
Reflecting on California and Prop. 187: From the Anti-Immigrant State to the Sanctuary State

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INTRODUCTION

Good morning, everyone. Before I begin, I would like to thank Dean Kevin Johnson, Professor Leticia Saucedo, Professor Shayak Sarkar, and members of the *UC Davis Law Review* for inviting me to this conference. It's always great to come back to UC Davis. King Hall will always be home to me and so I thank you for bringing me back home.

The title of my talk is called "Reflecting on California and Prop. 187: From the Anti-Immigrant State to the Sanctuary State." My presentation appropriately follows Professor Rick Su's discussion of Prop. 187 and also Professor Huyen Pham's presentation about other state or anti-state sanctuary laws that have been passed since Prop. 187. My talk builds on much of what they have already suggested but also seeks to move the discussion a little bit forward by focusing more on the work that local governments are doing with respect to SB 54.

As has already been noted, and you'll continue to hear this throughout the day, Prop. 187, the Save Our State measure that California voters passed in 1994, has been described as one of the harshest anti-immigrant laws in the country. More than fifty-nine percent of Californians voted for the measure that was clearly intended to deny public services such as public education to undocumented immigrants. It also mandated state employees to cooperate with the federal government. Commentators have thus rightly stated that the

* Copyright © 2020 Rose Cuison Villazor. Vice Dean, Professor of Law and Chancellor's Social Justice Scholar, Rutgers Law School. This is an edited version of Dean Cuison Villazor's presentation at the University of California, Davis, School of Law and UC Davis Law Review Symposium on Proposition 187. Some of my presentation comes from an article that Professor Rick Su and I coauthored with Professor Pratheepan "Deep" Gulasekaram and that we recently published in the *Columbia Law Review*.

passage of Prop. 187 represented a time in California when anti-immigrant sentiment was high. But we should remember that 1994 was not the first time that Californians engaged in displaying animus against immigrants. For example, recall that in the early 1920s, California voters passed the Alien Land Law, which intended to discriminate against Japanese and Japanese Americans. Between the 1850s and 1880s, the California legislature passed several laws intended to discriminate against Chinese immigrants and ban them from the state. Thus, from a historical perspective, California's timeline is filled with periods of anti-immigrant sentiments, with Prop. 187 as the most recent example of statewide legislation targeting immigrants.

But almost twenty-five years since the passage of Prop. 187, California seems to have taken a 180-degree turn with the passage of SB 54, the California Values Act. In enacting this law, California now refuses to use state resources to enforce federal immigration laws. It prohibits state employees from asking about a person's immigration status or reporting known immigration status to federal immigration officers and other authorities. Thus, while California was at one point an anti-immigrant state resulting from the passage of Prop. 187, it is now a sanctuary state through the enactment of SB 54. We are presented with two different pictures of California within the span of just two decades.

My talk examines the relationship between these two narratives about California that emerged from Prop. 187 and SB 54, and in so doing, I would like to make three brief points. First, some commentators have noted that Prop. 187 turned the state of California into a blue state, which then created the right conditions for the passage of SB 54. The political scientists in the room can probably better validate or examine whether or not that is true. The Cato Institute certainly has claimed that such a statement is accurate but I think that many of us might say, "Well . . . that might not necessarily be the case, that the facts might not be as clear, and California has been a blue state previously as well." One would have to look at that political descriptive statement much more broadly and historically. But one thing is clear: twenty-five years later, California has been dubbed a sanctuary state. Thus, my first point is to recognize the role that Prop. 187 played in California's shift from the anti-sanctuary state to a sanctuary state.

The second point is this: I think we need to be careful about celebrating California as a sanctuary state. As has already been alluded to, there are a number of local governments that have been challenging SB 54. Some have passed resolutions opposing the implementation of SB 54 and some, like the City of Huntington Beach, has filed a lawsuit arguing that SB 54 violates their autonomy as charter cities. There are

over a hundred charter cities like City of Huntington Beach in California that can assert localism as a tool for resisting SB 54. Thus, while we should be celebrating California as a sanctuary state, we should also pay attention to the growing movement among local governments of resisting SB 54. This does not mean that we should be afraid of localism, however. As I explain later, localism is a tool that can be used by cities in other states to push for progressive sanctuary city policies and other initiatives.

The third point will be brief in the interest of time. The different measures that everyone has talked about so far — Prop. 187, SB 54, local initiatives — raise the need to rethink the way that we understand descriptively and normatively immigration enforcement, regulation or integration. I would like to introduce the concept of “stakeholder theory,” which is a term that is borrowed from corporate governance law, but may be used to explore in immigration law. Stakeholder theory recognizes that there are different stakeholders in immigration law — federal, state, and local governments — as well as private individuals, organizations, communities, and many others. Indeed, many of us in this room can be considered stakeholders in immigration. I argue that the law needs to take in account the various stakeholders in immigration law and consider how their interests may be served in the regulatory framework of immigration law.

FROM THE ANTI-IMMIGRANT STATE TO THE SANCTUARY STATE

Let me turn to my first point — Prop. 187 played a role in establishing California as a sanctuary state twenty-five years after its passage. When Prop. 187 was passed, California reelected a Republican governor, Republicans controlled the State Assembly, and the State Senate became divided between Republicans and Democrats. Between 1994 and 2000, however, 1.1 million people registered to vote in the state of California, and one million of them self-identified as Latinx. Many individuals, Latinx individuals, ran for office at the local and state levels. Indeed, you saw some of them in the video that was shown in the beginning of the symposium. Prop. 187 engendered a political movement and political activism among those groups that Prop. 187 sought to vilify. This political movement had a significant impact. By 2000, California had become a solidly blue state and poised to pass SB 54.

California’s transition from the anti-immigrant state to the sanctuary state is quite remarkable. Prop. 187 was explicitly designed to mandate state employees to fully cooperate with the federal government in enforcing immigration law. SB 54 is exactly the opposite. It proscribes any kind of state or local cooperation with the federal government. It

prohibits the detention of immigrants. It bars the use of state resources in implementing the civil provisions of federal immigration law. In addition to passing SB 54, California also enacted other immigrant friendly state laws. Undocumented students are eligible to apply for financial aid and are exempted from nonresident tuition. Undocumented immigrants are now allowed to apply for a driver's license. They have access to professional and occupational licenses.

Notably, California's more inclusive state policies and pro-immigrant measures have reverberated outside the state. We are seeing replications of SB 54 in other states. For example, New Jersey's Attorney General issued the Immigrant Trust Directive, which similarly bars the use of state resources to enforce civil immigration laws and generally prohibits sharing of immigration-status information with immigration authorities. The Governor of New York issued an executive order that prohibits ICE agents from making arrests in state detention facilities. There are also proposed bills in New York to prevent ICE agents from going into state courthouses. Massachusetts passed a non-detainer policy.

Thus, Prop. 187 has had a broad impact both politically and legally in California and other states. We should therefore celebrate California's transition from the anti-immigrant state to a sanctuary state. Doing so serves as an important reminder of the work that many people have done to make this possible and our obligation to continue their work.

But — and here I move on to my second point — we cannot ignore, as we're celebrating SB 54, that even within the sanctuary state of California, there is resistance to laws designed to protect and support immigrants, undocumented and documented alike.

The term resistance has been used quite a bit since 2016 mainly in the context of resisting the Trump administration's policies. But resistance has also been used in a different way by local governments in trying to limit the ability of a state like California to implement sanctuary policies. For example, following are cities that have refused to comply with SB 54 and have opted to align themselves with the Trump administration's immigration enforcement policies: Yorba Linda, Hesperia, Escondido, Aliso Viejo, Mission Viejo, Fountain Valley, and various cities in San Diego.

Another such city is the City of Huntington Beach, which has filed a lawsuit against the state and specifically presented home rule arguments to contend that SB 54 should not be implemented in their city. The city's primary argument is that municipal affairs include the choice of a city to enforce federal immigration law. In other words, the City of Huntington Beach is saying that it wants to use its local powers to

cooperate with the federal government despite the state's enactment of SB 54.

These cities in California that are resisting SB 54 shows that there is no uniformity politically and legally in the state. A closer look at this "blue" sanctuary state reveals "red" cities, primarily on the west side. Not coincidentally, many of those cities have passed resolutions against SB 54 or are actively trying to file a lawsuit against the implementation of SB 54 asserting local governance over law enforcement and desiring cooperation with federal immigration authorities.

Despite the increased use of localism, I maintain that we need not be afraid of the assertion of local power. Many progressive lawyers have rightfully been reluctant to adopt states' rights and localism given their pernicious use historically. But, localism, like states' rights arguments and federalism arguments, is simply a legal tool that seek to push a particular vision to reach a desired outcome. We have seen today, in the era of Trump, how arguments grounded in states' rights have helped limit President Trump's immigration enforcement. Localism can do the same thing. Crucially, as Professors Rick Su, Deep Gulasekaram, and I argued elsewhere, relying on localism may serve as a powerful tool in other states that have passed anti-sanctuary laws.

Localism, for example, has been used by cities in Texas as a way to try to prevent Texas's anti-sanctuary statute from being implemented in Austin, San Antonio, and Houston. The same type of localism arguments is being used in other anti-sanctuary states like Georgia and Mississippi. Thus, we need to simply recognize that localism is only one tool that we can use in order to advance some of the progressive arguments that many might want to make for immigrants.

It looks like I am running out of time and I want to make sure that we have time for discussion and to eat our lunch. Let me therefore turn to my last point and introduce a concept that my coauthors Professors Deep Gulasekaram, Rick Su, and I are exploring. Specifically, we are examining ways of rethinking immigration enforcement, regulation and integration using Stakeholder Theory as a framing device. Borrowed from the area of corporate governance, Stakeholder Theory recognizes various stakeholders within a particular structure. In the United States, immigration law is primarily dominated by the plenary power doctrine in which the federal government is deemed to have plenary and primary governance over immigration enforcement and regulation. Thus, when a state or local government pass laws that appear to conflict with federal immigration law, the federal government may step in and claim that such state or local laws are preempted.

We are exploring what immigration enforcement, regulation, and integration might look like if we accept the idea that different entities and individuals are stakeholders in immigration and should therefore have greater involvement in immigration regulation, integration and perhaps even enforcement. This Stakeholder Theory will take into account not only the interests of state and local governments but also other stakeholders like churches, private organizations, communities, schools, and others that have an interest in immigration. I would be happy to answer questions about this theory during the Q&A.

For now, allow me to close. Prop. 187 eventually led to a change in the political makeup of California and paved the way for laws that advanced the rights of immigrants, including SB 54.

Thank you.