
Recollections of the Legal Battle Against Proposition 187

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Good morning. Thank you Professor Saucedo, my former colleague at MALDEF, for introducing me and also for taking the lead in organizing this important commemoration of the twenty-fifth anniversary of the enactment of Proposition 187. I'm not a scholar; later in the day you are going to hear from some tremendous scholars who have looked at these issues from a number of vantage points. I figured that I'm up here giving this keynote morning address for basically two reasons.

One, I called and reminded Professor Saucedo many months ago that 2019 would be the twenty-fifth anniversary, and I suggested that maybe a commemoration was appropriate. I knew that she would immediately pick it up. I knew that she would go to Dean Johnson and he would be interested, and so we got to today. I want to thank you, Professor Saucedo and Dean Johnson and UC Davis and the Law Review, for putting this commemorative event together. And I figure the second reason I'm up here this morning is that I was a young lawyer at MALDEF in 1994 when Proposition 187 was enacted. It was one of the first assignments that I had as a young attorney who had begun at MALDEF in October of 1993, roughly a year before the initiative passed. I had the opportunity then to work both on the campaign, debating some of the less illustrious purported authors of the initiative during the campaign, and then to work on the legal team that filed a federal court challenge to every provision of the initiative the day after the election.

I'm not a scholar. I view myself as the fodder for the scholars, but I want to try to say some things this morning that I hope will trigger some

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further thinking and analysis. I am going to focus on the legal case against Proposition 187 because I think it, as well as the political and sociological change catalyzed by the initiative in California, has repercussions and relevance today. This is an auspicious anniversary, or commemoration — in a decidedly negative way, as Dean Johnson suggested, because it is as relevant today as any of us could have imagined in our worst nightmares it would be, as we face the continuation of what is the most anti-Latino, nativist, anti-immigrant presidential administration in our entire history. So I think there are lessons in both the political and legal realm from what happened beginning twenty-five years ago for today. But, since it was twenty-five years ago, I feel I have to start with some basic information about Proposition 187.

I've spent many, many different occasions talking about Proposition 187 throughout my career; early on, it was easy because everybody, at least in California — but really across the country as the initiative garnered media attention nationwide — everyone knew what Proposition 187 was. But as the years have gone by, now I find myself talking to students in college or even law school, the majority of whom weren't even born when Proposition 187 was enacted. So, to remind those who maybe weren't alive, but have heard about it a little bit in class, Proposition 187 was the most anti-immigrant law passed by any state at the time — probably going back more than half a century. And it was an initiative enacted by voters that would have covered every public service you can imagine. It was a lengthy proposition, in ten sections, adding new provisions to a number of different codes in California law. And it would have affected not only undocumented immigrants, but really every person, citizen or not, in the state of California who sought to access any of those public services. Indeed, that was part of the argument during the campaign against the initiative: that it wasn't just about denying services to undocumented immigrants — many of the services it purported to deny were already, as a matter of federal or state law, denied to undocumented immigrants. It was really an effort to control everyone's life, in trying to access services, with particular effects of course on those who fit the then prevailing, and still current, stereotypes about who is undocumented. And that is because the centerpiece of all the operative provisions of Proposition 187 rested on "reasonable suspicion."

Small footnote: the law enforcement section, for whatever reason, dropped the word "reasonable," and law enforcement officers were supposed to act solely on their suspicion that someone was undocumented. Every other public servant — including, as Dean

Johnson mentioned, teachers; including professors at higher education settings; including social services workers; including health care workers — would have had to go through a particular drill if they had a reasonable suspicion that someone was undocumented. And it was the same five-part drill with each of the provisions, and that was: suspect, deny, verify, report, and notify.

In each of these provisions dealing with a specific service: if a public servant had a reasonable suspicion that someone was undocumented — based on no guidance in the initiative — but if you had that reasonable suspicion, you were directed to deny the services to that individual; to attempt to verify that individual's immigration status; and regardless of your success at verifying or not, you were to then report that individual to the state attorney general and to federal authorities — at that time the Immigration and Naturalization Service (“INS”). You were to send a notice to that individual from the state of California to the effect of saying: the State of California has concluded that you are undocumented; legalize or leave the state.

That drill was what was involved in each of the provisions with respect to the specific services involved. So, to remind folks, the first two operative provisions, Sections 2 and 3, were never enjoined. These had nothing to do with the drill I just described. These were new Penal Code sections in California law that would punish those who manufacture, distribute, or use fraudulent identity documents. We tried, but never succeeded, in convincing any judge to hold those up; they were allowed to take effect immediately. There were not many prosecutions, but they were in effect throughout the period that we're talking about.

The next provision, Section 4, was about law enforcement. As I have indicated, in that case, officers were to act based on suspicion alone, not reasonable suspicion. They were not to deny services, but were to go through the rest of the drill: attempting to verify status, notifying the individual that he or she was suspected of being undocumented, and reporting to federal and state authorities. Section 5 dealt with social services, with the same five-part drill that I described: suspect (reasonably), deny services, attempt to verify, report, and notify. Section 6 dealt with healthcare, with an exception solely for emergency services. Section 7 is the notorious provision that was, by conscious design, an attempt to undermine or directly contradict a then twelve-year-old Supreme Court precedent, *Plyler v. Doe*,¹ which held that,

¹ 457 U.S. 202 (1982).

under the federal Equal Protection Clause, no child could be denied a free K-12 education based on immigration status.

Section 7 applied to K-12 education, so it directly violated *Plyler*. The proponents knew this; it was part of their attempt to revisit *Plyler* before the Supreme Court and have what was a five-four decision a dozen years earlier, overturned. Section 8 dealt with higher education; it applied to the University of California, to the California State Universities, and to all of the community colleges throughout California, with the same drill: suspect, verify, deny, notify, and report. Section 9 was simply a provision designed to take all of that reporting to the state attorney general and in turn require the attorney general to pass that information on — whether it was received through the Proposition 187 drill or otherwise — or those suspicions on, to federal authorities, then the Immigration and Naturalization Service. Section 10 was simply a provision about severability, which became critical in the legal analysis of the initiative as it went through federal court.

It's important also, I think, to remember that Proposition 187 came up in a broader context of anti-immigrant lawmaking in California. It's easy, twenty-five years later, to assume that Proposition 187 popped up simply to abet Pete Wilson's failing — at that time — campaign for reelection, but it didn't. It arose in a context in California, backed up by what Dean Johnson has already described as an economy that was not flourishing — particularly in comparison to other parts of the country — and a state that was changing demographically. So there's a substantial amount of “demographic fear.” This phenomenon of demographic change and concomitant fear is something we see repeated across the country: in Arizona a decade ago, in states that replicated Arizona, and now nationwide. In California, twenty-five years ago, the “demographic fear” was a fear that the growth of the Latino community in particular, but also the Asian American community, somehow threatened to change the state in a way that would make the state's population majority uncomfortable. How California dealt with those demographic fears was an ongoing discussion, played out through legislative and other policy actions in the state. The precursors of Proposition 187 included the passage the year before, in 1993, of the law by the state legislature that prevented undocumented immigrants from obtaining driver's licenses.

Prior to 1993, undocumented immigrants in California could obtain driver's licenses. It was the change in law in 1993 that took licenses away. As we all know, California has now progressed; we have now restored licenses to the undocumented. And here's the critical point, the 1993 restriction was passed with bipartisan support, and it was passed

with support of Latino legislators in the Assembly and Senate at the time. Indeed, the bill that was ultimately passed to deny driver's licenses to the undocumented was authored by a Latino Democrat in the legislature. That gives you a sense of the context. There was bipartisan belief at the time that anti-immigrant measures had to be enacted to respond to the perceived demographic fear in the populace.

I'll give you one more example, this one a little more personal. Proposition 187 was one of my very early assignments after joining MALDEF. But my very first assignment was working with a team of lawyers — including Vibiana Andrade, who is here today and was speaking last night — that was attempting to prevent Los Angeles County from enacting an anti-day labor ordinance. It was an ordinance that would prevent day laborers, all of them immigrants, from being on sidewalks and seeking to solicit employment from those in cars passing by. This was a decidedly anti-immigrant proposal. We know this for two reasons. First, these ordinances against day-laborers soliciting were proliferating across California and even across the country. Part of the reason they proliferated is that, at a certain point, FAIR, the nativist Federation for American Immigration Reform, actually put on their website a model anti-day laborer ordinance and encouraged their local adherents to champion such an ordinance as a first step in seeking to restrict immigration. Get this enacted in your community, and you will be taking a step against immigration, was the FAIR leaders' pitch.

Second, we know the anti-immigrant origins of these local laws from long experience with such ordinances; this proliferation of ordinances ended up being something that MALDEF and I, in particular, spent many years challenging. Inevitably, we would look at the legislative record, and all of the testimony, in every case, presented to city councils or county boards considering these anti-day laborer ordinances had nothing to do with traffic control, traffic safety — the core reasons offered in defending these laws by those who enacted them. Instead, all the testimony was about “those people” — “those people” not having the right to work; “those people” shouldn't be in our communities. It was all anti-immigrant rhetoric that was behind these ordinances.

So, my example here is of the consideration and ultimate passage, by the Los Angeles County Board of Supervisors, of an anti-day laborer ordinance. This was a board of supervisors with three Democrats on that five-member board, and the main sponsor and proponent of the anti-day laborer ordinance was a moderate, African American Democrat named Yvonne Brathwaite Burke. She felt compelled to respond to her constituents with this very anti-immigrant ordinance targeting day laborers. Now, to explain how complicated the situation was, Burke

ended up being the plaintiff in, not the MALDEF case, but one of the other cases challenging Proposition 187. So, put that together as you analyze Burke, who sponsored and passed this anti-day laborer, anti-immigrant ordinance, but turned around and was the plaintiff in challenging the anti-immigrant Proposition 187. But that's just to explain a context where there was bipartisan concern about this "demographic fear," about the demographic changes. And immigrants were the scapegoat in policymaking at both state and local level.

The last point I'd like to make about the historical context is to affirm that this is a law that was very much tied to Pete Wilson's reelection campaign. We know, from inside information obtained during the signature-gathering phase, that what would become Proposition 187, the "Save our State" initiative, did not have anywhere near the signatures necessary as they approached the deadline to qualify the initiative for the ballot. What put them over the top was Pete Wilson directing the California Republican Party to send petitions, mini-petitions, to their mailing list. And it was through the sending of those mini-petitions, with only about three to four lines each for signatures, to the California Republican Party's mailing list, that the proponents obtained the signatures they needed to qualify what became Proposition 187 for the ballot.

I believe that many of the reported authors — and again it's not clear who actually wrote this thing. There were so many proclaimed authors, ranging from former INS administrator Alan Nielsen and former regional administrator Harold Ezell, to some of the more colorful and crazy advocates of anti-immigrant stances at the time from places like Orange County and the San Fernando Valley. And I say that they're crazy with actual knowledge of that because I had the opportunity to debate these "authors" of Proposition 187. And, inevitably, they didn't have good answers for why this was a good policy. By contrast, on our side, we had very good arguments for why it was bad policy — regardless of your views about immigration — to enact Proposition 187.

They inevitably could not respond to those policy arguments, and in the end, more than one of them — I saw two of them, and confirmed it with others who debated them — would end their arguments by saying to ignore all of those policy concerns. Instead, they would assert that it's important that we send a message to Washington, D.C. of dissatisfaction with how the federal government is addressing immigration. They would add that we have to send that message because — and the two that I saw, because they legitimately believed it — there was an ongoing conspiracy between Mexico and Mexican Americans in California and beyond, to take back the southwestern

United States. I couldn't believe it; my jaw dropped both times. But that was their legitimate belief — the then-circulating, so-called, Reconquista theory — that somehow there was a conspiracy to take back California. Not knowing how to respond, I of course said I could assure them that I was sure I would be invited to meetings of such a conspiracy and that I had received no such invitation.

But that was a measure of some of the grassroots “proponents” of the initiative. But what would put it on the ballot, and would ultimately help it to pass were the professional political folks behind Pete Wilson's reelection campaign. Not only would it not have gotten on the ballot, it's not clear it would have passed without that professional political involvement in getting it through. In the end, ultimately, Proposition 187 had 59% of the vote; Wilson had fifty-five percent. So he had less votes than the initiative itself, but it is what drove his reelection. He was behind in the polls to his opponent Kathleen Brown when the initiative got to the ballot. He used it, including the commercials that Dean Johnson mentioned earlier, to great effect, and it did secure his reelection.

Again, I want to focus on the lawsuits, but I did want to make a couple of comments about the political transformation of California in the years following Proposition 187. You're going to hear from some very wise, and smarter people than me, about that later today, but I want to make a couple of comments. First, I think it's important again to note that it's easy in retrospect to assume the transformation was immediate. It wasn't. It took years and years of work to really change the state of California politics, and we went through some tough times. This included losing the Democratic majority in the state Assembly, which meant that the Republican Party, which had supported Proposition 187, was in control of the Assembly. It took some incredible political strategies by Assembly Speaker Willie Brown to ensure that it took the Republicans longer to actually run that chamber than immediately taking control after the election. But it's important to remember that this was a gradual process. It didn't happen immediately, though certainly the anger and the fear was immediate.

Proposition 187 was a catalyst clearly, as you heard in that moving video, for many folks to naturalize. Many had been eligible for many, many years without ever taking the step to apply to become a United States citizen. We did see over the years an increase in naturalization, an increase in voter registration, and an increase in participation. But the key point I want to make about political transformation: I think it's easy — particularly when you have the Latino legislative caucus creating such a moving video — today it's easy to believe or suggest that

the transformation was entirely driven by the Latino community. I think that is a myth. Yes, the Latino community played a tremendous leadership role in that transformation, but it really took all communities in the state to change politics as a result of Proposition 187.

And I'd like you to think about this: it was an initiative that really exposed a tremendous racial divide in the electorate. Fifty-nine percent of the total vote in support of Proposition 187, but three quarters of Latino voters, according to exit polls, voted "no," and a majority of African American voters voted "no," and a majority of Asian American voters voted "no" on Proposition 187. So this was an initiative with an eighteen-point difference — an eighteen-point victory — but it was entirely driven by white voter support.

That pattern would be replicated two years later with Proposition 209. Another divisive, race-tinged, wedge issue, Proposition 209 targeted affirmative action in employment, education and contracting. Here again, exit polls said that that initiative passed because of white voter support, with Latinos, African Americans, and Asian Americans voting against Proposition 209. If you consider that context, it was a potential recipe for long-term division and long-term polarization in the state of California, with potentially dangerous consequences. So, I think it's not remarked upon as much as it should be, but one of the great accomplishments of the political transformation was to turn what could have been a recipe for long-term racial division and disunity, to a state that is now relatively unified in its opposition to what we see coming from Washington, D.C. Obviously, there are still folks in all communities who take the opposite view, but this is a relatively unified state, with every racial group supportive in large part of the resistance to the anti-immigrant messaging and policymaking from Washington, and resistant to the divisiveness of that rhetoric and that policymaking as well.

That's an extraordinary achievement — we had an initiative where a racially split vote could've led to disaster, and instead it led to an, over time, unified transformation of politics in the state. Part of that, I have to say, was addressing — either directly or as a side benefit of the conversation and organizing going on — it was really addressing demographic fears in a more positive and productive way than Pete Wilson did by championing Proposition 187 and later Proposition 209.

The transformation in California is an example of how to responsibly address demographic fear, and it largely had to do with efforts to ensure that communities were talking to each other; that there was exposure across communities to immigrant neighbors, immigrant colleagues, immigrant communities; and then understanding that the increasing

change in the demography of the state was not a threat to what folks valued so much about the state of California. So I think this is a critical — but not as much commented upon — element of the political transformation of the state.

Today, of course, we see similar transformations — and in a very positive way — beginning in other parts of the country. I think it's quite clear now, almost a decade later, that SB 1070 in Arizona — which you will recall was a law designed to involve all Arizona law enforcement in immigration enforcement — but that law has catalyzed a change in Arizona. What was previously a solid red state, is now purple; they elected a Democratic senator after many, many years, in the November 2018 midterm elections, largely as a result of an increase in the Latino vote. But I think we see a similar change beginning in Arizona to transform politics in the aftermath of a controversial, anti-immigrant law.

The question for us today is: what do we do if we see something similar happen in Texas, the big electoral prize, and more broadly across the entire country, either in response to what has happened in Texas, which includes the 2017 enactment of Senate Bill 4, or some other development. SB 4 was the similarly anti-immigrant law, akin to Arizona's SB 1070, but broader and more pernicious. In the case of that law, which would effectively empower every law enforcement officer, from the one-day rookie to the twenty-year veteran, to make his or her own mind up about whether and how to enforce immigration laws, without allowing any interference from police chiefs, or sheriffs, or elected officials who might think it unwise for police officers to become involved in the enforcement of immigration laws. So will this catalyze the change in Texas, or more broadly across the country, like what we have seen in California?

Unclear. I will note, as you will probably hear more of later today, that we did see, in the November 2018 midterm elections, a tremendous increase in participation of Latino voters in particular — outpacing other groups, and outpacing prior progress — that saw a higher turnout, in percentage terms, of eligible voters than ever before in the midterm elections among Latino voters. So we could be seeing more broadly the same change that we saw in California beginning with Proposition 187. I'm sure that an analysis of the elections a few weeks ago in the off-year states — Virginia, for example — may show a similar catalytic and significant change in Latino voter turnout as well.

But, as I have said, I want this morning to focus on the legal story of Proposition 187. Those of us who were involved in the challenges that were filed had to be working on these challenges while the campaign against Proposition 187 was moving forward. That's because at the time,

California law said that unless the initiative itself provides otherwise, the effective date of something passed by voters is the day after the election. California has subsequently changed that law because, if you think about it, it doesn't make sense, because sometimes these days we don't even know the outcome of an election until several days or weeks after the vote occurs. But at the time, state law said that an enacted initiative takes effect the next day. So, we had to be prepared to go into court the next day, and there was a broad coalition of civil rights, immigrant rights, and other public interest organizations preparing multiple challenges against the initiative.

I will focus on the federal case that MALDEF, together with the ACLU of Southern California, led. It was called *Gregorio T.*, a pseudonym for a young immigrant who would be devastatingly affected were Proposition 187 to take effect. *Gregorio T. v. Wilson*² was, at the time, the day after the election, the only case that challenged every provision of Proposition 187. There were other federal cases, filed that same day — and indeed some state court cases as well — that challenged, in particular, Section 7, the provision that directly contradicted the *Plyler* precedent by denying K-12 enrollment for undocumented students. There was also a case against Section 8, the higher education provision, filed that day by MALDEF in state court in Northern California.

For whatever reason, the federal cases filed the day after the election were all filed in Los Angeles, Central District Court in downtown Los Angeles. The state cases challenging Section 7 and Section 8 filed that day — and there were, I believe, four of them — were all filed in Northern California, in the San Francisco Superior Court. Over the course of all of that litigation, we were able to prevent the bulk of the initiative — all of it except Sections 2 and 3, the Penal Code provisions relating to fraudulent identification — from ever taking effect.

In federal court, that came first through an informal request by Chief Judge Matthew Byrne, who heard the case solely because the assigned judge, Mariana Pfaelzer, who would hear the remainder of the case, was out of the country at the time it was filed. He secured, the day after the election, an effective agreement — an oral agreement — from the state that they would not take steps to implement Proposition 187 for a week. That permitted us to engage in more careful — still only a week's worth, but more careful — briefing of the issues that would be heard a week after the day after the election, before Chief Judge Byrne. He then issued a temporary restraining order; it was then confirmed by the preliminary injunction issued by Judge Pfaelzer several weeks later, which

² 59 F.3d 1002 (9th Cir. 1995).

prevented all of the provisions other than Sections 2 and 3 from ever taking effect.

But what I want to focus on today are some of the details that aren't often as remembered. First, I note that, not only did Pete Wilson have a political strategy built around Proposition 187 — around exploiting that race-tinged wedge issue — but he also followed a very aggressive *legal* strategy, the details of which are not often remarked upon. I note them today. This was a case that lasted five years. Even in the context of complicated federal litigation, five years is a long time. You might think that it was hard-fought every day, every week of those five years. Not at all. What really made the case take as long as it did, was the particular strategy followed by the state in defending. That strategy did not involve a lot of discovery disputes. It involved assertions, which I'll go over, that lengthened the periods of time where we were simply waiting for the state to produce something to enable us to move forward with the litigation.

The first part of that aggressive legal strategy is that Pete Wilson filed his own lawsuit in January of 1995. Shortly after the initiative had been enacted, and shortly after the federal court cases had resulted in a temporary restraining order, as described earlier, Wilson filed his own lawsuit in state court in northern California seeking a declaratory judgment that Proposition 187 was constitutional, legal, and could be implemented. I note this strategy because, more recently, MALDEF has faced a similar strategy in the state of Texas, where immediately after SB 4 — that anti-immigrant law I mentioned previously that empowered law enforcement to decide, on their own, whether and how to enforce immigration law — immediately after that law was signed, the state of Texas filed its own case, anticipating lawsuits against SB 4. It filed its own case in federal court seeking a declaration that SB 4 was constitutional, lawful, and could be implemented.

In that case, the state made the mistake of naming not only the potential plaintiffs, in part because those affirmative cases had not yet been filed. Instead, Texas named a few of those potential plaintiffs who might challenge the law, but they also named MALDEF itself, the lawyers, as a defendant in the lawsuit. For those who understand legal ethics, that is not permitted, and that's a frivolous action against lawyers. We have no interest directly in SB 4. We got that case dismissed against us, and, ultimately, the entire case went nowhere for the state of Texas.

But the point here is that Pete Wilson and his legal team had adopted a similar strategy long, long ago with Proposition 187. In their case,

Wilson v. City of San Jose,³ they named some of the plaintiffs in the federal cases challenging the initiative — the City of San Jose and one of our clients, the California League of United Latin American Citizens (“California LULAC”) — and they sought a declaration from state court that the law was constitutional and could be implemented. This required us, then, to ensure that that case would not derail our case. We knew what was coming, and it came in February 1995, when they filed in federal court to request that the federal judge abstain from hearing the case in light of the pending state-court litigation that the state had just filed. So that’s why they filed the case: they were trying to stop a federal judge that they didn’t much like, even at that point, from determining ultimately whether Proposition 187 lived or died.

So we faced that abstention motion; we had to research and argue all of the many different abstention doctrines in the face of that request — that the federal court dismiss or at least stay any federal-court action against Proposition 187. Now, at the same time, representing our client California LULAC, we removed the state court case to federal court because while they tried to hide that it was all about federal law, it was in fact all about federal law. The contention that the law was unconstitutional was about federal constitutional provisions. So we had to respond when the state sought to remand the case back to state court; we had to brief and argue the doctrine of artful pleading — how they had avoided assiduously, but not successfully, the fact that this was a case about federal law.

As an aside, we felt very strongly — particularly, I did — that this was obvious forum shopping, filing a state court case in an attempt to derail a federal court case from moving forward, and that this was so illegitimate that Pete Wilson should be effectively punished for it. So, when we succeeded in defeating a motion to remand and the case was transferred from a Northern District of California federal court to the Central District, where the pending cases against Proposition 187 were, we sought to secure some sanction against Wilson.

While it was in the process of being transferred, the state of California filed a dismissal, only they were not allowed to file the dismissal because the case had no home at the time. It was in the cloud, in the real cloud. It had not yet arrived at the Central District, but it had left the Northern District; so there was effectively no place for them to file their voluntary dismissal.

Therefore, in turn, we attempted to file an answer, simply to stop them from voluntarily dismissing the case, in hopes that we could

³ 111 F.3d 688 (9th Cir. 1997).

instead secure a stipulated dismissal that would involve a little punishment in the form of attorney's fees recovery for their having filed the frivolous state-court case.

I will tell you that we felt strongly enough about it — I did — to argue it and take it all the way to the Ninth Circuit. Regrettably, it resulted in one of the only — in fact, *the only* — defeat for our side in the many cases that went on to be published decisions in the Ninth Circuit Court of Appeals. *Wilson v. City of San Jose*, if you look it up, says that we did not succeed in getting attorney's fees. They were allowed to voluntarily dismiss without our acquiescence, despite that intermittent period where it was being transferred from one court to another.

But the point here is that it was an aggressive legal strategy — that we did see replicated recently with SB 4 — in support of the asserted constitutionality of Proposition 187. I think it's important to note that that was only a part of a strategy that was designed, as much as possible, to preserve the opportunity to implement portions of Proposition 187. Throughout the litigation, it was clear that a focus of Pete Wilson in particular, was prenatal care benefits and long-term care benefits, both of which were being provided by state law over the strong opposition, ongoing, of Pete Wilson, to undocumented immigrants. So, as we went through the litigation, it was an attempt to implement — to devise Proposition 187 implementing regulations — for prenatal care and long-term care that resulted in lengthening the court process by so much.

We literally waited for a year as the state repeatedly said it was trying to come up with regulations that would cure constitutional problems with Proposition 187, and implement it with respect to prenatal care and long-term care. We literally waited over a year as they repeatedly assured us they were working on their regulations. Of course, our belief all along was that those regulations would effectively have to rewrite the proposition to save it, constitutionally. And you don't get to rewrite statutes by regulation. Nonetheless, we waited well over a year and that occasioned the lengthy time before this litigation concluded.

I did want to cite another example of Wilson's really aggressive legal strategy that had nothing to do with Proposition 187 but was going on at the same time. And I mention this because so many folks are often astounded to learn that the state of California — that Pete Wilson acted on behalf of all of us in the state of California — and filed the lawsuit that I'm about to mention. This is a lawsuit that went to the Ninth Circuit in 1997, so it was pending contemporaneously with litigation against Proposition 187. It's a case called *California v. United States*,⁴

⁴ 104 F.3d 1086 (9th Cir. 1997).

and what's extraordinary about the case is that it's a contention by Pete Wilson, on behalf of California, that the United States government was violating the Invasion Clause of the Constitution.

For those of us who have not committed the entire Constitution to memory, your vague recollection of the Invasion Clause in Article IV is correct. If you recall it, you believe the clause is about the responsibility of the federal government to defend any state from a military invasion, where one may ever occur. That is in fact what it's about. But Pete Wilson's argument on behalf of all of California in *California v. United States* was that the federal government, by failing to stop all undocumented migration to California, was violating the Invasion Clause and was not defending against a purportedly military, or military in nature, invasion by undocumented immigrants. Extraordinary.

The Ninth Circuit panel rejected the extraordinary contention in 1997, but it's there as a published decision. Another parallel today, of course, is that we now have a president who believes we face an emergency to build a wall on our southern border, a wall that one might otherwise only see truly being pursued in the context of a potential military invasion. So, the same attempt by Wilson, to analogize, under the law, peaceful undocumented migration to California with a military invasion, has echoes in Trump's wall-related efforts today.

I do want to say with regard to these elements of an aggressive legal strategy by Pete Wilson, we didn't really feel the aggression in the Proposition 187 federal litigation. You might imagine that this could be very contentious litigation, with nasty disputes about everything. But, twenty-five years later, I do want to note that we were fortunate in our litigation that a Republican attorney general, albeit being directed by Pete Wilson in pursuing the government defense of Proposition 187, ended up assigning to our case lawyers who were the most collegial opposing counsel I could ever imagine facing.

We didn't want to talk about it at the time because we didn't want to undermine these folks, but in fact, the attorney general ended up assigning, as the senior lawyer, a guy by the name of Charlton Holland, and he in turn brought on John Sugiyama to act as the effective day-to-day lead counsel. John Sugiyama, now a superior court judge, was the most gentlemanly lead opposing counsel that I have ever faced in decades of civil rights litigation. And I feel that we were fortunate that somehow this litigation, that could have been extremely contentious including these very aggressive legal strategies, was being run by lawyers who were clearly — if clearly, most certainly not openly — but clearly more sympathetic with our side than with the side they were directed to defend. So, we didn't feel it every day, but there were

aggressive legal strategies that went with Pete Wilson's political strategy to use Proposition 187 to drive his reelection.

I want to talk for a minute about relevance to today. The relevance, as you'll hear later, of the political change, the social change, following Proposition 187, to today, seems pretty clear. I have gone over a little bit of it. We face on a national level, the same sort of exploitation of demographic fears. The same policymaking that is designed — as Proposition 187 was — to catalyze fear and a refusal to access services to which folks are entitled. We see ongoing rhetoric that demonizes the immigrant community as somehow dangerous. Today, it is mainly in terms of criminality — versus the more military terms that may have been used in the earlier era — but the parallels are clear. But, for us in the legal arena, the parallels are more troubling. We are now in a situation where, to put it most directly, we might prefer California's adopted and practiced immigration regulatory scheme over the federal immigration regulatory scheme. Twenty-five years ago, it was the opposite. We preferred the very flawed, but nonetheless more humane, federal regulatory scheme over California's, proffered in Proposition 187. So those are seemingly contradictory impulses between today and twenty-five years ago.

In fact, when we go into court these days to challenge Trump policies, we are making arguments that are often the mirror opposite of the arguments that were being made against Proposition 187. As you all know, the main claim that brought down Proposition 187 was that it was preempted by federal law — that, no matter how much California might not like what the federal government was doing about federal immigration regulation at the time, the state had no right to enact or follow its own immigration regulatory scheme. Immigration regulation, unique among policy making, is an essential attribute of nationhood. You can't have multiple immigration regulation policies and continue to be a single nation.

That legal theory was not a slam-dunk plan. Twenty-five years later, we have seen this claim used against SB 1070, and seen it go to the Supreme Court in *Arizona v. United States*.⁵ And we've seen it used against local and state policies really across the country. It's easy then to assume that preemption was an obvious objection to Proposition 187 when it was being debated and enacted. It was not. At the time, federal preemption was really a "business" area of the law. Corporations and businesses used federal preemption, federal supremacy, to try to prevent

⁵ 567 U.S. 387 (2012).

states from enacting any more punitive, more damaging measures of regulation against them.

So when I was in law school, we didn't learn about preemption in any context related to immigration. It is true that, when we went into the litigation, we had one case, *De Canas v. Bica*⁶ — another case out of California — a case that did not work in striking the challenged state law. It was a case where the Supreme Court actually decided that the law being challenged was not preempted by federal law. Other than *De Canas*, you would have to go back over half a century to find cases about state immigration regulatory schemes at the time.

Those cases — because they really were so old — didn't use terms like federal supremacy or preemption. We adapted them, for our purposes, under the preemption doctrine, but really there was only one case, *De Canas*, a case that went the other way, that we centrally relied upon to challenge Proposition 187. So, it was by no means a forgone conclusion that the law would be struck down as preempted.

That is important background for today when, I think, preemption or federal supremacy is really viewed as a central part of the legal canon in civil rights and immigrant rights litigation. We always look to it as a potential backing for a challenge to state or local anti-immigrant regulations. But, with Trump in office, we are now in the position of needing to argue that federal preemption isn't quite as comprehensive. Maybe some of us might assert that in fact there is plenty of scope for states like California to adopt sanctuary — so-called “sanctuary” laws — to restrict the ability of local law enforcement to cooperate with federal regulation enforcement.

It is a somewhat uncomfortable position; it's not as clear a parallel to the political changes, between twenty-five years ago and today. Of course, today, even at MALDEF, we use claims that we didn't use twenty-five years ago — the Administrative Procedure Act (“APA”), for example. We use in some cases — contemplated using and may well use — the Tenth Amendment, the very flip side of federal supremacy and preemption, to argue that states do retain the constitutionally protected authority to engage in certain types of regulation without interference from the federal government. And I think we're not using the Tenth Amendment quite so much because most of what we are facing today is administrative in nature, really put forward by the Trump administration without any accompanying legislative change by Congress.

⁶ 424 U.S. 351 (1976).

Were there ever to be legislative change by Congress, that's where I think the Tenth Amendment might become much more vigorous in opposition to what Congress might, if they ever were, to formally enact to acquiesce in what the Trump administration is doing. But, today, because it's administrative action, it is mostly about the APA and about whether he's exceeding legislative authority from Congress. But, it is nonetheless clear that we are now using claims that we didn't use twenty-five years ago, almost coming full circle.

I used to give speeches — I think some of you may have read one or two of them — where I would talk about this transformation of preemption and federal supremacy into being a civil rights doctrine that it wasn't before. In addition, in other Proposition 187-related litigation, we used the Contracts Clause to challenge the higher education provision — the notion being that the state knew its universities could not modify a contract with students who enrolled as freshman with at least a spoken understanding that if they got good grades, they would be able to complete their degree program. And Proposition 187 came in and had the state of California abrogating that contract. So we used the Contracts Clause, which I would never have imagined being a civil rights provision of our Constitution, against Proposition 187 as well.

I would give speeches about this and talk about how when I was in law school, the quintessential civil rights provisions of the Constitution were Equal Protection, Due Process, and the Fourteenth Amendment. That wasn't the business we ended up being in; instead, we were using structural and "business," if you will, constructs from the Constitution — Contracts Clause, Supremacy Clause, even Tenth Amendment. I would then argue for a much broadened sense of what counts as civil rights law.

And now, here we are, twenty-five years later, and we're back to those old civil rights stalwarts; we regularly make racial intent claims against the Trump administration. In this regard, I would cite the recently-concluded citizenship-question litigation, where MALDEF filed one of several lawsuits against the late-added citizenship question for the 2020 Census. The claim that made the difference — that actually convinced the Trump administration to abandon any effort to qualify the citizenship question for the census, the claim that prevented it from going forward — was the racial intent claim, and that's even though we never had an adjudicated victory on the question of racial intent.

But, the fact that the MALDEF case had a live racial intent claim before the Fourth Circuit Court of Appeals made the difference. The live racial intent claim was then remanded for reconsideration — with his own indication that he would reconsider — to the federal judge in

Maryland. The pendency of that live racial intent claim is what scared the Trump administration into, first of all, sending an unprecedented letter to the Supreme Court, saying that the drop-dead deadline for the census is June 30 — we can't go beyond that — and to assert that the Court should therefore reach out, even though it's not before you justices, and make that racial intent claim go away.

But, when they didn't succeed at that, they were in a corner, having said that June 30th was their deadline, and they couldn't extend into the end of July in their effort to get the question on. In the meantime, they also did face the pendency of the racial intent trial. It would likely bring to light all of the now public evidence about a clear attempt to diminish the count of the Latino community in particular, and diminish political power of a community viewed, accurately, as opposed to the Trump administration. In light of the letter and the danger of the forthcoming retrial, Trump dropped his announced attempt to keep the citizenship question in the 2020 census.

That racial intent claim, even though it didn't formally succeed, is what I think succeeded in preventing that citizenship question, with its tremendous long-term potential harm to the immigrant community nationwide, not just in political power for Latino and Asian American communities, but also in the federal funding, so many streams of which are determined with that census data. But what turned around that anti-immigrant threat from this administration was the racial intent claim — back to what was the quintessential civil rights claim when I was in law school.

It is somewhat contradictory that we are now in the legal arena doing the mirror opposite of what we were doing in the 187-era, challenging state and local laws that targeted immigrants at the time. I don't know where that leaves us except to say that it gives me an opportunity to reiterate, from a different vantage point, what I've been saying all along for many years: that we on the progressive left need to adapt and create and disseminate a comprehensive legal doctrine of civil rights and immigrant rights in this country. The Federalist Society has done it quite capably on the other side over years and years. On our side, we haven't really quite done that. We need to have a comprehensive view about how every provision of the Constitution can and should be used and marshalled to defend the civil rights of all.

That shift, beginning twenty-five years ago, to incorporate within the civil rights canon, if you will, provisions like the Supremacy Clause, like the Contracts Clause, like the Tenth Amendment — is important. As an aside, I do have to say even then we were thinking about these issues because we faced, in the middle of the long-pending Proposition 187

litigation, the enactment by the federal government, of the welfare reform act — the Personal Responsibility and Work Opportunity Reconciliation Act of 1996. What we faced in that law was Title IV, which directly addressed the issue of immigrants', including undocumented immigrants', eligibility to receive some of the benefits and services also covered by Proposition 187.

To give you a sense again, of how tenuous the doctrine of preemption was vis-a-vis immigrant rights at the time: we had vigorous internal debates about what the enactment of welfare reform meant for our challenge to Proposition 187. There were some, who at the time were among the most knowledgeable about the preemption doctrine, who argued that it actually ended our case, in their view. We could no longer prevail with the enactment of that federal law.

Others — those who ultimately prevailed with the strategy going forward — concluded that it actually bolstered our case. It clearly delineated an occupation of the field by federal law that prevented California from attempting to legislate in the area of benefits eligibility for undocumented immigrants. But that is just an indication, just another illustration, of how uncertain the legal argument was at the time. But we also faced the very immediate danger — because we attempted to get Judge Pfaelzer in the Proposition 187 litigation to stop it, and she refused — that under federal law, Pete Wilson would get what he long wanted, which was to prevent prenatal care benefits from being provided to undocumented women. As you recall, that was a focus, as I said, of his federal defense of Proposition 187. Wilson wanted to be able to implement the proposition on prenatal care. He then was given the opportunity by the welfare reform act and we tried, but again Judge Pfaelzer declined, to prevent him from doing that in our Proposition 187 litigation.

Other litigation came forward to challenge the welfare reform act and to preserve prenatal care benefits. One of those pieces of litigation, which didn't ultimately succeed, was a MALDEF case under the Tenth Amendment. At the time, we faced the conundrum that we face today because we had media pundits who didn't understand how we could argue on the one hand that Proposition 187 violates federal supremacy, and on the other hand say that the federal government cannot do what it was doing with respect to prenatal care benefits for undocumented mothers. Our Tenth Amendment claim was related to a very specific provision of welfare reform that was put there for Pete Wilson and his effort on prenatal care.

It is a provision that says, very oddly, that states could in fact use their own money to provide benefits to undocumented immigrants, but if

they wanted to do so they had to be explicit and — here is what was put in for Pete Wilson — states had to enact a new law, after the effective date of welfare reform, to provide those benefits. Requiring that newly-enacted state law is what then gave Pete Wilson the ability to use his veto power to prevent prenatal care benefits from continuing in California.

We challenged that specific provision as a violation of the Tenth Amendment and the sovereign state right to determine when legislation remains in effect and when it sunsets, or loses its effect. Now we didn't win the case because of the judge's conclusion on severability — that the challenged provision could not be separated from the provision allowing states to provide state-paid benefits to undocumented immigrants. Even still, we were dealing then, so many years ago, with the seeming contradiction in the legal doctrine that we face today, which is how do we reconcile our contentions about the scope of federal supremacy and preemption with what we need to argue to limit the scope and effect of objectionable federal regulation in immigration today.

I think we do have a way to reconcile and we've had it for twenty-five years. It's quite clear that when we get into the details, there are ways to identify what is federal and what is state authority. Now that identifiable boundary can move depending on the congressional legislation but again at this point, we haven't really had congressional, formal, legislative acquiescence in what we see endangering immigrants coming from the executive branch of the federal government.

In the end, I've come to the conclusion that it is an opportunity for us, one more time, to be comprehensive on the progressive left about a constitutional theory that encompasses the entire Constitution in support of civil rights, including reconciling Supremacy Clause and Tenth Amendment. In the end, that, I hope, is the legacy, in the legal arena, of Proposition 187, whose anniversary we commemorate today. Thank you.