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# Subfederal Immigration Regulation and the Trump Effect

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# SUBFEDERAL IMMIGRATION REGULATION AND THE TRUMP EFFECT

HUYEN PHAM<sup>†</sup> & PHAM HOANG VAN<sup>‡</sup>

*The restrictive changes made by the Trump presidency on U.S. immigration policy have been widely reported: the significant increases in both interior and border enforcement, the travel ban prohibiting immigration from majority-Muslim countries, and the decision to terminate the Deferred Action for Childhood Arrivals (DACA) program. Beyond the traditional levers of federal immigration control, this administration has also moved aggressively to harness the enforcement power of local and state police to increase interior immigration enforcement. To that end, the administration has employed both voluntary measures (like signing 287(g) agreements deputizing local police to enforce immigration laws) and involuntary measures (threatening to defund jurisdictions with so-called “sanctuary” laws).*

*What has been the “Trump Effect” on subfederal governments’ immigration policies? We define the Trump Effect as the influence that Trump’s immigration policies have had on the immigration policies of states, cities, and counties. Have they fallen in line with the federal push for restrictive policies and increased enforcement, or have they resisted? Using our unique Immigrant Climate Index (ICI), we track the response of cities, counties, and states by analyzing the immigration-related laws they enacted in 2017—the first year of the Trump administration—and comparing it to previous years’ activity. Based on our data, we make several observations. First, subfederal governments have responded with surprising speed and in unprecedented numbers to enact laws that are almost uniformly pro-immigrant. In response to increased federal enforcement, these subfederal governments have enacted “sanctuary” laws limiting their cooperation with federal immigration enforcement. Most of these laws were enacted by cities and counties, which enacted more immigration regulations in this one year than they enacted during the previous twelve years combined (2005–16).*

*Second, in the context of historical ICI scores, these immigrant-protective laws helped to pull the national ICI score sharply upward. By assigning scores (positive or negative) to each subfederal immigration law, our ICI has tracked the climate for immigrants on a state-by-state basis and identified distinct phases in subfederal immigration regulation since 2005. Though the national ICI score (where individual state scores are added together, through time) remains highly negative, we observe a distinct Trump effect in 2017: Immigrant-protective laws enacted by certain jurisdictions are creating more positive climates for immigrants in those jurisdictions.*

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*Finally, the nature of governmental sanctuary in 2017 was distinctly more diverse than the sanctuary we have seen in decades past. In 2017, big urban cities were not the most active sanctuary cities, as was the case in past years; rather, medium-sized cities and suburbs with populations under 100,000 prevailed. Though most of these smaller jurisdictions voted for Hillary Clinton in the 2016 presidential election, a surprising number voted for Trump. Moreover, new sanctuary entities have emerged—including public school districts, public universities, and even mass transit authorities—which have limited their own cooperation with federal immigration enforcement. This diversity in government sanctuary reflects another aspect of the Trump Effect: how harsh immigration enforcement policies under this administration have made immigration issues much more important to a wider range of communities and to a larger range of policy areas.*

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## INTRODUCTION

The impact of the Trump administration on the nation's immigration policy has been profound. Since the first year of his administration, President Donald Trump has implemented restrictive policies on multiple immigration fronts. Through executive orders, executive actions, and agency memoranda, President Trump issued directions to halt admissions from certain majority-Muslim countries,<sup>1</sup> significantly decrease refugee admissions,<sup>2</sup> end Temporary Protective Status (TPS)

<sup>1</sup> Exec. Order No. 13,769, 82 Fed. Reg. 8977, 8978 § 3(c) (Jan. 27, 2017) (banning entry to the United States for citizens of Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen).

<sup>2</sup> *Id.* at 8989 § 5(d) (lowering the number of refugees to be admitted into the United States in 2017 to 50,000).

for Haitians, Nicaraguans, and Sudanese,<sup>3</sup> and terminate the Deferred Action for Childhood Arrivals (DACA) program.<sup>4</sup>

Perhaps most consequentially, the administration's enforcement of federal immigration laws has been undertaken with special zeal. As the chief executive, President Trump has used his enforcement discretion to enlarge the pool of removable immigrants,<sup>5</sup> expand the places where they are arrested for removal,<sup>6</sup> and short-circuit the administrative process by which many are removed.<sup>7</sup> The result: record high arrests of immigrants without criminal records,<sup>8</sup> with arrests occurring in areas conventionally thought to be off-limits to immigration

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<sup>3</sup> *Temporary Protected Status Designated Country: Haiti*, USCIS, <https://www.uscis.gov/humanitarian/temporary-protected-status/temporary-protected-status-designated-country-haiti> (last visited Nov. 8, 2018); *Temporary Protected Status Designated Country: Nicaragua*, USCIS, <https://www.uscis.gov/humanitarian/temporary-protected-status/temporary-protected-status-designated-country-nicaragua> (last visited Nov. 8, 2018); *Temporary Protected Status Designated Country: Sudan*, USCIS, <https://www.uscis.gov/humanitarian/temporary-protected-status/temporary-protected-status-designated-country-sudan> (last visited Nov. 8, 2018).

<sup>4</sup> See, e.g., Eliana Johnson, *Trump Has Decided to End DACA, with 6-Month Delay*, POLITICO (Sept. 3, 2017), <https://www.politico.com/story/2017/09/03/trump-dreamers-immigration-daca-immigrants-242301> (describing the Trump administration's decision to end deferred action for immigrants that unlawfully arrived during their childhood); Brian Naylor, *Trump Ends DACA, Calls on Congress to Act*, NPR (Sept. 5, 2017), <https://www.npr.org/2017/09/05/546423550/trump-signals-end-to-daca-calls-on-congress-to-act> (same).

<sup>5</sup> Exec. Order No. 13,768, 82 Fed. Reg. 8799, 8800 § 5 (Jan. 25, 2017) (rescinding removal priorities instituted by the Obama administration that targeted immigrants with serious criminal histories).

<sup>6</sup> See, e.g., Avi Selk, *He Dropped His Daughter Off at School. Minutes Later, Immigration Agents Took Him Away.*, WASH. POST (Mar. 4, 2017), <https://www.washingtonpost.com/news/post-nation/wp/2017/03/04/he-dropped-his-daughter-off-at-school-minutes-later-immigration-agents-took-him-away/> (describing the ICE arrest of a father shortly after dropping his daughter off at school).

<sup>7</sup> See Exec. Order No. 13,767, 82 Fed. Reg. 8793 (Jan. 25, 2017) (expanding the application of expedited removal, which applies to immigrants who cannot prove that they have lived continuously in the United States for two years before apprehension); see also Nolan Rappaport, *What Trump's "Expedited Removal" Really Means for Immigrants in US*, HILL (Feb. 24, 2017, 5:20 PM), <http://thehill.com/blogs/pundits-blog/immigration/321102-what-expedited-removal-really-means-for-illegal-immigrants-in> (predicting that expanded expedited removal will place immigrants in a Catch-22 in which they can get relief from expedited removal by proving they have lived continuously in the United States for more than two years, but are prohibited by law from making asylum claims if they have lived in the United States for over a year).

<sup>8</sup> See Nick Miroff & Maria Sacchetti, *Trump Takes "Shackles" off ICE, Which Is Slapping Them on Immigrants Who Thought They Were Safe*, WASH. POST (Feb. 11, 2018), [https://www.washingtonpost.com/world/national-security/trump-takes-shackles-off-ice-which-is-slapping-them-on-immigrants-who-thought-they-were-safe/2018/02/11/4bd5c164-083a-11e8-b48c-b07fea957bd5\\_story.html](https://www.washingtonpost.com/world/national-security/trump-takes-shackles-off-ice-which-is-slapping-them-on-immigrants-who-thought-they-were-safe/2018/02/11/4bd5c164-083a-11e8-b48c-b07fea957bd5_story.html) (describing the doubling of noncriminal arrests by ICE in 2017, as compared with 2016).

enforcement—such as courthouses,<sup>9</sup> school areas,<sup>10</sup> within the vicinity of public rallies,<sup>11</sup> and even inside hospitals.<sup>12</sup>

A critical piece of this administration's enforcement strategy is to harness the manpower of larger state and local police agencies to help enforce federal immigration laws. Like previous administrations, the Trump administration has employed voluntary measures, like signing 287(g) agreements through which state and local law enforcement officers become deputized to enforce federal immigration laws.<sup>13</sup> Unlike previous administrations, however, President Trump has been relentless in trying to coerce participation from unwilling "sanctuary" jurisdictions. That coercion has come in the form of lawsuits accusing these jurisdictions of violating federal law by providing sanctuary to undocumented persons,<sup>14</sup> threats to cut federal funding,<sup>15</sup> and

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<sup>9</sup> See, e.g., Stephen Rex Brown, *ICE Courthouse Arrests of Immigrants by ICE Agents Have Risen 900% in New York This Year: Immigrant Defense Project*, N.Y. DAILY NEWS (Nov. 15, 2017), <http://www.nydailynews.com/new-york/ice-courthouse-arrests-immigrants-900-n-y-2017-article-1.3633463> (describing the 900% increase in ICE courthouse arrests in New York in 2017, with most of the arrests occurring in New York City); Maya Rhodan, *Plainclothes Officers Arrested Immigrants at a Courthouse. Can They Do That?*, TIME (Sept. 18, 2017), <http://time.com/4946747/immigration-plainclothes-brooklyn-courthouse/> (describing the arrests of four immigrants outside of a Brooklyn courthouse by ICE officers who did not identify themselves).

<sup>10</sup> See, e.g., Selk, *supra* note 6.

<sup>11</sup> E.g., Samantha Schmidt, *ICE Nabs Young "Dreamer" Applicant After She Speaks Out at a News Conference*, WASH. POST (Mar. 2, 2017), <https://www.washingtonpost.com/news/morning-mix/wp/2017/03/02/ice-nabs-young-dreamer-applicant-after-she-speaks-out-at-a-news-conference/> (recounting the story of ICE officers pulling over and arresting a 22-year-old "DREAMer" while she was driving home after speaking out at a public rally against the announcement to end DACA).

<sup>12</sup> E.g., John Burnett, *Border Patrol Arrests Parents While Infant Awaits Serious Operation*, NPR (Sept. 20, 2017), <https://www.npr.org/2017/09/20/552339976/border-patrol-arrests-parents-while-infant-awaits-serious-operation> (reporting that Border Patrol agents detained parents of an ill child receiving treatment during a hospital visit).

<sup>13</sup> See, e.g., Memorandum of Agreement Between U.S. ICE & Bristol Cty. Sheriff's Office (Jan. 18, 2017), [https://www.ice.gov/doclib/287gMOA/Bristol\\_MOA\\_01182017.pdf](https://www.ice.gov/doclib/287gMOA/Bristol_MOA_01182017.pdf); Memorandum of Agreement Between U.S. ICE & Cape May Cty. Sheriff's Office (Apr. 10, 2017), <https://www.ice.gov/doclib/287gMOA/287gCapeMayNj2017-04-10.pdf>; Memorandum of Agreement Between U.S. ICE & Clay Cty. Sheriff's Office (June 30, 2017), <https://www.ice.gov/doclib/287gMOA/clay-fl-2017.pdf>; Memorandum of Agreement Between U.S. ICE & Nye Cty. Sheriff's Office (Apr. 20, 2017), <https://www.ice.gov/doclib/287gMOA/287gNyeCounty2017.pdf>.

<sup>14</sup> See, e.g., Sarah N. Lynch & Dan Levine, *U.S. Justice Department Sues California Over 'Sanctuary' Policies*, REUTERS (Mar. 6, 2018), <https://www.reuters.com/article/us-usa-justice-immigration/u-s-justice-department-sues-california-over-sanctuary-policies-idUSKCN1GJ07T> (reporting that the federal government is suing the state of California for sanctuary policies protecting illegal immigrants from deportation).

<sup>15</sup> See, e.g., Letters from Alan Hanson, Acting Assistant Attorney Gen., U.S. Dep't of Justice, to Katherine Sheehan, Mayor, Albany, N.Y.; Jesse Arreguin, Mayor, Berkeley, Cal.; Debbie O'Malley, Chair, Cty. Comm'n, Bernadillo Cty., N.M.; Miro Weinberger, Mayor, Burlington, Vt.; Mary Jane Robb, Sheriff, Contra Costa Cty.; Tony Yarber, Mayor,

targeting immigrants in these jurisdictions with Immigration and Customs Enforcement (ICE) raids.<sup>16</sup>

How have states, cities, and counties reacted to these aggressively restrictive federal immigration policies? Have they fallen in line with the federal push for restrictive policies and increased enforcement, or have they resisted? Using our unique Immigrant Climate Index (ICI), we track the response of subfederal governments by analyzing the immigration-related laws they enacted in 2017—the first year of the Trump administration—and comparing their ICI scores to previous years' activity. The ICI, which tracks subfederal immigration laws since 2005 and calculates the immigrant climate they have created, provides a systematic way to observe and understand trends in subfederal immigration regulation.

Using historical ICI data, we discern a distinct Trump Effect on subfederal immigration regulation. For most of the subfederal regulations under study, the Trump Effect is clear, as the laws' preambles or legislative history either directly reference Trump policies or a more restrictive immigration climate generally.<sup>17</sup> Based on our data, we offer three observations about the Trump Effect and its implications.

First, the most visible manifestation of the Trump Effect was the sharp growth of subfederal immigration regulation in 2017, regulation that was overwhelmingly pro-immigrant in nature. Much of this growth occurred at the city and county level; in 2017, cities and counties enacted more immigration regulations in this single year than was ever enacted in the previous twelve years added together (2005–16). These laws are almost uniformly immigrant-protective, focusing on policing laws that limit the authority of local police to cooperate with federal immigration enforcement, or laws protecting access to local

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Jackson, Miss.; and others (Nov. 15, 2017), <https://www.justice.gov/opa/press-release/file/1011571/download>.

<sup>16</sup> See, e.g., *ICE Targeting 'Sanctuary Jurisdictions' in Latest Raids*, ALL THINGS CONSIDERED (Sept. 29, 2017), <https://www.npr.org/2017/09/29/554600966/ice-targeting-sanctuary-jurisdictions-in-latest-raids> (discussing ICE's targeting of sanctuary jurisdictions in Philadelphia, Los Angeles, Denver, and across the state of Massachusetts); Matt Pearce & Andrea Castillo, *Federal Agents Sweep Nearly 100 7-Eleven Stores in Immigration Investigation*, L.A. TIMES (Jan. 10, 2018), <http://www.latimes.com/nation/nationnow/la-na-7-eleven-probe-20180110-story.html> (reporting that 7-Elevens nationwide, including in Los Angeles, were targeted in ICE raids).

<sup>17</sup> See, e.g., Coachella City Council, Cal., Res. No. 2017-52 (Aug. 23, 2017) (proclaiming Coachella, California, as a sanctuary city); River Forest Vill. Bd., Ill., Res. No. 17-15 § 5 (Aug. 21, 2017) (limiting city officials' ability to stop or arrest individuals based on immigration detainers or warrants); Albany City Council, Cal., Res. No. 2017-9 (Apr. 17, 2017) (declaring Albany, California, as a sanctuary city); Newark, N.J. Exec. Order No. 17-0001 (June 19, 2017) (limiting local cooperation with federal immigration authorities).

services regardless of immigration status.<sup>18</sup> The Trump Effect was also felt at the state level—though in a less dramatic manner—as state legislatures were less active than city and county governments, and more evenly divided between immigrant-protective laws and immigrant-restrictive laws.<sup>19</sup>

Our second observation is that this Trump Effect has pulled the national ICI score sharply upward. By assigning a positive score to immigrant-protective laws and a negative score to immigrant-restrictive laws, our ICI has tracked the climate for immigrants on a state-by-state basis since 2005. Using this historical data, three different phases in subfederal immigration regulation emerge: Phase I of intensely negative regulation (2005–12), Phase II showing a small but consistent uptick in positive regulation (2012–16), and Phase III reflecting the Trump Effect and the sharp upward turn in the national ICI score (2017–present). Since its inception, the national ICI score (where ICI scores for all the states are added together) has been in negative territory, fueled by restrictive omnibus laws like Arizona’s Senate Bill 1070 (SB 1070).<sup>20</sup> Since 2012, however, the national ICI score has trended upward, and this most recent surge of pro-immigrant laws helps pull the national score further upward. Though the 2017 laws were primarily enacted at the city and county levels, and thus have less influence on ICI scores (versus statewide laws), the sheer number of laws and their uniformly immigrant-protective nature have positively influenced the national ICI score. More significantly, by using their own resources and governmental authority, these jurisdictions have helped create more protective climates for immigrants within their communities, although that protection is greatly limited by the federal government’s supremacy in immigration enforcement.

Our third observation focuses on the changing nature of sanctuary. In 2017, not only did the number of sanctuary governments

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<sup>18</sup> See, e.g., SPOKANE, WASH., MUN. CODE § 18.07.020 (2017) (restricting the ability of employees of the city to inquire about immigration status); Oxnard City Council, Cal., Res. No. 15,046 (July 25, 2017) (prohibiting city agencies from entering into enforcement agreements with ICE); Windham Town Council, Conn., Res. No. 2694 (Jan. 17, 2017) (prohibiting local personnel from cooperating with immigration enforcement agencies); Bd. of Comm’rs for Multnomah Cty., Or., Res. No. 2016-132 (Dec. 22, 2016) (declaring Multnomah County a sanctuary county); York, Pa. Exec. Order (Jan. 24, 2017) (ensuring access to city services and benefits regardless of immigration status).

<sup>19</sup> E.g., California Values Act, S. 54, 2017–18 Leg., Reg. Sess. (Cal. 2017) (restricting law enforcement cooperation with federal immigration authorities for certain misdemeanors but not for serious or violent felonies); S. 4, 85th Leg., Reg. Sess. (Tex. 2017) (prohibiting local entities and campus police forces from adopting policies prohibiting or materially limiting enforcement of immigration laws).

<sup>20</sup> S. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010) (declaring “attrition through enforcement” the public policy of Arizona).

increase, but these governments created more diverse concepts of “sanctuary.” During Phases I and II, sanctuary governments tended to be larger cities, with populations of over 100,000, as well as Democratic voting patterns. In contrast, the most active sanctuary governments in 2017 were smaller cities and suburbs, with populations between 50,000 and 100,000 people; though most of these smaller jurisdictions voted for Hillary Clinton in the 2016 presidential election, a surprising number voted for Trump. Finally, new types of governmental actors engaged in the immigration debate as school districts, universities, and even transit authorities issued policies limiting their cooperation with federal immigration enforcement.<sup>21</sup> This diversity in government sanctuary shows how immigration enforcement issues have become more important to a wider range of communities and to a larger range of policy areas.

This Article proceeds in three parts. Part I provides the historical and legal framework to understand subfederal immigration regulation generally and the most recent surge of regulation specifically. This Part introduces our Immigrant Climate Index and uses the ICI as an analytical tool to understand the three distinct phases of subfederal immigration regulation. Part II describes the Trump Effect in detail. We start with an overview of the Trump administration’s markedly more aggressive immigration policies, and then analyze the substance of the resulting laws enacted by states, cities, and counties during 2017. In Part III, we zoom out and consider the broader implications of this Trump Effect. Using our historical ICI data, we give context to this latest phase and offer a framework for thinking about the future of subfederal immigration regulation.

## I

### UNDERSTANDING SUBFEDERAL IMMIGRATION REGULATION

#### A. *The Immigrant Climate Index*

To understand the full implications of the Trump Effect, it is crucial to understand the historical background of subfederal immigra-

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<sup>21</sup> See, e.g., North Shore Sch. Dist., Ill., Res. Declaring District 112 a Safe Haven School District (Mar. 21, 2017) (forbidding employees from disclosing a student’s immigration status unless required by law); Indianapolis Bd. of Sch. Comm’rs, Ind., Res. No. 7736 (Feb. 23, 2017) (limiting employees to cooperate with immigration enforcement efforts only where required by law and with permission from superintendent); Des Moines Indep. Cmty. Sch. Dist., Iowa, Res. No. 17-019 (Feb. 7, 2017) (requiring all ICE requests to access school information or grounds to be funneled to the superintendent); Davis Joint Unified Sch. Dist., Cal., Res. No. 37-17 (May 4, 2017) (requiring written notice before the entry of any federal immigration officials onto school property).



tion regulation generally. To that end, the ICI provides a unique measure of the climate created by subfederal immigration regulations on a state-by-state basis.<sup>22</sup> The ICI collects and analyzes subfederal immigration laws, assigning numerical scores based on the effect and scope of the laws and calculating scores by state over time. With data collection starting in 2005—the first year with significant subfederal immigration regulation—the ICI provides parameters to understand the immediate Trump Effect on subfederal immigration regulation and the historical context to interpret the significance of that effect.

In constructing the ICI, we include regulations enacted by cities, counties, and states that specifically affect immigrants within their jurisdictions. With this definition, we are less concerned with the legal form of the regulation (e.g., whether it is styled as a law, an ordinance, a policy, or a resolution) and more concerned with its effect: Does it concretely affect the lives of immigrants, either in a positive or negative way? For our larger ICI project, we are interested in measuring how subfederal laws affect the daily lives of immigrants within their jurisdictions. For this Article, the focus on policy effect is crucial in measuring how the Trump administration's immigration policies affect subfederal immigration policies. While subfederal governments often pass resolutions expressing support for or opposition to some immigration policy or principle, such as increased federal immigration enforcement, these resolutions do not change how the subfederal governments actually operate.

To separate immigration regulation from subfederal regulation generally, we look for a specific effect on immigrants that differs from any possible effect on nonimmigrants. Often, the link to immigrants is clear, as the regulation singles out immigrants in its text (e.g., granting or denying a benefit based on immigration status).<sup>23</sup> Occasionally, the

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<sup>22</sup> See Huyen Pham & Pham Hoang Van, *Measuring the Climate for Immigrants: A State-by-State Analysis*, in STRANGE NEIGHBORS: THE ROLE OF STATES IN IMMIGRATION POLICY (Gabriel J. Chin & Carissa B. Hessick eds., 2014); Huyen Pham & Pham Hoang Van, *State-Created Immigration Climates and Domestic Migration*, 38 U. HAW. L. REV. 181 (2016).

<sup>23</sup> E.g., DENVER, COLO., REV. MUN. CODE ch. 28, art. VIII, § 28-250(a)(3) (2017) (forbidding the conditioning of public services on immigration or citizenship status); OAK PARK, ILL., VILLAGE CODE ch. 13, art. 7, § 4 (2017) (disallowing the conditioning of village benefits, opportunities, or services on citizenship or immigration status); ROCKVILLE, MD., CITY CODE ch. 11, art. 1, § 11-3(e) (2017) (barring city officials for discriminating on the basis of citizenship or immigration status); SALEM, MASS., CODE OF ORDINANCES ch. 2, art. XVII, § 2-2062(a) (2017) (stating that city services must be available to all regardless of country of origin unless prohibited by law); River Forest Vill. Bd., Ill., Res. No. 17-15 § 5 (Aug. 21, 2017) (banning city employees from conditioning services based on immigration status unless required by law); West Palm Beach City Comm'n, Fla., Res. No. 112-17 § 5 (Mar. 27, 2017) (forbidding the conditioning of public services on immigration or citizenship status unless required by law).

regulation does not mention immigrants or immigration at all but has a disproportionate effect on immigrants (e.g., laws requiring or prohibiting the translation of government documents into other languages).<sup>24</sup> Because of its disproportionate effect, this kind of regulation would be classified as a subfederal immigration regulation.

The laws used in order to build the ICI come from several sources, with collection starting in 2005. To collect state laws, we looked to the immigration-related legislation collected by the National Conference of State Legislatures (NCSL)<sup>25</sup> and, using our definition of subfederal immigration regulation, filtered out laws that did not have a concrete effect on immigrants' lives. We supplemented the NCSL data with our own news searches, to capture state-level laws not enacted by legislatures (e.g., an executive order issued by a governor).

Collecting city and county laws was more complicated given that no central clearinghouse exists for this type of local legislation. For our ICI, city and county laws were compiled from a variety of sources, including data collected by advocacy groups,<sup>26</sup> government websites,<sup>27</sup> and searches of electronic news databases.<sup>28</sup> For each law found, we contacted the local governmental entity to confirm that the law had been enacted, the date of enactment, and the substance of the law; whenever possible, we obtained a copy of the enacted law. If our research indicated that the law was rescinded (because of litigation or other reasons), we marked the year of rescission in our database and adjusted our ICI calculations to reflect the rescission. If a single law contains several different provisions, we consider each provision sepa-

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<sup>24</sup> See, e.g., MINN. STAT. § 120B.115(a)(7) (2014) (stating that regional centers of excellence may aid in the translation of district documents and must work to close the achievement gap between different types of English learners); Santa Fe City Council, N.M., Res. No. 2017-19 (8) (Feb. 22, 2017) (committing the city to improving language access to city services and programs).

<sup>25</sup> *About Us*, NAT'L CONF. ST. LEGISLATURES, <http://www.ncsl.org/aboutus.aspx> (last visited Nov. 4, 2018).

<sup>26</sup> See, e.g., LATINO JUST. PRLDEF, <http://latinojustice.org> (last visited Nov. 4, 2018); MEXICAN AM. LEGAL DEF. & EDUC. FUND, <http://maldef.org> (last visited Nov. 4, 2018); NAT'L DAY LABORER ORGANIZING NETWORK, <http://www.ndlon.org/en/> (last visited Nov. 4, 2018); OHIO JOBS & JUST. PAC, <http://www.ojjpac.org> (last visited Nov. 4, 2018).

<sup>27</sup> See *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. ICE, <https://www.ice.gov/287g> (last updated Aug. 10, 2018). One means by which ICE enforces federal immigration laws is through 287(g) agreements, partnerships with state or local law enforcement agencies wherein those agencies partnering with ICE are delegated authority to enforce immigration laws within their respective jurisdictions. The ICE 287(g) website includes basic descriptions and requirements of 287(g) agreements and lists each participating entity.

<sup>28</sup> See *Westlaw News Headlines*, REUTERS (2018), <https://www.reuters.com/news/archive/westLaw>.

rately and include all provisions that meet our substantive criteria in our calculations.

Because immigration regulations will vary in their effect, it is not an accurate reflection of the subfederal climate to simply count the laws enacted in states. To reflect that varying effect, we considered both a law's type and its geographic range when calculating its ICI score. Which laws have more impact? In his influential model, Abraham Maslow posited that humans are motivated to fulfill basic needs first (physiological needs, like food and shelter, and safety needs, like security and freedom from fear) before being able to fulfill growth needs (like relationships, esteem, and self-actualization).<sup>29</sup> For immigrants, research applying Maslow's hierarchy suggests that immigrants are pushed to focus on their basic needs first, regardless of the personality development level they reached before immigrating.<sup>30</sup>

Incorporating that research, we divided the laws into four basic types, assigning scores (or "tiers") of 1 to 4, with higher points for laws that have more impact on immigrants' lives (either positive or negative). Tier 4 laws are policing laws that affect the physical security of immigrants by either increasing deportation risk (e.g., a 287(g) agreement that deputizes local law enforcement officers to enforce immigration laws<sup>31</sup>) or decreasing that risk (e.g., a "sanctuary law" that prohibits the use of subfederal resources to enforce immigration laws<sup>32</sup>). Tier 3 includes laws that affect access to the very important benefits that cannot be replaced or are only replaced at high personal cost. Tier 3 includes laws that affect access to general employment or driver's licenses. An example of a negative Tier 3 law would be a regulation requiring public contractors to certify that all of their workers have legal work authorization;<sup>33</sup> an example of a positive Tier 3 law

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<sup>29</sup> Seymour Adler, *Maslow's Need Hierarchy and the Adjustment of Immigrants*, INT'L MIGRATION REV., Winter 1977, at 444.

<sup>30</sup> *Id.*

<sup>31</sup> See *supra* note 13 and accompanying text.

<sup>32</sup> See, e.g., DENVER, COLO., REV. MUN. CODE ch. 28, art. VIII, § 28-250(a) (2017) (barring any city funds or resources to assist federal immigration enforcement); NEWTON, MASS., REV. ORDINANCES, ch. 2, art. VI, § 2-405 (2017) (disallowing city funds from being used to assist federal immigration enforcement); ITHACA, N.Y., MUN. CODE ch. 215, art. VI, § 215-44 (2017) (forbidding city resources from aiding any federal program requiring registration of individuals on the basis of their national origin); Santa Monica City Council, Cal., Res. Embracing Diversity and Clarifying the City's Role in Enforcing Federal Immigration Law (Feb. 28, 2017) (forbidding the use of city resources to detain or register individuals based solely on their noncompliance with civil provisions of federal immigration law); Honolulu City Council, Haw., Res. No. 17-50, CD1 (Apr. 26, 2017) (requesting that no county funds be expended to aid ICE).

<sup>33</sup> See, e.g., TEX. NAT. RES. CODE ANN. § 81.072(b) (West 2017) (requiring the Texas Railroad Commission to "not award a contract for goods or services in this state to a contractor unless the contractor and any subcontractor register with and participate in the

would be a regulation granting driver's licenses regardless of immigration status.<sup>34</sup>

In our ICI, Tier 2 laws affect access to benefits that are important but can be more easily replaced. Examples include a law requiring proof of legal immigration status to obtain publicly funded health-care<sup>35</sup> or a law granting in-state college tuition rates to undocumented students.<sup>36</sup> Another common Tier 2 law limits access to a specific job (e.g., license to be an insurance agent) based on immigration status. All of these benefits are important but, because alternatives exist, we assign two points to laws that limit or increase access to these benefits. Finally, Tier 1 encompasses laws that affect immigrants' lives in a concrete—albeit less significant—way. For example, laws requiring or prohibiting the translation of government documents into a secondary language are assigned one point, either positive or negative.<sup>37</sup>

In calculating ICI scores, we also weigh laws differently depending on their geographic reach. Statewide laws are assigned whole points (from 1 to 4 points, depending on their tier). City and county laws, however, receive fractional points, weighted to represent their more limited jurisdiction as compared with state laws. For example, when Las Vegas signed a 287(g) agreement in 2008,<sup>38</sup> the negative four points that the 287(g) agreement would usually receive

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E-verify program to verify employee information”); TEX. TRANSP. CODE ANN. § 223.051(b) (West 2017) (stating that the Texas Department of Transportation “may not award a contract for the construction, maintenance, or improvement of a highway” to a contractor unless that contractor and any subcontractor is registered with and participating in E-verify).

<sup>34</sup> See, e.g., CAL. GOV'T CODE § 12926(v) (West 2018) (including “National Origin” as discrimination for the basis of possessing a driver's license granted under Section 12801.9 of the Vehicle Code); CAL. VEH. CODE § 12801.9(a) (West 2018) (stating that the Department of Motor Vehicles shall issue a driver's license to a person who is unable to submit satisfactory proof of authorized presence in the United States if he or she meets all other qualifications for getting a license and provides satisfactory proof to the DMV of his or her identity and California residency); D.C. CODE § 50-1401.05(a) (2018) (declaring emergency status and amending previous legislation to allow individuals who have been previously assigned a SSN but can no longer establish legal presence in the United States to obtain a limited purpose driver's license, permit, or identification).

<sup>35</sup> See, e.g., ARIZ. REV. STAT. ANN. § 36-2903.03(A) (2011) (requiring applicants applying for health benefits to provide documentation of citizenship or qualified alien status).

<sup>36</sup> See, e.g., COLO. REV. STAT. § 23-7-103(2)(o) (2018) (allowing undocumented immigrants to be classified as in-state students if the primary purpose behind their Colorado residence is not their education or that of a family member); CONN. GEN. STAT. § 10a-29(9) (2018) (allowing undocumented immigrants to receive in-state tuition for Connecticut universities if certain conditions are met).

<sup>37</sup> See *supra* note 24.

<sup>38</sup> See Memorandum of Agreement Between U.S. ICE & Las Vegas Metro. Police Dep't (Sept. 8, 2008), <https://www.ice.gov/doclib/287gMOA/287goldlasvegasmprd.pdf>.

under the tier system was reduced to reflect the city's smaller population, as compared with the larger Nevada population:

$$\begin{aligned} & 1,951,269 \text{ (population of Las Vegas metropolitan area)} \\ & \div 2,700,551 \text{ (population of Nevada)} \\ & \times \text{-4 tier points} \\ & = \text{-2.89 points} \end{aligned}$$

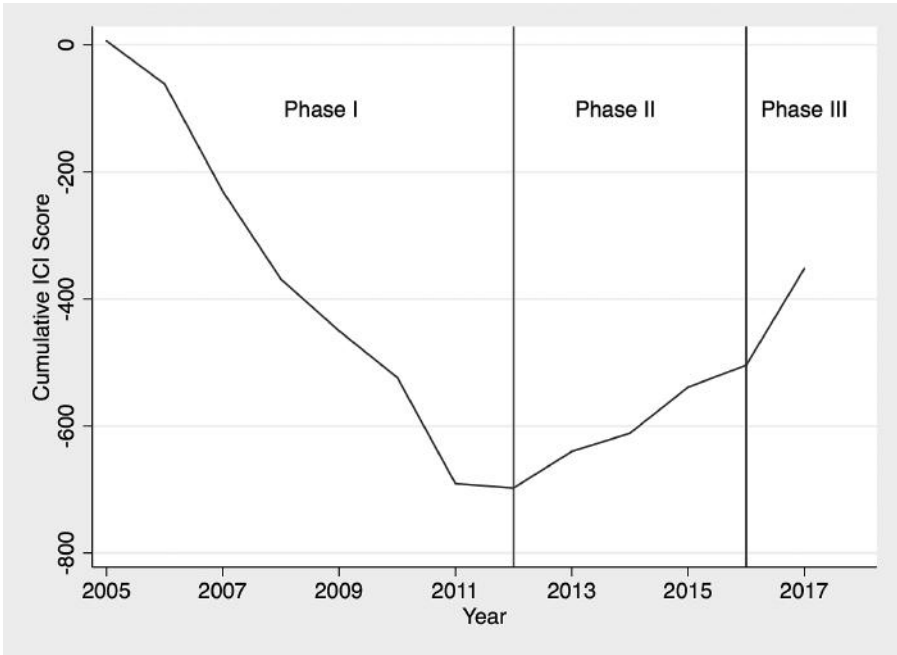
### *B. The Phases of Modern Subfederal Immigration Regulation*

We developed the ICI, in large part, to measure the growth and direction of subfederal immigration regulation. With an understanding of the ICI's construction and its data, we provide a richer, more nuanced history of subfederal immigration regulation. We emphasize the modern development of this phenomenon and, for reasons explained more fully below, we focus our analysis on subfederal regulation after the 9/11 attacks. Using national, cumulative ICI data, we identify three phases in this modern era of subfederal immigration regulation: Phase I, which includes intensely negative regulation (2005–12); Phase II, which shows a small but consistent uptick in positive regulation (2013–16); and Phase III, which reflects the Trump Effect, an increase in positive laws as well as changes in the types of local governments enacting these laws (2017). These phases become apparent when the national ICI score (a sum of individual states' scores) is viewed over time.<sup>39</sup>

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<sup>39</sup> See *infra* Figure 1.

FIGURE 1. NATIONAL ICI SCORES



National ICI Scores (2005–17)

In choosing a modern focus, we recognize that the history of subfederal immigration regulation in the United States is longer and more complex than what is discussed in this Article. States and local governments have long enacted laws that would qualify as subfederal immigration regulation under our definition. In this country's early history, dating as far back as the colonial period, states regulated the entry of immigrants who landed at their ports.<sup>40</sup> Since then, states have tried to enact subfederal immigration laws regulating the distribution of benefits like education and healthcare based on immigration status; the most restrictive of these laws have been struck down on preemption and other constitutional grounds.<sup>41</sup>

Yet even against this history, the subfederal immigration regulation that we have seen in the twenty-first century is unique. We trace

<sup>40</sup> See Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833, 1841 (1993) (noting that several colonies attempted to pass restrictive immigration legislation in response to the immigration of English persons convicted of crimes).

<sup>41</sup> See *Plyler v. Doe*, 457 U.S. 202 (1982) (striking down a state law that denied K–12 education to undocumented children on equal protection grounds); *Graham v. Richardson*, 403 U.S. 365 (1971) (invalidating state laws that denied welfare benefits to legal immigrant residents, holding that the laws were preempted by federal law and violated the equal protection clause).

the beginning of this regulation to the 9/11 attacks in 2001. Before those attacks, the federal government's position was that it had the exclusive authority to enforce civil immigration laws; subfederal governments, according to this view, only had legal authority to prosecute criminal immigration laws.<sup>42</sup> But after the 9/11 attacks, when the hijackers were determined to be Saudi nationals here on student and other temporary visas, Attorney General John Ashcroft issued an invitation to subfederal law enforcement agencies, asking them to become partners in enforcing federal immigration laws, both civil and criminal.<sup>43</sup> Using their "inherent authority" as sovereigns, Ashcroft argued that states could also enforce civil immigration laws (e.g., laws prohibiting visa overstays).<sup>44</sup>

The initial response was muted, as subfederal governments expressed reluctance to entangle themselves with immigration law enforcement. But with continued federal encouragement and national security concerns as a convenient foil, subfederal governments soon jumped into the legislative fray. According to the tracking done through our ICI and the National Conference of State Legislatures, subfederal governments at the city, county, and state level started enacting immigration laws in measurably higher numbers in 2005.<sup>45</sup> During Phase I, most of these laws were restrictive in nature, limiting the rights and benefits available to immigrants within the subfederal jurisdictions. In enacting these restrictive laws, subfederal governments cited frustration with the federal government's inability or unwillingness to enforce federal immigration laws, as well as the growing national security concerns in light of the 9/11 attacks.<sup>46</sup> Cities

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<sup>42</sup> See Assistance by State & Local Police in Apprehending Illegal Aliens, 20 Op. O.L.C. 26, 27 (1996), <http://www.justice.gov/sites/default/files/olc/opinions/1996/02/31/op-olc-v020-p0026.pdf> (opining that local police may enforce criminal but not civil provisions of the Immigration & Nationality Act); see also Christopher N. Lasch et al., *Understanding "Sanctuary Cities,"* 59 B.C. L. REV. 1703, 1720–21 (2018) (tracing the entanglement of immigration and criminal law enforcement to Reagan's War on Drugs that criminalized many drug offenses and thus increased the grounds for deportation).

<sup>43</sup> John Ashcroft, U.S. Attorney Gen., Prepared Remarks on the National Security Entry-Exit Registration System (June 6, 2002), <http://www.justice.gov/archive/ag/speeches/2002/060502agpreparedremarks.htm>.

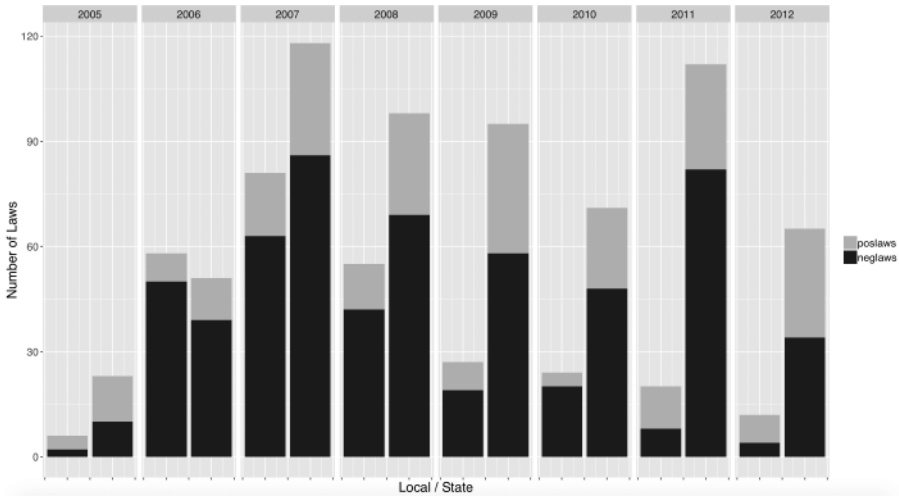
<sup>44</sup> *Id.*

<sup>45</sup> See *infra* Figure 2. In 2005, the National Conference of State Legislatures started compiling reports on immigration-related laws in 2005; before that year, state laws related to immigration were few in number and largely limited to the state distribution of social service benefits. E-mail from Ann Morse, Program Dir., Immigrant Policy Project, Nat'l Conference of State Legislatures, to Huyen Pham, Professor of Law, Tex. A&M Univ. Sch. of Law (Aug. 12, 2009, 11:57 EST) (on file with authors).

<sup>46</sup> See Dan Nowicki, *Arizona Immigration Law Ripples Through History, U.S. Politics*, ARIZ. REPUBLIC (July 25, 2010), <http://archive.azcentral.com/arizonarepublic/news/articles/2010/07/25/20100725immigration-law-history-politics.html> (blaming the Clinton and

like Hazleton, Pennsylvania, and Farmers Branch, Texas, enacted ordinances that restricted the ability of undocumented immigrants to rent housing, work, or obtain any public benefit within city limits.<sup>47</sup>

FIGURE 2. LOCAL LAWS AND STATE LAWS



Local Laws (first column) and State Laws (second column) (2005–12)

At the state level, states like Colorado and Georgia passed similarly comprehensive laws that required proof of lawful status for most state benefits, verification of work eligibility for state contractors’ employees, and authorization for the states to enter into 287(g) agreements with ICE.<sup>48</sup> During Phase I, a smattering of subfederal jurisdictions enacted positive laws but, as shown in Figure 2, the majority of laws were restrictive. Moreover, though local governments were initially active during Phase I, they were quickly outpaced by state governments.<sup>49</sup>

Obama administrations’ lack of immigration reform as the motivation for passing stricter state immigration laws).

<sup>47</sup> Federal courts struck down these provisions on preemption grounds. *Lozano v. City of Hazleton*, 724 F.3d 297 (3d Cir. 2013); *Villas at Parkside Partners v. City of Farmers Branch*, 726 F.3d 524 (5th Cir. 2013).

<sup>48</sup> H.R. 1017, 65th Gen. Assemb., 1st Spec. Sess. (Colo. 2006) (requiring employers to verify legal work status of all new employees); H.R. 1023, 65th Gen. Assemb., 1st Spec. Sess. (Colo. 2006) (mandating that a resident be either a lawful permanent resident or a citizen to receive public benefits); S. 529, 2005-06 Reg. Sess. (Ga. 2006) (authorizing the state to enter into 287(g) agreements with the Department of Justice; requiring public employers as well as contractors and subcontractors performing services within the state for a public employer to use E-Verify for all new employees; requiring certain private employers to use E-Verify for new full-time employees; and mandating that recipients of state benefits prove lawful immigration presence).

<sup>49</sup> See *supra* Figure 2.



In this sea of restrictive laws, the legislative activity of Arizona deserves special analysis. Starting in 2007, Arizona enacted the first of many negative immigration laws; furthermore, the types of restrictive laws enacted were predominantly of the most important type—Tier 4 policing-type laws that harness the power of local law enforcement agencies or otherwise impose criminal penalties to discourage illegal immigration. Because of the volume and restrictive nature of its immigration laws, Arizona has had the most negative ICI score among all the states, a “distinction” that continued into 2017. Not surprisingly then, Arizona gained a national reputation in the immigration debate, praised in some circles for taking a tough stance against illegal immigration, and condemned in others for embracing anti-immigrant and anti-Hispanic sentiment.<sup>50</sup>

Several other significant consequences flow from Arizona’s legislative activity. First, the legal challenges to its restrictive laws have resulted in two Supreme Court decisions which are part of the modern framework for permissible subfederal immigration regulation. The earlier decision, *Chamber of Commerce of the United States v. Whiting*,<sup>51</sup> upheld the Legal Arizona Workers Act, which authorized state courts to suspend or revoke the business license of an employer who intentionally or knowingly employs an “unauthorized alien.”<sup>52</sup> The Act also required all employers within the state to use E-Verify, a federal program that verifies the work eligibility of individual applicants.<sup>53</sup> In a 5-4 decision, the Court held that federal law did not preempt either of these provisions.<sup>54</sup> Specifically, the Court pointed to a provision in the federal Immigration Reform and Control Act which prohibits all state or local regulation of employer sanctions “other than through licensing and similar laws.”<sup>55</sup> This clause, the majority held, saved Arizona’s law from an express preemption challenge; looking more generally at Congress’s legislative scheme for employer

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<sup>50</sup> Compare Kris W. Kobach, *The Arizona Immigration Law: What It Actually Does, and Why It Is Constitutional* (Oct. 1, 2010), in 1173 HERITAGE LECTURES (Heritage Found., Washington, D.C.), Dec. 3, 2010, at 6, <https://www.heritage.org/immigration/report/the-arizona-immigration-law-what-it-actually-does-and-why-it-constitutional> (arguing that the Arizona law is “simply trying to help the federal government restore the rule of law”), with Alex Lach, *The Top 5 Reasons Why S.B. 1070 Damages America*, CTR. FOR AM. PROGRESS (June 25, 2012, 9:00 AM), <https://www.americanprogress.org/issues/immigration/news/2012/06/25/11785/the-top-5-reasons-why-s-b-1070-damages-america/> (arguing that the Arizona laws institutionalize racial profiling by allowing police to target people of color or those with a foreign accent).

<sup>51</sup> 563 U.S. 583 (2011).

<sup>52</sup> ARIZ. REV. STAT. ANN. §§ 23-212, 23-212.01 (2010).

<sup>53</sup> *Id.*

<sup>54</sup> *Whiting*, 563 U.S. at 611.

<sup>55</sup> 8 U.S.C. § 1324a(h)(2) (2018).

sanctions, the majority also found no conflict preemption.<sup>56</sup> This 2011 decision was widely understood to open the way for subfederal regulation of immigration employment.

*Arizona v. United States*,<sup>57</sup> the latter and more consequential lawsuit, involved a challenge to several provisions of Arizona's Senate Bill 1070 (SB 1070). The challenged provisions of SB 1070 (1) made unlawful presence in the United States a state crime, (2) made working or seeking work without lawful work authorization a state crime, (3) authorized local and warrantless arrests of immigrants believed to be removable from the United States, and (4) required state and local officers to verify the immigration status of anyone lawfully arrested or detained.<sup>58</sup> All provisions but the verification provision were struck down on preemption grounds.<sup>59</sup>

As precedent, *Arizona v. United States* reasserted a strong federal role in immigration enforcement and drew limits for subfederal governments interested in immigration regulation. While the decision gave a semi-green light to subfederal enforcement of federal immigration laws, the decision also halted two popular types of subfederal immigration regulation: laws which create state-level crimes to punish for immigration offenses, and laws giving more immigration enforcement authority to state and local officers than is available to federal immigration officers.<sup>60</sup> The issuance of *Arizona v. United States* in 2012 also marks the end of Phase I. As noted earlier, this phase was characterized by highly restrictive legislative activity, bringing the national cumulative ICI score down to the negative 800s by 2012.<sup>61</sup>

By 2013, however, the national ICI score started ticking upward; to be sure, the cumulative national score remained highly negative, but the upward trend is discernible. Looking at the subfederal legislative activity during Phase II (2013–16), we note that there were both increases in positive legislation (mostly at the state level) and decreases in negative legislation. In fact, 2013 marks the first year of the ICI index in which more positive laws were enacted than negative laws.<sup>62</sup> Why were there fewer negative laws in Phase II? The simplest explanation may be that subfederal governments inclined to enact restrictive laws had already done so by 2012; moreover, the Supreme

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<sup>56</sup> *Whiting*, 563 U.S. at 587.

<sup>57</sup> 567 U.S. 387 (2012).

<sup>58</sup> *Id.* at 394.

<sup>59</sup> *Id.* at 416.

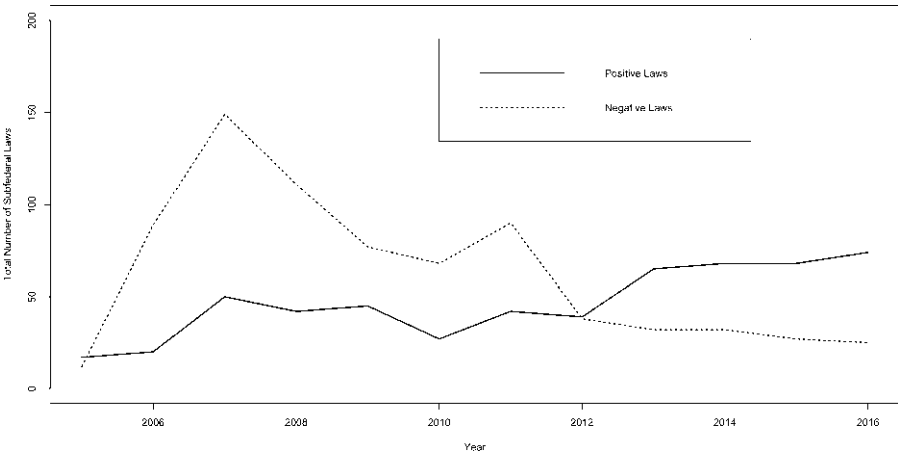
<sup>60</sup> *Id.* at 408.

<sup>61</sup> *See supra* Figure 1.

<sup>62</sup> *See infra* Figure 3.

Court's decision in *Arizona v. United States* put the brakes on several popular types of restrictive laws.

FIGURE 3. POSITIVE VS. NEGATIVE LAW



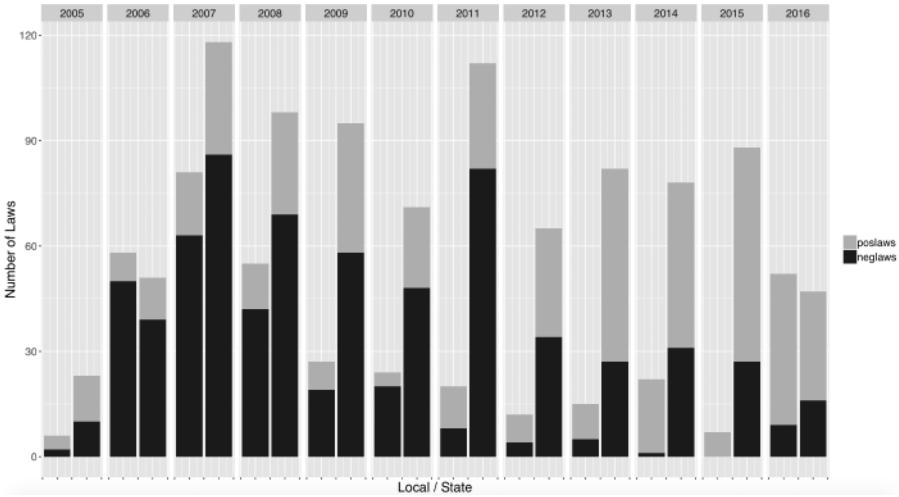
Positive vs. Negative Law (2005–16)

Understanding the uptick in positive laws during Phase II is more complex. We start by delving into the details of the upward trend. For the most part, the positivity did not come from cities and counties, which remained relatively quiet from 2012–16. They enacted fewer laws during this period, almost evenly balanced between positive and restrictive laws.<sup>63</sup> Rather, much of the upward trend can be attributed to the legislative actions of states, which enacted more positive laws than negative laws.<sup>64</sup>

<sup>63</sup> See *infra* Figure 4.

<sup>64</sup> See *infra* Figure 4.

FIGURE 4. LOCAL LAWS AND STATE LAWS



Local Laws (first column) and State Laws (second column) (2005–16)

California leads the states in this positive trend; in the same way that Arizona has come to symbolize restrictive immigration laws and anti-immigrant sentiment, California has become the public representation for positive and pro-immigration legislation.<sup>65</sup> In 2013, California enacted the California TRUST Act, a law that prohibits all state and local law enforcement agencies from honoring ICE detainer requests unless the detained immigrant has been charged or convicted of a serious offense.<sup>66</sup> During Phase II, detainer requests were generated through Secure Communities, an information-sharing program that automatically notified ICE if an immigrant of interest was booked in a local jail.<sup>67</sup> With that notification, ICE could ask the local law enforcement agency to detain the immigrant for an additional

<sup>65</sup> See Melanie Mason, *California Gives Immigrants Here Illegally Unprecedented Rights, Benefits, Protections*, L.A. TIMES (Aug. 11, 2015), <http://www.latimes.com/local/california/la-me-california-immigrant-rights-20150811-story.html> (explaining the array of state policies that give rights to immigrants in California, covering healthcare, higher education, and protection from federal immigration enforcement); Jazmine Ulloa, *California Becomes “Sanctuary State” in Rebuke of Trump Immigration Policy*, L.A. TIMES (Oct. 5, 2017), <http://www.latimes.com/politics/la-pol-ca-brown-california-sanctuary-state-bill-20171005-story.html> (reporting the passage of SB 54, making California a “sanctuary state” despite legal challenge and backlash from the Trump administration); see also Dean Kuipers, *How California Is Resisting Trump’s Immigration Policies*, NEWSWEEK (May 2, 2017), <http://www.newsweek.com/california-resisting-trump-immigration-policies-593379> (noting that in addition to its pro-immigrant laws, California residents are actively building “longer-term organizing power and infrastructure” to ensure that the state is a sanctuary state both in name and in practice).

<sup>66</sup> California TRUST Act, CAL. GOV’T CODE § 7282.5 (West 2018).

<sup>67</sup> See *infra* note 70.

forty-eight hours beyond the time the individual would ordinarily be released, to give ICE time to pick up and place the individual in removal proceedings.<sup>68</sup> With its TRUST Act, California eliminated one of the most valuable tools for federal-subfederal cooperation in immigration enforcement. Other active states during Phase II included Illinois, Minnesota, and Washington, enacting largely immigrant-protective laws.<sup>69</sup>

Why were more immigrant-protective laws enacted during Phase II? Like the subfederal governments that acted during Phase I, the states active during Phase II were motivated to act by perceived shortcomings in federal immigration policy. But during Phase II, states acted based on their perception of enforcement *excesses* committed by the Obama administration. Secure Communities, for example, was promoted as a way to remove dangerous immigrants, but multiple audits found that the program was removing large numbers of immigrants with no or very minor criminal records.<sup>70</sup> The removal of these sympathetic immigrants, with the resulting disruption to families and their communities, made the program extremely unpopular among immigration advocates and in other circles.<sup>71</sup>

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<sup>68</sup> 8 C.F.R. § 287.7(d) (2011).

<sup>69</sup> See, e.g., NAT'L CONFERENCE OF STATE LEGISLATURES, 2013 IMMIGRATION REPORT – ENACTED LAWS AND RESOLUTIONS BY STATE (2013), [http://www.ncsl.org/documents/statefed/2013enacted\\_Finalbystate.pdf](http://www.ncsl.org/documents/statefed/2013enacted_Finalbystate.pdf); NAT'L CONFERENCE OF STATE LEGISLATURES, 2014 IMMIGRATION REPORT – ENACTED LAWS AND RESOLUTIONS BY STATE 7–9, 11, 17 (2014), [http://www.ncsl.org/documents/immig/2014\\_Immig\\_Laws\\_by\\_State.pdf](http://www.ncsl.org/documents/immig/2014_Immig_Laws_by_State.pdf).

<sup>70</sup> See WILLIAM A. KANDEL, CONG. RESEARCH SERV., INTERIOR IMMIGRATION ENFORCEMENT: CRIMINAL ALIEN PROGRAMS 1 (2016) (noting that immigration advocacy groups criticized Secure Communities for removing large numbers of undocumented immigrants who had committed minor or nonviolent crimes); U.S. GOV'T ACCOUNTABILITY OFF., GAO-12-708, SECURE COMMUNITIES: CRIMINAL ALIEN REMOVALS INCREASED, BUT TECHNOLOGY PLANNING IMPROVEMENTS NEEDED (2012) (reporting that of the forty-four percent of alien Secure Communities removals on whom ICE collected arrest charge data, traffic offenses were the most frequent charges); see also *Secure Communities*, U.S. ICE, <https://www.ice.gov/secure-communities> (last visited Nov. 9, 2018) (advertising Secure Communities as simply a way to carry out ICE's law enforcement priorities for aliens in custody of state or local law enforcement).

<sup>71</sup> See *287(g) Agreements*, ACLU, <https://www.aclu.org/other/287g-agreements> (last visited Nov. 9, 2018) (noting the ACLU's opposition to 287(g) agreements, because they lead to racial profiling and civil rights abuses); *The 287(g) Program: An Overview*, AM. IMMIGRATION COUNCIL (Mar. 15, 2017), <https://www.americanimmigrationcouncil.org/research/287g-program-immigration> (highlighting that the 287(g) program has led to a host of problems, including damaging the relationship between police and local communities, and not focusing on serious criminals). The legal liability that some local police departments faced for honoring the detainer requests also increased opposition to the program. Laurence Benenson, *The Trouble with Immigration Detainers*, NAT'L IMMIGRATION F. (May 24, 2016), [http://immigrationforum.org/blog/the-trouble-with-immigration-detainers/#\\_edn45](http://immigrationforum.org/blog/the-trouble-with-immigration-detainers/#_edn45).

Thus, at the end of 2016 and President Obama's second term, the national ICI score was still starkly negative but showing a discernible uptick in positive legislation, led by states like California. 2017 marked the start of the Trump administration and a distinctly different phase in subfederal immigration regulation.

## II

### WHAT IS THE TRUMP EFFECT?

During the first year of his term, President Trump imposed significant restrictions on the nation's immigration policies, moving aggressively to reduce legal immigration and increase interior enforcement targeted at illegal immigration. Our ICI data show that these restrictive immigration policies at the federal level had a significant effect on immigration policies at the subfederal level, changing the way that states, cities, and counties regulated immigrants within their own jurisdictions. In this Part, we analyze the Trump Effect, starting with an overview of the restrictive federal immigration policies motivating action at the subfederal level. Then, we describe the changes during this Phase III of subfederal immigration regulation.

#### A. *Trump's Immigration Policies as Catalyst*

Though the Trump administration has changed the country's immigration policies on many fronts, our review here focuses on the policy changes that have spurred subfederal governments to change their own immigration regulations. Those federal policy changes are of two types: the administration's use of federal resources to enforce federal immigration laws, and its efforts to harness the enforcement power of state and local police in that immigration enforcement.

As the chief executive, President Trump has used his enforcement discretion to aggressively enforce federal immigration law. In the administration's most impactful enforcement action, the Department of Homeland Security rescinded enforcement priorities put into place by the Obama administration, priorities that focused federal immigration enforcement on dangerous criminals and recent arrivals.<sup>72</sup> With this rescission, all unauthorized immigrants, even those with no or minor criminal histories, are now priorities for enforcement.<sup>73</sup> Almost daily, the media reports on the heart-wrenching deportation of immigrants who have lived in the United States for many years, established

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<sup>72</sup> Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017).

<sup>73</sup> *Id.* (directing agencies to enforce the immigration laws of the United States against "all enforceable aliens").

successful careers, and leave behind U.S. citizen family members as a result of this rescission.<sup>74</sup>

Besides expanding who should be targeted for enforcement, the administration has also expanded where enforcement actions take place. Immigrants during the Trump era have been arrested at courthouses,<sup>75</sup> near schools,<sup>76</sup> after a public rally,<sup>77</sup> and even inside hospitals.<sup>78</sup> Though ICE maintains that a sensitive locations policy remains in effect, which should limit immigration enforcement actions in these areas,<sup>79</sup> it is clear that the Trump administration conducts immigration enforcement actions in areas previously thought to be off-limits. ICE arrests at courthouses raise special concerns, as critics argue that the arrests threaten public safety by deterring victims and witnesses to crimes from coming forth, and discouraging immigrants charged with low-level crimes from showing up for court appearances.<sup>80</sup>

The administration has also changed how many immigrants are removed by expanding the application of expedited removal. Through this process, removal can be ordered by low-level immigration officers, entirely circumventing the hearings provided by the immigration courts and all associated administrative and judicial appeals.<sup>81</sup> On January 25, 2017, as part of his Border Security and Immigration Enforcement Improvements Executive Order, President Trump

<sup>74</sup> See, e.g., Christina Caron, *Michigan Father Deported After Living in U.S. for 30 Years*, N.Y. TIMES (Jan. 16, 2018), <https://www.nytimes.com/2018/01/16/us/man-deported-jorge-garcia.html>; Alejandro Lazo, *After 20 Years in the U.S., Indiana Restaurant Owner Is Deported*, WALL ST. J. (Apr. 5, 2017) <https://www.wsj.com/articles/after-20-years-in-u-s-indiana-restaurant-owner-is-deported-1491443231>.

<sup>75</sup> See, e.g., Brown, *supra* note 9; Rhodan, *supra* note 9.

<sup>76</sup> See, e.g., Selk, *supra* note 6.

<sup>77</sup> E.g., Schmidt, *supra* note 11.

<sup>78</sup> E.g., Burnett, *supra* note 12.

<sup>79</sup> *FAQ on Sensitive Locations and Courthouse Arrests*, U.S. ICE, <https://www.ice.gov/ero/enforcement/sensitive-loc> (last visited Nov. 10, 2018) (noting that a sensitive locations policy is still in place, which includes schools, medical treatment facilities, places of worship, religious or civil ceremonies, and public demonstrations).

<sup>80</sup> See Kaelyn Forde, “Where Can Anyone Seek Justice?”: Experts Warn ICE Courthouse Arrests May Mean Witnesses, Victims Won’t Show Up, ABC NEWS (July 27, 2018), <https://abcnews.go.com/US/seek-justice-experts-warn-ice-courthouse-arrests-witnesses/story?id=56756506>; César Cuauhtémoc García Hernández, *ICE’s Courthouse Arrests Undercut Democracy*, N.Y. TIMES (Nov. 26, 2017), <https://www.nytimes.com/2017/11/26/opinion/immigration-ice-courthouse-trump.html>.

<sup>81</sup> See AM. IMMIGRATION COUNCIL ET AL., PRACTICE ADVISORY: EXPEDITED REMOVAL: WHAT HAS CHANGED SINCE EXECUTIVE ORDER NO. 13767, BORDER SECURITY AND IMMIGRATION ENFORCEMENT IMPROVEMENTS (Feb. 20, 2017), [https://www.americanimmigrationcouncil.org/sites/default/files/practice\\_advisory/final\\_expedited\\_removal\\_advisory\\_updated\\_2-21-17.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/final_expedited_removal_advisory_updated_2-21-17.pdf) (defining expedited removal as a procedure, which allows a Department of Homeland Security officer to arrest and deport an individual on the same day without a hearing before an immigration judge or review by the Board of Immigration Appeals).

announced his intent to expand expedited removal to include a new group: immigrants who cannot prove that they have lived continuously in the United States for two years before apprehension.<sup>82</sup> Though this expansion is permitted by federal law, it has never been invoked by past presidents.<sup>83</sup>

In addition to deploying federal resources to enforce immigration laws, the Trump administration has also moved aggressively to harness the enforcement power of state and local police. Like Presidents Barack Obama and George W. Bush, President Trump has used various tools to piggyback on the larger enforcement presence of local and state police in order to multiply the federal immigration power. But the Trump administration does so in ways that are markedly more aggressive than previous administrations. In brief, President Trump has expanded the use of both voluntary measures that depend on sub-federal jurisdictions' willing cooperation, as well as involuntary measures that try to force resisting jurisdictions into participation.

On the voluntary front, the Trump administration has reinvigorated the 287(g) program, whereby local and state police agree to be deputized to enforce immigration laws.<sup>84</sup> Following through on campaign promises, President Trump increased the number of agreements signed with local law enforcement agencies, signing seventeen new agreements in Texas alone.<sup>85</sup> He has also promised to restore a more aggressive form of the agreements, the "task force" model that would allow deputized local officers to enforce immigration laws on the streets, as well as in jails.<sup>86</sup>

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<sup>82</sup> Exec. Order No. 13,767, 82 Fed. Reg. 8793, 8796 (Jan. 25, 2017); Memorandum from John Kelly, U.S. Sec'y of Homeland Sec., Implementing the President's Border Security and Immigration Enforcement Improvements Policies (Feb. 20, 2017), [https://www.dhs.gov/sites/default/files/publications/17\\_0220\\_S1\\_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf](https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf).

<sup>83</sup> See Rappaport, *supra* note 7.

<sup>84</sup> See Mica Rosenberg & Reade Levinson, *Police in Trump-Supporting Towns Aid Immigration Officials in Crackdown*, REUTERS (Nov. 27, 2017), <https://www.reuters.com/article/us-trump-effect-immigration-police/police-in-trump-supporting-towns-aid-immigration-officials-in-crackdown-idUSKBN1DR169>.

<sup>85</sup> Lisa Maria Garza, *Trump Administration Reaches Deal with Texas Counties on Immigration*, REUTERS (July 31, 2017), <https://www.reuters.com/article/us-usa-immigration-texas/trump-administration-reaches-deal-with-texas-counties-on-immigration-idUSKBN1AG2H7>. One of the eighteen agreements cited in this article, signed by the Lubbock County Sheriff's Office, was actually signed in 2016 by the Obama administration. Kathryn Casteel, *While Some Communities Become Sanctuaries, Others Are Happy To Help With Trump's Immigration Crackdown*, FIVETHIRTYEIGHT (Aug. 10, 2017), <https://fivethirtyeight.com/features/while-some-communities-become-sanctuaries-others-are-happy-to-help-with-trumps-immigration-crackdown/>.

<sup>86</sup> See Garza, *supra* note 85.



The administration also resurrected the Secure Communities program, an information-sharing program through which ICE is automatically notified if an individual of interest is booked into a local jail.<sup>87</sup> If ICE wants to place the individual in removal proceedings, it may ask the local law enforcement agency to detain the immigrant beyond the immigrant's release date for ICE pickup.<sup>88</sup> Formerly, in response to successful legal challenges,<sup>89</sup> the Obama administration largely eliminated the detainer requests, asking in most instances that local authorities merely *notify* ICE of the immigrant's release date.<sup>90</sup> In 2014, President Obama suspended the controversial program altogether, though many of its functions were carried out by the successor Priorities Enforcement Program.<sup>91</sup> In reinstating Secure Communities, President Trump restored the ICE practice of placing detainer holds on all immigrants of interest.<sup>92</sup>

In a marked departure from previous administrations, President Trump has also relentlessly extracted participation from unwilling jurisdictions. Using the dual threats of federal funding cuts and targeted ICE raids, the Trump administration has targeted so-called "sanctuary cities," or jurisdictions that refuse to fully cooperate with federal immigration enforcement. In his Executive Order on interior enforcement, President Trump accused these jurisdictions of "willfully violat[ing] Federal law in an attempt to shield aliens from removal from the United States," and directed the Secretary of Homeland Security and the Attorney General to prevent these jurisdictions from receiving federal grants.<sup>93</sup> In 2017, Attorney General Jeff Sessions warned sanctuary jurisdictions that they are breaking federal law by

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<sup>87</sup> See *Secure Communities*, *supra* note 70.

<sup>88</sup> *Immigration Detainers*, ACLU, <http://www.aclu.org/issues/immigrants-rights/ice-and-border-patrol-abuses/immigration-detainers> (last visited Nov. 24, 2018).

<sup>89</sup> See, e.g., Jessica M. Vaughan, *ICE Policy Change on Detainers Fuels Lawsuits to Obstruct Enforcement*, CTR. FOR IMMIGR. STUD. (Apr. 23, 2014), <https://cis.org/Vaughan/ICE-Policy-Change-Detainers-Fuels-Lawsuits-Obstruct-Enforcement> (reporting on a federal judge in Oregon ruling that local law enforcement officials need not honor ICE detainers).

<sup>90</sup> See Elise Foley, *Immigration Official Walks Back Support for Mandating that Police Hold Immigrants*, HUFFPOST (Mar. 19, 2015), [https://www.huffingtonpost.com/2015/03/19/immigration-detainers\\_n\\_6904240.html](https://www.huffingtonpost.com/2015/03/19/immigration-detainers_n_6904240.html) (describing the decreased use of detainers and instead asking law enforcement to notify the agency if it was set to release someone who fit the deportation priorities).

<sup>91</sup> See *id.* (describing the transition from Secure Communities to the Priorities Enforcement Program (PEP)).

<sup>92</sup> See Exec. Order No. 13,768, 82 Fed. Reg. 8799, 8801 (Jan. 25, 2017) (directing the Secretary to terminate PEP and reinstate Secure Communities); *Secure Communities*, *supra* note 70 (describing Secure Communities, its reinstatement, and the subsequent effect).

<sup>93</sup> Exec. Order No. 13,768, 82 Fed. Reg. 8799, 8799, 8801 (Jan. 25, 2017).

not cooperating with federal agents and threatened them with the loss of specific federal law enforcement grants.<sup>94</sup>

The defunding threats have had both intended and unintended results. Facing the possibility of losing federal funding, some jurisdictions have in fact rescinded their policies limiting immigration cooperation. The mayor of Miami-Dade County, for example, immediately instructed county jails to comply with all detainer requests issued by ICE, abandoning the county's previous policy of only honoring detainer requests when the federal government reimbursed the detention costs.<sup>95</sup> But other jurisdictions quickly filed lawsuits to block any federal defunding efforts, arguing that the federal threats violate constitutional limits on federal power. Separate lawsuits were filed at various subfederal levels: the state of California,<sup>96</sup> the towns of Chelsea and Lawrence (Massachusetts),<sup>97</sup> the cities of Seattle, Portland,<sup>98</sup> Chicago,<sup>99</sup> and San Francisco, and the county of Santa Clara.<sup>100</sup>

Beyond defunding threats, the Trump administration has also tried to undermine sanctuary cities by conducting enforcement raids in their jurisdictions. In October 2017, ICE targeted ten sanctuary

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<sup>94</sup> See Carlos Ballesteros, *Trump and Jeff Sessions Are Going After More Sanctuary Cities*, NEWSWEEK (Nov. 15, 2017), <http://www.newsweek.com/sanctuary-cities-trump-sessions-department-justice-712965> (describing the noncompliance warning sent out by Sessions to twenty-nine cities, counties, and states); *Overview of Legal Requirements Generally Applicable to OJP Grants and Cooperative Agreements - FY 2017 Awards*, OFF. JUST. PROGRAMS, <https://ojp.gov/funding/Explore/SolicitationRequirements/index.htm> (last visited Nov. 5, 2018) (setting out express conditions related to federal immigration enforcement cooperation for certain grants).

<sup>95</sup> Samantha Schmidt, *As Major "Sanctuary Cities" Resist Trump's Threats, Miami-Dade Mayor Says City Will Comply*, WASH. POST (Jan. 27, 2017), <https://www.washingtonpost.com/news/morning-mix/wp/2017/01/27/as-major-sanctuary-cities-resist-trumps-threats-miami-mayor-says-city-will-comply/>.

<sup>96</sup> Dan Levine, *California Sues Trump Administration Over Sanctuary Policy*, REUTERS (Aug. 14, 2017), <https://www.reuters.com/article/us-usa-immigration-sanctuary/california-sues-trump-administration-over-sanctuary-policy-idUSKCN1AU1TI>.

<sup>97</sup> Milton J. Valencia, *Chelsea, Lawrence Challenge Trump on Sanctuary Cities*, BOS. GLOBE (Feb. 8, 2017), <https://www.bostonglobe.com/metro/2017/02/08/chelsea-lawrence-sue-trump-over-sanctuary-city-penalties/tXbFN0dM6Wy88gHEjwxdYO/story.html>.

<sup>98</sup> Maxine Bernstein, *Federal Judge Denies Trump's Motion to Dismiss Seattle, Portland Sanctuary Cities Case*, OREGONLIVE (Oct. 19, 2017), [http://www.oregonlive.com/portland/index.ssf/2017/10/federal\\_judge\\_wont\\_dismiss\\_sea.html](http://www.oregonlive.com/portland/index.ssf/2017/10/federal_judge_wont_dismiss_sea.html).

<sup>99</sup> Sandhya Somashekhar, *Chicago Sues Justice Department over New Police Grant Rules Targeting Sanctuary Cities*, WASH. POST (Aug. 7, 2017), [https://www.washingtonpost.com/news/post-nation/wp/2017/08/07/chicago-to-sue-justice-department-over-new-police-grant-rules-targeting-sanctuary-cities/?utm\\_term=.90e3f1afd945](https://www.washingtonpost.com/news/post-nation/wp/2017/08/07/chicago-to-sue-justice-department-over-new-police-grant-rules-targeting-sanctuary-cities/?utm_term=.90e3f1afd945).

<sup>100</sup> Bernstein, *supra* note 98.

jurisdictions during a four-day sweep, arresting 498 immigrants.<sup>101</sup> Those jurisdictions included Baltimore, Chicago, Denver, Los Angeles, New York, Portland, Philadelphia, Washington D.C., Santa Clara County (California), and Massachusetts.<sup>102</sup> The administration explicitly tied the decision to conduct these raids to the sanctuary policies in these jurisdictions. In a statement, ICE acting director Tom Homan said that “[s]anctuary jurisdictions that do not honor detainees or allow us access to jails and prisons are shielding criminal aliens from immigration enforcement and creating a magnet for illegal immigration. . . . As a result, ICE is forced to dedicate more resources to conduct at-large arrests in these communities.”<sup>103</sup>

In our analysis, these aggressive enforcement policies motivate many subfederal jurisdictions to change their own immigration regulations, either in protective or restrictive ways. For protective laws, the connection with Trump’s immigration policies is sometimes explicitly stated in the laws themselves. For example, in explaining its reasons for enacting immigrant-protective laws, Bernalillo County, New Mexico, stated in the preamble to its Administrative Resolution 2017-22:

[S]ince the election of a new National leadership there has been a sense of uncertainty and fear among many communities in Bernalillo County, across our State, and across the Nation; and . . . recent Presidential Executive Orders related to immigration enforcement have done nothing to allay those fears, and in fact contain directives that threaten to lead to family separation, endanger refugees fleeing violence and persecution, strip immigrants of their due process, and discriminate against the Muslim community . . . .<sup>104</sup>

Similarly, the city of Honolulu, in enacting its Haven of Aloha resolution, cited to “the 2016 national elections . . . [that] introduced themes, statements, and concepts reflective of a world view fraught with intolerance, prejudice, and fear” and that “the outcome of these national elections now raises the prospect that those same themes of intolerance, prejudice, and fear could find their ways into the laws and policies of our government; and such an outcome is contrary to the

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<sup>101</sup> Miriam Jordan, *Immigration Agents Arrest Hundreds in Sweep of Sanctuary Cities*, N.Y. TIMES (Sept. 28, 2017), <https://www.nytimes.com/2017/09/28/us/ice-arrests-sanctuary-cities.html>.

<sup>102</sup> *ICE Arrests 101 People in LA Immigration Sweep*, CBS L.A. (Sept. 28, 2017), <http://losangeles.cbslocal.com/2017/09/28/ice-arrests-immigration-sweep/>.

<sup>103</sup> *ICE Arrests Over 450 on Federal Immigration Charges During Operation ‘Safe City,’* U.S. ICE (Sept. 28, 2017), <https://www.ice.gov/news/releases/ice-arrests-over-450-federal-immigration-charges-during-operation-safe-city>.

<sup>104</sup> Bernalillo Cty. Bd. of Comm’rs, N.M., Admin. Res. No. 2017-22 (Mar. 14, 2017).

core values of our society . . . .”<sup>105</sup> These laws demonstrate the span of the Trump Effect.

Other protective laws in our analysis do not explicitly refer to President Trump or his administration but, studied in context, also evidence a reaction to his immigration policies. These laws refer more generally to their community values and their purposes in passing these laws. For example, Gary, Indiana, passed a resolution to recognize the “present and historic importance of immigrants to our community,” to demonstrate the city’s “commitment to ensur[ing] public safety for all city residents and specifically enabl[ing] immigrants to report crimes” and to “defend the human rights of immigrants and assure that each person is treated equally regardless of their immigration status.”<sup>106</sup> Similarly, in enacting its sanctuary policies, the city of Hudson, New York, described itself as a city that “values the social, cultural and economic contributions that have been made by immigrants,” and its police department as having “long determined that it will give full priority to public safety and justice concerns in preference to rigid enforcement of immigration regulations.”<sup>107</sup>

The motivations cited by these protective laws, together with the timing of their enactment (during the first year of the Trump presidency), provide strong evidence that they were enacted in response to the administration’s immigration policies and thus should be considered part of the Trump Effect. The enforcement policies under President Trump, which have been previously discussed, are markedly more aggressive than those of previous administrations.<sup>108</sup> This shift in enforcement policies, together with his other immigration policies, have caused critics to accuse President Trump of being racist and anti-immigrant;<sup>109</sup> with that context, the connection between Trump’s immigration policies and protective immigration regulations that draw upon principles of immigrant equality and nondiscrimination becomes clearer.

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<sup>105</sup> Honolulu City Council, Haw., Res. No. 17-50, CD1 (Apr. 26, 2017).

<sup>106</sup> Gary, Ind., Ordinance 9100 (May 22, 2017).

<sup>107</sup> Hudson Common Council, N.Y., Res. No. 5 (Mar. 21, 2017).

<sup>108</sup> See *supra* notes 72–103 and accompanying text (detailing the various aspects of Trump’s immigration enforcement policies and how they often diverge from previous administrations).

<sup>109</sup> See, e.g., Steve Holland, *Trump Says “I’m Not a Racist,” Keeps Door Open for DACA Deal*, REUTERS (Jan. 14, 2018), <https://www.reuters.com/article/us-usa-immigration-trump-racism/trump-says-im-not-a-racist-keeps-door-open-for-daca-deal-idUSKBN1F403G> (describing criticism of Trump’s characterization of some immigrants); David Leonhardt & Ian Prasad Philbrick, *Donald Trump’s Racism: The Definitive List*, N.Y. TIMES (Jan. 15, 2018), <https://www.nytimes.com/interactive/2018/01/15/opinion/leonhardt-trump-racist.html> (compiling a list of Trump’s racist comments).

On the restrictive side, these new laws provide a less explicit connection to Trump. But the substance of these laws, as explained in more detail below, demonstrates that they are reactions to immigration policies either initiated or intensified by the Trump administration. One important category of restrictive laws includes the new 287(g) agreements in 2017, responding to President Trump's directives to significantly expand the program.<sup>110</sup> At least some local law enforcement agencies who signed new agreements were motivated by their perception that the Trump administration would take tougher enforcement positions in implementing the program. For example, in signing a new 287(g) agreement in 2017, Sheriff A.J. Louderback of Jackson County, Texas, cited to changing federal immigration priorities as motivation: “[T]here is tremendous interest right now in cooperating with the federal government under this administration in order to reduce the risk for our citizens from criminal aliens.”<sup>111</sup>

Another important category during Phase III was anti-sanctuary laws enacted at the state level, restricting the authority of cities and counties to enact immigrant-protective laws like restricting cooperation with federal immigration enforcement. In signing Senate Bill 4, Texas Governor Greg Abbott emphasized the need for law and order. “Texas has now banned ‘sanctuary cities’ in the Lone Star State,” he said. “Now let’s be clear, the reason why so many people come to America is because we are a nation of laws. And Texas is doing its part to keep it that way.”<sup>112</sup> Though the issue of sanctuary certainly existed before the Trump administration, the administration brought this issue to the forefront with its aggressive actions to force cooperation from non-willing subfederal jurisdictions.<sup>113</sup> Thus, the immigrant-restrictive laws are also traceable to the administration’s immigration policies and can be considered part of the Trump Effect as well.

### B. *How Phase III Is Different*

This section analyzes in detail the substance of the laws enacted in 2017 and explains the differences that make Phase III distinct in

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<sup>110</sup> Exec. Order No. 13,767, 82 Fed. Reg. 8793, 8795 (Jan. 25, 2017) (commanding the Secretary of Homeland Security to enter into 287(g) agreements); Exec. Order No. 13,768, 82 Fed. Reg. 8799, 8800 (Jan. 25, 2017) (same).

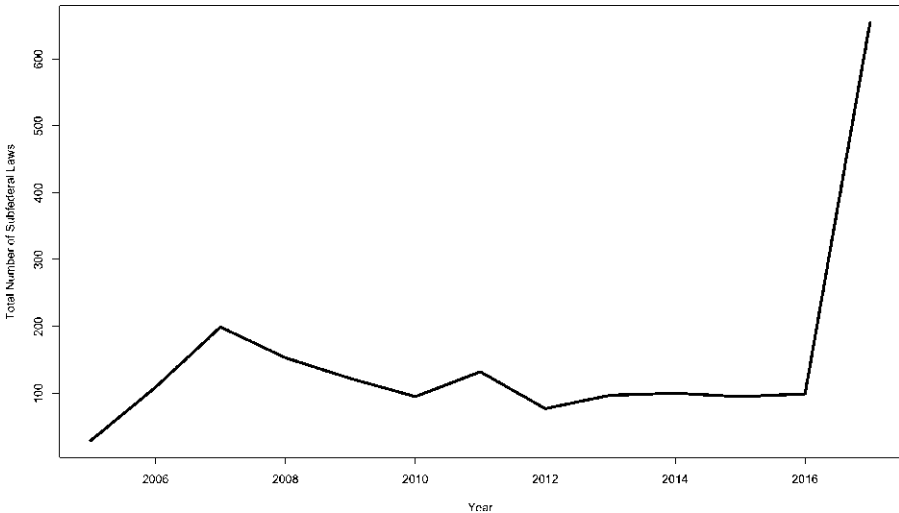
<sup>111</sup> Daniel González, *Trump Will Need Local Police to Help Carry Out Deportation Orders. Will They Comply?*, AZCENTRAL (Feb. 2, 2017), <https://www.azcentral.com/story/news/politics/immigration/2017/02/02/president-donald-trump-deportation-executive-order-police/97297342/>.

<sup>112</sup> Kolten Parker, *Without Notice, Texas Governor Greg Abbott Signs “Sanctuary Cities” Ban Live on Facebook*, TEX. OBSERVER (May 7, 2017), <https://www.texasobserver.org/without-notice-texas-governor-greg-abbott-signs-sanctuary-cities-ban-facebook-live/>.

<sup>113</sup> See *supra* notes 85–86, 93–95 and accompanying text.

subfederal immigration regulation. Using the ICI, significantly more legislative activity appears at the subfederal level than ever seen before. Combined, states, cities, and counties enacted over 600 laws in 2017, the highest number of laws of subfederal immigration laws ever enacted in a single year. For purposes of comparison, 99 laws were enacted in 2016, and the second highest yearly total occurred in 2007 (early Phase I), when 199 laws were enacted at all subfederal levels of government.<sup>114</sup>

FIGURE 5. TOTAL SUBFEDERAL LAWS ENACTED



Total Subfederal Laws Enacted (2005–17)

Drilling down, the ICI shows that approximately ninety percent of the 2017 laws were immigrant-protective in nature. Many of these laws were “sanctuary” laws, where subfederal governments limited the authority of their law enforcement agencies to cooperate with federal immigration enforcement. The law enacted by Denver is a typical sanctuary law, which lays out that the city values its immigrant residents, recognizes and upholds various provisions of the United States Constitution, and creates provisions protecting immigrant citizens, though it carves out exceptions by including language such as “except to the extent required by any federal, state, or city law or regulation.”<sup>115</sup> As part of its pro-immigrant approach, the Denver law also includes a provision pledging to distribute city services and benefits without regard for the immigration status of recipients.<sup>116</sup>

<sup>114</sup> See *infra* Figure 5.

<sup>115</sup> DENVER, COLO., REV. MUN. CODE ch. 28, art. VIII (2017).

<sup>116</sup> *Id.*

State legislatures have also sought to limit cooperation with federal immigration enforcement. Besides California, Illinois enacted its version of a TRUST Act, prohibiting its law enforcement agencies and officials from stopping, arresting, or detaining individuals solely based on immigration status, or detaining individuals based on an immigration detainer.<sup>117</sup> But beyond policing laws, protective state laws covered more legislative ground, reflecting the broader powers that states have vis-à-vis cities and counties. For example, Oregon now provides free reproductive health services to all Oregon women, regardless of immigration status.<sup>118</sup> Through its Assembly Bill 324, Nevada places advertising and other restrictions on document preparers, to prevent them from misrepresenting themselves as immigration attorneys or working with immigration attorneys.<sup>119</sup>

The remaining ten percent of subfederal laws enacted in 2017 were immigrant-restrictive in nature, either imposing restrictions on immigrants or supporting federal efforts to do so. At the city or county level, the restrictive laws were almost exclusively new 287(g) agreements. In 2017, the Trump administration signed twenty-five agreements, all with sheriff's departments throughout the United States.<sup>120</sup> These new agreements are part of the administration's push to expand the 287(g) program, both as a way to harness the enforcement power of cooperating jurisdictions and to blunt the impact of noncooperating jurisdictions.<sup>121</sup> As of December 2017, thirty-eight additional jurisdictions have expressed interest in joining the 287(g) program.<sup>122</sup> Unlike previous years tracked by the ICI, we did not observe cities and counties in 2017 enacting other types of restrictive laws (e.g., limiting their local benefits to residents with lawful immigration status).

Like state protective laws, state restrictive laws enacted in 2017 covered more legislative ground than their city and county counterparts. Several states passed laws restricting the implementation of

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<sup>117</sup> S. 31, 100th Gen. Assemb. (Ill. 2017).

<sup>118</sup> H.R. 3391, 79th Leg., Reg. Sess. (Or. 2017) (mandating provision of a suite of reproductive health services to all enrollees in private health benefit plans, without any mention of citizenship status).

<sup>119</sup> A.B. 324, 79th Leg., Reg. Sess. (Nev. 2017).

<sup>120</sup> Huyen Pham, *287(g) Agreements in the Trump Era*, 75 WASH. & LEE L. REV. 1253, 1274 (2018).

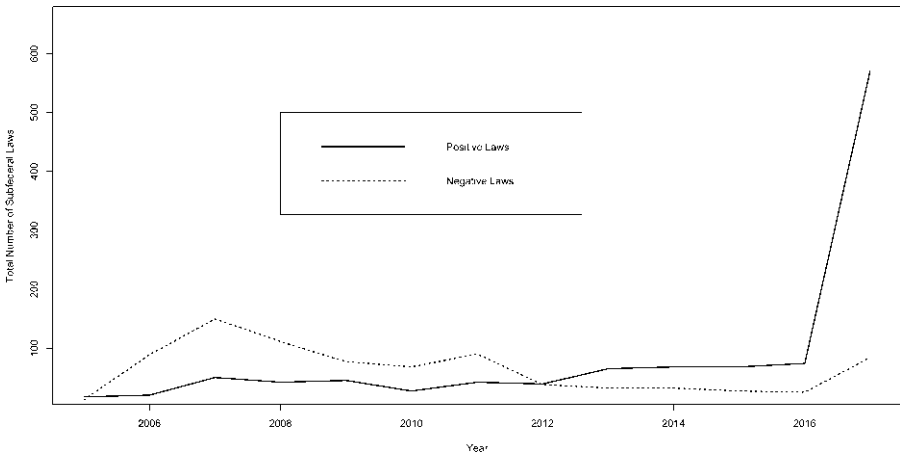
<sup>121</sup> *See id.* at 21–34 (explaining how the 287(g) agreements under Trump delegate federal powers to subfederal actors and do so more aggressively than under previous administrations).

<sup>122</sup> Kanyakrit Vongkiatkajorn, *How the Trump Administration is Using Local Cops to Widen Its Immigration Dragnet*, MOTHER JONES (Dec. 4, 2017), <https://www.motherjones.com/politics/2017/12/how-the-trump-administration-is-using-local-cops-to-widen-its-immigration-dragnet/>.

sanctuary laws in their jurisdictions: Indiana Senate Bill 423,<sup>123</sup> Mississippi Senate Bill 2710,<sup>124</sup> and Texas Senate Bill 4<sup>125</sup> all restrict local governments and universities, while Georgia House Bill 37<sup>126</sup> restricts private colleges. States also passed a handful of other policing laws that, among other things, enhance a criminal sentence for immigration violations<sup>127</sup> and require all child abuse offenders to provide immigration status when registering in the state's sex offender registry.<sup>128</sup> Beyond policing laws, other restrictive bills at the state level are more typical of the laws seen in previous years, denying benefits like government employment,<sup>129</sup> social welfare assistance,<sup>130</sup> or in-state college tuition based on immigration status.<sup>131</sup>

Figure 6 shows the breakdown of protective and restrictive laws enacted in 2017.

FIGURE 6. TOTAL POSITIVE VS. NEGATIVE LAWS



Total Positive vs. Negative Laws (2005–17)

The final distinguishing characteristic of Phase III is the very intense level of legislative activity from cities and counties. All across the country, thirty-nine different states, cities, and counties have

<sup>123</sup> S. 423, 120th Gen. Assemb., Reg. Sess. (Ind. 2017).

<sup>124</sup> S. 2710, 2017 Leg., Reg. Sess. (Miss. 2017).

<sup>125</sup> S. 4, 85th Leg., Reg. Sess. (Tex. 2017).

<sup>126</sup> H.R. 37, 2017–18 Gen. Assemb., Reg. Sess. (Ga. 2017).

<sup>127</sup> H.R. 1041, 110th Gen. Assemb. (Tenn. 2017) (inserting “illegal[ ] or unlawful[ ]” presence in the U.S. at the time of offense in the state’s list of sentence-enhancing factors).

<sup>128</sup> H.R. 149, 2017 Gen. Sess. (Utah 2017) (requiring that alien offenders provide documents establishing their immigration status).

<sup>129</sup> H.R. 1534, 29th Leg., Reg. Sess. (Haw. 2017).

<sup>130</sup> S. 222, 2017 Reg. Sess. (W. Va. 2017).

<sup>131</sup> S. 531, 91st Gen. Assemb., Reg. Sess. (Ark. 2017).



enacted more than 500 different laws. To give context, states during that same year enacted less than 150 laws. Thus, cities and counties are central to our analysis of the Trump Effect.

What kind of laws are cities and counties enacting? In 2017, the overwhelming majority of local laws, approximately eighty-eight percent, were immigrant protective in nature.<sup>132</sup> Most of these laws followed the sanctuary model analyzed earlier, limiting police cooperation with federal immigration authorities; some jurisdictions also pledged to distribute their locally-controlled benefits without regard for immigration status.<sup>133</sup> Have cities and counties always been this active in subfederal immigration regulation? Using ICI data, the answer is clearly no. In 2017, cities and counties enacted more laws in this single year than they enacted during the previous twelve years combined (2005–16).

This high level of local activity naturally leads to this question: Why are cities and counties becoming more active in immigration regulation? The answer, we suggest, lies in the Trump Effect. That is, cities and counties are reacting to this administration's immigration policies, with its emphasis on enforcement and restriction, by enacting laws that either support or limit the impact of the federal policies. As previously noted, many of the laws, particularly the immigrant-protective ones, express a connection to the Trump administration's policies, either directly or indirectly.<sup>134</sup>

On one level, the speed with which cities and counties have reacted to changes in federal immigration policy is not surprising. Because they have smaller and less cumbersome forms of governing (e.g., city councils versus larger state legislatures), they are able to reach consensus more easily and act on that consensus more quickly. We saw a similar, albeit smaller, trend in the very early years of Phase I, when immigrant-restrictive laws were the norm. In 2006, cities and counties took the lead in enacting restrictive laws that, among other things, denied local benefits on the basis of immigration status, committed local law agency resources through 287(g) agreements, and made English the official language.<sup>135</sup> States quickly caught up, however, and in 2007, outpaced local governments, both in the number of

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<sup>132</sup> Huyen Pham & Pham Hoang Van, Immigrant Climate Index Data (Oct. 29, 2018) [hereinafter ICI Data] (unpublished data) (on file with authors and *New York University Law Review*).

<sup>133</sup> See *supra* notes 115–16 and accompanying text.

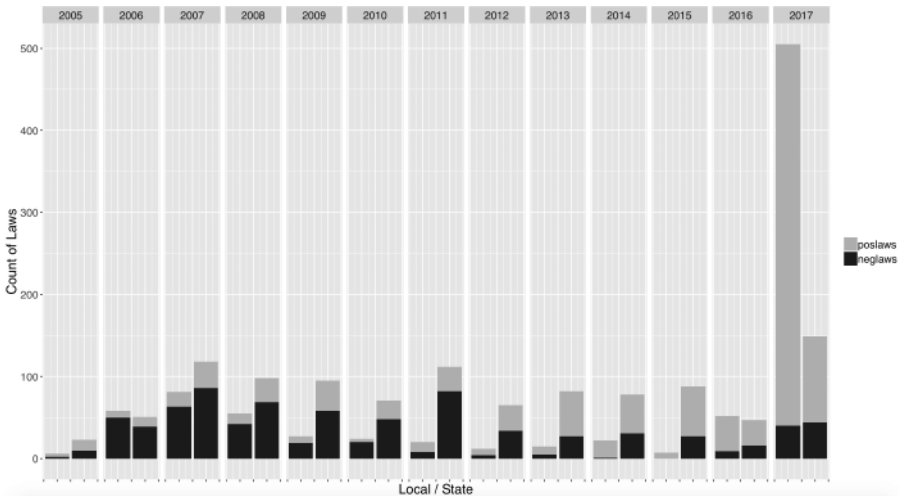
<sup>134</sup> See *supra* notes 104–07 and accompanying text.

<sup>135</sup> ICI Data, *supra* note 132.

restrictive laws and in the total number of immigration laws enacted.<sup>136</sup>

Figure 7 below shows the number of laws enacted by local governments (versus by states) and the breakdown of immigrant-protective and immigrant-restrictive laws enacted by each from 2005 to 2017.

FIGURE 7. LOCAL LAWS AND STATE LAWS



Local Laws (first column) and State Laws (second column) (2005–17)

### III UNDERSTANDING THE TRUMP EFFECT: CONTEXT AND ANALYSIS

With detailed information about the size, content, and contours of the Trump Effect, we turn now to analyzing its implications. Several observations emerge. First, with the benefit of our ICI data, we see that the Trump Effect is a distinctly larger escalation of a positive trend in subfederal immigration regulation that started in 2012. This section explores the significance of this positive trend. Building upon our analysis of the Trump Effect, we also analyze the changing nature of sanctuary in Phase III. We see more variety in the subfederal jurisdictions offering sanctuary, including diverse population size, political orientation, and even types of governmental entities participating. We conclude by offering some thoughts about the future of subfederal immigration regulation, incorporating our previous observations.

<sup>136</sup> *Id.*

### A. *More Positive Immigration Climates*

In Phase III, the national ICI score shows a sharp uptick. Though it remains in very negative territory, the national score is clearly trending upward. In this section, we analyze likely outcomes if this trend continues and the implications for immigrants living in these different jurisdictions.

As an initial matter, it is very unlikely that the determinants currently pushing the national ICI score upward will be enough to push the score into positive territory in the near future. As previously discussed, those determinants in Phase III have been a flurry of immigrant-protective laws enacted by cities and counties, and by the State of California.<sup>137</sup> As to the first determinant, the positive effect of protective laws enacted at the city and county level would struggle to overcome the negative ICI effect of restrictive state laws enacted during Phase I and II. As explained earlier, the ICI assigns less weight to laws enacted at the city and county level, giving them a score that represents that local government's proportion of the overall state's population.<sup>138</sup> This recalibration occurs because city and county laws, by definition, have much more limited jurisdiction and thus less effect on immigration climate than statewide laws.

For example, in 2017, Newburgh, New York, enacted six immigrant-protective laws that severely restricted the ability of its police and other municipal agencies to cooperate with federal immigration law enforcement. Specifically, these laws prohibit the Newburgh Police Department from entering into a 287(g) agreement, engaging in joint operations with ICE, honoring ICE detainer requests without a warrant, or releasing immigration data to ICE or other government agencies except under limited circumstances.<sup>139</sup> Additionally, the laws prohibit the police department or any city agents from inquiring into the immigration status of city residents they encounter and prohibit ICE access to municipal facilities without a warrant.<sup>140</sup> Because these laws are so comprehensive in protecting immigrants, we might expect that the laws would have a large impact on New York State's ICI score. Yet, because the laws only affect local government actions in the city of Newburgh (population 30,303),<sup>141</sup>

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<sup>137</sup> See *supra* notes 115–19 and accompanying text.

<sup>138</sup> See *supra* note 38 and accompanying text.

<sup>139</sup> Newburgh City Council, N.Y., Res. No. 71-2017 (Mar. 13, 2017).

<sup>140</sup> *Id.*

<sup>141</sup> *Newburgh Town, Orange County, New York*, U.S. CENSUS BUREAU: AM. FACTFINDER, [https://factfinder.census.gov/faces/nav/jsf/pages/community\\_facts.xhtml](https://factfinder.census.gov/faces/nav/jsf/pages/community_facts.xhtml) (last visited Oct. 30, 2018).

they only contribute 0.0375 positive points to the state's ICI score.<sup>142</sup> By comparison, Executive Order 170, signed by Governor Andrew Cuomo to limit the authority of state agencies (including state law enforcement agencies) from inquiring about immigration status or releasing immigration information to federal authorities,<sup>143</sup> adds a full eight points to New York State's score. The higher points assigned to the governor's executive order reflects its broader influence: All employees of state agencies within the State of New York (population 19,378,102)<sup>144</sup> are bound by this order.

On the restrictive side, during Phase III, seventeen counties in Texas signed 287(g) agreements. Within their individual jurisdictions, each agreement could have a tremendous effect, as 287(g) agreements have been shown to significantly increase the number of immigrants detected and placed into removal proceedings.<sup>145</sup> However, the combined effect of these agreements on Texas's ICI score must reflect the limited influence of these countywide agreements, decreasing them to just 0.5073 points each.<sup>146</sup> By contrast, Senate Bill 4 (SB 4), enacted by the Texas legislature in 2017, decreases the state's ICI score by twelve full points. SB 4, as previously discussed, requires all law enforcement agencies, including campus police departments, to comply with all federal immigration detainer requests, and prohibits them from enacting any rules or policies which would restrict or even discourage immigration law enforcement.<sup>147</sup> For offending law enforcement agencies and agency heads, the penalties include substantial fines, removal from office, and even personal criminal liability.<sup>148</sup>

Thus, if immigrant-protective laws continue to be enacted almost exclusively by cities and counties, even if enacted in high numbers, the ICI will most likely remain negative. If more states besides California enact immigrant-protective laws, then the ICI score could turn posi-

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<sup>142</sup> The calculation is as follows:  $(30,303/19,378,102 \text{ (New York state population)}) * 4 \text{ (police law)} * 6 \text{ (6 different laws)} = 0.0375$ .

<sup>143</sup> N.Y. Exec. Order No. 170 (Sept. 15, 2017).

<sup>144</sup> *New York*, U.S. CENSUS BUREAU: AM. FACTFINDER, <https://factfinder.census.gov/faces/nav/jsf/pages/index.xhtml> (last visited Oct. 30, 2018).

<sup>145</sup> RANDY CAPPS ET AL., MIGRATION POLICY INST., DELEGATION AND DIVERGENCE: A STUDY OF 287(G) STATE AND LOCAL IMMIGRATION ENFORCEMENT 18 (2011), <https://www.migrationpolicy.org/pubs/287g-divergence.pdf> (describing the "substantial number" of removals identified through the 287(g) program).

<sup>146</sup> The calculation is as follows:  $\text{the sum of } [(county \text{ population}/Texas \text{ population}) * 4 \text{ (police law)}] \text{ for each county signing a 287(g) agreement}$ .

<sup>147</sup> See S. 4, 85th Leg., Reg. Sess. (Tex. 2017). For ICI purposes, we count SB 4 as having three separate provisions: (1) requiring law enforcement agencies to honor all ICE detainer requests, (2) requiring university police to honor all ICE detainer requests, and (3) prohibiting the use of state government resources to discourage immigration enforcement.

<sup>148</sup> See *id.*

tive. We saw this kind of “trickle-up” activity in Phase I, as cities and counties initially took the lead in enacting restrictive laws, followed by states quickly taking over and outpacing local governments in enacting more restrictive laws. The national ICI swung in a sharply negative direction as a result.<sup>149</sup>

For immigrants living in the United States, a more positive national ICI score would seem to be a beneficial development, but there are two limiting realities. First, any benefits would be limited to the geographical jurisdiction granting the benefit; thus a higher *national* ICI score does not benefit an immigrant living in a restrictive jurisdiction. For example, an immigrant living in California (the state with the most positive ICI score), would experience many more benefits than a similarly-situated immigrant in Arizona (the state with the most negative ICI score). Even if she lacks legal immigration status, the California resident could apply for a state driver’s license<sup>150</sup> and state loans to attend college.<sup>151</sup> She also has the peace of mind of knowing that her employer is prohibited from reporting her to ICE as retaliation if she engages in legally protected activities—like demanding payment of wages<sup>152</sup>—and that her local police department is limited in its authority to cooperate with federal immigration law enforcement.<sup>153</sup> Meanwhile, an unauthorized immigrant living in Arizona is unable to obtain a driver’s license,<sup>154</sup> public benefits,<sup>155</sup> or even a liquor license.<sup>156</sup> She would also have to worry about the police checking her legal status at any type of law enforcement stop.<sup>157</sup>

The very different paths that California and Arizona have taken on subfederal immigration regulation are reflected in Figure 8 below. Though other subfederal jurisdictions have not taken the same extreme paths, the larger point remains true: Whether an individual immigrant experiences a positive or negative subfederal immigration climate depends on the laws of his or her particular jurisdiction.

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<sup>149</sup> See *supra* Figure 1.

<sup>150</sup> See A.B. 1660, 2013–14 Leg., Reg. Sess. (Cal. 2014).

<sup>151</sup> See S. 1210, 2013–14 Leg., Reg. Sess. (Cal. 2014) (omitting legal immigration status from its list of requirements to receive state loans).

<sup>152</sup> See A.B. 2751, 2013–14 Leg., Reg. Sess. (Cal. 2014).

<sup>153</sup> See S. 31, 2017–18 Leg., Reg. Sess. (Cal. 2017).

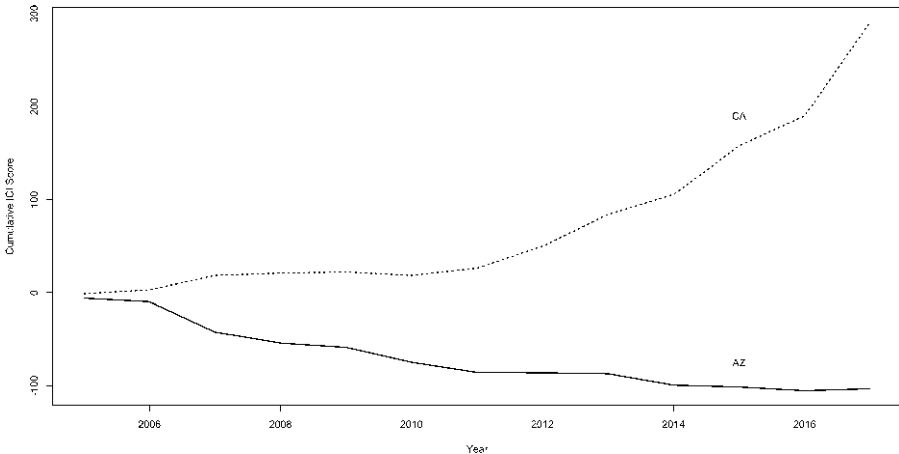
<sup>154</sup> ARIZ. REV. STAT. ANN. § 28–3153(D) (2010).

<sup>155</sup> H.R. 2467, 48th Leg., 1st Reg. Sess. (Ariz. 2007).

<sup>156</sup> H.R. 2391, 48th Leg., 1st Reg. Sess. (Ariz. 2007).

<sup>157</sup> See S. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

FIGURE 8. ICI SCORES, CALIFORNIA AND ARIZONA



ICI Scores of California and Arizona (2005–17)

The second limit on a positive ICI score is the reality of very harsh federal enforcement policies. Even the most immigrant-protective subfederal government is limited in its ability to stop the aggressive enforcement of federal immigration policies in its jurisdiction. In these sanctuary jurisdictions, ICE can and likely will continue to make arrests in sensitive areas, to make every immigrant without lawful status a priority for removal (regardless of criminal record), and to expand the application of expedited removal proceedings.<sup>158</sup> In fact, the Trump administration appears to be targeting some sanctuary cities for immigration raids.<sup>159</sup> The legal battles over what subfederal governments can do to enforce—and resist the enforcement of—federal immigration laws will continue for the near future.<sup>160</sup> But the federal government controls the levers of the federal immigration enforcement machine, and because of preemption principles, subfederal governments may not enact laws that conflict with or undermine federal immigration policies. As the Supreme Court in *Arizona v. United States* concluded, “The National Government has significant power to regulate immigration. . . . Arizona may have understandable frustrations with the problems caused by illegal immigration . . . but the State may not pursue policies that undermine federal law.”<sup>161</sup>

<sup>158</sup> See *supra* notes 66–83 and accompanying text.

<sup>159</sup> See *supra* notes 101–03 and accompanying text.

<sup>160</sup> See, e.g., Adam Liptak, *Sessions Targets California Immigrants Using a Ruling That Protected Them*, N.Y. TIMES (Mar. 7, 2018), <https://www.nytimes.com/2018/03/07/us/politics/jeff-sessions-california-lawsuit.html> (reporting that the Trump administration filed a lawsuit against California, alleging that California’s sanctuary policies are illegal).

<sup>161</sup> 567 U.S. 387, 416 (2012).

### B. *The Changing Nature of Sanctuary*

Phase III was also characterized by more diversity in the nature of the governments offering sanctuary, as compared with past years. In this analysis of sanctuary, we focus specifically on policing laws that limit subfederal cooperation with federal immigration law enforcement, or otherwise offer some protection from that federal enforcement. Though subfederal governments can offer health, educational, and other benefits to create a welcoming environment for immigrants, their limits on police cooperation with immigration enforcement also provide sanctuary or protection from possible removal. This focus on policing laws is consistent with how other academics, the media, and even the federal government discuss immigration sanctuary.<sup>162</sup>

Throughout Phases I and II, the most active sanctuary jurisdictions have been larger cities and counties, with populations of more than 100,000 people. The convergence between large population centers and pro-immigrant laws is perhaps not surprising, as cities in the modern political era have often been associated with large immigrant communities and more liberal immigrant policies.<sup>163</sup> But in 2017, smaller cities and counties with populations less than 100,000 took the lead, enacting more sanctuary laws than their larger counterparts.<sup>164</sup> This category of smaller cities and counties was more active in 2017 than it had been in all the previous ICI years combined, and outpaced the larger cities and counties in 2017 by more than forty percent.

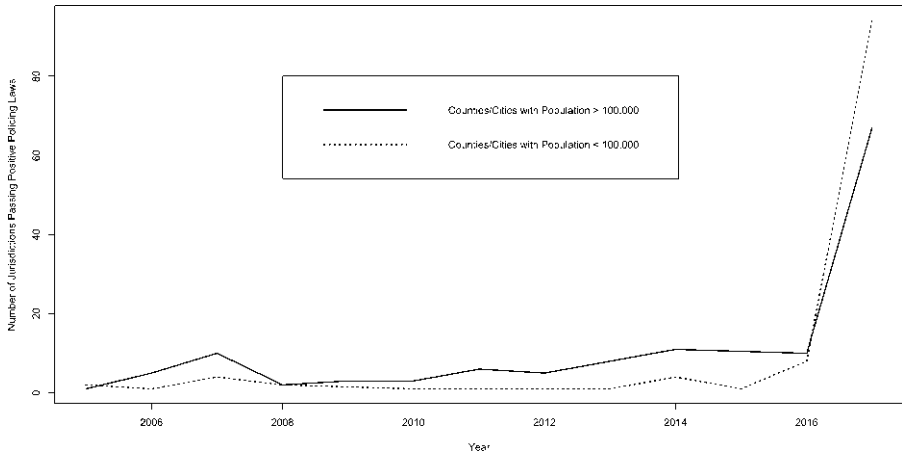
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<sup>162</sup> See, e.g., Lasch et al., *supra* note 42, at 1704 (describing sanctuary cities as localities that “have sought to disentangle their criminal justice apparatus from federal immigration enforcement efforts”); Tal Kopan, *Jeff Sessions Takes Immigration Fight to California, Announces Lawsuit*, CNN (Mar. 7, 2018), <https://www.cnn.com/2018/03/07/politics/jeff-sessions-california-sanctuary-cities-lawsuit/index.html> (discussing Sessions’ attacks on the leaders of sanctuary cities as “radical extremists”).

<sup>163</sup> See Jeffrey S. Passel & D’Vera Cohn, *20 Metro Areas Are Home to Six-in-Ten Unauthorized Immigrants in U.S.*, PEW RES. CTR. (Feb. 9, 2017), <http://www.pewresearch.org/fact-tank/2017/02/09/us-metro-areas-unauthorized-immigrants/> (noting that unauthorized immigrants settle primarily in large metropolitan areas, some of which have sanctuary policies limiting local police cooperation with immigration enforcement).

<sup>164</sup> See *infra* Figure 9. The crossover actually occurs at the end of 2016, due to the flurry of sanctuary legislation enacted after President Trump’s election in November 2016. To simplify analysis, we classified laws by the date of their enactment and limited our analysis of the Trump Effect to laws enacted in 2017, when President Trump took office.

FIGURE 9. CITIES AND COUNTIES ENACTING POSITIVE POLICING LAWS, BY POPULATION



Cities and Counties Enacting Positive Policing Laws, by Population (2005–17)

To be sure, larger cities and counties also became more active in 2017, with sixty-seven enacting immigrant-protective policing laws. But the bigger surge in activity by smaller cities and counties (ninety-four) demonstrates that the policy concerns motivating sanctuary laws<sup>165</sup> are now shared by a more diverse group of subfederal jurisdictions, not just the larger urban centers of years past.

In another sign of increased diversity, we note that a sizeable number of the 2017 sanctuary jurisdictions voted for President Trump in the 2016 presidential elections. As Figure 10 illustrates, the vast majority of sanctuary jurisdictions active in Phase III voted for Hillary Clinton; and if we use a Clinton/Trump vote in 2016 as proxy for Democratic/Republican political orientation, Democratic jurisdictions outnumbered Republican jurisdictions in enacting sanctuary laws during Phases I and II as well.<sup>166</sup> Given these historical trends, it is noteworthy that twenty cities and counties that voted for President Trump—with his campaign promises of restrictive immigration policies—also enacted policies protecting immigrants within their jurisdictions. For example, in September 2017, the Deerfield, New Hampshire Police Department adopted a policy prohibiting its officers from stopping, holding, or interrogating someone solely to determine his or her

<sup>165</sup> As noted earlier, those concerns include opposition to the Trump’s aggressive immigration enforcement policies, support for immigrants living within their communities, protecting public safety, and supporting equal rights and equal protection. *See supra* notes 104–07 and accompanying text.

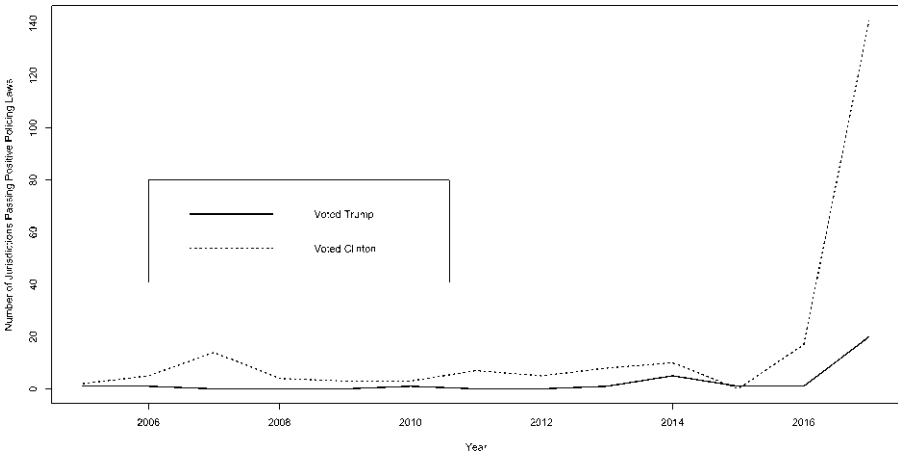
<sup>166</sup> In fact, these Republican-voting jurisdictions were largely inactive on the sanctuary front during Phases I and II, except for a bit of activity in 2014.



immigration status.<sup>167</sup> In November 2016, the city voted for Trump in the presidential election.<sup>168</sup>

This political diversity, albeit limited, provides more evidence that sanctuary concerns motivated by the Trump administration's aggressive immigration enforcement policies are becoming more widespread.

FIGURE 10. JURISDICTIONS ENACTING POSITIVE POLICING LAWS, BY POLITICAL AFFILIATION



Jurisdictions Enacting Positive Policing Laws, by Political Affiliation (2005–17)

In 2017, we also saw the emergence of new governmental players in this sanctuary debate: public school districts, public universities, and even mass transit authorities. During Phase III, these governmental entities issued “safe zone” statements, limiting their cooperation with federal immigration authorities. Public school districts, which run K–12 classes, were the most active among the new actors, with thirty-three school districts adopting immigrant-protective policies. A typical example of a protective school district policy is Indianapolis Public School Resolution 7736, which prohibits school district employees from (1) collecting or disseminating information about a student’s immigration status (or the status of the student’s family), except as legally required, or (2) assisting with immigration enforcement efforts unless legally required and authorized by the

<sup>167</sup> Melissa Proulx & Mark Hayward, *Deerfield PD Adopts New Policy for Dealing with Illegal Immigrants*, N.H. UNION LEADER (Sept. 20, 2017), <http://www.unionleader.com/Deerfield-PD-adopts-new-policy-for-dealing-with-illegal-immigrants>.

<sup>168</sup> *New Hampshire Election Results 2016*, N.Y. TIMES, <https://www.nytimes.com/elections/results/new-hampshire> (last updated Aug. 1, 2017). The vote count was 1091 votes for Clinton and 1607 votes for Trump.

school superintendent to do so.<sup>169</sup> The resolution also states that its previous policies against bullying, intimidation, or discrimination also protect students born outside the United States, or whose first language is not English.<sup>170</sup>

In an era of aggressive federal immigration enforcement, the reasons why school districts adopt immigrant-protective policies are rooted in their educational mission. The school districts exist to provide K–12 education to children living in their districts; after the Supreme Court’s decision in *Plyler v. Doe*, holding that children who lack lawful immigration status nonetheless cannot be denied access to K–12 education based on their status,<sup>171</sup> this educational mission evidently extends to immigrant children as well. As a practical matter, however, the ability to receive an education can be meaningless if children and their families fear being picked up by federal immigration authorities either at school, en route to school, or as a result of a school connection (e.g., because a school employee alerts ICE to the student’s status). If this fear takes root and spreads, school district officials might worry that parents will stop sending their children to school. If this happens on a large scale, the result might yet be the creation of a permanent underclass, which Justice Brennan warns about in *Plyler* as a compelling reason to recognize immigrant children’s constitutional right to education.<sup>172</sup>

As with other types of sanctuary laws, the impact of the school district policies may be limited. First, widespread enforcement actions on school campuses are not likely to occur; schools and school-related events are still considered to be sensitive locations under the Trump administration, meaning that enforcement actions should not be implemented there unless special circumstances exist.<sup>173</sup> Second, school districts do not exercise authority over areas around their schools, so they would not be able to, for example, protect parents who are arrested by ICE after dropping their children at school.<sup>174</sup>

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<sup>169</sup> Indianapolis Bd. of Sch. Comm’rs, Ind., Res. No. 7736 (Feb. 23, 2017).

<sup>170</sup> *Id.*

<sup>171</sup> See 457 U.S. 202, 229–30 (1982).

<sup>172</sup> *Id.* at 219–20.

<sup>173</sup> ICE’s website states that enforcement actions at sensitive locations may occur if “there are exigent circumstances, if other law enforcement actions have led officers to a sensitive location, or with prior approval from an appropriate supervisory official.” ICE provides no further explanation of what would constitute “exigent circumstances.” *FAQ on Sensitive Locations and Courthouse Arrests*, *supra* note 79.

<sup>174</sup> See Carolyn Jones, *What It Means When a School District Declares Itself a “Safe Haven” or “Sanctuary”*: A Quick Guide, EDSOURCE (Aug. 10, 2017), <https://edsources.org/2017/what-it-means-when-a-school-district-declares-itself-a-safe-haven-or-sanctuary-a-quick-guide/584273> (explaining that protective resolutions enacted by school districts are

The real impact of the school district policies may be more symbolic, as expressions of support for immigrant students and their families.

Public universities and colleges share the same educational mission as public school districts regarding the education of immigrant students, with some key differences. First, because there is no *Plyler*-type case for postsecondary education, no legal mandate exists to educate immigrant children with unauthorized status beyond high school. Second, colleges and universities tend to attract more attention from state legislatures, at least on issues related to immigration policy. As discussed earlier, four state legislatures—Georgia, Mississippi, Indiana, and Texas—enacted laws during Phase III that prohibited colleges and universities from enacting sanctuary-type protections.<sup>175</sup> These differences, plus the threat of losing federal funding, may explain why public universities have been more reluctant to embrace policies limiting their cooperation with federal immigration enforcement.<sup>176</sup>

One prominent exception is the California State University system, which issued guidelines for its twenty-three campuses limiting the ability of campus police and other university employees to cooperate with federal immigration law enforcement. Those guidelines contain provisions similar to other sanctuary laws: a prohibition against contacting, detaining, arresting, or questioning individuals solely based on their immigration status; a prohibition against honoring immigration detainers; and a prohibition against entering into 287(g) agreements.<sup>177</sup>

Finally, a handful of transit authorities became involved with the sanctuary debate during Phase III.<sup>178</sup> On June 22, 2017, the Bay Area

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intended to reassure students and their families that the districts “will do what they can to keep immigration authorities off school campuses”).

<sup>175</sup> See *supra* notes 123–26 and accompanying text.

<sup>176</sup> See, e.g., Stephen Dinan, *Congress Looks to Punish “Sanctuary Campus” Colleges That Protect Illegal Immigrants*, WASH. TIMES (Jan. 18, 2017), <https://www.washingtontimes.com/news/2017/jan/18/congress-looks-punish-sanctuary-campus-colleges/> (describing federal efforts to defund sanctuary campuses and the pushback from those campuses, including the University of California system); J.B. Wogan, *GOP’s “Sanctuary Campus” Threats Put a Price on Immigrants*, GOVERNING (Dec. 22, 2016), <http://www.governing.com/topics/education/gov-sanctuary-campus-trump-immigrants.html> (describing threats made by the state governments of Texas, Arkansas, and Georgia to defund public universities that establish themselves as sanctuary campuses).

<sup>177</sup> See, e.g., Open Letter from Timothy P. White, Chancellor, Cal. State Univ., to the Faculty, Staff & Students of the Cal. State Univ. (Nov. 17, 2016), <https://www2.calstate.edu/attend/student-services/resources-for-undocumented-students/Documents/Chancellor%20White%20Letter%20-%20November%202017,%202016.pdf>.

<sup>178</sup> Other transit authorities with sanctuary policies include the Los Angeles Port Police, the Los Angeles Airport Police, and the Metro Transit Police Department of the Minneapolis-St. Paul area. See Los Angeles, Cal. Exec. Directive No. 20 (Mar. 21, 2017),

Rapid Transit District, a special-purpose district body that operates the BART rapid transit system in the San Francisco Bay Area, adopted a Safe Transit policy.<sup>179</sup> Unless required by federal or state law, or a court order, this policy prohibits its employees from using BART resources to assist in immigration law enforcement, asking riders about immigration status, disseminating release date information about anyone in BART police custody, asking about immigration status on any BART questionnaire, providing ICE access to anyone in BART custody, threatening to report riders or others to ICE, asking for additional documents beyond those required by federal law to establish eligibility for employment or ridership programs, denying services based on immigration status, or using the federal E-Verify program.<sup>180</sup> Transit authorities in other cities have stopped short of adopting formal policies but have issued statements disclaiming any role in federal immigration law enforcement.<sup>181</sup>

With these policies and statements, the transit authorities are trying to reassure their riders and distance themselves from any association with federal immigration law enforcement. In the preamble to its Safe Transit policy, the BART Board of Directors emphasizes that it “will continue to stress cooperation with riders based on trust rather than fear” and “does not have the authority nor the desire to stop or arrest individuals based on a perceived immigration status.”<sup>182</sup> Access to public transportation is important for all city residents, but particularly so for unauthorized immigrants, who are ineligible for driver’s

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<https://www.lamayor.org/sites/g/files/wph446/f/page/file/Exec.%20Dir.%20No.%2020—Standing%20with%20Immigrants.pdf> (directive from the Los Angeles mayor directing the chiefs of the airport and port police to adopt policies prohibiting the investigation of individuals solely to determine immigration status); Minneapolis-St. Paul, Minn. Metro Transit Police Department, *Policy Manual: 428 – Immigration Enforcement*, METRO TRANSIT (2017), <https://www.metrotransit.org/transit-police-policy-manual> (prohibiting the Transit Police from taking any law enforcement action for the “sole purpose of detecting the presence of an undocumented person or persons or to verify immigration status”).

<sup>179</sup> Bay Area Rapid Transit Bd. of Dirs., Cal., Safe Transit Policy Res. (June 22, 2017), <https://www.bart.gov/news/articles/2017/news20170622-0>.

<sup>180</sup> *Id.*

<sup>181</sup> See, e.g., Shelby Bremer, *Rumors of Immigration Checks at CTA Stations Are False, Officials Say*, NBC CHI. (Feb. 15, 2017), <https://www.nbcchicago.com/news/local/cta-bag-checks-chicago-immigration-ice-raids-rumors-413892393.html> (describing statements made by Chicago Transit Authority to quell rumors that it participated in immigration checks at its stations); Elliot Njus, *TriMet Responds to False Rumors of Immigration Raids on Buses*, OREGONIAN (Feb. 10, 2017), [http://www.oregonlive.com/commuting/index.ssf/2017/02/trimet\\_responds\\_to\\_false\\_rumor.html](http://www.oregonlive.com/commuting/index.ssf/2017/02/trimet_responds_to_false_rumor.html) (describing TriMet’s denial of rumors that federal immigration officers were targeting bus riders in Portland).

<sup>182</sup> Safe Transit Policy Res., *supra* note 179.

licenses in most states.<sup>183</sup> As with similar sanctuary laws, public transit authorities can limit their own participation in immigration law enforcement, but they are unable to stop federal authorities from enforcing immigration laws on their public premises.<sup>184</sup>

The emergence of these specialized governmental entities in the sanctuary debate is significant. Though they have missions wholly distinct from immigration enforcement, their participation in the immigration debate reflects the encroachment of immigration issues into these other policy areas. Together with increased diversity in the profile of sanctuary cities and counties, we see the unprecedented reach of the Trump administration's immigration policies and the concerns generated by those policies.

### C. *The Future of Subfederal Immigration Regulation*

This Article has focused on the Trump Effect, analyzing in detail the influence that this presidency—with its dogged focus on immigration enforcement and restriction—has had on the immigration policies of states, cities, and counties. In this section, we offer some thoughts about the implications of our findings for the future of subfederal immigration regulation. In doing so, we are not offering predictions, but rather a framework for thinking about the future trajectory of this regulatory phenomenon.

First, it is clear that in enacting immigration regulations, states, cities, and counties are reacting to federal immigration policies, or at least to their perceptions of those policies. We saw this reaction in Phase I, when subfederal governments enacted immigrant-restrictive laws, responding to the perceived lax enforcement policies of the Obama administration and previous federal administrations. During Phase III, the pace and scope of subfederal immigration regulation—and the legislative history of these new laws—also reflect a reaction to federal policy. Federal immigration policy under the Trump administration has been decidedly more restrictive, and our analysis shows that the most extreme of these policies (e.g., deporting immigrants without criminal records) seem to garner the most vocal reaction from subfederal governments, usually in an immigrant-protective direction.

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<sup>183</sup> See *States Offering Driver's Licenses to Immigrants*, NAT'L CONF. ST. LEGISLATURES, <http://www.ncsl.org/research/immigration/states-offering-driver-s-licenses-to-immigrants.aspx> (last visited Oct. 30, 2018).

<sup>184</sup> See *Frequently Asked Questions for University Employees About Possible Federal Immigration Enforcement Actions on University Property*, UNIV. CAL. (Mar. 20, 2017), <https://www.universityofcalifornia.edu/content/frequently-asked-questions-federal-immigration-enforcement-actions> (containing guidance from the Regents of the University of California advising employees that the university cannot prevent ICE from entering public university property).

Second, while cities and counties may lead in the initial phase of subfederal immigration regulation, states matter the most. States control more resources and have broader geographic reach, so their laws have the potential to affect immigrants living within their jurisdictions in a much more impactful way. Our ICI, in its weighing of city and county laws, reflects that reality. So though many cities and counties have enacted immigrant-protective laws in this Phase III, helping to swing the national ICI score upward, state legislative activity will have the most impact. As we consider the future of subfederal immigration regulation, we should pay careful attention to what states do. Will states follow the lead of cities and counties and enact more immigrant-protective legislation, in the same way that we saw more states enact restrictive laws during Phase I? Though city and county level laws and policies are certainly important for immigrants living within their jurisdictions, the real impact comes at the state level.

The third piece of our framework recognizes that a great majority of subfederal governments are not involved in immigration regulation or are only minimally involved. Will more subfederal governments jump into the legislative fray? Subfederal immigration regulation has tended to attract those state and local governments that are the most passionate about immigration issues, either in immigrant-protective or -restrictive ways. We already saw some significant changes in the population size and political orientation of sanctuary cities. If the Trump administration continues to implement more and more restrictive immigration policies, it may inspire yet more subfederal governments to enact subfederal immigration regulation, making legislation at the state, city, and county levels even more important in the nation's immigration debate.

## CONCLUSION

The Trump administration's immigration policies, with their hyperaggressive focus on restriction and enforcement, have profoundly affected the immigration policies of states, cities, and counties. Using our Immigrant Climate Index data, we make three observations about this Trump Effect. First, subfederal governments, especially at the city and county level, reacted with a surge of legislative activity in 2017 that was mostly immigrant-protective in nature—so called “sanctuary” laws. Second, this surge of positive laws has helped pull the national ICI score sharply upward. That score remains in highly negative territory after years of mostly restrictive laws enacted at the state level, but the high volume of immigrant-protective laws enacted in 2017 fueled an upward trend that started in 2013.

Finally, the nature of government sanctuary in 2017 became more diverse. Compared with the larger, more urban sanctuary cities in years past, the most active sanctuary cities in 2017 were smaller cities and suburbs. A surprising number of these smaller jurisdictions voted for Trump in the 2016 presidential election. Another aspect of sanctuary diversity was the emergence of public school districts, public universities, and even transit authorities issuing policies limiting their cooperation with federal immigration enforcement. This increased diversity in government sanctuary reflects one of the most significant aspects of the Trump Effect: As the administration continues to pursue hyperaggressive immigration policies, it is motivating more—and more diverse—subfederal jurisdictions to enter the immigration regulation fray.