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The Promise and Peril of the Anti-Commandeering Rule in the Homeland Security Era: Immigrant Sanctuary as an Illustrative Case

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**THE PROMISE AND PERIL OF THE ANTI-COMMANDEERING
RULE IN THE HOMELAND SECURITY ERA: IMMIGRANT
SANCTUARY AS AN ILLUSTRATIVE CASE**

TREVOR GEORGE GARDNER*

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INTRODUCTION

In July of 2002, the George W. Bush administration published the “National Strategy for Homeland Security,” which begins with an open letter from President Bush to the people of the United States. The letter introduced the American public to “Homeland Security,” a concept Bush repeatedly framed in relational terms—as a “national strategy, not a federal strategy,” as a “shared responsibility” across the various levels of American government, and as a function of “mutually supporting state, local and private-sector strategies.”¹

The Homeland Security strategy of cooperative security governance appeared to have broad political support when the Bush administration created the Department of Homeland Security (DHS) and tasked the agency with orchestrating law enforcement collaboration across federal, state, and local government. Congress passed the federal legislation appropriating the funds for DHS by impressive margins: 299–121 in the US House of Representatives and 90–9 in the US Senate.² Less than a year after DHS began operations, it incorporated the Immigration and Naturalization Service (INS) as a subsidiary, renaming the division the Immigration and Customs Enforcement Agency (ICE).³ ICE officials immediately initiated a cooperative immigration

1. Letter from George W. Bush, President of the United States of America, to Americans (July 16, 2002), in THE NATIONAL STRATEGY FOR HOMELAND SECURITY (July 2002), available at http://www.subjecting-freedom.org/pdf/National_Strategy_of_Homeland_Security_2002.pdf. This important briefing from President Bush established Homeland Security as an administrative framework based, in part, on norms of cooperation across the various levels of government. The following passage indicates the manner in which the Bush administration introduced the concept of Homeland Security to the nation. “On October 8, I established the Office of Homeland Security within the White House and, as its first responsibility, directed it to produce the first *National Strategy for Homeland Security*. . . . *This is a national strategy, not a federal strategy. We must rally our entire society to overcome a new and very complex challenge. Homeland security is a shared responsibility. In addition to a national strategy, we need compatible, mutually supporting state, local, and private-sector strategies.* Individual volunteers must channel their energy and commitment in support of the national and local strategies. My intent in publishing the National Strategy for Homeland Security is to help Americans achieve a *shared cooperation* in the area of homeland security for years to come. . . . We have produced a comprehensive strategy that is based on the *principles of cooperation and partnership*. As a result of this Strategy, firefighters will be better equipped to fight fires, police officers better armed to fight crime, businesses better able to protect their data and information systems, and scientists better able to fight Mother Nature’s deadliest diseases. We will not achieve these goals overnight . . . but we will achieve them” [emphasis added]. *Id.*

2. Donald P. Moynihan, *Homeland Security and U.S. Public Management Policy Agenda*, 18 GOVERNANCE 171, 181 (2005).

3. Sen. Jeff Sessions & Cynthia Hayden, *The Growing Role for State & Local Law Enforcement in the Realm of Immigrant Law*, 16 STAN. L. & POL’Y REV. 323, 325, 327 (2005).

enforcement program structured to stem the flow of unauthorized immigration and protect the nation from terrorism and other threats to domestic security.⁴

Between 2001 and 2008, a number of subnational jurisdictions balked at the ICE proposal of cooperative immigration enforcement, choosing to abstain in part or in full from the federal government's augmented immigration enforcement apparatus.⁵ After introducing the Secure Communities program in 2008, ICE officials responded to state and local sanctuary policies by representing that subnational police participation was mandatory rather than elective.⁶ Unconvinced, state and local public officials pressed the issue and presented their alternative legal findings. Only then did ICE acknowledge that it could not "commandeer" state and local police into the revamped immigration enforcement program.⁷

This brief narrative captures the second wave of "immigrant sanctuary"—a term used to describe the state and local government practice of restricting police departments from participation in immigration enforcement. The immigrant sanctuaries of the Homeland Security era are of unique significance given the ongoing dialogue among legal scholars regarding the significance of local law enforcement participation in national and domestic security administration after 2001, as well as the legal framework structuring cooperative security governance.⁸

Despite the broad powers wielded by the federal government in security administration, the Supreme Court's holding in *Printz v. United States* serves

4. See David A. Harris, *The War on Terror, Local Police, and Immigration Enforcement: A Curious Tale of Police Power in Post-9/11 America*, 38 RUTGERS L.J. 1, 21 (2006).

5. Orde F. Kittrie, *Federalism, Deportation, and Crime Victims Afraid to Call the Police*, 91 IOWA L. REV. 1149, 1466 (2006).

6. Paloma Esquivel, *Federal Immigration Enforcement is Mandatory, Memo Says*, L.A. TIMES, Jan. 8, 2012, <http://articles.latimes.com/2012/jan/08/local/la-me-ice-foia-20120109>.

7. See Julia Preston, *Immigration Program Is Rejected By 3rd State*, N.Y. TIMES, June 7, 2011, at A13; Letter from Daniel H. Ragsdale, Acting Director of ICE, to Mike Thompson, U.S. House Representative (Feb. 25, 2014), available at http://immigrantjustice.org/sites/immigrantjustice.org/files/2014_02_25%20Thompson-signed-response-ICE.pdf.

8. See generally Ann Althouse, *The Vigor of Anti-Commandeering Doctrine in Times of Terror*, 69 BROOKLYN L. REV. 1231 (2004); Ernest A. Young, *Welcome to the Dark Side: Liberals Rediscover Federalism in the Wake of the War on Terror*, 69 BROOKLYN L. REV. 1277 (2004); Harris, *supra* note 4. The American public has also grown skeptical of the breadth of federal power in the field of security. Polls show that the daily revelations of secret government surveillance programs and the ever-expanding federal security infrastructure leave the polity questioning whether security governance is democratically accountable or instead operating as an autonomous system largely impervious to public opinion and conventional political power. *Obama's NSA Speech Has Little Impact on Skeptical Public*, PEW RES. CTR., Jan. 20, 2014, <http://www.people-press.org/2014/01/20/obamas-nsa-speech-has-little-impact-on-skeptical-public/>; see also *Most Young Americans Say Snowden Has Served the Public Interest*, PEW RES. CTR., Jan. 22, 2014, <http://www.pewresearch.org/fact-tank/2014/01/22/most-young-americans-say-snowden-has-served-the-public-interest/>.

as a substantial check against federal overreach.⁹ Hand wringing by legal scholars over the Court's reasoning in *Printz* and the rigid rules against commandeering attached to this reasoning¹⁰ have obscured the fact that the case now stands as a bulwark against the expansion of federal authority over state, county, and local police. Given the holding in *Printz*, ICE cannot require the active participation of subnational police in immigration enforcement and must instead—despite its previous assertions to the contrary—solicit this support through state and local governments who may, in turn, participate in immigration enforcement of their own volition.

How does an elective rather than legally mandated system of cooperative security governance impact domestic security? Opponents of the Court's decision in *Printz* contend that the rule against federal commandeering of state and local police hamstringing the federal government in times of national emergency, compromising the security of the citizenry.¹¹ Supporters argue in response that *Printz* would likely galvanize public debate about the very conception of domestic and national security, as it gives state and local governments clear legal authority to establish formal bureaucratic opposition to the federal ambition to expand security infrastructure through the incorporation of subnational police.¹²

The case of immigrant sanctuary will not resolve the debate among the justices in *Printz* or among the legal scholars concerned with the impact of the decision on the contours of federalism in contemporary American society. It can, however, offer empirical evidence helpful in investigating a few of the primary, yet speculative, claims made by advocates on either side of the commandeering debate. In the empirical portion of this article, I present the case of immigrant sanctuary as a platform from which to consider the promise and peril of anti-commandeering jurisprudence in the Homeland Security era. My empirical analysis of immigrant sanctuary is based on an original dataset I created, made up of coded data from seventy-five immigrant sanctuary laws and policies and basic demographic information from the associated jurisdictions.

I build a backdrop upon which to consider the data analysis in Part I, by explicating the anti-commandeering rule and outlining the legal debate over its costs, benefits, and constitutionality in the Homeland Security era. In Part II, I

9. See *Printz v. United States*, 521 U.S. 898 (1997).

10. See generally Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law*, 95 COLUM. L. REV. 1001 (1995); Kevin Todd Butler, *Printz v. United States: Tenth Amendment Limitations on Federal Access to the Mechanisms of State Government*, 49 MERCER L. REV. 595 (1998); Neil S. Siegel, *Commandeering and Its Alternatives: A Federalism Perspective*, 59 VAND. L. REV. 1629 (2006).

11. *Printz*, 521 U.S. at 940 (Stevens, J., dissenting).

12. See generally Althouse, *supra* note 8; Young, *supra* note 8.

provide an overview of the sanctuary policies enacted between 2001 and 2008, followed by data analysis that allows for an evaluation of some of the core claims made by opponents and proponents of the *Printz* decision. I complete the analytical portion of the paper in Part III by drawing the legal theory of expressive state action to the immigrant sanctuary case and the commandeering debate. The expressive theory of state action is especially salient in the context of bilateral security governance, where federal conceptions and theories of security tend to take shape unilaterally (i.e., by federal “say-so”) and outside of the public eye and public discourse. I conclude with a few thoughts about the importance of combative federalism to the fields of crime and security governance.

I. *PRINTZ* AND THE PROSPECT OF COOPERATIVE SECURITY GOVERNANCE

A. *The Case Against Federal Commandeering in the Homeland Security Era*

Justice Scalia, writing for the majority in *Printz*, established a bright-line rule prohibiting the federal “commandeering” of state and local police.¹³ The holding in *Printz* invalidated a provision in the Brady Handgun Violence Prevention Act that required Chief Law Enforcement Officers (CLEOs) at the state and local levels to provide temporary assistance to federal officials in the regulation of gun purchases.¹⁴ Citing the dual sovereignty principle of federalist governance and its holding in *New York v. United States*, the majority in *Printz* held that though the Constitution permits the federal government to require or prohibit specific acts by individuals, the federal government may not compel state governments to assist in the regulation of such acts.¹⁵

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 as an expedient solution to the crisis of the day.¹⁶

Given the scope of federal power in the field of security governance, the Court’s rationale in *Printz* deserves careful consideration in the Homeland Security era, where international and domestic threat gives the federal government great deference in shaping the public’s conception of the condition popularly known as “security” as well as the means by which to establish the condition.¹⁷ Federal power in the fields of crime and security governance now extends beyond the scope of federal security infrastructure to the level of

13. *Printz*, 521 U.S. at 925, 935.

14. *Id.* at 933–34.

15. *Id.* at 918–20.

16. *Id.* at 933 (quoting *New York v. United States*, 505 U.S. 144, 187 (1992)).

17. See generally PAT O’MALLEY, RISK, UNCERTAINTY, AND GOVERNMENT (2004).

subnational government, where law enforcement officials are increasingly subject to the national security agenda and related initiatives. In many instances, these initiatives conflict with the local crime control agenda and, in a more general sense, the local understanding of the “secure community.”¹⁸ The Court’s commitment to preserving a system of decentralized governance through the anti-commandeering rule might now seem prescient given the revelations of secret and expansive federal surveillance in the document leaks by the former federal contractor, Edward Snowden,¹⁹ and related public concerns about the extent to which federal security institutions remain accountable to the democratic process.²⁰

B. “State Sovereignty” as a Threat to Domestic Security

Few, if any, critics of the anti-commandeering rule call for the Court to permit unrestrained federal commandeering of state and local police. Most contend, from a functionalist orientation, that the Court’s bright-line rule against commandeering is imprudent given the myriad of exigent circumstances in which the federal government may need to enlist local police in a law enforcement or security initiative.²¹ The common example within this line of argument is the complex terrorist attack that spans two or more jurisdictions. However, climate change and the need for intergovernmental coordination to protect against violent storms, flooding, and related mass displacement seem just as significant. Many of the problems arising from Hurricanes Sandy and Katrina were immediate and dire; they transcended jurisdictional boundaries and required cooperation across the federal, state, and local levels of government. Given these circumstances, what sense would it make to hamstring federal officials with a bright-line rule that bars federal commandeering of state and local police?

In his dissent in *Printz*, Justice Stevens describes the value of centralized security administration in uncertain times.²²

18. See generally Daniel M. Stewart, *Collaboration Between Federal and Local Law Enforcement: An Examination of Texas Police Chiefs’ Perceptions*, 14 POLICE Q. 407 (2011); David Thacher, *The Local Role in Homeland Security*, 39 LAW & SOC’Y REV. 635 (2005); Veena Dubal, *The Demise of Community Policing? The Impact of Post-9/11 Federal Surveillance Programs on Local Law Enforcement*, 19 ASIAN AM. L.J. 35 (2012).

19. Editorial, *Edward Snowden, Whistle-Blower*, N.Y. TIMES, Jan. 1, 2014, http://www.nytimes.com/2014/01/02/opinion/edward-snowden-whistle-blower.html?_r=0.

20. See *Obama’s NSA Speech Has Little Impact on Skeptical Public*, *supra* note 8. Despite its concerns about centralized authority, the Court has granted the federal government considerable deference in security matters. See generally Note, *Keeping Secrets: Congress, the Courts, and National Security Information*, 103 HARV. L. REV. 906, 906–25 (1990).

21. See, e.g., *Printz v. United States*, 521 U.S. 898, 939–70 (1997) (Stevens, J., dissenting).

22. *Id.*

Matters such as the enlistment of air raid wardens, the administration of a military draft, the mass inoculation of children to forestall an epidemic, or perhaps the threat of an international terrorist, may require a national response before federal personnel can be made available to respond.²³

Stevens determined the imposition on local law enforcement officers in the event of federal commandeering to be modest and the Court's "absolute principle" barring the enlistment of local law enforcement to be a dangerous overreaction.²⁴ Many in the legal academic community have expressed similar disapproval regarding the majority's method of argument,²⁵ its claims that the rule barring commandeering bolsters federalist values,²⁶ and its general insensitivity to the value of commandeering in the case of national emergency.²⁷

The most concerning aspect of the national security objection may be the suggestion that the public could suffer grave harm in a time of crisis if the federal government is not allowed a free hand to coordinate intergovernmental collaboration.²⁸ Fortunately, this claim can be evaluated empirically. In the following section, I use the case of immigrant sanctuary to investigate the specific claim made by supporters of the *Printz* decision regarding its impact on the federal government's ability to secure cooperative arrangements across the various levels of government in the specific context of a national crisis. To my knowledge, there has not been a study that assesses subnational government utilization of the anti-commandeering rule in the context of security governance, despite much speculation regarding national vulnerability as a consequence of the rule and countervailing claims regarding the rule's unique ability to temper federal government power.

II. IMMIGRANT SANCTUARY AS A TEST CASE

A. *Three Propositions Regarding the Relationship Between National Security, National Emergency, and the Rule Against Commandeering*

Scholars wary of the expansive growth of federal power in the era of Homeland Security and the War on Terror have identified the anti-

23. *Id.* at 940.

24. *Id.* at 966–67, 977.

25. See generally Butler, *supra* note 10. See also Caminker, *supra* note 10.

26. See Siegel, *supra* note 10, at 1630–57.

27. One commenter expressed his dismay that the anti-commandeering rule was "so broad, so insensitive" that it did not provide for leeway even when the federal government commandeered in order to satisfy a compelling government interest—"for example, commandeering of state and local officials in the wake of a terrorist attack or devastating hurricane." *Id.* at 1655.

28. *Id.* at 1686 n.202 (quoting *Printz v. United States*, 521 U.S. 898, 940 (1997) (Stevens, J., dissenting)).

commandeering rule as one of the few mechanisms moderating this power.²⁹ In response to scholars and jurists who support situational commandeering—particularly in the context of national emergency—commandeering opponents have held to the notion that the Court’s decision in *Printz* protects social interests easily forgotten in moments when warnings of threat to national security seem pervasive and unrelenting.³⁰ Though the claims of commandeering opponents are not easily confirmed or dismissed, I look to test their validity using data from the immigrant sanctuary case.

To this end, I have identified three key assertions made by commandeering opponents regarding the anti-commandeering rule and its ramifications for security governance.

1. Commandeering opponents argue that in the Homeland Security era, the concepts of “national security” and “national emergency” are a point of contention.³¹ For instance, commandeering opponents have criticized Justice Stevens’s assertion in *Printz* that high murder rates in the United States constitute a national emergency that might require an intergovernmental response orchestrated by the federal government.³² They argue that the cause of violent crime is best understood through an investigation of local milieu and, more fundamentally, that the “national security/emergency” labels should be subject to public debate.³³ The anti-commandeering rule is thought to have the effect of *decentralizing government power in the context of such a debate, undermining the hegemonic quality of various narratives pertaining to the nation’s security*. In the absence of federal commandeering, state autonomy in crime and security governance would, in theory, reveal “national security” to be a variable social construction rather than an essential and knowable entity.
2. Commandeering opponents also maintain that when states abstain from federal enforcement initiatives *they are likely to engage and enrich a national debate about conceptions of emergency, threat, and national security*. In addition to revealing dissent regarding the true meaning of security, state autonomy is thought to provide the discursive space for a dynamic and inclusive debate between state and local collectives and federal officials regarding “best practices” and best perspectives in the field of security governance.

29. *See generally* Althouse, *supra* note 8.

30. *See id.* at 1273.

31. *Id.* at 1272.

32. *Id.*; *Printz*, 521 U.S. at 940–41 (Stevens, J., dissenting).

33. *See* Althouse, *supra* note 8, at 1262.

3. Commandeering opponents argue that the anti-commandeering rule does not require an emergency exception given that subnational governments will feel immense pressure to cooperate with federal officials in circumstances that are appropriately classified as national emergencies³⁴ or when the situation is “dire.”³⁵ According to this view, the willingness of subnational jurisdictions to join the federal government in a domestic security or criminal enforcement initiative is itself a reliable test of the credibility of the federal government’s threat and security claims.

The proliferation of immigrant sanctuary policies between 2001 and 2008 provides an excellent empirical case from which to assess these propositions. After the creation of the Department of Homeland Security in 2002, the department’s subsidiary, ICE, looked to establish an augmented immigration enforcement program using state and local police as surrogates.³⁶ Select officers would receive the authority to make arrests for the violation of federal immigration laws and federal officials expected every police department, jail, and prison to identify the unauthorized immigrants that came into their custody.³⁷

The federal government developed the collaborative initiative through the 287(g) provision of the IIRIRA of 1996³⁸ and the Criminal Alien Program (CAP), which was eventually succeeded by “Secure Communities,” or S-Comm.³⁹ Immigration enforcement partnership programs did not gain traction at the subnational level until 2006 when the American public began to express serious concern about the scale of unauthorized immigration.⁴⁰

34. See Young, *supra* note 8, at 1291.

35. Althouse, *supra* note 8, at 1274.

36. RANDY CAPPES ET AL., MIGRATION POLICY INSTITUTE, DELEGATION AND DIVERGENCE: A STUDY OF 287(G) STATE AND LOCAL IMMIGRATION ENFORCEMENT 9 (2011), available at <http://www.migrationpolicy.org/pubs/287g-divergence.pdf>. See generally Adam B. Cox & Thomas J. Miles, *Policing Immigration*, 80 U. CHI. L. REV. 87 (2013) (“Today, local police are being integrated into federal immigration enforcement on a scale never seen before in American History.”).

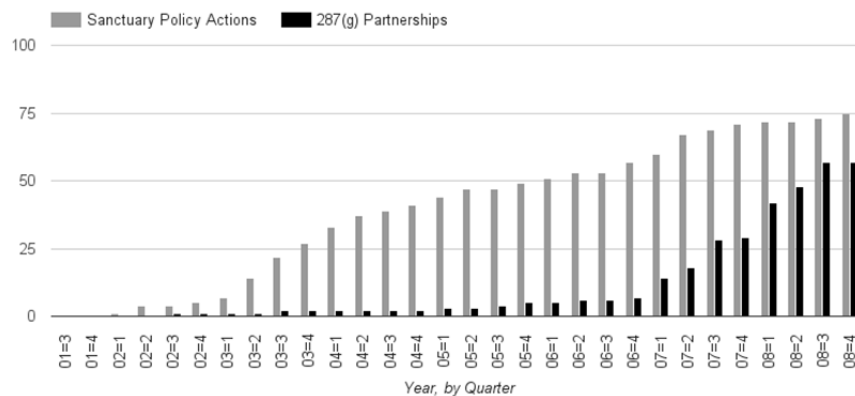
37. CAPPES ET AL., *supra* note 36, at 5; Cox & Miles, *supra* note 36, at 93.

38. Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996 § 133, Pub. L. No. 104-208, 110 Stat. 3009–546 (amending 8 U.S.C. § 1357).

39. Cox & Miles, *supra* note 36, at 93.

40. See *infra* Figure 1.1.

Figure 1.1: Sanctuary Policies and Enforcement Partnerships, Cumulative (2001–2008)⁴¹



Instead of walking in step with the DHS program, many subnational jurisdictions obstructed the integration of the federal immigration system and state and local criminal justice systems. Some in this group publicized their stance, seemingly inviting a confrontation with the federal government.⁴² Each sanctuary jurisdiction either prohibited or restricted local police collaboration with Immigration and Customs Enforcement, concluding that the ICE partnership initiative undermined one or several local interests such as local community solidarity and efficacy in local crime governance.⁴³

In May of 2003, the state of Alaska based its decision to restrict police participation in immigration enforcement on its objection to perceived federal infringement of civil liberties.⁴⁴ The Alaska immigrant sanctuary provision is embedded within a broader range of restrictions preventing local police from aiding federal officials in the exercise of new powers and authorities granted by the Patriot Act.⁴⁵ The city of Richmond, California, also objected to the federal immigration enforcement campaign, but for very different reasons.⁴⁶

41. Data on file with the author.

42. Cecilia M. Vega, *San Francisco Promotes Services for Illegal Immigrants*, SAN FRANCISCO CHRON., Apr. 3, 2008, <http://www.sfgate.com/bayarea/article/S-F-promotes-services-for-illegal-immigrants-3219519.php>; Jesse McKinley, *San Francisco Reaches Out to Immigrants*, N.Y. TIMES, Apr. 6, 2008, http://www.nytimes.com/2008/04/06/us/06immig.html?pagewanted=print&_r=0; DreamActivist, *San Francisco—Sanctuary City*, YOUTUBE (Apr. 4, 2008), <https://www.youtube.com/watch?v=BMzsUo2aM4U>.

43. See Vega, *supra* note 42; see also McKinley, *supra* note 42.

44. H.R. J. Res. 22, 23rd Leg., 1st Sess. (Alaska 2003).

45. *Id.*

46. See Richmond City Council, *A Resolution of the Richmond City Council Reaffirming Its Support For Comprehensive Immigration Reform That Is Fair, Just and Humane*, Res. 11–07

Richmond's policy cited a shortage of agricultural labor and the dysfunction of the national immigration system as its primary rationales.⁴⁷

B. Data on Immigrant Sanctuary Policy

Scholars have yet to systematically account for the rationales driving the immigrant sanctuary movement or the legal mechanisms facilitating immigrant sanctuary practice. I sought to fill this gap in the literature through an analysis of immigrant sanctuary policy actions taken by subnational governments between 2001 and 2008.⁴⁸ I use the results of this analysis to assess the aforementioned claims regarding the value of the anti-commandeering rule in the context of security governance.

The population of sanctuary policies underlying the analysis were coded for the time of enactment, the level of policy restriction, the state in which the policy was enacted, the region of the country in which the policy was enacted, the type of jurisdiction enacting the policy (i.e., city, county, or state), and the rationale(s) expressed in the preamble of the policy. A review of the full slate of immigrant sanctuary policies enacted between 2001 and 2008 revealed nine primary rationales expressed across the seventy-five policies.

The immigrant sanctuary policies that populate the dataset derive from an original list published by the National Immigration Law Center in 2009, titled,

(Feb. 6, 2007), available at <http://www.ci.richmond.ca.us/archives/67/reso.%2011-07%20Immigration%20Reform.pdf>.

47. *Id.*

48. (n=75). The policy timeline ends in 2008 due to the federal government's shift in immigration enforcement strategy. In 2008, federal officials launched the Secure Communities program, which relies on a reflexive data sharing process that occurs between subnational police and the Federal Bureau of Investigation. Cox & Miles, *supra* note 36, at 93; see also AARTI KOHLI ET AL., THE CHIEF JUSTICE EARL WARREN INSTITUTE ON LAW AND SOCIAL POLICY AT UC BERKLEY SCHOOL OF LAW, SECURE COMMUNITIES BY THE NUMBERS: AN ANALYSIS OF DEMOGRAPHICS AND DUE PROCESS 1–3 (Oct. 2011). For several decades, the FBI has provided a courtesy criminal record-check service for state and local police, which all subnational police departments utilize in criminal processing. The Secure Communities program simply inserted an additional data-share mechanism in which every state and local police request to the FBI for a criminal records check triggers a simultaneous check of the ICE immigration database. If the ICE database check indicates that the detainee is an unauthorized immigrant or eligible for an immigration related sanction, ICE issues a detainer for the criminal suspect. Consequently, subnational enforcement partnering and immigrant sanctuary policy lost relevance after 2008 when the federal government introduced Secure Communities as a national program that would trigger the immigration-status verification mechanism in response to any criminal records check requested by state or local police. See Laura Sullivan, *Enforcing Nonenforcement: Countering the Threat Posed to Sanctuary Law by the Inclusion of Immigration Records in the National Crime Information Center Database*, 97 CALIF. L. REV. 567, 583–85 (2009); see also Cox & Miles, *supra* note 36, at 94–95.

“Laws, Resolutions, and Policies Instituted Across the U.S. Limiting the Enforcement of Immigration Laws by State and Local Authorities.”⁴⁹

C. Findings and Analysis

The sanctuary policy dataset produced a series of findings that speak to the three claims by commandeering opponents who hold, generally, that the anti-commandeering rule in *Printz* provides important social and political benefits in an era of centralized and opaque security governance.

Claim 1: The anti-commandeering rule undermines the hegemonic quality of the domestic and national security narratives and concepts circulated by federal officials.

The resurgence of the immigrant sanctuary movement after 2001 demonstrates the rupture of the federal security narrative by way of counteractive measures by subnational governments.⁵⁰ Abstaining jurisdictions spanned the political spectrum—from conservative and politically moderate states like Alaska, Montana, and New Mexico, to liberal enclaves like Berkeley, California, and Ann Arbor, Michigan. The sanctuary policy actions took the form of both legislative and administrative mechanisms,⁵¹ which suggests that a variety of state and local government institutions challenged the federal government’s cooperative enforcement initiative and the assertion of cooperative immigration enforcement as essential to domestic security.

Table 1.1: Sanctuary Policy Actions, 2001-2008⁵²

Policy Mechanism	Total	Percentage
Ordinances	9	12.0%
Resolutions	50	66.7%
Police Orders	12	16.0%
Executive Orders	4	5.3%
Total Sanctuary Policy Actions	75	100%

49. NAT’L IMMIGRATION LAW CTR. (NILC), LAWS, RESOLUTIONS, AND POLICIES INSTITUTES ACROSS THE U.S. LIMITING THE ENFORCEMENT OF IMMIGRATION LAWS BY STATE AND LOCAL AUTHORITIES (2009).

50. See *infra* Figure 1.2.

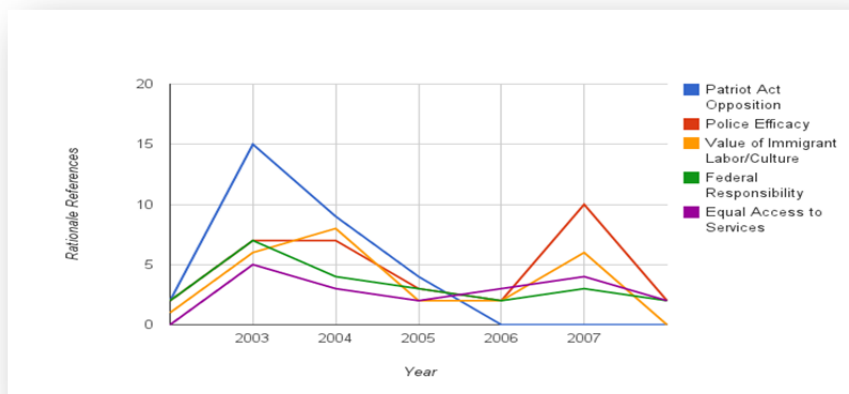
51. See *infra* Table 1.1.

52. Data on file with the author.

Claim 2: The anti-commandeering rule functions as a platform for debate between the federal government and subnational governments regarding the precise meaning of domestic security.

The challenge posed by sanctuary jurisdictions introduced alternative narratives regarding the relationship between unauthorized immigration and domestic security.⁵³ These oppositional security narratives can be found in the preamble of the sanctuary policies themselves. In general, they contend that the associated population is *less* stable, cohesive, and ordered (specifically, less secure from physical, social, and economic harms and civil rights and civil liberties violations) when its police partner with the federal government to enforce federal immigration law.

Figure 1.2: Sanctuary Policy Rationales by Year⁵⁴



When placed along a timeline, these oppositional narratives roughly correspond to dominant security discourses at the federal level.⁵⁵ For instance, in 2003, just after the passage of the Patriot Act and creation of the Department of Homeland Security, rationales related to the expansive federal power in the field of security were the rationales most frequently cited across sanctuary policies.⁵⁶ Available evidence suggests that between 2001 and 2005, DHS promoted cooperative immigration enforcement as necessary for its counterterrorism strategy. However, in 2005, when federal officials pivoted to a security narrative that claimed unauthorized immigration as a societal threat in its own right (apart from its implications for counterterrorism), rationales related to the impact of police participation in immigration enforcement on police efficacy were the rationales most often expressed in sanctuary policy

53. See *supra* Figure 1.2.

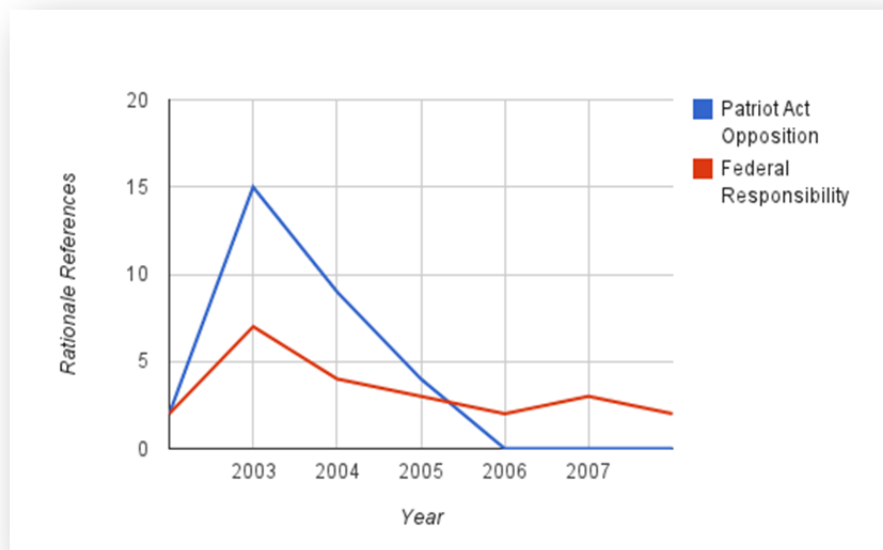
54. Data on file with the author.

55. See *supra* Figure 1.2.

56. See *infra* Figure 1.3.

actions. For example, most of the policy actions taken between 2006 and 2008 expressed concern that home raids by ICE damaged the relationship between police and local immigrant communities.⁵⁷ Other sanctuary policy actions in the same time frame made the more general claim that police participation in ICE diminished the police department's ability to investigate, solve, and prevent crimes. These correlations show attentiveness among state and local governments to the specific security claims of DHS, and a discursive response by dissenting jurisdictions, narrowly tailored to the federal security narrative of the hour.⁵⁸

Figure 1.3: Federal Overreach Rationales⁵⁹

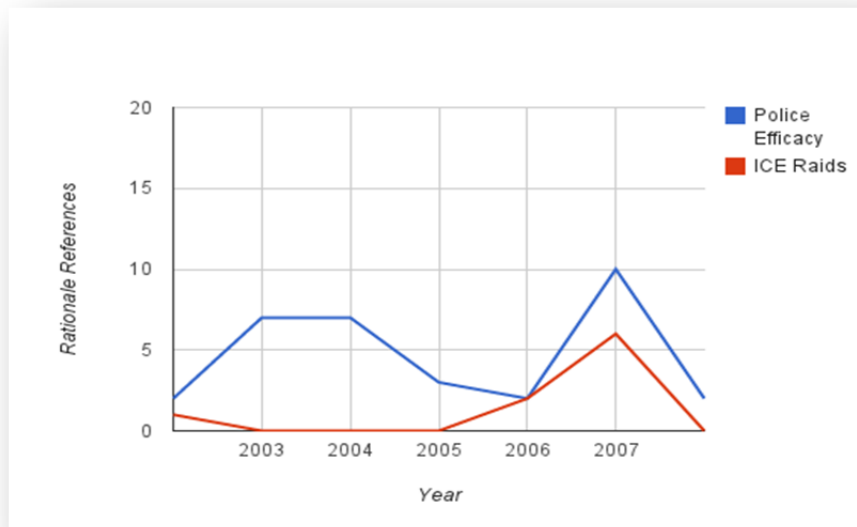


57. See *infra* Figure 1.4.

58. Letter from Mary Elizabeth Heffernan, Secretary for Massachusetts Governor Deval Patrick, to Marc Rapp, Acting Director, Secure Communities (Immigration and Customs Enforcement, Department of Homeland Security) (June 3, 2011) (on file with author). Ethnographic and archival research could confirm and expand upon these findings. I did find anecdotal evidence from several sanctuary jurisdictions showing that state and local officials directly and often publicly challenged ICE's claims regarding the threats associated with unauthorized immigration, the proportion of criminal aliens in the unauthorized immigrant population, and the credibility of the "criminal alien" classification.

59. Data on file with the author.

Figure 1.4: Police Efficacy Rationales⁶⁰



The data do a poor job of capturing nuance within the state and local government objections to cooperative immigration enforcement. A qualitative inquiry via case study, producing rich, fine-grained data regarding local sentiment and related public debate would convey in clearer terms the nature of the federal-subnational debate over enforcement and sanctuary. However, the temporal analysis of the oppositional narratives in the immigrant sanctuary policy preambles and the DHS immigration enforcement narratives show a discursive exchange regarding the notion and pursuit of domestic security after 2001. This exchange reverberated in open letters between state and local government attorneys, Homeland Security officials, and United States Attorneys’ offices, and in the context of aggressive public advocacy from local and federal politicians and immigrant rights groups.⁶¹ The study underlying this article allows for a nation-level temporal analysis, but cannot account for the robust debates in each jurisdiction that likely preceded the enactment of any one immigrant sanctuary policy.

60. Data on file with the author.

61. Data on file with the author.; Jaxon Van Derberken, *Feds Probe SF’s Minor Offender Shield*, SAN FRANCISCO CHRON., June 29, 2008, <http://www.sfgate.com/crime/article/Feds-probe-S-F-s-migrant-offender-shield-3206605.php>; Don Babwin, *Cook County Defies Government on Immigration*, ASSOCIATED PRESS, Oct. 4, 2011, <http://cnsnews.com/news/article/cook-county-defies-government-immigration>.

Claim 3: Subnational governments that opt for a combative, rather than cooperative, stance in relation to a federal security initiative will make exceptions in the interest of public safety.

Table 1.2: Level of Enforcement Restriction⁶²

Level of Restriction	Number of jurisdictions	%
Level-1: Barring the use of government resources for the enforcement of immigration law (without clear exception)	23	30.6%
Level-2: Barring the use of government resources for the enforcement of immigration law with specific exceptions. ⁶³	31	41.3%
Level-3: Barring the use of government resources for immigration enforcement actions that target individuals solely based on immigration status	16	21.3%
Level-4: Objection to local participation in immigration enforcement absent meaningful restrictions	5	6.7%
Total	75	100%

My preliminary analyses show that most of the jurisdictions enacting sanctuary policy between 2001 and 2008 included exceptions to the restrictions on police participation in immigration enforcement. Moreover, the specified restrictions fell along a continuum. To convey the variation in the degree to which sanctuary policies restrict local officials from participating in immigration enforcement, I classified sanctuary policies as belonging to one of four levels of restriction.⁶⁴ Fewer than one-third of the seventy-five sanctuary policy actions do not include an exception. Thirty-one provide narrow

62. Data on file with the author.

63. Restriction exceptions have been coded as (a) serious crime (n=7), (b) criminal or traffic offenses (n=23), and (c) permission by designated city official (n=1).

64. See *supra* Table 1.2.

exceptions and twenty-one include broad exceptions. None of the policies established a sanction for breach of the noncooperation policy.

State and local governments rarely place a total ban on cooperation in immigration enforcement. Though many subnational governments vigorously objected to the scope and intensity of the immigration enforcement campaign launched after 2001, the policies stemming from such objections, more often than not, included provisions that local officials believed would ensure public safety. Level 3 and 4 restrictions, though present in only 28% of the policies,⁶⁵ allow police considerable discretion in regard to the question of whether to refer an unauthorized immigrant detainee to ICE.

The sanctuary policies articulated other exceptions common to state and local legislation. Many of the city and county sanctuary resolutions and ordinances instruct local officials to ignore sanctuary policy if required to do so by “state or federal statute, regulation, or court decision.”⁶⁶ This provision acknowledges the ability of a state legislature to mandate cooperative immigration enforcement by local police via state statute if it considers enforcement cooperation essential to the preservation of security of state residents.⁶⁷ Put simply, states generally have the option of overriding city and county sanctuary provisions. A functional immigrant sanctuary at the local level therefore requires both a local sanctuary law or policy *and* the absence of a preemptive state statute mandating local cooperation with federal officials.

III. SECURITY IDEOLOGY AND THE EXPRESSIVE THEORY OF STATE ACTION

A. *Immigrant Sanctuary as Functional Dysfunction*

Commandeering proponents offer two additional arguments against the *Printz* decision and a constitutionally assured fragmentation across American law enforcement and security institutions. First, why should state and local jurisdictions be permitted to obstruct federal immigration enforcement initiatives in pursuit of democratic accountability? Would it not be more effective to situate democratic accountability for domestic security policy at the federal level, exercised through the state and local representatives who serve in Congress? Given the diversity of threats facing the nation in the Homeland Security era, political consensus regarding security governance seems a clear prerequisite for strong security. If congressional representatives (rather than state and local representatives) collectively determined the scope and quality of domestic and national security initiatives, state and local police

65. See *supra* Table 1.2.

66. See, e.g., BERKELEY CITY COUNCIL RESOLUTION, REAFFIRMING BERKELEY AS A CITY OF REFUGE, No. 63, 711-N.S. (2007).

67. While states generally can force local governments to cooperate in enforcement, the federal government cannot.

departments could freely participate in federal directives. Americans would then, in theory, receive the benefit of both cohesive and democratically accountable security governance. This model of democratic accountability establishes a unified system free of the gaping holes in the nation's security umbrella caused by state or local enforcement abstinence policies.

What, then, makes the anti-commandeering rule and the opportunity it provides for enforcement dysfunction a superior legal framework for security governance? The social science literature on crime governance provides at least one compelling answer. It shows that democratic accountability in the field of crime governance runs along a continuum—it is strongest at the local level and weakest at the level of federal government.⁶⁸ Ordinary citizens exercise meaningful influence over the quality of local policing and punishment, but this influence wanes at the state and federal levels where well-organized and well-funded interest groups thrive. Congressional representatives are less responsive to citizen concerns than city council members, making the security initiatives organized at the federal level and dictated to local police departments an efficient and highly integrated model of security governance, but a model in which local communities surrender control of the local institutions built to serve them.

The creep of federal influence over local crime governance over the past several decades only heightens concerns about federal commandeering in the Homeland Security era.⁶⁹ Political scientists have argued in recent years that in contemporary American political life the citizens most affected by crime policy lack the basic resources necessary to lobby at the federal level.

While some citizen groups seem to fare well on the national level, others—for example neighborhood associations, community-based organizations, ex-offenders groups, mothers' and parents' groups—are deeply embedded in local contexts and often resource-poor, making it difficult to migrate across multiple legislative venues. . . . Policymakers at higher levels seem largely insulated from the policy priorities of these [resource-poor] groups, despite their persistent and occasionally successful organizing efforts at the local level.⁷⁰

The distribution of political power in the field of crime and security governance must be considered when contemplating a world without the anti-commandeering rule. Federal influence over state and local police departments is likely negatively correlated with the influence of the moderately resourced political groups that aggressively advocate against penal excess or “overcriminalization” at the local government level. In the best of

68. See LISA MILLER, *THE PERILS OF FEDERALISM* (2010); see also WILLIAM STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* (2011).

69. See CAPPS ET AL., *supra* note 36; see also Cox & Miles, *supra* note 36 (regarding the technical innovations facilitating the Secure Communities program).

70. MILLER, *supra* note 68, at 6.

circumstances, the groups come to exercise meaningful influence over local crime policy. However, they find themselves at a severe disadvantage when decisions regarding the quality of local policing are made at the state and federal levels of government.

The slate of immigrant sanctuary policies passed after 2001 and predicated on the Court's interpretation of the Tenth Amendment in *Printz* frustrated the efficient model of security governance that lies at the core of the Homeland Security model. They asserted local democratic control of the police and in many instances undermined the federal government's national security narratives regarding criminal aliens. Evidence from the underlying study suggests that the incongruity between the federal government's robust immigration enforcement initiative after 2001 and the immigrant sanctuary response fostered a dialogue in which immigrant sanctuary jurisdictions and allied advocates asked the American public to at least consider the notion of the unauthorized immigrant population as an essential part of the local community rather than a criminal threat to the same. In a remarkable transformation, the federal government, in response, has shifted from a plan that initially targeted the entire unauthorized immigrant population for deportation to a plan that targeted unauthorized immigrants in contact with the criminal justice system, and later to a plan that ostensibly targeted unauthorized immigrants charged with "serious crimes." There are now indications that the federal government may abandon the cooperative immigration model entirely, which would all but sever the enforcement model of *deportation via criminal detention*.⁷¹ It seems fair to say that the immigrant sanctuary movement, though dysfunctional from the standpoint of efficient security governance, played a part in this process of immigration enforcement regression. Immigrant sanctuaries directly challenged the federal government's theory of security and conceptualization of criminal threat. This is not a story of cooperation, efficiency, or synergistic management of a social problem, but instead one of resistance. In the case of immigrant sanctuary, enforcement resistance helped to transform American sensibilities in the field of security governance, despite a long history of intergovernmental consensus on such matters.

B. *Expressive Law and Social Meaning in Security Governance*

The final critique of my analysis of the anti-commandeering rule would likely call into question the impact of the immigrant sanctuary policies themselves and incorporated rationales. How are we to understand the

71. Letter from Jeh Johnson, DHS Secretary, to Thomas S. Winkowski, Acting Director, Secure Communities (Immigration and Customs Enforcement, Department of Homeland Security) (Nov. 20, 2014), available at http://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf.

significance of these policies in terms of their role in contesting and shaping public perceptions of unauthorized immigrant presence? Fortunately, scholars have carefully considered this question in a rich literature on “expressive law.” This literature reveals the law’s expressive function and its power to transform social meaning,⁷² particularly in instances in which the federal government’s values and priorities conflict with those of subnational governments.⁷³

An inquiry into the expressive quality of law should begin with a few simple facts about the law itself. Some laws shape behavior by requiring sanction for undesired behavior, while others, though having an enforcement component, seek to shape social behavior primarily by “making statements” that shape social norms. In the latter case, law is crafted to govern human behavior by transforming social meaning rather than through coercion.⁷⁴ Expressive law may ultimately fail to have any impact on public opinion or it may fundamentally change social understandings.

Given the apparent political consensus after 2001 that security governance must be cooperative across the various levels of government and the federal campaign to utilize local police resources in combatting unauthorized immigration, a normative shift that disentangled unauthorized immigrants from notions of criminal and security threat seemed highly unlikely. Yet this is exactly what happened over the course of the immigrant sanctuary campaign. A sizeable number of jurisdictions, including many large American cities, enacted immigrant sanctuary policy and in many instances articulated an alternative understanding of unauthorized immigrant presence—one that cast this recently maligned population as valued community members rather than as criminals. In his model of expressive law, Cass Sunstein captures the cultural thrust of the immigrant sanctuary policy movement.

What is perhaps less standard is to see the law as an effort to produce adequate social norms. The law might either do the work of such norms, or instead be designed to work directly against existing norms and to push them in new directions. The latter idea is grounded on the view that law will have moral weight and thus convince people that existing norms are bad and deserve to be replaced by new ones.⁷⁵

If we are inclined to accept that the law has an expressive value and can transform social meaning, how can we determine when the expressive quality of law will find an audience or, alternatively, fall on deaf ears? The literature suggests that the law is more likely to have an expressive quality when it is

72. See Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996).

73. Adam Cox, *Expressivism in Federalism: A New Defense of the Anti-Commandeering Rule*, 33 LOY. L.A. L. REV. 1309 (2000).

74. *Id.* at 2024–25.

75. *Id.* at 2031.

local and well publicized. Americans tend to view local public law as an indication of public beliefs about a particular issue, far more so than state or federal public law. Scholars have argued that citizens lack full information regarding public opinion and that the government, in passing laws, provides one mechanism by which they come to understand local sentiment.⁷⁶ Consequently, pending bills and enacted legislation brought to the public's attention have a greater likelihood of establishing the moral character of a given community.

Immigrant sanctuary ultimately satisfies both of these criteria. Immigrant sanctuary policies are concentrated at the local level, in cities and counties that either oppose the use of police departments for federal rather than local priorities or object to the treatment of unauthorized immigrants by the federal government or in American society in general. The sanctuary policies have also received considerable media attention given that they directly conflict with a prominent federal security initiative and pertain to the contentious issue of unauthorized immigration.

Expressive law holds unique value in the federalist system of governance, particularly in instances in which state or local governments pass laws challenging federal law or federal enforcement initiatives.⁷⁷ Scholars have argued that in challenging the federal government by way of expressive law, state and local governments act as "alternative political institutions" rather than merely alternative or subservient systems of governance. As semi-autonomous political entities, subnational governments can reorient various national debates using the expressive quality of public law. The value of this tool is enhanced in fields like security governance, where the federal government tends to dictate the terms of related national debates. In the new cooperative paradigm of Homeland Security, the federal government seeks cooperative arrangements with state and local government, but arrangements facilitated by its own definition of domestic security and, likewise, its risk assessments of groups historically stigmatized in American society. Such assessments are often made in the aftermath of spectacular violence and in the midst of panic. Through expressive law, state and local governments can provide alternative security narratives and modes of security governance that penetrate national anxieties and force rigorous debate on the security matter in question.

Expressive law thus provides special utility within the federal system of governance, where state and local governments have the power to challenge, disrupt, and even sink federal initiatives. I have attempted to argue, additionally, that this is especially true in the field of security, where federal cultural and administrative power reaches its apex. In the case of the immigrant

76. Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339, 358 (2000).

77. See Cox, *supra* note 73, at 1323–27.

sanctuary policy movement, state and local governments confronted the federal attempt to integrate the immigration and criminal enforcement systems. The federal government has incrementally retreated from the initiative and adopted a fresh narrative of immigrant presence in which the “criminal alien” label is no longer applied to unauthorized immigrants merely “in contact with” the criminal justice system, but more narrowly to unauthorized immigrants charged with serious offenses. This shift in enforcement indicates a change in the social meaning attached to unauthorized immigrant presence, setting the stage for more recent and ongoing modification of federal immigration enforcement priorities.

CONCLUSION

Absent the Court’s conclusion that the federal government “lacks the power to directly compel the States,”⁷⁸ federal power in security governance, despite its recent heights, would increase substantially. Law enforcement resources at the subnational level greatly exceed those of the federal government. Data from 2004 identified 12,766 local police departments, 3,067 county sheriff’s offices, 49 general service state law enforcement agencies, and 1,481 specialty agencies in the areas of transit, park, and campus policing, among others. Federal security infrastructure is small in comparison, with the total number of federal law enforcement agencies falling somewhere between 65 and 200 and the number of federal officers totaling around 105,000.⁷⁹ The total number of Americans working as full-time law enforcement personnel at the subnational level stands at 1.1 million.⁸⁰

Given these statistics, it seems all but certain that the consolidation of state and local criminal justice resources for the purpose of federal ambitions in the field of domestic security would translate to a fundamental redistribution of government power. Among other things, it would likely establish a cultural and administrative continuum between crime governance and security governance, eliminating the distinction between criminal and national security matters that has largely preserved an accepted division of labor between the federal and subnational governments.

78. *Printz v. United States*, 521 U.S. 898, 924 (1997); *New York v. United States*, 505 U.S. 142, 166 (1992).

79. Daniel Stewart, *Collaboration Between Federal and Local Law Enforcement: An Examination of Texas Police Chiefs’ Perceptions*, 14 *POLICE Q.* 407, 409 (2011).

80. BRIAN A. REAVES, DEP’T OF JUSTICE & BUREAU OF JUSTICE STATISTICS, *CENSUS OF STATE AND LOCAL ENFORCEMENT AGENCIES* (July 26, 2011), available at <http://www.bjs.gov/in dex.cfm?ty=pbdetail&iid=2216>.