Sanctuary Cities and Republican Liberty

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Abstract
What are sanctuary cities? What are the political stakes? The literature provides inadequate answers. Liberal migration theorists offer few insights into sanctuary city politics. Critical migration scholars primarily address the relationship between sanctuary cities and political activism, a small part of the phenomenon. The historical literature examines continuities between 1970s sanctuary church activism and contemporary sanctuary cities, confusing what is essential to sanctuary churches and what is only sometimes associated with sanctuary cities. Together these approaches obscure more than they reveal. This article suggests a republican account of sanctuary cities. Reconstructing American migration politics from the colonial era onward shows that sanctuary cities have roots in both the colonial republican revolt and the republican principle of freedom as nondomination. That reconstruction reveals much about both sanctuary cities and the federal government’s long-running assault on them. The resulting robust analytical framework clarifies what is at stake in the politics of sanctuary cities: federal sovereignty in migration politics specifically and republican liberty in migration politics generally.

Keywords
sanctuary cities, migration ethics, republicanism, nondomination, liberalism, radical democracy

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What are sanctuary cities? What are the political stakes with regard to them? Neither the theoretical nor historical literature provides an adequate account of the first question, and, as a result, the second remains unanswerable. Mainstream liberal migration scholarship rarely takes up the topic. Recognizing the analytical deficiencies of liberalism, the more critical migration literature usually navigates sanctuary politics through theories of civil disobedience, “acts of citizenship,” or, broadly speaking, radical democracy. But these critiques are limited insofar as activism (however understood) is only a small part of contemporary sanctuary politics. The historical research is similarly limited. It is often claimed that the historical roots of sanctuary cities are found in the sanctuary church politics of the 1970s and 1980s. There certainly are continuities between sanctuary church activism and contemporary sanctuary city politics, but they are, again, only a small part of the story, and they belie crucial substantive differences. The problems are mutually confounding; the particular historical framing supports the particular theoretical critique, and vice versa. The best accounts offer only partial and in many ways misleading critiques of sanctuary cities. Prima facie, there is a significant gap in our understanding. Sanctuary cities define the juridical-political lives of at least 11 million irregular migrants living in the United States today and affect many more of the citizens living alongside them.1

I make three arguments. The first is historical. As will be shown, sanctuary politics are often situated within a two-stage/four-decade descriptive frame, in which the sanctuary church movement of the 1980s was followed and expanded by sanctuary city politics. That framing is based on apparent historical and political continuities, but appearances are misleading. I will argue that sanctuary cities can be shown to be grounded in constitutional provisions, theories, institutions, and norms tracing back to the colonial era, which manifest as a mode of politics categorically different from that of sanctuary churches. That is to say, the two-stage/four-decade sanctuary church/city historical framework is inadequate, nominal, and misleading. A four-century perspective is necessary.

The second argument is theoretical and analytical. It is that sanctuary cities should be understood not in terms of liberal or radical democratic theory but in terms of republicanism. Sanctuary cities should be understood specifically in the context of what neorepublicans call social and political nondomination. The third argument is normative and raises the question of the stakes behind the discussion of sanctuary cities—stakes occluded by historical and theoretical errors. Taking a long view in the republican perspective reveals that the stakes are high in their legal and constitutional implications and bear on the freedoms of all citizens. I argue that the legitimacy of the plenary power doctrine—the juridical basis of the federal government’s claim to sovereign prerogative in migration governance—is challenged by contemporary sanctuary city politics. So too are the principles of republican liberty related to the unchecked power of the federal government, which pertain to citizens and aliens alike.

I develop these arguments in tandem through a historical reconstruction of American migration politics from the colonial era onward, focusing on critical junctures that bear on the politics of sanctuary cities today. I begin by sketching the present state of sanctuary politics and the state of the scholarly art and
conclude by summarizing the arguments. The historical reconstruction unfolds in the following stages:

1. The coordinates of colonial era radical republican critiques of migration are established.
2. The aristocratic and liberal statist assaults on Stage 1 in the nineteenth century are tracked.
3. The paradoxical migration jurisprudence stemming from the irreconcilability of Stages 1 and 2 is tracked as it unfolds in the twentieth century.
4. Twenty-first-century sanctuary politics are situated in the historical and theoretical perspectives established from Stage 1 onward.

Admittedly, such a broad historical reconstruction risks providing a thin account of the politics grounding contemporary sanctuary cities. However, I hope to show that it yields historical, analytical, theoretical, and normative critiques of far higher resolution than others on offer.

A republican critique of migration and sanctuary cities may raise some eyebrows, so allow me to address this point first. Contemporary neorepublican theorization has not been particularly interested in either migration or sanctuary politics. Normative political theorists have tried to move past that gaunt critique, with some success, often assuming that republican history contributes little to today’s ethics of nondomination and migration. One reason for that assumption is that republicanism is widely held to be a political philosophy of bounded communities. Another is that republican history does not appear to yield many practices worth salvaging. From Rome’s founding myth of the rape of the Sabine women to settler colonialism, through the American history of slavery, Western expansion, genocide, racism, contemporary minutemen, and beyond, republicanism has often stood not as a wellspring of critical theory but as a model for brutality in migration politics. Ideologically, those practices have always been cast as civilizational imperatives to guard against barbarous others or, to use Hannah Arendt’s own channeling of the Roman republican tradition, “isolated tribes who were vegetating their lives away.” Philosophically, those politics have often found support in what Jonathan Israel calls the “moderate Enlightenment”—the aristocratic, elitist, theocratic, conservative, and reactionary mode of republicanism that prioritized preserving the privileges, stability, and freedoms of the few against the radical republicans’ universal claims of equality.

My point here is not to signal the brutality etched into republicanism’s history and then move on, assuming that what is past is past. I avoid that approach for two reasons. First, as a matter of historical analysis, it is disingenuous and analytically ruinous to efface the history, particularly because the civilizational mission continues in the very legal architecture of the migration law system. As Matthew Lindsay writes,

The Court’s intemperate defense of American citizenship against invading foreign races cannot, therefore, be swept aside like some unseemly discursive debris of a bygone era, cluttering the logically sound foundation of immigration exceptionalism; rather, it is the cornerstone of the entire edifice.
Second, as a matter of normative theorization, it is dangerous to ignore the history. Doing so risks quietly replicating those practices while inadvertently helping to keep them obscured. Nevertheless, avoiding the history is the prevailing norm of contemporary neorepublican theorization. As this article will show, those politics are alive and well in the field of migration politics and important in understanding the forces currently amassing against sanctuary cities.

Although less prevalent as a historical phenomenon, another tradition has, at least since the early modern period, defended an image of republicanism that rejects the regressive aristocratic or moderate tradition. That tradition prioritizes the nondomination of aliens and citizens alike and expresses those priorities institutionally and constitutionally. It has its own myth of Rome’s foundation as a sanctuary city and its own early modern history. It is found at the core of the democratic republican revolutions of the eighteenth and nineteenth centuries. Philosophically, that line of republican thought had its strongest defenders in what Israel calls the “radical Enlightenment.” Republicanism’s radical Enlightenment encompasses a cluster of ideas grounded in principles of reason, toleration, equality, universal rights, and the common good, expressed politically as a form of democratic republicanism that rejects aristocratic rule, Hobbesian sovereignty claims, and Lockean social contractualism. Similar principles were also at the core of the American colonial and revolutionary experience and were distilled into a unique and historically unprecedented critique of migration and membership. These more democratic and egalitarian conceptions of republicanism—and the institutions that followed—were virtuous in principle but often steeped in the same racism, sexism, and xenophobia as the more aristocratic variant of republicanism. I do not aim to avoid those practices, but I do hope to show the importance of those principles over time. As will be seen, the principles expounded and given constitutional expression by that tradition proved an enduring legacy, a bulwark protecting contemporary democratic republican resistance to aristocratic republicanism and unchecked executive power. Indeed, those principles underwrote a constellation of ideas relating to migration that has been largely overlooked by migration ethicists, including republican theorists. An unintended consequence of contemporary republican theorists’ avoiding their own ugly history is their unintentionally ignoring a wealth of more appealing republican ideas and practices.

The point, finally, is not to choose one tradition over the other. Historical and analytical insights are gleaned by situating American migration politics within the conflict between these ideas in the field of migration politics. Loosely speaking, this is the same approach Jonathan Israel takes in his study of the history of the Enlightenment. This article mimics that framework on a much smaller scale and finds it to be a rather generative approach.

**Historical and Theoretical Critiques of Sanctuary Cities**

Sanctuary cities have become a regular flashpoint of political contestation in the United States. The term “sanctuary city” denotes a variety of practices whereby counties, cities, or states protect irregular migrants from attempts by the federal government to
detain and possibly deport them. These protections can be defensive, such as withholding information from federal agencies. They can also be proactive, such as providing irregular migrants with all the privileges of residency irrespective of citizenship status. The data on irregular migrants are inexact. Most scholars accept that as of 2018, there were upward of 11 million irregular migrants in the United States. A recent study argues that the real figure could be upward of 22 million. It is difficult to ascertain where those irregular migrants reside, but studies have shown that the majority of them live in some twenty urban areas, most of which are sanctuary cities, counties, or states.

The historical understanding of US sanctuary politics is usually framed as having two stages. The first stage is the sanctuary church movement that began in the 1970s to house and support refugees and exiles (primarily from El Salvador and Guatemala) at risk of being deported by the federal government. These politics initially drew on biblical notions of sanctuary, as well as moral assertions regarding human dignity and the imperative to provide hospitality and charity to refugees. However—and thanks in large part to the activism of Jim Corbett and John Fife—the sanctuary church movement was politicized; it shifted from a responsive movement to proactive resistance against the American military involvement in South America that generated the flight of these refugees from their home countries. As Sophie Pirie notes, “They wanted sanctuaries that were impregnable but highly visible as political platforms from which to lay bare the hypocrisies and lies they saw in United States foreign policy and domestic liberalism.”

Sanctuary churches were vulnerable for the same reasons, particularly in their overt law breaking, limited scope, and the demands they placed on activists and parishioners. Initially, its novelty and small size protected the sanctuary movement; but as it grew, its successes magnified those vulnerabilities. It is there that the federal government struck. A sustained assault on sanctuary churches—including surveillance, infiltration, propaganda, and criminal prosecution—significantly undermined the movement. Sanctuary cities—the second stage—are usually framed as building on the sanctuary church movement and responding to a similar set of concerns. Certainly, many so-called cities of refuge from the mid-1980s expressly took up this political struggle. More expansive historical accounts also tie the sanctuary city model to the politics of giving sanctuary to soldiers resisting the Vietnam War. The tactical and strategic benefits of sanctuary cities (size, administrative, and legal support) solved many of the challenges faced by sanctuary churches.

Sanctuary cities should be a first-order concern in the realm of migration ethics. Nevertheless, they are conspicuously absent from the research agenda of mainstream liberal migration theory. Debates within liberal migration theory—including analytical and normative ones—often appear to cover the whole spectrum of plausible considerations. They stretch from universalist accounts of the rights of all humans to particular accounts of the rights of bounded communities and individuals to decide on entry or membership, with a slew of topics in between. But mainstream liberal critiques of migration ethics, despite their wide scope, are routinely inattentive to sanctuary city politics.
Recognizing the analytical deficiencies of liberalism, a variety of critical approaches to the study of migration and sanctuary cities have set out to fill the gaps in the literature. Thinking through sanctuary politics, this research has focused on what is described by Engin Isin as “acts of citizenship,” by Jennifer Ridgely as “insurgent citizenship,” and by Harald Bauder as “urban activism” or, broadly speaking, radical democracy. These writers address the activism through which excluded groups claim their own political standing against the exclusionary practices of state domination and the hegemony of nationalistic conceptions of citizenship. This literature has much to recommend it, but it is also theoretically cloistered and historically presentist in ways that limit its analyses. It is theoretically cloistered in presupposing that the only alternative to liberalism is the politics of activism and civil disobedience. And, like the more historical accounts of sanctuary politics, it situates sanctuary cities squarely within the politics of the late twentieth century. That is a mistake insofar as it looks only at the most recent instance of a politics with deep historical roots—roots that, I propose, are more important in shaping the present moment than any one instance of resistance.

Scholars of American migration law, who usually couch their thoughts within debates about immigration federalism and the plenary power doctrine, are the final source of critical reflection on sanctuary cities. Indeed, much of the best historical, political-scientific, and theoretical work on sanctuary cities is being done by legal scholars. For instance, Pratheepan Gulasekaram and S. Karthick Ramakrishnan have persuasively argued against simple demographic and “federal inaction” accounts, defending instead a “polarized change model” that accounts for the roles of party polarization, ethnic nationalism, and what they call “issue entrepreneurs.” There is much to recommend Gulasekaram and Ramakrishnan’s model in particular and the legal scholarship more broadly. A more general contribution I hope to make is to show why political theorists, migration ethicists, and scholars of sanctuary cities should pay more attention to this scholarship. Similarly, I hope to show the value of couching the legal scholarship in a longer critique of the history of competing republican political philosophies. To this, I now turn.

Eighteenth-Century Republican Migration and Naturalization Debates

Colonialism dictated that the metropole had to grow the populations of the colonies rapidly to bolster their powers against native peoples and competing European powers. Denizenship was a crucial incentive to increase emigration to the colonies. However, distance meant that colonial governors could rarely enforce standardized regimes of alien control, whatever the wishes of the metropole. Certainly, formal control to grant aliens the “rights of Englishmen” remained firmly in Parliament. But effective control was necessarily deferred to the colonies. The result was a practical devolution of membership and migration governance. One consequence was a functional loosening of the “jealously guarded” right of Parliament to control the
naturalization of subjects. However, as long as the results of those devolved practices aligned with the goals of the metropole, they appeared benign and necessary. Nevertheless, a crucial social shift had taken place; whatever the meaning of the “rights of Englishmen” in Britain, it became associated with practices of local self-governance in the colonies.

By the mid-eighteenth century, as the colonies became more politically autonomous, both Parliament and the Crown changed their perspectives on emigration to and membership in the colonies. The Crown saw an emergent threat in an increasingly powerful periphery. Parliament increasingly recognized the colonies less as benign administrators and more as malignant usurpers of its power to naturalize. Justifying these fears, when the British attempted to stem the outward flow of laborers to the colonies—in part by making colonial endenization increasingly difficult—they were met by practical subterfuge and legal dissimulation on the part of colonial governors who remained eager to augment their populations. What resulted was widespread experimentation in the local governances of migration and membership. As Marilyn Baseler writes, “The ability of the colonists to ignore, evade, and reshape English regulations vitiates many policy decisions and generated a chaotic array of citizenship procedures.” In turn, limitations to ready endenization of aliens became associated with British political obstinacy. These experiments in local politics crystalized under the aspect of the groundswell in republican political thinking.

As relations between the colonies and Britain decayed, the colonists urgently had to formulate an alternative theory of allegiance that would lend those myriad practices some intellectual cohesion. At the time, the dominant theory was of perpetual allegiance—the idea that anyone born within a monarch’s realm remains in allegiance to said sovereign until death. A key philosophical step in the struggle for independence was recognizing how the theory of perpetual allegiance facilitated the domination of the colonies and, concurrently, formulating an alternative theory of membership that expressed nondomination. What the colonists devised was the notion of volitional allegiance—a theory of membership based solely on a person’s willful act to assume full legal personhood under the jurisdiction of a republic. Volitional allegiance inverts the logics of perpetual allegiance. Where the latter holds that the king is sovereign and the subject subordinate, the former asserts the sovereignty of individuals and the subjection of the state. On that account, the state or city has no natural or sovereign power over membership; it is merely an administrative functionary over a certain jurisdictional scope. The jurisdiction administers residents and does not control whether they have legal standing. Those who did not volitionally choose citizenship were certainly subject to the laws, but they had no say in their creation. Those who did choose citizenship took on all the duties that followed.

The theory of volitional allegiance purposefully precluded feudal notions of the bounded community or nation. It could not presuppose such notions because to accept a natural (or theological) foundation for political allegiance would be to endorse the sovereignty of the Crown. Instead, it spoke to the autonomy of the individual to choose to join a jurisdiction at will and, by necessity, also presupposed the individual right to expatriate oneself at will. Expatriation had to be assumed for logical reasons and also
for tactical ones, as no other theory of membership could address the paradoxes of new political foundations. Volitional allegiance did not simply transfer Blackstone’s understanding of the “rights of Englishmen” to the colonies. It transformed them in a way that made them theoretically antithetical.

Another pillar of these insurgent republican politics was the widespread practice of alien suffrage. Suffrage could be afforded to nonsubject aliens because it was widely assumed (and practiced) that residency was the prerequisite of suffrage, not subjectship. Where towns could not easily circumvent formal restrictive manumission laws, they often responded by democratizing the institutions that make up practical citizenship and demoting the formal significance of subjectship. Jamin Raskin described the practice of alien suffrage as a “remarkable willingness to welcome aliens qua aliens into the nascent political enterprise of the new nation.” Throughout the eighteenth century and late into the nineteenth, alien suffrage was widespread. For example, in 1840—despite the exclusionary reaction then well underway—the Illinois Supreme Court vigorously defended the institution of alien suffrage as consonant with the letter and spirit of the Illinois and US constitutions. It is striking that the Illinois Supreme Court further stipulated, thereby affirming the account of endenization above, that the meaning of “citizen” in the Illinois constitution did not mean formal legal membership; it meant “citizen” in the sense of inhabitant of a city. Indeed, the zenith of alien voting was in 1875 when “nearly one-half of all the states and territories had some experience with voting by aliens.” These were deeply ascriptive practices—both alien suffrage and volitional allegiance were open only to white male aliens—but therein they were universal in their scope.

Although gesturing toward a political philosophy with emancipatory potential, these politics were also self-interested. For many, the comportment of the colony toward aliens revealed its governors’ latent political aspirations. A regime that does not afford legal personhood to aliens assumes a position of mastery over them. Restrictive migration regimes are extreme examples of what the English republicans referred to as the despised “negative voice” of the Crown arbitrarily to “give or withhold assent to any acts of legislations,” except that what is being given or not is legal personhood. Thomas Paine—the most consistent and dogged spokesperson of the radical Enlightenment—broadened this idea in his criticism of corporate towns that restricted and commodified membership. “It is a perversion of terms,” Paine wrote, “to say that a charter gives rights. It operates by a contrary effect, that of taking rights away. Rights are inherently in all inhabitants; but charters, by annulling those rights in the majority, leave the right, by exclusion, in the hands of a few.” But it is the general consequences for republican liberty that are really at stake once the specific exclusionary regime is accepted:

Those whose rights are guaranteed, by not being taken away, exercise no other right than as members of the community they are entitled to without a charter; and, therefore, all charters have no other than an indirect negative operation. They do not give rights to A, but they make a difference in favor of A, by taking away the rights of B, and consequently are instruments of injustice. . . . This species of feudality is kept up to aggrandize the corporations at the ruin of the towns; and the effect is visible.
How are we to characterize such a regime? For Paine, the answer is clear: “Their refusing or granting admissions to strangers, which has produced the custom of giving, selling, and buying freedom, has more of the nature of garrison authority than civil government.”

As with republican history, so too with republican constitutionalism. The Fifth Amendment protection of “persons” (later augmented in the Fourteenth) supports the idea of republican membership as an undifferentiated recognition of legal personhood and residency. Certainly, the federal government had the power to regulate naturalization, but controlling the movement of people across territorial borders was not an enumerated Tenth Amendment power. By contrast, the Declaration of Independence identified the use of said power as a grave injustice against republican liberty. The natural born citizenship clause did restrict certain offices from being held by aliens, but it self-evidently treated those cases as special exceptions to the rule of alien participation in the governance of the republic. Finally, the practice of alien suffrage was certainly not made unconstitutional and was widely recognized as being in line with both the spirit and letter of the Constitution.

**Nineteenth-Century Liberal Ideological Transformations**

The subsequent history of these ideas and institutions tracks with that of the radical Enlightenment more generally. From the foundation onward, it is one of relentless elitist onslaughts and precipitous popular decline. The first significant development was the steady cultural ascension of aristocratic (or oligarchic) and preservationist republicanism to a position of hegemony. The radical ideas of equality, toleration, and democracy at the core of insurgent republicanism had succeeded because they incorporated both popular and elite resistance against common enemies. Revolutions need broadly inclusive ideologies, and the principles of the radical Enlightenment fit the bill. Those pragmatic concerns functioned temporarily to check the aristocratic tendencies of many of the revolutionary leaders. No longer united in opposition to the British after the Revolution, those incommensurable but temporarily tolerated divisions quickly split into competing Democratic-Republican and Federalist factions. The latter quickly marshaled an array of antidemocratic, racist, xenophobic, and intolerant membership claims typical of elitist republicanism, which—aided by an oligarchy-owned press and a theological revival—gained broad popular acceptance. The principles of democratic republicanism may adhere naturally to revolutionary moments, but once the question shifts to preserving the revolutionary, the principles of aristocratic and moderate republicanism thrive.

Moderate Republicans had real reasons to fear radical republicanism. Democratic republicanism, in practice, was highly ascriptive and applicable only to white males. Nevertheless, the threat of its principles—equality, democracy, and mass suffrage—was measured by their universal appeal rather than their often hypocritical implementation. The history of eighteenth-century revolts and revolutions attests to as much. In addition to standard aristocratic concerns with paupers, vagabonds, and popular revolts (e.g., Shays’ rebellion), there were now also more serious concerns with internal slave revolts (inspired by the Haitian Revolution). The enemies who generated the most
ardent aristocratic fear were French immigrants. Few missed the French and Haitian revolutions that so worried the aristocratic class; and then the Federalists were inspired by the more radical republican principles of the American Revolution.55

Fear was the engine for incrementally more restrictive naturalization laws from the 1790s onward.56 The Alien and Sedition Acts (1798) were the legislative hallmarks of those reactionary politics. Admittedly, the reaction against President Adams and the Alien and Sedition Acts was swift and successful, and the acts lapsed under President Jefferson’s administration, the Alien Enemies Act excepted. A crucial element of the Democratic-Republican revolt (primarily an urban revolt) against the Alien and Sedition Acts was that they entailed the unconstitutional use of an undelegated power to control the movement of people across borders and the empowerment of the executive to revoke due process rights at whim.57 Nevertheless, the pushback against Adams, Alexander Hamilton, and other aristocratic assailants turned out to be the exception, not the rule. The Democratic-Republican victory was the historical high-water mark of the radical republican critique of migration and membership. Certainly, the Fifth and Tenth Amendments stood as significant constitutional hurdles going forward, but the aristocratic reaction would make steady inroads in shaping popular and elite opinion against these migration principles henceforth.

The second transformative shift was the passing of the Reconstruction Amendments (1865–70). Their importance for emancipating slaves has led to the celebration of ius soli as the eminent American contribution to theories of membership and migration ethics. That history is well known. Less well appreciated is how the constitutionalization and lionization of ius soli was instrumental in transforming and undermining the radical republican critique of migration and membership. The transformative aspect was crucial and beneficial. As we have seen, many of the insurgent republican ideas express radical Enlightenment notions of equality, democracy, and tolerance universally while simultaneously denying them in practice through various ascriptive and exclusionary practices. Certainly, there were critical voices, but in practice even the most outspoken radicals were deeply hypocritical. The long-term benefit of the Reconstruction Amendments for the radical republican tradition—although one that would only very slowly yield practical fruit—is their setting a constitutional barrier in defense of those principles against those ascriptive practices.

More immediate and detrimental was the conceptual and spatial transformation in the status of aliens vis-à-vis membership. Ius soli implied (but only implied) collapsing the distinction between alien friends and alien enemies of the colonial and postrevolutionary periods. The emerging conceptual correlates fostered a different distinction between aliens and citizens. The implicit relationship of enmity between insiders and outsiders created a new discursive framework within which the previously overt racist, xenophobic, and ascriptive membership categories of the Federalists (by then a popular position, too) could be reconfigured. Instead of the horizontal model of republican membership—which had global breadth but was ascriptively exclusive—the Reconstruction Amendments shifted the idea of republican membership to one more robustly inclusive but territorially delimited. The domestic depth of formal equality established in the Reconstruction Amendments was seemingly won at the cost of its
global breadth. Consequently, *ius soli*—irrespective of its *domestic* emancipatory elements—dealt a significant blow to the ideas of volitional allegiance and alien suffrage in their unbounded or principled senses by territorializing membership. It thereby undermined local endenization, volitional allegiance, and alien suffrage without ever broaching a debate.

When President Andrew Johnson vetoed the Civil Rights Act of 1866, he used that same argument as a foil for his opposition. Civil rights, Johnson asserted, are already “secured to all domiciled aliens and foreigners, even before the completion of the process of naturalization. . . . The bill in effect proposes a discrimination against large numbers of intelligent, worthy, and patriotic foreigners, and in favor of the negro.” The argument is absurd for many reasons, not the least being that the freedom of the foreigner does not have to be traded off against that of the slave. However, it did reveal that the notion still prevailed that aliens could freely enjoy the same domestic liberties as citizens. These arguments were not only available to be made and understood but also popular enough to be exploited by the president for political leverage.

The third transformation was the emergence of the plenary power doctrine in migration constitutional jurisprudence. As the chorus of opponents to the Alien and Sedition Acts attested, the Fifth Amendment affords rights to persons. And controlling the movement of people across borders is not an enumerated power of the federal government. The aristocratic assault against the most radical elements of the colonial republican critique of migration and membership could prevail in popular opinion and the political branches of government, but the signal weakness of the aristocratic exclusionary politics was that it could not readily overcome those constitutional hurdles. That problem was solved in 1889 when the plenary power doctrine was transferred from the realm of Indian affairs to migration jurisprudence. Doing so gave quasi-constitutional standing to the federal government’s claims to having sovereignty in questions of migration control. The plenary power doctrine is crucial to the subsequent analysis, and a longer explication of its genesis and function is in order.

The plenary power doctrine is rooted in the Indian laws and the requirement of a constitutional garb for westward expansion. No textual constitutional foundations were forthcoming. Hence, in the early Indian affairs cases, the assertion of federal legitimacy rested not on any constitutional principle but rather on the Hobbesian assertion of a right to conquest. Such references to extraconstitutional justifications were accepted by the court and have been a defining legal trait of the plenary power doctrine throughout its history. As Sarah Cleveland notes in reference to one particularly egregious plenary power ruling, “The most remarkable aspect of Justice Miller’s analysis was the complete absence of any reliance on the Constitution as the basis for national authority.” To ameliorate the constitutional paradox and avoid the noxious Hobbesian claims underlying the doctrine, jurists and courts found ample ideological support in the “enlightened” colonialism of Emer de Vattel and others.

The signal case for migration law was *Chae Chan Ping v. the United States* (1889), as it transposed the plenary power doctrine of federal sovereignty from the realm of Indian treatise law to migration law. Looking for some legal foundation to exclude
and deport Chinese migrants, the court had to go beyond the Constitution to the realm of international law. The plenary power doctrine was exactly what anti-immigration forces needed to juridically solidify their cultural gains against the radical republican tradition. The doctrine obviated the constitutional restraints that had been a bulwark against aristocratic anti-immigrant politics since the foundation.

It is worth pausing to consider the valence of international law on this crucial migration decision. The Founders certainly made routine reference to international law and norms. However, on the question of migration specifically, the radical wing of American republicanism was adamant that the international legal norm of perpetual allegiance amounted to a collusion of tyrants for keeping subjects at bay. The principle had to be rejected, even by the most aristocratic republicans. A revolutionary war of independence cannot unfold under conditions where it is accepted that the executive rightly holds the arbitrary power to rule on membership. However, returning to Chae Chan Ping, with the normative underpinning of the radical republican tradition now forgotten, the court could look upon the old international order with some enthusiasm. Hence, the court ruled that the ability to control the movement of people over borders was an “incident of sovereignty” that, although not an enumerated constitutional power, was imputed by the court to be held by the federal government.64 The European absolutist ideas, laws, and norms regarding migration thereby began returning under the guise of the sovereign (liberal) nation-state. If the Reconstruction Amendments implied a bounded mode of republican membership and a new relationship of enmity between citizens and aliens, Chae Chan Ping (quasi-)constitutionally established this relationship within the logics of European national sovereignty. Henceforth, aliens were no longer “people,” per se. In the eyes of the federal government, they became, as Gerald Neuman notes, agents of foreign governments.65

The so-called Chinese exclusion cases mark a schism in American migration politics. Following Chae Chan Ping, a cascade of anti-immigration decisions flowed from the court. In Nishimura Ekiu v. United States (1892), the court rejected the notion that aliens had the constitutional standing to claim due process rights, because due process could not result from statutes derived from the plenary powers.66 Furthermore, the court found that administrative officials could be empowered to wield those plenary powers without review.67 In Fong Yue v. United States (1893), the court found no meaningful difference between exclusion and deportation. If a distinction were to be made, it would have to be established by the political branches of government because, as a derivative of the plenary powers of the federal government, the whole issue was supposed intrinsically to be beyond judicial review (per Chae Chan Ping).68

**Toward Sanctuary: Twentieth-Century Plenary Powers, Constitutional Avoidance, and Plyler**

The court’s interpolation of the Constitution as unexceptionally European—not having emerged as a rejection of the dominant mode of European migration and membership politics but having continued them—amounted to a small counterrevolution. In the
realm of migration law, it marked an abdication of limited government, written constitutionalism, and judicial review. It is for that reason that “no constitutional source for the authority was offered.”69 This brings me to the driving paradox of twentieth-century American migration law.

If the court was to maintain an extraconstitutional doctrine of federal sovereignty in migration politics against constitutional challenges, it had to devise a strategy for circumventing, avoiding, or ignoring the paradox.70 This is a hazardous strategy for any court. At many points, it simply asserted the nonjusticiability of cases to avoid addressing the paradox. But its avoidance strategy cannot always succeed, in large part because migration issues naturally manifest deeply and broadly throughout society. Migration is not one legal issue; it is cross-cutting. In circumstances where the court could neither avoid nor reiterate the plenary power doctrine, the legal question at hand needed to be redirected toward more palatably judiciable topics. As many legal scholars have pointed out, this has been the strategy of the courts for over a century.

The avoidance strategy of the court has shaped the tactics of anti- and pro-immigrant forces.71 I will address the development of anti-immigration migration politics; but as they are best understood as reactions to pro-immigrant successes, I will start there. From the outset, the federal government’s claim to unchecked sovereign power in questions of migration was challenged, first in dissenting opinions, such as those of justices Brewer and Fuller in *Fong Yue Ting*, and more substantively in *Yamataya v. Fisher* (1903). Both cases focused on the location of aliens and the constitutional rights afforded to “people.” These early responses to the doctrine were the first attempts at what would become the strategy to reestablish footholds for alien non-domination. Key was to focus on issues in which the federal government was least able to deploy reasons-of-state arguments successfully and in which the denial of the rights of aliens would imply the denial of the rights of citizens as well. Tactical decisions were made to accept cases located far from the borders where aliens had established communal ties. The result was a series of cases that confirmed and augmented the Fourth, Fifth, and Fourteenth Amendment protections of aliens.72

Consider *Plyler v. Doe* (1982), an important signpost in the historical development of American migration law. *Plyler* shows the continued vitality of the radical Enlightenment ideas embedded in the Constitution and at the same time helps to characterize the kind of politics anti-immigration forces would subsequently set out to undermine.73 In July 1977, the Tyler Independent School District in eastern Texas began charging $1,000 annually for undocumented immigrant children to attend grade school. Led by the Mexican American Legal Defense and Educational Fund, the battle over the rights of these children to receive an education ultimately culminated in *Plyler*.74 The court ruled that aliens have the right to receive an education. The decision is worth quoting at length, because it clearly evinces the continued valence of the radical republican tradition on contemporary immigration jurisprudence:

The illegal aliens who are plaintiffs in these cases challenging the statute may claim the benefit of the Equal Protection Clause, which provides that no State shall “deny to any
person within its jurisdiction the equal protection of the laws.” Whatever his status under the immigration laws, an alien is a “person” in any ordinary sense of that term. This Court’s prior cases recognizing that illegal aliens are “persons” protected by the Due Process Clauses of the Fifth and Fourteenth Amendments, which Clauses do not include the phrase “within its jurisdiction,” cannot be distinguished on the asserted ground that persons who have entered the country illegally are not “within the jurisdiction” of a State even if they are present within its boundaries and subject to its laws. Nor do the logic and history of the Fourteenth Amendment support such a construction. Instead, use of the phrase “within its jurisdiction” confirms the understanding that the Fourteenth Amendment’s protection extends to anyone, citizen or stranger, who is subject to the laws of a State, and reaches into every corner of a State’s territory.75

*Plyler* was a crucial decision in the nondomination of aliens and a rather striking confirmation of the radical principle of equality expressed in the language of personhood. Henceforth, states had to provide children access to public education regardless of legal status. To the consternation of the dissenting justices—and signaling the irreconcilability of the two operative republican critiques of migration ethics—the decision was made despite the acknowledged “flood” of immigrants crossing the southern border and concerns that it would incentivize immigration for those seeking to secure their children’s education in the United States.

For many commentators writing around the time of *Plyler*, the appearance of a telos in the development of the plenary power doctrine—less breadth, more depth enunciated at a territorial border—foreshadowed a reckoning. Pushed to such an extreme, the extraconstitutionalism at its core would finally have to come under judicial scrutiny. By 1990, it appeared that the notion of the federal government’s holding unchecked privileges in questions of migration law was ready to crack under the pressure of its own paradoxes. At that time, Hiroshi Motomura concluded,

> to move confidently into the second century of immigration law, we need to understand what went wrong in the first century. The development of a subconstitutional case law based on phantom constitutional norms is persuasive evidence that as long as judges have discretion to decide cases, no area of law, not even immigration law, can hope to insulate itself forever from the rest of our legal culture. This was the vain hope, and ultimately the failure, of the plenary power doctrine.76

The hope was that the extraconstitutionality of the doctrine would come under constitutional review and it would be discarded on the basis of either the original intent or the text of the Constitution itself. However, instead of retreating or yielding power, the federal government—with the support of a chorus of anti-immigrant forces—reconfigured its deployment of the arbitrary powers conferred on it by the court. The result was a broad set of measures culminating in the illegalization of migrant life, which in turn motivated modern sanctuary city politics.

Following *Plyler*, the champions of federal sovereignty in questions of migration politics regrouped and refocused. If *Plyler* reasserted—rather astoundingly—the radical republican claim of the equality of persons under its jurisdiction, it also signaled
that the “persons” it referred to were the children of irregular migrants who had not chosen their path in life. Their parents, by contrast, were held to have quite consciously broken the federal law—by the fact of their irregularity—and were therefore justly subject to having their rights curtailed.\textsuperscript{77} That, in effect, was the juridical opening through which anti-immigration forces would have to act. Simultaneously, as Linda Bosniak notes, although the court asserted the individual culpability of the irregular migrant, it also raised questions of the structural culpability of the federal government for both encouraging the use of irregular migrants as cheap labor and not seriously attempting to stop irregular migrants at the border.\textsuperscript{78} Finally, the court showed sympathy for the condition of the irregular migrant who must live precariously under the sway of arbitrary powers.

Thus anti-immigration forces had two tasks: to make the irregular migrant an agent deserving of criminalization and then to criminalize that agent’s life. Having learned from the post–Civil War criminalization of black life, celebrants of the arbitrary power of the federal government found that they could project that power domestically by illegalizing alien life.\textsuperscript{79} Until the late 1970s, border policing was under the jurisdiction of the Immigration and Naturalization Services (INS), which, notably, defended its monopoly,\textsuperscript{80} in part because of the legal complexities involved with exploiting plenary power and the need to cloister that power from domestic legal challenges. However, following \textit{Plyler}, anti-immigrant forces changed tactics. By both vilifying irregular migrants and criminalizing alien life with the aim of deportation, federal sovereign power was not just allowed but compelled to be projected internally to the states. This was the first phase in what is called “immigration federalism.”

Immigration federalism describes the projection of federal policy at the local level by means of local enforcement, through a multiplicity of measures and means.\textsuperscript{81} Those measures are notably fine-grained and concerted. For example, the 1986 Immigration Reform and Control Act obligated employers to verify the legal status of employees. Others include banning access to food stamps, restricting access to Medicare, expanding the number of crimes that can result in deportation, punishing citizens who even unwittingly facilitate the movement of aliens across the border (including impounding their vehicles without trial), restricting due process rights, and allowing the use of secret evidence in deportation hearings, to mention just a few.\textsuperscript{82} By deputizing cities and states, inculcating itself into the processes of city life, the federal government was able to project its power at a granular level.\textsuperscript{83} Constitutional constraints against the deployment of federal powers domestically remained, but they were circumvented by way of negative incentives (such as making formerly unconditional grants to local police services conditional) and facilitating the communication of information from willing local law enforcement agencies to Immigration and Customs Enforcement (ICE).\textsuperscript{84} The resulting illegализation resulted in what Ridgley describes as a “trajectory of criminalization [that] helps legitimize withholding some of the most basic civil rights from noncitizens, including due process, prohibitions on detention without charges, and freedom from discrimination.”\textsuperscript{85}
Twenty-First-Century Sanctuary Cities

I am now positioned to describe a new historical, constitutional, and ideological vantage point for analyzing what sanctuary cities do and how they do it. Sanctuary cities are the most recent episode in a long-running contestation between radical republican principles and moderate or elitist republican principles (conjoined to liberal notions of national sovereignty). Within that general historical and conceptual framework, a series of observations into the history and theory of sanctuary city politics can be ascertained and the contemporary literature on sanctuary cities evaluated.

The first point is to note that sanctuary cities are the latest episode in the politics of immigration federalism. At the tail end of the turn to “crimmigration,” scholars began to use the term “immigration federalism” to describe the federal government’s various practices of deputizing state and local forces to implement and enforce federal immigration policy.86 The strength of immigrant federalism is simultaneously its weakness, as it makes the federal government dependent on pliable states and localities. Federalism is, of course, a theory of dual sovereignty. “New immigrant federalism” describes the politics of states’ using their constitutional powers to push back against the politics of federal conscription.87 The consequences of immigration federalism for aliens and citizens alike rejuvenated city- and state-level concerns about immigration and (in)justice. Once those concerns were broached—and as segments of the public became weary of the federal government’s treatment of aliens—the seemingly natural subordinate status of the states and cities was revealed as unfounded. Indeed, the opposite was shown to be the case. Sanctuary cities are the most flagrant expression of new immigrant federalism.88

Sanctuary cities can profitably be understood through republican political theoretical categories. Sanctuary cities implement reactive and proactive measures exploiting the law and politics of immigrant federalism with the intent of bolstering institutions of political nondomination of the irregular migrant in relation to the federal government.89 One common approach is for agencies to temper the relationship of domination between the alien and the federal government by breaking the cycle of information from local police forces to the federal government.90 For example, sanctuary cities will pass ordinances that compel (or allow) city employees to inquire only into the residency status of people using city services and not into their citizenship status. Similarly, many sanctuary cities make reporting on the citizenship status of those detained by police a choice on the part of the officer. For example, New York City’s Executive Order 124 prohibited the New York Police Department from investigating and reporting on immigrant status.91 The order was challenged by the federal government, and although the city ultimately lost the case, it lost in a way that made sanctuary possible.92 The court found that the city cannot bar police officers from volunteering to inform ICE about the status of suspected criminals. However, in doing so, they confirmed the voluntary nature of the application of the law. Henceforth, the city made reporting immigration status optional. In 2008, Hartford, Connecticut, passed a similar resolution.93 That is to say, sanctuary cities are what neorepublicanism would term institutions of political nondomination.
Many sanctuary cities function as institutions of social nondomination for irregular migrants. Some cities have provided access to extra educational opportunities for young people and classes in English as a second language for older immigrants. Some sanctuary cities set up institutions to circumvent the requirements for official governmental identification by creating their own official ID cards. For example, in 2007, New Haven, Connecticut, created ID cards that provided full access to the city’s resources and facilities for any local resident, regardless of immigration status. It is important to realize just how critical these mundane services are for the nondomination of immigrants. Driver’s licenses serve the obvious function of allowing illegalized aliens to drive legally, but they also provide official identification that gives undocumented immigrants access to other local and state services. Basic social capabilities—using public transit, accessing medical care, signing utilities contracts, getting one’s garbage picked up, filing noise complaints, and a variety of others—are the quotidian drudgery of city life and the unregistered minutia of social nondomination. For aliens suffering under the arbitrariness of the federal government, unmoled access to these services constitutes the substantive differences between less dominated inclusion and more dominated exclusion.

Furthermore, sanctuary cities are leading the way in restoring alien suffrage. Again, historical reconstruction affords significant analytical insights into why suffrage would be on the sanctuary city agenda and, more concretely, how it could be legally asserted. Plyler anticipated this development. As Justice Blackmun wrote in his concurrence, “In a sense, then, denial of an education is the analogue of denial of the right to vote: the former relegates the individual to second-class social status; the latter places him at a permanent political disadvantage.” The connection between Blackmun’s observation and the core assertions of the radical republican defense of the rights of residents, ready endenization, and volitional allegiance is apparent. The dissenting opinion registered these politics as threats but—despite gesturing toward the plenary powers of the federal government—ultimately could not directly revert to the language of sovereignty, because of the use of “persons” in the Fourteenth Amendment. What Plyler did for education and social justice, sanctuary cities are beginning to do for a range of other political and social issues.

Sanctuary cities also embody a mode of membership similar to that affirmed by colonists who wanted to assert their independence from an unresponsive British regime. Again, this is a mode of membership forged in the hearth of republican considerations, with freedom as nondomination. Sanctuary cities evoke the language of residency and denizenship, pervasive before the revolution, stripped (in principle) of its ascriptive past by the Reconstruction Amendments, and recast within the post–Chae Chan Ping spatial logics of the federal sovereignty. Although it often goes unstated, sanctuary cities assume a form of volitional allegiance. They tacitly reject Lockean social contractualism and resist membership regimes that mimic the exclusionary corporate-charter regimes of the early modern period. Sanctuary cities do not distinguish between citizens and aliens; they register only residents. The experimentation with membership
spawned by British recalcitrance in the colonial era resonates with the flourishing of experimental migration governance seen in the legislation of hundreds of sanctuary cities—as it should, since the constitutional foundations of the latter were the constitutional outputs of the former. Sanctuary politics do not manifest an “alternative vision of citizenship,” as many critical scholars have argued, so much as they manifest one of the original visions of republican membership.104

I can now set out the case against radical democratic accounts of sanctuary cities. Radical democratic (broadly understood) critiques yield only partial explanations and often risk serious misunderstanding of what sanctuary cities are. The focus on political activism and civil disobedience is the core problem. As has been shown, political activism may help generate political support for sanctuary politics but is unrelated to the purpose or the institutional substance of sanctuary cities. Above all, sanctuary cities must be understood as institutions with constitutional standing that afford protection to residents. They are not transgressive forms of politics. Nor are they directed toward “doing politics” or civil disobedience. Sanctuary cities cannot be understood as a form of civil disobedience because there is no law breaking involved. The point of sanctuary cities is to allow irregular migrants to go about their day without fear of molestation by unchecked federal forces. That is an elementally republican principle.

To use Philip Pettit’s language, sanctuary cities are institutions that enable irregular migrants not to kowtow or act slavishly but to look people in the eye.105 Critical migration scholarship is quite correct in showing how sanctuary politics fostered inventive and rebellious acts of forming “political subjectivity.” The insight of a longer republican historical analysis is that these practices also predated the Westphalian state, just as they appear to postdate it.

Similarly, I can now diagnose the two related reasons that liberal critiques of migration ethics are so routinely inapt for evaluating what sanctuary cities are and why they are important. The first is that they presuppose a set of political categories and concerns—the nation-state,106 borders, freedom as noninterference—peripheral to the politics that positively constitute and motivate sanctuary cities in history, theory, or practice. Second, we can now see with some precision how the liberal notion and practice of national sovereignty was conjoined with aristocratic republicanism and put to work to undermine the core republican principles embodied first in the colonial and postrevolutionary periods and now in sanctuary cities. The history of the decline of the migration politics animating those politics closely tracks the ascension of Lockean liberal nationalism in popular culture, political branches of government, and finally the Supreme Court. The idea of the nation-state that animates so much of contemporary migration ethics—and which is often taken as a political given—reiterates that historical assault on the republican critique of migration politics.

Sanctuary churches and cities seem to be closely related historically; but their historical proximity should not be conflated with a robust historical connection. Both shield irregular migrants from the power of the federal government, and they do so
under the banner of “sanctuary.” There are activist elements in both. However, those connections are quite thin. To focus only on them obscures more than it reveals. As has been shown, sanctuary cities are not sites of civil disobedience and they are not social movements. Although many cities declared themselves sanctuary (or “welcoming”) cities after the sanctuary church movement was repressed by the federal government in the 1980s, none of the post-2000 sanctuary cities refer to sanctuary churches or imperatives to aid refugees or resist American foreign international aggression. Those concerns simply are no longer on the sanctuary agenda, which strongly indicates that the civil disobedience central to the first sanctuary cities was not a persistent or regular trait of all sanctuary cities. Instead, the concern is overwhelmingly one of municipal care for its denizens.

More important, the substantive legal, constitutional, and institutional roots of contemporary sanctuary cities are categorically different from the sanctuary church movement. “Sanctuary,” in the religious sense, means protection of those fleeing persecution and prosecution. The sanctuary churches filled that role, but sanctuary cities do not. Conflating these two sites of migration politics unavoidably muddles our understanding. All things considered, the term “sanctuary city” is a misnomer. In April of 2018, the US Court of Appeals for the Seventh Circuit set out to clarify this same point:

The City uses the term Welcoming City in its ordinance, localities which have concluded that cooperation in federal civil immigration efforts is counterproductive or simply offensive are often labeled “sanctuary” cities or states, but that term is commonly misunderstood. The term signifies a place of refuge or protection . . . and is used for example to describe a house of worship, into which, if a person flees, law enforcement authorities commonly will not enter to forcibly remove the person. That definition has no correlation to the so-called sanctuary cities at issue here.107 The judge had to force this definition because the confusion that follows from the widely held understanding of sanctuary cities as continuing the civil disobedience politics of the sanctuary church—a confusion seen at both academic and public levels—muddies the legal issues surrounding sanctuary cities and their dissimilarity to sanctuary churches. Sanctuary churches are acts of civil disobedience. They accept the legality of the state’s action but dispute the morality of those actions. In sharp contrast, sanctuary cities are law-abiding entities that challenge the constitutionality of the federal government’s assault on irregular migrants.

To be clear, I am not calling into question the historical chronology of the events. Sanctuary cities were created after the sanctuary church movement, and indeed some early sanctuary cities were directly inspired by the sanctuary church movement and set out to overcome its inherent limitations. However, I do argue that that historical narrative accounts for only a nominal connection to a specific moment in the history of sanctuary politics; it tells a very small part of a much longer story and an unrepresentative part at that. Furthermore, I argue that to understand the substantive aspects of sanctuary cities today—their legal, constitutional, and political significance—we need to trace their roots back to their origins.
A second point of clarification: I am not claiming that the officials, activists, or beneficiaries involved with sanctuary politics are intentionally rehashing the ideology of democratic republicanism. There may be affinities between the principles underlying the radical Enlightenment and those of the officials, activists, and beneficiaries of sanctuary politics, but my argument does not rest on those affinities. Indeed, the historical reconstruction above brings into focus the extent to which the aristocratic republican tradition has merged with liberal statism and become hegemonic. The radical Enlightenment critique of democratic republicanism may have flourished before and during the foundation of the republic, but there is little left of it today. However, as I have tried to show, the judges and justices bearing on each particular case—and, as detailed below, at least one Supreme Court justice today—are quite attuned to this other tradition.

Accepting the analysis above, then, how is it that sanctuary cities have taken a republican form? The answer—summarizing my arguments above—is that institutions and constitutions matter. Generally speaking, they can carry the burdens of republican liberty for some time, even where there is a poverty of express republican ideological support. But we need not romanticize this history. The strength of the sanctuary city movement is grounded in the politics of states’ rights and in rather strong (textualist) constitutional claims. Those principles have long been defended by political forces with little sympathy for the politics of sanctuary, but those same defenses carry over to sanctuary cities. For that reason, despite a concerted and successful assault on the ideology of the radical Enlightenment as manifested in migration politics and law—against democracy, equality, tolerance, and the rights of peoples (as opposed to citizens) and for xenophobia, racism, and intolerance—the agents of sanctuary (citizens, aliens, lawyers, activists) have nevertheless found strong constitutional footings to defend those principles. Even if the principles have been forgotten, the same arguments and constitutional footholds can be used by various parties making analogous claims—and as we can see, they already have been.

An important historical-institutional clarification follows from that general observation. There is a tendency in the literature of sanctuary cities to presume that they sprang up ex nihilo in the late twentieth century in response to a particular confluence of political pressures, perhaps spurred on by sanctuary churches. In essence, what the historical reconstruction above shows is that the opposite is the case. On the topic of migration, the republic was, in principle, founded as a global sanctuary. The history I have tracked above is one of the progressive erosion of the scope of those principles over time. Of course, every observer of American history and migration politics will scoff at the principle of “global sanctuary” and note—as I have above—that those principles were never realized in practice and were often foils for exclusion, repression, slavery, and genocide. That is not in doubt. But it is worth drawing attention to an inverse historical process. Sanctuary cities have deployed constitutional and institutional powers derived from those radically ascriptive principles to form a politics that rejects ascriptive considerations and thus tries to realize those founding principles in a remarkably universal form. Sanctuary cities are not new; they are what remain.
Having shown the limitations of liberal and radical democratic critiques of sanctuary cities and the standard historical account—and having established their republican historical and theoretical credentials—I turn to the question of stakes. Legally at stake is the plenary power doctrine, the (quasi)constitutional foundation of federal sovereignty in modern American migration law. The court’s strategy has resulted in the whittling down of the constitutional pedestal of federal sovereign power and simultaneously allowed for the enormous expansion of federal power in certain areas of migration law. The (quasi)constitutional paradox that has generated and shaped contentious pro- and anti-immigration debates over the course of modern American migration is seemingly coming to a head: whether to uphold a constitutionally dubious doctrine, one antithetical to core democratic republican principles, or not to uphold it and risk bringing the enormous police and administrative apparatus of federal immigration law enforcement into legal uncertainty. That conclusion can be drawn from the long historical narrative set out above; it has also been reached by a growing array of legal scholars.\(^{109}\) There are certainly other constitutional means whereby the federal government could (and does) police the movement of people across borders (the Commerce Clause, most obviously). So the legal and political implications may not be calamitous. Nevertheless, the risks are high, and they are, in sum, what is specifically at stake in the politics of sanctuary cities.

However, the stakes are more general still. Where the country lands on questions of sanctuary is a measure of where it stands on core principles of republican liberty. Hence it follows that the stakes are not only (or even primarily) related to the domination of the irregular migrant. The illegalization of migrant life is a rather acute form of social and political domination. However, as a matter of constitutional character, unchecked federal power is an assault on the republican liberties of persons in general, irrespective of citizenship status.\(^{110}\) Domination for some portends domination for all.\(^{111}\)

That brings me to the normative lessons to be learned from the history at hand. I have focused on the limitations of liberalism and radical democracy as frameworks for understanding sanctuary cities. I have also conceded that analytically there is no case—and no need to make one—that contemporary sanctuary politics is rooted in the ideology of radical republicanism. Nevertheless, a normative critique concerned with how sanctuary supporters should stake their claims seems apt and potentially powerful. Not only are the usual liberal and radical democratic debates in the political theory of migration largely inapt—insofar as they offer any analytical insights—their normative value seems similarly gaunt. By contrast, the language of nondomination, anti-slavery, and equality—and notions of freedom as institutionalized nondomination—has historically encompassed very powerful lines of argumentation capable of motivating political change. Agents involved with sanctuary politics (such as irregular migrants, citizens, activists, pundits, and academics) could revive and make use of democratic republican theory and ideology. Indeed, there are many good reasons to think that the republican approach could cast a far wider net than liberal or radical democratic critiques, primarily for reasons of self-interest. Liberal critiques tend toward pitying irregular migrants (if they are of a cosmopolitan persuasion) or denigrating them (if
they are of the more nationalist variant). Radical democratic critiques valorize the activism against the status quo. The virtue of the democratic republican critique of migration ethics is that it makes a clear and persuasive case that the well-being of the irregular migrant is linked to the well-being of citizens. That, we recall, was Paine’s very worry: “Their refusing or granting admissions to strangers, which has produced the custom of giving, selling, and buying freedom, has more of the nature of garrison authority than civil government.”

Notably—and I conclude on this point—some in the Supreme Court appear to agree with my evaluation. It has not yet addressed sanctuary cities head-on, but a debate is unfolding within related decisions, signaling that the court is ramping up its preparations to address the constitutionality of the federal government’s unchecked sovereignty in migration politics. Lending further confirmation to this article’s thesis, the framework of those preparations is in line with the history of competing republicanisms sketched above. Sessions, Attorney General v. Dimaya (decided April 17, 2018) is a case in point. James Dimaya was a lawful permanent resident who committed two first-degree burglaries. The federal government sought to deport him. The case concerns a specific question regarding whether the pertinent law was unconstitutionally vague. What is important is not the decision itself but the stunning ancillary debate between justices Thomas and Gorsuch that unfolded within their separate dissent and concurrence, respectively. There, the constitutionality of federal sovereignty claims is broached through a proxy discussion of the power of the executive over aliens in general. Justice Thomas throws down the gauntlet, and Justice Gorsuch responds.

Justice Thomas begins by arguing that the question of vagueness is not sufficient to merit constitutional review, then he quickly moves on to his main target. “Even assuming the Due Process Clause prohibits vague laws, this prohibition might not apply to laws governing the removal of aliens.” He then proceeds to lay out a historical case, which amounts to a summation of the two-century-long aristocratic reaction against the most radical elements of the revolutionary republican tradition. Justice Thomas asserts the precedential importance of English constitutional law in the field of migration by asserting the continuity of Blackstone’s defense of perpetual allegiance. He reviews the Alien and Sedition Acts, notes that they were enacted by the Fifth Congress, defends the Federalist justification of the acts, attacks the Democratic-Republicans, and reiterates the feudal connection of the acts by noting they were “modeled after the Alien Act 1793 in England, which similarly gave the King unfettered discretion to expel aliens.” On that foundation, Justice Thomas’s position unfolds as expected. He, like the justices in Chaey Chan Ping, anchors his claim to international legal norms and Vattel in particular, cites Fong Yue v. United States (1893), and then points out, quite correctly, that this history and these decisions have formed the foundation of claims to executive privilege in questions of migration for some two hundred years. Notably, although legislative and precedential textual evidence abounds, constitutional support for Justice Thomas’s position is conspicuously thin. As we have seen, that has been the problem of Supreme Court justices when creating and upholding the plenary power doctrine. But they have not been staunch originalists, which makes Justice Thomas’s defense all the more striking. Justice Thomas’s sources for interpretation look to prerevolutionary feudal membership and alienage principles (which the
Founders expressly revolted against) and to late nineteenth-century European notions of national sovereignty (Chae Chan Ping). Justice Thomas, at least in regard to the idea of unchecked executive power in the realm of migration, is not an originalist; he is a loyalist.

Justice Gorsuch sets out the alternative position. Tactfully forgoing consideration of Justice Thomas’s asserting a precedential relationship between a feudal monarch’s arbitrary power to define subjectship and alienage and the Revolution—and also allowing that “precedent seemingly requires”¹¹⁹ that the court endorse unchecked executive prerogative or “unfettered discretion”—Justice Gorsuch outlines the other side of Justice Thomas’s story (or, to put it in the framework assumed throughout this article, he outlines the radical Enlightenment side of Justice Thomas’s moderate Enlightenment story). The Alien and Sedition Acts, Justice Gorsuch writes, were among “the most notorious laws in our country’s history”; they were “widely condemned as unconstitutional,” repudiated by the people, and brought about the demise of the Federalist Party and Jefferson’s election.¹²⁰ Appropriately, Justice Gorsuch then goes on to review many cases in which the court has endorsed the constitutional rights of aliens. Where Justice Thomas cites the feudal legal regimes that underwrote English notions of perpetual allegiance, Justice Gorsuch returns to basic republican constitutional principles: “A government of laws and not of men can never tolerate that arbitrary power.”¹²¹

It is a brief retort, and my intention is not to delve into these opinions. However, it allows me to make two final summative observations. First, the long history of competing radical and reactionary American migration politics sketched above is not a quixotic interpolation. I believe it is a debate that is vibrantly alive in contemporary judicial debates. Second, those debates will almost certainly shape the future of sanctuary cities and states as well as the republic. The court will decide the fate of the plenary power doctrine in American migration law and politics. Until then, sanctuary cities will remain for aliens and citizens alike a bulwark of republican freedom against arbitrary federal power. It is far from certain that sanctuary cities can withstand the present assault.

Conclusions

I have made three arguments. The first is that the historical frame normally housing sanctuary politics is superficial and essentially nominal. Yes, sanctuary cities followed sanctuary churches, and some were initially inspired by them. But, substantively, these two modes of politics are essentially unrelated. Sanctuary cities have constitutional and ideological roots in the colonial republican period. The second argument is that the politics demonstrated by sanctuary cities can be only partially captured by liberal and radical democratic theory. Again, both focus on exceptions and fail to explain sanctuary politics in a robust way. I argue rather that, for a variety of reasons, republicanism is a more astute analytical framework for thinking about sanctuary cities; sanctuary cities are republican institutions of nondomination. My third argument is that there are normative reasons why republicanism should guide how we think about
sanctuary cities. All three arguments bring me to the cumulative point regarding what is at stake. At stake in the politics of sanctuary cities is the federal government’s sovereignty in the field of migration politics. More generally, the republican liberties of migrants and citizens alike are at risk.

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Notes

1. I will use “irregular migrants” in the hope of its being minimally laden with other peoples’ norms (thanks to Rainer Bauböck for suggesting the term). I will also use the term “alien” as it is commonly used in the legal scholarship.


8. For a longer account of this problem, see Hoye, “Neorepublicanism, Old Imperialism.”


24. Marfleet, “Understanding ‘Sanctuary.’”
York: Zed Books, 2008), 15–43. For a recent overview of radical democratic thought, see Martin Breau, Christopher Holman, Rachel Magnusson, Paul Mazzocchi, and Devin Penner, eds., Thinking Radical Democracy: The Return to Politics in Post-War France (Toronto: University of Toronto Press, 2015).


27. Gulasekaram and Ramakrishnan, New Immigration Federalism, chap. 4.


29. Ibid., 60.

30. Ibid., 42–69.

31. Ibid., 60; Zolberg, Nation by Design, 26–34.

32. Baseler, Asylum for Mankind, 60–69.

33. Ibid., 63.


42. Ibid., 1403.

43. Ibid., 1404–5.

44. Ibid., 1406.


50. Ibid., 216, emphasis added.

51. Ibid., 217.

52. On the natural born citizenship clause and the radical republican tradition, see Hoye, “Migration, Membership, and Republican Liberty.”


these historical transformations, see Gulasekaram and Ramakrishnan, *New Immigration Federalism*, chap. 2.

59. Cleveland, “Powers Inherent in Sovereignty.”

60. Ibid., 25–80.

61. Ibid., 62.

62. Ibid., 31, 40.


64. Chae Chan Ping v. United States, US Supreme Court, May 13, 1889.


68. Ibid., 553.


78. Ibid., 67–68.


88. E.g., the so-called California Values Act that passed in 2017 in response to President Donald Trump’s immigration policies.

89. Here, I understand political nondomination in Philip Pettit’s sense: Pettit, *On the People’s Terms*, chap. 3.


94. On social justice and nondomination, see Pettit, *On the People’s Terms*, chap. 2.


100. Plyler v. Doe, at 234.


102. Hoye, “Migration, Membership, and Republican Liberty.”

103. Membership as denizenship and residency is a common attribute of city-level membership politics and theory. See Rainer Bauböck, “Reinventing Urban Citizenship,” *Citizenship*


105. Pettit describes the eyeball test as being able to “look others in the eye without reason for the fear or deference that a power of interference might inspire; they can walk tall and assume the public status, objective and subjective, of being equal in this regard with the best.” Pettit, On the People’s Terms, 84.

106. For a contemporary critique of the problem of methodological nationalism, see Sager, “Methodological Nationalism.”


110. On this point, see Hoye, “Migration, Membership, and Republican Liberty.”

111. Or, as David Cole writes, “What we do to immigrants creates a precedent that then makes it more thinkable to do the same to citizens.” Cole, “Enemy Aliens,” 989.

112. For a full development of this idea, see Hoye, “Migration, Membership, and Republican Liberty.”

113. Paine, Political Writings, 217.


116. Ibid., slip op. at 6.

117. Ibid., slip op. at 13–14.

118. Ibid., slip op. at 7.

119. Ibid., slip op. at 17, emphasis added.

120. Ibid., slip op. at 12.

121. Ibid., slip op. at 19.

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