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Toward Détente in Immigration Federalism

Cristina M. Rodriguez

In its efforts to enforce the immigration laws, the federal government has been challenged by the forces of federalism. Spurred in part by social movements and partisan and interest group politics, state and local police and political officials across the country have concluded that the federal government both under-enforces and over-enforces the law.\(^1\) The case for under-enforcement has been made most vociferously in the state of Arizona and like-minded jurisdictions that have sought to augment federal enforcement with their own efforts, most of which have been invalidated or significantly curbed by federal courts. More recently, the case for over-enforcement has been embodied in the anti-detainer movement, or the refusal by states such as California and cities such as Chicago to honor federal requests to hold potentially removable non-citizens in the custody of their law enforcement agencies.\(^2\)

In previous work, I have highlighted the value of this sort of disharmony in immigration matters.\(^3\) I have contested the rhetoric of uniformity that dominates immigration doctrine and scholarship and explored the utility of having state and local actors challenge, contradict, and even frustrate the federal government, whether by passing legislation, engaging in oppositional politics, or using their law enforcement institutions to advance different judgments about how immigration enforcement should be prioritized. This churning has resulted in the significant reconceptualization (or crystallization) of federal power. The Supreme Court’s 2012 decision in Arizona v. United States\(^4\) invalidating

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* Leighton Homer Surbeck Professor of Law, Yale Law School. I am grateful for the conversation of participants in the symposium on The Future of Immigration Enforcement at the University of Virginia School of Law, as it assisted me greatly in the formulation of this Article. I also am indebted to Megan Braun and Erica Newland for exceptional research assistance.


much of the state’s infamous Senate Bill 1070 (S.B. 1070)\(^5\) has curbed state and local participation, while President Obama’s November 2014 announcement\(^6\) of major changes to the federal enforcement regime has shifted the parameters of federal enforcement to accommodate local concerns. The immigration federalism conflict that many scholars have described has given rise to new rules of engagement.

In this Article, I explore the extent to which these new rules reflect a form of détente that should be embraced and extended. By détente, I mean a renewed prioritization of values of comity and cooperation rather than hierarchy or resistance in the relationship between federal and local law enforcement.\(^7\) As a general matter, such détente will be valuable because the law enforcement agencies of different governments police the same space and interact with overlapping communities. From the federal government’s point of view, it cannot do its job without the cooperation of states and localities. The information concerning arrests and potential criminal conduct that local law enforcement agencies possess is indispensable to the federal government’s efforts to identify removable non-citizens. At the local level, different jurisdictions will have a variety of perspectives on immigration enforcement; some jurisdictions might see effective enforcement as relevant to their public safety missions or as good for community relations, and others might regard the absence of enforcement as crucial to those same interests. But whatever the local perspective, immigration enforcement in their communities remains a fact of life for local officials. As with law enforcement generally, all parties in the federalism web stand to benefit from comity rather than competition.\(^8\)


\(^7\) Throughout this Article, I use the term “local law enforcement” to encompass state law enforcement bureaucracies, as well, unless specifically stated otherwise, in order to avoid repetition.

\(^8\) Whether informal principles of comity characterize the interaction of law enforcement constitutes a subject of lively academic debate. Compare Erin Ryan, Negotiating Federalism, 52 B.C. L. REV. 1, 31–32 (2011) (arguing that negotiations over which actor will bring a prosecution tend to be informal and amicable and that state actors tend to welcome federal intervention, especially in areas of lower priority to states such as terrorism or immigration), with Margaret H. Lemos, State Enforcement of
These cooperative values long have been part of immigration enforcement—customs the federal government embraced even as it filed suit to preempt Arizona’s S.B. 1070. Acknowledging their ascendance and calling for their reinforcement does not, however, entail abandoning the dynamic and conflict-driven conception of federalism I have described elsewhere, either as a descriptive or normative matter. Instead, the call is to derive some of the benefits of that dynamic—to approach conflict resolution over difficult subjects—in a way that improves intergovernmental relations and sustains a fair and legitimate system of enforcement. Achieving this détente will require movement by federal, state, and local actors alike. The Obama Administration, in fact, has taken an enormous first step by replacing its controversial Secure Communities program and by revamping its detainer policies in response to local pressures. The goals of this Article include understanding the value of this move and considering what should follow from it as enforcement policy develops.

To understand the obstacles to and benefits of détente, I divide this Article into three Parts. First, I take a brief step back from today’s federalism contretemps to consider the purposes that an enforcement agenda might serve, in order to have a sense of where and how enforcement détente should be directed. Second, I discuss the Obama Administration’s recent announcement of changes to Secure Communities.

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Federal Law, 86 N.Y.U. L. Rev. 698, 702, 719 (2011) (noting that when states enforce federal laws, they often do so with total disregard for the legal positions of federal agencies and that they have “political incentives to challenge federal orthodoxy”), and John S. Baker, Jr., State Police Powers and the Federalisation of Local Crime, 72 Temp. L. Rev. 673, 681 (1999) (arguing that federal and state actors have competing incentives and that cooperation is “at best tenuous”).

9 In the criminal setting, norms of comity and even deference also govern the federal government’s decision-making. The U.S. Attorneys’ Manual, for example, states that a federal prosecutor may decline to prosecute if she believes that “no substantial Federal interest would be served by the prosecution” or if the defendant is “subject to effective prosecution in another jurisdiction.” U.S. Dep’t of Justice, U.S. Attorneys’ Manual 9-27.220 (2014). Indeed, the federal government often depends on state officials to advance its own law enforcement interests given the former’s limited personnel, including in cases such as drug prosecutions. See Robert A. Mikos, On the Limits of Supremacy: Medical Marijuana and the States’ Overlooked Power to Legalize Federal Crime, 62 Vand. L. Rev. 1421 (2009).

10 See U.S. Dep’t Homeland Sec., Guidance on State and Local Governments’ Assistance in Immigration Enforcement and Related Matters (Jul. 23, 2012) [hereinafter DHS Guidance], available at http://www.dhs.gov/xlibrary/assets/guidance-state-local-assistance-immigration-enforcement.pdf (“In light of laws passed by several states addressing the involvement by state and local law enforcement officers in federal enforcement of immigration laws, DHS concluded that this guidance would be appropriate to set forth DHS’s position on the proper role of state and local officers in this context.”).

11 I have described the negotiation of conflict as one of federalism’s greatest values, both to the federal government and localities, as well as in furtherance of the interests of effective government. See Rodriguez, supra note 1, at 2097.
as an opening move in a détente with enforcement skeptics. I explore how local officials might respond and how the dynamics of enforcement federalism might change as the Department of Homeland Security implements the reforms. Finally, I consider the condition of federal-state relations from the side of the more pro-enforcement localities. What might ongoing cooperation in these jurisdictions entail in the shadow of the Supreme Court’s decision in *Arizona v. United States* and DHS enforcement reforms that pull in the opposite direction of what pro-enforcement jurisdictions might prefer? In each Part, I consider what the federal government might seek to achieve through cooperative interaction with local partners, as well as which institutional or other interests might drive local officials’ posture with respect to immigration enforcement, and what local officials stand to gain by harmonizing their efforts with the federal government.

I. THE PURPOSES OF ENFORCEMENT

To begin to define the contours of a sustainable détente, or to achieve a workable integration of law enforcement agencies, we must take a step back to consider the purposes immigration enforcement serves. This consideration could take shape as a first-principles inquiry into what the objectives of enforcement, or of an immigration system for that matter, should be. Numerous other contributors to this symposium have explored how the predicates for enforcement should be defined and enforcement resources allocated to promote values such as security, fairness, justice, and the rule of law. These values will certainly inform any characterization of détente, as the divergent enforcement priorities of federal and local law enforcement reflect different conclusions about their relative weight. Achieving a workable integration will require reaching compromise positions on how these principles are to be advanced in practice.

But rather than spell out a complete first-principles agenda, or engage the important claim that the grounds for enforcement should be narrowed, I assume that the parameters of the Immigration and Nationality Act ("INA") remain constant and consider the factors that should inform the

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12 Though the focus of this Article is on enforcement federalism, I have written elsewhere about integration federalism as well. See Rodriguez, supra note 3; Cristina M. Rodriguez, *Legal Frameworks Affecting Immigrant Integration: Federal Baselines and Local Variation* (Oct. 2014) (paper commissioned by National Academy of Sciences Committee on Immigrant Integration) (on file with author). In truth, enforcement policy also has consequences for immigrant integration: the anti-detainer movement described in this Article, for example, reflects the desire to promote immigrant integration, whereas laws such as Arizona’s S.B. 1070 seek to push immigrants out of local communities.
design of enforcement programs from an institutional point of view. Within this framework, the purposes of enforcement (or the appeal of under-enforcement and non-enforcement) will differ depending on institutional perspective—whether the vantage point is federal or local, or that of political officials versus law enforcement agents and bureaucrats.

Achieving détente requires an integration of these different institutional interests alongside cooperation on underlying substantive questions, such as who should be the targets of enforcement and to what extent. Institutional integration will necessarily be dynamic, particularly as the first-principles inquiry progresses. The process also will require taking to heart one of the consistent and compelling themes of the work of David Martin, in whose honor this symposium has been convened: that principles of democratic accountability and effective administration require the construction of an enforcement regime with integrity. This idea embodies not just the insight that a generous legal immigration policy depends on the existence of a strong and coherent enforcement regime, but also that the rule of law and trust in government depend on having an enforcement regime that works well.13

Generally speaking, a wide range of factors will give shape to the federal government’s enforcement interests. Some will be directly in the control of the Department of Homeland Security (“DHS”), and others will be a function of decisions made by other actors over which the Department may or may not have influence. At all levels of government, officials’ political preferences will exert meaningful influence on enforcement posture. The concept of political preferences, however, is a stand-in for a wide variety of interests that elected officials and their appointees might have. At the federal level, for example, concerns such as the need to respond to particular political constituencies or to advance the policy objectives that brought the President and his or her political appointees to office will shape enforcement policy from the top, as will the politician’s core objectives of re-election and party success. Other political constraints will come in the form of congressional oversight, which can exert pressure on the Executive Branch to act as a faithful agent by implementing the enforcement objectives of either the enacting or sitting Congress.

13 See, e.g., David Martin, Eight Myths About Immigration Enforcement, 10 N.Y.U. J. LEGIS. & PUB. POL’Y 525, 526 (2007) (“The one truly indispensable component of viable immigration reform must be steps that will steadily build a stable, enduring, and functional enforcement system. In my view, only by developing the capacity to enforce the deliberate choices that the nation makes about immigration can we reduce the bitter polarization these issues have produced and thereby calm the wild swings of policy that we have witnessed for two decades.”).
Bureaucratic imperatives and the goals and preferences of the civil service and career law enforcement officials will also be relevant to the federal agenda, particularly as they inform day-to-day decision-making and define political officials' bandwidth for action. The capacity of the bureaucracy also matters. The ability and even the impulse to enforce depend on Congress' appropriation of funds. Appropriations can be enabling by making enforcement agencies flush with dollars to spend on their agendas, perhaps even creating expanded enforcement goals—a fair characterization of DHS and its enforcement arms in recent years. But appropriations also can serve as constraints, since the dollars appropriated must be spent, and since Congress sometimes specifies how the money it allocates should be spent. The state of technology and the availability of information and personnel to carry out the enforcement mission will shape where and how the federal government discharges its enforcement obligations. More than anything, it is this need for information that historically has made cooperation with states and localities crucial to federal enforcement.

At the state and local level, unlike in other regulatory domains, there is no parallel scheme or bureaucracy of immigration enforcement, whether civil or criminal. Local officials do not administer a comprehensive immigration enforcement scheme, and it therefore may seem incongruous to attempt to identify the interests that shape the local approach to immigration enforcement. But as scholars have copiously documented, federal immigration enforcement implicates local officials, laws, and interests in significant ways. I previously have characterized the system as an integrated law enforcement regime rather than an exclusively federal


one. In addition, state and local governments and police increasingly engage in autonomous practices that amount to immigration enforcement policies, often self-consciously designed to be so. It therefore makes sense to speak of a local approach to immigration enforcement, but to understand it as dynamically related to the federal agenda.

The party and political affiliations of those in charge of local enforcement bureaucracies inevitably will inform the nature of local involvement in enforcement. These affiliations might track partisan lines, leading local legislators or enforcement officials to challenge federal policy when different parties control different levels of government. Or, they might simply reflect the policy preferences of the dominant political party in a jurisdiction, regardless of who is in charge of the federal government. The characteristics of the non-cooperation movement, whose foothold has been primarily in liberal or Democratic-leaning jurisdictions, underscore how local institutional concerns, such as protecting community policing in immigrant communities, shape the agenda, even when like-minded politicians control the federal bureaucracy. Pre-existing political biases about what causes crime, who constitutes legitimate targets of policing, and the imperatives of social control ultimately shape whether localities demand more or less federal enforcement or choose to participate in cooperative enforcement schemes. Additional bureaucratic and personnel-driven factors, such as the professional interests of law enforcement officials and the potential prestige and excitement of working in collaboration with the federal government, also matter.

This multiplicity of interests means any détente is unlikely to please all parties. Détente, however, requires compromise. I now turn to consider how these many interests have interacted in recent years, in an effort to give the concept of compromise some content. Given that state and local

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18 The preamble to Arizona’s S.B. 1070, for example, includes this language:

The legislature finds that there is a compelling interest in the cooperative enforcement of federal immigration laws throughout all of Arizona. The legislature declares that the intent of this act is to make attrition through enforcement the public policy of all state and local government agencies in Arizona. The provisions of this act are intended to work together to discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States.

governments have pulled the federal government in pro- and anti-enforcement directions at the same time, this content will be multi-faceted and even contradictory.

II. SECURE COMMUNITIES AND THE MOVE TOWARD DÉTENTE

Détente in immigration federalism has taken hold in one important form. In November 2014, the Obama Administration announced that it would replace its controversial Secure Communities with a new Priorities Enforcement Program ("PEP"). As part of this initiative the Department announced that it would reform its detainer policy, a long-standing practice according to which it has requested that local officials hold potentially removable arrestees in local custody for 48 hours while U.S. Immigration and Customs Enforcement ("ICE") determines whether to assume custody and initiate removal proceedings. As explained in more detail below, these changes come on the heels of escalating resistance by state and local jurisdictions to cooperation with the federal government. As of this writing, approximately 270 jurisdictions had laws, ordinances, or practices in place restricting police authority to honor DHS detainer requests. The Administration’s reformulation of its enforcement strategy, therefore, looks like an effort to salvage a relationship vital to the DHS mission.

Launched in 2008 in fourteen jurisdictions, and extended nationwide by 2014, Secure Communities has been the name given to an information-sharing program that enables DHS to tap into the fingerprint data state and local police routinely send to the Federal Bureau of Investigation ("FBI") for ordinary law enforcement purposes. By comparing that data to DHS’s IDENT database, the Department can determine whether state and local officials have a potentially removable person in their custody and then decide whether to issue a detainer to the local jurisdiction so that ICE can take custody to commence the federal process.

The announcement that Secure Communities would be replaced by PEP was greeted as a dramatic shift in enforcement strategy. What the shift means in practice remains to be seen, but a number of factors that gave rise to, and shaped the parameters of, the Secure Communities program are

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19 See Johnson Memo I, supra note 6; Johnson Memo II, supra note 6.
likely to drive PEP as well. First and foremost, Congress has mandated that certain information in the federal government’s possession be shared across law enforcement agencies and the intelligence community.\(^{22}\) DHS and the Department of Justice (“DOJ”) have determined that the fingerprint data that local police send voluntarily and as a matter of course to the FBI fall within this mandate. Secure Communities also reflected a still-present political imperative to expand enforcement capacity and to heighten its precision—a congressional priority reflected in significant increases in funding from 2008 to 2011.\(^{23}\) These appropriations also have intersected with the push within DHS and by Congress to utilize the latest technology to make enforcement more efficient.\(^{24}\) The combination of these imperatives transcended the Bush and Obama Administrations, although the ultimate goal of expanding enforcement may have differed for political leaders from the different parties.\(^{25}\)

Secure Communities also offered an attractive alternative to other available means to mine the information in the hands of local police—a need immigration officials will still face. Rather than rely on local police themselves to decide to turn over information about potentially removable non-citizens, whether through their formal participation in the so-called 287(g) program,\(^{26}\) or through the informal means that had long characterized federal-state relations, a data-sharing program triggered by the information sent to the FBI amounted to using federalism’s institutions

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22 8 U.S.C. § 1722(a)(2) (2012) (“[T]he President shall develop and implement an interoperable electronic data system to provide current and immediate access to information in databases of Federal law enforcement agencies and the intelligence community that is relevant to determine whether to issue a visa or to determine the admissibility or deportability of an alien.”).


25 One might suggest that, for a Republican Administration, enforcement for enforcement’s sake serves the Administration’s political objectives that revolve around rule-of-law values and rhetoric. For a Democratic Administration, by contrast, strong enforcement builds legitimacy that then opens space for other immigration policy goals, such as legalization—a relationship President Obama himself, as well as his supporters, have emphasized. In truth, President Bush and elements of his political apparatus, may well have shared the latter goal, given the importance of immigration reform to his domestic policy agenda and his support of comprehensive reform in 2006 and 2007.

26 Enacted by Congress in 1996, this program authorized the Attorney General to “enter into written agreements with a State, or any political subdivision” to enable local officials to carry out the functions of “investigation, apprehension, or detention of aliens in the United States.” See 8 U.S.C. § 1357(g)(1) (2012).
without having to use its people. Whether because direct local police involvement in immigration enforcement along the 287(g) model raised the specter of racial profiling and other forms of abuse, or because relying on local police themselves led to an inefficient and unreliable diffusion of responsibility, interoperability held out the promise of a streamlined form of cooperation.

Under the PEP reformulation, the data-sharing component remains intact, as the statutory language requires. But DHS has always retained discretion in deciding how to use the information interoperability generates—a discretion that enabled DHS to rename and re-orient the program in response to criticism, in two potentially meaningful ways. First, ICE will now pursue enforcement actions only against noncitizens who fall within certain narrowly defined priority categories or pose a “danger to national security.” Second, the agency will replace its detainer requests with requests that local jurisdictions notify ICE when a noncitizen with a match in IDENT is to be released from local custody. And, if ICE elects to issue a detainer request in special circumstances, that request “must specify that the person is subject to a final order of removal or there is other sufficient probable cause to find that the person is a removable alien, thereby addressing the Fourth Amendment concerns raised in recent federal court decisions.”

Whether PEP adequately addresses the criticisms of Secure Communities, canvassed below, remains to be seen. For my purposes, the most interesting element of the reformulation is not the merits of what DHS has done, but instead what might have prompted it. Though more time and distance from the controversy will be required before a complete account of DHS’s change of heart can be given, the first draft of history suggests that the potentially far-reaching shift in federal policy announced in November 2014 illuminates the power of the local in cooperative enforcement ventures.

For a variety of reasons, both the idea and the implementation of Secure Communities provoked various forms of localized unrest. An immigrants’ rights social movement has brought attention to the human costs of

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27 See Rodriguez, supra note 1, at 2105 (“[S]hifts in federal enforcement strategies reflect a desire to utilize federalism’s institutions while keeping its actors at bay.”).
28 According to the memoranda issued in conjunction with the announcement of PEP, these priority categories include noncitizens suspected of terrorism and aliens convicted of offenses classified as felonies by the jurisdiction of conviction (aggravated felonies, as defined by the Immigration & Naturalization Act, 8 U.S.C. § 1101(a)(43) (2012), or gang-related offenses). See Johnson Memo II, supra note 6, at 3.
29 Johnson Memo I, supra note 6, at 1.
enforcement, and Secure Communities has been one of its targets, alongside advocacy for administrative relief for unauthorized immigrants and for reform in Congress. In addition, bureaucratic and political mistakes in the roll out of Secure Communities sowed distrust between local and federal officials and gave the former incentives to challenge the latter. In combination, these forces gathered enough momentum over the last several years to prod an Administration disposed to take heed of immigrants’ interests to change course.

Among immigrants’ rights advocates and many police departments, the prospect of nationwide, technology-driven immigration enforcement through local police departments immediately raised the concern that some local police would engage in racial profiling in order to channel noncitizens into the deportation pipeline. This concern evolved into a more general worry about the conflation of ordinary law enforcement with immigration enforcement. If any encounter with police might lead eventually to removal, then the trust essential to community policing would be lost, particularly if victims and witnesses became fearful of interacting with police.

Compounding the controversy, over time it became clear that the reach of the program would not be limited to the serious criminals and repeat immigration offenders ICE claimed would be the priorities of the program. According to ICE’s own data, by August 31, 2012, the program had resulted in the removal of 160,000 noncitizens convicted of crimes. But many ordinary immigration law violators have also been swept up in the program’s reach. The specter of the otherwise law-abiding noncitizen ensnared by a traffic stop and then deported simply for being unauthorized has become a trope in public debate over the program. Even though such a person’s removal would have resulted from unlawful status or some other immigration violation and not the traffic stop, the circumstances of the removal create a highly sympathetic case. Finally, as a recent empirical

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33 This development probably should not have come as a surprise to anyone paying attention to the program; even when the agency sets enforcement priorities, it can be difficult for law enforcement officials to look the other way when potentially removable non-citizens who do not fit those priorities nonetheless come to the agency’s attention. It also can be difficult for high-level DHS officials located
study has documented, DHS justified Secure Communities and its dramatic expansion of enforcement capacity as a means of promoting enhanced public safety, but the program does not appear to have had an impact on crime rates. Indeed, it would have been surprising if it had, given that social science research associates immigration and immigrants with lower crime rates.

Many local officials and Democrat politicians ultimately came to share these substantive concerns with the program. Prodded by advocates, cities and states over the last several years have adopted laws, often known as TRUST Acts, to limit their cooperation with ICE detainers, including large and powerful jurisdictions such as California. One recent estimate identifies nearly 300 cities and counties with non-cooperation ordinances of some kind, and nearly half of the twenty-two million noncitizens in the United States reside in one of these jurisdictions. Indeed, immigrants’ rights advocates, to advance their agenda, have effectively exploited the institutions of federalism and the anti-commandeering doctrine developed by the Rehnquist Court, which holds that the structure of the Constitution prevents the federal government from using local enforcement institutions against their will to serve federal ends. The momentum behind the non-cooperation movement arguably crested when localities’ concerns for the financial burdens associated with detainers combined with some well-
timed federal court judgments that called into question the very legality of detainers and raised the threat of constitutional liability for local police.

All of these factors created a crisis for DHS as a law enforcement agency by undermining its very capacity to enforce. DHS may have had good reason to believe that the accumulation of non-cooperation laws would accelerate to a degree that would spiral beyond its control to manage through tactics such as cajoling and informal bargaining. Perhaps more importantly, the growing publicity surrounding the local resistance and the underlying advocacy also generated a political crisis for an Administration that purportedly sought to ameliorate the threat of deportation for certain groups and to gain favor among supporters of immigration reform. In announcing the program’s reformulation, DHS Secretary Jeh Johnson framed PEP as a response to localities’ growing opposition to the program. Without collaboration and good will at the state and local level, ICE could not effectively do its job. And with Democratic politicians in large states and cities such as California and New York visibly taking on the federal behemoth, the Administration likely sought a way to reclaim the mantle of would-be immigration reformers.

But the rise of formal resistance among local officials stemmed not just from the policy-driven disquiet with the impacts of Secure Communities, but also with the mismanagement of federal-local relations that attended its roll out. DHS originally billed the program as optional, entered into Memoranda of Agreement with states and localities to govern the program, and opened the option of an opt-out for concerned jurisdictions, all of which contributed to the crisis.

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39 See, e.g., Miranda-Olivares v. Clackamas Cnty., No. 3:12-CV-02317-ST, 2014 WL 1414305, at *11 (D. Ore. Apr. 11, 2014) (holding that the country violated the Fourth Amendment by relying on ICE detainer that did not provide probable cause regarding removability); Morales v. Chadbourn, 996 F. Supp. 2d 19, 29 (D.R.I. 2014) (concluding that detention for purposes of investigation was not permissible).


41 Johnson Memo 1, supra note 6, at 1 (“The goal of Secure Communities was to more effectively identify and facilitate the removal of criminal aliens in the custody of state and local law enforcement agencies. But the reality is the program has attracted a great deal of criticism, is widely misunderstood, and is embroiled in litigation. . . . Governors, mayors, and state and local law enforcement officials around the country have increasingly refused to cooperate with the program. . . . The overarching goal of Secure Communities remains in my view a valid and important law enforcement objective, but a fresh start and a new program are necessary.”).
which gave the program the veneer of cooperative federalism responsive to local concerns. But in 2010, DHS Secretary Janet Napolitano announced that the Department viewed participation in data-sharing as mandatory, and in August 2011 DHS unilaterally rescinded the agreements. Given the statutory mandate cited above, DHS was correct that the fingerprint-sharing element of the program was mandatory, at least once local jurisdictions sent their prints to the FBI. But DHS had created a kind of reliance interest in the possibility of an opt-out, which in turn received a lot of press attention. The abrupt change in posture from a relationship of consultation to one of hierarchy, and DHS’s trampling of that reliance interest, not surprisingly upset local officials in those jurisdictions skeptical of Secure Communities as a policy matter.

This whole sequence of events ultimately underscores the importance of incorporating state and local concerns into federal policy to keep the system functioning and diffuse political battles with the potential to undermine the federal government’s enforcement efforts in the public mind. But now that DHS has reformulated its approach to enforcement in light of the multi-faceted criticism of Secure Communities, the turn toward cooperation and away from confrontation requires local officials to respond in kind. To do so is not obviously in their interests. Particularly if immigrants are not responsible for higher levels of crime and disorder than their citizen counterparts, and their removal does not have an impact on crime rates, then it is not clear what localities stand to gain from more effective immigration enforcement. Given that many of the jurisdictions to have resisted federal enforcement depend on and seek to foster the well being of their immigrant communities, enabling federal enforcement may seem anathema to their interests and preferences.

But even where resistance to cooperation has flowered, the seeds for cooperation on new terms may exist. Some states and localities opposed to Secure Communities have tailored their non-cooperation policies so that police are still required to hand over the most serious offenders to ICE. Local officials may have the same concerns about public trust as their federal counterparts—the fear that failure to enforce will be linked in the public mind to drop-offs in public safety, even if that connection does not

42 DORIS MEISSNER ET AL., supra note 14, at 111.
43 See, e.g., Letter from John Morton, Dir., Immigration & Customs Enforcement, to Jack Markell, Governor of Del. (Aug. 5, 2011), available at https://epic.org/privacy/secure_communities/SGN.pdf. The confusion over the structure of the program is puzzling. As noted above, Congress mandated the data sharing between the FBI and DHS, and local police share their fingerprint data with the FBI voluntarily and as a matter of course. Moreover, some localities operated under a misimpression that detainers were mandatory.
have empirical support. As with law enforcement generally, it may be
ter better for localism if local officials are the ones to provide information and
resources to federal immigration officials, rather than for DHS and ICE to
establish a stronger ICE presence in the community. Finally, localities may
have strategic interests in enforcement. To the extent the anti-detainer
movement reflects political preferences regarding immigration, a well-
functioning enforcement scheme marked by cooperation will more likely
facilitate collaboration on the admissions side than antagonism. Sustaining
the more targeted and less de-stabilizing approach to enforcement
embodied in the November 2014 announcement will require the system
actually to function in order to keep critics in Congress and elsewhere at
bay and to build broad public support for immigration reform that
encompasses legalization. Indeed, another of the themes of Dave Martin’s
work—that an open system of immigration depends on public confidence,
which in turn requires the government to enforce the rules that the political
community has imposed surrounding immigration—should give localities
a reason to reciprocate DHS’s efforts to achieve détente.

The state and local side of détente, therefore, should involve at least
initial cooperation with the new ICE notification policy, to give the
reformulation a reasonable chance to succeed, or at least to produce
different results that can be evaluated on their own terms. A corollary to
this cooperation could include opening channels for clear and transparent
communication to ICE of circumstances in which even notification might
undermine local interests. This cooperation should be all the more
palatable in light of the Administration’s expansion of deferred action to
cover a broad swath of the unauthorized population, making as many as
five million people eligible for insulation from removal and thus
dramatically contracting the territory covered by PEP.44

Again, much remains to be seen about how significant a shift PEP will
be. Though the shift in priorities, as well as the replacement of the detainer
policy with higher standards, do seem meaningful, it is not altogether clear
that a core concern of enforcement skeptics—the dangers of conflating
police with immigration enforcement—will be ameliorated. After all, the

44 See Press Release, Migration Policy Inst., As Many as 3.7 Million Unauthorized Immigrants
Could Get Relief from Deportation Under Anticipated New Deferred Action Program (Nov. 19, 2014),
available at http://www.migrationpolicy.org/news/mpi-many-37-million-unauthorized-immigrants-
could-get-relief-deportation-under-anticipated-new. Of course, the combination of PEP and DAPA will
heighten anxiety among some immigrants. For those who do not qualify for DAPA, the diminished size
of the pool of removable noncitizens increases their chance of apprehension and removal. It would be
surprising if sympathetic cases of noncitizens with ties to the United States, including to citizen
children and relatives, did not arise among those still deemed priority targets.
data-sharing feature of Secure Communities remains in place, and a noncitizen's concern that interaction with police could result in deportation therefore may not be irrational, especially given that the finer institutional points of PEP will be more difficult to communicate to a general public. The enforcement priorities articulated under PEP also include the aggravated felony category, which sweeps into its reach a wide range of offenses, many of which would strike the average person as minor. Finally, it also seems unlikely that immigrants' rights advocates will lift the pressure they have been placing on politicians and police departments, especially given the turn in some quarters to a rhetoric of "not one more" deportation. Their core opposition is to immigration enforcement plain and simple, whether exercised in a more targeted fashion or not.\(^4\) But as law enforcement partners on whom the federal government relies, states and localities play an institutional role and have incentives as bureaucrats within a larger political structure that may well lead them to give PEP a chance, especially after the federal government has responded to their resistance not with hierarchy and threats to withhold funds, but rather with amelioration.

### III. COOPERATION AFTER ARIZONA V. UNITED STATES

The détente the federal government has initiated might seem asymmetric. On the one hand, the Obama Administration responded to enforcement skeptics by reformulating its signature program to further narrow the scope of targets and constrain its own abilities to quickly remove noncitizens by shifting its detainer policy. On the other, the Administration's response to jurisdictions interested in more robust enforcement has been to file preemption lawsuits across the country, the most notable of which resulted in a Supreme Court decision striking down most of Arizona's enforcement plan and resoundingly reaffirming federal primacy. In the case of S.B. 1070 and other like statutes, the federal government resorted to hierarchy rather than principles of comity to displace local challenges to its authority.\(^4\)

\(^4\) The Immigrant Local Resource Center, for example, provides online resources for advocates. In assessing the PEP program, the ILRC asks "How do we keep winning?" and emphasizes that "[t]he goal is still zero ICE collaboration in order to fully protect our communities." See Organizer Alert: Life After "PEP-Comm," IMMIGRANT LOCAL RES. CTR., http://www.ilrc.org/files/documents/ilrc_organizers_advisory-2015-01_06.pdf (last visited Mar. 31, 2015).

\(^4\) One easy response to this claim of asymmetry would be to point to the Obama Administration's record enforcement numbers. The Administration may have rejected Arizona's particular brand of enforcement, but in a more general sense it has contributed to the expansion of what has been called a
This two-part approach of resistance to local pressures on the one hand and capitulation on the other might be easily explained by the policy preferences of the Administration in power. Skeptical itself of enforcement and anxious to appear to certain constituencies as if it has acted to protect immigrants’ interests, the Administration intervenes to stop the oppositional politics of Arizona and changes course to move closer to Democratic counterparts in places such as California, New York, and Chicago. But an institutional explanation might also be relevant. Immigration federalism can have operational consequences, making it harder for DHS to do its job if local policies diverge from federal ones. In the case of S.B. 1070-like laws where states and localities have sought to play the traditional federal enforcement role, the federal government was on firm ground in resorting to preemption, even as its decision to file such suits was unprecedented. But in the case of the non-detainer ordinances, the Rehnquist Court’s anti-commandeering doctrine limited the federal government’s capacity to force localities to cooperate.

In one sense, détente may not be necessary with pro-enforcement localities. The political and policy momentum in their favor appears to have subsided. The Supreme Court left in place Section 2(B) of S.B. 1070, but enthusiasm for its enforcement has been sporadic and county- and city-specific. Other jurisdictions have abandoned similar provisions. These responses to the Supreme Court’s decision in *Arizona v. United States* highlight that the state enforcement laws may have been more about

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47 For an exploration of these political and institutional dynamics, see Rodriguez, supra note 1, at 2095.

48 In its suit against S.B. 1070, the Government argued that § 2(B) of the law, which requires local police to inquire into immigration status, interfered with federal enforcement because its mandatory nature added to the DHS workload and hamstrung the agency’s ability to pursue its particular enforcement agenda. Brief for the United States on Petition for Writ of Certiorari at 16–18, 46, *Arizona v. United States*, 132 S. Ct. 2492 (2012) (No. 11-182). In its decision in *Arizona v. United States*, the Court upheld this questioning provision in the absence of evidence of implementation but left open the possibility of as-applied lawsuits. 132 S. Ct. at 2510.

making a political statement than addressing a genuine law enforcement need. The aftermath of Arizona in Arizona and elsewhere highlights how the institutional interests of police (in this case in keeping their distance from immigration enforcement) can supersede the interests of politicians when the momentum behind the latter’s cause has died down.

And yet the need for and interest in cooperation remains. Some jurisdictions still have 287(g) agreements, though these are small in number, and the Obama Administration has eliminated the model of the program that authorizes police to conduct immigration enforcement in the field, as opposed to during intake at jails. More importantly, even as it sought to preempt Arizona, the government articulated a conception of cooperation that emphasized federal primacy but also placed state and local police within the enforcement pipeline. In a guidance document issued during litigation, DHS sought to characterize the customary forms of federal and local interaction as distinct from Arizona’s approach under S.B. 1070, arguing that the former remained vital to DHS enforcement.

The guidance included a non-exhaustive list of past cooperative practice, including “participating in joint task forces,” providing assistance in execution of a search or arrest warrant, initiating a stop at the request of DHS officials to aid ongoing federal investigations, referring possible violations of federal immigration law to federal officials, and lending equipment or facilities to DHS for federal enforcement purposes. Even if the government receives the vast bulk of the information it needs from PEP, thus displacing many of these other forms of traditional cooperation, thousands of localities will willingly respond to federal requests for notification in addition to providing the other forms of cooperation as contemplated in the guidance.

Where enthusiasm for immigration policing and questioning still exists, and even where cooperation is grudging, the need remains for joint federal-local efforts to manage its consequences. Egregious figures such as Sheriff Joe Arpaio in Maricopa County, Arizona, should be resisted—there is no value in localism for localism’s sake that can counteract constitutional

51 See DHS GUIDANCE, supra note 10, at 8 (defining the term “cooperate” in 8 U.S.C. § 1357(g)(10) to mean “the rendering of assistance by state and local officers to federal officials, in the latter officials’ enforcement of the INA, in a manner that maintains the ability to conform to the policies and priorities of DHS and that ensures that individual state and local officers are at all times in a position to be—and, when requested, are in fact—responsive to the direction and guidance of federal officials charged with implementing and enforcing the immigration laws”).
52 Id. at 13.
violations or policing deliberately intended to disrupt the federal mission.53 Instead, managing local involvement should entail recognizing local partners as part of an integrated scheme, rather than as officials acting beyond their competencies. This recognition might have several different components. It could include identifying ways of imparting awareness of federal priorities and training officers in the complexities of combining immigration questioning and ordinary policing. This suggestion is not that the 287(g) program should be scaled up; the program does not appear to have generated widespread local interest or produced meaningful efficiencies for the federal government, especially when compared to Secure Communities’ (and PEP’s) far greater reach. Rather, local police can be trained in how to avoid racial profiling, how to maintain constructive relations with immigrant communities when providing immigration-related assistance, and in the complexities of the INA and the various lawful statuses that exist so that enforcement targets can be more precisely identified.

More broadly, détente would include listening to and acknowledging the particular concerns states and localities have about immigration’s impact, whether perceived or real, whether motivated by politics or genuine policy concerns. One simple means of advancing these objectives highlighted by other scholars would be to provide more funding to the states with the largest immigrant and unauthorized populations—states whose institutions must absorb the highest costs associated with illegal immigration. Such outlays could help respond to the political and institutional dynamics that have given rise to enforcement-oriented localism. Another possibility would be to incorporate state and local actors into any new enforcement institutions developed as federal policy changes or as Congress enacts reform. The bill passed by the Senate in 2013 contained one such example that, in theory at least, would have taken advantage of local knowledge, incentives, and expertise, while setting a place for local figures in federal enforcement policy. Section 4 of the bill would have created a Border Security Commission that included all border-state governors and the Governor of Nevada to develop a border

53 In 2011, for example, DHS terminated its 287(g) agreement with Sheriff Arpaio. See Press Release, Dep’t of Homeland Sec., Statement by Secretary Janet Napolitano on DOJ’s Findings of Discriminatory Policing in Maricopa County (Dec. 15, 2011), available at http://www.dhs.gov/news/2011/12/15/secretary-napolitano-dojs-findings-discriminatory-policing-maricopa-county (“Discrimination undermines law enforcement and erodes the public trust. DHS will not be a party to such practices.”).
security policy alongside federal officials if DHS could not certify by a particular date that the border had been secured.54

In thinking through different models of cooperation that might channel local interests, it will be valuable to think more broadly about how law enforcement collaboration generally functions. A wide variety of intergovernmental law enforcement and information-sharing collaborations exist to learn from. Most of these taskforces, whether operated by the FBI, DHS, or other agencies, exist in areas of concurrent regulation, so they are not precisely parallel to the immigration context. But even in the immigration setting, the law enforcement spheres are not autonomous, and so these models can serve as guides. The basic missions of these taskforces tend to be the same: to expand agency capabilities and to ensure that all relevant law enforcement is operating within similar parameters in order to share intelligence. Their pitfalls include duplicated efforts, which shift local priorities or deplete local resources. This critique particularly applies to the Border Enforcement Security Task Force ("BEST"), initiated by ICE and U.S. Customs and Border Protection ("CBP") in 2005 and authorized by the Jaime Zapata Border Enforcement Task Force Act of 2012.55 In addition, where federal and local officials enter into collaboration simply for collaboration’s sake, efforts can be ineffective. Collaboration appears to be most valuable when federal officials, based in the field, spearhead the cooperation and establish policies to guide it.56 In all cases, striking a balance between standardization and customization presents a significant challenge, and the right balance likely depends on the particular law enforcement context.

CONCLUSION

In the aftermath of Arizona v. United States, it might seem as if the future of immigration enforcement will not involve significant federalism debates. Certainly the Supreme Court has curtailed the power of states and localities to devise enforcement regimes to parallel and complement the federal one. But federalism’s mark on the future of immigration

enforcement cannot be escaped. First, federalism has set the stage. Enforcement enthusiasts and skeptics alike have made use of the institutions of federalism in recent years to challenge the federal government's priorities, forcing the Executive Branch to crystallize and recalibrate its enforcement agenda for the future. The agitation in states and localities of the last decade concerning whether and how to enforce the immigration laws has proven to be a productive source of conflict, because it has led to a reckoning over the proper use and organization of federal power. Second, enforcement enthusiasts have lost room to maneuver at the local level as the result of the federal government's efforts to centralize enforcement and re-assert its control over the politics of immigration, and enforcement skeptics have succeeded in using the institutions of federalism to curtail federal power. But the enforcement machinery still remains practically tied to or dependent on state and local police, prosecutors, and legal regimes. As the federal government itself has recognized, the integrated nature of immigration enforcement and politics thus necessitates a détente, or a prioritization of principles of comity and cooperation between the federal government and local actors, rather than a politics of opposition. Through a commitment to the incorporation of varied institutional and political interests in the formulation of enforcement policy, the goals of effective and accountable government can be served, even in as fraught a domain as immigration.