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Sanctuary Values

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1 Introduction

"Sanctuary" policies – policies that seek to limit the participation of local law enforcement in the immigration enforcement project – have been enacted around the United States in four major waves: first, in the 1980s, responding to perceived injustice in the treatment of migrants from Central America. Second, in the late 1990s and more intensely after 9/11, bucking increased pressure on localities to participate in immigration enforcement. Third, from 2008 to 2014, in disapproving "Secure Communities" federal enforcement program. And, fourth, following the election of President Donald J. Trump, whose campaign explicitly targeted "sanctuary" jurisdictions and promised to dramatically increase immigration enforcement both at the border and in the interior of the United States.[1]

Even this brief recounting of the recent history of "sanctuary" shows that sanctuary policies can be viewed on an abstract level as the state and local responses to an increase or fear of increase in federal immigration enforcement policy. However, in the legal arena, mainly with respect to federal litigation in courts, lawyers, and judges have framed the question of sanctuary as one regarding our federalist system, one in which state and federal governments struggle over the power to regulate or protect noncitizens. This formalistic "authority" framing obscures the motivating values and policy reasons why states and localities want to prevent increases in immigration enforcement in their communities. On a more pragmatic level, the rationales used to justify sanctuary by local policy makers and advocates have widely varied, with motivations that range from a concern over inclusion and racial equity concerns, to a desire to reduce the harm caused by increased enforcement that separates families and the harm

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[1] For a more detailed account of what constitutes "sanctuary policies," see Lasch, et al. "Understanding Sanctuary Cities."

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that comes from detention and deportation. The formalistic authority arguments brought in court ignores these important concerns and creates a stilted and artificial framework that invites misinterpretation and abuse, without ever allowing a vigorous and crucial discussion over questions of community.

Kevin Johnson and others have observed that in the United States, litigation over state involvement in immigration enforcement tends to submerge salient civil rights issues beneath dry, technical arguments about preemption and federal supremacy. One could add the Tenth Amendment anticommandeering doctrine, the state-law authority of county sheriffs, and the doctrine of separation of legislative and executive power (in particular when it comes to imposing conditions on federal funding streams) to the list of doctrinal arenas in which the importance of racial and civil justice is ignored in favor of formalistic authority doctrines.

Yet, the fourth wave of sanctuary – the movement following the election of Donald J. Trump to the Presidency, and continuing into the Biden presidency – brings a promise of a more relevant and coherent discussion of communal identity and values. This promise is further strengthened by the rhetoric of antidiscrimination and equality of advocates and politicians, which in turn is sharpened by the transparency of the Trump administration's nativist and racist agenda. This promise, however, fades as long as litigation on sanctuary continues to be centered on the rarified air of legal doctrines that exclusively discuss authority and sovereignty. The very values motivating and undergirding the sanctuary movement, such as identity, equity, and harm reduction, will continue to remain hidden and unexplored if lawyers and judges continue to frame questions around sanctuary policies as one of authority rather than of community. Moreover, not only would the core questions of sanctuary remain hidden, but the use of formalism and authority legal doctrines would create a false equivalency allowing those who oppose sanctuary an abundance of tools to create policies of exclusion and harm. One example is the claimed equivalency of Texas's SB4 (requiring local law enforcement to comply with immigration detainers) and California's SB54 (forbidding such compliance).[2] When questions center on which system of government – whether it be state, local, or federal can make immigration policies – the underlying and often motivating questions about sanctuary policies are lost.

[2] Ma, "California Divided: The Restrictions and Vulnerabilities in Implementing SB 54," pp. 141, 143–145.

This chapter sets out to explore how more normatively laden doctrines from constitutional law can be brought to bear on the legal issues pertaining to sanctuary. Even when structural legal doctrines are relevant, they nonetheless should be understood as situated in a larger framework permeated by the very values that sanctuary proponents seek to activate.

This chapter proceeds in four parts. Part I begins with a description of some of the recent "sanctuary" battles and the legal theories around which those battles have been framed, exposing the doctrinal framing as largely formalistic and devoid of the values that motivated the policies from the start. Part II lays out the difference between a structural or "authority and power" approach used in such litigation from a communal approach that centers on questions of identity, equity, and harm reduction. Part III provides possible reasons for the avoidance of discussing communal values that are the root of these policies and conflicts, and Part IV demonstrates why it is a problem. The chapter then concludes with a brief meditation on the broader implications of such an approach.

2 Power Struggles over "Sanctuary"

Many of the important legal contests over immigration policy generally in the United States have come, in the last decade or so, packaged as legal battles over authority. Many examples of this phenomenon have concerned interior, not border, enforcement. Mirroring this larger trend, litigation and debate over "sanctuary" or antisanctuary legislation or policies have arisen from varied sources. States and localities (most notoriously Arizona with its Senate Bill 1070) have claimed a role in the enforcement process, directing resources to apprehend suspected undocumented migrants, or hold suspected migrants for federal officials. Other localities who seek to create "sanctuary" have attempted to disentangle law enforcement from immigration enforcement and raised concerns over the practice of holding state and local prisoners beyond their release date pursuant to "detainers" issued by federal immigration officials.

In each of these instances, it will be seen, the axis of litigation was not policy itself or its goals or consequences but the authority to make policy. As a consequence, the legal doctrines deployed were focused entirely on structural or sovereignty concerns. The packaging of the litigation, to continue the metaphor begun in the preceding paragraph, obscured the contents of the package. This was in contrast to the political and public debate,

which focused much less on authority or power, but on questions of racial equity and community harm.[3]

2.1 Arizona's Senate Bill 1070: A Battle over Antisanctuary Measures Is Fought in Terms of Federal Supremacy and Preemption

The legal battle over Arizona's Senate Bill 1070 was a case in point, even as the proposed law was in fact an "anti-sanctuary" bill designed to involve local law enforcement into immigration enforcement. Senate Bill 1070 was one of several bills authored by immigration restrictionist groups in an attempt to force local and state involvement in immigration enforcement.[4] The law required Arizona law enforcement, normally tasked with policing and enforcing states to inquire into the immigration status of people they encountered, and it also created criminal sanctions based on immigration status that mirrored the federal system.[5] One focal point of attacks by the community and advocates on Arizona's law (and others like it) authorizing state-level immigration enforcement had been the risk of racial profiling. Asking local law enforcement to engage in immigration enforcement increases the risk that non-white community members would be subject to increased arrests and detention based solely on their race.

Racial profiling puts at risk several communal concerns. First, it risks alienating and separating members of a community and strikes at the heart of a community's identity. Second, the risk of racial profiling comes with it the attendant possibility of putting members of the community in harm's way, either through detentions and arrest by local authorities, or even deportations and family separation. Detention and deportations not only inflicted harm on those who were detained and deported, but often would result in harm to family members and the community as a whole.

Despite the risk associated with racial profiling, the Supreme Court's decision striking down the law followed the path predicted by Kevin Johnson and proposed by the US government attorneys and demonstrated

[3] Kaur, "US Immigration Policies toward Haitians Have Long Been Racist, Advocates Say"; Kamasaki, "US immigration Policy: A Classic, Unappreciated Example of Structural Racism"; Trump, "Presidential Announcement."

[4] Campbell, "The Road to 1070: How Arizona Became Ground Zero for the Immigrants' Rights Movement and the Continuing Struggle for Latino Civil Rights in America."

[5] See generally, Eagly, "Local Immigration Prosecution: A Study of Arizona Before SB 1070," p. 1749.

"how the current legal analysis of the constitutionality of the spate of state and local immigration measures often focuses on federal preemption and the Supremacy Clause, a relatively dry, if not altogether juiceless, body of law."[6]

Concerns over local law enforcement involvement with immigration enforcement was not limited to border states such as Arizona, or Texas, but ranged widely throughout the United States. The New Orleans police department, in response to a consent decree from the Department of Justice agreed not to use perceived or actual immigration status in taking law enforcement action and to not inquire into immigration status with victims of crime. Both of these provisions highlighted community concerns over equity – namely that immigrant community members should be able to access legal protections as any other member of the community, yet the police's ability to protect the community erodes when members of the community do not trust the police or law enforcement.[7]

2.2 Defunding Sanctuary Jurisdictions: A Battle over Antisanctuary Measures Is Fought in Terms of Separation of Powers, Spending Clause Doctrines, and the Tenth Amendment

The Trump administration continued to use the "authority" framework to attack cities and localities that attempted to enact sanctuary policies by threatening federal funding accusing the localities as deviating from a national policy on immigration.[8] The Trump administration "first with an executive order"[9] and then with Department of Justice actions that directly linked federal grant funding with cooperation in immigration enforcement and compliance with Section 1373, put localities and even states into the crosshairs.[10]

[6] Johnson, "Immigration and Civil Rights: State and Local Efforts to Regulate Immigration," p. 612; see also Heeren, "Persons Who Are Not the People: The Changing Rights of Immigrants in the United States," pp. 391, 400.

[7] Just as litigation obscured these communal values, a Congressional hearing by House Judiciary Chairman Bob Goodlatte attempted to subvert these concerns into one of authority, accusing the attempt to create a bias free police policy as a way of violating federal supremacy over immigration law.

[8] Lai and Lasch, "Crimmigration Resistance and the Case of Sanctuary City Defunding", pp. 553–556.

[9] Exec. Order No. 13,768, 82 Fed. Reg. 8799 at § 9(a) (January 25, 2017), www.gpo.gov/fdsys/pkg/FR-2017-01-30/pdf/2017-02102.pdf.

[10] Ibid., p. 557–563 (describing the administration's actions, and the litigation response, through the end of 2017).

Although the attack on localities and states over funding was replete with civil rights implications, those concerns did not come to the fore in court.[11] The local governments resisting the administration's antisanctuary efforts by and large eschewed substantive claims that would have, for example, surfaced the antidiscriminatory norms underlying their policies and the race-based nature of the administration's attack on them.[12] And the courts' holdings, nearly all of which rejected the administration's defunding measures, relied on legal doctrines that focused largely on the procedure for defunding and ignored the root of the controversy. The President's executive order was enjoined on the grounds that (1) the power to attach funding conditions belongs to Congress, not the executive branch, and the executive order therefore violated the separation of powers doctrine; (2) the executive order violated Spending Clause doctrine because it did not impose funding conditions unambiguously, attached conditions that were not "germane" to the funding at issue, and imposed conditions that attached to such a large amount of federal funding as to be coercive.[13] Later decisions invalidated the Attorney General's efforts to attach funding conditions to the same federal grants for the same reasons,[14] and the additional reason that compliance with Section 1373 could not be made a condition of federal funding because Section 1373 itself violated the anticommandeering doctrine rooted in the Tenth Amendment.[15]

2.3 Immigration Detainers: A Battle over Pro-sanctuary Measures Is Fought in Terms of the Tenth Amendment, Federal Supremacy and Preemption, and State-Law Authority

A final area demonstrating how sanctuary contests ignore communal concerns lies in the plethora of litigation spawned by the federal government's

[11] No less than the administration's Muslim ban and rescission of DACA, the sanctuary defunding measures could have been litigated as being fueled by unconstitutional animus. See, for example, Johnson, "Lessons about the Future of Immigration Law from the Rise and Fall of DACA," pp. 343–390.

[12] See Lai and Lasch, "Crimmigration Resistance and the Case of Sanctuary City Defunding," pp. 540–545 and n. 348.

[13] Order granting the County of Santa Clara's and the City and County of San Francisco's Motions to Enjoin Section 9(a) of Exec. Order 13,768, *County of Santa Clara* v. *Trump,* No. 17-cv-00574 (N.D. Cal. April 25, 2017).

[14] Cohen, "A Gun to Whose Head? Federalism, Localism, and the Spending Clause," pp. 430–435.

[15] *City of Chicago* v. *Sessions,* 321 F. Supp. 3d 855, 2018 WL 3608564 at *5–*11 (N.D. Ill. 2018) (relying on *Murphy* v. *National Collegiate Athletic Ass'n*, ––– U.S. ––––, 138 S.Ct. 1461, 200 L.Ed.2d 854 (2018) to find Section 1373 unconstitutional); *City of Philadelphia* v. *Sessions,* 309 F. Supp. 3d 289, 329–331 (E.D. Pa. 2018) (same).

increased use of detainers as an interior enforcement mechanism. Through detainers, immigration officials ask local law enforcement to prolong the detention of prisoners otherwise entitled to their release, to allow time for them to be taken into immigration custody. Early resistance to this program featured strong civil-rights-based critiques rooted in the concern that entangling local policing with immigration enforcement would contribute to racial profiling.[16] But litigation around the legality of detainer-based detention has largely been grounded in questions of authority: Does the federal government have the authority to require local officials to comply with detainers?[17] Do federal immigration officials have the authority to request such detentions?[18] Do state officials have authority to make what amount to civil immigration arrests?[19]

It is worth noting that these sanctuary controversies have involved conflicts between governments at the state, federal, and local levels and encompass all permutations of contested authority – not just generating conflicts between the federal and state governments[20] or between the federal and local governments (whether counties[21] or cities)[22] but also engendering conflicts between state and local governments.[23]

Lost in the much of the discussion was not only the substance of the Fourth Amendment whose requirement all governmental entities would be required to follow but also the underlying harms of the detainer practice, both for its propensity of racial bias and its tendency to cause increased detention and all of its attendant harms. The overall question of whether the increased use of detention and separation of people from their families or community was never addressed. While traditional concerns

[16] See generally, Lasch, "Rendition Resistance", pp. 154–163.

[17] *Galarza* v. *Szalczyk*, 745 F.3d 634 (3d Cir. 2014).

[18] *Moreno* v. *Napolitano*, 213 F. Supp. 3d 999 (N.D. Ill. 2016).

[19] *Santos* v. *Frederick County Bd. of Com'rs*, 725 F.3d 451 (4th Cir. 2013); *Lunn* v. *Commonwealth*, 477 Mass. 517, 78 N.E.3d 1143 (2017); *Cisneros* v. *Elder*, 490 P.3d 985 (Colo. App. 2020), as modified on denial of reh'g (17 December 2020), cert. granted in part sub nom. *Saul Cisneros* v. *Bill Elder*, in his Official Capacity as Sheriff of El Paso County, Colorado., 21SC6, 2021 WL 2188930 (Colo. 24 May 2021). One exception has been the focus of the Fourth Amendment and whether and how these detentions can pass the warrant and reasonable suspicion requirements. See Kagan, "What We Talk about When We Talk about Sanctuary Cities," p. 1140.

[20] *Arizona* v. *United States*, 567 U.S. 387, 132 S. Ct. 2492 (2012).

[21] For example, *Galarza*.

[22] For example, *City of Chicago*; *City of Philadelphia*.

[23] For example, *El Cenizo* (lawsuit brought by cities and counties to enjoin operation of Texas's Senate Bill 4, requiring localities to comply with federal immigration detainer requests).

over loss of liberty in litigation require the balancing of government interests against individual loss of liberty and its harms, none of that discussion surfaced in the litigation around detainers.

3 Differentiating between an Authority and Power Framing from a Communal Values Framing

Kevin Johnson has asked, "[A]t their most fundamental level, how can racial profiling in [immigration] enforcement, massive detentions of noncitizens, and record levels of deportations not implicate civil rights concerns?"[24] The answer to this rhetorical question, as we have seen, is that at every turn, civil rights concerns about *how* authority is exercised have been subordinated to formal doctrines pertaining to *who* may exercise authority.

The doctrines that have been deployed by litigants and courts in these sanctuary battles avoid discussion of the values motivating communities to put into place the sanctuary policies in the first place. The absence of discussion of communal values is made visible most dramatically when political actors shift in their allegiance to the formalistic power doctrine depending on the issue at stake. And nowhere has this been more obvious than in the shifting allegiances regarding whether authority should be centralized (and supported by doctrines like preemption) or localized (and supported by doctrines like anticommandeering under the Tenth Amendment).[25]

Former Attorney General Sessions, for example (like many Republicans), often threw his allegiance behind local control. For example, he has written that "[l]ocal control and local accountability are necessary for effective local policing. It is not the responsibility of the federal government to manage nonfederal law enforcement agencies."[26] Similarly, he has touted local authority when it comes to the subject of removing Confederate monuments.[27] These positions, of course, reflect

[24] Johnson, "Immigration and Civil Rights: State and Local Efforts to Regulate Immigration," pp. 635–636.

[25] Bulman-Pozen, "Preemption and Commandeering without Congress," pp. 2042–2043.

[26] Att'y General Jefferson B. Sessions III, Memorandum for Heads of Department Components and United States Attorneys, *Supporting Federal, State, Local and Tribal Law Enforcement* (March 31, 2017).

[27] Shabad, "Jeff Sessions Says Administration Won't Allow Extremist Groups to 'Obtain credibility'."

the classic Republican antifederal-government viewpoint. But when it comes to "sanctuary" policies, Sessions favors centralized federal authority, and characterizes local policymaking as "contrary to the rule of law."[28] As Richard Briffault has noted, a "particularly salient feature of the new preemption has been the reversal of the presumed association of liberals and Democrats with big government and conservatives and Republicans with local control."[29]

Such shifting visions of authority were observed by Democratic member of Congress Zoe Lofgren at the outset of the hearings concerning the transformation of New Orleans from "Crescent City" to "Sanctuary City." "It's ironic," Lofgren said, "that my republican colleagues today argue against local policies in favor of a top-down mandate from Washington."[30]

The only obvious consistency was whether or not the form of government supported increased immigration enforcement – when the federal government was "failing" to increase immigration enforcement, then local and state powers would be elevated, but when the federal government increased its focus on immigration enforcement, such as during President Trump's administration, local and state authorities must be diminished. The use of structural arguments merely as tools to forward a specific policy agenda only fuels cynicism and debases questions of sovereignty itself. When the question of sanctuary is reduced to a question of authority and power, there is little surprise that the debate then turns on whether a specific policy serves a political agenda, rather than on a doctrinal basis. For instance, during the Obama administration, those who favored more immigration enforcement viewed Arizona's policies as necessary in the wake of a federal government that failed to enforce immigration law, while during the Trump administration, any attempts by localities to prevent such enforcement were viewed as interference of a federal policy on immigration enforcement.

Additionally, the formalistic nature of the authority doctrine can be seen by examining the rules around the federalist doctrines. With respect to Tenth Amendment anticommandeering doctrine, for example, the simple rules of the doctrine are: (1) the federal government cannot "command the States' officers … to administer or enforce a federal regulatory

[28] For example, U.S. Dep't of Justice, "Attorney General Sessions Delivers Remarks to Federal Law Enforcement Authorities about Sanctuary Cities."

[29] Briffault, "The Challenge of the New Preemption," p. 2025.

[30] *New Orleans: How the Crescent City Became a Sanctuary City – Hearing Before the H. Subcomm. on Immigration and Border Security of the H. Comm. on the Judiciary*, p. 4.

program"[31] and (2) the federal government cannot "dictate[] what a state legislature may and may not do."[32] These rules apply without regard to the content of the federal command or dictation. Similarly, the separation of powers principle upon which much of the sanctuary defunding litigation was decided states simply that the Spending Clause power resides in Congress and not the executive branch, and must be exercised by the former and not the latter.[33] Again, this rule applies regardless of content. This doctrinal arena allowed judges and lawyers to avoid discussing or making judgments over policies and questions about the impacts and harms attendant to these policies.

Another way of observing the quality of the formalistic power doctrine is that the goal or resolution of the controversy is difficult to measure. With respect to the sanctuary defunding issues, if Congress could be persuaded to pass legislation embodying the administration's antisanctuary funding conditions, the separation of powers doctrine would no longer apply. With respect to immigration detainers, if the federal administration could persuade (rather than command) localities to comply, the Tenth Amendment doctrine would then fall away.[34] However, if the discussion centered on the communal goals, such as the harm inflicted on these communities by these policies, a measurable impact can be discerned – the promotion of sanctuary policies would lead to less racial bias in local law enforcement and less harm inflicted on communities. Alternatively, for those favoring increased immigration enforcement, the underlying harms such as generalized crime reduction or increase in wages could also be fairly measured.

Some of the formalistic power-based doctrines upon which sanctuary contests have been decided may and have discussed community values that animate the policies. For example, the question of state and local arrest authority that has been at issue in the most recent rounds of

[31] *Galarza* v. *Szalczyk,* 745 F.3d 634, 644 (3d Cir. 2014) (quoting *Printz* v. *United States,* 521 U.S. 898, 935 (1997)).

[32] *City of Chicago* v. *Sessions,* 321 F. Supp. 3d 855 (N.D. Ill. 2018) (quoting *Murphy,* 138 S.Ct. at 1478).

[33] *Cty. of Santa Clara* v. *Trump,* 250 F. Supp. 3d 497, 530 (N.D. Cal. 2017) (citing *South Dakota* v. *Dole*, 483 U.S. 203, 206 (1987)).

[34] Persuasion by the federal government was not necessary in Texas, where the state legislature commanded Texas localities to comply. City of El Cenizo, *Texas* v. *Texas*, 890 F.3d 164, 191 (5th Cir. 2018) ("For better or for worse, Texas can 'commandeer' its municipalities in this way.").

immigration detainer litigation[35] may include a discussion of the harms imposed by such policies. State laws regulating arrest authority may in fact be brokered by vibrant substantive debate, which involve a discussion of communal concerns over safety and inclusion.[36] Nonetheless, while formalistic power and federalist concerns can involve values and concerns that motivate the community, the courts and legal decisions (rather than the political ones) rarely touch upon or invoke them as part of the discussion. They are framed as collateral justifications rather than centralized as legal doctrines. Concerns such as displacing family units or encouraging racial bias become the background rather than animating the legal arguments involved.

4 Why Have Formalistic Empty Doctrines Carried the Day?

There are several possible explanations for the phenomenon just observed, the ubiquitous use of structural and formalistic doctrine in legal contests over sanctuary, rather than engaging with the animating concerns of the community.

The debate over authority in the immigration arena may be caused by a conspicuous vacuum of authority at the federal level. Even when a single political body controls both the Senate and the House of Representatives, along with the White House, little to no legislative action has been passed to reform an immigration system that is universally seen as broken. When President Biden entered office, he quickly proposed several legislative reforms to the immigration system; then when Republican support never materialized, he and the legislative leaders folded into his larger budget bill. Unfortunately, when the Senate Parliamentarian opined that the Democrats proposals for immigration reform should not be included in a budget bill (that would be immune from a Senate filibuster) legislative fixes for the immigration system has again seemingly faded at the time of writing this chapter.[37] As with many major divisive policy issues

[35] See, for example, *Lunn* and *Cisneros*.

[36] See, for example, *Cisneros* at __ (noting that in 2006, Colorado enacted Senate Bill 90, "which required local law enforcement to report individuals to ICE when there was probable cause to believe they were present in violation of federal immigration law," but then in 2013 "repealed that statute entirely, declaring that 'the requirement that public safety agencies play a role in enforcing federal immigration laws can undermine public trust'") (citations omitted).

[37] See Sullivan et al., "Democrats Quietly Scramble to Include Immigration Provision in Social Spending Bill." See also LeVine, "Dems' Last-Ditch Immigration Gambit Loses Steam."

of a national character, which includes gun control, and climate change, Congress has been stymied from acting. This has left little room for policymaking other than executive action by the President. Unfortunately, there is little room for open debate and public input into executive decisions.

The lack of legislative movement by Congress has invited states and localities to begin to try and fill in the gaps.[38] With executive policies that lack public inputs, coupled with an increasing politicization of immigration, a motivated and engaged public has no choice but to push questions of local and state control over immigration. As state and local politics fill the vacuum left by the paralysis of Congress, questions over authority and structural formalism abound. While an important component, this is an incomplete picture, as questions over local and state control of immigration have existed since the founding of the nation.

The debate over sanctuary policies has been dominated by a narrative framing thirty years in the making – the narrative of immigrant criminality.[39] This narrative is "sticky" – it continues to persuade even in the face of empirical evidence to the contrary.[40] The power of the narrative lies in its exploitation of cognitive biases.[41] And perhaps, the existence of this powerful narrative shaped the strategies available to advocates.

As immigrants became associated more with criminality, so did the immigration system become more associated with law enforcement systems. While some of these battles had been fought since the beginning of the nineteenth century, their relative salience grew in the 1980s and 1990s as the Drug War and Tough on Crime policies took root and consequently viewed the border as a gateway for drugs and crime. Even as some immigration advocates attempted to divorce themselves from the label of criminality,[42] a broad consensus by political actors and the public existed that immigration rule violators should be treated under a criminal justice paradigm.

[38] See Bulman-Pozen, "Preemption and Commandeering without Congress," pp. 2041–2042 and Briffault, "The Challenge of the New Preemption," p. 1997.

[39] Lai and Lasch, "Crimmigration Resistance and the Case of Sanctuary City Defunding," pp. 565–567.

[40] Gulasekaram et al., "The Importance of the Political in Immigration Federalism," pp. 1452–1453.

[41] Ibid., pp. 1451–1452.

[42] Sharpless, "'Immigrants Are Not Criminals': Respectability, Immigration Reform, and Hyperincarceration," pp. 711–725.

In the case of immigration detainers, for example, the narrative of immigrant criminality supported the notion that local law enforcement, whose daily business was controlling crime, should take an active role in immigration enforcement. This premise was so powerfully internalized that local sheriffs unquestioningly complied with immigration detainers for years before the *Galarza* litigation exposed the notion that sheriffs were not *required* to do so. This factor mirrors the difficulty and slow pace of criminal justice reform in the country. Just as substantive criminal enforcement questions have been avoided by courts, leading to substantial frustration by local communities,[43] it may be much easier to convince courts that there were structural issues of enforcement by localities rather than trying to fight against the paradigm of criminality overall. The Tenth Amendment provided advocates with a tool to avoid the paradigm of immigrant-as-criminal and litigate out of its long shadow.[44] While this approach avoided the sticky narratives of immigrant criminality, it sidelined the value-laden controversy over the racial and historical basis for the criminality premise.

While one possible explanation for the choice of formalistic doctrines suggests a conscious attempt to avoid the more potent content supplied by the dominant antisanctuary narrative, another explanation is that those responsible for litigating sanctuary contests have had mixed motivations. In the sanctuary defunding contests, for example, localities fought to retain federal funding historically associated with policing practices not necessarily inconsistent with the dominant narrative.[45] Government attorneys charged with litigating may have been unable, through their own positional bias, to advance some of the critiques available.[46]

Related to the idea that some "advocates" engaged in the sanctuary contests may have mixed motivations is the notion that those representing a "side" in such a contest may in fact lack the consensus necessary to shift the battle from the terrain of formalistic power and authority doctrine to a discussion involving harm reduction and equity. Advocates had to broker

[43] One such example can be seen with qualified immunity and its effect on police misconduct. See Schwartz, "The Case against Qualified Immunity," pp. 1805.

[44] The Tenth Amendment may have been a particularly favorable choice of doctrine given how restrictionists had successfully "exploit[ed] the discourse of state and local rights for their particular policy ends." Ibid., p. 1453.

[45] Lai and Lasch, "Crimmigration Resistance and the Case of Sanctuary City Defunding," pp. 590–601.

[46] Ibid., p. 584 (noting that the failure to advance the normative positions available to counter the immigrant-as-criminal narrative "had the consequence of signaling a potentially weak commitment to earlier expressed values underlying sanctuary policies").

compromise and find allies, many of whom may have been more easily persuaded by structural and resource concerns than ones rooted in harm reduction and destigmatization. In Denver, for example, while advocates unveiled an ambitious "sanctuary" ordinance rooted in antidiscrimination and equality principles, the ordinance that ultimately passed reflected deep compromises brokered during the legislative process.[47] The final version of the ordinance eschewed language that would invoke doctrines like equal protection, instead adhering to the tepid doctrines of sanctuary battles that had already been fought on normatively blanched fields.

Litigators must of course choose from the tools available to them, and the selections made in the contests over sanctuary may reflect nothing more than choices based upon the suitability of available doctrines rather than the advancement of possible narratives that would have better reflected communal values. The evolution of legal doctrines may have contributed to litigation that battled over structure and power in at least two ways.

First, doctrinal evolution may have resisted efforts to imbue doctrine with normative heft. Deborah Jones Merritt describes how this may have occurred with the Tenth Amendment. For much of the nation's history, the Tenth Amendment – which reserves to the States and to the people those powers not delegated to the federal government in the Constitution –[48] was regarded as a simple "truism" signifying nothing more than the notion of a limited central government of enumerated powers.[49] But in its "revolutionary" 1976 decision in *National League of Cities* v. *Usery*,[50] the Supreme Court "promised a dramatic reshaping of federal-state relations."[51] This reshaping would bar the federal government from regulating "the States as States," interfering with "essential 'attributes of state sovereignty'," and "obstructi[ng] 'the States' freedom to structure integral operations in areas of traditional governmental functions."[52]

Within a decade, though, the Court overruled the decision, abandoning the balancing test and its promise of decision-making that addressed the

[47] Murray, "Denver's New Stance on Immigration Could Draw Blowback from the Feds – But Other Cities Have Gone Further," p. 1.
[48] U.S. Const. amend. X.
[49] Merritt, "Republican Governments and Autonomous States" p. 818.
[50] 426 U.S. 833 (1976).
[51] Merritt, "The Guarantee Clause and State Autonomy" p. 11.
[52] Ibid., p. 12–13 (citations omitted).

consequences and harms arising from discrimination and unequal treatment and instead returned the doctrine to a neutered state only able to address obvious or blatant forms of discrimination.[53]

Second, doctrinal evolution may have drained previously existing normative content. Areas of law, such as equal protection, that we might initially think of as directly involving questions of communal identity and harm have increasingly grown more ineffectual and drained of its ability to reflect communal concerns. The introduction of a requirement requiring proof of animus,[54] the refusal to examine more closely government actions,[55] and the emphasis on formal equality rather than antisubordination[56] all contributed to the neutering of equal protection as a constitutional protection. By 1996, Reva Siegel declared that "[t]his body of constitutional law once served to dismantle status-enforcing state action, but, … the doctrines now serve to rationalize, rather than scrutinize, the new, facially neutral forms of status-enforcing state action they have helped bring into being."[57] In 2009, Kenji Yoshino announced "the end of equality doctrine as we have known it,"[58] and in 2012, Ian Haney-López declared that "equal protection will not again advance racial justice until colorblindness and malicious intent are overthrown."[59]

This inability of the equal protection doctrine as a legal and judicial tool to address real concerns over racial discrimination and its effects can be seen in stark relief following the murder of George Floyd. The doctrinal evolution of a Constitutional amendment tasked with making real the sacrifices and values fought over during the Civil War had been unable to prevent the most overt and violent examples of racial bias in the killing of black men by police.

While all of the foregoing may help account for the absence of normatively charged litigation around sanctuary, mystery still remains. This is particularly so in light of the alacrity with which other aspects of the administration's immigration platform have been challenged through content-rich doctrinal theories. The Muslim ban, for example, was immediately challenged as having been "motivated by animus and a desire to

[53] Ibid., p. 14 (citing *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985)).
[54] *Washington* v. *Davis,* 426 U.S. 229 (1976).
[55] Yoshino, "The New Equal Protection," pp. 755–763.
[56] See Ehrenreich and Siebrase, "Breastfeeding on a Nickel and a Dime," p. 76.
[57] Siegel, "'The Rule of Love': Wife Beating as Prerogative and Privacy," p. 2195.
[58] Yoshino, "The New Equal Protection," p. 748.
[59] Haney-López, *Intentional Blindness,* p. 1876.

discriminate on the basis of religion and/or national origin, nationality, or alienage."[60] More recently, advocates have successfully challenged the federal criminal statute on illegal re-entry as motivated by racial animus and disproportionately impacting communities of color.[61] Likewise, the decision to end President Obama's Deferred Action for Childhood Arrivals program was attacked as violative of equal protection,[62] with advocates labeling the decision "a culmination of President's Trump's oft-stated commitments … to punish and disparage people with Mexican roots."[63] In light of such claims it is not clear that the foregoing represents a complete or convincing explanation for the terms on which sanctuary has been litigated.

5 The Problem with a Formalistic Power Doctrine

Why is the application of formalistic federalism a poor way to resolve sanctuary issues? The two most obviously concerning results of the subversion of doctrines that reflect communal concerns in favor of normatively blank ones are: First, that the legal debates in which we engage do not reflect community concerns, so in fact we never even discuss topics of great normative importance, and second, that the legal decisions these contests produce are also unmoored from the concerns of the communities that created the policies in the first place. There are less immediately obvious consequences that are nonetheless of great importance. Two that are discussed here are the contribution to a growing ahistoricism and the generation of false equivalencies.

5.1 We Don't Argue about What We Mean to Be Arguing About

Effective legal arguments take the form of narratives, taking advantage of "humankind's basic tool for giving meaning to experience or

[60] *State of Hawai'i, et al.* v. *Donald J. Trump, et al.*, No. 1:17-cv-00050, Document 64 ("Second Amended Complaint for Declaratory and Injunctive Relief") at 32 (D. Haw. Mar. 8, 2017).

[61] *United States* v. *Carrillo-Lopez*, 2021 WL 3667330 (D. Nev. Aug. 18, 2021).

[62] *Nat'l Ass'n for the Advancement of Colored People* v. *Trump,* 298 F. Supp. 3d 209, 223 (D.D.C. 2018), *adhered to on denial of reconsideration,* 315 F. Supp. 3d 457 (D.D.C. 2018) (noting equal protection claim).

[63] *States of New York, Massachusetts, et al.* v. *Donald Trump et al.*, No. 1:17-cv- 05228, Document 1 ("Complaint for Declaratory and Injunctive Relief") at 2–3, 52 (E.D.N.Y. Sep. 6, 2017).

observation."[64] Through narrative, advocates frame events for legal decision makers, and the framing choices that advocates make define the "trouble" that must be addressed, cast actors in the story in the roles of champion and villain, and generate expectations as to how the trouble will be resolved.[65]

But legal doctrine, of course, can constrain the narrative choices available to advocates and consequently the community.[66] The law serves as the setting for advocates' narratives, describing the terrain on which narrative contests must take place.[67] Formalistic power doctrine narrow narrative possibilities and consequently deprive legal contests of normative arc.[68] In the battle that took place in the Supreme Court over Arizona's SB1070, for example, the framing of the issue as one of preemption contributed to the complete absence of discussion of racial profiling.[69] Similarly, in the sanctuary defunding cases, the "perceived challenges of introducing a racial justice narrative in the litigation context" may have contributed to the absence of nondiscrimination narratives that might have been expected given the sanctuary jurisdictions' explicit pronouncements along these lines.[70] The discussion of local or state power versus federal power obscured the harms that increased enforcement brought to the communities that were trying to avoid them.

These observations are consistent with Kevin Johnson's prediction that the *Arizona* case would not be decided on civil rights grounds and thus implicate his warning as to the consequences of embracing legal doctrine that stifles civil rights narratives:

> The nation needs to face up squarely to the fact that race and the civil rights of people are at the core of the modern debate over immigration. Until it does, we will not be able to fully understand and address what is at stake in

[64] Alper et al., "Stories Told and Untold: Lawyering Theory Analyses of the First Rodney King Assault Trial," p. 5; see also, generally, Delgado, "Storytelling for Oppositionists and Others: A Plea for Narrative" and Alfieri, "Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative."

[65] *cf.* Stone, *Causal Stories and the Formation of Policy Agendas*.

[66] See, for example, Yoshino, "Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays," pp. 1802–1811.

[67] Olivares "Narrative Reform Dilemmas."

[68] See Sarat, "Narrative Strategy and Death Penalty Advocacy," p. 356.

[69] See Lasch, "Immigration Detainers after Arizona", pp. 648–654.

[70] Lai and Lasch, "Crimmigration Resistance and the Case of Sanctuary City Defunding," pp. 602–603.

the continuing national discussion of immigration reform and U.S. immigration law and its enforcement.[71]

5.2 *We Don't Decide What Needs to Be Decided*

Closely related to the issue of narrative suppression and selection is its natural consequence – when legal doctrine stifles or diverts debate over "what is at stake," the resulting legal decisions of course will not contribute to discussions that directly impact communities of concern.[72] Just as the development of constitutional norms is stifled by doctrines imposing procedural prerequisites to the litigation of substantive constitutional law,[73] the substitution of authority-based doctrines for doctrines that reflect communal concerns prevents courts and other decision-making bodies from advancing our understanding of how the Constitution addresses "what is at stake."

In the sanctuary battles, the principal sanitizing of a communal concern has been the removal of race from discussions as to the legality of sanctuary or antisanctuary policies. When a locality creates a sanctuary policy, it does so to protect the locality's community, namely a city or county. When a state does so, it also is concerned with the residents of the state itself. Race as a communal concern goes to the heart of a community's identity, and how a community defines itself. The Court's decision in *Arizona*, for example, was noteworthy for its avoidance of race – the only mention of race in the Court's opinion was to cite the "show me your papers" portion of SB 1070 (the only provision the Court upheld against challenge) as limiting Arizona officers from "consider[ing] race, color or national origin … except to the extent permitted by the United States [and] Arizona Constitution[s]" and requiring the provision to be implemented so as to "protect[] the civil rights of all persons"[74] The central

[71] Johnson, "Immigration and Civil Rights: State and Local Efforts to Regulate Immigration," pp. 612.

[72] Ibid.

[73] See, for example, Liebman, "More Than 'Slightly Retro': The Rehnquist Court's Rout of Habeas Corpus Jurisdiction in Teague v. Lane," p. 575; Shay and Lasch, "Initiating a New Constitutional Dialogue: The Increased Importance Under AEDPA of Seeking Certiorari from Judgments of State Courts," p. 228; Lochner, "Qualified Immunity, Constitutional Stagnation, and the Global War on Terror," p. 852.

[74] *Arizona,* 567 U.S. at 411. Justice Alito, in his separate opinion, adverted to "civil-liberty concerns" but only in the context of a discussion of Fourth Amendment concerns that did not explicitly address race. *Arizona,* 567 U.S. at 449 (Alito, J., concurring in part and dissenting in part).

concern about empowering police to demand proof of lawful presence in the United States was the potential for racial profiling. By relegating race to this spare summary, and moving immediately to the Constitution's structural framework, not only did the Court's decision proceed on grounds inhospitable to the litigation of race discrimination, but it also swept such concerns aside.

The Third Circuit decision in *Galarza* v. *Szalczyk*,[75] which was groundbreaking in the litigation over immigration detainers, is another demonstration of how race disappears in the cold light of authority-based doctrines. *Galarza* involved a United States citizen, Ernesto Galarza, who was detained by Lehigh County (Pennsylvania) on the basis of a detainer.[76] Because the issue before the Third Circuit concerned whether the federal government could command the county to detain Galarza, the relevant doctrine applied by the court included the constitutional-avoidance canon of statutory construction, and the Tenth Amendment's anticommandeering doctrine.[77] Nowhere mentioned was the racial profiling claim brought by Galarza – a claim that the Lehigh County officers involved in his detention, because of his Hispanic ethnicity, had either reported him to federal immigration officials despite knowing of his citizenship or failed to consult available identity documents that would have demonstrated his citizenship.[78] The district court had upheld this claim against a motion to dismiss based on qualified immunity,[79] but these claims and facts were deemed irrelevant to the authority-based doctrines on which the Third Circuit's decision rested. And yet, there is no debate that concerns over racial equity and community inclusion were animating the fears of the community and motivating attempts to disentangle local law enforcement from immigration enforcement.

5.3 *Formalistic Power Doctrines Contribute to Ahistoricism*

Sanctuary debates that rely on arguments sanitized of racial content have contributed to divorcing the legal context from its racially inflected history. Reva Siegel has described as "status regime modernization"[80] a

[75] 745 F.3d 634 (3d Cir. 2014).
[76] Ibid., pp. 636–638.
[77] Ibid., p. 639–645.
[78] *Galarza* v. *Szalczyk,* 10-CV-06815, 2012 WL 1080020, at *15–17 (E.D. Pa. Mar. 30, 2012), *vacated and remanded,* 745 F.3d 634 (3d Cir. 2014).
[79] Ibid.
[80] Siegel, 'The Rule of Love': "Wife Beating as Prerogative and Privacy," pp. 2178–2179.

phenomenon whereby "status relationships [are] translated from an older, socially contested idiom into a newer, more socially acceptable idiom."[81] Siegel's description of race relations in the Reconstruction period shows that status regime modernization can be effectuated by a transition from content-rich to contentless doctrine:

> In this era, the legal system continued to draw distinctions on the basis of race and gender, but it now began to emphasize formal equality of entitlements in relationships once explicitly organized as relationships of mastery and subordination, and to repudiate openly caste-based justifications for such group-based distinctions as the law continued to enforce. While the American legal system continued to distribute social goods and privileges in ways that favored whites and males, it now began self-consciously to disavow its role in doing so. The new interest in rule-equality and the energy devoted to explaining law without recourse to overtly caste-based justifications mark an important shift in the mode of regulating race and gender relations, a deformalization and concomitant modernization of status law.[82]

This transition from antisubordination to formal equality has been seen more recently in the adoption of a "colorblind" approach to equal protection doctrine, which scholars have criticized for its ahistoricism.[83]

Sanctuary debates are deeply connected to this phenomenon and susceptible to a similar ahistoricism. Just as the "Southern strategy" that swept Nixon into power in the aftermath of the Civil Rights Movement depended on a "racially sanitized" law-and-order rhetoric,[84] accompanied by an emphasis on states' rights,[85] even so have these same moves been replicated in the sanctuary debates. The immigrant-as-criminal narrative provided the ability for a legal shift from explicit subordination to facially neutral crime-control strategies.[86] With an acceptance of immigration control as merely a form of crime control, the racial

[81] Ibid.
[82] Ibid.
[83] For example, Powell, *Rhetorical Neutrality: Colorblindness, Frederick Douglass, and Inverted Critical Race Theory;* Obasogie and Newman, "Black Lives Matter and Respectability Politics in Local News Accounts of Officer-Involved Civilian Deaths: An Early Empirical Assessment," pp. 550–551; Barnes, "The More Things Change: New Moves for Legitimizing Racial Discrimination in a 'Post-Race' World," p. 2102.
[84] Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, p. 42.
[85] Haney-López, *Dog Whistle Politics: How Coded Racial Appeals Have Reinvented Racism and Wrecked the Middle Class*, pp. 56–57.
[86] See, generally, Lasch, "Sanctuary Cities and Dog-Whistle Politics"; Lai and Lasch, "Crimmigration Resistance and the Case of Sanctuary City Defunding," pp. 565–567.

implications of the former can be ignored by legal actors in deciding the legality and constitutionality of sanctuary policies. And the emphasis on states' rights has characterized both pro-sanctuary and antisanctuary positions.

A particular corner of the debate, in which sanctuary is compared to antebellum "nullification" of federal authority, demonstrates how power doctrines rooted in the allocation of state and federal authority obliterate and reshapes the connection between law and history. In a February 2017 opinion piece in *the Wall Street Journal*, Karl Rove suggested that cities and counties that seek to disentangle themselves from federal immigration enforcement are morally and politically equivalent to the antebellum South.[87] Sanctuary cities are just like 1832 South Carolina, Rove argued, because they "believe they can declare a federal law null and void within their jurisdictions."[88] In April 2017, the White House renewed this rhetoric. After a federal court enjoined the President's executive order attempting to defund sanctuary cities,[89] the White House issued a statement claiming that sanctuary cities "are engaged in the dangerous and unlawful nullification of Federal law in an attempt to erase our borders."[90] A year later, Attorney General Sessions made the same argument while castigating sanctuary jurisdictions during remarks to California law enforcement officers. Sessions declaimed: "There is no nullification. There is no secession. Federal law is 'the supreme law of the land.' I would invite any doubters to Gettysburg, and to the graves of John C. Calhoun and Abraham Lincoln."[91]

Putting aside the question of whether sanctuary policies are accurately characterized as violating federal law, raising the specter of southern nullification to attack sanctuary was wrong as a matter of history. Scholars responded to Rove's piece and to Sessions's claimed connection to the tradition of Abraham Lincoln, by pointing out that "those driving sanctuary-city policies are the heirs to an entirely different states' rights

[87] Rove, "Trump and the 21st-Century Nullifiers – What 'Sanctuary Cities' Have in Common with 1832 South Carolina."

[88] Ibid.

[89] Cty. of Santa Clara v. Trump, 250 F. Supp. 3d 497 (N.D. Cal. 2017), *reconsideration denied,* 267 F. Supp. 3d 1201 (N.D. Cal. 2017), *appeal dismissed as moot sub nom. City & Cty. of San Francisco* v. *Trump,* 17-16886, 2018 WL 1401847 (9th Cir. Jan. 4, 2018).

[90] The White House, Statement on Sanctuary Cities Ruling (Apr. 25, 2017).

[91] U.S. Dep't of Justice, "Attorney General Sessions Delivers Remarks at the 26th Annual Law Enforcement Legislative Day Hosted by the California Peace Officers' Association."

tradition – one based in the North that helped to topple slavery, thanks to its resistance to immoral laws."[92]

It was the formalism of legal doctrine that facilitated the historical misdirection deployed by Rove, the White House, and Attorney General Sessions, whose pronouncements betrayed an understanding of history that mirrored the legal doctrine pertaining to federalism – admitting no normative dimension in defiance of both history and common sense.

5.4 *Formalistic Power Doctrines Flatten the Normative Universe, Creating Dangerous False Equivalencies*

Just as the absence of communal values in authority-based doctrines encourages false historical analogies, it also encourages false equivalencies in our understanding of the present. For example, while state-level sanctuary and pro-immigration enforcement state and local actions are based on a similar view of authority, they nonetheless have clearly divergent normative aims.[93] Sanctuary legislation frequently cites antisubordination and racial equality rationales as the basis for sanctuary policies. Antisanctuary legislation tends to cite the need to reduce criminality and other law and order goals, which themselves are racially contested. Yet, these normative justifications tend to disappear once relocated in litigation. The absence of this normative direction in the legal doctrine facilitates the equalizing of differently motivated sanctuary and antisanctuary legislation. The Fifth Circuit's decision upholding Texas's SB4 – antisanctuary[94] legislation prohibiting Texas localities from adopting policies to disentangle local law enforcement from federal immigration enforcement – provides an example.

The court addressed the claim that Texas was precluded from enacting such state-level legislation by the doctrine of field preemption. Its discussion applying this contentless doctrine was predictably devoid of normative substance.[95] But furthermore, the court also engaged in false

[92] See Giesberg, "Jeff Sessions Is Wrong. Sanctuary-City Advocates Aren't Like Secessionists. They're Like Abolitionists." Baker, "A Brief History of Sanctuary Cities"; Trainor, "What the Fugitive Slave Act Can Teach Us about Sanctuary Cities"; Lasch, "Resistance to the Fugitive Slave Act Gives Sanctuary Cities a Model for Resistance"; Lasch, "Rendition Resistance", supra note 16.

[93] Rodriguez, "Enforcement, Integration, and the Future of Immigration Federalism," pp. 514–521.

[94] City of El Cenizo, *Texas* v. *Texas*, 890 F.3d 164, 178 (5th Cir. 2018).

[95] Ibid., p. 177 (analyzing whether "SB4 and the federal statutes involve different fields").

equivalencies because of the normatively empty terrain on which it proceeded. Describing the local ordinances that SB4 intended to displace as "regulat[ing] whether and to what extent the local entities will participate in federal-local immigration enforcement cooperation," the court said these ordinances had precisely "the same goal" as SB4 had on a state level.[96] Both sets of legislation – local and state – attempted to "regulate 'federal-local cooperation in immigration enforcement.'"[97] Because they legislated in the same field, if SB4 were field preempted, "so too [would be] the local ordinances …."[98]

A recent decision demonstrates how precisely the same contentless doctrine yields an opposite result. While Texas cities were forced to yield to state authority per SB4, in California, a court held that localities could not be subordinated to California state legislation the court deemed "an unconstitutional invasion into the rights of the city" to run its own police force and jail in accordance with its own ordinances and charter.[99] Though the ruling was from the bench, the court's acquiescence to Huntington Beach's argument that the California Values Act is "commandeering"[100] of municipal authority smacks of a false equivalency rooted in normatively empty authority-based doctrines. (By contrast, the decision upholding Texas's SB4 had concluded that "[f]or better or for worse, Texas can 'commandeer' its municipalities in this way").[101]

6 Conclusion

Using the term "sanctuary" to describe local policies designed to impact immigration enforcement has been critiqued and rejected by a spectrum of commentators. For example, in creating a policy to stop honoring ICE detainers, political leaders seeking distance from the immigrant-as-criminal narrative, have labeled these policies as "Fourth Amendment" policies. Those who seek more immigration enforcement continue to wield the label of "sanctuary" as a pejorative, attempting to associate the term with lawlessness.[102] The evolution of a term that by definition

[96] Ibid., p. 178.
[97] Ibid.
[98] Ibid.
[99] Debenedicits, "California Can't Enforce Sanctuary Law against Charter Cities".
[100] Ibid.
[101] *El Cenizo,* 890 F.3d at 191.
[102] Lind, "Sanctuary Cities, Explained."

involves safety, peace, and freedom from persecution to one that invokes lawlessness and increased crime is partly made possible by narratives and legal doctrines used in court when examining immigration law generally. Litigation over immigration policy generally is dominated by authority and structural questions. As demonstrated in this chapter, this tendency holds true when questions over sanctuary policies arise.

Modern litigation over sanctuary has devolved into questions of authority and power. This devolution has resulted in sidelining why communities have adopted sanctuary policies in the first place. Questions of authority and power manifest in legal arguments over whether and how federal supremacy over immigration clash with state sovereignty issues embodied in the Tenth Amendment or other structural concerns in the Constitution, such as separation of powers. These structural framings again avoid the term "sanctuary" in favor of questions of authority and the clash of governments. But sanctuary, or the desire to keep people safe from harm has always been a consistent and unavoidable reason that these policies exist in the first place. Advocates for sanctuary may have a myriad of motivations, but principally they want to avoid racial bias and discriminatory treatment of their community members and they want to protect their community members from the harms that are inflicted by immigration detention and deportation. By contrast, as this chapter sets forth, litigants and courts have largely set aside such concerns and instead focused on legal doctrines that are largely out-of-reach of the public, perpetuating the myth that immigration policy generally need not be held accountable to constitutional mandates on racial equity or balancing government interests against the civil liberties of individuals.[103]

By framing the issues around the question of authority and not over the underlying question over whether such policies are either necessary to protect the community from racialized policing or whether the harms of enforcement policies themselves can be justified by government interests, there is an inherent acceptance that those concerns are not subject to litigation at all. The absence of legal discourse over whether these policies are in fact racialized furthers the notion that the racial impact of those policies are irrelevant to their constitutionality. Similarly, if there is no discussion over the harms of increased enforcement, which includes family separation, public health concerns, and detention and deportation, then

[103] This belief usually arises of out an expanded notion of what the "plenary power" doctrine established by the Chinese Exclusion Cases actually means. See Rosenbaum, "(Un)equal Immigration Protection," pp. 243–253.

it creates an assumption that such government actions are immune from constitutional scrutiny.

Not every litigation challenge or defense to sanctuary needs to reflect concerns over community values. But immigration policy itself is an offshoot of community concerns, it helps shape the United States as a community, and its implementations are almost always justified as a means to either preserve the identity of the nation as a whole or as a way to protect it from harm. The lack of discussion and debate over these concerns involving sanctuary policies, whether by cities, counties, or states, creates a vacuum of public understanding. If the Government need not justify or establish what harms that an immigration policy is purported to address, then immigration policy becomes increasingly more undemocratic.

This is not to say that litigation should be viewed as a means to *make* policy. Most sanctuary policies and its corollary antisanctuary or "local immigration enforcement" policies have gone through a political process prior to litigation. At times the political process may involve a local or state-wide legislative process, or it may also involve political leaders issuing changes in policies or programs. Litigation however does play an important role in making sure such policies conform to constitutional and legal requirements. Modern litigation around sanctuary has focused only on the mandates relating to structure and sovereignty. What has been missing in sanctuary litigation has been the constitutional and legal mandates intended to protect against bias and undue harm imposed by the government. Legal principles of equitable treatment and the balancing of harms by government policies are especially needed given how sanctuary and immigration policies can involve important counter-majoritarian principles. Sanctuary policies seek to protect residents, especially those who are not able to fully participate politically. Moreover, the communities that are seeking to create these policies are often smaller political entities subsumed under larger ones – cities versus counties, counties versus states, and of course states versus the federal government. Litigation narratives that reflect the desire to provide safety and equitable treatment are important, not just for those who face immigration enforcement but also the larger public to understand how immigration enforcement policies impact our local communities.