COMMENT

A DOCTRINE WITHOUT EXCEPTION: CRITIQUING AN IMMIGRATION EXCEPTION TO THE ANTICOMMANDEERING RULE

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INTRODUCTION

Federal courts across the country have heard numerous lawsuits about the legality of "sanctuary cities," which limit cooperation with the federal government's immigration enforcement efforts.[1] For example, a sanctuary city might reject detainer requests issued by federal immigration officials or limit the amount of information state or local officials provide to federal immigration agents.

To curb this kind of noncooperation, several decades ago, Congress enacted 8 U.S.C. § 1373 (§ 1373), which makes it unlawful for state and local government officials to "prohibit, or in any way restrict, any government entity or official from sending [information] to, or receiving [it] from" federal immigration officials.[2] Although § 1373 was unsuccessfully challenged shortly after its enactment, in recent years the statute has gained renewed attention as the federal government attempted to enforce its terms by threatening to

1 *See Major Developments Relating to "Sanctuary" Cities Under the Trump Administration*, AM. C.L. UNION, https://www.aclu.org/other/major-developments-relating-sanctuary-cities-under-trump-administration [https://perma.cc/49SA-8UYK] (detailing a portion of the sanctuary city lawsuits filed in federal courts). For the purposes of this Comment, I will primarily focus on state and local governments outside the tribal context for two reasons. First, 8 U.S.C. § 1373 is directed at state and local governments in particular, and second, the Tenth Amendment objection that I raise in this Comment does not apply to Native Nations. *See* Talton v. Mayes, 163 U.S. 376, 383 (1896) (distinguishing Native Nations from states as "distinct, independent political communities, retaining their original natural rights," which, in the Supreme Court's view, limited the applicability of the Constitution to Native Nations). It is important to note, however, that Native Nations are currently being subjected to significant federal involvement on tribal land regarding immigration. *See Border Security and Immigration Enforcement on Tribal Lands*, NAT'L CONG. OF AM. INDIANS (2017), https://www.ncai.org/attachments/Resolution_MSMbAIAXAZXkvpaQLeKPtiNDhbFkTcERuyTyrrzhdmZnjXYtIxG_ECWS-17-002%20final.pdf [https://perma.cc/8JPD-AC93] (describing the unique harms that federal immigration enforcement has on tribal lands, including separating members from the same Native Nation on either side of the Mexican-United States border and forcing tribal law enforcement to incur significant expenses on behalf of the Department of Homeland Security and other agencies).

2 *See* 8 U.S.C. § 1373(a) (forbidding state or local legislatures from passing laws that restrict information sharing).

withdraw federal policing funding from noncompliant jurisdictions.[3] Cities and states have been remarkably successful in these recent lawsuits, as district courts across the country have found the federal efforts to enforce § 1373 by withdrawing federal grant funding to be unlawful under both administrative law and constitutional grounds. And some district courts have found the statute itself to be unconstitutional and in violation of the anticommandeering rule, which prohibits the federal government from instructing states and cities to enact federal policies.[4]

But, in early 2020, the Second Circuit stood alone in finding the federal effort to enforce § 1373 to be lawful and the statute itself to be constitutional.[5] By preserving the federal immigration law despite its seeming contravention of the anticommandeering principle, the opinion created a circuit split that advanced the anomalous view that federal immigration actions are exempt from the otherwise generally applicable anticommandeering doctrine.[6]

The anticommandeering doctrine is based upon on the Tenth Amendment, which provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States

3 *See* Exec. Order No. 13768, 82 Fed. Reg. 8799, 8799 (Jan. 25, 2017) ("[J]urisdictions that fail to comply with applicable Federal law [will] not receive Federal funds . . . ."); *see also* U.S. DEP'T OF JUST., OFF. OF JUST. PROGRAMS, STATE OR LOCAL GOVERNMENT: FY 2017 CERTIFICATION OF COMPLIANCE WITH 8 U.S.C. § 1373 (2018), https://www.ojp.gov/sites/g/files/xyckuh241/files/media/document/fy17jag_clo_1373cert_revaug10.pdf [https://perma.cc/ZM4E-C42F] (conditioning federal funding on compliance with federal immigration regulations through a certification of compliance).

4 *See* City of Chicago v. Sessions, 321 F. Supp. 3d 855, 872 (N.D. Ill. 2018) (finding that § 1373 constitutes unconstitutional commandeering), *aff'd sub nom.* City of Chicago v. Barr, 957 F.3d 855 (7th Cir. 2020); *see also* City of Philadelphia v. Sessions, 309 F. Supp 3d 289, 331 (E.D. Pa. 2018) (holding that "Section 1373 violates the Tenth Amendment of the Constitution"), *aff'd in part, vacated in part on other grounds sub nom.* City of Philadelphia v. Att'y Gen. of the U.S., 916 F.3d 276 (3d Cir. 2019); City & County of San Francisco v. Sessions, 349 F. Supp. 3d 924, 953 (N.D. Cal. 2018) (ruling that § 1373 "is unconstitutional"), *aff'd in part, vacated in part sub nom.* City & County of San Francisco v. Barr, 965 F.3d 753 (9th Cir. 2020); United States v. California, 314 F. Supp. 3d 1077, 1101 (E.D. Cal. 2018) ("The Court finds the constitutionality of Section 1373 highly suspect."), *aff'd in part, rev'd in part*, 921 F.3d 865 (9th Cir. 2019).

5 *Compare* New York v. U.S. Dep't of Just., 951 F.3d 84, 111 (2d Cir.) (speaking directly to the constitutional questions surrounding § 1373), *reh'g denied* 964 F.3d 150 (2d Cir. 2020), *with* City of Chicago v. Sessions, 888 F.3d 272, 282-83 (7th Cir. 2018) (finding that the constitutional question was not before the court and deciding the "appeal turns on the more fundamental question of whether the Attorney General possessed the authority to impose the conditions at all"), *and* City of Los Angeles v. Barr, 941 F.3d 931, 934 (9th Cir. 2019) (resolving the sanctuary city litigation on statutory authority grounds).

6 *See generally* City of Chicago v. Sessions, 888 F.3d 272; City of Philadelphia v. Att'y Gen. of the U.S., 916 F.3d 276 (3d Cir. 2019); City of Los Angeles v. Barr, 941 F.3d 931 (9th Cir. 2019). *But see* New York v. U.S. Dep't of Just., 951 F.3d at 123 (holding that the Attorney General could condition federal funding on compliance with federal immigration officials).

respectively, or the people."[7] Honing in on the text of the Tenth Amendment, the Second Circuit reasoned that "[a] commandeering challenge to a federal statute depends on there being pertinent authority 'reserved to the States.'"[8] The court surmised that the authority of state power "is not so obvious in the immigration context."[9] This opinion echoed previous Supreme Court opinions that have lauded federal power over immigration as broad, preeminent, and exclusive.[10] The Second Circuit thus concluded that the federal government may permissibly commandeer in the immigration context.[11] The Second Circuit's relied on a federally enumerated right within the Constitution—regulating immigration—to justify federal commandeering and carve out an exception to the anticommandeering rule based on a federally enumerated right in the Constitution.

The Second Circuit's decision that the federal government can commandeer state governments in areas of exclusive federal authority through an enumerated right has profound implications. Not only would it be the first time the anticommandeering rule has been given an exception, but this precedent would allow the federal government free reign over state and local resources, facilities, and even legislatures to further any federal immigration agenda. The federal government could conscript entire state and local police departments to act as fully-fledged federal immigration officials, all financed with state funding.

Such a result directly undermines the concerns that animated the anticommandeering rule. The constitutional prohibition on commandeering was meant to divide power in order to avoid federal tyranny, maintain political accountability, and prevent the federal government from shifting

7 *See* U.S. CONST. amend. X; *see also* New York v. United States, 505 U.S. 144, 183-84 (1992) (holding that the federal government commandeering state governments into administering federal regulatory schemes is "irreconcilable with the powers delegated to Congress by the Constitution and hence with the Tenth Amendment's reservation to the States of those powers not delegated to the Federal Government.").

8 New York v. U.S. Dep't of Just., 951 F.3d at 113.

9 *Id.*

10 This concept is known as the federal exclusivity principle, and the Supreme Court considers this facet of immigration "well-settled." *See* Arizona v. United States, 567 U.S. 387, 394-95 (2012) ("The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens."); *see also* Toll v. Moreno, 458 U.S. 1, 10 (1982) ("Our cases have long recognized the preeminent role of the Federal Government with respect to the regulation of aliens within our borders."); Hines v. Davidowitz, 312 U.S. 52, 63 (1941) ("Our system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference.").

11 *See* New York v. U.S. Dep't of Just., 951 F.3d at 113 (finding that a commandeering challenge depends on there being reserved state power, which is not clear in the immigration context).

costs onto states.[12] If the Second Circuit's approach stands, the federal government would exercise unchecked authority in the area of immigration, force states to be politically accountable for federal immigration regulations, and shift the costs of a federal immigration program onto states.

This Comment will analyze the Second Circuit's view that the anticommandeering doctrine has an immigration exception. Part I provides background on sanctuary cities, the anticommandeering doctrine, and the federal government's "exclusive" power over immigration. Then, in Part II, I argue that, contrary to the Second Circuit's holding, the anticommandeering rule does not, and should not, have an exception for immigration related commands. First, the anticommandeering rule has always been a doctrine of general applicability. The Supreme Court has never created an exception nor instituted any balancing test between federal and state interests.[13] Second, anticommandeering concerns apply in the immigration context as forcefully as any other area of the law. The three primary concerns animating anticommandeering—division of power, political accountability, and cost shifting—all exist when the federal government commandeers state or local resources in the immigration context. Third, even if powers committed "exclusively" to the federal government, which the Second Circuit maintains immigration to be, permitted federal commandeering, the reality of immigration regulation belies the federal exclusivity principle. The federal exclusivity principle has become boilerplate, contradicting the emerging consensus that states and local governments consistently and frequently regulate immigration.

I. HISTORY AND BACKGROUND ON SANCTUARY CITIES, ANTICOMMANDEERING, AND THE FEDERAL EXCLUSIVITY PRINCIPLE

The sanctuary city debate is notable in that it has pitted one historically recognized constitutional power against an emerging constitutional restraint: the federal immigration power against the federal prohibition on commandeering states. Generally, these two have lived in congruity. The federal government regulated immigration, but did not commandeer the states to do so. The passage of § 1373—and the Second Circuit's preservation of it—have threatened this balance, creating an artificial tension between these two

12 *See* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1477 (2018) (listing the three justifications for the anticommandeering rule as dividing power to protect liberty, promoting political accountability, and preventing one government from shifting costs onto another).

13 *See* Printz v. United States, 521 U.S. 898, 932 (1997) ("[T]he whole *object* of the law [is] to direct the functioning of the state executive, and hence to compromise the structural framework of dual sovereignty, such a 'balancing' analysis is inappropriate.").

constitutional principles. This Part provides a brief historical background on these issues to contextualize the novelty of the Second Circuit's decision.

A. *Sanctuary Cities*

The term "sanctuary cities" refers to either state or local governments that have limited cooperation with the federal government on immigration-related programs.[14] Sanctuary city policies can cover a range of issues, including information sharing,[15] investigations,[16] and identification cards.[17]

In response to sanctuary policies, the United States Department of Justice (DOJ) announced that the federal government would condition the Edward Byrne Memorial Justice Assistance Grant Program (Byrne JAG), a significant source of federal funds for state and local policing, on compliance with three new conditions intended to force cities and states to cooperate with federal immigration officials.[18] This Comment focuses on just one of the three conditions, the so-called "compliance condition," which requires recipients of Byrne JAG funds to prove compliance with § 1373.

Section 1373 provides that "a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and

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14 *See* Kristina Cooke & Ted Hesson, *What are 'Sanctuary' Cities and Why is Trump Targeting Them?*, REUTERS (Feb. 25, 2020), https://www.reuters.com/article/us-usa-immigration-crime/what-are-sanctuary-cities-and-why-is-trump-targeting-them-idUSKBN20J25R [https://perma.cc/LQG6-DSEL] (stating that sanctuary jurisdictions are those that "limit cooperation with federal immigration enforcement").

15 *See, e.g.*, Act of Oct. 5, 2017, ch. 495, 2017 Cal. Stat. 3733 (codified at CAL. GOV'T CODE §§ 7282-7282.5, 7284-7284.12 (West 2018)) (limiting the ability for federal immigration agents to use information from state and local law enforcement databases).

16 *See id.* (forbidding California's state and local law enforcement agencies from using state funds or resources "to investigate, interrogate, detain, detect, or arrest" suspected undocumented immigrants in compliance with federal immigration requests).

17 *See Sanctuary City Supportive Resources*, CHI.: OFF. OF THE MAYOR, https://www.chicago.gov/city/en/depts/mayor/supp_info/office-of-new-americans/sanctuary-city-supportive-resources.html [https://perma.cc/Z5VJ-HQD9] (rolling out a valid, government-issued ID that does not convey information about national origin or legal status).

18 *See Backgrounder on Grant Requirements*, U.S. DEP'T OF JUST., https://www.justice.gov/opa/press-release/file/984346/download [https://perma.cc/V7HY-GP8P] (listing the three conditions to receive federal funding); *see also* Jeff Sessions, Att'y Gen. U.S., Remarks on Sanctuary Jurisdictions (Mar. 27, 2017), https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-sanctuary-jurisdictions [https://perma.cc/7PWQ-QPG2] (requiring states to comply with the 8 U.S.C. § 1373 as a condition to receive the Edward JAG grant); *Edward Byrne Memorial Justice Assistance Grant (JAG) Program*, U.S. DEP'T OF JUST., BUREAU OF JUST. ASSISTANCE https://bja.ojp.gov/program/jag/overview [https://perma.cc/4Q9T-W6SF] (explaining that the Byrne JAG grants are "the leading source of federal justice funding to state and local jurisdictions").

Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual."[19]

Although the Supreme Court has spoken to what kinds of conditions amount to unconstitutional coercion,[20] conditioning federal funding on complying with § 1373 is irrelevant to the statute's constitutional analysis. As one lower court put it,

> [A]rgu[ing] that no anticommandeering claim exists here because compliance with Section 1373 is merely a condition on grand funds which [a sanctuary city] is free to refuse. . . . ignores that Section 1373 is an extant federal law with which [a sanctuary city] must comply, completely irrespective of whether or not the City accepts Byrne JAG funding.[21]

Thus, although the DOJ described § 1373 as a "compliance *condition*," it has always been a federal law that mandates compliance from state and city government officials.

At the litigation stage, the federal government's withholding of federal funds from sanctuary cities resulted in significant losses in three circuit courts. When ruling against the federal government, the Third, Seventh, and Ninth Circuits avoided the constitutionality of § 1373. Instead, these circuits rested their decisions on administrative law grounds, finding the Attorney General lacked the requisite statutory authority to withhold federal funding.[22] The Second Circuit, however, ruled in favor of the federal government and explicitly ruled on the constitutionality of § 1373, finding there was no anticommandeering violation.[23] The Second Circuit's decision

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19 8 U.S.C. § 1373(a). The Immigration and Naturalization Service has since been disbanded and reincorporated as the U.S. Citizenship and Immigrations Service, the U.S. Immigration and Customs Enforcement Service, and the Customs and Border Protection Service, which are all part of the U.S. Department of Homeland Security.

20 *Compare, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 537, 581 (2012) (finding that creating conditions for funds approximating twenty percent of a state's total budget was a "gun to the head"), *with* South Dakota v. Dole, 483 U.S. 203, 204, 210 (1987) (ruling that instituting conditions on federal funding amounting to five percent of a state's total budget was not coercive).

21 City of Chicago v. Sessions, 321 F. Supp. 3d 855, 867 (N.D. Ill. 2018), *aff'd sub nom* City of Chicago v. Barr, 957 F.3d 855 (7th Cir. 2020).

22 *See* City of Chicago v. Sessions, 888 F.3d 272, 282, 287 (7th Cir. 2018) (stating that the constitutional question of using federal funds to conscript state and local law enforcement in federal immigration schemes was not before the court and affirming the district court's holding that "the City established a likelihood of success on the merits of its contention that the Attorney General lacked the authority to impose the notice and access conditions on receipt of the Byrne JAG grants"); *see also* City of Philadelphia v. Att'y Gen. U.S., 916 F.3d 276, 279 (3d Cir. 2019) ("The City attacked the government's ability to impose the [c]hallenged [c]onditions on several statutory and constitutional fronts. But we need only reach the threshold statutory question."); City of Los Angeles v. Barr, 941 F.3d 931, 934 (9th Cir. 2019) (deciding the issue on statutory authority grounds).

23 *See* New York v. U.S. Dep't of Just., 951 F.3d 84, 113 (2d Cir. 2020) (ruling the conclusion that § 1373 violates the Constitution "does not follow"), *reh'g denied* 964 F.3d 150 (2d Cir. 2020).

became the first significant win for the federal government in the sanctuary city debate, but it also opened the door for federal commandeering within the immigration context.

B. *The Anticommandeering Rule*

The anticommandeering doctrine only recently emerged after the federal government, as the Supreme Court put it, "attempted in a few isolated instances to extend its authority in unprecedented ways."[24] The anticommandeering doctrine was not only justified on constitutional grounds, stemming from the Tenth Amendment, but on structural and historical grounds as well.

Under the Constitution, states have plenary power and the federal government is limited to act only on their enumerated powers.[25] Even when the federal government acts within its enumerated powers, it cannot generally mandate states' compliance.[26] The Supreme Court has stressed that "[t]his separation of the two spheres is one of the Constitution's structural protections of liberty."[27] Under the Tenth Amendment, the Supreme Court has repeatedly affirmed the principle that the federal government cannot commandeer state legislative processes by directly compelling them to enact and enforce federal laws.[28]

In addition to constitutional text, the Court also articulated three other justifications for the anticommandeering doctrine.[29] First, it provides a clear division of power to reduce the risk of tyranny and abuse from either the federal or state government.[30] Second, it preserves political accountability by

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24 Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1476 (2018).

25 *See* New York v. United States, 505 U.S. at 156 (1992) (citation omitted)(calling the federal government "an instrument of limited and enumerated power" and finding "that what is not conferred, is withheld, and belongs to the state authorities").

26 *See id*. at 166 ("We have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts.").

27 Printz v. United States, 521 U.S. 898, 921 (1997).

28 *See* New York v. United States, 505 U.S. at 161. (quoting Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 (1981)) ("Congress may not simply 'commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'" (alteration in original)); *see also Murphy*, 138 S. Ct. at 1476 (finding that while Congress has only certain enumerated powers, "all other legislative power is reserved for the States, as the Tenth Amendment confirms. And conspicuously absent from the list of powers given to Congress is the power to issue direct orders to the governments of the States").

29 *See Murphy*, 138 S. Ct. at 1477 (mentioning the three reasons as avoiding abuses of power, maintaining political accountability, and preventing cost shifting from Congress to the states).

30 *See* New York v. United States, 505 U.S. at 181-82 (citing Gregory v. Ashcroft, 501 U.S. 452, 458 (1991)) ("[A] healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."); *see also Murphy*, 138 S. Ct. at 1477 (finding

letting voters know which government deserves credit or blame for any particular regulation.[31] And third, it prevents the federal government from shifting regulatory costs to the states.[32]

The Supreme Court provided a roadmap for what kind of federal statutes constitute commandeering. In *New York* and *Printz*, the Court found that federal mandates that *affirmatively* require states to enact federal laws amounted to unconstitutional commandeering.[33] The Court broadened this rule in its recent decision in *Murphy v. National Collegaite Athletic Ass'n* by holding that federal *prohibitions* on state actions could also amount to unconstitutional commandeering.[34] The *Murphy* decision resulted in multiple courts finding that § 1373, a federal *prohibition* on state legislatures, was unconstitutional commandeering.[35]

As a result of *Murphy*, the anticommandeering rule took center stage in the Second Circuit's analysis of § 1373. The Second Circuit found that § 1373 did not amount to federal commandeering for two reasons. First, according to the court, federal statutes do not implicate the anticommandeering rule in areas lacking "pertinent authority 'reserved to the States.'"[36] The court focused specifically on the immigration context to highlight the broad and preeminent power that the federal government possessed in regulating immigration.[37] This immigration

that the anticommandeering rule reduces "tyranny and abuse from either front" (quoting New York v. United States, 505 U.S. at 181-82)).

31 *See* New York v. United States, 505 U.S. at 168-69 ("[W]here the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished."); *see also* Note, *States Commandeered Convictions: Why States Should Get a Veto over Crime-Based Deportation*, 132 HARV. L. REV. 2322, 2323 (2019) (describing how political accountability gets "eviscerated" when the federal government engages in commandeering).

32 *See* Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349, 1360-61 (2001) (discussing how governments can shift costs onto others); *see also* Note, *supra* note 31, at 2339 (describing the federal government's attempts to shift costs onto states in the immigration context).

33 *See* New York v. United States, 505 U.S. at 176 (finding that forcing states to "take title" to radioactive waste if they did not regulate it was an affirmative mandate to enact a federal regulatory program); *see also* Printz v. United States, 521 U.S. 898, 933 (1997) (holding that a federal statute that mandates state officials to participate in a federally regulatory scheme is unconstitutional).

34 *See Murphy*, 138 S. Ct. at 1478 (ruling that prohibitions, not just affirmative mandates, can violate the anticommandeering rule).

35 *See* City of Philadelphia v. Sessions, 309 F. Supp 3d 289, 329 (E.D. Pa. 2018) (holding that in light of *Murphy*, § 1373's prohibitions on state and local officials "is fatal to [its] constitutionality under the Tenth Amendment"), *aff'd in part, vacated in part on other grounds sub nom.* City of Philadelphia v. Att'y Gen. of the U.S., 916 F.3d 276 (3d Cir. 2019); *see also* City & County of San Francisco v. Sessions, 349 F. Supp. 3d 924, 945 (N.D. Cal. 2018) ("Section 1373 is unconstitutional considering the anti-commandeering principle and the Supreme Court's recent decision in *Murphy v. NCAA*.").

36 *See* New York v. U.S. Dep't of Just., 951 F.3d 84, 113 (2d Cir. 2020) ("A commandeering challenge to a federal statute depends on their being pertinent authority 'reserved to the States.'"), *reh'g denied* 964 F.3d 150 (2d Cir. 2020).

37 *See id.* (using caselaw and statutes related to immigration to dismiss a commandeering challenge to § 1373).

supremacy—in the court's mind—assuaged any anticommandeering concerns over § 1373.[38] Second, citing preemption cases, the court found that states cannot pass laws *contrary* to the federal government, so a federal statute explicitly preventing state and local legislatures from contradicting federal law did not amount to anticommandeering.[39]

C. *The Federal Immigration Power*

The federal exclusivity principle asserts that the federal government has sole authority over regulating immigration.[40] The Supreme Court has reiterated this principle time and again, attempting to ground it in the Constitution and originalist arguments.[41] The DOJ has, likewise, echoed this idea that the government has exclusive authority to make and enforce immigration laws.[42]

The federal government has interpreted this exclusive immigration power broadly. More than regulating the inflow and outflow of immigrants, the federal government regulates local employment contracts,[43] police procedures,[44] and in-state tuition,[45] all under the umbrella justification of "immigration." But the pertinent constitutional text falls short of establishing the federal government's exclusive authority over such broad issues. The most specific text on the topic grants Congress the power only "[t]o establish an uniform Rule of

38 *See id.* (finding the commandeering concerns about § 1373 to fall short in an area such as immigration where the federal government has "broad" and "preeminent" power).

39 *See id.* ("It is doubtful that States have reserved power to adopt—in the words of the district court—immigration policies '*contrary* to those preferred by the federal government.'").

40 *See* De Canas v. Bica, 424 U.S. 351, 354 (1976) ("[The] [p]ower to regulate immigration is unquestionably exclusively a federal power.").

41 *See* Arizona v. United States 567 U.S. 387, 395 (2012) (citing THE FEDERALIST NO. 3 (John Jay)) ("It is fundamental that foreign countries concerned about the status, safety, and security of their nationals in the United States must be able to confer and communicate on this subject with one national sovereign, not the 50 separate States."); *see also* Hines v. Davidowitz, 312 U.S. 52, 64 (1941) ("One of the most important and delicate of all international relationships . . . has to do with the protection of the just rights of a country's own nationals when those nationals are in another country.").

42 *See* Katie Benner, *Justice Dept. Sues Over Sanctuary Laws in California, N.J. and Seattle*, N.Y. TIMES (Feb. 10, 2020), https://www.nytimes.com/2020/02/10/us/politics/justice-department-sanctuary-law.html [https://perma.cc/3HFC-WFP2] (describing how Attorney General William Barr claimed that the Constitution gave the federal government the exclusive authority to regulate immigration).

43 *See* 8 U.S.C. § 1324(a)(3)(A)-(B) (prohibiting any person from hiring "unauthorized aliens").

44 *See id.* § 1227(a)(2)(A)(i) (requiring federal immigration agents to determine what crimes constitute those of "moral turpitude"); *see also* Note, *supra* note 31, at 2337 (discussing how federal penalties depend exclusively on state and local criminal actions).

45 *See* 8 U.S.C. § 1623 (forbidding state colleges and universities from providing in-state tuition to illegal aliens).

Naturalization . . . ."[46] To get to the exclusivity principle, courts have interpreted "[n]aturalization" broadly to include all immigration-related fields.[47]

This expansion of "naturalization" to support the federal exclusivity principle in immigration has rested in large part on originalist arguments.[48] The Supreme Court has held that "the supremacy of the national power in the general field of foreign affairs, including power over immigration" is reinforced by the Federalist Papers.[49] Citing Federalist Paper 42 as support for the federal exclusivity principle over immigration, the Court noted the flaws associated with having fifty different paths to United States citizenship instead of a singular federal path.[50] But this justification and the constitutional text still speaks only to the importance of *naturalization* to become a United States citizen, not immigration broadly.

As a result of this tension, the federal exclusivity principle over immigration has received criticism in recent years. Scholars have questioned whether the Constitution grants the federal government such a broad power over all immigration-related issues, arguing that such a conclusion is inconsistent with current practices in which states regulate their borders and engage in foreign affairs.[51] In particular, scholars point out that the federal exclusivity principle is belied by how states and local governments regulate immigration at the local level.[52] As courts continue to rely on the federal exclusivity principle throughout sanctuary city litigation, this emerging scholarly consensus has pushed against these decisions.

II. THE UNIQUE FLAWS OF THE SECOND CIRCUIT'S PROPOSED EXCEPTION TO THE ANTICOMMANDEERING RULE

In this Part, I argue that the Second Circuit's exception to the anticommandeering rule for immigration-related commandeering undermines the core justifications for the anticommandeering rule. This Part is broken into

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46 U.S. CONST. art. I, § 8, cl. 4.

47 *See* Arizona v. United States, 567 U.S. 387, 394-95 (2012) (finding that the "Rule of Naturalization" gave the federal government authority over immigration that is both "extensive and complex").

48 *See id*. at 395 (citing the Federalist Papers to support the holding that the federal government has supremacy over the area of immigration broadly).

49 *See* Hines v. Davidowitz, 312 U.S. 52, 62 (1941).

50 *See id*. at 73 n.35 (citing THE FEDERALIST NO. 42 (James Madison)) (finding that Madison's writings explained the importance of federal power over immigration).

51 *See* Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 611 (2008) ("Nowhere in the Constitution is the federal government explicitly given exclusive power over immigration."); *see also* Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignties*, 35 VA. J. INT'L L. 121, 161 (1995) (questioning the premise of federal exclusivity over foreign affairs since "[s]tate officials now have routine dealings with foreign governments").

52 *See* Rodríguez, *supra* note 51, at 611 ("Nowhere in the Constitution is the federal government explicitly given exclusive power over immigration.").

two Sections. The first Section argues that the anticommandeering rule continues to have broad applicability to all areas of the law, even if the federal government claims exclusive authority in a particular area. The Supreme Court has strongly rejected both balancing tests and categorical exemptions from the anticommandeering rule. This Section will also analyze the most recent Supreme Court anticommandeering case, *Murphy v. National Collegiate Athletic Ass'n*, in which the Court broadened the kind of federal statutes that constitute commandeering, and note how the Second Circuit's preservation of § 1373 directly contradicts this recent precedent.

The next Section examines the immigration exception in particular and explains why the Second Circuit's holding is flawed. First, the Second Circuit's exception conflates preemption analysis into what should have been a purely anticommandeering analysis. The Second Circuit ignored that § 1373 regulated state officials, not private actors. Second, an exception for immigration negates the rationales for the anticommandeering rule. The same justifications for forbidding anticommandeering—concerns over division of power, political accountability, and cost-shifting—still exist in the immigration context. Third, an exception for immigration intrudes on one of the most core state powers: the state police power. By expanding discretion to local law enforcement that states cannot revoke, § 1373 intrudes on the duties of local police, an area traditionally preserved for state power. Fourth, an exception based on the Second Circuit's reasoning relies on a refuted theory of the federal government's role in immigration. The idea that the federal government exclusively regulates immigration has been eroded not just by scholars but also by courts and the federal government itself.

A. *The Anticommandeering Rule is Applicable Across All Federal Enumerated Powers*

Any exception to the anticommandeering rule for federal actions based on a specific enumerated power would be antithetical to the very foundation of the doctrine.[53] To date, courts have never recognized an exception based on a federal enumerated power to the anticommandeering rule.[54]

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53 The focus of this Comment is on exceptions for specific *enumerated powers*, as opposed to exceptions for certain state institutions, as the Court recognized in *Testa v. Katt*, which required state courts to enforce federal law because of the Supremacy Clause, or exceptions for certain functions, as the Court left open in *Printz v. United States* for information sharing mandates. *See* Testa v. Katt, 330 U.S. 386, 394 (1947) (finding that the Supremacy Clause requires that state judiciaries enforce federal law); *see also* Printz v. United States, 521 U.S. 898, 918 (1997) (declining to decide whether information sharing mandates violate the anti-commandeering rule).

54 *See* New York v. United States, 505 U.S. 144, 166 (1992) (finding federal commandeering unconstitutional even if the federal government has an enumerated power); *see also* City of Chicago v. Sessions, 321 F. Supp. 3d 855, 872 (N.D. Ill. 2018) (finding "a mere policy rationale does not

The anticommandeering rule is a rule of broad applicability: it admits no balancing tests and no exceptions for federal actions made pursuant to a particular enumerated power.[55] The rationale is that either a balancing test or an exception would permit the federal government to engage in unconstitutional power grabs, even in areas where the federal government has an enumerated power. In further demonstration of its commitment to the anticommandeering rule, the Supreme Court has defined anticommandeering not only to encompass affirmative federal mandates but also to include federal prohibitions on state action.

The Second Circuit's preservation of § 1373 disregards this precedent. By prohibiting states from passing laws that limit cooperation with federal agencies through § 1373, the federal government, as all courts except the Second Circuit post-*Murphy* have ruled, clearly crossed the line into commandeering.[56] But, even after acknowledging *Murphy*'s applicability to § 1373, the Second Circuit carved out an immigration exception in a doctrine that has been without an exception based on an enumerated power since its inception.

This Section will critique in three parts the Second Circuit's holding that an enumerated power exception could exist within the anticommandeering rule. First, I examine how Supreme Court precedent has rejected a balancing test even in instances where the federal government has presented a considerable federal interest. This rejection—even at times of national crisis—suggests a strong commitment to the broad applicability of the anticommandeering rule. Second, I discuss how the Supreme Court has directly addressed whether an exception based on a constitutionally enumerated right should exist and explicitly rejected this position. Finally, I analyze how the Supreme Court has recently broadened the definition of anticommandeering to include federal *prohibitions* on state actions—rather than affirmative mandates—implicating § 1373, a federal statute that prohibits state legislatures from passing certain laws, directly.

1. Rejecting a Balancing Test

A balancing approach to the anticommandeering doctrine would weigh federal interests against state interests, but the Supreme Court has flatly rejected such an approach. It held in *New York* that even "a particularly strong federal interest" could not "enable Congress to command a state government

empower the Court to craft a constitutional exception heretofore unidentified in Tenth Amendment jurisprudence."), *aff'd sub nom.* City of Chicago v. Barr, 957 F.3d 855 (7th Cir. 2020).

55 *See* New York v. United States, 505 U.S. at 167 (rejecting the federal government's argument that it can commandeer states as justified under the federally enumerated power to regulate interstate commerce).

56 *See supra* text accompanying note 4.

to enact *state* regulation."[57] The Court emphasized, "Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents."[58] This approach reinforces the principle that once the federal government has crossed the line into commandeering, the action becomes unconstitutional. The federal government's interest in a particular area—regulating nuclear waste, handguns, or immigration—cannot justify the federal government's action.

Even in times of national crisis, the federal government's interest in commandeering the states cannot overcome the anticommandeering rule. When a novel virus known as COVID-19 forced the United States to reckon with a global pandemic, it was state governors—not the President—who had the power to lift stay-at-home orders.[59] The Supreme Court has upheld state authority to regulate high-stakes areas, such as the safety and health of its residents, finding that these matters "do not ordinarily concern the National Government. So far as they can be reached by any government, they depend, primarily, upon such action as the State in its wisdom may take . . . ."[60] This yielding of power to states, regarding even the most consequential of issues, precludes any balancing test and undermines any contention that an enumerated right exception to the anticommandeering rule should exist. The federal government may have an enumerated right to regulate an area, it may even have a significantly high interest at stake, but it does not have a carte blanche to commandeer.

2. Denying Any Exceptions Based on an Enumerated Right

In addition to rejecting a balancing test, the Supreme Court has also rejected granting any particular area of law an exemption to the anticommandeering rule. But the Second Circuit would make an exemption

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57 *See* New York v. United States, 505 U.S. at 178 (rejecting a balancing test even when the federal law served an important interest). This view was later reaffirmed in *Murphy*. *See* Murphy v. Nat'l Collegiate Athletics Ass'n, 138 S. Ct. 1461, 1476 (2018) (holding that "*New York* was clear and emphatic" in its rejection of a balancing test as part of the anticommandeering rule).

58 *Murphy*, 138 S. Ct. at 1477 (citing New York v. United States, 505 U.S. at 178).

59 *See* Jonathan Turley, *Trump Says It's His Call to Reopen the Country. The Constitution Says Otherwise*, WASH. POST (Apr. 14, 2020, 6:00 AM), https://www.washingtonpost.com/outlook/2020/04/14/coronavirus-federalism-trump-states/ [https://perma.cc/6FL6-LT7P] (describing how the Tenth Amendment forbids the federal executive from encroaching on state executives, even in times of crises). *But see* Donald J. Trump (@realDonaldTrump) TWITTER (Apr. 13, 2020, 10:53 AM) https://twitter.com/realDonaldTrump/status/1249712404260421633 [https://perma.cc/42TMXMMH] (arguing that "[i]t is the decision of the President" to lift stay-at-home orders).

60 Jacobson v. Massachusetts, 197 U.S. 11, 38 (1905).

based on a constitutionally enumerated right.[61] According to the Second Circuit, the Constitution grants the federal government "broad" and "preeminent" authority to regulate immigration; therefore, the Constitution does not reserve power to the states in this area.[62] If the states have no power, then—according to the Second Circuit—the Tenth Amendment is not implicated.[63] When the Tenth Amendment is not implicated, the Second Circuit's logic continues, the anticommandeering rule becomes inapplicable.[64] Although the Supreme Court has found textual support for the federal exclusivity principle in immigration,[65] the notion that this gives the federal government the authority to commandeer state legislatures contradicts Supreme Court precedent.

Even explicit enumerated powers in the Constitution cannot justify federal commandeering of state and local legislative decisions.[66] The Supreme Court spoke directly to this issue in *New York*. The federal government had argued that when it regulates pursuant to the Commerce Clause it may commandeer state governments to regulate nuclear waste.[67] The Supreme Court rejected this argument, stating, "where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts."[68] As an example, the Supreme Court noted that the federal government could "regulate interstate commerce directly," but the Commerce Clause

61 *See* New York v. U.S. Dep't of Just., 951 F.3d 84, 113 (2d Cir. 2020) (finding that commandeering challenges depend on states possessing some reserved power which does not exist where the federal government has preeminent power), *reh'g denied* 964 F.3d 150 (2d Cir. 2020).

62 *Id*. at 113.

63 *See id*. (citing New York v. U.S. Dep't of Just., 343 F. Supp. 3d 213, 235 (2018)) ("It is doubtful that States have reserved power to adopt . . . immigration policies '*contrary* to those preferred by the federal government.'").

64 *See id*. ("A commandeering challenge to a federal statute depends on there being pertinent authority 'reserved to the States.'").

65 *See* Arizona v. United States, 567 U.S. 387, 394-95 (2012) (finding that the federal government has "broad, undoubted power over immigration" because of the "uniform Rule of Naturalization" clause in the Constitution); *see also* Hines v. Davidowitz, 312 U.S. 52, 73 n.35 (1941) (citing THE FEDERALIST NO. 42 (James Madison)) (describing how early concerns over federal authority in immigration resulted in the "uniform rule of naturalization" being added to the Constitution).

66 *See* New York v. United States, 505 U.S. 144, 166 (1992) ("[E]ven where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts."); *see also* Josh Blackman, *Improper Commandeering*, 21 U. PA. J. CONST. L. 959, 971-72 (2019) (describing how Justice O'Connor observed in New York that even if the federal government had an enumerated power, it was still improper for federal power to commandeer state legislatures).

67 *See* Brief for the United States at 30-32, New York v. United States, 505 U.S. 144 (Nos. 91-543, 91-558, 91-563) (arguing that the "take-title" provision is permissible commandeering since Congress has the power to regulate interstate commerce under the Commerce Clause).

68 New York v. United States, 505 U.S. at 166.

"does not authorize Congress to regulate state governments' regulation of interstate commerce."[69]

The Second Circuit's opinion ignores this reality. By treating § 1373 as constitutional, the Second Circuit misses the critical distinction that the majority in *New York* highlighted. Section 1373 moves beyond regulating immigration directly and seeks to regulate state governments' regulation of immigration. Even if the federal government has an enumerated right to regulate immigration, regulating states' handling of immigration is unconstitutional commandeering.

The Supreme Court provided two avenues that the federal government could employ to address an issue at the state level. First, using Congress's spending power, the federal government could attach conditions on the receipt of federal funds.[70] Second, the federal government could regulate private actors directly.[71] But in no scenario is the federal government allowed to mandate state action based solely on its enumerated right.

3. Including Prohibitions in the Definition

The Supreme Court broadened the scope of anticommandeering rule to include not just affirmative mandates but also *prohibitions* on state legislatures.[72] Holding that the distinction between affirmative mandates and prohibitions was an "empty" one, the Court held in *Murphy* that "[i]t was a matter of happenstance that the laws challenged in *New York* and *Printz* commanded 'affirmative' action as opposed to imposing a prohibition."[73]

Thus, a statute that prohibits state legislatures from passing a particular type of law would seem squarely addressed by *Murphy*. Such statutes are unconstitutional under the anticommandeering rule.[74] Viewed in light of this decision, § 1373—a statute prohibiting state legislatures from limiting information sharing with federal immigration officers—should be

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69 *Id*.

70 *See id*. at 167 (citing South Dakota v. Dole, 483 U.S. 203, 206 (1987) ("Congress may attach conditions on the receipt of federal funds."); *see also* Daniel J. Hemel, *Federalism as a Safeguard of Progressive Taxation*, 93 N.Y.U. L. REV. 1, 6-7 (2018) (discussing how states are endowed with entitlements that the federal government can only conscript for a price).

71 *See* New York v. United States, 505 U.S. at 167 ("[W]here Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress' power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation.").

72 *See* Murphy v. Nat'l Collegiate Athletics Ass'n, 138 S. Ct. 1461, 1478 (2018) (finding that anticommandeering applies to both instances in which the federal government mandates affirmative action or prohibits state action).

73 *Id*.

74 *See id.* (ruling that the anticommandeering rule applies to both affirmative actions and prohibitions).

unconstitutional. In fact, under *Murphy* every other court besides the Second Circuit has come to that conclusion, finding § 1373 unconstitutional.[75]

When considering the same statute in 1999, the Second Circuit originally held that § 1373 was constitutional because the court reasoned that federal *prohibitions* on passing state laws did not amount to commandeering.[76] According to the court, only *affirmative* mandates for states to enact or administer laws could amount to commandeering.[77] Since *New York* and *Printz* only analyzed affirmative mandates, this narrow reading of the anticommandeering rule could stand at the time. In *Murphy*, as discussed above, the Supreme Court explicitly rejected this interpretation, finding that prohibitions can also amount to commandeering.[78]

Ruling on its constitutionality again in light of *Murphy*, the Second Circuit was still not persuaded that § 1373 amounted to an unconstitutional act of commandeering. Although it acknowledged *Murphy*'s holding, the Second Circuit still found that § 1373 was constitutional because it regulated immigration, an area where the federal government has "broad" and "preeminent" power.[79] According to the Second Circuit, § 1373 could be upheld—even if it acts as an explicit federal prohibition on state action—because immigration sharing between federal and state officials is a crucial feature of the immigration system.[80] Thus, the Second Circuit's reasoning narrowed the Supreme Court anticommandeering precedent into a convoluted assessment of federal interests, disregarding *Murphy*'s central holding in the process.

B. *The Proposed Exception for Immigration is Particularly Flawed*

This Section makes four arguments against an exception to the anticommandeering rule within the immigration context in particular. First, an immigration exception cannot be justified under the Supremacy Clause since

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75 *See supra* text accompanying note 5.

76 *See* City of New York v. United States, 179 F.3d 29, 35 (2d Cir. 1999) (stating that Congress had not "affirmatively conscripted states, localities, or their employees into the federal government's service . . . . Rather, they prohibit state and local governmental entities or officials only from directly restricting the voluntary exchange of immigration information . . . .").

77 *See id.* (finding § 1373 constitutional because it was a prohibition and not an affirmative conscription of states and localities).

78 *See Murphy*, 138 S. Ct. at 1478 (broadening the definition of anticommandeering to include prohibitions).

79 *See* New York v. U.S. Dep't of Just., 951 F.3d 84, 113 (2d Cir. 2020) (citations omitted) (holding the conclusion that states have reserved power is "not so obvious in the immigration context where it is the federal government that holds 'broad' and 'preeminent' power"), *reh'g denied* 964 F.3d 150 (2d Cir. 2020).

80 *See id.* at 113-14 (citations omitted) (finding that "[c]onsultation between federal and state officials is an important feature of the immigration system").

federal supremacy applies only in the preemption context, where private parties are regulated, rather than in the anticommandeering context, where state actors are regulated. Second, an immigration exception would undermine the justifications for the anticommandeering rule by concentrating federal power in one location, eradicating political accountability, and spending state resources on federal enforcement. Third, an immigration exception would intrude on states' police power by giving the federal government supervisory authority over state and local police. Finally, an immigration exception rests on a refuted theory of federal exclusivity in immigration.

1. The Exception Conflates Preemption with Anticommandeering

The Supreme Court cautioned against conflating federal preemption with anticommandeering.[81] In *Murphy*, the Court held, "[t]he anticommandeering doctrine does not apply when Congress evenhandedly regulates an activity in which both States and private actors engage."[82] Elsewhere, the Court has explained that the key distinction regarding Tenth Amendment federalism principles is whether the federal government regulates private actors or state officials.[83] If a federal statute regulates private actors, courts should engage in a preemption analysis. If federal statute regulates state officials, however, then courts should engage in an anticommandeering analysis.

Without ever using the word "preemption," the Second Circuit relied on this preemption paradigm by arguing that states cannot adopt "immigration policies '*contrary* to those preferred by the federal government.'"[84] The Second Circuit then cited *Arizona v. United States*, a case dedicated to federal preemption, as support for the conclusion that a "State may not pursue policies that undermine federal law."[85] As discussed above, this conclusion would only be correct if the federal government implemented a statute regulating *private actors*. States have little recourse when a federal law regulates private actors. But the Supreme Court held in *Murphy* that "every form of preemption is based on a federal law that regulates the conduct of private actors, *not* the States."[86] Indeed, the federal government has passed

81 *See Murphy*, 138 S. Ct. at 1479 (finding that a preemption analysis requires the federal statute to be regulating individuals, rather than states).

82 *Id.* at 1478.

83 *See* Reno v. Condon, 528 U.S. 141, 149-50 (2000) (finding that a federal statute does not violate the Tenth Amendment if it regulates private parties rather than state actors).

84 New York v. U.S. Dep't of Just., 951 F.3d at 113.

85 *Id.* (citing Arizona v. United States, 567 U.S. 387, 416 (2012)) ("[The] State may not pursue policies that undermine federal law."). *See generally* Arizona v. United States, 567 U.S. 387 (2012).

86 *Murphy*, 138 S. Ct. at 1481 (emphasis added).

immigration laws that regulate private actors, and courts have rightfully found state laws contrary to those to be preempted.[87]

In this case, however, the federal statute does not purport to regulate private actors. Section 1373 regulates state and local legislatures by restraining state and local representatives from passing certain forms of immigration-related bills and by dictating the actions of state and local law enforcement.[88] The idea that states cannot implement laws "contrary" to the federal government, as the Second Circuit held, carries no weight in a context where the federal statute regulates state and local officials. Therefore, the notion that preemption doctrine can play a role in commandeering cases is flawed.[89]

Admittedly, the court's concern with a state program that obstructs the federal government from enacting a federal regulatory scheme is valid. The anticommandeering rule only prohibits the federal government from regulating state and local legislatures and executive officials; it does not authorize states to pass laws that deliberately obstruct the federal government. This is a legitimate federal concern, and it is still an open question as to what kind of state actions arise to the level of obstruction.[90] Limiting information sharing in the immigration context does not, however, obstruct any federal regulatory scheme.[91] The desired information originates from state diligence, exists for purposes of state proceedings, and would be relayed by state actors, all of whom are funded by state taxpayers. Of course, sharing this state-generated immigration information would make the federal government's job easier, but convenience alone has never justified federal commandeering.[92] As the Seventh

87 *See* Arizona v. United States, 567 U.S. 387, 400 (2012) (finding that a state law creating a new criminal misdemeanor conduct already proscribed by federal law was preempted); *see also* Hines v. Davidowitz, 312 U.S. 52, (1941) ("[W]here the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot . . . conflict or interfere with, curtail or complement, the federal law . . . .").

88 *See* 8 U.S.C. § 1373(a) ("[A] Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.").

89 The Second Circuit's importation of preemption doctrines faces more obstacles given that § 1373 mandates how states should treat their own police force. The Second Circuit itself held that "[t]raditionally, there has been a presumption against preemption with respect to areas where states have historically exercised their police powers." *See* N.Y. SMSA, Ltd. v. Clarkstown, 612 F.3d 97, 104 (2d. Cir. 2010); *see also infra* notes 142–153 and accompanying text for more discussion on state police power.

90 *See* United States' Opposition to Defendant Joseph's Motion to Dismiss the Indictment at 15, United States v. Joseph, No. 19-10141-LTS, 2019 WL 6168476 (D. Mass. Oct. 18, 2019) (arguing that the anticommandeering rule does not apply when state agents are "affirmatively, corruptly impeding [a federal] immigration proceeding . . . .").

91 *See* City of Chicago v. Sessions, 888 F.3d 272, 282 (7th Cir. 2018) (finding the restrictions on information sharing did not arise to interference with the federal government).

92 *See* City of Chicago v. Sessions, 321 F. Supp. 3d 855, 872 (N.D. Ill. 2018) ("[T]his Court has found no controlling authority holding that such information sharing provisions are constitutionally

Circuit noted, such a claim of obstruction is "a red herring" since "nothing in this case involves any affirmative *interference* with federal law enforcement at all, nor is there any interference whatsoever with federal immigration authorities."[93] Therefore, limiting information sharing is a far cry from state obstruction of federal immigration laws.

2. The Exception Undermines the Rationales for the Anticommandeering Rule

This subsection argues that an immigration exception would result in the same harms the Supreme Court sought to avoid when it adopted the anticommandeering rule in *New York*. These principles have continued to animate anticommandeering cases. The anticommandeering rule relies on three primary justifications for its existence in constitutional law.[94] First, there are concerns connected to the proper division of power in a federalist system. If the federal government could commandeer states to enact or administer any federal program, then its power would expand substantially. Such a result runs contrary to a federalist structure, designed to divide power between levels of government.[95] Second, there are concerns connected to maintaining political accountability. If the federal government could force states to implement policies that are unpopular for their constituents, then those constituents may punish the state officials at the ballot box. This concern is especially true when regulating local immigrant communities, whose impact is primarily felt at the local level. Third, there are concerns regarding cost shifting between levels of government. If the federal government could use state taxes to pay for federal regulatory programs, then states would be drained of their monetary resources. This result could hinder states' abilities to provide their own state programs.

a. *Division of Power*

The division of power between levels of government is the essential feature of federalism. An immigration exception to the anticommandeering rule threatens to upend the proper balance. Underscoring the importance of the

impervious, and a mere policy rationale does not empower the Court to craft a constitutional exception heretofore unidentified in Tenth Amendment jurisprudence."), *aff'd sub nom.* City of Chicago v. Barr, 957 F.3d 855 (7th Cir. 2020).

93 City of Chicago v. Sessions, 888 F.3d at 282.

94 *See* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1477 (2018) (describing the three justifications for the anticommandeering rule as dividing power to protect liberty, promoting political accountability, and preventing one government from shifting costs onto another).

95 *See* THE FEDERALIST NO. 45 (James Madison) ("The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.").

anticommandeering rule, the Supreme Court in *Printz* held that "the Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location . . . ."[96] Allowing the federal government to subvert the anticommandeering rule in the immigration context blurs this division of power. This is especially troubling since federalism depends on states serving as a check on federal power grabs.

Allowing an immigration exception to the anticommandeering rule guts one of the few defenses that the Founding Fathers envisioned as part of the states' arsenal. James Madison wrote,

> [A]mbitious encroachments of the federal government, on the authority of the State governments, would not excite the opposition of a single State, or of a few States only. They would be signals of general alarm. Every government would espouse the common cause . . . . Plans of resistance would be concerted.[97]

In his theory of federalism, if the federal government encroached on state governance, states could respond accordingly.

Sanctuary cities are just the kind of response to federal overreach that Madison envisaged. First, the federal government asked state and local law enforcement to serve as federal immigration officials.[98] In response to that encroachment, some state and local officials passed laws prohibiting immigration-related information sharing.[99] The federal government then passed § 1373, conscripting state legislatures to federal will. According to Madison, states should rebuke federal overreach. Under this Madisonian vision, the actions states took to preserve sanctuary cities represent a properly functioning federalist nation.

Section 1373 blurs this division of power by granting federal control over state and local officials and, thus, conscripting state and local legislatures. The Supreme Court has found both actions unconstitutional under the anticommandeering rule. The statute directly discusses the actions of "any government entity or official," including state or local government officials.[100]

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96 Printz v. United States, 521 U.S. 898, 933 (1997).

97 THE FEDERALIST NO. 46 (James Madison).

98 *See* Exec. Order No. 13768, 82 Fed. Reg. 8799, 8800 (Jan. 25, 2017) ("It is the policy of the executive branch to empower State and local law enforcement agencies across the country to perform the functions of an immigration officer . . . .").

99 *See* Act of Oct. 5, 2017, ch. 495, 2017 Cal. Stat. 3733 (codified at CAL. GOV'T CODE §§ 7282-7282.5, 7284-7284.12 (West 2018)) (forbidding states officials from sharing immigration-related information from state databases with federal immigration agents).

100 *See* 8 U.S.C. § 1373(a) ("[A] Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.").

Essentially, it increases the freedom that state and local officials can exert when working for a nonfederal government. This violates anticommandeering principles, which would prohibit the federal government from deciding how to allocate local officers' time and resources.[101]

The federal government may argue that § 1373 never tells state or local officials what to do, but merely allows local officials the discretion whether to share information with the federal government. This additional discretion, however, is a usurpation of power by its very nature because it gives state and local officials discretionary privileges, outside of what their own government may have given them. Strapped for cash, a state or local government may decide to limit local law enforcement to just the immediate needs of the community, but § 1373 would make this very choice illegal. Federal command over state and local officials is exactly what the Supreme Court feared. In *Printz*, the Supreme Court warned that the Tenth Amendment means nothing if one could "say that the Federal Government *cannot* control the State, but *can* control all of its officers."[102]

Second, § 1373 conscripts state and local legislatures. The statute states that any "State, or local government entity or official may not prohibit, or any way restrict," information sharing with federal immigration officials.[103] In *Murphy*, the majority observed that putting state legislatures under the direct control of Congress "is as if federal officers were installed in state legislative chambers and were armed with the authority to stop legislators from voting on any offending proposals."[104] The Court warned, "A more direct affront to state sovereignty is not easy to imagine."[105]

Although the Second Circuit recognized that the rule in *Murphy* that "prohibitions as well as mandates can manifest impermissible commandeering" should apply to § 1373, it found the federal government could conscript state legislatures because the provision inovled immigration.[106] Not only did the Second Circuit contravene all division of power concerns, but it did so by essentially overruling recent Supreme Court precedent.

Through both the means, mandating what laws state legislatures can pass, and the ends, control over state and local officers, § 1373 erodes state power

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101 *See* City of Chicago v. Sessions, 321 F. Supp. 3d 855, 869 (N.D. Ill. 2018) ("Section 1373 supplants local control of local officers; the statute precludes Chicago, and localities like it, from limiting the amount of paid time its employees use to communicate with INS."), *aff'd sub nom.* City of Chicago v. Barr, 957 F.3d 855 (7th Cir. 2020).

102 Printz v. United States, 521 U.S. 898, 931 (1997) (emphasis added).

103 8 U.S.C. § 1373(a).

104 Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1478 (2018).

105 *Id.*

106 *See* New York v. U.S. Dep't of Just., 951 F.3d 84, 113 (2d Cir. 2020) (finding that immigration is different in the anticommandeering context because it is not clear that states have any reserved power), *reh'g denied* 964 F.3d 150 (2d Cir. 2020).

and subverts core federalism principles. The statute demonstrates federal commandeering at every level of a state hierarchy by conscripting state legislatures and controlling the actions of those on the ground.

b. *Political Accountability*

An immigration exception to the anticommandeering rule would also create political accountability issues. Officials of sanctuary cities and states have explained that they want to be seen as welcoming and inclusive of immigrants because doing so will better serve their entire community.[107] To those officials, the sanctuary city debate invigorates concerns over political accountability. It provides an opportunity for progressive localities to enact policies that counteract federal policies with which their constituents disagree with. Philadelphia Mayor Jim Kenney stated that sanctuary cities "preven[t] a White House run by a bully from bullying Philadelphia into changing its policies."[108] Local sanctuary policies stem from a multitude of motivations that constituents cite, from public safety to the local economy. Mandating compliance with federal regulations thwarts these goals.

First, there are public safety rationales for limiting cooperation with the federal government. Both the federal and state governments maintain that their position is better for public safety. The federal government has argued that sanctuary policies threaten public safety by allowing cities to shield dangerous immigrants.[109] By contrast, sanctuary cities and states have argued that cooperating with federal immigration enforcement threatens public safety by scaring away immigrant victims and rerouting law enforcement

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107 *See Sanctuary City Supportive Resources*, *supra* note 17 (stating that Chicago's mayor wanted his constituents to know that Chicago will "continue to provide a home to hardworking, honest individuals—regardless of their place of birth"); *see also* Jeff Gammage & Anya van Wagtendonk, *Judge Rules for Philadelphia in 'Sanctuary City' Case*, PHILA. INQUIRER (June 6, 2018), https://www.inquirer.com/philly/news/sanctuary-city-judge-rules-for-philadelphia-trump-undocumented-immigrants-20180606.html [https://perma.cc/R97N-VDXV] (reporting that Philadelphia's mayor stated, "Philadelphia has always been and will always be a welcoming city," and "Philadelphia needs its immigrant community").

108 Gammage & van Wagtendonk, *supra* note 107.

109 *See* Press Release, NYC Sanctuary Policies Continue to Shield Criminal Aliens, U.S. Immigr. & Customs Enf't, U.S. Dep't of Homeland Sec. (Jan. 24, 2020), https://www.ice.gov/news/releases/nyc-sanctuary-policies-continue-shield-criminal-aliens [https://perma.cc/U5NM-UU4H] ("When law enforcement agencies don't honor ICE detainers, these individuals, who often have significant criminal histories, are released onto the street, presenting a potential public safety threat."); *see also* U.S. DEP'T OF HOMELAND SEC., BUDGET-IN-BRIEF FISCAL YEAR 2019 at 4 (2019) (describing how illegal immigration threatens national security and public safety); Press Release, Acting ICE Director Calls Out Jurisdictions With Sanctuary Policies for Threatening Public Safety, U.S. Immigr. & Customs Enf't, U.S. Dep't of Homeland Sec. (Sept. 26, 2019), https://www.ice.gov/news/releases/acting-ice-director-calls-out-jurisdictions-sanctuary-policies-threatening-public [https://perma.cc/8X52-MHLR] (describing how the acting ICE director accused sanctuary cities of threatening public safety by harboring violent immigrants).

efforts elsewhere.[110] While the federal government has pointed to isolated instances of violent crimes committed by undocumented immigrants, state and local governments have highlighted the chilling effect these laws would have on witness cooperation and other citizen compliance.[111] Before passing a bill that limited the involvement of state and local law enforcement in federal immigration enforcement, the California state legislature cited a study finding that seventy percent of undocumented immigrants were less likely to contact local law enforcement if they were the victims of a crime.[112] Furthermore, many sanctuary policies make exceptions for those convicted of violent crimes, allowing states and local law enforcement discretion to report dangerous criminals to the federal government.[113]

Recent empirical evidence has corroborated the sanctuary cities' position. Researchers have found that crime in sanctuary cities is lower by a statistically significant amount than crime in nonsanctuary cities when controlling for population characteristics.[114] Thus, state and local officials have been saying

110 *See Sanctuary City Supportive Resources*, *supra* note 17 ("FBI crime data . . . shows that sanctuary policies increase public safety by allowing local law enforcement to focus on keeping neighborhoods safe and encouraging immigrant communities to cooperate with [local] law enforcement."); *see also* Alyssa Garcia, Comment, *Much Ado About Nothing?: Local Resistance and the Significance of Sanctuary Laws*, 42 SEATTLE U. L. REV. 185, 206-07 (2018) (describing how jurisdictions use sanctuary laws "to encourage victims and witnesses to come forward in reporting crime and aid in investigations"); *see also* Tom K. Wong, *The Effects of Sanctuary Policies on Crime and the Economy*, CTR. FOR AM. PROGRESS (Jan. 26, 2017, 1:00 AM), https://www.americanprogress.org/issues/immigration/reports/2017/01/26/297366/the-effects-of-sanctuary-policies-on-crime-and-the-economy [https://perma.cc/G7BZ-UCSY] (describing how police organizations have concluded that working with federal immigration officials "would result in increased crimes against immigrants and in the broader community, create a class of silent victims and eliminate the potential for assistance from immigrants in solving crimes or preventing future terroristic acts.").

111 *See* CHI., ILL., MUN. CODE § 2-173-005 (2018) ("The cooperation of the City's immigrant communities is essential to prevent and solve crimes and maintain public order, safety, and security in the entire City."); *see also* SEATTLE, WASH., ORDINANCE NO. 121063 (Jan. 28, 2003) (describing how immigrant communities are afraid to access benefits for fear of being reported to federal immigration officers).

112 *See Senate Bill 54: Hearing Before the Assemb. Comm. on Public Safety*, 2017-2018 Leg. Sess. (Cal. 2017) (statement of Reginald Byron Jones-Sawyer, Sr., Chair on Public Safety) (citing a report by the University of Illinois on the willingness of undocumented immigrants to contact local law enforcement).

113 *See* Act of Oct. 5, 2013, ch. 570, 2013 Cal. Stat. 4649 (codified at CAL. GOV'T CODE § 7282 (West 2018)) (granting local law enforcement the discretion to cooperate with federal immigration officers when a suspected undocumented immigrant has committed over thirty different violent crimes); *see also* Act of Oct. 5, 2017, ch. 495, 2017 Cal. Stat. 3733 (codified at CAL. GOV'T CODE §§ 7282-7282.5, 7284-7284.12 (West 2018)) (giving local law enforcement the discretion to share information with federal immigration officials when the suspected undocumented immigrant has committed certain violent crimes).

114 *See* Wong, *supra* note 110 (finding crime—both violent and nonviolent types—to be statistically significantly lower when compared to nonsanctuary cities); *see also* Gene Demby, *Why Sanctuary Cities are Safer*, NAT'L PUB. RADIO (Jan. 29, 2017), https://www.npr.org/sections/codeswitch/2017/01/29/512002076/why-sanctuary-cities-are-safer [https://perma.cc/QT9K-JWKC]

what the research has demonstrated: the more involvement local law enforcement has with federal immigration agents, the more crime occurs, despite the federal government's insistence to the contrary.[115]

There are also economic considerations for fostering immigrant communities. Research has demonstrated that immigrants contribute skills to and help stimulate local economies.[116] Immigrants benefit cities by serving as both laborers and consumers.[117] Some estimates have found that if the United States deported all undocumented immigrants, the national gross domestic product would decrease by almost eight trillion dollars by 2030.[118] By contrast, the federal government fears that low-income immigrants are a net drain on the economy and have passed the controversial public charge rule to deny visas to low-income immigrants.[119]

Regardless of whether benefits exist in passing sanctuary laws, prohibiting state and local governments from choosing which policies to implement prevents them from weighing such considerations. One commentator noted, "Those communities that shun illegal immigrants will not receive the benefits, if it turns out they exist. On the other hand, those who welcome illegal immigrants will have to bear the costs or other negative consequences, if it turns

(highlighting a study that found that counties that complied with federal detainer requests experienced 35.5 fewer crimes per 10,000 people than those that did).

115 *See* Wong, *supra* note 110 (finding that "the data suggest that when local law enforcement focuses on keeping communities safe, rather than becoming entangled in federal immigration enforcement efforts, communities are safer and community members stay more engaged in the local economy.").

116 *See* GIOVANNI PERI, THE IMPACT OF IMMIGRANTS IN RECESSION AND ECONOMIC EXPANSION 6 (June 2010) ("Immigration can boost the supply of skills different from and complementary to those of natives, increase the supply of low-cost services, contribute to innovation, and create incentives for investment and efficiency gains."); *see also* Wong, *supra* note 110 ("Median household income is statistically significantly higher in sanctuary counties compared to nonsanctuary counties."); Neeraj Kaushal, Cordelia W. Reimers & David M. Reimers, *Immigrants and the Economy*, *in* THE NEW AMERICANS: A GUIDE TO IMMIGRATION SINCE 1965, at 176, 180-81 (Mary C. Waters & Reed Ueda, eds., 2007) (finding that immigrants contribute more than their population share to the United States gross domestic product).

117 *See* Kaushal et al., *supra* note 116 (observing that immigrants made up a fifth of all low-wage work in the United States and that immigrants are a net taxpayer benefit when accounting for the taxes and public services they use).

118 *See* Lena Groeger, *The Immigration Effect: There's a Way for President Trump to Boost the Economy by Four Percent, But He Probably Won't Like It.*, PROPUBLICA (July 19, 2017), https://projects.propublica.org/graphics/gdp [https://perma.cc/PPH7-E2AW] (finding that if the United States deported all unauthorized immigrants, the country would lose almost $8 trillion over the next 14 years).

119 *See* Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41292 (Aug. 14, 2019) (to be codified at 8 C.F.R. pt. 103, 212, 213 ,214, 245, 248) (preventing immigrants from receiving a visa if they are likely at any time to become a public charge of the United States).

out there are any after all."[120] Mandating compliance with federal regulations frustrates local officials' ability to reap these benefits or incur these costs.

Federal encroachment, thus, undermines state and local political accountability. Some communities may want their officials to pass sanctuary policies to procure the benefits associated with increased immigration, but federal mandates can impede these officials' ability to enact those policies. Unaware of the federal government's role, voters could view their state and local officials as bedfellows with federal immigration agencies, such as the Immigration and Customs Enforcement (ICE), and could punish them at the ballot box. This concern is particularly significant in the immigration area, where many Americans seek to abolish ICE entirely, and national polls show that Americans rank ICE as the least popular federal agency.[121]

Section 1373 in particular frustrates political accountability by prohibiting state and local officials from directing their own officials. Through this statute, the federal government asks line-level state employees to use their own discretion to determine what to communicate to federal immigration officials, rather than follow the guidance of local elected policymakers. In *Printz*, the Supreme Court warned against this precise situation in which states are "put in the position of taking the blame for [a federal program's] burdensomeness and for its defects."[122]

Some Justices have disputed this claim, calling the notion that "voters will be confused over who is to 'blame' [as] reflect[ing] a gross lack of confidence in the electorate that is at war with the basic assumptions underlying any democratic government."[123] But, voters may blame their state or local governments for consequences not obviously linked to compliance with federal immigration mandates, such as increased crime, a dearth of laborers, or a sluggish economy.

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120 Sharyl Attkisson, *Sending Immigrants to Sanctuary Cities has Consequences—and That's a Good Thing*, HILL (Apr. 15, 2019), https://thehill.com/opinion/immigration/438867-sending-immigrants-to-sanctuary-cities-has-consequences-and-thats-a-good [https://perma.cc/99MJ-SFE4].

121 *See* Establishing a Humane Immigration Enforcement System Act, H.R. 6361, 115th Cong. (2017) (proposing a bill "[t]o establish a Commission tasked with establishing a humane immigration enforcement system [and] terminat[ing] Immigration and Customs Enforcement"); *see also* Eric Katz, *Here's What House Democrats Envision Happening After They Abolish ICE*, GOV'T EXEC. (July 12, 2018), https://www.govexec.com/management/2018/07/heres-what-house-democrats-envision-happening-after-they-abolish-ice/149676 [https://perma.cc/635L-XEZS] (discussing how the "Abolish ICE" movement has increased in popularity).

122 Printz v. United States, 521 U.S. 898, 930 (1997).

123 *See id.* at 957 n.18 (1997) (Stevens, J., dissenting) ("[T]o the extent that a particular action proves politically unpopular, we may be confident that elected officials charged with implementing it will be quite clear to their constituents, where the source of the misfortune lies."); *see also* Neil S. Siegel, *Commandeering and Its Alternatives: A Federalism Perspective*, 59 VAND. L. REV. 1629, 1632 (2008) ("[I]t seems likely that citizens who pay attention to public affairs and who care to inquire will be able to discern which level of government is responsible for a government regulation . . . .").

c. *Cost Shifting*

Moreover, an immigration exception to the anticommandeering rule raises cost-shifting concerns. By requiring state and local officials to serve, in effect, as federal immigration officials, the federal government shifts costs onto state and local governments. Executive Order 13768, issued in 2017, provides: "It is the policy of the executive branch to *empower* State and local law enforcement agencies across the country to perform the functions of an immigration officer . . . ."[124] Although the Order uses the word "empower," the administration's efforts to enforce § 1373 suggest instead that the federal government would like to shift its financial and regulatory burden onto state and local officials by having state and local law enforcement carry out federal immigration laws.

In 2019, ICE spent $8.8 billion to administer federal immigration laws, with the majority of its budget spent on enforcement and removal operations.[125] An immigration exception would allow the federal government to offset these costs by requiring compliance through state and local officials. Even some local residents that may otherwise favor increased immigration enforcement have expressed fear that federal mandates requiring states to administer federal immigration would burden local taxpayers.[126]

A core principle of federalism is the notion that the Tenth Amendment reserves powers to the states that Congress cannot simply take, but must purchase.[127] One commentator noted, "The anti-commandeering doctrine does not necessarily mean that states will stop administering federal programs . . . . These doctrines do mean, though, that the states need not relinquish these entitlements unless they get paid."[128] Thus, the federal government can incentivize compliance, but it cannot mandate it through a federal law such as § 1373.

3. The Exception Ignores State's Inherent Police Powers

Stripping state legislatures of their ability to outline specific state officials' duties has another important consequence. This policy results in the federal

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124 Exec. Order No. 13768, 82 Fed. Reg. 8799, 8800 (Jan. 25, 2017) (emphasis added).

125 *See* U.S. DEP'T OF HOMELAND SEC., *supra* note 109 (spending over $5.1 billion on enforcing immigration laws and removal undocumented immigrants).

126 *See* Chris Joseph, *Alabama State Senator Files Bill That Would Criminalize Sanctuary City Policies*, WAFF 48, https://www.waff.com/2020/03/10/decatur-state-senator-filed-bill-that-would-criminalize-sanctuary-city-policies/ (Mar. 10, 2020, 5:56 AM) [https://perma.cc/Z36B-3HXX] (describing how a bill mandating local compliance with federal immigration laws "would put more pressure on city taxpayers").

127 *See* Daniel Hemel, *supra* note 70, at 6-7 ("When members of Congress believe that the benefits of having the states enact or administer a particular program are greater than the costs to the states of enacting or administering the program, Congress can purchase the states' entitlement for a price.").

128 *Id.* at 8.

conscription of an inherent state power: state police power.[129] As Justice Clarence Thomas emphasized, the Supreme Court has always rejected constitutional interpretations of federal power "that would permit Congress to exercise a police power . . . ."[130] In fact, the Supreme Court has held that any assertion disputing state police power "is belied by the entire structure of the Constitution" and undermines an inherent part of American federalism that "is deeply ingrained in our constitutional history."[131]

An immigration exception to the anticommandeering rule constrains states' ability to assert their police power. For example, § 1373 gives supervisory authority to the federal government over state police power by prohibiting how states choose to allocate state officers' time and resources. When deciding how to allocate state official's time, states had passed information sharing restrictions that prevented state or local police from sharing information with the federal government.[132] As noted above, states did so largely out of public safety concerns by highlighting how cooperation with federal immigration officials prevented victims and witnesses of crimes from coming forward.[133] This decision reflected the policy choice to address crime rates by increasing community trust in local police. Federal mandates that supervise states and prevent them from addressing their public safety concerns threaten state police power.

The Second Circuit's contention that anticommandeering concerns are inapplicable absent a reserved state power is turned on its head when examining the implications such a policy has on state police power. Policy decisions about immigration do not occur in a vacuum. Requiring state and local police to comply with federal mandates rather than adhering to state objectives intrudes on a core power that states possess.

Even cases that have heralded federal exclusivity in immigration have drawn the line at encroachments on state police power. In *DeCanas v. Bica*, the Supreme Court held that the federal government has exclusive power over immigration but cautioned the federal government from passing statutes that

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129 *See* Jacobson v. Massachusetts, 197 U.S. 11, 24-25 (1905) (finding that states did not surrender their police power when joining the United States or when ratifying the Constitution).

130 *See* United States v. Lopez, 514 U.S. 549, 584 (1995) (Thomas, J., concurring) ("[W]e *always* have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power; our cases are quite clear that there are real limits to federal power.").

131 United States v. Morrison, 529 U.S. 598, 618 n.8 (2000).

132 *See* Act of Oct. 5, 2017, ch. 495, 2017 Cal. Stat. 3733 (codified at CAL. GOV'T CODE §§ 7282-7282.5, 7284-7284.12 (West 2018)) (limiting information sharing between local police with federal immigration officials).

133 *See* CHI., ILL., MUN. CODE § 2-173-005 (2018) ("The cooperation of the City's immigrant communities is essential to prevent and solve crimes and maintain public order, safety, and security in the entire City."); *see also* SEATTLE, WASH., ORDINANCE NO. 121063 (Jan. 28, 2003) (describing how immigrant communities are afraid to access benefits for fear of being reported to federal immigration officers).

intrude on a state police power.[134] In addition, the Court in *Arizona v. United States* maintained that three state policies that supplemented the federal government's immigration regulations were invalid but preserved one state policy that pertained to state police authority.[135] The policy was a state statute that mandated information-sharing between state and local law enforcement and ICE to determine a detained person's citizenship status.[136] The Court upheld a state's discretion to dictate how their own police force interacts with federal agencies, even if the law means the police force will ignore "federal enforcement priorities" when reporting to ICE.[137] In this instance, a federal statute that ultimately outlines what state and local police can do has passed this threshold and inappropriately infringes on state police power.

Furthermore, when rationalizing its attack on sanctuary cities, the federal government has repeatedly cited public safety concerns. ICE has stated, "When law enforcement agencies don't honor ICE detainers, these individuals, who often have significant criminal histories, are released onto the street, presenting a potential public safety threat."[138] Even if these public safety concerns were meritorious, the authority to regulate public safety remains squarely within the state police power. The Supreme Court has held that a state police power encompasses public safety and "do[es] not ordinarily concern the national government"[139] The Court has elsewhere emphasized that this police power "has never been surrendered by the states . . . ."[140] When regulating immigration at the local level, the line between immigration and police power blurs. Federal commandeering in immigration not only forces state officials to act as federal immigration agents, but also forces

134 *See* DeCanas v. Bica, 424 U.S. 351, 356-57 (1976) (finding that "[s]tates possess broad authority under their police powers" despite previously ruling that the federal government has exclusive power over immigration).

135 *See* Arizona v. United States, 567 U.S. 387, 411-15 (2012) (granting state legislatures the power to mandate that police contact ICE when they have reasonable suspicion that someone is an undocumented immigrant).

136 *See id.* at 411 (describing how the Arizona statute requires state officers to try to determine the immigration status of anyone they "stop, detain, or arrest").

137 *See id.* at 412-14 (acknowledging the state law could lead to frivolous police stops but preserving it despite these limitations).

138 Press Release, NYC Sanctuary Policies Continue to Shield Criminal Aliens, U.S. Immigr. & Customs Enf't, U.S. Dep't of Homeland Sec. (Jan. 24, 2020), https://www.ice.gov/news/releases/nyc-sanctuary-policies-continue-shield-criminal-aliens [https://perma.cc/U5NM-UU4H].

139 *See* Jacobson v. Massachusetts, 197 U.S. 11, 25, 28 (1905) (finding that the *state* police power encompasses public health and public safety); *see also* Chicago, Burlington, & Quincy Ry. Co. v. Illinois, 200 U.S. 561, 592 (1906) ("We hold that the police power of a state embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety.").

140 *See* New Orleans Gas-Light Co. v. La. Light & Heat Producing & Mfg. Co., 115 U.S. 650, 661 (1885) ("[T]here is a power, sometimes called the police power, which has never been surrendered by the states . . . .").

federal officials to act as state and local law enforcement by expanding federal power into the policing of local neighborhoods and communities.

4. The Exception Rests on a Refuted Theory of Federal Exclusivity

This final subsection describes state power in the immigration context and argues that the sanctuary city debate fails to conform to the federal exclusivity principle. Even if some exclusively federal enumerated power could merit exemption from the anticommandeering rule, the on-the-ground reality demonstrates that immigration regulation is not exclusively federal. Although the emerging consensus amongst scholars refutes the federal exclusivity principle, courts continue to cite it.[141] The Supreme Court frequently asserts that the "[p]ower to regulate immigration is unquestionably exclusively a federal power."[142] The reality, however, is that the federal government would not have a functional immigration regulatory system without support from state or local governments. This landscape renders the federal government's claim of exclusive authority inaccurate. Despite the Supreme Court's boilerplate assertions of exclusivity, many courts, including the Supreme Court itself, have held that states have the ability to pass certain immigration regulations.[143] In addition, scholars have demonstrated that state and local governments continue to be heavily involved in regulating immigration.[144] The federal government has even invited states and local governments to regulate immigration.[145]

When confronted with the on-the-ground reality of immigration, the federal exclusivity principle is a legal fiction. With increasing frequency, scholars have criticized the federal exclusivity principle as boilerplate.[146]

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141 *See* Rodríguez, *supra* note 51 (arguing that the Constitution does not actually grant the federal government exclusive authority over immigration); *see also* Peter J. Spiro, *The States and Immigration Law in an Era of Demi-Sovereignties*, 35 VA. J. INT'L L. 121, 161 (1995) (questioning the basis for federal exclusivity in foreign affairs when state and local governments have in recent decades taken a more active role in international and immigration law).

142 DeCanas v. Bica, 424 U.S. 351, 354 (1976); *see* Arizona v. United States, 567 U.S. 387, 395 (2012) (finding that the federal government power over immigration is well-settled).

143 *See* Arizona v. United States, 567 U.S. 387, 413-15 (2012) (upholding a state law that allows state officers to ascertain the immigration status of an individual); *see also* New York v. U.S. Dep't of Just., 951 F.3d 84, 113 (2d Cir. 2020) (holding that immigration leaves little reserved power for states but then later finding that states could still enact laws pertaining to immigration), *reh'g denied* 964 F.3d 150 (2d Cir. 2020).

144 *See* Rodríguez, *supra* note 51, at 582-609 (describing examples of local regulation through both restriction and integration-oriented policies including harsher penalties like criminal and civil penalties but also benefit programs like day-labor centers).

145 *See* 8 U.S.C. § 1621(d) (allowing states to include any undocumented immigrants into a state or local benefit program).

146 *See* Rodríguez, *supra* note 51, at 576 ("The federal exclusivity principle, in all of its legal and rhetorical permutations, does not map well onto reality on the ground.").

Federalism scholar Cristina Rodríguez has argued that the federal exclusivity principle operates as an "exclusivity lie."[147] She notes that cities and states have continued to regulate immigration by integrating immigrants into daily life.[148] According to Rodríguez, if courts fully enforced the federal exclusivity principle, they would have to annul a significant number of immigration regulations that stem from state and local governments.[149]

Sometimes courts even cite the federal exclusivity principle within the very cases that uphold the authority of state and local governments to pass immigration-related regulations. In *Decanas v. Bica*, the Supreme Court held that federal exclusivity in immigration was unquestionable, but in the same opinion, the majority held that Congress must clearly state its intention "to preclude even harmonious state regulation touching on aliens . . . or illegal aliens . . . ."[150] Absent such a showing, the Court conceded that states may possess the power to pass laws that do not conflict with federal regulations and even gave state courts the power to evaluate these state regulations.[151] In *Arizona v. United States*, the Supreme Court additionally preserved a state policy that required state and local police to make a reasonable attempt to discern someone's immigration status.[152] *Arizona* is frequently cited as supporting the federal exclusivity principle, but in reality the Court's opinion granted concessions to states to regulate within the area of immigration.

The Second Circuit's opinion perpetuates this inconsistency. At one point it cites *Arizona v. United States*, a case that adheres to the federal exclusivity principle, to support its claim that the federal government has broad and preeminent power to regulate immigration.[153] The Second Circuit later pivots, however, stating, "This does not mean that States can never enact any laws pertaining to aliens."[154] The court ultimately concedes that states can pass laws pertaining to immigration, so long as they do not conflict with

147 *Id.* at 574-80.

148 *See id.* at 581 (discussing how states and cities have used administrative processes to integrate immigrants into public life).

149 *See id.* at 609 (stating that true acceptance of the exclusivity principle would render "restrictive ordinances, day labor centers, and sanctuary laws" vulnerable).

150 DeCanas v. Bica, 424 U.S. 351, 358 (1976).

151 *See id.* at 363, 365 (holding that state legislation that supplements federal statutes is an open question and state courts should "decide the effect of these administrative regulations" to decide whether they conflict with federal regulations).

152 *See* Arizona v. United States, 567 U.S. 387, 413-15 (2012) (preserving a state law that allowed local law enforcement to assess someone's immigration status).

153 *See id.* at 394 ("The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens.").

154 New York v. U.S. Dep't of Just., 951 F.3d 84, 113 (2d Cir. 2020), *reh'g denied* 964 F.3d 150 (2d Cir. 2020).

federal regulations.[155] This concession appears at odds with the court's earlier claim that the anticommandeering rule is inapplicable in instances such as immigration where states have no reserved power. By continuously recognizing state power to regulate immigration, courts have transformed the concept of "exclusivity" into mere boilerplate language.

Both sides—the federal government *and* sanctuary cities—premise the entire sanctuary city debate on state and local involvement, further undermining the federal government's claim of exclusive federal authority. The very facts that led to this dispute undermine the federal exclusivity principle. In virtually every legal document in this case, from executive orders[156] to Byrne JAG grant applications[157] to judicial opinions,[158] the federal government mandated state and local compliance. This begs the question: How can an area truly be an exclusive federal power when it depends on state and local government cooperation to function?

If the federal government truly had exclusive authority over immigration, then it would not need to commandeer state and local officials. The purpose of commandeering in the immigration context thus reveals the unique incoherence of relying on the exclusivity fiction to authorize it.

CONCLUSION

At first glance, the Second Circuit's opinion may come across as an unremarkable circuit split regarding statutory authority. Its constitutional analysis of § 1373, however, transformed its decision into a wholehearted attack on the anticommandeering rule, subverting all notions of American federalism. The immigration exception that the Second Circuit proposes could have significant consequences. Under the Second Circuit's logic that preserved § 1373, the federal government could explicitly commandeer state and local actors, legislatures, and even police forces to carry out federal immigration-related regulations. Historically viewed as an essential check on federal power, states could lose their ability to govern any area tangentially related to immigration, including passing statutes within their own legislative chambers or enforcing state law using local law enforcement.

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155 *See id.* (surmising that there could be a scenario where states could pass immigration laws so long as they do not conflict with federal law).

156 *See* Exec. Order No. 13768, 82 Fed. Reg. 8799, 8800 (Jan. 25, 2017) (asking state and local law enforcement agencies to perform the functions of immigration officers).

157 *See* U.S. DEP'T OF JUST., OFFICE OF JUST. PROGRAMS, STATE OR LOCAL GOVERNMENT: FY 2017 CERTIFICATION OF COMPLIANCE WITH 8 U.S.C. § 1373 (2018) (requiring state and local government officials to allow for information sharing regarding citizenship and immigration status).

158 *See* New York v. U.S. Dep't of Just., 951 F.3d at 113 (finding that state or local limits on information sharing were contrary to the policies "preferred by the federal government").

Moreover, the idea that exclusive enumerated powers should constitute an exception to the anticommandeering rule will affect more than immigration. The federal government could commandeer state agents, facilities, and resources in a wide variety of areas, citing any enumerated power within the Constitution, including its Commerce or Military Power. An enumerated powers exception swallows the entirety of the anticommandeering rule.

Since the seminal anticommandeering cases, the Supreme Court has blocked all attempts to instill a balancing test or carve out an enumerated right exception to the anticommandeering rule. Even in recent years, the Court has not only reaffirmed the justifications for the anticommandeering rule but also broadened the definition of what federal laws constitute anticommandeering. Each decision has only heightened the importance of the anticommandeering rule in our federalist system.

From the very beginning of this nation, states have had plenary authority, exerting a high degree of power over their own constituents. James Madison wrote, "The powers delegated by the proposed Constitution to the federal government, are few and defined. Those which are to remain in the State governments are numerous and indefinite."[159] By allowing the federal government to seize state power based on a particular category of law, the litigation surrounding the sanctuary city debate threatens to upend this reality.

159 THE FEDERALIST NO. 45 (James Madison).

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