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Who Polices Immigration?

Nations define themselves through their immigration policies. Establishing who may enter, who must leave, and who is eligible for membership is central to nation-state sovereignty. Although the United States prides itself on being a "nation of immigrants," concerns about "undesirable" newcomers—convicts, the poor, the infirm, and those from groups considered to be "racially inferior"—have been features of American immigration policy from its inception.[1] Early lawmakers worried that admitting the "wrong" kind of immigrants would burden public resources and increase crime. Lawmakers responded to these fears by creating restrictive immigration laws, attaching penalties to violating those laws, and increasing the government's resources and administrative capacity to implement them. As the chapter explains, during the nation's first one hundred years, the federal government lacked the capacity to regulate the admission of newcomers. This task fell to the states, which established admissions criteria and created state immigration boards to regulate passengers at ports. The federal government passed naturalization laws but did not regulate the admission and expulsion of foreigners. This balance of power shifted after a series of Supreme Court decisions in the 1880s and 1890s redrew the lines of immigration authority for federal, state, and local governments. These decisions established the federal government's authority to regulate immigration. From them on, states and localities could pass laws that affected immigrants residing in their jurisdictions, as long as these policies did not venture into immigration control.[2]

As this chapter shows, however, even after the federal government obtained exclusive control over immigration enforcement, state and local police agencies occasionally helped federal authorities round up foreigners through immigration

raids and unlawful arrests. Indeed, there are numerous examples of police making immigration arrests throughout the twentieth century, despite numerous legal and judicial opinions establishing that only federal immigration officers have civil immigration enforcement authority.

Today, the authority of states and localities to control immigration is once again under debate. State and local governments continue to pass laws that regulate the lives of immigrants, blurring the boundaries between controlling immigrants and controlling immigration. Moreover, the role of state and local law enforcement agencies in immigration enforcement continues to expand as the federal government creates formal avenues for local law enforcement agencies to partner with federal immigration enforcement authorities. These policy choices convey powerful messages about race and national belonging.

THE FIRST HUNDRED YEARS: STATE AND LOCAL CONTROL OF IMMIGRATION

Contrary to popular belief, the United States has never had legally open borders. The border was *physically* open, in the sense that it was not effectively controlled, but attempts to banish "outsiders" date back to colonial times.[3] For example, the earliest attempts at regulating newcomers reflected a preoccupation that America would serve as a dumping ground for "sick," "lazy," "immoral," or otherwise unwanted residents from other countries. Immigration laws during the colonial period emerged in response to Britain's practice of punishing felons by sentencing them to indentured servitude and transport to America.[4] At the time, English Poor Laws held that local communities were responsible for providing relief to poor residents. As a result, towns had an interest in keeping out residents that might burden public resources. Localities cared little about whether indigent newcomers came from faraway continents or from adjacent towns: both were undesirable if arrivals imposed public costs.

After independence, Americans continued to fear that European countries would send criminals to their shores. In 1788, the Confederation Congress adopted a resolution encouraging individual states to "pass proper laws for preventing the transportation of convicted malefactors from foreign countries into the United States."[5] At the time, southern states fiercely opposed federal regulations on the movement of people because this legislation would have threatened the institution of slavery.[6] The federal government was unable and unwilling to challenge the South because of an agreement that Congress could not prohibit the importation of slaves until 1808, so immigration laws were kept within state authority.[7] Cities and states regulated immigration through state police powers to control health, welfare, and morals.[8]

In its early years, the federal government passed a series of naturalization laws to establish criteria for citizenship, rather than immigration laws. Sparsely

populated, the country needed new residents and a way to turn foreigners into citizens who would invest in the nation. Eligibility for citizenship was connected to whiteness. The first federal naturalization law, passed in 1790, established that "free white aliens" with two years of residence were eligible for naturalization, as were the children of citizens.[9] In 1795, Congress extended the required residency period to five years.[10] Amid heightened concerns related to national security, Congress passed a series of laws known collectively as the Alien and Sedition Acts in 1798. Provisions extended the residency requirements for naturalization to fourteen years and established the president's right to deport dangerous or treasonous noncitizens. Very unpopular, these laws were never enforced, and most of their provisions were repealed or allowed to expire. In 1802, the five-year residency requirement for naturalization was reinstated.[11]

With Congress relatively inactive when it came to legislating immigration, states and localities filled the void. While some states wanted to attract immigrants to work as laborers, others were concerned about the economic and cultural burdens that "racially inferior" immigrants might impose on their communities. What resulted was a patchwork of laws to encourage the settlement of some immigrants, while regulating the admission of those who were considered "undesirable." Poor immigrants were seen as particularly undesirable because poverty was considered a moral failing. Laws banned the entry of foreign paupers, made poor immigrants ineligible for public aid, punished those who transported indigent residents into the area, and threatened to remove poor immigrants from the jurisdiction. Convicts were similarly unwanted. For example, a 1787 Georgia law declared that felons arriving from other US states or foreign countries would be arrested, removed from Georgia, and banned from returning. Those who returned after being expelled would "suffer death without benefit of clergy" upon conviction.[12]

State immigration laws also reflected an interest in maintaining the American racial hierarchy. In addition to southern legislation designed to keep black residents in bondage, state laws in the North signaled an unwillingness to receive black settlers, even though many northern states opposed slavery. For example, some northern states passed laws requiring free blacks to register and prove they could support themselves or risk banishment. In the South, emancipated slaves were required to leave the state or risk reenslavement, and free black sailors from other countries were not allowed to land or disembark at southern ports.[13]

Volunteers, philanthropists, and political appointees served on state immigration boards and administered immigration policy. Although immigration control at the time was relatively ineffective, some migrants were advised to seek passage to cities where they would not be subjected to strict scrutiny.[14] Major port cities like New York and Boston developed a robust infrastructure for screening new arrivals. In 1847, the state of New York established a board, called the Commissioners of Emigration, to institutionalize immigration administration. In 1855, the

New York Commissioners of Emigration constructed an immigration depot called Castle Garden; in the years that followed, most immigrants arriving to America passed through it. Its services included caring for the sick, protecting newcomers from being defrauded, sending able-bodied migrants to locations where they might find work, administering medical checks, and prohibiting the entry of passengers who were likely to become charges, sometimes by sending them back to their countries of origin.[15] These services were funded by charging a head tax on each arriving passenger.

THE RISE OF FEDERAL AUTHORITY OVER IMMIGRATION ENFORCEMENT

States regulated immigration almost exclusively during the nation's first century, but a series of Supreme Court decisions reduced state authority in immigration legislation and made way for federal control of immigration. In the 1849 *Passenger Cases,* the Supreme Court narrowly struck down Massachusetts and New York laws that imposed mandatory head taxes on all incoming passengers.[16] States responded by allowing shipmasters to pay either an "optional" nonrefundable head tax *or* a refundable, but significantly more expensive, bond on each person transported to the country.[17] Steamship companies opposed these fees because they made operating more expensive and less profitable. In *Henderson v. Mayor of the City of New York* (1875), the Supreme Court struck down the New York state law requiring shipmasters to pay a bond for foreign passengers arriving at ports. In doing so, the Supreme Court invalidated state immigration laws, arguing that they made it impossible for Congress to maintain a uniform admissions policy at all US ports. In *Chy Lung v. Freeman* (1875), the Supreme Court struck down a California law directed at Chinese women, allowing state immigration officials to deny entry to anyone suspected of being lewd or debauched unless the ship's captain paid a substantial bond to the state. In its decision, the Supreme Court declared that the "admission of citizens and subjects of foreign nationals to our shores belongs to Congress, and not to the states."[18]

Alarmed that the ban on head taxes would lower the costs of passage and result in new arrivals of poor immigrants, cities and states lobbied the federal government to craft a national immigration law to stem the entry of paupers and convicts and to cover the costs of providing immigrants services.[19] By 1875, millions of European immigrants had arrived on the East Coast, and California had received several hundred thousand Chinese immigrants and laborers. The American Civil War, fought between 1861 and 1865, also changed states' preferences. Battered from the Civil War, southern states were no longer resistant to federal authority over immigration law. On the West Coast, state and local governments in California had enacted numerous racist and discriminatory policies

on the basis of Chinese residents' supposed racial inferiority.[20] "Chinamen" (and women) were considered permanently alien and "unassimilable," and their presence threatened Anglo-American superiority.[21] On the East Coast, organized labor groups called for immigration policies that would protect American workers from European invaders.

The federal government responded to these local pressures by enacting a series of immigration laws. One set of laws created broad race-based restrictions on Asian migrants, while another was directed at European newcomers who were excluded only when they fell into specific "undesirable" categories. The first federal immigration law, the Page Act of 1875, was enacted to appease nativists in California. It barred the entry of Asian contract labor and Asian women suspected of prostitution.[22] In 1882, the Chinese Exclusion Act barred the entry of all skilled and unskilled Chinese "laborers" for ten years but allowed for the entry of merchants, clergy, diplomats, teachers, students, and travelers, as well as the reentry of Chinese migrants already present. The law also made all Chinese immigrants in the United States ineligible for citizenship.[23] Subsequent amendments made these provisions even stricter, requiring Chinese migrants to provide documentation to gain admittance and, later, barring reentry of Chinese immigrants under many circumstances.[24] Future amendments made legally admitted Chinese residents deportable by creating new documentation requirements. The 1892 Geary Act and the 1893 McCreary Amendment required all Chinese residents living in the United States to obtain and carry certificates of residence and identity or risk deportation.[25]

In 1882, Congress also passed its first general federal immigration policy to regulate European migration. That year, New York's Board of Emigration Commissioners had threatened to shut down its immigration depot, Castle Garden, if Congress did not act. The Immigration Act of 1882 mirrored New York and Massachusetts state immigration laws by barring the entry of "any convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge."[26] The law also created a fifty-cent head tax on incoming passengers, to be paid into the US Treasury and distributed to all states that supported foreign paupers. Moreover, since the federal government had no immigration bureaucracy, the law expressly authorized the Treasury to enter into agreements with state boards and officials to help enforce its provisions. As a result, even though states were no longer allowed to craft immigration legislation, state agencies retained substantial authority over immigration enforcement and administration through the 1880s.[27] The federal government relied on state officials to collect taxes, inspect arriving passengers, and exclude criminals and paupers.[28] In addition, even though the 1882 law allowed officials only to exclude immigrants, state immigration officials in Massachusetts and New York deported immigrants who required public aid.[29]

Meanwhile, in California, Chinese residents began to test the constitutionality of various provisions of the Chinese Exclusion Acts, and other discriminatory local policies, in a series of Supreme Court challenges. These decisions were important because they established legal doctrine regarding the authority of federal, state, and local authorities to regulate immigration. In 1886, the Supreme Court struck down a San Francisco ordinance that targeted Chinese-owned laundries, declaring that noncitizens were entitled to equal protection under the Fourteenth Amendment.[30] In 1889, the Supreme Court unanimously upheld the federal government's absolute and exclusive sovereign authority to create immigration policy and exclude aliens, even those previously granted admission.[31] In 1893, the Supreme Court affirmed Congress's virtually unlimited authority to set deportation policy and remove foreigners.[32] Taken together, these rulings established the federal government's exclusive authority over immigration and made state attempts to regulate immigration through de facto immigration policies illegal, at a time when immigration was expanding.

By the beginning of the twentieth century, the courts established that Congress had plenary power over immigration. As a result, when states attempted to regulate immigration, their attempts were often struck down on the grounds of federal preemption (a doctrine holding that federal law supersedes state law) or equal protection. The Chinese Exclusion Acts were a turning point in US immigration policy. Although US policies had always reflected a fear of outsiders, never had they been so singularly focused on racial exclusion. The Chinese Exclusion Acts paved the way for future race-based immigration policies and an administrative apparatus to implement them.[33]

BUILDING THE BUREAUCRATIC MACHINERY

Enforcing immigration laws requires a bureaucratic administration. Even as the federal government consolidated control over immigration legislation, it had no bureaucratic apparatus, infrastructure, or employees to implement and enforce the law. Congress solved this problem by creating partnerships with state boards and officials to help enforce immigration provisions. As a result, even though states were no longer allowed to craft immigration legislation, state agencies retained substantial authority over immigration enforcement and administration through the 1880s.[34] The federal government relied on state officials to collect taxes, inspect arriving passengers, and deny passage to criminals and paupers.

The Immigration Act of 1891 increased the number of grounds on which prospective newcomers could be denied entry and also made excludable immigrants deportable.[35] In addition, it established a federal bureaucracy, the Office of Superintendent of Immigration in the Treasury Department, to oversee immigration enforcement at ports and land borders. For the first time, immigration enforcement

was put into the hands of federal employees rather than state agents.[36] Sometimes, however, these federal employees were former state officials who continued to work as immigration inspectors when federal control subsumed state control.[37] Although formally under federal authority, immigration enforcement remained highly fragmented. For example, an immigration inspector might be responsible for enforcing either the Chinese Exclusion Act, the Immigration Act of 1891, or an 1885 law that banned alien contract labor, but none had the authority to enforce all three laws at once.[38]

Moreover, federal officials faced significant challenges enforcing immigration restrictions, which required sorting and classifying people on characteristics that were not readily apparent. When writing the Chinese Exclusion Act, Congress might have believed that discerning between a laborer and a merchant would be easy, but in practice inspectors' decisions were arbitrary and often based on corporeal markers of social class.[39] Since it was impossible to determine who was eligible for admission on the basis of outward appearance, lawmakers created requirements for specific kinds of documentation. For example, Chinese passengers had to arrive in US ports with a certificate issued by the Chinese government, certifying that their occupational status made them admissible for entry.[40] Later, a policy stipulating that Chinese residents obtain a "certificate of residence" required the corroborating testimony of a white witness to verify one's eligibility for admission. Eventually, all residents of Chinese descent, including US citizens, were required to carry photo identification.[41] Each of these documentary requirements laid the groundwork for a regulatory system of processing, tracking, and surveilling immigrants in the name of immigration control. For example, years later, the Immigration Bureau expanded its use of photo identification cards, eventually requiring them of all immigrants entering the country.[42] The "papers" required to prove one's status in the country during the Chinese Exclusion Acts were the precursors to modern-day visas, passports, and immigrant identification cards, or "green cards."[43]

With immigration enforcement firmly in the hands of the federal government, lawmakers turned to expanding the country's bureaucratic capacity to administer it. Although the Supreme Court had given Congress a green light to create and enforce virtually any immigration policy it saw fit, immigration enforcement was still quite rudimentary. In the 1880s, for example, just a handful of immigration inspectors were employed at Castle Garden to screen thousands of passengers that arrived daily.[44] Still, as exclusionary immigration laws and immigration inspections became barriers to entry, some migrants turned to Mexico and Canada, entering the United States via largely unregulated land borders.[45] In response, the government increased border control on the northern and southern borders, although this "control" consisted of irregular patrols by several dozen mounted inspectors who worked for the Customs Service and were responsible for policing thousands of miles of sparsely populated rough terrain.

In 1924, Congress imposed numerical restrictions on immigration and established a national origins quota system to "preserve" the racial makeup of the country.[46] The quota system allocated visas proportionate to the number of people who traced their origins to those countries in the 1890 census.[47] This increased the number of visas allocated to northern Europeans and reduced the visas available for southern and eastern Europeans, who were considered racially and biologically inferior.[48] The law also categorically excluded Asians and other nonwhite immigrants from being considered for admission by barring the entry of people who were ineligible for citizenship.

Because immigration restrictions are always accompanied by more illegal entries, these quotas "stimulated the production of illegal aliens."[49] During the 1920s, the philosophy of immigration enforcement evolved as both border policing and deportation assumed central roles in immigration control. Up to that point, the Immigration Service deported several thousand people a year but generally declined to deport immigrants who had already settled in the country, even if they had entered without permission. In the 1920s, Congress eliminated these long-standing limitations on deportation, made unlawful entry a crime for the first time, and created new state machinery to apprehend and deport unauthorized immigrants. Congress established the US Border Patrol (USBP) in 1924.[50] The following year, Congress gave the newly formed USBP law enforcement authority to make warrantless arrests of any alien attempting to enter the country without proper inspection and to serve warrants for the violation of any immigration law. The Bureau of Immigration interpreted this authority expansively, taking it as permission to arrest suspected unauthorized immigrants anywhere within the country. As a result, the bureau expanded its reach, dramatically increasing the number of arrests and expulsions occurring in the internal spaces of the nation. In 1933, the Bureau of Immigration merged with the Bureau of Naturalization to form the Immigration and Naturalization Service (INS).

In 1952, Congress passed the Immigration and Nationality Act (INA), which reorganized immigration and naturalization laws, bringing them together within one body of text.[51] While it altered the quota system slightly, it kept racist quotas largely in place. By the 1960s, the nation's overtly racist immigration policies were an embarrassment on the world stage. In 1965, Congress passed the Hart-Cellar Act, establishing the basic structure of contemporary immigration policy. The Hart-Cellar Act prioritized family reunification and established racially neutral quotas, with each country allotted the same number of visas. These legal changes ushered in a new migration stream, largely from Latin America, Asia, and the Caribbean, that dramatically diversified the United States. However, the Hart-Cellar Act also established limits on migration from the Western Hemisphere for the first time. This coincided with the abolishment of the Bracero Program, a program that had imported hundreds of thousands of Mexican immigrants as

laborers throughout the Southwest. Seemingly overnight, Mexican migrants who had formerly had legal paths to entry became "illegal" immigrants who no longer qualified for legal admission.

The 1986 Immigration Reform and Control Act (IRCA) is widely remembered for granting amnesty to nearly 2.7 million unauthorized migrants living in the United States. IRCA's employment and enforcement provisions, however, ensured that all future unauthorized residents would find it even more difficult to enter, work, and live in the United States. For example, IRCA made it "illegal" for unauthorized immigrants to work in the United States and established employer sanctions to penalize employers that "knowingly" hired unauthorized workers. However, since the law did not require employers to verify if employment documents were valid, employers could easily avoid penalties by claiming not to know that employees presented false documents. IRCA also called for a massive deployment of resources to the United States-Mexico border, in the form of agents, physical barriers, and technological surveillance, and included provisions for interior enforcement.[52] Most importantly, IRCA was the harbinger of a new political preoccupation with immigrants and crime. Section 701 of IRCA contained a sentence stating that the attorney general should deport aliens whose criminal convictions made them subject to deportation "as expeditiously as possible after the date of the conviction."[53] This provision made deporting "criminal aliens"—that is, noncitizens convicted of a crime—an immigration enforcement priority.

Before IRCA, the federal government was already allocating additional resources to border enforcement. For example, between 1979 and 1986, the Border Patrol doubled in size from 1,900 to 3,500 officers. IRCA authorized a 70 percent budget increase ($123 million of supplementary funding) in 1987 alone.[54] While most of that money went to border enforcement, $16 million was allocated to the interior and was focused on "criminal aliens."[55] For example, to comply with the requirement to deport people "expeditiously" the INS launched two programs to screen inmates in federal, state, and local jails and prisons. The Alien Criminal Apprehension Program (ACAP) and the Institutional Removal Program (IRP) were the first formal "jail status check" programs administered by the INS. These two programs called for immigration officers to conduct on-site interviews with potentially deportable inmates in jails and prisons to prevent their release from criminal custody.

The IRP and ACAP focused on identifying immigrants convicted of "aggravated felonies," a new immigration offense created by the Anti-Drug Abuse Act of 1988.[56] In addition, the Anti-Drug Abuse Act created the Law Enforcement Support Center (LESC), an office that provides investigative support for state and local law enforcement agencies attempting to determine if immigrants are deportable. Located in Vermont, it continues to provide 24/7 investigative support to state and local officers who call to determine the immigration status of immigrants in their

custody. Its officials can respond to immigration queries by issuing an immigration detainer, a request that the agency detain the individual in question so that immigration authorities can assume custody. The IRP and ACAP turned into the Criminal Alien Program (CAP), an expansive immigration enforcement program that relies on personnel in local, county, state, and federal correctional facilities to share records and inmate information with ICE officers, who may interview, identify, and detain inmates at their discretion. The largest of ICE's interior enforcement programs, CAP receives hundreds of millions of dollars from Congress every year and accounts for the majority of interior removals in the United States.[57]

POLICE PARTICIPATION IN IMMIGRATION ENFORCEMENT THROUGH THE YEARS

This section provides an abridged history of the police's role in immigration enforcement after the federal government consolidated its control over immigration. It shows that state and local law enforcement agencies have always played a role in immigration enforcement; this includes supporting the federal government by participating in immigration raids and/or making immigration arrests without official authority. Moreover, since "illegality" is associated with being of Mexican and Latino origin, many of these police enforcement actions have targeted minority residents by relying on corporeal markers of race and class.[58]

In 1919, the US attorney general initiated an enforcement campaign, known as the Palmer Raids, to round up and deport "radical" foreigners in response to public hysteria regarding the threats of communism.[59] Local police and federal officials raided bookstores, union halls, and private homes, detaining immigrants at Ellis Island pending deportation.[60] Later, when fears of communists gave way to racial and economic frustrations, local police supported immigration authorities by participating in joint immigration sweeps or conducting local sweeps and turning arrestees over to the Immigration Service. During the 1920s, welfare relief workers cooperated with immigration officials to deport immigrants who received public assistance. For example, in 1920, Denver police conducted raids of popular Mexican businesses, arresting three hundred people, after welfare officials complained that hordes of destitute Mexicans were draining social service agencies.[61] However, the immigration inspector determined that the majority of those arrested were US citizens and that only thirty-five "were subject to deportation beyond all doubt."[62] In the Southwest, millions of Mexicans and Mexican Americans were questioned, detained, and deported through coordinated interagency roundups during the 1930s, '40s, and '50s.[63] During an enforcement initiative called Operation Wetback, the El Paso Border Patrol engaged in novel methods to drive up their apprehension numbers, paying the El Paso Police Department between $1 and $2 for every undocumented person delivered to their custody.[64]

While there is a long history of state and local police cooperation with immigration enforcement, people continue to disagree about whether police have the *authority* to enforce immigration law. This conflict stems from the INA, which allows local police to enforce the immigration crimes of smuggling, transporting, and harboring, but does not address state and local authority over civil immigration violations, like being present in the United States without authorization.[65] Since the 1970s, the role of local law enforcement agencies in immigration enforcement has been established through legal opinions, judicial decisions, and additional legislation. For example, in 1978 the attorney general of the Department of Justice (DOJ) issued a press release affirming that "the responsibility for enforcement of the immigration laws rests with the Immigration and Naturalization Service, and not with state and local police."[66] The press release indicated that state and local police forces could notify the INS when arresting persons for non-immigration-related criminal violations but that officers should "not stop and question, detain, arrest or place an 'immigration hold' on any persons not suspected of crime, solely on the ground that they may be deportable aliens."[67]

Still, some departments and officers across the country made immigration arrests without legal authority. For example, in 1980 the US Commission on Civil Rights issued two reports that addressed police participation in immigration enforcement.[68] One report focused on immigration enforcement practices in Southern California and the other on enforcement practices across the country. The reports found that "immigration law enforcement activities by local police . . . have not been confined to the harboring section of the [INA] statute."[69] In Los Angeles, San Diego, and Orange County, Latinos reported being questioned and detained during investigatory police stops and being released only when they could supply proof of legal presence. In addition, the reports documented numerous examples of police arresting Latinos for no other reason than suspected immigration violations, sometimes with the encouragement of the INS.

It is worth noting that sometimes officers engaged in these practices in direct violation of police policies. For example, in 1979, the Los Angeles Police Department (LAPD) issued a policy, Special Order 40, banning immigration investigations. The order read: "It is the policy of the Los Angeles Police Department that undocumented alien status in itself is not a matter of police action. It is, therefore, incumbent upon all employees of this department to make a personal commitment to equal enforcement of the law and service to the public, regardless of alien status."[70] The policy explicitly dictated that officers should not inquire about one's immigration status or make immigration arrests. However, the US Commission on Civil Rights report revealed that some officers did so anyway. Faced with information that officers were conducting investigatory police stops of Latino residents, a department official conceded that some officers violated policy because of frustration about crime.[71]

Although the LAPD established an official policy to ban immigration investigations, the reports revealed that other departments took a more permissive attitude toward immigration enforcement. Quotes from police officials in some departments indicated that officers thought arresting and detaining people for immigration violations was perfectly acceptable. For example, a police officer in Grand Prairie, Texas, arrested and detained a US citizen of Latino descent on an immigration hold for three days. The officer explained that when he could not tell the difference between an "illegal alien or a Mexican" he "put them in jail for investigative charges."[72] Similarly, an official from the San Diego Sheriff's Department acknowledged that officers stopped US citizens of Mexican descent during immigration investigations but explained, "Since most aliens are dark-eyed and dark skinned, most residents of Mexican origin understand that being stopped is merely a matter of being in the wrong place at the wrong time."[73] Not only did these officers engage in racial profiling, but they thought it was acceptable to detain Americans of Hispanic origin, on the off chance that they might be undocumented. In 1983, the Ninth Circuit Court of Appeals analyzed whether state and local police could enforce immigration laws in *Gonzales v. City of Peoria*. Eleven plaintiffs alleged that Peoria police, acting under city policy, unlawfully stopped, questioned, and arrested people of Mexican descent because of their race and appearance. Residents who could not provide proof of legal presence were arrested and detained at the local jail for the INS. The court found that the city, department administrators, and officers expressed a great deal of confusion about what immigration laws (if any) police were authorized to enforce. Still, the court determined that the officers were acting in good faith and were not motivated by racial hostility.[74] The court further decided that while local police could not enforce the civil provisions immigration law, they could detain or arrest individuals for criminal violations of the INA. This decision effectively expanded state and local immigration arrest authority, giving police a role in "criminal" immigration enforcement.[75]

By the 1980s, courts, legal opinions, and legislation established distinctions between civil and criminal immigration violations. The federal government had the full authority to enforce all provisions of immigration law, but state and local police could enforce only criminal immigration violations. A memo issued by the Office of Legal Counsel at the US DOJ in February of 1996 reiterated this point, stating that "state and local police lack recognized legal authority to stop and detain an alien solely on suspicion of civil deportability, as opposed to a criminal violation of the immigration laws or other laws."[76]

The 1990s saw increased interagency cooperation between police and immigration authorities, as agencies participated in joint task forces to fight human smuggling, drug trafficking, and gangs. Sometimes local law enforcement agencies initiated cooperation with immigration authorities to serve their own purposes. For example, in 1995 local and city officials in Dalton, Georgia, established

a Criminal Alien Task Force after the rapid influx of Latino immigrants generated racial resentment about jobs and crime. Two Dalton police officers, a bilingual secretary, and two part-time INS investigators staffed the task force, which targeted "criminal aliens" for deportation by reviewing probation files and conducted worksite raids at manufacturing plants. In four years the task force placed almost a thousand people in deportation proceedings.[77]

In Chandler, Arizona, the police department invited the USBP to participate in a joint immigration sweep in 1997. The Chandler Police Department believed the immigration sweep would reduce public disorder in the city's gentrifying business district by targeting unauthorized immigrants who congregated in the city center. The USBP agreed to participate, and between July 27 and July 31 two dozen city police officers and five USBP agents blanketed the downtown business district during what became known as the Chandler Roundup. Officials targeted residents based on a "Mexican" appearance, using skin color and the ability to speak Spanish as markers for presumed illegality.[78] During the joint operation, officials detained and deported 432 unauthorized immigrants, all but three of whom were Mexican.[79] They also detained over forty US citizens.

CARVING OUT A ROLE FOR STATE AND LOCAL POLICE VIA THE 287(G) PROGRAM

In 1994, California voters passed an anti-immigrant bill, Proposition 187, in a landslide victory. Proposition 187 barred undocumented immigrants from receiving most social services, including nonemergency health care, prenatal care, and public education. The law obligated law enforcement officials to investigate and report the immigration status of arrestees, and it required government officials to notify immigration enforcement officials about persons they believed were illegally present. Although it was immediately challenged, and a federal judge ruled it unconstitutional before its measures could take effect, the law sent a clear message to federal legislators that California voters were unhappy with the status quo.

Federal lawmakers heard the message. Just as states pressured the federal government to enact restrictive immigration policies in the 1880s, Proposition 187 spurred lawmakers into action. The year 1996, when Republicans were still riding high off of an electoral landslide in 1994, marked a turning point in immigration policy. Amid "tough on crime" legislation spurring dramatic growth of the prison population even though crime in the United States was falling, a number of immigration laws drew on similarly punitive logic to criminalize immigrants.[80] In fact, scholars identify 1996 as a watershed year in the criminalization of immigration law or the emergence of the crimmigration system.[81] For example, The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) and the Antiterrorism and Effective Death Penalty Act (AEDPA) increased the list of crimes

considered "aggravated felonies" for immigration purposes. Prior to 1996, only noncitizens who received prison sentences of five years or more were deportable under the aggravated felony statute. The new laws changed the aggravated felony statute so that a conviction for any crime that carried a one-year *potential* sentence became a deportable offense, even if the violation was not a deportable offense when it was committed. IIRIRA also strengthened the enforcement arm of the INS by calling for one thousand new Border Patrol agents yearly and creating a multilayered border fence. In addition, it barred judicial review of most deportation cases and mandated immigrant detention pending removal. As a result, relatively minor offenses could trigger the expedited removal of legal permanent residents.

Perhaps most significantly, IIRIRA and AEDPA expanded the role and authority of state and local police in immigration enforcement by allowing greater cooperation between agencies. AEDPA gave local police the authority to detain unauthorized immigrants who had previously been deported, and IIRIRA included an amendment that authorized local and state law enforcement agencies to receive training to enforce federal immigration laws. The fact that local police did not have the authority to make civil immigration arrests rankled some members of Congress. After a high-profile crime involving an undocumented immigrant assailant, legislators from Iowa sponsored an amendment to allow local police to work with immigration enforcement agencies more closely. This amendment, which would come to be known as 287(g), called for allowing police to detain immigrants with pending deportation orders.

The members of congress backing the amendment drew on a racialized political rhetoric that linked immigrants and crime. Introducing the amendment on the House floor in March of 1996, Congressman Tom Latham (R-IA) said:

> Mr. Chairman, I rise today to offer this amendment in remembrance of Justin Younie, the 19-year-old son of Rick and Vicki Younie, who was brutally attacked, stabbed, and murdered in the small Iowa town in which he was born and raised. Justin's killers were illegal aliens to our country, our state, and to the quiet community of Hawarden. While Justin's murder is the real tragedy from that night, many in the community were further incensed that the crime was committed by illegal aliens. . . . My amendment will allow state and local law enforcement agencies to enter into voluntary agreements with the Justice Department to give them the authority to seek, apprehend, and detain those illegal aliens who are subject to an order of deportation.[82]

While both the victim and the perpetrators were Iowa residents at the time of the crime, the statement magnifies the victim's ties to the state by describing Iowa as the place of his birth. Unlike the assailants, who are characterized as outsiders to the country, state, and "quiet community of Hawarden," the victim is referenced

by name and described in relation to his family. The congressman suggests that the crime is even more deplorable because the assailants were unauthorized immigrants who should not have been residing in Iowa. At the core of this statement is an assertion about who belongs in "America's heartland."

Only three representatives spoke out against the amendment on the House floor. In contrast to Congressman Latham, who positioned immigrants as outsiders who did not belong, these legislators asserted that immigrants were members of the towns and cities in which they lived. They also argued that inviting police to conduct immigration enforcement would undermine the police's ability to protect and serve. For example, Congresswoman Sheila Jackson Lee (D-TX) said, "It is dangerous to put immigration authority in these local law enforcements so that they cannot do their real job, which is to protect those communities and protect the larger communities and engender trust in the community so they can get the job done."[83] Congresswoman Nancy Pelosi (D-CA) also spoke out against the amendment, saying that Congress should "allow our state and local law enforcement officials to protect and serve within communities, rather [than] to increase the fear."[84]

The amendment, which was codified as section 287(g) of the INA, passed as part of IIRIRA. It was a major innovation. For the first time, state and local law enforcement agencies could, with training and approval from the federal government, enforce both civil and criminal immigration laws directly. The federal government approved three types of federal-local policing partnerships for the 287(g) program. The task force model allowed officers to directly enforce immigration law concurrent with their regular policing duties, the jail model allowed officers to investigate immigration status violations in correctional facilities, and the hybrid model combined features of both the jail and task force models.

Local agencies did not clamor to participate in the 287(g) program. Indeed, in the six years after the passage of the amendment, only one agency seriously considered this local-federal partnership. In 1998, the Salt Lake City Council explored a one-year pilot project to cross-deputize police officers as INS officers. Frustrated by a shortage of bed space, too few federal immigration officers to pick up inmates with deportation orders, and a police chief who claimed that 80 percent of the city's felony drug arrests were committed by unauthorized immigrants, officials in Salt Lake City began drafting plans to allow twenty cross-deputized police officers to identify, detain, and transport immigrant detainees to INS facilities in adjacent states.[85] Since the agreement was publicly supported by the county sheriff, the local police chief, and several city council members, most expected that the city council would approve the one-year 287(g) pilot program. However, at a four-hour public hearing on the evening of the city council vote, Latino community members packed the room and spoke passionately against the plan. Residents voiced concerns about racial profiling and challenged the police chief's contention that

members of the immigrant community constituted a large proportion of felony arrests in the city.[86] By the end of the meeting, community members convinced one council member who had promised to vote for the agreement to change his mind, and the council narrowly voted against the agreement 4–3.[87] No other agencies considered participating in the 287(g) program until after the September 11, 2001, attacks. After 9/11, the federal government began pouring money into interior immigration enforcement, providing additional resources for the federal government to police noncitizens in the name of national security and counterterrorism. The newly formed Department of Homeland Security (DHS) sought to enlist police and sheriffs as immigration enforcement partners and encouraged agencies to participate in the 287(g) program. The DOJ also encouraged local police and sheriffs to participate in immigration enforcement. On June 6, 2002, Attorney General John Ashcroft announced that state and local police had the "inherent authority" to enforce civil provisions of immigration law, particularly as it related to the country's antiterrorism mission.[88] Ashcroft's interpretation of police authority in immigration enforcement directly contradicted long-standing legal opinions issued by the DOJ. His new stance was released as a classified memo, and it has never been withdrawn.

In 2002, the Florida Department of Law Enforcement became the first law enforcement agency to participate in the 287(g) program. The agency framed its participation as a counterterrorism strategy. Several of the 9/11 hijackers had lived in Florida before the attack and had been stopped by state and local police for traffic violations but had not been investigated. A number of officers working in one of the area's regional domestic security task forces, task forces specifically designed to prevent and respond to acts of terrorism, received immigration enforcement training.

In the following years, a few more law enforcement agencies sought immigration enforcement authority through 287(g), but these agencies narrowly tailored their enforcement efforts by focusing on "high-priority" targets.[89] The state of Alabama signed on to participate in 287(g) in 2003 to address identification and document fraud.[90] In 2006, the 287(g) program shifted when the Mecklenburg County (North Carolina) sheriff, Jim Pendergraph, implemented a 287(g) designed to identify as many unauthorized immigrants as possible.[91] While Pendergraph's stated motivation for participating in 287(g) was public safety, the Mecklenburg County Sheriff's Office used the 287(g) program to conduct immigration inquiries on every single immigrant booked into jail. Unlike the 287(g) programs in Florida and Alabama, which utilized risk-based approaches to identify several hundred removable immigrants per year, Mecklenburg County's dragnet placed 2,321 unauthorized immigrants in removal proceedings in 2007. Over half were arrested by local police for low-level traffic violations.[92]

In his 2006 testimony to Congress touting the early successes of the 287(g) program, Sheriff Pendergraph explained his belief that federal immigration

enforcement was ineffective. "Think of the frustration we feel when a group of illegals leaves my jail for deportation and they smile and say, 'We'll see you next week,'" Pendergraph told Congress. The sheriff was also incensed by social service provisions. He complained that the county health department paid translation costs for Spanish speakers seeking medical attention and predicted that in five years 20 percent of children starting kindergarten would be "children of illegal immigrant parents with little or no English skills."[93] The sheriff seemed to resent the fact that undocumented residents had rights. Medical providers were legally required to provide language access to patients, and schools were legally required to educate children who lived in their districts, regardless of their origins or legal status. Thus, rather than see children growing up in North Carolina as fellow North Carolinians, the sheriff made clear that these students, by virtue of their parentage, were not legitimate members of the "imagined community."[94]

In 2007 and 2008, fifty-four additional agencies signed 287(g) agreements with ICE, authorizing them to conduct immigration investigations, issue detainers, and generate the charging documents that begin the deportation process. At its peak, about seventy agencies participated in the 287(g) program. Most agencies implemented programs modeled after Mecklenburg County's jail enforcement program. The majority of 287(g) programs were implemented in the US South, where immigrant populations were small but growing rapidly. The Davidson County Sheriff's Office, which I will discuss at length in the next chapter, signed a 287(g) agreement in 2007.

The enforcement of immigration laws by state and local officials raised immediate concerns among national law enforcement associations, criminal justice research foundations, immigration policy research organizations, and immigrants' rights groups across the nation. For example, reports issued by the Police Executive Research Forum and the Major Cities Chiefs Police Association indicated that some law enforcement officials worried that enforcing immigration laws would jeopardize trust between departments and immigrant communities, making it less likely that immigrants would cooperate with authorities by reporting crime.[95] Officials also voiced concerns that their agencies lacked the personnel, resources, and expertise to enforce immigration laws and that doing so might distract departments from their core public safety missions. Moreover, civil rights and immigrant rights organizations drew a direct link between 287(g) programs and the racial profiling of Latino immigrants.[96]

The 287(g) program even faced criticism from federal government agencies. For example, a report issued by the Government Accountability Office (GAO) in 2009 found that while ICE officials stated that the program's objective was to address serious crime, these objectives were not articulated on any program-related documents, including 287(g) agreements, case files, brochures, and training materials.[97] In practice, ICE allowed local law enforcement agencies to run the 287(g)

program according to individual agency preferences, and some agencies used their authority to process individuals arrested for minor crimes. In 2010, the DHS's Office of Inspector General issued an equally critical report, concluding that ICE did not supervise 287(g) programs sufficiently and ignored potential civil rights violations by participating agencies.[98]

The most infamous example of 287(g) civil rights abuses occurred in Maricopa County, Arizona. Maricopa County Sheriff Joe Arpaio used his agency's immigration authority to enlist over 160 deputies to conduct immigration patrols, neighborhood sweeps, investigative police stops, raids on local businesses, and immigration investigations in the local jail. For years, residents in Latino neighborhoods accused the sheriff's office of widespread racial profiling, alleging that deputies were using brown skin and "Latino or Mexican appearance" as probable cause to stop and detain residents for suspected immigration violations. After a series of lawsuits alleging various civil rights abuses, a three-year DOJ investigation found that the Maricopa County Sheriff's Office (MCSO) had engaged in "a pattern or practice of unconstitutional policing."[99] The MCSO's discriminatory practices included racial profiling; unlawfully stopping, detaining, and arresting Latinos; retaliating against individuals who criticized MCSO policies; and denying services to Latino inmates in the jail. The DHS terminated its 287(g) task force agreement with Maricopa County in December of 2011. The government also restructured its existing 287(g) agreements.

In 2012, ICE announced that it was phasing out 287(g) task force agreements in favor of other enforcement programs that could identify removable immigrants more efficiently. Many of the agencies that had 287(g) programs allowed their agreements to lapse, although some jail enforcement programs continued operating. A program called Secure Communities, which began in 2008, was central to ICE's new enforcement strategy. The Secure Communities (S-Comm) program automated immigration status checks in jails and prisons by linking the fingerprint data that state and local police had gathered during arrest and booking to federal databases containing information about immigration and criminal history. When the arrestee's fingerprints matched those in ICE's biometric database, ICE notified the correctional facility to hold the individual until ICE could assume custody. Initially, federal officials indicated that state and local officials could opt out of S-Comm, but after several jurisdictions attempted to do so ICE changed course, stating that the program was mandatory. After criticisms that the majority of people removed through S-Comm were not criminals, and after a number of lawsuits challenging the government's contention that it could force correctional facilities to participate, ICE announced its intention to phase out S-Comm for a new program called the Priority Enforcement Program (PEP). Like S-Comm, PEP relied on biometric information sharing, but it outlined stricter enforcement priorities

regarding when federal officials could issue immigration detainers. In January 2017, a new executive order eliminated PEP's enforcement priorities, marking a return of the more expansive Secure Communities Program.[100] The executive order also communicated the federal government's renewed interest in reviving the 287(g) program. As of April 2017, thirty-seven agencies in sixteen states continue to run 287(g) programs in local jails.[101]

THE RISE OF STATE AND LOCAL IMMIGRATION POLICIES

At the height of the 287(g) program's popularity in the mid- to late 2000s, an anti-immigrant backlash was occurring in cities, towns, and states across the country. This backlash occurred amid accusations that the federal government did not have the resources or the political will to enforce immigration laws in the nation's interior. Slowly, state and municipal legislatures began to adopt legislation to signal their pleasure or disapproval over the presence of unauthorized immigrants within their boundaries. For example, in 2005, state lawmakers introduced 300 immigration-related bills, but between 2007 and 2011 that number jumped to an average of 1,475 immigration-related bills a year.[102] Some of these bills were proimmigration policies that offered protection to unauthorized residents by expanding access to driver's licenses, limiting police cooperation with immigration investigations, and providing health, welfare, or educational benefits to residents, regardless of status. However, most were anti-immigration bills with a variety of provisions, including making proof of legal status a requirement for obtaining services that had previously been available to all residents, mandating police enforcement of immigration laws, and criminalizing immigrants through new work and documentation requirements. Many of these bills were never formally passed or implemented, and several were vetoed by state governors.

In 2006, the small former coal-mining town of Hazleton, Pennsylvania, became famous for its efforts to make Hazleton "one of the toughest places in the United States for 'illegal' aliens."[103] Hazleton officials passed the Illegal Immigration Relief Act, which called for punishing landlords who rented apartments to undocumented residents and punishing businesses who hired them. It also declared English to be the city of Hazleton's official language. In the years that followed, more than one hundred localities attempted to pass Hazleton-style exclusionary measures.[104]

In 2007, Oklahoma passed HB 1804, which required police to check the immigration status of any persons "suspected" of being unlawfully present in the United States, required proof of legal presence for accessing services that had previously been available to all residents, and made it a felony to offer undocumented immigrants transportation, jobs, or shelter. Called the Oklahoma Taxpayer and Citizen Protection Act, the law read: "The State of Oklahoma finds that illegal

immigration is causing economic hardship and lawlessness in this state and that illegal immigration is encouraged when public agencies within this state provide public benefits without verifying immigration status."[105] The text of the law made clear that immigrants were, by their mere presence, responsible for the suffering of Oklahoma taxpayers. Three years later, Arizona passed SB 1070, which critics called the "show me your papers" law for its provision requiring police to investigate a person's immigration status during any stop, detention, or arrest and mandating that noncitizens carry proof of legal presence.[106] The states of Alabama, Georgia, Indiana, South Carolina, and Utah followed Arizona's lead, passing their own draconian bills to push immigrants out or prevent them from settling. Boasting about the state immigration bill in Alabama, a lawmaker said the bill "attacks every aspect of an illegal's life. . . . The bill is designed to make it difficult for them to live here so they will deport themselves."[107] Numerous local and state immigration bills were challenged on the grounds that they violated the federal government's plenary power over immigration and immigration enforcement. At issue was whether these bills regulated immigration or immigrants. Recall that states and localities can pass laws that affect immigrants' lives, but they may not pass their own immigration laws. Of course, although some state and local agencies already enforced immigration laws through the 287(g) program, there are important differences between the 287(g) program and state and local bills that mimic the 287(g) program. Chiefly, localities may not conduct this type of enforcement by themselves; participating in the 287(g) program requires training and permission from the federal government.

In 2012, the Supreme Court ruled that most of the provisions in Arizona's SB 1070 were unconstitutional and preempted by the federal government's plenary power over immigration.[108] The court found, for example, that the state could not *require* local police to verify the citizenship of people with whom they came in contact and that officers could not make warrantless arrests on suspicion of removability. However, the court left in place one provision that allowed officers to ask individuals about their legal status. The decision stipulated that delaying someone's release to investigate suspected immigration status violations would raise "constitutional concerns" but left the provision in place because of uncertainty as to whether implementation would "require state officers to delay the release of detainees for no reason other than to verify their immigration status."[109] After the court's decision, the five states that had similar laws on the books also ended their enforcement initiatives; since Arizona's law was struck down, no additional states have passed similar legislation.

As this chapter shows, immigration control efforts span the nation's history and reflect deliberate political choices to "design" the nation.[110] During the nation's first one hundred years, state legislators established immigration policies and set up

state immigration boards to execute them. Ultimately, these immigration controls were relatively weak, and the biggest barrier to entry was whether one could pay for the cost of passage. Over the last 150 years, the federal government has expanded its administrative capacity to implement immigration laws, creating a sprawling bureaucracy and a large federal police force dedicated to immigration enforcement. While there is only one set of *federal* immigration laws, varied state and local responses to immigrant communities ensure that, in practice, immigration control varies across localities.[111] Some localities have amplified the effects of immigration enforcement by passing restrictive anti-immigrant laws and formally cooperating with ICE, and others have attempted to attenuate its effects by resisting ICE's efforts.

Although US immigration policies no longer *formally* select immigrants by race, immigration control continues to be driven by ideas about race, nation, and who "belongs" in America. The US-Mexico border is a militarized fortress, but politicians continue to insist that it is "out of control," even though net migration has been at zero or negative since 2008.[112] It is not clear how much immigration enforcement is necessary to convince the public, or media pundits, that the government is sufficiently regulating migration.[113] The moral panic about unauthorized immigrants, and more specifically *Latinos,* convinces some that an immigrant invasion is threatening "American" communities and degrading "national identity."[114] And since few politicians can afford to be "soft" on immigration or crime, they give immigration controls their enthusiastic support, with little regard to whether additional laws are effective.[115] Enacting tough immigration policies is politically expedient at multiple levels of government.

In the next chapter we turn our attention to Nashville, Tennessee, and its politics of immigration enforcement. The chapter examines Nashville's march toward immigration restriction, showing that state and local laws that regulate the lives of immigrants blur the boundaries between controlling immigration and controlling immigrants.