

RAISING ARIZONA V. UNITED STATES:  
HISTORICAL PATTERNS OF AMERICAN IMMIGRATION  
FEDERALISM

by  
Daniel J. Tichenor & Alexandra Filindra\*

*Immigration policy and regulation have been hotly contested issues in the United States since the 1800s. At the center of this historic immigration debate have been issues of federalism and core questions under the United States Constitution. Arizona v. United States, one of the Supreme Court's blockbuster decisions of the summer of 2012, has brought to the forefront once again pressing constitutional questions regarding immigration. The first Part of this Article begins by exploring the historic role the federal government has played in immigration policy. The historic evidence demonstrates that the federal government regularly has been a reluctant and lethargic actor when it comes to addressing emergent regulatory challenges and controversies. The curbed federal enthusiasm for immigration enforcement has also led to a historic pattern of state governments actively pressing the federal government to assume greater responsibility over immigration. Where states have been invited by the federal government to enforce immigration policy, the resulting enforcement regime has been one that is collaborative in nature, rather than following a strict division of labor. In short, despite the "plenary power" doctrine and myths of exclusive federal control over immigrant admissions and rights, the states have routinely left their mark on the formation and outcomes of U.S. immigration policies. The second Part of this Article explores the key features and*

---

\* Daniel J. Tichenor is Philip H. Knight Professor of Social Science and Senior Faculty Fellow at the Wayne Morse Center for Law and Politics. He has published extensively on immigration politics and policy, the American presidency, civil liberties, and social movements in U.S. politics. His books include *Dividing Lines: The Politics of Immigration Control in America* (Princeton University Press), which won the Gladys M. Kammerer Award in 2003 for the best book in the field of U.S. national policy, *The Politics of International Migration* (Oxford University Press), *Debates on Immigration* (Sage), and the three-volume *A History of the American Political System* (ABC-CLIO). His recent immigration articles have appeared in *International Migration Review*, *Labor Studies*, *Studies in American Political Development*, *Forum: Journal of Applied Research in Contemporary Politics*, and *The Nation*. Dr. Alexandra Filindra, Ph.D., is Assistant Professor of Political Science at the University of Illinois in Chicago. She studies immigration policy at the state level as well as public opinion and immigration policy preferences among Americans. She completed her Ph.D. at Rutgers University and served as a post doctoral researcher at Brown University. Her work has been funded by the Rhode Island Foundation and the Bill and Melinda Gates Foundation. Some of her research has appeared in *State Politics and Policy Quarterly*, *Urban Affairs Review*, *Harvard Educational Review*, and *Social Science Quarterly*. She can be contacted at: aleka@uic.edu.

*significance of the Supreme Court’s Arizona v. United States decision, reviewing its interpretation of federal preemption doctrine and the relative immigrant enforcement power of the states. The third Part of this Article explores states as immigration policy combatants, specifically analyzing three forms of state immigration activism nurtured by the dynamics of American federalism. The final Part of this Article analyzes Arizona’s S.B. 1070, and other recent state laws, to capture our three forms of devolution operating in contemporary American immigration politics. This Article concludes that even in a domain presumed to be the sole responsibility of the federal government, states and local governments have played significant roles in shaping and implementing immigration law and policy.*

INTRODUCTION ..... 1216

I. ARIZONA V. UNITED STATES AND IMMIGRATION FEDERALISM ..... 1219

II. STATES AS IMMIGRATION REGULATORS IN THE VOID: INTERGOVERNMENTAL SEPARATION ..... 1223

III. STATES AS IMMIGRATION POLICY COMBATANTS: INTERGOVERNMENTAL CONTENTION ..... 1230

IV. STATES AS INVITED IMMIGRATION ENFORCERS: INTERGOVERNMENTAL COLLABORATION ..... 1238

V. CONCLUSION: ARIZONA V. UNITED STATES AND THE DYNAMICS OF IMMIGRATION FEDERALISM ..... 1244

INTRODUCTION

In the summer of 1873, a Chinese woman named Ah Fong boarded an American steamship bound for California.<sup>1</sup> When the vessel arrived at the port of San Francisco, she and 21 other Chinese women were interrogated by California’s immigration commissioner, a relatively new state official charged with denying admission to Chinese immigrants deemed unfit.<sup>2</sup> The commissioner was enforcing a recent California law that prohibited Chinese from landing without a \$500 bond (about \$10,000 today) unless they could prove their “good character.”<sup>3</sup> The state legislation was adopted in response to growing popular hostility on the Pacific Coast toward Chinese immigration, which for the first time topped 100,000 persons in the decade after the Civil War.<sup>4</sup> Against the backdrop of unprecedented levels of unemployment in the West, tens of thousands of unskilled Chinese immigrants were employed as cheap and

---

<sup>1</sup> *In re Ah Fong*, 1 F. Cas. 213, 214 (C.C.D. Cal. 1874) (No. 102).

<sup>2</sup> *Id.* at 214–15.

<sup>3</sup> *Id.* at 215; see also Act of Mar. 30, 1874, sec. 70, § 2952, 1873–74 ACTS AMENDATORY OF THE CODES, 1, 39–41 (Cal. 1874); DANIEL J. TICHENOR, DIVIDING LINES: THE POLITICS OF IMMIGRATION CONTROL IN AMERICA 97–98 (2002); *Purchasing Power Calculator*, MEASURING WORTH, <http://www.measuringworth.com/pppowerus/>.

<sup>4</sup> TICHENOR, *supra* note 3, at 97.

exploitable labor by railroad, clothing, furniture, and cigar companies.<sup>5</sup> Racial hostility and economic insecurity fueled the rise of a powerful anti-Chinese movement in the early 1870s, one that came to dominate California politics and led to the state law restricting Chinese immigration.<sup>6</sup> It was into this firestorm that Ah Fong and her fellow passengers unwittingly landed when their steamship anchored in the port of San Francisco.

After examining Ah Fong and the other Chinese women on board, the state's immigration commissioner determined that they fell within a "lewd and debauched" class of aliens who could be denied entry unless \$500 bonds were provided for each of them.<sup>7</sup> Since none of these women had the \$500 or the means to return home and none were permitted entry to California, all were placed in detention under the custody of the San Francisco Coroner's office.<sup>8</sup> Ah Fong and her fellow detainees sought relief through the U.S. court system.<sup>9</sup> After first losing her case before the California Supreme Court, Ah Fong and her fellow passengers eventually were freed by the federal Circuit Court for the District of California.<sup>10</sup> In his opinion for the federal circuit court, Justice Stephen Field stated forcefully that California laws aimed at curbing Chinese entry were unconstitutional.<sup>11</sup> However strong the "general feeling" of Californians was for restricting Chinese inflows, he concluded, the power to control immigration was granted exclusively to the federal government.<sup>12</sup> After a year in detention, Ah Fong and 21 other Chinese women were released and granted entry to U.S. soil.<sup>13</sup> In the wake of Field's ruling, the gaze of the anti-Chinese movement shifted from state and local politics to Washington, D.C.<sup>14</sup> Despite constitutional prescriptions for federal leadership on immigration policy, neither Congress nor the White House was eager to upset a nineteenth-century norm of relative national inaction on immigration matters.<sup>15</sup> Yet mounting western popular pressure for a *federal* Chinese exclusion law would soon alter this hands-off, *laissez-faire* tradition.<sup>16</sup> At the heart of this early campaign for immigration restriction were defining struggles over race, civil rights, and electoral politics, but policy outcomes hinged upon how power over

---

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 90, 97–98.

<sup>7</sup> *In re Ah Fong*, 1 F. Cas. at 214–15.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 218.

<sup>11</sup> *See id.*

<sup>12</sup> *Id.* at 216–17.

<sup>13</sup> *Id.* at 218.

<sup>14</sup> TICHENOR, *supra* note 3, at 98.

<sup>15</sup> *See id.* at 40, 52, 112. *See also In re Ah Fong*, 1 F. Cas. at 217 ("If . . . further immigration is to be stopped, recourse must be had to the federal government, where the whole power over the subject lies.")

<sup>16</sup> TICHENOR, *supra* note 3, at 52, 98, 106–07, 112.

immigration and the regulation of noncitizens was divided between different levels of American government.<sup>17</sup>

Fast forward to one of the Supreme Court's blockbuster decisions of the summer of 2012: *Arizona v. United States*.<sup>18</sup> For more than a decade, the federal government has been unable to come up with a solution that meets the demands of those favoring tougher border and workplace enforcement to discourage unauthorized flows, while also satisfying those concerned about legalizing and integrating the more than 11 million undocumented immigrants now living in the country.<sup>19</sup> Gridlock in Washington over immigration reform has made state and local governments restive, with many protesting that inaction has significant implications for their budgets, public safety, the utilization and quality of their services, and the character of their communities.<sup>20</sup> Amidst intense media scrutiny, bruising debates, and legal uncertainty, a number of state and local leaders have seized the initiative by adopting their own policy responses.<sup>21</sup> *Arizona v. United States* focuses on the constitutionality of one such state effort: Arizona's Senate Bill 1070 (S.B. 1070).<sup>22</sup> The controversial law contains provisions requiring state and local law enforcement officers to determine the immigration status of anyone involved in a lawful stop, detention, or arrest where "reasonable suspicion exists" that the person is unlawfully present; making it a crime to be in Arizona without legal papers; making it a crime for undocumented immigrants to apply for or get a job in the state; and allowing for the warrantless arrest of individuals if there is probable cause that they committed crimes that could lead to their deportation.<sup>23</sup>

Within days of its signing, S.B. 1070 was challenged in federal court as an unconstitutional violation of equal protection, due process, and the supremacy of the national government over immigration matters.<sup>24</sup> President Barack Obama also wasted no time in denouncing the law and its potential for discrimination, declaring that no one "should . . . be

---

<sup>17</sup> See *id.* at 45, 52–53, 85–86, 98, 113.

<sup>18</sup> 132 S. Ct. 2492 (2012).

<sup>19</sup> MICHAEL HOFER ET AL., OFFICE OF IMMIGRATION STATISTICS, DEP'T OF HOMELAND SEC., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2011, at 1 (2012), available at [http://www.dhs.gov/xlibrary/assets/statistics/publications/ois\\_ill\\_pe\\_2011.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2011.pdf). See generally Mariano-Florentino Cuéllar, *The Political Economics of Immigration Law*, 2 U.C. IRVINE L. REV. 1 (2012).

<sup>20</sup> Marisa S. Cianciarulo, *The "Arizonafication" of Immigration Law: Implications of Chamber of Commerce v. Whiting for State and Local Immigration Legislation*, 15 HARV. LATINO L. REV. 85, 87–88 (2012).

<sup>21</sup> *Id.* at 88–89.

<sup>22</sup> *Arizona*, 132 S. Ct. at 2497.

<sup>23</sup> Support Our Law Enforcement and Safe Neighborhoods Act (S.B. 1070), ch. 113, 2010 Ariz. Sess. Laws 450, amended by H.B. 2162, ch. 211, 2010 Ariz. Sess. Laws 1070.

<sup>24</sup> Brief of *Amici Curiae* Arizona Attorneys for Criminal Justice & Nat'l Ass'n of Criminal Defense Lawyers in Support of Respondent at 3, *Arizona*, 132 S. Ct. 2492 (No. 11-182), 2012 WL 939048; Complaint at 23–24, *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010), 2010 WL 2653363.

subject to suspicion simply because of what they look like.”<sup>25</sup> Like the *Ah Fong* decision more than a century before, the *Arizona v. United States* ruling was set against the backdrop of key struggles over race, civil rights, and electoral politics. Yet, as in the past, issues of federalism commanded center stage in this dispute over immigration law and policy.

To adequately explain American immigration federalism in general and *Arizona v. United States* in particular, it is crucial to understand the forces that have fueled extensive state-level participation in governing immigration and the lives of noncitizens over time. In this Article, we illuminate how the dynamics of American federalism over time have nurtured three forms of state activism in immigration policymaking. First, we demonstrate that the federal government regularly has been a reluctant and lethargic actor when it comes to addressing new immigration’s most significant regulatory challenges and controversies. States often have been among the first to enter the void—proposing, enacting, and implementing policy innovations and controls amidst inertia at the national level. Second, we show that state governments and officials also have actively pressed the federal government to assume greater responsibility over immigration and to enact major immigration reforms. This has proven especially true when the courts eventually strike down particular forms of states’ activism in this policy domain. Finally, we highlight the extent to which states have been invited by the federal government to be immigrant enforcers as well, the result of a frequently collaborative relationship in policy implementation that defies a strict division of labor or control between levels of American government. In short, despite the “plenary power” doctrine and myths of exclusive federal control over immigrant admissions and rights, the states have routinely left their mark on the formation and outcomes of U.S. immigration policies.

In the next Part of this Article, we analyze the key features and significance of the Supreme Court’s *Arizona v. United States* decision, reviewing its interpretation of federal preemption doctrine and the relative immigrant enforcement power of the states. We then take up in turn the three forms of state immigration activism nurtured by the dynamics of American federalism. Finally, in the conclusion, we return to Arizona’s S.B. 1070, *Arizona v. United States*, and other recent state laws, to capture our three forms of devolution operating in contemporary American immigration politics.

## I. ARIZONA *V.* UNITED STATES AND IMMIGRATION FEDERALISM

Whereas most of the fiery debate that accompanied passage of S.B. 1070 focused on racial profiling and civil rights, the *Arizona v. United States* majority ultimately fastened its ruling upon federal preemption

---

<sup>25</sup> Peter Baker, *As Leaders Mull Border Policy, Wives See Personal Side*, N.Y. TIMES, May 20, 2012, at A11.

doctrine.<sup>26</sup> This was consistent with the legal strategy and arguments advanced by the U.S. government, which chose not to join various civil rights groups in claiming before the federal court that the Arizona law violated the Equal Protection Clause of the Fourteenth Amendment.<sup>27</sup> Avoiding claims of racial profiling, the core of the administration's argument in *Arizona v. United States* was that Arizona had infringed on exclusive federal powers and thereby violated the Constitution's Supremacy Clause.<sup>28</sup> This strategy enabled the Supreme Court majority to largely skirt thornier Fourteenth Amendment questions and to concentrate its decision on the issue of federal primacy over immigration control. It also freed the U.S. government from meeting the tougher burden associated with an equal protection claim, namely, that the State of Arizona had "discriminatory intent" when it passed S.B. 1070.

The Court's majority opinion was written by Justice Kennedy, who was joined by Chief Justice Roberts and Justices Breyer, Ginsburg, and Sotomayor. Justices Alito, Scalia and Thomas wrote separate dissents, while Justice Kagan, the former Solicitor-General, recused herself.<sup>29</sup> The majority strongly affirmed the primacy of the federal government over immigration control and noncitizen rights.<sup>30</sup> The Court noted early on that "[t]he Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens," and concluded that "[t]he federal power to determine immigration policy is well settled."<sup>31</sup> In underscoring the federal government's primacy on immigration questions, the Court pointed to the "fundamental" requirement that foreign governments be able to communicate with one counterpart—the U.S. government—when discussing immigration questions.<sup>32</sup> The majority concluded that the federal government's regulatory powers over immigration and noncitizen rights were "extensive and complex," and that it could exercise "broad discretion" over the substance and manner of immigration enforcement.<sup>33</sup> The ruling substantially rejected the "mirror image" theory of preemption, which proposes that states can enact and enforce criminal immigration laws if they "mirror" federal statutes.<sup>34</sup>

---

<sup>26</sup> *Arizona*, 132 S. Ct. at 2492, 2510.

<sup>27</sup> See Brief for the United States, *Arizona*, 132 S. Ct. 2492 (No. 11-182), 2012 WL 939048; see also Brief of *Amici Curiae* Arizona Attorneys for Criminal Justice & National Ass'n of Criminal Defense Lawyers in Support of Respondent at 3, *Arizona*, 132 S. Ct. 2492 (No. 11-182), 2012 WL 1044364 (summarizing argument that S.B. 1070 violates the equal protection clause of the Fourteenth Amendment).

<sup>28</sup> Brief for the United States, *supra* note 27, at 13–14.

<sup>29</sup> *Arizona*, 132 S. Ct. at 2497.

<sup>30</sup> *Id.* at 2510.

<sup>31</sup> *Id.* at 2498.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 2499.

<sup>34</sup> Gabriel J. Chin & Marc L. Miller, *The Unconstitutionality of State Regulation of Immigration Through Criminal Law*, 61 DUKE L.J. 251, 253 (2011).

After establishing federal primacy on immigration issues, the Court focused on four provisions of S.B. 1070 that were invalidated by both the district court and the Ninth Circuit Court of Appeals:

- (1) Section 2(B), which requires state and local police officers to check the immigration status of anyone whom they arrest or detain and allows them to stop and detain anyone suspected of being an undocumented immigrant (popularly known as the “show me your papers” provision).
- (2) Section 3, which makes it a state crime for someone to be in the United States without valid immigration documents.
- (3) Section 5(C), which makes it a crime for undocumented immigrants to apply for or hold a job in Arizona.
- (4) Section 6, which authorizes state law enforcement officers to arrest someone without a warrant if they have probable cause to believe that the individual has committed any public offense that makes a person deportable under U.S. immigration law.<sup>35</sup>

The Court turned its attention first to Section 3. Rejecting Arizona’s argument that the provision was valid because it largely followed federal law requiring immigrants to carry valid legal papers, the Court clarified that Congress had established a clear and exclusive system for immigrants to register with the federal government.<sup>36</sup> In short, it was a matter of “field preemption”: when Congress provides a full set of standards in an area, state regulations of the same terrain are invalid even if they are identical to federal laws.<sup>37</sup> On these grounds alone, the majority concluded, Section 3 was invalid.<sup>38</sup> But the Court noted that Section 3 was *not* identical with federal law, imposing penalties that were both different and harsher than federal ones.<sup>39</sup>

The Court also struck down Section 5(C).<sup>40</sup> The State of Arizona argued that this provision of S.B. 1070, which criminalized undocumented *employees*, should survive because it had no counterpart in federal law.<sup>41</sup> Yet the Court again turned to the concept of “field preemption,” pointing out that Congress already had established a full set of standards governing the employment of undocumented workers.<sup>42</sup> In so doing, the majority noted, Congress had made a “deliberate choice” to target employers and not to criminalize undocumented workers seeking or holding jobs.<sup>43</sup>

---

<sup>35</sup> *Arizona*, 132 S. Ct. at 2501–10.

<sup>36</sup> *Id.* at 2502.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 2502–03.

<sup>39</sup> *Id.* at 2503.

<sup>40</sup> *Id.* at 2503–05.

<sup>41</sup> *Id.* at 2503.

<sup>42</sup> *See id.* at 2504.

<sup>43</sup> *Id.*

The last provision invalidated by the Court was Section 6, which authorized police officers to make warrantless arrests when they had probable cause to believe that an individual had committed a deportable offense.<sup>44</sup> The majority again highlighted the federal government's provision of a complete set of procedures for deportation or removal of undocumented persons from U.S. territory.<sup>45</sup> However, the Court also observed that federal law requires a warrant or likelihood of escape before an undocumented immigrant can be arrested and held for possible removal.<sup>46</sup> On both of these grounds, Section 6 was struck down.<sup>47</sup>

The majority also held that the most controversial provision of S.B. 1070, Section 2(B), was not unconstitutional on its face due to safeguards in the law such as the ban on racial profiling.<sup>48</sup> But the Court was clear that there was only a very narrow way in which the provision could be applied constitutionally, and that it was leaving the door wide open for future claims.<sup>49</sup> "This opinion does not foreclose other preemption and constitutional challenges to the law as interpreted and applied after it goes into effect," the majority noted.<sup>50</sup> In particular, the Court was emphatic that the state courts could hold that Arizona law enforcement officers could not detain a person beyond the time necessary to address the non-immigration-related cause for the stop, detention, or arrest. A lower court might hold, for instance, that it would be unconstitutional if a police officer in Arizona prolonged the detention of a person at a traffic stop longer than the time required to write a ticket.<sup>51</sup> The majority invited future scrutiny of the limitations on Arizona's application of Section 2(B) by lower courts. "Detaining individuals solely to verify their immigration status would raise constitutional concerns," the Court wrote, adding that "it would disrupt the federal framework to put state officers in the position of holding aliens in custody for possible unlawful presence without federal direction and supervision."<sup>52</sup>

Justices Scalia, Thomas, and Alito agreed with the majority that Section 2(B) could go into effect, but each filed separate opinions dissenting from key portions of the decision. Justice Scalia's dissent insisted that no section of S.B. 1070 was invalid, arguing that the architects of the U.S. Constitution intended for the states to exercise sovereign power over immigration and especially to keep out people who

---

<sup>44</sup> *Id.* at 2505–07.

<sup>45</sup> *Id.* at 2505.

<sup>46</sup> *Id.* at 2505–06.

<sup>47</sup> *Id.* at 2507.

<sup>48</sup> *See id.* at 2507–10.

<sup>49</sup> *See id.* at 2509–10.

<sup>50</sup> *Id.* at 2510.

<sup>51</sup> *Id.* at 2509.

<sup>52</sup> *Id.*

are here unlawfully.<sup>53</sup> “If securing its territory in this fashion is not within the power of Arizona,” Justice Scalia noted, “we should cease referring to it as a sovereign State.”<sup>54</sup> His dissent also took the Obama administration to task for inadequate immigration enforcement, and he rejected the U.S. government’s claim that it required exclusive control over immigration issues in order “to allocate scarce enforcement resources wisely” since Arizona would be spending its own money to enforce S.B. 1070.<sup>55</sup> Justice Thomas also would have upheld S.B. 1070 in its entirety based on a narrow reading of federal preemption.<sup>56</sup> Justice Alito concurred with the Court’s determination upholding Section 2(B) and invalidating Section 3, but disagreed that Sections 5(C) and 6 were unconstitutional.<sup>57</sup>

The *Arizona v. United States* decision and its focus on federalism are more than merely products of federal inaction on comprehensive immigration reform and intergovernmental conflict in recent years. Indeed, the underlying dynamics that led to *Arizona v. United States* and that are likely to inspire a new wave of legal challenges reflect long-standing patterns of American immigration federalism. It is to these historical patterns that we now turn.

## II. STATES AS IMMIGRATION REGULATORS IN THE VOID: INTERGOVERNMENTAL SEPARATION

As much as the United States is a nation built upon immigration, it also is one in which centralized regulation of immigrant admissions and rights was quite slow to develop. From the 1820s until the start of the Civil War, roughly 5 million European immigrants settled in the young republic.<sup>58</sup> “During the 1820s, immigration accounted for only 4 percent of the steady increase in American population; by the 1850s, immigration accounted for nearly one-third of U.S. population growth.”<sup>59</sup> During this period, the federal government remained all but silent on European immigration. Congress passed legislation that required the counting of new arrivals after 1819 to maintain uniform statistics, and it mandated minimum living standards for vessels carrying immigrant passengers to the country.<sup>60</sup> Otherwise, the federal government left control of immigration largely in the hands of the states until the late nineteenth-

---

<sup>53</sup> *Id.* at 2511 (Scalia, J., concurring in part and dissenting in part).

<sup>54</sup> *Id.* at 2522.

<sup>55</sup> *Id.* at 2520.

<sup>56</sup> *Id.* at 2521 (Thomas, J., concurring in part and dissenting in part).

<sup>57</sup> *Id.* at 2524–25 (Alito, J., concurring in part and dissenting in part).

<sup>58</sup> TICHENOR, *supra* note 3, at 56; U.S. IMMIGRATION & NATURALIZATION SERV., 1994 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 25 (1996).

<sup>59</sup> TICHENOR, *supra* note 3, at 56.

<sup>60</sup> The Steerage Act, ch. 46, §§ 2–4, 3 Stat. 488, 488–89 (1819).

century.<sup>61</sup> In practice, this meant that the tasks of regulating immigration devolved to key maritime states and authorities in their port cities.<sup>62</sup>

Consequently, the modest structures governing immigrant traffic in antebellum America were the creation and ongoing responsibility of a few coastal states, such as New York (where most newcomers landed), Maryland, Massachusetts, Pennsylvania, and South Carolina.<sup>63</sup> State immigration laws authorized exclusion of immigrants with criminal records, contagious illnesses, and other qualities deemed undesirable, but few were turned away.<sup>64</sup> Maritime states also charged ship masters small head taxes on their immigrant passengers to cover various expenses such as the care of indigent and sick arrivals, a practice affirmed by the Supreme Court in 1837.<sup>65</sup> The 1848 *Passenger Cases* abrogated this holding, asserting that state head taxes violated federal prerogatives, but states made minor adjustments and continued taxing ship masters to offset the expenses of receiving immigrants.<sup>66</sup>

The dramatic expansion of U.S. territory with the Louisiana Purchase and the cession following the Mexican-American War created a strong demand for new immigrants to settle a large frontier.<sup>67</sup> Industrialization also fueled the nation's appetite for new workers.<sup>68</sup> Most states and territorial governments actively recruited European newcomers, stationing their own "immigration commissioners" and agents overseas or in domestic port cities to entice new arrivals to settle within their borders.<sup>69</sup> The federal government also joined in these recruitment efforts, sending its own agents to encourage European emigration while Congress included enticements in the Homestead Act

---

<sup>61</sup> TICHENOR, *supra* note 3, at 67–70.

<sup>62</sup> THOMAS M. PITKIN, *KEEPERS OF THE GATE: A HISTORY OF ELLIS ISLAND* 9 (1975).

<sup>63</sup> *See* TICHENOR, *supra* note 3, at 58.

<sup>64</sup> GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW* 20–43 (1996).

<sup>65</sup> *Mayor of New York v. Miln*, 36 U.S. (11 Pet.) 102 (1837). The case involved a New York statute requiring ships' masters to provide a passenger manifest, to post security for indigent passengers, and to remove undesirable aliens. *Id.* at 130–31. The Court held that the statute was an exercise of the State's police powers, and therefore not preempted by Congress's Commerce Clause powers. *Id.* at 132.

<sup>66</sup> *Passenger Cases*, 48 U.S. (7 How.) 283, 408–09 (1849); James W. Fox Jr., *Citizenship, Poverty, and Federalism: 1787–1882*, 60 U. PITT. L. REV. 421, 559–60 (1999).

<sup>67</sup> John Higham, *American Immigration Policy in Historical Perspective*, 21 LAW & CONTEMP. PROBS. 213, 214 (1956); Trina Williams Shanks, *The Homestead Act: A Major Asset-Building Policy in American History*, in *INCLUSION IN THE AMERICAN DREAM: ASSETS, POVERTY, AND PUBLIC POLICY* 20, 21 (Michael Sherraden ed., 2005).

<sup>68</sup> Higham, *supra* note 67, at 214; *see also* Bina Kalola, Note, *Immigration Laws and the Immigrant Woman: 1885–1924*, 11 GEO. IMMIGR. L.J. 553, 554 (1997).

<sup>69</sup> E. MERTON COULTER, *THE SOUTH DURING RECONSTRUCTION 1865–1877*, at 102 (1947); Higham, *supra* note 67, at 215; Kalola, *supra* note 68, at 559.

for new immigrants to settle and develop frontier lands.<sup>70</sup> Inflows from Europe reached record levels in the post-Civil War decades: immigration soared to 2.3 million in the 1860s, 2.8 million in the 1870s, and 5.2 million in the 1880s.<sup>71</sup> The vast majority of these immigrants first arrived in New York, where they were channeled through a central immigration depot, Manhattan's Castle Garden.<sup>72</sup> New York authorities determined early on that not all immigration was desirable, and state lawmakers established a Board of the Commissioners of Emigration to supervise an administrative staff charged with policing the immigrant traffic.<sup>73</sup> In particular, state agents at the port of New York were to exclude or collect so-called "commutation money" for

any lunatic, idiot, deaf, dumb, blind, maimed, or infirm persons, or persons above the age of sixty years, or widow with a child or children, or any woman without a husband, and with child or children, or any person unable to take care of himself or herself without becoming a public charge.<sup>74</sup>

New York officials perceived special obligations and burdens in their state's role as the nation's primary regulator of immigration. "While New York has to endure nearly all of its evils, the other States reap most of the benefits of immigration," noted Friedrich Kapp, a state Commissioner of Emigration in the 1870s.<sup>75</sup> "Our State . . . act[s] in the interest of the whole Union, by efficiently protecting all the immigrants on their arrival, and by preventing the spread of diseases imported by them over the country at large, and this while deriving far less advantage from immigration than the Western States."<sup>76</sup> As mass European immigration remade American social, economic, and political life in the decades before and after the Civil War, New York and other maritime states stepped forward to screen and care for immigrants at a time when the federal government lacked both the collective will and administrative capacity to do so.<sup>77</sup>

The politics of Chinese exclusion offers a different portrait of state policy innovation in the void, one in which state politicians responded first to strong anti-immigrant sentiment. Chinese immigration of the late

<sup>70</sup> Homestead Act of 1862, ch. 75, 12 Stat. 392 (allowing any person filing a declaration of intention to naturalize to obtain 160 acres of unappropriated public land); Shanks, *supra* note 67, at 23.

<sup>71</sup> RANDY CAPPS & JEFFREY S. PASSEL, FOUND. FOR CHILD DEV., DESCRIBING IMMIGRANT COMMUNITIES 2 (2004), *available at* <http://fcd-us.org/sites/default/files/DescribingImmigrantCommunities.pdf>.

<sup>72</sup> FRIEDRICH KAPP, IMMIGRATION AND THE COMMISSIONERS OF EMIGRATION 18, 61 (Arno Press 1969) (1870).

<sup>73</sup> Act of May 5, 1847, ch. 195, 1847 N.Y. Laws 182, 182–85; KAPP, *supra* note 72, at 85.

<sup>74</sup> KAPP, *supra* note 72, at 98–99 (quoting § 3, 1847 N.Y. Laws at 184).

<sup>75</sup> *Id.* at 157.

<sup>76</sup> *Id.* at 159.

<sup>77</sup> *See* TICHENOR, *supra* note 3, at 58.

nineteenth-century was miniscule compared to its European counterparts (4% of all immigration at its zenith), but it inspired one of the most brutal and successful nativist movements in U.S. history.<sup>78</sup> Official and popular racism made Chinese newcomers especially vulnerable; their lack of numbers, political power, or legal protections gave them none of the weapons that enabled Irish Catholics to counterattack nativists.<sup>79</sup> Chinese workers were first recruited to California from the 1850s through the 1870s as cheap contract labor for mining, railroad construction, manufacturing, and farming.<sup>80</sup> They inspired hostility among white workers for allegedly lowering wages and working conditions, while newspapers and magazines portrayed the Chinese as a race of godless opium addicts, prostitutes, and gamblers.<sup>81</sup> Labor leaders in San Francisco organized large anti-Chinese clubs in every ward of the city during the 1860s, and comparable associations followed in cities and towns throughout the state.<sup>82</sup> California politicians also learned that anti-Chinese speeches and policies translated into votes.<sup>83</sup> The State's first Republican governor, Leland Stanford, called upon the legislature in 1862 to discourage immigration of the "degraded" Chinese at the same time as his own farming and railroad enterprises employed them.<sup>84</sup> The legislature complied, imposing a tax on Chinese workers to "protect Free White Labor."<sup>85</sup>

Economic distress inflamed the anti-Chinese movement in the years following the Civil War, as "the closing of unproductive mines, the completion of the transcontinental railroad," and a flood of new settlers to the Pacific Coast led to rampant unemployment.<sup>86</sup> California labor leaders established Chinese Exclusion Leagues throughout the state, which ultimately spread to other Pacific Coast and Mountain States.<sup>87</sup> During the 1867 election, they called on the leaders of the major *state* parties, rather than national politicians, to impose restrictions on Chinese

---

<sup>78</sup> *See id.* at 89–91.

<sup>79</sup> *See id.*

<sup>80</sup> *Id.* at 89.

<sup>81</sup> *See id.*

<sup>82</sup> *Id.* at 90–91; *see also* ELMER CLARENCE SANDMEYER, *THE ANTI-CHINESE MOVEMENT IN CALIFORNIA* 40–41 (1939).

<sup>83</sup> SANDMEYER, *supra* note 82, at 41, 46.

<sup>84</sup> ASSEMBLY JOURNAL, 13th Sess., at 98 (Cal. 1862) (Governor Stanford decrying in his inaugural address the "deleterious influence upon the superior race" of "the numbers among us of a degraded and distinct people"); ALEXANDER SAXTON, *THE INDISPENSABLE ENEMY: LABOR AND THE ANTI-CHINESE MOVEMENT IN CALIFORNIA* 62–63 (1971) (describing Stanford's enthusiastic support for Chinese labor on the Central Pacific Railroad).

<sup>85</sup> Anti-Coolie Act of 1862, ch. 339, 1862 Cal. Stat. 462 (titled "An Act to protect Free White Labor against competition with Chinese Coolie Labor, and to discourage the Immigration of the Chinese into the State of California").

<sup>86</sup> TICHENOR, *supra* note 3, at 91.

<sup>87</sup> *Id.*; *see also* ROGER DANIELS, *ASIAN AMERICA: CHINESE AND JAPANESE IN THE UNITED STATES SINCE 1850*, at 63 (1988); SANDMEYER, *supra* note 82, at 43.

immigration.<sup>88</sup> While California Democrats like Henry Haight pledged to fight “against populating this fair State with a race of Asiatics,” Republican incumbents endorsed all forms of “voluntary immigration” and found themselves swept out of Sacramento.<sup>89</sup> Within a few years, California politicians of both parties enacted a dizzying array of anti-Chinese laws that were designed to restrict immigration and to deprive Chinese immigrants of the most basic civil, economic, and social rights.<sup>90</sup> This early stage of Chinese exclusion offers an ignominious illustration of how state authorities may aggressively fill the policy void when the federal government is slow to respond to grassroots pressure over new immigration.

The idea of discouraging undocumented immigration through labor-related sanctions and penalties is not new for the United States. When Congress debated immigration reform in 1952, liberal senator Paul Douglas (a Democrat from Illinois) urged his colleagues to impose legal sanctions on those who illegally smuggled aliens into the country and on employers who intentionally hired undocumented aliens.<sup>91</sup> Yet his employer-sanctions amendment, backed by organized labor, was defeated by lawmakers protecting the interests of Southwestern growers and other employers who relied upon undocumented workers.<sup>92</sup> The McCarran-Walter Act of 1952 (the original Immigration and Nationality Act) contained language that made it unlawful to transport or harbor undocumented aliens, but clarified that “harboring” did not include employment of these unauthorized migrants.<sup>93</sup> This “Texas proviso,” as it later became known, underscored the power of grower lobbies and other employer groups in Congress and their ability to derail employer sanctions legislation.<sup>94</sup> In the decades that followed, employer sanctions proposals languished in committee.<sup>95</sup>

The issue of illegal immigration gained fresh attention in the 1970s, as both government officials and the news media pointed to growing undocumented populations and porous borders as critical challenges.<sup>96</sup> Employer sanctions again appealed to many liberal Democrats because they promised to discourage unauthorized entries by “targeting unscrupulous employers rather than resorting to mass deportation campaigns” of the past.<sup>97</sup> “If employers could be dissuaded from hiring

---

<sup>88</sup> See SANDMEYER, *supra* note 82, at 45; SAXTON, *supra* note 84, at 69.

<sup>89</sup> SAXTON, *supra* note 84, at 91 (quoting *The Victors Rejoicing After the Battle*, DAILY ALTA CAL., Sept. 6, 1867, at 1); see also DANIELS, *supra* note 87, at 37.

<sup>90</sup> DANIELS, *supra* note 87, at 37–39.

<sup>91</sup> 98 CONG. REC. 797–800 (1952).

<sup>92</sup> See TICHENOR, *supra* note 3, at 194.

<sup>93</sup> Immigration and Nationality Act, ch. 477, § 274(a)(4), 66 Stat. 163, 229 (1952); TICHENOR, *supra* note 3, at 194.

<sup>94</sup> See TICHENOR, *supra* note 3, at 194.

<sup>95</sup> See *id.* at 227–28.

<sup>96</sup> *Id.* at 225–29.

<sup>97</sup> *Id.* at 226.

undocumented aliens, so the argument went, fewer foreign workers would be drawn illegally across national borders by the magnet of American jobs.”<sup>98</sup> Yet Senate defenders of grower interests doomed bill after bill.<sup>99</sup> Against this backdrop, sub-national governments took action. During the 1970s, twelve states enacted legislation that prohibited employers from “knowingly” hiring undocumented immigrants.<sup>100</sup> Most of these laws were poorly enforced, but they represented the first effort to impose sanctions on the employers of undocumented aliens.<sup>101</sup> The federal government finally followed suit with the Immigration Reform and Control Act of 1986 (IRCA), the first federal legislation to introduce significant employment-related sanctions and penalties.<sup>102</sup> Proponents of employment sanctions hoped to achieve two goals: reduce the incentive for undocumented entry to the United States, and maintain high protections for the U.S. labor force.<sup>103</sup> Hispanic groups and business organizations strongly opposed the employment provisions of IRCA, but the Act was seen as a successful compromise because it provided “amnesty” and access to legal residency to more than 3 million undocumented immigrants.<sup>104</sup>

By 1990, the tide had already started to change on employment sanctions. First the NAACP and (in 2000) the AFL-CIO reversed their position on employment sanctions, in part as a result of studies that showed an increase in discrimination against “job applicants whose foreign appearance or accent led [employers] to suspect that they might be unauthorized aliens” as well as noncitizens.<sup>105</sup> The GAO’s recommendation was for Congress to repeal the employment sanctions provisions or create a system that would make it easier for employers to comply without discriminating against prospective job applicants.<sup>106</sup> The academic consensus has been that employment sanctions have failed,<sup>107</sup>

---

<sup>98</sup> *Id.*

<sup>99</sup> Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 U. CHI. LEGAL F. 193, 199–200.

<sup>100</sup> See Christopher Dickey & Tom Grubisich, *First Test of Alien Law Ends in Dismissal in Va.*, WASH. POST, Jan. 31, 1979, at C3; see also, e.g., Act of Mar. 27, 1977, ch. 438, 1977 Va. Acts 651, 652.

<sup>101</sup> See Dickey & Grubisich, *supra* note 100.

<sup>102</sup> Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, sec. 101, § 247A(a), 100 Stat. 3359, 3360.

<sup>103</sup> Wishnie, *supra* note 99, at 195–96.

<sup>104</sup> TICHENOR, *supra* note 3, at 262; Daniel J. Tichenor, *Immigration Policy: Polarized Politics, Elusive Reform*, WORLD POL. REV. (Oct. 9, 2012), <http://www.worldpoliticsreview.com/articles/12401/immigration-policy-polarized-politics-elusive-reform>.

<sup>105</sup> U.S. GEN. ACCOUNTING OFFICE, IMMIGRATION REFORM: EMPLOYER SANCTIONS AND THE QUESTION OF DISCRIMINATION 6 (1990); Wishnie, *supra* note 99, at 208.

<sup>106</sup> See U.S. GEN. ACCOUNTING OFFICE, *supra* note 105, at 4.

<sup>107</sup> See *Shortfalls of the 1986 Immigration Reform Legislation: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Security, & Int’l Law of the H. Comm. on the Judiciary*, 110th Cong. 38–40 (2007) (statement of Muzaffar A. Chishti,

and the federal government seems to concur, given near abandonment of enforcement of IRCA in the late 1990s and early 2000s.<sup>108</sup> Although in the past four years Immigration and Customs Enforcement (ICE) has conducted a number of high profile raids in a number of states (in 2008, ICE raided poultry plants in five Southern states),<sup>109</sup> the number of employer audits performed by federal immigration authorities declined significantly from 1990 to 2003, and so has the fining of employers.<sup>110</sup>

In more recent years, however, employer sanctions experienced a renaissance at the state level where the idea of penalizing employers who hire undocumented immigrants is popular with politicians and voters. While efforts to give employer sanctions teeth in federal legislation have failed to date, state officials again have sought to fill the policy void. In 2007 and 2008 alone, the National Conference of State Legislatures documented 423 immigrant-employment-related bills in more than 30 state legislatures, several dozen of which became law.<sup>111</sup> Unlike earlier decades when employer sanctions were primarily a California-centered debate, this new wave of sanctions reform was led by states such as Arizona, Colorado, Georgia and Oklahoma, which have enacted strict immigration employment laws.<sup>112</sup> Minnesota introduced an executive order whereby employers are required to screen many prospective hires through the federal E-Verify system to ensure that they are eligible for employment.<sup>113</sup> Arizona's new law, which went into effect on January 1, 2008, targets businesses that "knowingly" and "intentionally" hire undocumented immigrants.<sup>114</sup> The Legal Arizona Workers Act mandates a license suspension of up to 10 days as well as probation for employers

---

Director, Migration Policy Institute's Office at New York University School of Law); THE PAPER CURTAIN: EMPLOYER SANCTIONS' IMPLEMENTATION, IMPACT, AND REFORM 4 (Michael Fix ed., 1991); Peter Brownell, *The Declining Enforcement of Employer Sanctions*, MIGRATION INFO. SOURCE (Sept. 2005), <http://www.migrationinformation.org/Feature/display.cfm?id=332>.

<sup>108</sup> See Brownell, *supra* note 107.

<sup>109</sup> Jerry Seper, *ICE Raids Net 280 at Poultry Plants*, WASH. TIMES, Apr. 17, 2008, at A6.

<sup>110</sup> Brownell, *supra* note 107.

<sup>111</sup> NAT'L CONFERENCE OF STATE LEGISLATURES, 2007 ENACTED LEGISLATION RELATED TO IMMIGRANTS AND IMMIGRATION 2 (2008), available at <http://www.ncsl.org/Portals/1/documents/immig/2007Immigrationfinal.pdf> [hereinafter 2007 ENACTED LEGISLATION]; NAT'L CONFERENCE OF STATE LEGISLATURES, OVERVIEW OF STATE LEGISLATION RELATED TO IMMIGRANTS AND IMMIGRATION: JANUARY-MARCH 2008, at 3 (2008), available at <http://www.ncsl.org/Portals/1/documents/immig/immigreportapril2008.pdf> [hereinafter OVERVIEW OF STATE LEGISLATION].

<sup>112</sup> 2007 ENACTED LEGISLATION, *supra* note 111, at 7, 24.

<sup>113</sup> Exec. Order No. 08-01, 32 Minn. Reg. 1284, 1284-85 (Jan. 7, 2008) The Executive Order requires some but not all employers to screen prospective hires: newly hired executive branch employees, employees of vendors receiving state contracts in excess of \$50,000, and recipients of business subsidies. *Id.* at 1285.

<sup>114</sup> Legal Arizona Workers Act, ch. 279, sec. 2, § 23-212, 2007 Ariz. Sess. Laws 1312, 1313-14 (codified at ARIZ. REV. STAT. ANN. § 23-212).

who hire undocumented immigrants.<sup>115</sup> Employers are required to verify an applicant's work eligibility through the federal E-Verify system.<sup>116</sup>

In *Chamber of Commerce v. Whiting*, a 5–3 Supreme Court majority determined that the Legal Arizona Workers Act was not preempted because the Immigration Reform and Control Act of 1986 (IRCA) makes an exception for states and local governments to impose their own sanctions on employers who knowingly hire undocumented workers in cases of “licensing.”<sup>117</sup> Because the Arizona law penalized offending employers by suspending or revoking its business licenses, the Court concluded that it was a “licensing law” that validly fell within IRCA’s exception.<sup>118</sup> It also found that whereas the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) barred the federal government from requiring participation in E-Verify, nothing kept *states* from mandating participation from its employers.<sup>119</sup> As much as nineteenth century state immigration law and regulation, recent employer-sanctions reform provides a potent illustration of how state governments today, as in the past, have not hesitated to regulate immigrants and immigration amidst inertia at the national level.

### III. STATES AS IMMIGRATION POLICY COMBATANTS: INTERGOVERNMENTAL CONTENTION

As much as states have shaped American immigration policy over time as innovators and regulators when the federal government has been largely silent, they also have played a significant role in pressuring the federal government to assume greater responsibility for immigration control and to achieve major immigration reform. Our two historical cases, which involve immigration screening by maritime states and Chinese exclusion by western states,<sup>120</sup> underscore this tradition of fervent intergovernmental lobbying for national immigration reform by state officials. As we shall see, the federal courts often have spurred state demands on national policy-makers by striking down state-level regulations on immigration and immigrants as unconstitutional intrusions on matters deemed to be exclusively the purview of the federal government.

When the 1870s began, official efforts to regulate European immigration remained largely the province of state governments with key ports of entry.<sup>121</sup> The vast majority of new immigrants—originating primarily from Germany, Ireland, and the United Kingdom—arrived in

---

<sup>115</sup> *Id.* § 23-212(F)(2).

<sup>116</sup> *Id.* § 23-214.

<sup>117</sup> *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011).

<sup>118</sup> *Id.* at 1975–81.

<sup>119</sup> *Id.* at 1985.

<sup>120</sup> *See supra* Section II.

<sup>121</sup> TICHENOR, *supra* note 3, at 67.

New York City, where they were channeled through what had become the nation's central immigration depot, Castle Garden.<sup>122</sup> The few modest immigration controls established by legislation in maritime states authorized the potential exclusion of individual immigrants deemed “undesirable” and created a system of bonding and head taxes to support the screening process, immigrant poor relief, and health care.<sup>123</sup> In 1875, however, the Supreme Court specifically nullified state requirements that shipmasters pay bonds and head taxes for their immigrant passengers.<sup>124</sup> But the Court's more sweeping verdict was that state regulations in this field were an “unconstitutional usurpation of exclusive congressional power to regulate foreign commerce.”<sup>125</sup> Its opinion urged national uniformity: “The laws which govern the right to land passengers in the United States from other countries ought to be the same in New York, Boston, New Orleans, and San Francisco.”<sup>126</sup>

The decision deprived New York and other maritime states of their traditional means of supporting immigrant reception and assistance. State immigration boards continued to screen European newcomers at port city depots like Castle Garden and to care for sick and indigent immigrants, but “[o]fficials in New York, Massachusetts, Maryland, and other ‘front-line’ states found this arrangement intolerable.”<sup>127</sup> Without bonds or head taxes, they “faced the prospect of raising taxes or realigning their budgets to offset the financial burdens of receiving and providing public benefits to record numbers of immigrants.”<sup>128</sup> Coastal state governors, lawmakers, and immigration boards lobbied Congress with petitions, resolutions, and reports highlighting the need for federal relief from the costs of administration and immigrant care. They also advocated federal legislation to exclude convicts and “confirmed paupers” altogether.<sup>129</sup>

Despite these lobbying efforts, neither Republicans nor Democrats in Congress rushed to establish new federal regulations on immigration or national administrative capacities for screening and assisting new arrivals.<sup>130</sup> Steamship companies celebrated their liberation from a bonding and head tax system that reduced profits.<sup>131</sup> Many national leaders were reluctant to enact any new federal policies that might slow

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *See* *Henderson v. Mayor of New York*, 92 U.S. 259, 266–68 (1876).

<sup>125</sup> TICHENOR, *supra* note 3, at 68; *see also* *Henderson*, 92 U.S. at 272–74.

<sup>126</sup> *Henderson*, 92 U.S. at 273.

<sup>127</sup> TICHENOR, *supra* note 3, at 68.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*; *see also* *The Care of Immigrants*, N.Y. TIMES, June 19, 1882, at 1. *See generally* E.P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY, 1798–1965, at 396–404 (1981).

<sup>130</sup> TICHENOR, *supra* note 3, at 68.

<sup>131</sup> *See id.*

European inflows or offend immigrant voters.<sup>132</sup> In short, Congress turned a deaf ear to coastal state officials clamoring for a national response to the economic and social burdens of mass immigration. After six years of inaction, New Yorkers were fuming:

The Federal courts have decided that the business of regulating immigration does not belong to the State . . . . Congress has had ample time and opportunity to deal with the subject. For four years strenuous efforts have been made to secure action from that sluggish body, but it has treated its obvious duty with perverse neglect. There are several bills pending somewhere in the intricate mazes of legislation, but there seems to be no power to get any one of them through. The present situation is disgraceful and cannot last.<sup>133</sup>

Frustrated by federal delays, New York's Board of Emigration Commissioners sent shockwaves through Congress by threatening in 1881 to close down Castle Garden and to end all of its regulatory activities related to immigration.<sup>134</sup> New York's brinksmanship finally forced Washington's hand. Congress quickly responded to the crisis by adopting the Immigration Act of 1882, essentially providing national authorization for state policies that had been struck down by the Court.<sup>135</sup> The new legislation borrowed language from state statutes to restrict admission of "any convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge."<sup>136</sup> It also established a system of funding immigrant inspections and providing for immigrant welfare by assessing a head tax of 50 cents per newcomer.<sup>137</sup> Tellingly, the legislative innovations of maritime states provided the model for the 1882 law and their vigorous lobbying efforts were the critical force behind its enactment.

The nationalization of Chinese exclusion both fits with and departs from the processes that led to stiffer regulation of European immigration with the Immigration Act of 1882. As was the case for the maritime states and the nullification of their head tax system, judicial activism stopped state-level Chinese exclusion cold during the Gilded Age. One of the most prominent California laws enacted in the early 1870s prohibited Chinese from landing on state soil without a bond unless they could prove their "good character" to the state's Commissioner of Immigration.<sup>138</sup> However, as noted in the introduction of this Article,

<sup>132</sup> *See id.* at 68–69.

<sup>133</sup> *The Care of Immigrants*, *supra* note 129.

<sup>134</sup> TICHENOR, *supra* note 3, at 69.

<sup>135</sup> *Id.*; Immigration Act of 1882, ch. 376, § 2, 22 Stat. 214, 214; ROY L. GARIS, IMMIGRATION RESTRICTION: A STUDY OF THE OPPOSITION TO AND REGULATION OF IMMIGRATION INTO THE UNITED STATES 88–89 (1927).

<sup>136</sup> § 2, 22 Stat. at 214; GARIS, *supra* note 135, at 89; TICHENOR, *supra* note 3, at 69.

<sup>137</sup> § 1, 22 Stat. at 214; GARIS, *supra* note 135, at 87; TICHENOR, *supra* note 3, at 69.

<sup>138</sup> Act of Mar. 30, 1874, sec. 70, § 2952, 1873–74 ACTS AMENDATORY OF THE CODES, 1, 39–41 (Cal. 1874); SANDMEYER, *supra* note 82, at 52.

state efforts to restrict Chinese immigration in 1874 were challenged before California's federal circuit court.<sup>139</sup> This was the case that decided the fate of Ah Fong and her fellow passengers who were denied entry by state officials pending receipt of \$500 bonds for each of them.<sup>140</sup> Recall that in his decision, Justice Stephen Field expressed sympathy with the "general feeling" of Californians that "the dissimilarity in physical characteristics, in language, in manners, religion and habits, will always prevent any possible assimilation of them with our people."<sup>141</sup> He nevertheless invalidated state efforts to curb Chinese entry, advising that "recourse must be had to the federal government, where the whole power over this subject lies."<sup>142</sup> Two years later, the Supreme Court handed down two decisions that nullified state immigration laws because they were said to encroach upon congressional authority to regulate foreign commerce.<sup>143</sup>

The introduction of judicial activism to immigration law dramatically altered the strategy of the anti-Chinese movement. During the Reconstruction period, anti-Chinese activists directed most of their energies to successfully shaping state and local policies.<sup>144</sup> They tended to vigorously oppose enhanced responsibilities for the national state, which they associated with Radical Republican designs of extending civil rights protections and circumscribing state and local racial practices.<sup>145</sup> But judicial limitations on state police powers created new imperatives: Chinese exclusion could be achieved only if new federal regulatory controls were established.<sup>146</sup> "Our only hope is in the Government," declared Aaron Sargent, a California senator and proponent of Chinese restriction.<sup>147</sup>

Against the backdrop of intensely competitive elections of the late nineteenth-century—routinely characterized by Republican dominance in the North and Democratic control in the South—most national party leaders saw California and its neighbors as crucial battleground states.<sup>148</sup> Shortly after Field struck down state restrictions on immigration in 1874, Western state officials and their congressional delegations called for national limits on Chinese immigration.<sup>149</sup> Whereas lobbying efforts by maritime states like New York for federal authorization of traditional

<sup>139</sup> See *In re Ah Fong*, 1 F. Cas. 213 (C.C.D. Cal. 1874) (No. 102).

<sup>140</sup> *Id.* at 214–15.

<sup>141</sup> *Id.* at 217.

<sup>142</sup> *Id.*

<sup>143</sup> See *Chy Lung v. Freeman*, 92 U.S. 275, 280–81 (1876); *Henderson v. Mayor of New York*, 92 U.S. 259, 272–73 (1876).

<sup>144</sup> TICHENOR, *supra* note 3, at 98; see also DANIELS, *supra* note 87, at 38–39.

<sup>145</sup> TICHENOR, *supra* note 3, at 98.

<sup>146</sup> *Id.*

<sup>147</sup> 4 CONG. REC. 2856 (1876) (statement of Sen. Aaron Sargent).

<sup>148</sup> TICHENOR, *supra* note 3, at 98.

<sup>149</sup> *Id.*; see also 4 CONG. REC. 2850–56.

screening and head tax systems inspired little response from national policymakers, leaders and members of both parties in Congress eagerly carried favor with anti-Chinese voters of the Far West.<sup>150</sup> The Immigration Act of 1875 made it illegal to transport Asian immigrants without their voluntary consent (a response to “coolie labor”), and designated prostitutes and those convicted of felonious crimes as excludable classes.<sup>151</sup> The Democratic House and Republican Senate in 1876 created a Joint Special Committee to Investigate Chinese Immigration, a body that listened sympathetically to the testimony of Western state officials advocating more vigorous Chinese exclusion.<sup>152</sup>

In 1879, a California referendum calling for Chinese exclusion won by a lopsided 154,638 to 883 vote.<sup>153</sup> The same year, Congress passed the Fifteen Passenger Law, barring vessels from transporting more than fifteen Chinese passengers at a time.<sup>154</sup> Both Western state officials and grassroots activists demanded more draconian restrictions. Party competition in presidential elections of the post-Reconstruction era turned the anti-Chinese crusade into a political juggernaut. As *The New York Times* noted, “Which great political party is foolish enough to risk losing the votes of the Pacific States by undertaking to do justice to the Chinese?”<sup>155</sup> By 1881, the State Department negotiated a treaty agreement with China that recognized the right of the U.S. to “regulate, limit, or suspend” Chinese immigration but not “absolutely prohibit it.”<sup>156</sup> A year later, large bipartisan majorities in Congress passed legislation barring Chinese laborers and their families from entering the country for ten years.<sup>157</sup> In subsequent years, national lawmakers imposed even more sweeping restrictions on Chinese immigration and rights.<sup>158</sup>

Fast forward to more recent years: During the 1990s, several of the largest immigrant-receiving states pressed the federal government to take responsibility for inadequate enforcement of its immigration laws.<sup>159</sup> In particular, many of these states complained that porous borders and uneven enforcement had produced large populations of undocumented

<sup>150</sup> TICHENOR, *supra* note 3, at 98–100.

<sup>151</sup> Immigration Act of 1875, ch. 141, 18 Stat. 477.

<sup>152</sup> S. Rep. No. 44-689, at III (1877).

<sup>153</sup> MARY ROBERTS COOLIDGE, CHINESE IMMIGRATION 123 (1909).

<sup>154</sup> Chinese Immigration Act, H.R.2423, 45th Cong. (1879). The President vetoed the bill, and the Congress was unable to override that veto. 8 CONG. REC. 2275–77 (1879).

<sup>155</sup> *The Chinese Must Go*, N.Y. TIMES, Feb. 26, 1880, at 4.

<sup>156</sup> Treaty Providing for Future Regulation of Chinese Immigration into the United States, U.S.-China, art. I, Nov. 17, 1880, 22 Stat. 826.

<sup>157</sup> Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58 (repealed 1943).

<sup>158</sup> CHARLES J. McCLAIN, IN SEARCH OF EQUALITY: THE CHINESE STRUGGLE AGAINST DISCRIMINATION IN NINETEENTH-CENTURY AMERICA 159 (1994); GWENDOLYN MINK, OLD LABOR AND NEW IMMIGRANTS IN AMERICAN POLITICAL DEVELOPMENT 106–08 (1986); TICHENOR, *supra* note 3, at 107.

<sup>159</sup> TICHENOR, *supra* note 3, at 277–78.

aliens who overtaxed state-level public benefits programs.<sup>160</sup> In an effort to force federal action and to relieve what these states viewed as unfair budgetary burdens associated with porous borders, they pursued three strategies. First, states initiated legal action against the federal government and bolstered their claims through legislative resolutions urging Washington to reimburse them for immigrant-related services. Second, they lobbied Washington with resolutions. Finally, California placed Proposition 187 on the November 1994 ballot as a test case for similar resolutions in other states.<sup>161</sup>

States, led by Florida, California, Arizona, New Jersey, Texas, and New York joined in suing the federal government<sup>162</sup> for “its continuing failure to enforce or rationally administer its own immigration laws since 1980” and asked to be compensated for their spending on services to immigrants.<sup>163</sup> The lawsuits were ultimately thrown out as federal courts recognized the dispute to be fundamentally political not legal in nature.<sup>164</sup> In a decision that was echoed in all dismissals that followed, U.S. District Judge Edward Davis was sympathetic to Florida’s financial difficulties and the state’s struggle with Washington.<sup>165</sup> As Judge Davis noted, “The Court recognizes that the State of Florida is suffering under a tremendous financial burden due to the methods in which the Federal Government has chosen to enforce the immigration laws. . . . But recognizing these facts does not create a *legal* theory under which this Court may grant relief. Without such a *legal* theory this Court must dismiss this action.”<sup>166</sup>

In addition to legal action, state legislatures introduced multiple resolutions imploring the federal government to take action and compensate states for the costs of immigrant-related services. The language of the resolutions makes it clear that at least in the early 1990s, states did not perceive themselves as responsible for immigration

---

<sup>160</sup> Roberto Suro, *White House Pressured by Immigration Politics*, WASH. POST, Mar. 28, 1994, at A1; *House Approves Immigration Bill After Removing Legal Immigration Restrictions*, 73 INTERPRETER RELEASES 349, 350–51, 354–56 (1996).

<sup>161</sup> Proposition 187, 1994 Cal. Stat. A-317, *invalidated* by League of United Latin Am. Citizens v. Wilson, 997 F. Supp. 1244 (C.D. Cal. 1997).

<sup>162</sup> Arizona v. United States, 104 F.3d 1095 (9th Cir. 1997); California v. United States, 104 F.3d 1086 (9th Cir. 1997); Chiles v. United States, 69 F.3d 1094 (11th Cir. 1995). Texas, New York, and New Jersey filed similar lawsuits. The lawsuits were dismissed by federal courts and the U.S. Supreme Court refused to hear the cases. Texas v. United States, 106 F.3d 661 (5th Cir. 1997) (affirming the dismissal of Texas’ claims); New Jersey v. United States, 91 F.3d 463 (3d Cir. 1996) (affirming the dismissal of New Jersey’s claims); Padavan v. United States, 82 F.3d 23 (2d Cir. 1996) (affirming the dismissal of New York’s claims).

<sup>163</sup> Nancy Gibbs, *Keep Out, You Tired, You Poor . . .*, TIME, Oct. 3, 1994, at 46 (internal quotation marks omitted).

<sup>164</sup> Arizona, 104 F.3d at 1096; California, 104 F.3d at 1091; Chiles, 69 F.3d at 1097; Texas, 106 F.3d at 664; New Jersey, 91 F.3d at 469; Padavan, 82 F.3d at 27.

<sup>165</sup> Chiles v. United States, 874 F. Supp. 1334, 1335, 1344 (S.D. Fla. 1994).

<sup>166</sup> *Id.* at 1344.

policymaking. The House in Virginia passed a resolution (it failed to pass the Senate) to request that the state study the cost of providing services to undocumented immigrants in the state and evaluate the continuation of these services given diminishing federal funding for them.<sup>167</sup> Another failed resolution in Virginia directed the Attorney General to join in the legal action and sue the federal government over immigrant services reimbursement.<sup>168</sup>

The California legislature, by far the most assertive in this domain at the time, focused its fire on the federal government, introducing and enacting resolutions that urged Washington to “carry out existing federal law, including formal as well as implied commitments” by providing additional funding for immigrant social services and education.<sup>169</sup> According to California lawmakers, “since documented and undocumented immigrants . . . enter our state and country as a result of national policy decisions and federal action, and since judicial decisions mandate the provision of service to immigrants regardless of status, the federal government clearly has a responsibility to assist states and local communities in the provision of these mandated services . . . .”<sup>170</sup> Further emphasizing the State’s role as a victim of federal negligence, the resolution noted that California has provided immigrant services “[a]cting in good faith under the law” and has done so “despite the failure of the federal government to reimburse [the State] . . . as promised.”<sup>171</sup>

California Gov. Pete Wilson, a chief proponent of Proposition 187, never shied away from the immigration issue. In a 1996 speech, Gov. Wilson echoed the concerns of his state’s legislators in complaining that “the Clinton Administration has continually refused to comply with a Federal law requiring that the Federal Government take custody of criminal alien felons or reimburse the states for the costs of incarcerating them.”<sup>172</sup> According to Wilson, the reason why California joined other states in the lawsuits against the federal government and the reason for Proposition 187 was that,

California has had enough, and it’s time to stop illegal immigration . . . . The remedy sought is essential to the survival of the state of California . . . . If the federal government were held accountable, they would quickly discover that the cost of ignoring the real and explosively growing problem of illegal immigration is far greater than the cost of fixing it . . . . Congress must be forced to bear the fiscal consequences for its immigration policy . . . . If they feel the

---

<sup>167</sup> H.R.J. Res. 488, 1995 Sess. (Va. 1995).

<sup>168</sup> H.R.J. Res. 638, 1995 Sess. (Va. 1995).

<sup>169</sup> S.J. Res. 5, 1993 Leg. (Cal. 1993).

<sup>170</sup> Assemb. J.R. 8, 1993 Leg. (Cal. 1993).

<sup>171</sup> *Id.*

<sup>172</sup> Steven A. Holmes, *California Governor Sues U.S. for Cost of Imprisoning Aliens*, N.Y. TIMES, Mar. 6, 1996, at A14.

(financial) pinch in the federal budget, then and only then will they have an incentive to fix this policy that simply doesn't work.<sup>173</sup>

Viewed from the federalism perspective, Proposition 187 was a last resort effort by a state to force the immigration issue on the federal agenda. Accordingly, Proposition 187 was not billed as a states' rights issue but rather as an initial step in a war to be fought at the federal level. Immigration was not portrayed as a social problem but rather as a national security concern—the domain of Washington not state capitals.

Proposition 187 was designed to exclude undocumented immigrants from all state-provided services, from healthcare and welfare to public education.<sup>174</sup> Recipients of public benefits (with the exception of emergency healthcare) were required to prove their legal immigration status prior to receiving a service and service providers were expected to report all suspected immigration violators.<sup>175</sup> Not only did the Proposition prohibit the “sanctuary city” practice that had emerged in the mid-1980s in several urban centers, but also, foreshadowing the 287(g) “Memorandum of Understanding” (MOU) process, it mandated that law enforcement officers investigate the immigration status of any detainee suspected of undocumented entry into the United States and report all such undocumented entrants to federal authorities.<sup>176</sup>

The official ballot labeled the initiative “the first giant stride in ultimately ending the ILLEGAL ALIEN invasion.”<sup>177</sup> Linda Hayes, the Southern California Media Director for Proposition 187, focused specifically on the threat to the country's territorial integrity warning that in the future “a Mexico-controlled California could vote to establish Spanish as the sole language of California . . . and there could be a state-wide vote to leave the Union and annex California to Mexico.”<sup>178</sup> The Proposition, which was written by former Reagan-era INS officials Alan Nelson and Harold Ezell, was supported and financed by Republican supporters and especially Republican Assemblyman Dick Mountjoy.<sup>179</sup> As early as 1986, Ezell, then West Coast INS Commissioner, declared that “his mission is to stop the ‘invasion’ of illegal aliens entering the United

---

<sup>173</sup> Thomas Farragher, *Wilson Sues U.S. Over Illegal Immigrants High Costs: Wants \$2 Billion as Reimbursement for Escalating Bills*, SAN JOSE MERCURY NEWS, Apr. 29, 1994, at 1A.

<sup>174</sup> Proposition 187, 1994 Cal. Stat. A-317, *invalidated* by *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 775 (C.D. Cal. 1995).

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> Stanley Mailman, *California's Proposition 187 and Its Lessons*, N.Y. L.J. Jan. 3, 1995 at 3.

<sup>178</sup> Linda R. Hayes, Letter to the Editor, *California's Prop. 187*, N.Y. TIMES, Oct. 15, 1994, at 118.

<sup>179</sup> Paul Feldman, *Hospitals Not Prepared to Implement Prop. 187*, L.A. TIMES, Oct. 31, 1994 at A1; Rick Oltman, *'Save Our State': Dick Mountjoy and California's Proposition 187*, 22 SOC. CONT., Winter 2011-2012, at 8.

States from Mexico and other countries.”<sup>180</sup> Proposition 187 was aimed at accomplishing exactly that. A jubilant Governor Wilson, on the day of the election, noted that “[t]his issue was never about race or racism. To the contrary, Californians of every race and color and creed voted not just to send a message, but they voted for fairness and the rule of law.”<sup>181</sup> In the governor’s view, non-emergency healthcare and education were not basic human rights to which immigrants were entitled. Undocumented immigrants were to be protected from exploitation—which the governor refrained from ever defining—but not offered public services.<sup>182</sup>

Ultimately, Proposition 187 was challenged in court and was declared unconstitutional.<sup>183</sup> The election to the governorship of Democrat Gray Davis, ensured the death of the initiative. In spite of pressure to have the U.S. Supreme Court resolve the issue, Gov. Davis did not file further appeals, effectively muting the issue.<sup>184</sup> The lawsuits, resolutions, and test cases initiated by several states in the 1990s did not produce significant immigration reforms,<sup>185</sup> but both the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)<sup>186</sup> and the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA)<sup>187</sup>—each enacted in 1996—were informed by the grievances raised by the largest immigrant-receiving states and ultimately authorized a larger role for state and local officials in regulating immigrants and immigration (IIRIRA by encouraging collaborative enforcement and PRWORA by giving states discretion over noncitizen access to welfare programs and benefit levels).<sup>188</sup>

#### IV. STATES AS INVITED IMMIGRATION ENFORCERS: INTERGOVERNMENTAL COLLABORATION

The state and federal governments have long collaborated in the enforcement of the nation’s immigration laws. When Congress reluctantly adopted legislation in 1882 that nationalized state policies

<sup>180</sup> Marcia Chambers, *Immigration Chief on West Coast Pressing Fight on Illegal ‘Invasion’*, N.Y. TIMES, Dec. 4, 1986, at B17.

<sup>181</sup> *Illegal Aliens Barred from Public Services*, SEATTLE POST-INTELLIGENCER, Nov. 8, 1994, at A16.

<sup>182</sup> Ed Mendel, *Wilson Denies Any Immigrant Bashing; Tells Governors His Actions Aren’t Racist*, SAN DIEGO UNION-TRIBUNE, May 28, 1994, at A1.

<sup>183</sup> League of United Latin Am. Citizens v. Wilson, 908 F. Supp. 755, 774 (C.D. Cal. 1995), *aff’d on reconsideration in part*, 997 F. Supp. 1244 (C.D. Cal. 1997).

<sup>184</sup> TICHENOR, *supra* note 3, at 287; Nicole E. Lucy, *Mediation of Proposition 187: Creative Solution to an Old Problem? Or Quiet Death for Initiatives?*, 1 PEPP. DISP. RESOL. L. J. 123, 147–49, 151–52 (2001).

<sup>185</sup> TICHENOR, *supra* note 3, at 277, 274–275.

<sup>186</sup> Pub. L. No. 104-208, 110 Stat. 3009-546.

<sup>187</sup> Pub. L. No. 104-193, 110 Stat. 2105 (1996).

<sup>188</sup> IIRIRA § 133, 110 Stat. at 3009-563; PRWORA § 402, 110 Stat. 2114; TICHENOR, *supra* note 3, at 278.

governing the reception and assistance of immigrants, it lacked the administrative capacities to enforce these new regulatory policies.<sup>189</sup> Congress resolved this dilemma by authorizing the existing coastal state immigration boards, commissioners, and agencies to enforce federal legislation with direction from U.S. Treasury officials.<sup>190</sup> In short, the 1882 law placed the national imprimatur on well-established state regulations and restored the authority of state and local officials to implement these policies. Labor unions later won federal exclusions on contract labor,<sup>191</sup> and the Treasury Department assigned specially-trained federal contract labor inspectors to Castle Garden and other immigration depots.<sup>192</sup> But these federal inspectors supplemented, rather than replaced, state examiners who were the backbone of the country's early administrative machinery enforcing immigration laws.<sup>193</sup> This mixed federal-state system endured until a national Bureau of Immigration was finally established in 1891.<sup>194</sup> The first decade of national immigration enforcement was largely a state-run enterprise, albeit one that was funded by federal contracts.<sup>195</sup> In the decades that followed, federal immigration officers collaborated with state and local law enforcement officials in their work.<sup>196</sup> When President Dwight Eisenhower authorized "Operation Wetback" in 1954, for example, the Immigration and Naturalization Service collaborated with state and local officers in a dramatic, military-style campaign that seized and removed hundreds of thousands of undocumented Latino immigrants.<sup>197</sup> But to capture intergovernmental collaboration in the enforcement of immigration law, we would like to focus on cooperative efforts initiated by IIRIRA in 1996.

The division of authority in terms of who enforces civil immigration law became quite blurry after the enactment of federal immigration reforms in 1996. In particular, IIRIRA included provisions that allowed greater collaboration between federal and sub-national authorities in immigration enforcement.<sup>198</sup> IIRIRA introduced section 287(g) of the Immigration and Nationality Act (INA), which enables states to enter into voluntary agreements of cooperation with the federal government for the purpose of bestowing on state and local police the authority to

<sup>189</sup> See Immigration Act of 1882, ch. 376, 22 Stat. 214; TICHENOR, *supra* note 3, at 69.

<sup>190</sup> Immigration Act of 1882 § 2, 22 Stat. at 214; TICHENOR, *supra* note 3, at 69.

<sup>191</sup> TICHENOR, *supra* note 3, at 69–70.

<sup>192</sup> PITKIN, *supra* note 62, at 9, 10.

<sup>193</sup> *Id.* at 10.

<sup>194</sup> Act of March 3, 1891, ch. 551, § 7, 26 Stat. 1084, 1085; TICHENOR, *supra* note 3, at 70.

<sup>195</sup> See TICHENOR, *supra* note 3, at 69.

<sup>196</sup> See PITKIN, *supra* note 62, at 14.

<sup>197</sup> KITTY CALAVITA, *INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION, AND THE I.N.S.* 53–54 (1992); TICHENOR, *supra* note 3, at 201–02.

<sup>198</sup> Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, sec. 133, § 287, 110 Stat. 3009-546, 3009-563 (codified as amended at 8 U.S.C. § 1357 (2006)).

enforce national immigration law.<sup>199</sup> At the time, the U.S. Department of Justice (DOJ), through its Office of Legal Counsel (OLC), continued to argue that this division of authority in immigration enforcement had not changed in any way.<sup>200</sup> The events of 9/11, however, “were seen by John Ashcroft’s DOJ as license to further involve states and localities in the enforcement of *both* criminal and civil immigration law.”<sup>201</sup> In a 2002 opinion, the U.S. Department of Justice reversed its previous stance on the issue by concluding that state and local law enforcement have an “inherent authority” to enforce civil and criminal immigration statutes.<sup>202</sup> This position was further promoted by the Bush White House. Days after the Attorney General’s pronouncement, White House General Counsel Alberto Gonzales, in a letter addressed to the Migration Policy Institute, stated that “state and local police have inherent authority to arrest and detain persons who are in violation of immigration laws and whose names have been placed in the National Crime Information Center (NCIC).”<sup>203</sup>

The new position was enthusiastically received by a number of border hawks in Congress who sought to further facilitate the enlisting of sub-national law enforcement in the immigration arena. In July 2003, Rep. Norwood (a Republican from Georgia) introduced the Clear Law Enforcement for Criminal Alien Removal Act of 2003 (CLEAR Act) and in November of the same year the Senate followed suit with the Homeland Security Enhancement Act of 2003 (HSEA).<sup>204</sup> The proposed

---

<sup>199</sup> INA § 287(g), 8 U.S.C. 1357(g).

<sup>200</sup> See Assistance by State and Local Police in Apprehending Illegal Aliens, 20 Op. O.L.C. 26, 27 (1996).

<sup>201</sup> ALEXANDRA FILINDRA & DANIEL J. TICHENOR, BEYOND MYTHS OF FEDERAL EXCLUSIVITY: REGULATING IMMIGRATION AND NONCITIZENS IN THE STATES 17, available at <http://convention2.allacademic.com/one/apsa/apsa08/> (search for “Filindra” in author field, then follow “PDF” hyperlink); see also NAT’L IMMIGRATION FORUM, BACKGROUND: IMMIGRATION LAW ENFORCEMENT BY STATE AND LOCAL POLICE 2–3, 5 (rev. Aug. 2007), available at <http://www.policyarchive.org/handle/10207/bitstreams/11652.pdf>. In the aftermath of September 11, the DOJ also initiated an “interview” program of Muslim and Arab males in the country. See FILINDRA & TICHENOR, *supra*, at 17 n.11 (“The goal of the program was to conduct ‘voluntary’ interviews with 19,000 male foreign nationals residing at the time in the United States. The DOJ requested the help of state and local police in this effort, but several big city police departments such as San Francisco, CA and Portland, OR refused to participate in such a[] sweeping program that would subject scores of people not suspected of any crime to police investigation.”).

<sup>202</sup> Memorandum from Jay S. Bybee, Asst. Att’y Gen., Office of Legal Counsel, U.S. Dep’t of Justice to the Att’y Gen. (Apr. 3, 2002), available at <http://www.aclu.org/FilesPDFs/ACF27DA.pdf>; Nat’l Immigration Law Center, *Alabama State Troopers Said to Receive “Clear Authority” in Civil Immigration Enforcement*, IMMIGRANTS’ RIGHTS UPDATE, Nov. 2003, at 5–6, available at <http://www.nilc.org/document.html?id=661>.

<sup>203</sup> Letter from Alberto R. Gonzales, Counsel to U.S. President, to Demetrios G. Papademetriou, President, Migration Policy Inst. (June 24, 2002), available at <http://www.migrationpolicy.org/files/whitehouse.pdf> (emphasis added).

<sup>204</sup> H.R. 2671, 108th Cong. (2003); S. 1906, 108th Cong. (2003).

legislation (which was unsuccessfully re-introduced in 2005)<sup>205</sup> sought to tie federal funding to state and local law enforcement participation in immigration law enforcement.<sup>206</sup> Senator Jeff Sessions (a Republican from Alabama) was among the most vocal proponents of the new proposal, arguing that federal immigration enforcement authorities are outnumbered 5,000 to 1 by undocumented immigrants.<sup>207</sup> According to the Senator, this situation represented a threat to the nation's security as "3,000 of the 'alien absconders' within our borders are from one of the countries that the State Department has designated to be a 'state sponsor of terrorism.'"<sup>208</sup> Similar bills have been introduced in March 2008 by conservative Republican legislators in Congress. The Effective Immigration Enforcement Partnerships Act of 2008, introduced by Senators Chambliss and Isakson, is promoted as the solution to the illegal immigration crisis through extensive state and local cooperation in immigration enforcement matters.<sup>209</sup> The bill is part of a series of 15 Republican legislative initiatives aimed at enhancing border security, improving enforcement of labor-related immigration laws, and using penal and control mechanisms to resolve the immigration problems of the country.<sup>210</sup>

Using language first suggested by the legal scholar and immigration restriction activist Kris Kobach,<sup>211</sup> Senators Chambliss and Isakson suggested that state and local police involvement in immigration law enforcement would represent a "force multiplier" for federal ICE authorities entrusted with immigration enforcement.<sup>212</sup> Local authorities are exceedingly seen as the many "ears and eyes" of federal authorities who are familiar with communities and can identify and apprehend alien criminals more easily and efficiently than federal authorities.<sup>213</sup>

In spite of the existence of 287(g) on the books since 1996, it was not the federal government, but rather a local government that made the first move to have its police trained on immigration enforcement. In 1998, Salt Lake City asked the INS to deputize 20 local law enforcement agents and train them in identifying and arresting undocumented

<sup>205</sup> S. 1362, 109th Cong. (2005).

<sup>206</sup> H.R. 2671 §§ 101-02; S. 1906 §§ 101-02.

<sup>207</sup> 151 Cong. Rec. 15,224 (2005) (statement of Sen. Jeff Sessions).

<sup>208</sup> *Id.*

<sup>209</sup> S. 2717, 110th Cong. (2008); Press Release, Office of Senator Johnny Isakson, Chambliss, Isakson Introduce Legislation to Help Local and State Law Enforcement Combat Illegal Immigration (Mar. 5, 2008), available at <http://isakson.senate.gov/press/2008/030508immigration.htm>.

<sup>210</sup> Press Release, *supra* note 209.

<sup>211</sup> See Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179 (2005).

<sup>212</sup> Press Release, *supra* note 209.

<sup>213</sup> *Id.*; LISA M. SEGHELLI ET AL., CONG. RESEARCH SERV., ENFORCING IMMIGRATION LAW: THE ROLE OF STATE AND LOCAL LAW ENFORCEMENT 21-22 (2009).

immigrants.<sup>214</sup> The city viewed this as a new initiative to fight crime, but strong resistance from local Latino advocates and the ACLU forced the local authorities to abandon the plan.<sup>215</sup> The first state to sign an MOU with the U.S. Department of Justice was Florida.<sup>216</sup> The state developed a pilot program in collaboration with the federal authorities.<sup>217</sup> Although initially Florida officials envisioned putting all 40,000 state and local police officers in the service of immigration law enforcement, the plan was reduced in scope dramatically.<sup>218</sup> The final agreement provided for 35 police officers, sheriff's deputies and Florida Department of Law Enforcement agents to be trained in immigration enforcement. These individuals were then to be part of various state and local task forces with a focus on terrorism.<sup>219</sup>

Collaboration between the federal government and states really accelerated between 2002 and 2008. After 2002, ICE partnered with police forces in a number of states and localities through the provisions of 287(g).<sup>220</sup> Alabama signed an MOU in 2003, the second state to do so.<sup>221</sup> One of the main driving forces behind this initiative for Alabama was the state's desire to combat driver's license fraud, a major problem in that jurisdiction.<sup>222</sup> Colorado and Georgia became partners in 2007.<sup>223</sup> Missouri Governor Blunt ordered all law enforcement agencies in his state to prepare for 287(g) training and deputization, which will allow state police to enforce federal immigration law.<sup>224</sup> The Governor made funding available for police organizations willing to participate in the program.<sup>225</sup> Arizona—another partner—has plans to train more than 70 officers, both state troopers and corrections officers.

<sup>214</sup> Mary Beth Sheridan, *Plan to Have Police in Florida Help INS Stir Rights Debate; Activists Say Immigrants' Trust at Issue*, WASH. POST, Mar. 6, 2002, at A17.

<sup>215</sup> *Id.*; Letter from Stephen C. Clark, Legal Dir., Am. Civil Liberties Union of Utah, to M. Bryce Jolley, Chair, Salt Lake City Council (Aug. 28, 1998) *available at* <http://www.acluutah.org/ltr082898.htm>.

<sup>216</sup> Sheridan, *supra* note 214; Memorandum of Understanding Between U.S. Dep't of Justice and State of Fl. 1, (July 2, 2002), *available at* <http://www.aildownloads.org/advo/FloridaDeptofLawEnforcementMOU.pdf>.

<sup>217</sup> See Memorandum, *supra* note 216, at 1.

<sup>218</sup> Sheridan, *supra* note 214.

<sup>219</sup> *Id.*

<sup>220</sup> Daniel C. Vock, *Police Join Feds to Tackle Immigration*, STATELINE (Nov. 27, 2007), <http://www.stateline.org/live/details/story?contentId=259949>; see also Angela M. Banks, *The Curious Relationship Between "Self-Deportation" Policies and Naturalization Rates* 16 LEWIS & CLARK L. REV. 1149, 1174–76 (2012).

<sup>221</sup> Vock, *supra* note 220.

<sup>222</sup> See *id.*

<sup>223</sup> *Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, ICE, <http://www.ice.gov/news/library/factsheets/287g.htm>.

<sup>224</sup> *Missouri Initiatives to Enforce Laws Against Illegal Immigrants*, 84 INTERPRETER RELEASES 2036, 2036 (2007).

<sup>225</sup> See HUMAN RIGHTS TASK FORCE, MO. ASS'N FOR SOC. WELFARE & MO. IMMIGRANT & REFUGEE ADVOCATES, ANALYSIS OF NEW MISSOURI IMMIGRATION LEGISLATION 2 (2008).

Republican Governor Romney of Massachusetts signed an MOU in late 2006,<sup>226</sup> days before leaving office, but his successor, Democrat Deval Patrick rescinded it.<sup>227</sup> Other states have stopped short of participating in the program, but have developed their own rules for how and when local police can call in the ICE cavalry.<sup>228</sup> New Jersey Attorney General Anne Milgram established a uniform rule for when federal assistance on immigration issues is desirable and welcome.<sup>229</sup>

A number of local authorities, ranging from Los Angeles County's Sheriff's Department, to Tulsa County Sheriff's Department (Oklahoma) and from Herdon Police Department (Virginia) to Rogers Police Department (Arkansas) have also signed similar agreements.<sup>230</sup> By late 2007, a total of 34 state and local authorities had joined the 287(g) club while an additional 77 had filed applications.<sup>231</sup> Half of the states have chosen to train officers within their corrections system while others have used it for state troopers and patrols.<sup>232</sup> In total, nearly 600 state and local police officers have been trained to enforce national immigration law.<sup>233</sup>

The 287(g) agreements have attracted fire from all directions: federal, state and local officials, as well as immigrant advocates, have raised doubts about the constitutionality, appropriateness, and likely effectiveness of the program.<sup>234</sup> Former Immigration and Naturalization Service (INS) Commissioner Doris Meissner went on the record as a critic.<sup>235</sup> Meissner stated that her Agency had strong reservations about deputizing local police with no substantive training in immigration law and enforcement.<sup>236</sup> Local activists in many locations that have implemented 287(g) have collected evidence of racial profiling practices by the police.<sup>237</sup> In one highly publicized case, 58% of all traffic stops and

<sup>226</sup> *Governor Romney, Immigration and Customs Enforcement Sign Immigration Enforcement Agreement*, U.S. FED. NEWS, Dec. 13, 2006, available at 2006 WLNR 21803854, at \*1.

<sup>227</sup> John Gramlich, *Romney's Record as Governor*, CQ WKLY., Aug. 25, 2012, available at 2012 WLNR 18738774, at \*2.

<sup>228</sup> See Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373, 1374–75 (2006).

<sup>229</sup> OFFICE OF THE ATTORNEY GEN., N.J. DEP'T OF LAW AND PUB. SAFETY, LAW ENFORCEMENT DIRECTIVE NO. 2007-3 (2007).

<sup>230</sup> *Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, *supra* note 223.

<sup>231</sup> Vock, *supra* note 220.

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*; Eleanor Stables, *State, Local Police Slowly Warming to Immigration Enforcement*, CQ HOMELAND SECURITY, Nov. 7, 2007, available at 2007 WLNR 22372706.

<sup>234</sup> *E.g.*, Vock, *supra* note 220.

<sup>235</sup> Sheridan, *supra* note 214.

<sup>236</sup> *Id.*

<sup>237</sup> Vock, *supra* note 220; see also Press Release, Rights Working Grp., Rights Groups Say New 287(g) Program in TN and SC to Lead to Bias (Mar. 21, 2012), available at <http://www.rightsworkinggroup.org/content/rights-groups-say-new-287g-program-tn-and-sc-lead-bias>.

searches made by an Alabama police officer trained by ICE targeted Latinos, even though Hispanics represent less than 2% of the state's population.<sup>238</sup> In 1998, the ACLU noted complaints from Arizona where the INS and the Chandler Police Department conducted joint operations.<sup>239</sup> A large number of local residents were infuriated because they were stopped by the police "for no other apparent reason than their skin color or Mexican appearance or use of the Spanish language."<sup>240</sup>

## V. CONCLUSION: *ARIZONA V. UNITED STATES* AND THE DYNAMICS OF IMMIGRATION FEDERALISM

Immigration control has traditionally been considered the sole responsibility of the federal government. For generations after the Supreme Court definitively prohibited states and localities in 1876 from governing the admission and removal of newcomers, the power of the federal government to regulate immigration has been understood in almost every circumstance to be exclusive and indivisible. As Gabriel Chin and Marc Miller recently described the consensus: "No one denies that Congress and the federal executive have exclusive authority over the substance and procedure of the admission, exclusion, and removal of noncitizens, documented and undocumented."<sup>241</sup> At the same time, however, state and local efforts to influence immigration have flourished for more than a century alongside this legal reality. As we have seen, at the heart of *Arizona v. United States* and similar cases are long-standing patterns of states acting as innovators, combatants, and partners with the federal government in national immigration policymaking.

*Arizona v. United States* is both a product and reflection of the dynamics of American immigration federalism. As we found over time, when the federal government has been too removed from the day-to-day demands of new immigration or too reluctant or gridlocked to take action, states often have sought to fill the policy void. In this vein, Arizona is one of many states in recent years to take action aimed at controlling immigration generally and counteracting unauthorized immigration in particular. Recent data collected by the National Conference of State Legislatures reveals a dramatic expansion of state legislative activism on immigration issues in recent years.

---

<sup>238</sup> Vock, *supra* note 220.

<sup>239</sup> Letter from Stephen C. Clark to M. Bryce Jolley, *supra* note 215.

<sup>240</sup> *Id.* (quoting OFFICE OF ATTORNEY GEN. GRANT WOODS, STATE OF ARIZ., RESULTS OF THE CHANDLER SURVEY 31 (1997)).

<sup>241</sup> Chin & Miller, *supra* note 34, at 252.

Year	Introduced	Passed Legislatures	Vetoed	Enacted	Resolutions	Total Laws & Resolutions
2005	300	45	6	39	0	39
2006	570	90	6	84	12	96
2007	1,562	252	12	240	50	290
2008	1,305	209	3	206	64	270
2009	1,500	373	20	222	131	353
2010	1,400	356	10	208	138	346
2011	1,607	318	15	197	109	306

We also have examined intergovernmental conflicts as a key dynamic of immigration federalism, with states and localities pressing hard when Congress and the White House have failed to address perceived immigration problems. As the battle over S.B. 1070 vividly illustrates, Arizona is to contemporary immigration politics what California was in the 1990s: an agent of grassroots opposition to new immigration in open combat with the federal government. Finally, we have found that *the federal government* in fact has played a key role in actively enlisting the states to help in efforts to control immigration and to regulate newcomers. If in the past the federal government relied on the administrative capacities of state immigration boards, commissions, and agencies to implement federal immigration policies, the survival of S.B. 1070's controversial Section 2(B) relied heavily on the fact that its requirement that Arizona police officers verify an individual's legal immigration status was already something that Congress has encouraged state and local officials to do. The extent of state activism in this field reflects an ebb and flow over time, but the presence of states among the cast of characters influencing the formation and outcomes of U.S. immigration and immigrant policies is unlikely to change.

Undaunted by the controversy that swirled around S.B. 1070, other states followed suit with legislation requiring police to check the immigration status of criminal suspects, compelling businesses to check the legal status of workers using a federal system called E-verify, and forcing applicants for public benefits to verify eligibility with new documentation of lawful presence.<sup>243</sup> In Alabama, for instance, a state where the undocumented immigrant population grew fivefold to roughly

<sup>242</sup> NAT'L CONFERENCE OF STATE LEGISLATURES, 2012 IMMIGRATION-RELATED LAWS AND RESOLUTIONS IN THE STATES 2 (2012), available at <http://www.ncsl.org/Portals/1/Documents/immig/2012ImmigrationReportJuly.pdf>.

<sup>243</sup> See Brooke Meyer, *2011 State Laws Addressing E-Verify*, NAT'L CONFERENCE OF STATE LEGISLATURES (Nov. 23, 2011), <http://www.ncsl.org/issues-research/immig/2011-state-laws-addressing-e-verify.aspx>; *State Omnibus Immigration Legislation and Legal Challenges*, NAT'L CONFERENCE OF STATE LEGISLATURES (Aug. 27, 2012), <http://www.ncsl.org/issues-research/immig/omnibus-immigration-legislation.aspx>.

120,000 in ten years, Republican Governor Robert Bentley hailed new legislation in 2011 as the “strongest” and “toughest” in the nation.<sup>244</sup> Along with familiar law enforcement, employment, and public benefits provisions, the Alabama law went further than most in mandating schools to determine the legal status of students and making it a crime to knowingly rent or give a ride to an undocumented immigrant.<sup>245</sup> States like Georgia and South Carolina also have enacted laws that are similar to Section 2(B) in key respects, raising the prospect of state and local officers engaging in immigration enforcement on a wider and more regular basis.<sup>246</sup>

While restrictive laws in states like Arizona and Alabama continue to steal most of the headlines, numerous other states have adopted very different approaches. A dozen states offer tuition breaks to undocumented immigrants to attend public colleges and universities, including a California law providing reduced university tuition to graduates of the state’s high schools that withstood a challenge, which found its way to the U.S. Supreme Court.<sup>247</sup> From New York to California, state lawmakers have passed bills aimed at helping legal and undocumented immigrants in housing, health, employment, education, and other areas of integration.<sup>248</sup>

In Utah, a bipartisan coalition of government, business, religious, and civic leaders drafted a “Compact” on immigration reform endorsing a balance of federal solutions, effective law enforcement, protection of families, recognition of immigrants as valuable workers and taxpayers, and “humane” treatment of immigrants. In the winter of 2011, Utah legislators passed a package of bills for a temporary worker program, law enforcement, public benefits, and immigrant services.<sup>249</sup>

Meanwhile, cities and towns across the country have joined a “new sanctuary movement” that refuses to cooperate with federal efforts to identify and remove undocumented immigrants.<sup>250</sup> In response, restriction-minded members of Congress, such as Representative. Steve

<sup>244</sup> *Alabama Illegal Immigration Law Tougher Than Arizona’s*, FOX NEWS LATINO (June 10, 2011), <http://latino.foxnews.com/latino/politics/2011/06/10/alabama-illegal-immigration-law-tougher-than-arizonas/>.

<sup>245</sup> Beason-Hammon Alabama Taxpayer and Citizen Protection Act, 2011 Ala. Adv. Legis. Serv. 535 (LexisNexis).

<sup>246</sup> Illegal Immigration Reform and Enforcement Act of 2011, No. 252, 2011 Ga. Laws 794; An Illegal Immigration Reform Bill, No. 69, 2011 S.C. Acts 325.

<sup>247</sup> CAL. ED. CODE § 68130.5 (West 2012); *Martinez v. Regents of Univ. of Cal.*, 241 P.3d 855, 859 (Cal. 2010), *cert. denied*, 131 S. Ct. 2961 (2011); Marina Alexio et al., *Analysis of Policies Toward Applications from Undocumented Immigrant Students at Big Ten Schools*, 30 LAW & INEQ. 1, 3–4, 4 n.23 (2012).

<sup>248</sup> 2007 ENACTED LEGISLATION, *supra* note 111.

<sup>249</sup> Tichenor, *supra* note 104.

<sup>250</sup> Pamela Begaj, Comment, *An Analysis of Historical and Legal Sanctuary and a Cohesive Approach to the Current Movement*, 42 J. MARSHALL L. REV. 135, 145 (2008).

King (a Republican from Iowa), have demanded that all federal funds be cut to sanctuary cities.<sup>251</sup>

The Constitution is often vague in its division of powers between the national government and states. Immigration policy is not one of them. According to the Constitution, as the federal courts clarified in the nineteenth-century, the federal government is granted exclusive authority to control immigration. It is telling, then, that contemporary battle lines over immigration policy cut across federal and state politics. Immigration reform struggles today powerfully capture the clashes and interdependence of national and state governments over policy, as well as the striking diversity of states and localities in how they respond to new challenges. It also captures a familiar conflict between rival conceptions of federal-state relations. Like the Anti-Federalists before them, immigration restriction champions advancing tough enforcement measures from Arizona to Georgia view the federal government as too remote and insulated to understand the problems associated with porous borders. Their opponents, however, view national reform as essential for restoring coherence and respect for human rights in how the United States governs immigration.

Our chief concern in this Article has been to situate *Arizona v. United States* within a longer history of American immigration federalism, highlighting the intergovernmental dynamics that animate three forms of state activism. Even in a domain presumed to be the sole responsibility of the federal government, states and local governments have played a significant role in shaping and implementing immigration law and policy. In perhaps one of the least likely places, then, we find powerful evidence of the deep historical imprints and contemporary influence of American federalism.

---

<sup>251</sup> Mickey McCarter, *Democrats Find Plenty to Dislike in Final House DHS Appropriations Bill for FY 2013*, HOMELAND SEC. TODAY (June 11, 2012), <http://www.hstoday.us/industry-news/general/single-article/democrats-find-plenty-to-dislike-in-final-house-dhs-appropriations-bill-for-fy-2013/5c2b80ad16fbd2361b3d82b0bb8497ed.html>.