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Rick Su

University of North Carolina School of Law, rick.su@unc.edu

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Publication: *University of California Davis Law Review*

Recommended Citation

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The First Anti-Sanctuary Law: Proposition 187 and the Transformation of Immigration Enforcement

Rick Su*

Anti-sanctuary efforts are sweeping the country, as the federal government and a growing number of states impose stringent restrictions on the ability of cities and other localities to limit their involvement in federal immigration enforcement. Many are now wondering how far this movement will go. But where and how did this movement begin? This Essay argues that the roots of the contemporary anti-sanctuary movement can be traced to Proposition 187, a ballot initiative adopted by California voters in 1994. As the nation's first anti-sanctuary law, Proposition 187 established the basic provisions featured in nearly every anti-sanctuary measure enacted since. Moreover, it led the federal government to reshape federal law and initiatives to enable the kind of federal-local cooperation that Proposition 187 envisioned. As a result, Proposition 187 did more than simply set the groundwork for the modern anti-sanctuary movement. It also led to a restructuring of the federalism relationship that made the proliferation of anti-sanctuary legislation like Proposition 187 more necessary. In other words, although Proposition 187 is largely remembered as a benefit-restricting measure, it is its anti-sanctuary efforts that constitute its most lasting legacy.

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INTRODUCTION

On October 5, 2017, California enacted SB 54, a “sanctuary” law that prohibits state and local officials from participating in federal immigration enforcement.¹ Exceptions were provided in certain cases.² But as only the second state to pass such a measure,³ California was widely recognized as a vanguard in resisting the federal government’s escalating interior enforcement efforts. Immigration advocates immediately lauded the law as a model. The federal government quickly filed suit to challenge its constitutionality.⁴ All the while, SB 54 stood out as a counterpoint to the wave of *anti*-sanctuary measure sweeping the country.⁵ While several states have enacted laws to compel the participation of local officials in federal immigration enforcement in recent years, California was now mandating that they refuse.

But if California is now leading the charge on sanctuary, it was also a pioneer in the anti-sanctuary movement that it now opposes. Indeed, in the 1990s, long before the political battle over sanctuary policies dominated the national debate, California enacted the nation’s first anti-sanctuary law. Local officials were required to “fully cooperate” with the federal government.⁶ They were mandated to take affirmative steps to verify the legal status of immigrants, and report those found unauthorized to the federal government.⁷ Local sanctuary policies were also explicitly prohibited.⁸ That law was Proposition 187.⁹ It was enacted as a ballot initiative in 1994 with the support of nearly sixty percent of California voters.¹⁰ And I argue in this Essay that it reshaped our nation’s approach to immigration enforcement, and ultimately gave rise to the sanctuary debates that now dominate immigration politics.

¹ See SB 54, 2017-2018 Leg., Reg. Sess. (Cal. 2017).

² See *id.* § 2.

³ Illinois was the first state to pass a statewide sanctuary bill, also in 2017. See Illinois TRUST Act, 5 ILL. COMP. STAT. 805/15 (2017).

⁴ See *United States v. California*, 921 F.3d 865, 876 (9th Cir. 2019).

⁵ See Pratheepan Gulasekaram et al., *Anti-Sanctuary and Immigration Localism*, 119 COLUM. L. REV. 837, 839-40 (2019).

⁶ See Proposition 187: Illegal Aliens. Ineligibility for Public Services. Verification and Reporting (1994), at § 4(a).

⁷ See *id.* § 4(b).

⁸ See *id.* § 4(c).

⁹ See generally *id.*

¹⁰ See BILL JONES, CAL. SECRETARY OF STATE, STATEMENT OF VOTE, at xxv (1994).

Much has been written about Proposition 187. And despite the fact that it was never enforced — initially blocked by a court injunction¹¹ and later abandoned by elected officials¹² — it has long served as a cautionary tale. For some, the story is one of political backlash, and what can happen when the issue of immigration is cast through the lens of race, criminality, and the welfare state.¹³ For others, it is an account of political transition, and how one law tipped a traditionally Republican state into becoming a Democratic stronghold.¹⁴ In both tellings, the focus is on how Proposition 187 sought to deny unauthorized immigrants access to the state's social services, emergency healthcare, and its public schools and universities.¹⁵ What has largely been overlooked is how Proposition 187 sought to compel state and local involvement in immigration enforcement, and did so by denying state and local officials the ability to limit their participation.

This Essay is a reexamination of Proposition 187 as an anti-sanctuary law. At the most basic level, it shines light on the enforcement mandates and sanctuary prohibitions that have become common features in nearly every anti-sanctuary measure that has been adopted since Proposition 187's introduction. But more importantly, this Essay argues that Proposition 187 advanced a new model of immigration enforcement based on federal-local cooperation. This new model would eventually be embraced by the federal government, resulting in federal reforms that both supported and enabled the kind of coordinated enforcement that Proposition 187 proposed. In doing so, however, the federal response to Proposition 187 also made laws like Proposition 187 more important to federal immigration enforcement efforts, thus leading to the wave of anti-sanctuary laws that are now proliferating at the state level. In other words, although Proposition 187 is largely remembered as a benefit-restricting measure, it is its anti-sanctuary efforts that constitute its most lasting legacy.

This Essay is organized in three parts. Part I details the anti-sanctuary measures of Proposition 187, how they coalesce into a distinct vision of

¹¹ See *League of United Latin Am. Citizens v. Wilson*, 997 F. Supp. 1244, 1261 (C.D. Cal. 1997).

¹² See ROBIN DALE JACOBSON, *THE NEW NATIVISM: PROPOSITION 187 AND THE DEBATE OVER IMMIGRATION* xiv (2008).

¹³ See, e.g., *id.*; KENT A. ONO & JOHN M. SLOOP, *SHIFTING BORDERS: RHETORIC, IMMIGRATION, AND CALIFORNIA'S PROPOSITION 187* (2002).

¹⁴ See, e.g., ANDREW WROE, *THE REPUBLICAN PARTY AND IMMIGRATION POLITICS: FROM PROPOSITION 187 TO GEORGE W. BUSH* (2008).

¹⁵ See, e.g., Gerald L. Neuman, *Aliens as Outlaws: Government Services, Proposition 187, and the Structure of Equal Protection Doctrine*, 42 *UCLA L. REV.* 1425, 1425 (1995).

federal-local cooperation, and how this vision led to its downfall in federal court. The goal here is to cast Proposition 187 in a new light, and to suggest the radical manner in which its drafters sought to reshape immigration policies at both the federal and local levels. Part II describes Proposition 187's legacy. The state law may have been enjoined because it sought to advance a broad vision of how federal immigration enforcement should be carried out. But it was precisely this vision of coordinated enforcement that was ultimately adopted into federal law. Part III explores Proposition 187's impact on today's sanctuary and anti-sanctuary debates. It argues that the reason these debates have escalated to the forefront of immigration politics is because the vision of immigration enforcement that Proposition 187 set forward cannot be effectuated through federal law alone; it requires complementary policies at the state and local levels. As long as federal immigration policies revolve around the type of federal-local cooperation that Proposition 187 introduced, states and localities will continue to be embroiled in the broader immigration debates.

I. PROPOSITION 187 AS AN ANTI-SANCTUARY LAW

A. *The Anti-Sanctuary Provisions of Proposition 187*

That Proposition 187 was intended as an anti-sanctuary measure should not be surprising given its text. Commentators have long emphasized the law's attempt to "prevent illegal aliens in the United States from receiving benefits or public services."¹⁶ But as the preamble made clear, the goal was also "to provide for cooperation between the[] agencies of state and local government with the federal government, and to establish a system of required notification by and between such agencies."¹⁷ In other words, Proposition 187 was about more than the relationship between immigrants and the state. It was also an attempt to redefine the relationship of state and local officials with federal immigration authorities.

Indeed, the goal of federal-local cooperation extends well beyond the statement of purpose in the preamble; it was written right into the substantive provisions of Proposition 187 itself. Like many state anti-sanctuary laws that have been enacted since, Proposition 187 contains a broad cooperation mandate. Section 4, for examples, begins by stating that "[e]very law enforcement agency in California shall fully cooperate

¹⁶ Proposition 187: Illegal Aliens. Ineligibility for Public Services. Verification and Reporting (1994), at § 1.

¹⁷ *Id.*

with the United States Immigration and Naturalization Service” with respect to individuals under arrest and suspected of being in the country without legal authorization.¹⁸ What this “full cooperation” entails, or what kind of enforcement activities would be required, is not explicitly set out. But this appears to have been precisely the point. Given its open-ended language, law enforcement officials would be required to participate in any federal immigration initiative in which their participation is requested, and presumably in any manner desired by federal authorities.

Aside from a broad mandate to cooperate, Proposition 187 also sets out a number of specific activities that state and local officials must do to support federal immigration enforcement efforts. These include verification, reporting, and notification mandates, all of which are required regardless of whether participation is requested by the federal government. Under Section 4(b), law enforcement officials are required to verify the immigration status of anyone under arrest if there is any suspicion that they are present in violation of federal immigration laws.¹⁹ If an immigrant is identified as unauthorized through this verification process, Section 4(b) further requires state and local officials to report the “apparent illegal status” to federal immigration authorities and the state’s Attorney General, along with “any additional information that may be requested.”²⁰ In addition, a separate notification requirement instructs law enforcement officials to specifically tell unauthorized immigrants to “obtain legal status or leave the United States.”²¹ It is worth noting that Proposition 187 did not limit these mandates to local law enforcement officials. Indeed, Sections 5 through 7 extends the verification, reporting, and notification requirements to the state state’s social service administrators, healthcare providers, and educators.²²

Last, Proposition 187 bans what we would now refer to as sanctuary policies. Of course, the cooperation, verification, and reporting requirements described above already restricts the ability of local governments to limit their participation in federal immigration enforcement. But Proposition 187 also explicitly bans policies to that effect. Section 4(c) states that any “legislative, administrative, or other action by a city, county, or other legally authorized local government

¹⁸ *Id.* § 4(a).

¹⁹ *See id.* § 4(b)(1).

²⁰ *Id.* § 4(b)(3).

²¹ *Id.* § 4(b)(2).

²² *See id.* §§ 5(c), 6(c), 7(d).

entity . . . to prevent or limit the cooperation required by [the cooperation mandate] is expressly prohibited.”²³

What is striking about these provisions is how they operate independent of the benefit-restricting measures that were touted as the core of Proposition 187. To be sure, at the time that Proposition 187 was introduced, these anti-sanctuary provisions were largely described as the means by which benefit-restrictions can be meaningfully enforced. It was argued that only by verifying legal status can California ensure that governmental benefits like social services, healthcare, or public education are not used by unauthorized immigrants. But even if this is how these provisions were justified, it is clear that they also stand on their own. Benefits can be denied without requiring law enforcement to “fully cooperate” with federal immigration officials. Local law enforcement officials provide no direct governmental “benefit” that would require them to first verify the immigration status of those they arrest. Nor is it clear that local sanctuary policies, especially those enacted in order to conserve local resources for local priorities, cannot operate in tandem with a state policy that denies benefits to unauthorized immigrants.

Understanding Proposition 187 as an anti-sanctuary measure also explains why these provisions continue to be copied by the wave of anti-sanctuary legislation now sweeping the country more than two decades later. Few states are now seeking to restrict benefits to unauthorized immigrants (in part because the federal government has imposed far more sweeping legislation to that effect). But Proposition 187’s anti-sanctuary provisions have only spread. Cooperation mandates have not only become commonplace, but are also increasingly more open-ended. An anti-sanctuary law enacted by Alabama in 2015, for example, requires law enforcement officials to both “fully comply with and . . . support the enforcement of federal [immigration] law”²⁴ The same can be said of Proposition 187’s verification and reporting requirements. In fact, the reason why SB 1070 — the infamous anti-immigration measure enacted by Arizona in 2010 — was dubbed the “show me your papers” law²⁵ was because it requires law enforcement officials to independently verify the immigration status of anyone they encounter in a “lawful stop, detention or arrest,” and report illegal status to the federal government.²⁶ Moreover, sanctuary bans are now an

²³ See *id.* § 4(c).

²⁴ ALA. CODE § 31-13-5(b) (2019).

²⁵ See, e.g., DORIS MARIE PROVINE ET AL., *POLICING IMMIGRANTS: LOCAL LAW ENFORCEMENT ON THE FRONT LINES 1* (2016).

²⁶ See ARIZ. REV. STAT. ANN. § 11-1051(B) (2019).

increasingly common feature of state law. And although the scope of contemporary sanctuary bans has grown,²⁷ the bans themselves all build upon the basic framework set forth by Proposition 187.

In short, Proposition 187 is, at heart, an anti-sanctuary law. It is an anti-sanctuary law because it seeks to eliminate local discretion over how and in what circumstances local communities wish to participate in federal immigration enforcement. And it does so not only by imposing a broad mandate to cooperate with the federal government, but also through specific requirements to assume many of the duties of federal authorities. This is not to say that the benefit-restricting provisions of Proposition 187 are not important. After all, it was these provisions that proponents of Proposition 187 touted, and which persuaded many California voters. But the manner in which the benefit restrictions were to be carried out were also tied to a separate goal of promoting an immigration enforcement regime encompassing all levels of the federal system.

B. *Reimagining Immigration Enforcement*

Proposition 187, I have argued, established the basic framework for the kind of anti-sanctuary laws that have proliferated since its enactment. But the significance of Proposition 187 is not just as an anti-sanctuary law, or even the nation's first. It is also because Proposition 187 sought to fundamentally reshape how immigration laws are enforced and how policies concerning enforcement are made. First, Proposition 187 imagined a system of complementary enforcement in which state and local officials could be used to greatly expand the enforcement capabilities of the federal government. Federal-local cooperation, rather than exclusive federal authority, would serve as basic structural framework for our nation's immigration enforcement system. Second, Proposition 187 advanced a vision of immigration policymaking in which states, and not just the federal government,

²⁷ Proposition 187 sought to ban sanctuary policies that limit federal-local cooperation with respect to immigrants under arrest. Indiana and Virginia, however, now prohibit any policies that restrict the involvement of government officials to anything "less than the full extent *permitted* by federal law." See IND. CODE § 5-2-18.2-4 (2019); VA. CODE ANN. § 15.2-1409 (2019) (emphasis added). Proposition 187 targeted sanctuary effectuated through "legislative, administrative and other actions." Contemporary sanctuary bans are increasingly drafted to cover far more, including "patterns and practice[s]," "informal, unwritten polic[ies]," and "procedures and customs." See S.B. 4, 85th Leg., Reg. Sess. (Tex. 2017) (codified in TEX. GOV'T CODE ANN. § 752.053(a)(1) (2019)); IOWA CODE § 825.1 (2018); H.B. 9, 2018 Gen. Assemb., Reg. Sess. § 2 (Fla. 2018).

would play a central role. After all, if it is through federal-local cooperation that immigration enforcement can be expanded, then states are well-positioned to mediate that relationship.

These ideas may now seem commonplace. But it is important to keep in mind how radical they might have appeared at the time that Proposition 187 was introduced. We take it as a given today that expansive immigration enforcement depends on the participation of state and local actors. But in the 1990s, federal-local cooperation with respect to immigration was just starting to be considered. There was little consensus on the legality of state and local officials participating in immigration enforcement.²⁸ There were even less agreement on whether they should. This is not to say that federal-local cooperation was entirely absent. A number of pilot programs had been developing since the late 1980s, many of which involved law enforcement agencies in California.²⁹ Local officials also reported immigrants to federal authorities on an ad hoc basis.³⁰ But as a matter of federal law and policy, there were no national programs that formally integrated state and local officials into federal enforcement efforts. Nor was there a national system available that would allow local officials to take part in identifying or removing unauthorized immigrants.

This is likely why Proposition 187's requirement to "fully cooperate" with the federal government was written in such a broad and open-ended manner. Efforts to compel or encourage federal-local cooperation today tend to refer explicitly to participation in an existing federal program, like compliance with federal detainers or participation in 287(g) agreements.³¹ But without any program or policy to refer to, the drafters of Proposition 187 needed to anticipate the range of formal

²⁸ See Nancy Cervantes et al., *Hate Unleashed: Los Angeles in the Aftermath of Proposition 187*, 17 CHICANO-LATINO L. REV. 1, 7 (1995); Paula Sue Smith, *An Argument Against Mandatory Reporting of Undocumented Immigrants by State Officials*, 29 COLUM. J.L. & SOC. PROBS. 147, 154-55 (1995).

²⁹ See, e.g., *The Impact of Federal Immigration Policy and INS Activities on Communities Before the Information, Justice, Transportation, and Agriculture Subcommittee of the Committee on Government Operations House of Representatives*, 103d Cong. 319-34 (1994) (testimony of G.H. Kleinknecht, Associate Commissioner of Enforcement, Immigration and Naturalization Service); Peter H. Schuck & John Williams, *Removing Criminal Aliens: The Pitfalls and Promises of Federalism*, 22 HARV. J.L. & PUB. POL'Y 367, 422-33 (1999).

³⁰ See, e.g., Patrick J. McDonnell, *Police Fear Prop. 187 Will Crush Hard-Earned Trust*, L.A. TIMES (Nov. 5, 1994, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1994-11-05-mn-58755-story.html> [<https://perma.cc/42VG-6DE6>] ("During the 1992 riots, the LAPD turned over hundreds of suspected illegal immigrants to the INS.").

³¹ See, e.g., TENN. CODE ANN. § 4-42-102 (2019) (regarding federal detainers); *id.* § 7-68-105 (regarding 287(g) agreements).

programs that might be developed and the different kinds of federal request that might be made. And they did so by essentially giving the federal government an open-ended invitation to conscript the state's law enforcement officials as they see fit.

But the drafters of Proposition 187 were also not content to simply anticipate the development of federal immigration policies that might call upon state or local participation. They wanted to advance federal-local cooperation as a central operating principle, and to do so directly from the state level. As a result, Proposition 187 also needed to address the possibility that such a model of immigration enforcement might be forestalled by federal reluctance or local opposition. Even if the state's personnel are entrusted to the federal government, there was no guarantee that they will be fully or effectively utilized. Moreover, given that the vast majority of the state's governmental officials are under the direct control of cities and counties,³² any effort to commandeer them on the federal government's behalf would have to overcome local policies that deny their participation. After all, coordinated action in our federal system is in many cases a three-way street. A ballot initiative like Proposition 187 can bind the state. But to implement a model of federal-local cooperation, the law also needed to overcome possible resistance both above and below.

To that end, Proposition 187 goes further than simply requiring "full cooperation" by state and local officials. To overcome federal reluctance, it imposes verification and notification requirements that effectively orders state and local officials to act as immigration enforcement agents, and a reporting requirement that seeks to compel the federal government to follow the state's lead. If the federal government chooses not to use state and local officials to identify unauthorized immigrants, Proposition 187 requires them to take steps to identify on their own. States and local governments may not have the constitutional authority to deport unauthorized immigrants on their own, but those immigrants can still be driven to "self-deport"³³ when state and local officials instruct them to "obtain legal status or leave the

³² See, e.g., LISA JESSIE & MARY TARLETON, U.S. CENSUS BUREAU, 2012 CENSUS OF GOVERNMENTS: EMPLOYMENT SUMMARY REPORT 2-3 (2014), https://www2.census.gov/govs/apes/2012_summary_report.pdf [<https://perma.cc/4L3P-WRJP>].

³³ Indeed, this was how then-Governor Pete Wilson described the intended effect of Proposition 187's benefit restrictions as well. See William Safire, *Opinion, Self-Deportation?*, N.Y. TIMES, Nov. 21, 1994, at A15. For earlier state efforts to encourage "self-deportation," see DANIEL KANSTROOM, *DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY* 218 (2007).

United States.”³⁴ All the while, the reporting requirement allows California to maintain political pressure on the federal government to “do their job.” Proposition 187 cannot directly compel the federal government to deport unauthorized immigrants that state and local officials identify. But federal authorities might nevertheless be spurred into taking action, which appears to be what the verification and reporting requirements aimed to do.

Having addressed the relationship between the federal government and the state, Proposition 187 turns to the thorny issue of the state’s own local governments. Local sanctuary policies were relatively rare at the time. But the few that existed were a major concern for the law’s sponsors. Years before Proposition 187 was proposed, one of its key supporters openly criticized sanctuary policies like Special Order 40 in Los Angeles.³⁵ And during the campaign for Proposition 187, a spokesperson for one of its organizational sponsors argued that “[i]t’s cities like San Francisco,” which had “declared itself a sanctuary for illegal immigrants . . . that make referendums like [this] necessary.”³⁶ As a result, Proposition 187 wields the power that states exercised over their localities to compel their participation. Section 4(c) specifically preempts any “city, county, or other legally authorized local government entity” from “prevent[ing] or limit[ing]” the “fully cooperate” mandate contained in Section 4(a).³⁷ Moreover, the preemption applies to “legislative, administration, or other actions” that may be taken by a local government or its officials.³⁸ In other words, Proposition 187 limits the discretion that local governments have traditionally enjoyed with respect to directing the activities of their officials, or setting the law enforcement priorities for their communities. And to the extent local governments implement policies limiting the circumstances when or manner in which local officials may check the immigration status of immigrants they encounter, those policies are preempted by Proposition 187’s verification and reporting requirements.

³⁴ Proposition 187: Illegal Aliens. Ineligibility for Public Services. Verification and Reporting (1994), § 4(b)(2).

³⁵ See Mary Ann Milbourn, *Sanctuary Resolution ‘Ridiculous,’ INS Says*, DAILY NEWS L.A., Nov. 27, 1985, at 1; see also Harold W. Ezell, *Blow to INS Bashers*, MERCURY NEWS, May 20, 1987, at 15B (criticizing the church-led sanctuary movement).

³⁶ Mi Young Pae, *S.F. Panel Opposes Prop. 187*, S.F. CHRON., Aug. 13, 1994, at A17.

³⁷ Proposition 187: Illegal Aliens. Ineligibility for Public Services. Verification and Reporting (1994), at § 4(c).

³⁸ *Id.*

C. *The Legal Challenge Against Proposition 187*

Proposition 187 was not just an anti-sanctuary law. As the nation's first, it was also intended to fundamentally reshape the baseline presumption with respect to how immigration responsibilities should be allocated among the various levels of our federal system. This, I have argued, is why Proposition 187 was a radical proposal at the time that it was introduced. Yet it was also this "reimagining" of our nation's response to illegal immigration that led to its downfall. In *League of United Latin American Citizens v. Wilson*,³⁹ District Court Judge Pfaelzer enjoined major parts of Proposition 187 for infringing on the federal government's plenary power over immigration, and thus violating the Constitution's supremacy clause. The problem was not that Proposition 187 directly conflicted with any provision of federal law. Rather, it was that the initiative's effort to fundamentally reshape how immigration enforcement was carried out ran afoul of the federal government's exclusive authority to establish its own immigration enforcement policy.

Indeed, despite all the attention paid to Proposition 187's benefit restrictions, nearly every one of these provisions survived the initial rounds of legal challenges. Drawing upon *De Canas v. Bica*,⁴⁰ in which the United States Supreme Court explained that not "every state enactment which in any ways deals with aliens is a regulation of immigration and thus per se preempted," Judge Pfaelzer held that California had the right to withhold the state's own resources from unauthorized immigrants. And even if the "denial of benefits . . . may indirectly or incidentally affect immigration by causing such persons to leave the state or deterring them from entering California in the first place, such a denial does not amount to a 'determination of who should or should not be admitted in the country,'"⁴¹ which remains a sphere of exclusive federal authority. As a result, California was permitted to deny social services, state-funded healthcare, and even post-secondary public education to unauthorized immigrants. The only benefit that could not be denied was primary and secondary education, which the Supreme Court had recognized as a right of all children in *Plyler v. Doe*.⁴² But that injunction was expected; it was intended all along that Proposition 187

³⁹ *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755 (C.D. Cal. 1995).

⁴⁰ 424 U.S. 351 (1975).

⁴¹ *Wilson*, 908 F. Supp. at 770 (quoting *De Canas*, 424 U.S. at 355).

⁴² 457 U.S. 202 (1982).

was to be used as a vehicle to compel the Court to reconsider its holding in *Plyler*.⁴³

Where Proposition 187 ran into trouble was with respect to its anti-sanctuary provisions, and more specifically the cooperation, verification, and reporting mandates. Of course, concerns about these provisions were extensively raised during the political campaign leading up to the vote on the ballot initiative. Critics argued that it would lead to the establishment of a “police state” in California.⁴⁴ They feared that with little to go on, state and local officials will rely on racial profiling in deciding when Proposition 187’s verification requirement needed to be implemented.⁴⁵ And these criticisms came not only from immigrant advocates, but also from federal and local officials. Doris Meissner, Commissioner of the Immigration and Naturalization Service, questioned the use of the police in immigration enforcement operations, while Attorney General Janet Reno argued that “[i]t does not make sense to turn schoolteachers and nurses into Border Patrol agents.”⁴⁶ Local officials from across the state issued public statements against Proposition 187 as well,⁴⁷ with some police departments going as far as to suggest that they might refuse to comply with its enforcement mandates entirely.⁴⁸

But for Judge Pfaelzer, it was ultimately the novel vision of federal immigration enforcement underlying Proposition 187 that ran afoul of constitutional constraints. Taken on their own, none of the anti-sanctuary provisions were explicitly preempted by federal law. Yet taken as a whole, Judge Pfaelzer concluded that they constituted a “comprehensive scheme to detect and report the presence and effect the removal of illegal aliens.”⁴⁹ This California could not do. By requiring state and local officials to make an independent determination of an individual’s immigration status, the court explained, California was infringing upon powers that the Constitution and Congress “exclusively reserved” for federal officials.⁵⁰ The only context where state and local

⁴³ See, e.g., WROE, *supra* note 14, at 80.

⁴⁴ See, e.g., ONO & SLOOP, *supra* note 13, at 83-84.

⁴⁵ See, e.g., John SW Park, Note, *Race Discourse and Proposition 187*, 2 MICH. J. RACE & L. 175, 184 (1996).

⁴⁶ *Id.*

⁴⁷ See WROE, *supra* note 14, at 71-73; Patrick J. McDonnell, *L.A. Police Panel Joins Foes of Measure*, L.A. TIMES, Oct. 19, 1994, at B4.

⁴⁸ See Park, *supra* note 45, at 185.

⁴⁹ *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 769 (C.D. Cal. 1995).

⁵⁰ *Id.* at 770.

verification would be permitted, according to the court, was in the limited cases where a federal program for immigration status verification already existed. Nor was it permissible for Proposition 187 to deny those “suspected” or “reasonable suspected” of being unauthorized from receiving governmental benefits. As Judge Pfaelzer explained, the “reasonably suspects” language effectively creates a separate category of immigrants distinct from those that have been actually determined to be in this country illegally; only Congress can create new immigration categories in this manner.⁵¹

Contrary to conventional accounts then, Proposition 187 did not fail constitutional scrutiny because it sought to deny benefits to unauthorized immigrants. The voters who enacted Proposition 187 may have been motivated by its benefit-restricting measures. But it was its anti-sanctuary provisions that were deemed unconstitutional, and more specifically because they coalesced into a “comprehensive scheme” of federal-local cooperation over immigration.

II. THE ANTI-SANCTUARY LEGACY OF PROPOSITION 187

More than an effort to deny governmental benefits to unauthorized immigrants, I have argued that Proposition 187’s goal was also to effectuate a model of immigration enforcement based on federal-local cooperation. It was this effort to create a “comprehensive scheme” for the identification, reporting, and removal of unauthorized immigrants that led to Proposition 187’s downfall. Yet, as I argue here, it was also this “comprehensive scheme” that proved to be Proposition 187’s most lasting legacy.

This Part describes how federal law and policy were transformed in response to Proposition 187. The ballot initiative’s influence can be seen in the comprehensive immigration reforms adopted by Congress in 1996. Its vision also underlies many of the enforcement initiatives that were developed by the federal government in the years following Proposition 187’s introduction. My claim here is not just that the federal government copied Proposition 187’s anti-sanctuary provisions into federal law. It is also that subsequent federal reforms paralleled, supported, and complemented state laws like Proposition 187. As a result, instead of displacing state anti-sanctuary efforts, the federal response to Proposition 187 made the proliferation of laws like it even more necessary.

⁵¹ See *id.* at 779.

A. Reshaping Federal Law

Proposition 187's influence on federal law can most readily be seen in the comprehensive immigration reforms adopted by Congress in 1996. That year, alongside landmark reforms to the criminal justice system,⁵² Congress passed the Illegal Immigration Reform and Immigrant Responsibilities Act ("IIRIRA")⁵³ and the Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA").⁵⁴ Like Proposition 187, IIRIRA was an effort to curtail illegal immigration. Congress also made clear its intent to "remove the incentive for illegal immigration provided by the availability of public benefits"⁵⁵ through restriction imposed by PRWORA. And politically, Proposition 187 figured prominently in the enactment of both laws. In congressional hearing and floor debates, the "lesson" of Proposition 187 was endlessly invoked as a justification for drastic federal action on immigration.

The many ways that IIRIRA reformed federal immigration law is beyond the scope of this Essay. For our purposes here, what stands out is the extent to which Congress embraced the cooperative vision of immigration enforcement that Proposition 187 set out. IIRIRA laid the legal foundations at the federal level for implementing the kinds of cooperation, verification, and reporting activities that Proposition 187 sought to carry out at the state level. It did so by making it clear that federal law now welcomed local participation, thus removing the legal constraints that led to Proposition 187's injunction. In various provisions of IIRIRA, Congress also created a federal "interface" that addressed many of the administrative challenges that state and local officials faced if Proposition 187 was to be enforced. In other words, if California extended an invitation to the federal government to undertake a new era of federal-local collaboration over immigration, Congress accepted that invitation in 1996 by meeting the state halfway.

Indeed, what is remarkable about IIRIRA is the degree to which it complements Proposition 187 by specifically addressing its legal limitations and administrative shortfalls. If one of the reasons Proposition 187 was enjoined was because immigration enforcement is

⁵² See, e.g., Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

⁵³ Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996) (codified as amended in scattered sections of 8 U.S.C.).

⁵⁴ Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996).

⁵⁵ *Id.* § 400, 110 Stat. at 2260.

a power that is “exclusively reserved” in the federal government,⁵⁶ Congress made clear its ability and desire to delegate that authority. Adding section 287(g) to the Immigration and Naturalization Act, IIRIRA created a process by which the federal government could train and deputize state and local officials as federal immigration agents.⁵⁷ Deputization under this section requires a formal agreement between the federal government and a law enforcement agency. But having done so, state and local law enforcement officials are not only provided the legal authority to act as federal officials, but also resources previously available only to federal immigration authorities.

Through IIRIRA, Congress also responded to concerns that Proposition 187’s enforcement mandates were impractical because state and local officials lacked the training and resources to identify unauthorized immigrants on their own. To that end, IIRIRA established a formal process by which state and local officials can count on federal assistance in verifying immigration status. In fact, Congress explicitly made such assistance mandatory on the federal government itself, limiting the discretion ordinarily exercised by administration officials. Section 1373 states that federal immigration authorities “shall respond to an inquiry by a Federal, State, or local government agency, seeking to verify . . . [the] immigration status of any individual . . . by providing the requested verification or status information.”⁵⁸ To carry out this mandate, the federal government established the Law Enforcement Support Center, which provides “immigration status, identity information, and real-time assistance to local, state, and federal law enforcement agencies . . . 24 hours a day, seven days a week, 365 days a year.”⁵⁹ In this respect, Section 1373 of IIRIRA is a mirror image of

⁵⁶ See *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 770 (C.D. Cal. 1995).

⁵⁷ See 8 U.S.C. § 1357(g) (2019).

⁵⁸ 8 U.S.C. § 1373(c) (2019). Congress also made clear that no formal agreement on the employee of a state or local government to “communicate” or “otherwise to cooperate” with the federal government in immigration enforcement matters, including the “reporting . . . identification, apprehension, detention, or removal of aliens not lawfully present in the United States.” *Id.* § 1357(g).

⁵⁹ *Law Enforcement Support Center*, U.S. IMMIGRATION & CUSTOMS ENFT, <https://www.ice.gov/lesc> (last visited Dec. 26, 2019) [<https://perma.cc/PKM7-STZD>]. Although IIRIRA created the mandate that led to the implementation of this system, the system itself had been proposed by federal officials long before then. See *The Impact of Federal Immigration Policy and INS Activities on Communities: Hearings Before the Subcomm. on Info., Justice, Transp., & Agric. of the H. Comm. on Gov’t Operations*, 103d Cong. 30 (1993-1994) (discussing “an initiative which came out of the 1986 Anti-Drug Abuse Act and which Attorney General Barr approved in the final months of his administration and that is, INS has proposed to establish a criminal alien tracking center

Proposition 187's cooperation mandate. If Proposition 187 conscripts state and local officials on behalf of the federal government, IIRIRA conscripts federal officials on behalf of the state and local governments.

Lastly, Congress, too, felt it necessary to address the prospect that law enforcement officials, largely under the control and supervision of local governments, might be constrained by local policies. To that end, the 1996 reforms included a ban on local sanctuary policies that both mirrored and went beyond the one included in Proposition 187. Section 1373 prohibits any policies that "prohibit, or in any way restrict, any governmental entity or official from sending to, or receiving from" federal immigration authorities immigration-related information. In addition, no policies can restrict any official from "maintaining such information," or "exchanging such information with any other Federal, State, or local government entity."⁶⁰ That Congress did not require verification and reporting directly makes sense, given that such mandates would likely run afoul of the Supreme Court's anti-commandeering doctrine, which forbids the federal government from directly conscripting state and local officials to implement federal laws.⁶¹ But Congress tried to reach a similar outcome by prohibiting state and local officials from enacting policies that would limit such cooperation.⁶² And despite being upheld by a federal court shortly after it was enacted,⁶³ some courts are now holding that Section 1373's anti-

that would operate 7 days a week, 24 hours a day, 365 days a year; it would be for the specific purpose of providing a response to queries from State and local police concerning a suspected alien, aggravated felon, or narcotic offender in custody").

⁶⁰ 8 U.S.C. § 1373(b) (2019).

⁶¹ See, e.g., *Printz v. United States*, 521 U.S. 898, 943 (1997); *New York v. United States*, 505 U.S. 144, 177 (1992). In these two cases, the Supreme Court held that the Tenth Amendment and federalism principles of the Constitution barred the federal government from commandeering the state legislative process, or conscripting state and local officials from carrying out federal programs.

⁶² There were also signs that some members of Congress wanted to go further to compel state and local participation in immigration enforcement. At the time that IIRIRA was considered, there were efforts to give the federal anti-sanctuary ban more teeth by conditioning federal grants on state and local cooperation in immigration enforcement. See, e.g., *Proposals for Immigration Reform: Hearing Before the Subcomm. on Immigration & Refugee Affairs of the S. Comm. on the Judiciary*, 103d Cong. 45-46 (1994). These early proposals mirror the defunding efforts of the Trump administration in recent years. See Exec. Order No. 13,768, 82 Fed. Reg. 8799 (2017).

⁶³ See *City of N.Y. v. United States*, 179 F.3d 29, 37 (2d Cir. 1999).

sanctuary provision may run still afoul of the anti-commandeering rule that Congress tried to avoid after all.⁶⁴

Proposition 187 may have never been enforced, but as this Section illustrates, its goals carried over into federal law. Congress adopted many of Proposition 187's anti-sanctuary provisions that were struck down as preempted. More importantly, Congress embraced the vision of federal-local cooperation that Proposition 187 outlined, and explicitly enabled many of the collaborative pathways that it sought to create. The connection is not coincidental. As the legislative records surrounding IIRIRA reveal, congressional representatives had California's ballot initiative in mind when they wrote and debated the 1996 reforms. And that influence persists today. We may still be debating the wisdom of conscripting local law enforcement officials into federal immigration enforcement efforts. That debate, however, is now framed almost entirely around the model that Proposition 187 introduced, and the specific manner in which it had influenced the development of federal law.

B. *Reshaping Federal Enforcement*

If one legacy of Proposition 187 is in federal law, another is in the various "operations" developed by federal immigration authorities. Recall that one of the most expansive provisions of Proposition 187 was its requirement that state and local government officials "fully cooperate" with federal immigration enforcement efforts. I noted that at the time it was enacted, it was difficult to define what such cooperation entailed because there were no established formal programs integrating local officials into federal immigration enforcement efforts. That quickly changed, however, in the years following Proposition 187's enactment and the 1996 immigration reforms.

Indeed, nearly every major interior enforcement initiative since 2000 has been designed with federal-local collaboration in mind. Operation Community Shield, for example, expanded existing anti-gang task forces consisting of federal, state, and local officials to specifically target immigrant gangs by leveraging criminal and civil immigration laws.⁶⁵ Since 2005, such task forces have carried out a number of neighborhood raids and sweeps that have picked up criminal immigrants alongside

⁶⁴ See *City of Chi. v. Sessions*, 321 F. Supp. 3d 855, 866-73 (N.D. Ill. 2018); *City of Phila. v. Sessions*, 309 F. Supp. 3d 289, 329-31 (E.D. Pa. 2018); *County of Santa Clara v. Trump*, 275 F. Supp. 3d 1196, 1215-16 (N.D. Cal. 2017).

⁶⁵ See Jennifer M. Chacon, *Whose Community Shield?: Examining the Removal of the "Criminal Street Gang Member,"* 2007 U. CHI. LEGAL F. 317, 327-29 (2007).

those who were simply present in the United States without authorization.

Operation Secure Communities, initiated in 2008, instituted an even closer and more enduring link between local law enforcement and federal immigration officials. Launched at first as a voluntary program, jail and prison officials were provided the opportunity to submit the fingerprints of immigrants to the federal government to cross-check against known immigration violators.⁶⁶ This greatly expanded the ability of the federal government to detect unauthorized immigrants by screening those who come into contact with local law enforcement. Many communities were initially eager to participate in Secure Communities, especially as a way of identifying unauthorized immigrants who had been arrested for serious and violent crimes. But when it was announced that Secure Communities would no longer be a voluntary program, and that all fingerprints processed through the FBI's database would be shared with immigration officials, many communities voiced their opposition.⁶⁷ This led Secure Communities to be formally suspended during the later years of the Obama administration, though the practice of cross-checking fingerprints still persisted.⁶⁸ Soon after his inauguration, President Trump formally reinstated Secure Communities.⁶⁹

But the operational logistics of Secure Communities also led to other programs that required further local involvement. One such program is the issuance of federal detainers. Having flagged a suspected unauthorized immigrant through Secure Communities or other means, federal officials needed a way to ensure that individual could be transferred into federal custody. To do that, it was often necessary for local law enforcement officials to keep that individual in their custody until such a transfer can actually take place. As a result, the federal

⁶⁶ See MARIE GOTTSCHALK, *CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS* 228 (2016); Ming H. Chen, *Trust in Immigration Enforcement: State Noncooperation and Sanctuary Cities After Secure Communities*, 91 *CHL.-KENT L. REV.* 13, 23 (2016).

⁶⁷ See Julia Preston, *Despite Opposition, Immigration Agency to Expand Fingerprint Program*, *N.Y. TIMES* (May 11, 2012), <https://www.nytimes.com/2012/05/12/us/ice-to-expand-secure-communities-program-in-mass-and-ny.html> [https://perma.cc/MK7H-RYS9].

⁶⁸ See ANGELA S. GARCÍA, *LEGAL PASSING: NAVIGATING UNDOCUMENTED LIFE AND LOCAL IMMIGRATION LAW* 103 (2019).

⁶⁹ See Farah Stockman & J. David Goodman, *Trump Immigration Policies Pose Conflict for Police in 'Sanctuary Cities'*, *N.Y. TIMES* (Feb. 24, 2017), <https://www.nytimes.com/2017/02/24/us/sanctuary-city-trump-immigration-detainers.html> [https://perma.cc/3C9Q-2DL7].

government began issuing “detainers” instructing local law enforcement officials to hold a particular individual for up to forty-eight hours after the time they would ordinarily be released from state custody.⁷⁰ Further, the federal government began demanding access to state and local facilities in order to assume custody of a suspected individual or to conduct further investigations.⁷¹ Though detainers have now been legally construed by courts as mere “requests” that state or local governments can choose to honor or ignore,⁷² many state and local officials initially considered them to be binding obligations.

Proposition 187’s vision of expanding immigration enforcement through local participation was realized in large part by the implementation of Secure Communities. Not only did a formal program now exist whereby the “full cooperation” requirement is given form, but reporting and verification by local officials was both automated and difficult to avoid given how central the FBI fingerprint database has become to everyday law enforcement activities. Indeed, when it comes to interior enforcement, the federal government is now almost entirely reliant on local involvement in effectuating removals. In recent years, the Secure Communities program itself has contributed to the removal of more than 80% of all immigrants deported from the nation’s interior.⁷³ Not only has this greatly expanded the interior enforcement capabilities of federal immigration enforcement, as the sponsors of Proposition 187 wanted, but it has also allowed the federal government to outsource much of its costs. When Proposition 187 was proposed, budget analysts predicted that its verification and reporting requirements might cost tens of millions on an ongoing basis, and perhaps more than 100 million in the first year.⁷⁴ Though Secure Communities and detainers involve

⁷⁰ See 8 C.F.R. § 287.7 (2019).

⁷¹ See, e.g., *City of Chi. v. Sessions*, 888 F.3d 272, 278-79 (7th Cir. 2018) (describing federal effort to condition federal grant on being granted access to state and local facilities for immigration enforcement purposes).

⁷² See *Galarza v. Szalczyk*, 745 F. 3d 634, 640-41 (3d Cir. 2014).

⁷³ Interior deportation numbers decreased from 2012 to 2017, but the share of those connected to the Secure Communities program increased. In 2015, for example, out of 69,478 deportations from the interior, 60,105 were identified through the Secure Communities program (86.5%). In 2017, out of 81,603 interior deportations, 67,792 were identified through Secure Communities (83%). In contrast, less than half of interior deportations were connected to Secure Communities in 2012 (83,578 out of 180,970). See *Deportations Under ICE’s Secure Communities Program*, TRAC REP. (Apr. 25, 2018), <https://trac.syr.edu/immigration/reports/509/> [<https://perma.cc/P3G7-SN7Y>].

⁷⁴ See Proposition 187: *Illegal Aliens. Ineligibility for Public Services. Verification and Reporting. Initiative Statute: Official Title and Summary Prepared by the Attorney General* (1994), available at https://repository.uchastings.edu/cgi/viewcontent.cgi?article=2103&context=ca_ballot_props [<https://perma.cc/YEP6-UCNF>].

only law enforcement officials, recent estimates peg the cost to state and local governments in California alone to be approximately \$65 million a year.⁷⁵

Perhaps even more important than how federal operations and initiatives have reshaped immigration enforcement, however, is how they have reshaped the political rhetoric around the role of states and localities. When Proposition 187 was enacted, the thought of formally incorporating states and local officials into federal immigration enforcement was perceived as extraordinary. It was precisely because it would be extraordinary that the sponsors of Proposition 187 pushed it as a ballot initiative in California, and urged it as a model for other states. But since then, federal-local participation is widely considered to be the default baseline — a basic and necessary component of our nation's immigration enforcement strategy. And this view has prevailed despite the fact that the federal government's ability to mandate local participation in federal immigration enforcement is constitutionally limited.⁷⁶ In contrast, it is now the cities and counties seeking to extricate themselves from immigration that are viewed as extraordinary. Moreover, this view is increasingly shared by not only the critics of local sanctuary policies, but also its supporters. Again, if Proposition 187 was radical for offering a new model of federal immigration enforcement, it is worth noting how that radical vision has become the accepted norm.

C. Reshaping State Involvement

As noted earlier, the anti-sanctuary torch of Proposition 187 is now carried by other states. In the past several years, waves of anti-sanctuary legislation have been enacted at the state level. In their basic structure, they continue to mirror that of Proposition 187, from the broad cooperation requirement and specific mandates to the ban on local sanctuary policies. Yet recent state anti-sanctuary laws have also gone further, especially with regards to the rise of punitive provisions that dramatically increase the penalties for localities and officials that fail to comply.

This is not to say that Proposition 187 did not spur other states to act in its immediate aftermath. A wave of copycat legislation arose on the

⁷⁵ See CATHOLIC LEGAL IMMIGRATION NETWORK, *THE COST OF STATE & LOCAL INVOLVEMENT IN IMMIGRATION ENFORCEMENT* 3 (2014) [<https://perma.cc/ZS9N-GKG5>]; JUDITH A. GREENE, JUSTICE STRATEGIES, *THE COST OF RESPONDING TO IMMIGRATION DETAINERS IN CALIFORNIA* (2012), <https://www.justicestrategies.org/publications/2012/cost-responding-immigration-detainers-california> [<https://perma.cc/A257-EESH>].

⁷⁶ See, e.g., *City of Chi. v Sessions*, 888 F.3d 272, 280 (7th Cir. 2018); *County of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 525-26 (N.D. Cal. 2017).

heels of Proposition 187's enactment. Arizona, Florida, and New York proposed legislation that copied its "fully cooperate" provision.⁷⁷ Similar reporting and verification mandates were proposed in Minnesota, Virginia, and Oregon.⁷⁸ Legislators in New York introduced a bill prohibiting local sanctuary policies mirroring the one in Proposition 187.⁷⁹ In states that provided for ballot initiatives, similar grassroots efforts emerged. None of these efforts, however, proved successful. Perhaps public support outside of California was not as strong. Perhaps the legal challenges that Proposition 187 faced deterred lawmakers in other states. Or perhaps political energy was redirected towards federal reform efforts that would eventually culminate in IIRIRA.

But starting in the late 2000s, state anti-sanctuary laws proliferated, and their enactment follows the federal developments described above. As federal reliance on local participation increased in the mid- to late-2000s, more and more local governments chafed against the new demands and began adopting sanctuary policies to limit their involvement. As sanctuary policies became more common and begun to attract national attention, states stepped in to ban them and mandate participation. Oklahoma and Missouri passed anti-sanctuary legislation in 2007 and 2008 respectively.⁸⁰ Arizona's SB 1070 was enacted in 2010.⁸¹ Alabama followed with similar legislation a year later.⁸² And in recent years, states like Texas, Tennessee, and Florida have joined the wave.⁸³ And like Proposition 187, these laws are based around the idea that states needed to take the lead once again — not only to compel more federal enforcement, but also to foreclose local opposition.

Given these developments, it is worth reflecting on the degree to which contemporary anti-sanctuary measures make sense precisely because Proposition 187's success in reshaping federal law and enforcement policies. If Proposition 187's cooperation mandate seemed broad and perhaps vague in its requirements, similar mandates are now

⁷⁷ See S.B. 262, 1995 Leg., Reg. Sess. (Fla. 1995); S.B. 1043, 42d Leg., 2d Reg. Sess. (Ariz. 1996); A.B. 9113, 219th Gen. Assemb., 2d Reg. Sess. (N.Y. 1995).

⁷⁸ See H.B. 1268, 1996 Leg., Reg. Sess. (1996 Va.); H.B. 249, 79th Leg., Reg. Sess. (Minn. 1995); H.B. 2933, 68th Leg., Reg. Sess. (Or. 1995).

⁷⁹ See A.B. 9112, 219th Gen. Assemb., 2d Reg. Sess. (N.Y. 1995).

⁸⁰ See H.B. 1804, 52st Leg., Reg. Sess. (Ok. 2007); H.B. 1549, 1771, 1395, & 2366, 94th Gen. Assemb., 2d Reg. Sess. (Mo. 2008).

⁸¹ See S.B. 1070, 49th Leg., 2d Reg. Sess. (Az. 2010).

⁸² See H.B. 56, 2011 Leg., Reg. Sess. (Al. 2011).

⁸³ See TEX. GOV'T CODE § 752.053(a)(1) (2017); S.B. 168, 2019 Leg., Reg. Sess. (Fla. 2019); H.B. 2315, 110th Leg., Reg. Sess. (Tenn. 2018).

largely understood to refer to specific federal initiatives like detainer requests and established task forces. If questions were initially raised about the ability of state and local officials to comply with Proposition 187's verification and reporting requirements, those concerns are now largely alleviated by the availability of federal assistance in verifying immigration status, and the establishment of a federal infrastructure to receive and act on local reporting.

Moreover, reforms to federal law and policies have largely addressed the legal concerns that initially led to Proposition 187's injunction. Through IIRIRA, Congress made clear that state and local participation neither conflicted with nor frustrated the federal scheme of immigration enforcement; rather, such participation was explicitly welcomed and encouraged. Thus, when the Supreme Court reviewed the constitutionality of Arizona's SB 1070, it specifically referred to the 1996 immigration reforms in upholding anti-sanctuary provisions that mirrored those enjoined in Proposition 187.⁸⁴ Thus, if anti-sanctuary laws are now proliferating, it is because they are precisely the kind of state laws that the federal government sought to encourage in the aftermath of Proposition 187.

Indeed, in many cases, state anti-sanctuary laws today seem specifically designed to overcome the legal limits that federal anti-sanctuary efforts have faced. Because the federal government cannot directly commandeer state and local officials to carry out federal immigration enforcement, states are needed to do so on its behalf. As the Trump administration has struggled to defund sanctuary cities by denying them federal grants, states are stepping in with even more defunding punitive measures that would deny all state aid. And while the federal government's anti-sanctuary efforts have been stalled by legal challenges, *state* anti-sanctuary measures like SB 4 in Texas have escaped relatively unscathed.⁸⁵ It would appear today that the heart of the anti-sanctuary movement is once again centered over states, much like it was at the time that Proposition 187 was enacted.

And with that, it appears that the vision of federal-local cooperation that Proposition 187 proposed for immigration enforcement has also become the model for anti-sanctuary legislation. Through Proposition 187, California prompted and encouraged complementary anti-sanctuary legislation at the federal level in order for laws like Proposition 187 to work. The enactment of those complementary

⁸⁴ *Arizona v. United States*, 567 U.S. 387, 413-15 (2012).

⁸⁵ See *City of El Cenizo v. Texas*, 890 F.3d 164, 180 (5th Cir. 2018) (upholding SB 4 from federal preemption challenges, among others).

legislation at the federal level in turn spurred more states to pursue more anti-sanctuary measures — not only because they are more effective as a result of these federal reforms, but also because state laws became more necessary in order to fill the gaps that federal law cannot reach. This too, then, is the legacy of Proposition 187.

III. PROPOSITION 187 AND THE SANCTUARY / ANTI-SANCTUARY DEBATE

Proposition 187 was not only the nation's first immigration law, but was also responsible for the vision of federal-local cooperation that has become the centerpiece of our nation's approach to immigration enforcement. This is perhaps Proposition 187's most lasting legacy, reflected not only in the development of federal and state laws, but also the sanctuary/anti-sanctuary framing that now dominates the immigration debates. This Part offers further reflections on how this legacy has shaped the contemporary debate over sanctuary and anti-sanctuary policies. In addition, it comments on how the "success" of Proposition 187 has influenced the nature of immigration advocacy, both in favor and against increased interior enforcement.

A. *The Continuing Role of States*

First, Proposition 187 solidified the role of states in federal immigration policymaking. For immigration advocates, it demonstrated the efficacy of using states as a platform to influence federal policies. More importantly, the cooperative model of immigration enforcement that Proposition 187 pushed, and which the federal government embraced, further amplified the role of states in the development of federal enforcement strategies. As the federal government became more reliant on state and local participation in immigration enforcement, state governments effectively became permanent partners in federal enforcement programs. As a result, this reliance created a political environment in which states wield an outsized influence on the ability of the federal government to expand immigration enforcement efforts in the nation's interior.

Of course, none of this is to say that Proposition 187 was unique in its influence on federal policy. Since the beginning of federal immigration regulations in the late nineteenth century, state laws have served as templates for federal laws.⁸⁶ Indeed, Proposition 187 wasn't even the first California law to play this role. California's efforts to restrict and expel Chinese immigrants served as the template for federal

⁸⁶ Rick Su, *The States of Immigration*, 54 WM. & MARY L. REV. 1339, 1359 (2013).

restrictions on contract laborers, prostitutes, and eventually the nation's first race-based immigration ban.⁸⁷ In the early twentieth century, California pioneered the use of "alienage" regulations that limited the governmental rights and privileges of non-citizens, which led to similar restrictions at the federal level.⁸⁸ And just two decades before Proposition 187 was enacted, California passed an employer restriction law targeting unauthorized immigrants. This law was not only upheld by the Supreme Court,⁸⁹ but went on to become one of the centerpieces of the 1986 federal immigration overhaul. From this perspective, much of the nation's immigration policies — from the Chinese Exclusion Act to employer verifications — can be directly tied to laws and policies enacted first in California.

Even in this historical context, however, Proposition 187 stands out. And not simply because of the widespread national attention that it garnered, but also because of the governmental relationship that it formed between the federal, state, and local governments in the federal system. Earlier state laws on immigration were deemed successful if they were eventually replicated and replaced by federal law. Thus, when the federal government enacted employer restrictions in the Immigration Reform and Control Act of 1986,⁹⁰ Congress explicitly preempted any similar laws at the state level, including the California law that it copied.⁹¹

The federal response to Proposition 187, however, did not seek to displace state and local officials, or state laws, in the same way. Rather, the cooperative framework that arose was premised on state and local participation, and of the kind that Proposition 187 sought to mandate. In other words, unlike previous state laws on immigration, the federal adoption of Proposition 187 as an enforcement model did not render state anti-sanctuary laws like Proposition 187 superfluous and unnecessary. Instead, it made them more important. For the cooperative model to work, it was not only necessary for laws like Proposition 187 to exist, but also that it spreads to all of the other states.

This explains why even as federal attention to immigration enforcement has grown in recent decades, state and local regulations concerning immigration have expanded as well. California voters may have enacted Proposition 187 in order to send a message to the federal

⁸⁷ See *id.* at 1361.

⁸⁸ See *id.* at 1360.

⁸⁹ See *De Canas v. Bica*, 424 U.S. 351, 365 (1975).

⁹⁰ Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified as amended in scattered sections of 8 U.S.C.).

⁹¹ See 8 U.S.C. § 1324a(h)(2) (2019).

government about the need for immigration enforcement.⁹² But one effect of the federal response is that every state and locality is now forced to develop policies on their willingness to dedicate resources to immigration enforcement, even those that would otherwise refrain from involving themselves in immigration policymaking altogether. In turn, states and localities have become more crucial as sites for immigration advocacy. Proposition 187 itself was propelled to victory in part because of the support that it drew from former federal immigration officials and national advocacy organizations.⁹³ California provided a platform for these officials and organizations to steer the national immigration debates after traditional federal forums were closed off. And given the success of Proposition 187 as a political strategy, and the manner in its success decentralized immigration policymaking, it makes sense that immigration advocates have since turned their attention beyond the federal government. To contest the perceived inadequacies of the Obama administration's immigration policies, enforcement advocates turned to states like Arizona to advance their position.⁹⁴ To challenge the Trump administration's enforcement excesses, immigrant advocates turned to states like California and Illinois, and cities like San Francisco and Chicago.⁹⁵

Indeed, it is worth reflecting on how Proposition 187 has changed the political rhetoric surrounding immigration. At the time it was enacted, sanctuary policies hardly figured in the national debate over immigration. In fact, the term "sanctuary" was not even widely used to describe policies that limited states and localities participation in immigration enforcement. One reason for this was that state and local cooperation in this federal responsibility was seen largely as discretionary — something helpful, but not part of the regulatory baseline when it came to immigration. But after Proposition 187 and the 1996 federal reforms, state and local participation was recast in the public's eye as expected, if not required. The jurisdictions that limited their involvement in some way, however limited, became the outlier. Those that duly cooperated with all demands of the federal government, and in much the same way that Proposition 187 sought to mandate with its broad "cooperation" mandate, were understood to be the norm.

⁹² See WROE, *supra* note 14, at 6.

⁹³ See Su, *supra* note 86, at 1371.

⁹⁴ See *id.* at 1384-87.

⁹⁵ See, e.g., Daniel Altschuler & Peter L. Markowitz, *4 Ways Cities and States Can be Sanctuaries Now*, THE NATION (Dec. 5, 2016), <https://www.thenation.com/article/archive/four-ways-cities-and-states-can-become-sanctuaries-now/> [https://perma.cc/J8LQ-U6WT].

Hence the “sanctuary” label attached to policies in which states and localities limited their participation, despite the fact that such policies provide unauthorized immigrants no refuge from federal officials.⁹⁶ It is also why the sanctuary/anti-sanctuary controversy is now considered central to our nation’s immigration debate.

B. Constraining the Role of Localities

One legacy of Proposition 187 is an expansion of the governmental arenas in which immigration policies are made. Yet it can also be argued that Proposition 187 pushed in the opposite direction as well: narrowing the scope of potential immigration policymakers by constraining the role of localities. This is not to say that the sponsors of Proposition 187 sought to cut local governments out of immigration entirely. If anything, the model of immigration enforcement that they endorsed was one in which local officials would play an expanded role. But Proposition 187 rested on the concept that local participation could be compelled without local support. Instead, the state could mandate it directly. In other words, if local officials were central to the expansion of federal immigration enforcement, it would be the state that serves as their broker.⁹⁷

Ironically, at the time that Proposition 187 was being considered, California localities were already actively cooperating with the federal government on immigration enforcement. For proponents of Proposition 187, early sanctuary policies like those in Los Angeles and San Francisco loomed large. But as noted earlier, in the years before Proposition 187’s enactment, the federal government had fostered a strong working relationship with city and county law enforcement officials in the state, including their participation in several federal pilot programs that were eventually expanded nation-wide. Nor were local sanctuary policies as restrictive as critics made them out to be. For example, Special Order 40 in Los Angeles permitted local involvement

⁹⁶ The “sanctuary” label was first used to refer to the church-led movement to insulate, quite physically, Central American refugees from deportation in the 1970s and 1980s. See generally SUSAN BIBLER COUTIN, *THE CULTURE OF PROTEST: RELIGIOUS ACTIVISM AND THE U.S. SANCTUARY MOVEMENT* (1993). Besides the religious and historic connections, “sanctuary” made sense there because the churches were seeking to block federal officials from apprehending unauthorized immigrants in their care, as they are once again doing today. See, e.g., Laurie Goodstein, *Immigrant Shielded From Deportation by Philadelphia Church Walks Free*, N.Y. TIMES (Oct. 11, 2017), <https://www.nytimes.com/2017/10/11/us/sanctuary-church-immigration-philadelphia.html> [<https://perma.cc/ME63-CBQK>].

⁹⁷ See *supra* Part I.B.

in immigration enforcement in a large number of situations.⁹⁸ Through their participation in federal pilot programs, and in circumstances permitted by existing sanctuary policies, localities in California were cooperating with federal officials. Yet, in both of these cases, it was the localities themselves — motivated by local concerns and guided by the interests of their local constituency — that decided the manner and circumstances in which local resources would be allocated to immigration enforcement. It was local officials that negotiated those terms with federal officials. Proposition 187 then did not simply seek to insert states into immigration policymaking, it also sought to insert states into this federal-local relationship. In other words, Proposition 187 aimed to sever the federal-local relationship that had been building with respect to immigration enforcement in California and substitute a federal-state relationship in its stead.

Moreover, by insisting that states play a role in brokering the federal-local relationship, Proposition 187 offered the federal government a partial solution to one of the biggest obstacles in implementing a cooperative model of immigration enforcement. Given that the vast majority of law enforcement officials in the country are employed by local governments like cities and counties, it is these *local* officials that hold the greatest promise for expanding federal immigration enforcement efforts. But because of this patchwork system of law enforcement, the federal government faces the daunting task of having to negotiate with each and every police or sheriff's department individually. The best they can hope for is a patchwork system of cooperation across the country. It would be easier if the federal government could simply mandate local participation in immigration enforcement through its plenary power over immigration. However, the Constitution and our system of federalism also prevents it from commandeering local officials directly. The federal government could substantially increase the number of immigration agents that operate within the nation's interior. But such an expansion would be at great cost, and would still pale in comparison to more than 470,000 sworn officers that serve in local police departments and sheriff's offices.⁹⁹

⁹⁸ See Los Angeles, Cal., Special Order No. 40 (Nov. 27, 1979) (allowing for reporting of unauthorized immigrants if they have been “booked for multiple misdemeanor offenses, a high grade misdemeanor or a felony offense, or [have] been previously arrested for a similar offense”).

⁹⁹ See BRIAN A. REAVES, BUREAU OF JUST. STATS., LOCAL POLICE DEPARTMENTS, 2013: PERSONNEL, POLICIES, AND PRACTICES 1 (2015), <https://www.bjs.gov/content/pub/pdf/lpd13ppp.pdf> [<https://perma.cc/JTA7-F9JV>].

Instead of negotiating with local governments and law enforcement agencies directly, however, Proposition 187 suggested that states can mandate local participation on the federal government's behalf. At the very least, states can forbid local policies that would limit their participation. After all, local governments are traditionally understood in American law as creatures of the state.¹⁰⁰ And if the federalism principles of the Constitution forbids the federal government from "commandeering" local officials as subsidiaries of the sovereign states, no such federal constitutional principles protect local officials from commandeering by their own state.¹⁰¹ To be sure, state commandeering is no substitute for uniform federal mandates. But negotiating with 50 states is far easier than dealing with the nearly 90,000 local governments and more than 17,000 state and local law enforcement agencies across the United States.¹⁰²

That states might have a strong interest in brokering the participation of their local government is not surprising. What is surprising, however, is that this form of state intervention began in California. To be sure, as "creatures of the state," local governments have long been understood to be especially vulnerable to state regulation and preemption. But California was not only one of the many states that had amended its constitution to grant "home rule" to their local governments at the turn of the twentieth century, but also adopted a particularly strong form that prohibited the state from interfering with "municipal affairs."¹⁰³ Indeed, just two years before Proposition 187 was proposed, the California Supreme Court struck down a state law prohibiting public financing of local candidates because it was an interference into municipal affairs. Few state constitutions, and even fewer state courts, have gone as far as California's in protecting localities from state control, especially when it comes to their "sole right to regulate, control, and govern their *internal conduct* independent of [state] laws."¹⁰⁴ Yet through Proposition 187, California also became the first state to directly dictate the duties of local government officials with respect to immigration, and prohibit local governments from regulating, controlling, and governing their officials through local policies. Given the demographic and politics shifts at the

¹⁰⁰ See *Hunter v. Pittsburgh*, 207 U.S. 161, 178-79 (1907).

¹⁰¹ Gulasekaram et al., *supra* note 5, at 853-54.

¹⁰² See DUREN BANKS ET AL., BUREAU OF JUST. STATS., NATIONAL SOURCES OF LAW ENFORCEMENT EMPLOYMENT DATA 3-4 (2016), <https://www.bjs.gov/content/pub/pdf/nslead.pdf> [<https://perma.cc/9MQE-PF33>].

¹⁰³ See CAL. CONST. art. XI, § 5.

¹⁰⁴ *Johnson v. Bradley*, 841 P.2d 990, 994 (Cal. 1992) (quoting *Fragley v. Phelan*, 58 P. 923, 925 (Cal. 1899)).

time, it may not be surprising that California led the charge on immigration. But given its constitutional structure and precedents on state-local relations, it is surprising that it did so in such a manner.

Interestingly, localities in California did not raise “home rule” concerns in opposition to Proposition 187. This is not to say that local opposition to Proposition 187 were absent. Indeed, local governments and officials were some of the fiercest critics of the law, and many participated in the litigation against the state.¹⁰⁵ Moreover, local governments and officials raised a host of local concerns with respect to Proposition 187’s enforcement mandate — erosion of community trust, burden on local resources, harm to immigrant neighborhoods¹⁰⁶ — many of which have become commonplace arguments in support of local sanctuary policies. But what was missing in the initial response was any legal assertion that Proposition 187 unconstitutionally interfered with local matters by undermining the authority that local governments and their constituents exercised over their officials. Perhaps local officials did not believe that “home rule” would be a winning argument, even in a state like California. Perhaps they believed that immigration, a national issue, would be construed by courts as more of a matter of statewide concern, rather than a municipal affair. Perhaps local officials did not feel such an argument was necessary given the more promising federal constitutional claims against Proposition 187. In any event, the precedent that localities in California established in response to Proposition 187 still largely holds. Even as similar anti-sanctuary laws have been enacted in other “home rule” states, there has been little effort by localities to challenge these measures as an infringement of local control.

Ironically, it is against SB 54, California’s *sanctuary* law, that home rule arguments are now being raised. As a matter of policy, Proposition 187 and SB 54 cannot be more different. Instead of mandating local cooperation with federal authorities, SB 54 prohibits it. Instead of requiring local actions to be taken with respect to unauthorized immigrants, SB 54 bans it. Instead of preempting local sanctuary policies, SB 54 establishes such a policy for the entire state. But what SB 54 and Proposition 187 share is that they both seek to eliminate local discretion with respect to immigration enforcement by mandating specific local actions (or inaction) and preempting countervailing local policies. In response, the City of Huntington Beach is suing the state on

¹⁰⁵ See WROE, *supra* note 14, at 71-73.

¹⁰⁶ See, e.g., Patrick McGreevy, *LAPD Passes on Immigration – Commission Spurns*, DAILY NEWS L.A. (CA), June 25, 1994, at N4.

the ground that SB 54 unconstitutionally intrudes on their home rule powers to govern municipal affairs. It is far too early to know how this litigation will end. Yet a district court judge has already issued a preliminary injunction against the application of SB 54 to the city.¹⁰⁷

CONCLUSION

It has been over twenty-five years since Proposition 187 was adopted by California voters. At the time it was enacted, its enforcement provisions were widely seen as a radical attempt to decentralize our nation's system of immigration enforcement. But had it been enacted today, it would have found an immigration system that not only supports the kind of state and local participation that it sought to effectuate, but also increasingly demands it as a matter of federal law and policy. Federal-local cooperation is now welcomed and encouraged. Institutional structures now exist to facilitate local verification and reporting. Sanctuary is now explicitly denounced as an obstacle to federal enforcement.

It would be easy, of course, to say that Proposition 187 was simply ahead of its time. But as this Essay has argued, it was Proposition 187 itself that was responsible for the transformation that followed. As the nation's first anti-sanctuary law, Proposition 187 cast the mold for the anti-sanctuary laws that proliferated in its wake. By proposing a model of state and local participation, it highlighted the kinds of federal reforms that would be needed to complement similar state efforts going forward. Indeed, unlike other state immigration laws that have shaped federal law and policies, Proposition 187 led to the creation of a federal system that would require continued action by states to conscript local officials on the federal government's behalf. In this regard, Proposition 187 ensured continued state involvement in the development of immigration law and policy.

Given the degree to which federal immigration enforcement efforts have become dependent on state and local participation, it is unlikely that states and localities will be disentangled from immigration policymaking in the foreseeable future. The federal government plenary power over immigration will increasingly be tied up with politics at the state and local level. The flip side, however, is that avenues for effective advocacy in the immigration arena is decentralized as well. Just as

¹⁰⁷ See Priscella Vega, *Judge Rules for Huntington Beach in its Challenge to State's 'Sanctuary' Immigration Law*, L.A. TIMES (Sept. 27, 2018, 7:35 PM), <https://www.latimes.com/socal/daily-pilot/news/tn-dpt-me-sb54-hearing-20180927-story.html> [<https://perma.cc/H9BR-43BZ>].

2014

University of California, Davis

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Proposition 187 was effective in shaping federal immigration policy, so might laws like SB 54. Only time will tell what the next twenty-five years might bring.