C. §1357(g).

16 Even without a formal 287(g) agreement, many localities enmesh themselves with the federal enforcement bureaucracy by, for example, entering into contracts with the federal government to permit the latter to use local jails as detention facilities.

17 A recent memorandum from the secretary of homeland security observes: "[t]he INA 287(g) program has been a highly successful force multiplier . . . To the greatest extent practicable, the Director of ICE and Commissioner of CBP shall expand the 287(g) program to include all qualified law enforcement agencies that request to participate" (Kelly 2017).

administration officials. Its reach far exceeds the 287(g) program, because it relies on technology to harness information in the hands of local police regarding potentially removable noncitizens, rather than on local personnel themselves, and since 2013 it has been operational across the country.

In the main, and across all three administrations, this form of immigration federalism has had two key components, one of which leaves no genuine decision-making authority with localities and the other of which has become a flashpoint of federalism conflict. The intergovernmental dynamic begins with information sharing. State and local police routinely and for criminal justice purposes share their arrest data with the Federal Bureau of Investigation (FBI). As required by federal statute, the FBI then shares that information with its sister agency, DHS. DHS can then determine if a person in state or local custody is removable by comparing the arrest data to DHS's own databases. Obama-era efforts to discontinue Secure Communities in 2014 notwithstanding, this feature has remained in place continuously since 2008.

Some localities have regarded the FBI's sharing of their data with DHS as conscription into federal service raising constitutional concerns, and they have called on DHS to permit jurisdictions to opt out of the program (Kalhan 2013, 1131). But as noted above, federal law directs the president to establish an interoperable system that facilitates data sharing across law enforcement agencies,[18] and the law thus requires the FBI to share its data with DHS given appropriate technological capacities. More to the point, because localities voluntarily share their information with the federal government (i.e., the FBI), the downstream use of the data by the federal government does not amount to commandeering in the constitutional sense, because the federal government has not coerced localities into sharing their data in the first instance. This information-sharing component of enforcement policy ultimately reflects an end-run around federalism to a certain extent, because it occurs automatically and therefore eschews dependence on state and local officials themselves to support federal enforcement policy. But that fact has not quieted the federalism debate, largely because of what happens next.

The federalism-relevant component of Secure Communities arises with the choice the information sharing creates for DHS — what, precisely, should DHS do with the knowledge that a potentially removable noncitizen is in local custody? Both DHS and localities have discretion over the answer. The traditional answer under Secure Communities has been for the federal government to issue a detainer request, asking localities to hold the person in question for up to 48 hours, until ICE officials can take custody and determine whether and how to start the federal deportation process. Despite some confusion among localities that has since been clarified by several courts,[19] detainers are voluntary requests, not legal

18 8 U.S.C. § 1722 ("[T]he President shall develop and implement an interoperable electronic data system to provide current and immediate access to information in databases of Federal law enforcement agencies and the intelligence community that is relevant to determine whether to issue a visa or to determine the admissibility or deportability of an alien.").

19 See, for example, Galarza v. Szalczyk, 745 F.3d 634 (3rd Cir. 2014).

commands.[20] For DHS to demand compliance would cross over into unconstitutional commandeering by using local institutions and personnel to enforce federal law without the consent of the state entities.[21]

As discussed in more detail below, these circumstances created by existing federalism doctrine have made detainer policy an important point of controversy for intergovernmental relations when the periphery and the center differ in their objectives. At least for the zealous jurisdictions considered here, honoring detainer requests seems like an easy and obvious way to advance immigration enforcement.[22] And yet, even for pro-enforcement jurisdictions, external constraints may limit the extent of cooperation. A growing number of lower courts have held that local detainer authority is limited by the Fourth Amendment's prohibition on search and seizure and the requirement that police have probable cause before making an arrest or holding someone in custody beyond their state-law release date.[23] As this doctrine develops, even zealous enforcement jurisdictions may eschew certain detainer requests for fear of incurring constitutional liability.

A zealous enforcement jurisdiction might also adopt any number of complementary enforcement measures that have not been preempted by *Arizona v. United States*. The Immigrant Policy Project of the National Conference of State Legislators (NCSL) documents some examples,[24] including laws that require government contractors and subcontractors to use E-Verify — an electronic database that checks whether a potential employee is authorized to work in the United States — and laws that prohibit the use of consular or embassy documents to determine identity or residence for law enforcement purposes.[25] In a counter-precedent to *Arizona*, too, the Supreme Court in 2011 upheld an Arizona law that threatened to rescind the business licenses of companies that did not comply with federal prohibitions on the hiring of unauthorized workers, finding that the law fell within an express clause of the INA permitting certain types of state support of the

20 8 C.F.R. § 287.7(a).

21 Printz v. United States, 521 U.S. 898 (1994) (holding that federal government could not require local law enforcement to assist in the enforcement of federal gun control statute in light of the Tenth Amendment's protection of state sovereignty).

22 Other means of facilitating federal enforcement have developed over the years. Perhaps the most important intergovernmental program outside of Secure Communities has been the Criminal Alien Program, through which immigration officials operate inside corrections facilities in order to coordinate and hasten the deportation proceedings of noncitizens convicted of state law crimes (Schuck 2013, 612).

23 See, e.g., Morales v. Chadbourne, 793 F.3d 208, 215 (1st Cir. 2015); Miranda-Olivares v. Clackamas Cnty., No. 3:12-cv-02317, 2014 WL 1414305, at *10 (D. Or. Apr. 11, 2014).

24 According to NCSL (2015, 1; 2016, 1), state legislatures enacted 185 immigration-related law in 2013, 171 in 2014, and 216 in 2015. NCSL defines immigration-related law broadly, and the measures it documents cut across numerous regulatory arenas, including law enforcement, education, public benefits, and voting. Many of the measures promote immigrant integration or are otherwise designed to protect the interests of immigrants, including the unauthorized.

25 See, for example, North Carolina House Bill 318, amending the state's E-Verify requirement to make it stricter, and prohibiting the use of consular documents (NCSL 2016).

employer sanctions regime.[26] Few if any states appear to have followed Arizona's lead in pursuing this particular enforcement strategy, but it remains lawful.

The utility or success of these complementary measures may be largely independent of whether the local and federal objectives align; local jurisdictions can adopt them regardless of the identity of the presidential administration. In theory, having a zealous enforcement regime in Washington could either propel or obviate the enactment of such laws at the local level. Vigorous enforcement rhetoric from the federal government, coupled with the opportunity to informally cooperate with federal officials, might satisfy the local enforcement impulse. Or, the presence of a like-minded, pro-enforcement regime in Washington could stir local interest, generated either through the work of the interest group or intraparty networks that have been pushing pro-enforcement policy at all levels of government, or as the result of energized public opinion on the immigration question.

B. Enforcement Skepticism

Enforcement skepticism abounds in our federal system. Few, if any, localities reject immigration enforcement of all kinds (in contrast to some immigrants' rights advocates). But local skepticism embodies an overarching concern that immigration enforcement will have a negative impact on local communities — a concern typically buttressed by a commitment to immigrant integration regardless of lawful status. This orientation is common among political officials and bureaucrats in immigrant-heavy cities such as New York, Chicago, Houston, and San Francisco, as well as in Democratic states with large immigrant populations, such as California and Illinois. But small towns such as New Haven, Connecticut, have also been the sites of some of the fiercest resistance to federal enforcement tactics, as well as pro-immigrant politics, and progressive cities within conservative states also have adopted the skeptic's posture.

The central federalism question these skeptical jurisdictions face is whether and to what extent to cooperate with the federal government by honoring detainer requests. By one estimate, over 300 jurisdictions have adopted some form of noncooperation strategy[27] (Henderson 2014). Sometimes called TRUST Acts, or colloquially referred to as sanctuary

26 Chamber of Commerce v. Whiting, 563 U.S. 582 (2011). The Arizona law at issue in this case survived preemption largely because of a savings clause in the INA. Even though Congress preempted all state laws that sanctioned employers for hiring unauthorized workers in 1986, when it adopted a federal employer sanctions regime, it expressly provided that states could continue to use licensing and other similar laws to regulate. The Arizona law fell squarely within the text of the savings clause, and so claims that the law otherwise undermined the federal scheme or that Congress intended the law to have a narrower reach did not persuade the Court. The Court also held that Arizona's E-Verify mandate did not conflict with federal law, id. at 608, confirming that states retained authority to adopt measures of this kind to deter the hiring of unauthorized workers.

27 The anti-detainer policy is the most recent instantiation of the noncooperation impulse. In the 1990s, cities such as New York and Los Angeles adopted policies that prohibited local officials from communicating immigration status information to the federal government. Congress eventually preempted these laws in 1996, and the US Court of Appeals for the Second Circuit rejected a claim brought by then-Mayor Rudolph Giuliani that the 1996 law violated the Tenth Amendment by commandeering local governments as immigration enforcers. See New York v. United States, 169 F.3d 29 (2nd Cir. 1999).

laws,[28] these measures delineate under what circumstances states and localities will honor detainer requests. Though few if any jurisdictions categorically rule out cooperation, the adoption of some form of noncooperation law underscores that localities retain the discretion to decide what circumstances warrant enforcement.

These policies have both pragmatic and symbolic dimensions. They reflect concern that conflating policing and immigration enforcement will undermine trust in public officials and police and could even undermine public safety.[29] But they also embody a political position on the immigration debate writ large — that immigrants or some subset of immigrants (the unauthorized without a criminal record, for example) ought not be deported. With respect to the former, it remains empirically contestable whether the noncooperation laws actually promote public safety. And whether they result in fewer deportations also remains to be meaningfully established.

But whether noncooperation laws can actually claim their supposed pragmatic benefits, they do succeed in joining a political fight. Localities that have resisted federal enforcement in this way have decided for themselves whether to be complicit in federal immigration enforcement. The noncooperation movement as a whole offers an alternative vision of immigrants' place in the community to the exclusionist narrative advanced by zealous enforcement jurisdictions. Indeed, the TRUST Acts and other similar laws reflect the influence of a widespread immigrants' rights movement that has sought to use the federal structure to its advantage by creating alternative legal regimes (Rodriguez 2015, 12-15; Vock 2013).

Federal-local polarization. In 2017, a highly polarized version of the intergovernmental dynamic created by local enforcement skepticism dominates federalism debates. On January 25, 2017, President Trump issued an executive order (EO) laying out the administration's interior enforcement policies.[30] Section 9 of the order targets so-called sanctuary jurisdictions, threatening to rescind federal funds for jurisdictions that refuse to comply with 8 U.S.C. §1373, a provision of the INA designed to facilitate local cooperation with federal law. In order to prevent local officials from shielding any immigration status information in their possession from federal enforcement officials, Congress enacted §1373, declaring it unlawful for states and their subdivisions to prohibit their personnel from communicating immigration information to the federal government. In addition to targeting noncompliance with §1373, the executive order also threatens "appropriate enforcement action" against any entity that "has in effect a statute, policy, or practice that prevents or hinders the enforcement of Federal law."[31] In response to the EO, a handful of localities around the country have taken the federal government to court, leading at

28 The sanctuary designation harkens back to a movement of the 1980s of churches providing safe haven to unauthorized immigrants cum refugees fleeing the civil wars of Central America.

29 One comprehensive academic study finds that Secure Communities, which entails the detainers some localities resist for public safety reasons, has not reduced police ability to resolve crimes (Cox and Miles 2017), though the effects detainers might have on trust and the psychic burdens they impose on immigrants may be hard to measure.

30 Enhancing Public Safety in the Interior of the United States, Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017).

31 Id.

least one district court to cast constitutional doubt on the order, despite acknowledging the federal government's authority to take the steps it outlined in the course of litigation.[32]

In this sort of polarized context, the federalism question becomes twofold: What can the federal government do to reign in resistant localities? And what are the legal foundations for ongoing local resistance? Any legal analysis will depend on the precise reach of the federal and local actions at issue. But a few general principles provide a framework that can be applied to federal-local tensions of this sort.

Federal power is simultaneously limited and broad. On the first score, the anti-commandeering doctrine interprets the Tenth Amendment and the federalist structure of the Constitution to prohibit the federal government from requiring states and their subdivisions to act as federal agents in the implementation of federal law.[33] Any federal law or interpretation of federal law by the executive that would treat detainer requests as mandatory fits comfortably within the scope of commandeering, as it would reflect the expectation that local police and their facilities and resources serve as agents of immigration enforcement, whether local officials consent or not.[34]

But the federal government can accomplish a great deal through its use of the spending power that it could not otherwise achieve through direct regulation. Congress can create incentives for localities to serve federal objectives by conditioning federal funds on compliance with certain terms. This power is not unlimited, and the Supreme Court has recently reinvigorated what had come to be seen as a perfunctory set of doctrinal limits on federal power.[35] In the interests of federalism, the exercise of the spending power must conform to certain criteria: (1) the condition must be unambiguous and imposed before funds have been distributed; (2) any condition must be germane to the federal program

32 County of Santa Clara v. Trump, __F. Supp. 3d__, 2017 WL 1459081 (N.D. Cal. 2017). The decision is at once narrow and broad. The government's litigating position before the district court was that section 9 of the EO did nothing more than direct the attorney general to rescind grant monies to jurisdictions that failed to comply with the statute, where the grants in question already required, as a term of the grant, compliance with the federal statute. The court acknowledged the federal government's authority to take away funds that already had been made contingent on compliance with §1373, thus giving the government what it purported to want. And yet, the court went to great lengths to reject the government's construction of the order, concluding that it would have rendered the order toothless. Instead, the court read the EO to potentially reach a much larger pool of funds for a wider range of local actions and then proceeded to conclude that its reading raised serious constitutional problems under federalism and spending clause doctrine.

33 New York v. United States, 505 U.S. 144 (1992) (striking down as unconstitutional commandeering a federal statute that required states that did not comply with federal scheme to dispose of radioactive waste to take title to the waste); Printz v. United States, 521 U.S. 898 (1994) (applying commandeering doctrine to state executive officials).

34 A 2016 report by the inspector general of the DOJ offers a potentially expansive but also likely erroneous interpretation of §1373 — that the statute could encompass policies that prohibit honoring civil detainer requests, even if they do not prohibit information sharing with the federal government, because they affect ICE's interaction with local officials. This interpretation strays far beyond the text of the actual statutory provision. Because reading the law to require compliance with civil detainer requests would raise serious constitutional concerns under the commandeering doctrine, there is little if any justification for reading the law so atextually. See Horowitz (2016).

35 National Federation of Independent Business v. Sebelius, 567 U.S. 519 (2012) (striking down the structure of the Affordable Care Act's expansion of Medicaid because it made the entirety of the states' Medicaid funding contingent on expanding the program according to the terms of the law).

pursuant to which the funds are being appropriated; and (3) the financial inducement cannot be overly coercive.

Each of these criteria leaves considerable room for interpretation, particularly the question of what amounts to coercion. But especially since the Supreme Court's reliance on the spending clause to invalidate the Medicaid expansion component of the Affordable Care Act, courts have demonstrated a willingness to test the federal government's positions. In the case of the Trump EO, the federal government offered an interpretation of the order that conformed to existing doctrine — that it directed the attorney general to rescind a small number of federal grants already clearly conditioned on compliance with §1373 from those grant recipients that willfully violated the statute. But the district court rejected this reading of the EO, finding instead that it could be read to reach all federal funds, and not just law enforcement funds that might have some nexus to immigration enforcement and §1373. Moreover, the order was not clear about what constituted a violation of its conditions.

Beyond the particularities of the January Trump EO, at least three important conclusions about federal power over localities emerge from the case. First, the district court emphasized that the spending power belongs to Congress and not the executive, which by the court's lights meant that only Congress could place conditions on federal grants — a principle that would significantly limit a new administration from unilaterally using federal funds as incentives. This conclusion must be complemented with the observations that Congress can delegate to the executive the authority to set terms for its own grant programs. Requiring compliance with federal law, whatever one thinks of the law, seems straightforwardly legitimate.

Second, these observations about Congress's spending authority open up a whole range of possibilities for a federal government seeking to tamp down local enforcement resistance. It is unlikely a court would find a constitutional problem with a statute that conditioned relevant funds not only on compliance with §1373, but also with detainer requests themselves, unless, of course, either of those conditions is itself unconstitutional (on which more below). In other words, with a willing Congress, the federal government could really test how far localities' commitment to noncooperation runs.[36]

And third, the legality and concrete effects of the executive order may ultimately be of secondary importance to the larger political purpose of the EO and other administration actions like it. The government's own interest in §1373 seems somewhat modest. Some anecdotal evidence exists of local government personnel taking it upon themselves to inform the federal government of the immigration status of people with whom they had come into contact — the acts protected by §1373. But there is no evidence or even really strong reason to believe that government personnel would be motivated or able to report immigration status on a large enough scale to make any meaningful difference in federal

36 As soon as the president announced his executive order, Miami-Dade County rescinded its noncooperation law, citing its desire to maintain its federal funding. Leaving aside the likelihood that the county misunderstood the legal effect of the order and acted hastily, its actions may well reveal that it and perhaps other jurisdictions only tepidly support the noncooperation movement.

enforcement efforts.[37] This actuality also re-enforces that, for enforcement skeptics at the local level, very little is actually at stake as a practical matter when it comes to §1373.

The stakes in the debate over §1373, then, are largely political, expressive, and rhetorical. The Trump EO amounts to the use of the bully pulpit to persuade or shame localities into joining the enforcement bandwagon, or to otherwise build political momentum for a robust and proud enforcement strategy regardless of local opposition. And the local resistance to the order, including the decision to file suit even before the government had taken any action to rescind funds, fits within a larger movement to create a locally based counternarrative to immigrants as public safety risks who ought to be removed to promote the rule of law.

To be sure, to sideline the spending clause as a source of federal authority, out-and-out resistance by enforcement skeptics could take other forms, too. Enforcement skeptics could challenge the very constitutionality of §1373, as Santa Clara County did in its complaint against the Trump EO, declaring that it itself violated the federal statute. But in addition to there being little to gain from ridding the Code of §1373, invalidating §1373 would require expanding the commandeering doctrine to cover at least some information sharing. A plausible claim could be made that §1373 prevents state and local governments, as well as their sub-entities such as police departments, from supervising their employees in order to serve federal immigration purposes — form of commandeering. But drawing the doctrine this broadly could have significant and unpredictable downstream consequences for federal law and policy. In other words, enforcement skeptics should be careful of expanding an already controversial tenant of federalism that limits federal power in a context where the local position happens to match their ideological preferences, because that match may not always exist. Indeed, cause-oriented mobilization of structural constitutional doctrines always present this risk and therefore should be handled with caution and humility.

Without relying on federalism doctrine, enforcement skeptics who seek to end local cooperation with federal enforcement altogether could also pursue Fourth Amendment litigation. As noted, a number of courts have found that localities lacked authority to comply with particular detainers, on the ground that local police had no probable cause to hold the individual in question. This conclusion reflects both the general requirements of the Fourth Amendment, as well as the principle that local jurisdictions do not have independent authority to enforce immigration law. As instances of courts finding Fourth Amendment violations in as-applied cases accumulate, the threat of constitutional liability by itself may lead jurisdictions to eschew ever-larger numbers of detainer requests. Not only could this approach significantly constrain the federal government's reliance on detainers, it also could significantly curtail the federal government of the spending clause as means of instigating compliance with detainers, since conditions on grants may not themselves be violations of the law.

Cautious intergovernmental compromise. Even when enforcement skeptics are in office at both the local and the federal level, intergovernmental tensions will persist. Even though the Obama administration advocated legislation that would have expanded immigration in myriad ways, and used its administrative authorities to grant large-scale enforcement

37 The central and most fruitful local avenue for federal enforcement comes from the arrest data the federal government acquires through Secure Communities, making detainer policy the far more consequential site of local enforcement and resistance.

relief, the local noncooperation movement flowered among Democratic jurisdictions during the same years. The likes of Chicago and New York, despite being crucial Democratic strongholds, presented bureaucratic headaches for the Obama-era DHS.

This tension among political allies stems to a significant degree from institutional factors. The federal government simply cannot abandon immigration enforcement altogether. By charging it with the enforcement of the INA, Congress has delegated responsibility to enforce the nation's immigration laws and appropriated significant sums of money to effectuate that responsibility. By law and custom, the administration cannot fail to honor either form of delegation, even as it may have considerable authority to make discretionary judgments about the scope and nature of enforcement policy (Cox and Rodriguez 2015, 142-65, 210-14). By contrast, local jurisdictions need not have anything to do with immigration law or enforcement to satisfy their governmental responsibilities. Immigration enforcement at the very least can be a distraction from the management of local public welfare, if not an outright impediment to serving the local interest, for some of the very reasons identified by the noncooperation movement.

The notion that a skeptical local jurisdiction would cooperate with federal enforcement therefore might seem like an impossibility — a null set. But enforcement cooperation extends well beyond local assistance of federal deportation policy and can include joint efforts that even enforcement skeptics could support, such as cooperation to target smuggling rings (Meissner and Kerwin 2009, 48-49, 54). And with respect to deportation policy, there could be pragmatic reasons for local skeptics to reach an enforcement détente with the federal government, even though localities can more comfortably and visibly reject immigration enforcement than the federal government (Rodriguez 2015, 15-16, 20). Indeed, few if any of the anti-detainer policies adopted at the local level eschew detainer requests altogether. Instead, localities have defined for themselves the sorts of detainers they will honor, usually recognizing the prudence of responding to detainers for people who have committed serious or violent crimes. This kind of partial cooperation reflects recognition at the local level of a potential public safety dimension to immigration enforcement. But perhaps more important, it demonstrates the importance of maintaining functional, cordial intergovernmental relations, given the value of federal-local cooperation not only with respect to law enforcement writ large, but also across other domains.

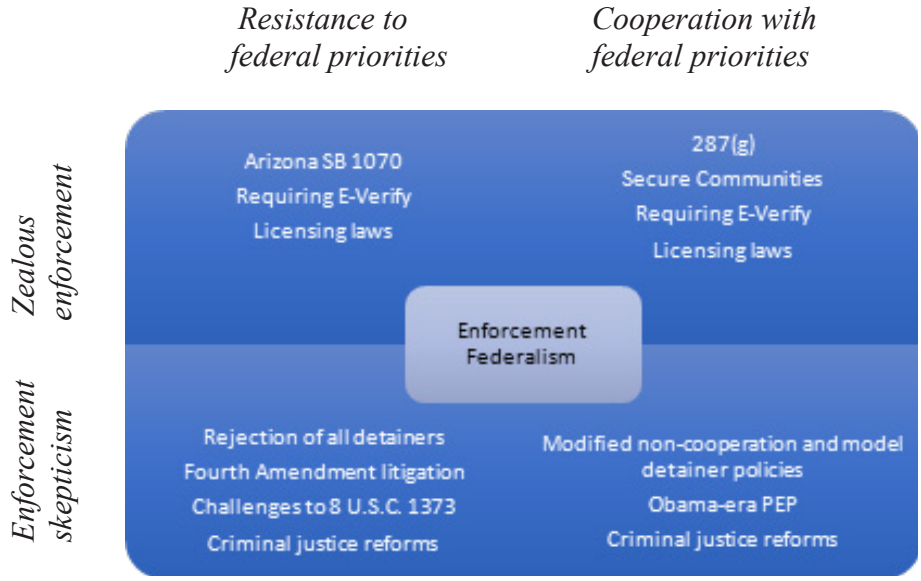
Embodying this pragmatic tendency, some jurisdictions have begun developing model detainer ordinances. In particular, to address potential Fourth Amendment liability, jurisdictions might opt to decline detainers that are not accompanied by a warrant or some indication of probable cause that the person in custody is deportable. As many have done, localities could exercise their own judgment concerning the types of underlying crimes that warrant the initiation of removal proceedings, declining detainer requests based only on immigration status violations. To complement this prioritization, localities might also enumerate for themselves the positive equities, such as community or family ties, that would warrant declining a detainer request in individual circumstances. These sorts of judgments — of when removal is appropriate — might seem like precisely the sorts of determinations that ought to be left to the federal government. But because they fundamentally implicate the local government's relationship to its own community, they are judgments that local officials are well placed, perhaps even better-placed, to make, as well.

When enforcement skeptics populate both the local level and the political positions of the federal administration, noncooperation laws that embody pragmatic compromise arguably represent a form of enforcement collaboration — a way of recognizing the inevitability of some form of deportation regime while working however awkwardly toward ensuring its basic fairness. Put another way, otherwise skeptical local jurisdictions might better justify calibrated cooperation when the political officials in charge of the enforcement regime self-consciously define their policies to achieve humane and targeted enforcement. This uneasy but not necessarily oppositional relationship arguably presents the best state of affairs from a systemic perspective, if we accept a baseline legitimacy to immigration enforcement and acknowledge the integration of the enforcement regime, because it helps to keep the federal government accountable.

The Obama administration's now superseded Priorities Enforcement Program (PEP) reflects this sort of equilibrium. In November 2014, then-DHS Secretary Jeh Johnson announced PEP as a rebranding and reformulation of Secure Communities, in response to pressure from enforcement-skeptical jurisdictions. "Governors, mayors, and state and local law enforcement officials around the country," he noted, "have increasingly refused to cooperate with [Secure Communities] . . . The overarching goal of Secure Communities remains in my view a valid and important law enforcement objective, but a fresh start and a new program are necessary" (Johnson 2014). The program would have maintained the data-sharing feature of Secure Communities, which is required by statute, but it would have changed the DHS follow-up strategy. Instead of issuing detainer requests, ICE simply would have notified local officials if a potentially removable person was in their custody, thus re-enforcing local discretion over how to proceed.

Beyond developing a cooperative but wary relationship with a federal enforcement apparatus whose policymakers might share certain skeptical objectives, resistant localities could take other steps to help disentangle local law enforcement from immigration enforcement without engaging in outright defiance. As noted at the outset, state and local criminal justice systems feed the immigration bureaucracy not only through the decisions of police, but also through the charging decisions made by prosecutors. Because criminal convictions under state law become the basis for removal in many cases, state and local prosecutors exert tremendous indirect effect on enforcement policy. Developing charging practices with immigration consequences in mind thus could reduce the number of noncitizens in the potential enforcement pool. The Maryland State's Attorney's Office, for example, recently has instructed prosecutors to consider the immigration consequences for potential defendants, victims, and witnesses of charging minor, nonviolent crimes (Fenton 2017). Of course, when determining prosecutorial priorities within the criminal justice context, the immigration consequences of a conviction can represent but one factor; it hardly seems prudent to create a system where immigration consequences drive criminal justice policy, and backlash by the public and lawmakers against broad policies of this sort is likely to be swift. But as an equity, those consequences can quite reasonably be taken into account. It would be perfectly appropriate for state and local prosecutors' offices, as a matter of policy, to include immigration consequences as a relevant general factor in guiding discretionary judgments (Motomura 2011).

The varieties of enforcement federalism thus look something like the following:



Both enforcement enthusiasts and enforcement skeptics at the local level will be able to advance their agendas regardless of who controls the federal enforcement bureaucracy. In the former case, localities can adopt laws in aid of enforcement that have escaped preemption. The skeptics can take advantage of conservative federalism doctrines that prevent the federal government from coopting local authorities to limit their own participation in enforcement, and they can manage their own criminal justice systems with a view to how they feed into the federal immigration system.

But the scope and tenor of immigration federalism will always remain a function of intergovernmental dynamics. Those dynamics will be shaped by a set of legal relationships and constitutional doctrines that the federal courts have done much to refine in recent years, precisely because immigration federalism has filled judicial dockets. Perhaps more important, the nature of the federal-local relationship will vary in response to shifts in political control at each level of government, even as it embodies persistent institutional tensions. And in mediating this interplay of politics and bureaucracy, the architects of any enforcement federalism strategy will have to grapple with the central question of the place of immigrants in our society.

II. Integration Federalism: Political Will and Bureaucratic Capacity

Despite the fact that immigration law and the immigration bureaucracy emanate from and are controlled by the federal government, Washington historically has played a very limited role in the formulation and implementation of integration policy. As a 2011 Government Accountability Office report notes, "no single federal entity has been designated to lead the creation, implementation, and coordination of a national immigrant integration capability" (GAO 2011, 25). Instead, immigrant integration largely has been a private sector affair, with state and local institutions playing crucial roles as well in devising affirmative integration

policies. In the integration and acculturation of immigrant children, for example, the local public schools play the single most important and comprehensive role. And a variety of state services and public-private partnerships provide language instruction and civics education, job training, and assistance with public benefits. Many of the federal integration programs that do exist, primarily to aid in the resettlement of refugees, involve contracts with NGOs to provide basic services, or are otherwise run through state agencies.

As with enforcement federalism, integration federalism captures the ideological polarization of the country over the place of immigrants in American communities and their role in the nation's future. This divergence has long-standing historical roots. In the antebellum period, for example, states in the West and South of the country adopted policies to attract immigrants in order literally to build their communities. Eastern seaboard states, by contrast, sought to drive immigrants away because they perceived them as public burdens and sources of crime (Salyer 1995, 4-5). In the years leading up to the Chinese Exclusion Acts and the decades that followed, many states, including California, adopted laws restricting immigrants' ability to earn a livelihood or take advantage of local public resources. Today, many states and localities seek to ground and improve the lives of immigrants, often regardless of their legal status. These local integration measures aim to secure immigrants' long-term political incorporation and economic and financial stability, as well as their cultural affiliation and sense of social solidarity with those who make up the communities around them. Other jurisdictions remain agnostic or indifferent to the incorporation enterprise. Still others actively seek to drive immigrants away — to promote their attrition — primarily with the sort of enforcement federalism above, but also by closing many local institutions and benefits to immigrant participation (Suro 2015, 1-25).

A thorough accounting of federalism's role in shaping the possibilities for immigrant integration is well beyond the scope of this paper. We would need to begin by defining the thorny concepts of integration and acculturation and articulating a set of markers to determine success. From there, a discussion of the particular policies and institutional commitments that facilitate integration could begin. The possibilities for affirmative integration strategies in today's context, as well as the particular role the federal government might play, have been covered expertly and comprehensively elsewhere in this series (de Graauw and Bloemraad 2017, 105-23).

But the historical and contemporary relevance of federalism to the project of immigrant integration, as well as the potential effects of the enforcement federalism discussed in Parts I and III on the prospects of immigrant integration, warrant making three conceptual points about federalism and integration. First, the problem of unauthorized immigration looms large in integration policy, and only Congress can decisively address the matter. The absence of legal status, in the main, deprives noncitizens of the capacity to work lawfully and therefore of adequate labor and employment protections. It also creates an inherent instability in immigrants' lives (for fear of removal) that diminishes the incentives and opportunities for making investments that would enable long-term settlement, such as language acquisition, civic knowledge, and home ownership. And it can heighten the psychological and financial burdens on mixed-status families. To be sure, unauthorized immigrants have become deeply embedded in their communities, and those who arrived as youth are functionally American — the very justifications for legislative legalization

and administrative relief. The creation by the executive branch of discretionary statuses, including the large-scale deferred action granted by the Obama administration, have helped ameliorate the disabilities associated with lack of status. But the 2016 election underscores the fragility and inadequacy of discretionary statuses, at least as mechanisms of stabilizing the lives of unauthorized immigrants and those with whom they associate. The lack of legal status will always be a drag on social status.

A great deal of contemporary immigration federalism, both of the enforcement and integration varieties, consists of a debate about the meaning of unauthorized status and its relevance to community participation (Rodriguez 2008, 581-600). Like past federal administrations, some states and localities have sought to ameliorate the lack of status with the regulatory authorities at their disposal. In tandem with their enforcement skepticism, cities and states such as New York, Chicago, and California and its localities, have attempted stabilize the status of unauthorized immigrants, including through the extension of benefits and legal protections, such as in-state tuition, drivers' licenses or municipal identification cards, and labor and employment guarantees (Ramakrishnan 2015, 2-6). Enforcement enthusiasts have done the same, not only through indifference to immigrant integration, but also through measures as draconian as prohibiting landlords from renting to unauthorized immigrants[38] (Suro 2015, 9-17).

Of course, as with any issue, the approach to unauthorized immigration does not track partisan lines neatly. Some indifferent or even hostile jurisdictions have adopted in-state tuition laws, for example, or a variety of affirmative integration measures (Rodriguez 2008, 579-80, 585-86). As discussed in more detail below, within hostile states, progressive cities seek to protect and incorporate the unauthorized in some ways. And even in states with historical commitments to integration, the political will behind integration strategies can wane in response to politics. In Illinois, for example, the current Republican governor, upon taking office, proposed to slash spending for affirmative integration programs and rescinded two executive orders issued by his predecessor, one of which prohibited state law enforcement from stopping individuals on the basis of immigration or citizenship status, and the other aimed to enable residents of the state to benefit from Deferred Action for Childhood Arrivals — even as he proclaimed support for immigration reform (Tareen 2015). But this variation is simply further evidence of the churning federalism will produce until the federal government resolves the status question.

A legal framework that draws from similar resources as the one governing enforcement federalism also structures this domain. Anti-integration measures can run afoul of federal policy and therefore be preempted.[39] And the Equal Protection Clause provides a strong

38 The federal courts of appeals have taken differing positions on whether the INA preempts these landlord ordinances. Compare Villas at Parkside v. Farmers Branch, 688 F.3d 801 (5th Cir. 2012) (concluding that local landlord ordinances constitute de facto attempts to regulate immigration and are thus preempted), with Keller v. Fremont, 719 F.3d 931 (8th Cir. 2013) (concluding that the connection between landlord laws and immigration regulation was too attenuated to justify preemption). The Supreme Court has declined to intervene.

39 See *Villas at Parkside*, 688 F.3d 801; *Keller*, 719 F.3d 931.; Arizona Dream Act Coalition v. Brewer, 757 F.3d 1053 (9th Cir. 2014) (issuing preliminary injunction against Arizona law that would have denied drivers' licenses to recipients of Deferred Action for Childhood Arrivals, on the ground that plaintiffs were likely to succeed with their claim that the state law violated the Equal Protection Clause).

bulwark for legal immigrants against state discrimination and a potentially available but still weak and uncertain tool for unauthorized immigrants. But from the point of view of integration policy, this framework simply manages the political contestation around immigrants' social place and restrains states and localities from engaging in egregious forms of discrimination. It cannot cure the ultimate instability of unlawful status. The persistence and irresolution of the federalism debates over the meaning of unauthorized status point to the need for federal intervention, not only if our goal is to anchor and improve the lives of unauthorized immigrants not only to provide stability, but also in the interest of shifting integration federalism — whether of the enforcement or integration variety — to more constructive and less legally contested terrain.

Second, the need for federal leadership on the status question does not mean that the work of integration should pass to the federal government. Instead, integration policy writ large would benefit from a well-conceived, intergovernmental strategy that plays to the institutional competencies of the different levels of government. The federal government's primary role, as the government least connected to the integrative institutions described above, should be to provide a strong integration scaffolding, which would include sharing information, coordinating best practices, and providing robust resource support. Indeed, were Congress to adopt a legalization program to address the status question, its implementation would necessarily depend on state and local institutions working with the private and nonprofit sector, simply because federal capacity does not exist to provide outreach to eligible immigrants, protect them from fraudulent service providers, assemble the requisite documentation to support a claim of legalization, or provide the English-language and civics instruction that likely would be necessary to qualifying for legalization (Pew Charitable Trusts 2014, 2-3).

As with the federalization of any issue, the risks of shifting the weight of integration policy to the federal government would be two-fold. Centralization can have a leveling effect, which in the integration context could mean providing less support and creative problem solving than would come from the most dynamic states and localities with the deepest experience integrating immigrants and their children. And, robust centralization could also threaten to turn integration policy into a homogenizing and ideological project, as opposed to a quotidian, practical one. Over-federalization could create pressure on lawmakers or officials to define a concept of Americanness to guide integration, which if done without nuance or openness, could stifle policy flexibility, such as by prohibiting or discouraging native language use in language education.

Of course, some states will be well suited to the role of integration innovation — California and New York leap immediately to mind. But other parts of the country will have neither the political will nor the bureaucratic capacities required to develop true integration policies, thus leaving integration to the vagaries of social life, or the private sector, which may or may not be robust in any given jurisdiction. And states, including today's integration paragon

of California,[40] might themselves succumb to the over-ideologization of integration. But this possibility of variation — of highs and lows resulting from political diversity and different historical trajectories — is precisely why the federal government's role should be as a facilitator rather than as the primary player. The federal government can coordinate a national integration strategy that nonetheless permits, prioritizes, and harnesses local and private sector leadership.

Third, the value of a disaggregated integration strategy should not be understood as obviating the importance of a national concept of citizenship supported by federal legal authority. The promise of state and local strategies for integration, particularly because of local progressive resistance to enforcement, has given rise to an optimistic but romantic notion of local citizenship (Ramakrishnan and Colbern 2015, 10-13); (Spiro 2009, 568-71). The concept is valuable as far as it goes, which is not as a substitute for national citizenship or belonging, but as a bridge to it. The practices of citizenship are certainly grounded at the local level, as the preceding discussion of integration policy presumes. The ultimate expression of local citizenship — voting rights in municipal elections — may be attainable in some jurisdictions (Gilbert 2014), but it remains a limited form of participation, and an impossible one for those who lack even legal immigrations status. The citizenship status that can only be granted by the federal government, like legal status itself, will be indispensable to the long-term stability that promotes investment in the community and adaptation to the country.

III. Cities and States

Because the federal government controls the domain of immigration law and policy, discussions of immigration federalism naturally become framed by the dichotomy that guides Parts I and II of this essay: the scope of federal law on the one hand and the limits of state and local power on the other. The central intergovernmental relationship in the formulation of enforcement policy, in particular, is of course the federal connection to the sub-federal. Legal federalism debates thus revolve around understanding the vast scope of the INA and the extent to which the US Code and the Constitution leave localities with any authority to shape enforcement policy other than through carefully controlled cooperation with the federal government.

But as happens in federalism debates generally, a singular focus on relations between the central government and the periphery obscures another vital intergovernmental dynamic in immigration federalism — the relationship between states and their subdivisions, especially their cities. The existence of thousands of local governments, and particularly of large urban centers that transcend their geography, has significant implications for the regulation of the populace's health, safety, and welfare. Localities often operate according

40 At the state level, California has undergone a shift that ought to be studied and understood, as a potential model for transformation. In the mid-1990s, it was the land of Proposition 187 and the effort to exclude unauthorized immigrants from whatever state and local institutions were possible. Voters also enacted an ideologically driven, counterproductive measure to prohibit the use of native language in English-language instruction in the public schools. But today, the state has taken the lead in doing everything within its power to provide security to unauthorized immigrants, both by resisting federal enforcement and providing affirmative tools of integration, and it even appears to be rethinking the native language ban (Suro 2015).

to their own politics while overseeing the institutions most vital to immigrant integration, such as schools and police forces. And the ideological diversity within states embodied in local governments further complicates and enriches the national debates over contentious issues that federalism helps structure (Gerken 2014; Bulman-Pozen 2014).

Across the country, staunchly Republican states and their erstwhile blue cities sharply diverge on some of the day's most pressing socioeconomic concerns, including gun control and gun rights, civil rights for the LGBTQ community, and immigration enforcement. And, of course, the dynamic works the other way, too, with Democratic statehouses looking for means of ensuring that local agents tow their line. These increasingly pitched battles also reflect a more profound divergence in American life — between rural and exurban communities on the one hand, whose interests are magnified and often protected at the state level, and cities on the other, whose cosmopolitan ethos is driven by wealth, immigration, and economic productivity. Indeed, the rural-urban split cuts across the country and the red and blue lines our national-level politics rely on to divide up the country. Increasingly sophisticated accounts of American federalism thus break down the blue and red boxes of the states to study decentralization in all of its manifestations (Gerken 2010; Hills 2005). The once ancillary field of local government law has become central to federalism theory, if not constitutional law itself.

In our constitutional system, states have the formal power, and cities are essentially creatures of state law. Powerful and important cities can sometimes drive state policy by virtue of their sheer size and economic might. But the divergence in world views between many states and their cities is still leading the former to use their formal authority to enact laws to preempt the latter. For progressive movements that find their firmest footing in liberal cities within conservative states — think Houston, Austin, and San Antonio in Texas, and Raleigh-Durham and Charlotte in North Carolina — state preemption of local law represents a clear and present danger. And this dynamic matters a great deal generally, too, because states themselves are internally complex. State preemption of local law can succeed in flattening the ideological and policy diversity federalism produces.

Immigration federalism has long been marked by this state-city tension (Rodriguez 2008, 637-40). Republican states have been responding for at least a decade to the noncooperation movement by preempting local sanctuary laws. Texas Senate Bill 4 (SB 4), enacted in May of this year,[41] builds on this practice, as do similar laws recently adopted in North Carolina, Georgia, and Alabama. Texas SB 4 introduces formal legal devices meant to coerce local police and governments into participating in federal immigration enforcement. SB 4 takes the predictable step of expressly preempting local laws or policies that prohibit officials from engaging or assisting in the enforcement of state and federal immigration laws, and it requires that law enforcement agencies honor ICE detainer requests. But the law goes a novel step further and targets potentially noncompliant officials directly with legal jeopardy. The law defines failure to honor detainer requests as a misdemeanor, enumerating fines as high as $25,000 per offense (after a first offense). The law also creates a civil proceeding to remove *elected* officials who violate the law's provisions.[42]

41 Tex. S.B.4, 85th Leg., (2017).

42 The law does carve out a number of local institutions from its reach, including hospitals, peace officers working at religious institutions, school districts, public health departments, community centers, or mental health authorities. See SB 4, section 752.052, subsections (a)-(f).

As with the higher-level, federal-state debate, these sorts of laws can be analyzed legally or as a matter of politics and policy. Legally speaking, it is a familiar tenet of local government law that cities "can exercise power only within the legal frameworks that others have created for them" (Frug and Barron 2006, 1). The US Constitution does not protect cities from state interference in the way it protects states (and its subdivisions) from federal commandeering or displacement. The commandeering doctrine, which can provide a bulwark for enforcement skeptics at the local level against the federal government, applies when the federal government has dragooned states or localities into the implementation or enforcement of federal law. The doctrine embodies the balance the Constitution strikes between the central government and the states. But the principle does not apply when the federal government is absent from the equation. To be sure, cities may have state law claims against preemption statutes or other state measures that interfere with local policy making or governing structure,[43] and some local government scholars argue that cities ought to have a place within the US constitutional firmament. But the basic principle that localities amount to creatures of state law gives states wide-ranging coercive authority over its subdivisions.

In fact, there are strategic reasons to remain wary of devising structural claims to prevent states from disabling their subdivisions, for the same reason that preemption works as a double-edged sword in federal-state relations. Fights over constitutional structure frequently if poorly mask deeper disagreements about policy. One could certainly take a principled, across-the-board, localist position, on the theory that local policies are easiest to change or best reflect our ideological diversity in its many manifestations. But it can be risky to develop structural claims in highly charged settings such as immigration policy, where those advancing the novel legal claims really have an underlying agenda. Cities (especially large ones) in the main tend to support the progressive agenda, especially when it comes to immigration, because of their cosmopolitan and immigrant identities. But states can also be enforcement skeptics. The California model discussed above reflects precisely that, and the state legislature has relied on preemption as a tool to promotes its vision of state integration policy.[44]

But even though states have considerable power over their cities, they cannot regulate their subdivisions in ways that would violate federal law or the US Constitution, or require their subdivisions to do what would otherwise be legally prohibited. Based on this principle, in confronting SB 4, a good lawyer would thus ask whether federal law or the Constitution prohibits anything about the Texas law.

Because the INA defines and effectively captures the field of immigration enforcement, there is always the possibility that a state enforcement law will run into conflict with it. But

43 See, e.g., State Building and Construction Trades Council of Cal. V. City of Vista, 54 Cal.4th 547, 555-557 (S. Ct. Cal. 2012) (striking down application of state prevailing wage law to contracts entered into by local jurisdiction and discussing home rule doctrine that permits cities "to govern themselves free of state legislative intrusion, as to those matters deemed municipal affairs" but does not insulate them from state laws that address matters of "statewide concern").

44 The state legislature enacted a law preempting localities from adopting housing ordinances that penalized landlords for renting to unauthorized immigrants, responding to the emergence in the late 2000s of these sorts of ordinances at the local level in various parts of the country. See 2007 Cal. Assem. Bill 976, 2007-2008 Reg. Sess. (2007).

because federal law contemplates localities offering their cooperation with federal law, a state law that requires local entities to respond to detainer requests, which are themselves requests for cooperation, seems to re-enforce the INA. Perhaps a hypothetical state requirement that localities enter into 287(g) agreements would create tension with an INA that contemplates leaving that choice to the local sheriffs and police departments, on the theory that law enforcement officials are the appropriate local entities to decide whether to actively enforce immigration law. But because local authority stems from state authority, it would be hard to muster a claim that the state cannot stand in for its own subdivision in making that choice, in the absence of a state law basis to ground that claim.

Constitutional rights provisions might also limit certain types of state preemption laws, including SB 4. In the case of the anti-anti-cooperation laws, the most viable claim would be the Fourth Amendment one, which local enforcement skeptics could use against either the federal or the state government. To the extent honoring a federal detainer request would violate the Fourth Amendment, the state cannot require its police departments to violate the Constitution. The limit of this approach is that it makes challenging state laws facially, or in their entirety, difficult. Fourth Amendment claims tend to be fact-specific. But perhaps the very complexity of sorting out which detainers can be honored and which risk Fourth Amendment liability provides a strong legal policy argument against the adoption of a sweeping pro-detainer law, to insure localities from legal liability and act as a prophylactic against predictable Fourth Amendment violations.

Slightly further afield, equal protection claims against anti-sanctuary laws might be devised, to the extent local noncooperation laws can be framed as attempts to insulate noncitizens or particular racial groups from animus and discrimination. Preemption laws that withdraw such protections might be manifestations of animus against noncitizens.[45] Unlike the Fourth Amendment theory, this legal critique of the likes of SB 4 has not been tested to date; the primary purpose of most anti-detainer laws is to promote good policing, not to prevent discrimination, and states like Texas could well justify their own preemption laws by pointing to the importance of enforcing federal immigration law. But regardless of its likelihood of success, this approach to legal strategy at least has the benefit of expressing substantive reasons for opposing the state law.

The limits of these legal claims against state laws like SB 4 underscore the surpassing importance of a feature of immigration federalism also relevant in the federal-local debate — the need to build a politics around these issues. Litigation can certainly be a part of that strategy. Even unsuccessful legal arguments can play a vital role in deepening these political claims, and lawsuits can help write a narrative about immigration, policing, and the local community to counter the state's. By drawing attention through litigation to the sheer breadth of the state's attempt to control its localities, litigation can draw political support and other resources to a fight worth having as part of the broader immigration enforcement debate. But cities are unlikely to be able to protect themselves, or advance the interests of their noncitizen residents, with legal arguments alone.

45 Romer v. Evans, 517 U.S. 620 (1996) (striking down amendment to Colorado Constitution that prohibited localities from adopting nondiscrimination ordinances to protect gays and lesbians, on the ground that the amendment reflected bias or animus on the basis of sexual orientation, in violation of the Equal Protection Clause).

Another legal political-strategy would have the federal government come in on the side of localities in some way. Some scholars have raised the prospect that Congress or the federal government might take steps to protect cities from state preemption through congressional preemption (Davidson 2007), or at least give states incentives to permit their cities room for maneuver, including by providing funding for integration programs (Rodriguez 2008, 637) — long a source of concern for states with large immigrant populations. But whether a federal-local partnership is either viable or a good idea depends less on theories of optimal intergovernmental arrangements than on one's views about the politics of immigrant integration.

The state-local divide ultimately helps highlight how fundamentally contingent political structure questions can be. The intergovernmental relationship we might prefer will depend both on our substantive immigration preference and on the policies each level of government might pursue at any given moment in time. But regardless of substantive preferences, the very fact that intergovernmentalism encompasses a multiplicity of arrangements means that a federalism strategy must be attentive to the full range of intergovernmental relations. Laws such as SB 4 re-enforce a vigorous enforcement agenda and help quash locally supported movements toward humane enforcement, or even non-enforcement. As with integration policy, an exclusive focus on what emanates from the center therefore obscures many of the sites in which our immigration policies and the corresponding politics take shape.

Conclusion

Despite its control over the terms of immigration law and the vast administrative apparatus created to enforce it, the federal government cannot escape the push and pull dynamics generated by federalism. In an arena as ideologically contested as immigration policy, it should come as no surprise that our federal system will produce divergent policies and regular challenges to whatever might be the federal government's reigning conception of immigration policy. The intergovernmental disputes and dependencies that can arise in a federal system are most apparent and complex when it comes to enforcement policy and the federal government's relationship to states, cities, and their law enforcement bureaucracies. But they are also increasingly salient in the relationships between states and their cities, which are often at odds about the place of immigrants in our societies. To a less pointed extent, federalism also structures the processes of immigrant integration, separate and apart from debates over how vigorously to pursue deportation, though the latter intimately affects the former, too. The intractability of the immigration policy questions that animate these federalism dynamics is perhaps the best argument for sustaining an intergovernmental framework for immigration, whether enforcement or integration is at stake. And yet, perhaps the most contested matter within immigration federalism — the proper social status of those without legal status — can only be truly resolved through decisive federal action. Whether our immigration federalism and the legal and policy diversity it entails can eventually prompt a humane and lasting resolution to that question remains to be seen.

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