

June 2024

## The Subfederal in Immigration Polarization

Huyen Pham

*Texas A&M University School of Law*

Pham Hoang Van

*Baylor University*

Follow this and additional works at: <https://lawandinequality.org/>

---

### Recommended Citation

Huyen Pham & Pham H. Van, *The Subfederal in Immigration Polarization*, 42(1) LAW & INEQ. 33 (2024), DOI: <https://doi.org/10.24926/25730037.690>.

## The Subfederal in Immigration Polarization

Huyen Pham & Pham Hoang Van<sup>†</sup>

### Abstract

The framing of subfederal immigration regulation as a red-blue divide is conventional wisdom. As more states, cities, and counties have engaged in the regulation of immigrants within their jurisdictions, it is not particularly surprising to see deep-red states like Texas enacting laws that restrict the rights of immigrants in their jurisdictions (e.g., requiring police within the state to honor detainers issued by United States Immigration and Customs Enforcement (ICE)) or deep-blue states like California enacting laws that protect immigrants' rights (e.g., issuing driver's licenses without requiring proof of lawful immigration status).

Rather than only reflecting national polarization on immigration issues, however, our empirical study shows that subfederal immigration regulation has contributed to increasing national polarization on immigration issues. Using our unique Immigrant Climate Index (ICI) and over fifteen years of subfederal immigration legislation data, we find that subfederal regulation initially crossed red-blue lines more frequently, with blue jurisdictions enacting restrictive laws and red jurisdictions enacting integrationist laws.

Starting with the Obama Administration, subfederal regulation has become more partisan, which has increased *national* partisanship in two important ways. First, as national legislative policy remains gridlocked on immigration issues, regulation has devolved to smaller, more partisan state legislatures or city

---

<sup>†</sup>. Huyen Pham, Professor of Law and Associate Dean for Faculty Research & Development, Texas A&M University School of Law (J.D., Harvard Law School; A.B., Harvard College); Pham Hoang Van, Professor of Economics, Hankamer School of Business, Baylor University (Ph.D., Economics, Cornell University; S.M., S.B., Mechanical Engineering, MIT). We thank our colleagues at Texas A&M University and Baylor University for their helpful comments. We are particularly grateful for the comments we received at the Law & Society Association's Race, Reckoning, & Remedy Conference (Lisbon 2022) and the University of Oklahoma's Speaker Series. We would also like to thank Samantha Davis, Lexie Ford, Guillermo Gomez, and Sarah Subramanian for their superb research assistance.

councils. This change then extends regulation to include policies and issues that are primarily, if not exclusively, within local control (e.g., access to private housing or professional licenses). Thus, as local governments regulate immigration through local policies, they create more substantive issues about which to express immigration disagreement in the *national* debate. Second, we identify a copycat counter-effect dynamic *between* subfederal governments, as the enactment of a novel, controversial immigration regulation often inspires duplication and then a counter-reaction as protest effect. For example, Arizona's infamous S.B. 1070 law (requiring law enforcement officers to verify the immigration status of detained persons whom officers suspect are in the United States illegally) inspired copycat laws in Utah, Georgia, Indiana, Alabama, and South Carolina. These restrictive laws, in turn, engendered protest legislation, like California's "anti-Arizona" TRUST Act that greatly restricts police in honoring immigration detainees. Further, as more formerly federal policies (like abortion) devolve to the subfederal level, our analysis of polarization trends in immigration provides insights into polarization in other policy areas.

## Table of Contents

Abstract .....	33
Table of Contents .....	35
Introduction.....	35
I. The Immigrant Climate Index.....	43
II. Horizontal and Vertical Subfederal Interactions.....	47
A. Federal-Subfederal Interactions .....	47
i. Bush II Administration (2005–2008).....	49
ii. Obama I Administration (2009–2012).....	51
iii. Obama II Administration (2013–2016) .....	57
iv. Trump Administration (2017–2020).....	59
B. The Independent Role of Subfederal Regulations .....	63
i. Increasing the Scope of Immigration Regulation .....	63
ii. The Copycat and Opposing Law Cycle .....	71
Conclusion .....	85

## Introduction

On June 6, 2002, Attorney General John Ashcroft made a seismic announcement by inviting state and local police to use their “inherent authority” as sovereigns to join federal immigration authorities in enforcing civil immigration laws.<sup>1</sup> This invitation was issued after the 9/11 attacks and the discovery that the hijackers had violated United States immigration laws to enter the country and commit terrorist attacks. Having local enforcement agencies (LEAs) join in this “narrow anti-terrorism mission” was characterized by Ashcroft as a force multiplier, piggybacking on the labor of significantly larger LEA forces, with federal agencies in

---

1. John Ashcroft, U.S. Att’y Gen., Prepared Remarks on the National Security Entry-Exit Registration System (June 6, 2002), <https://www.justice.gov/archive/ag/speeches/2002/060502agpreparedremarks.htm> [https://perma.cc/2DBT-695Z].

control.<sup>2</sup> The invitation also reversed a longstanding federal position that the enforcement of civil immigration laws (e.g., laws prohibiting visa overstays) belonged exclusively to the federal government, with an established carveout for state and local police to enforce criminal immigration laws (e.g., human trafficking laws).<sup>3</sup>

Twenty years after Ashcroft issued this invitation and opened the floodgates to modern subfederal immigration regulation, the reality has diverged significantly from the narrow, federally controlled framework that Ashcroft pitched. Though policing laws remain the most common type of subfederal regulation, states, cities, and counties have also enacted laws either restricting or enhancing immigrant access to employment, benefits, housing, legal services, and translation services.<sup>4</sup> And as evidenced by the federal lawsuits and other federal actions by different presidential administrations to challenge subfederal laws, the federal government has not always controlled or even agreed with the substance of these laws.<sup>5</sup>

One important consequence of inviting subfederal immigration regulation is the extreme polarization that has developed among subfederal governments on immigration issues, as reflected in the often vastly different laws. Texas, for example, now requires all its law enforcement agencies to honor federal immigration detainers, making it easier for ICE to deport noncitizens who have been stopped by local police.<sup>6</sup> The Texas

2. *Id.*

3. *Id.*

4. See, e.g., Lisa M. Sanchez & Isabel Williams, *Extending a Hand in Perilous Times: Beneficial Immigration Policy in the Fifty States, 2005-2012*, 101 SOC. SCI. Q. 6 (Oct. 2020); Ann Morse, *Report on State Immigration Laws: 2020*, NAT'L CONF. STATE LEGISLATURES (Mar. 8, 2021), <https://www.ncsl.org/research/immigration/report-on-state-immigration-laws-2020.aspx> [<https://perma.cc/F4YX-YT29>].

5. See, e.g., Uriel J. Garcia, *Justice Department Sues Texas over Gov. Greg Abbott's Order for Law Enforcement to Pull Over Vehicles with Migrants*, TEX. TRIB. (July 30, 2021), <https://www.texastribune.org/2021/07/30/justice-department-sues-texas-greg-abbott-migrants/> [<https://perma.cc/FYY4-CYSF>]; Matt Zepotosky, *Justice Dept. Sues California over 'Sanctuary' Laws That Aid Those in U.S. Illegally*, WASH. POST (Mar. 6, 2018), [https://www.washingtonpost.com/world/national-security/justice-dept-sues-california-over-sanctuary-laws-that-aid-those-in-us-illegally/2018/03/06/fd489c2e-215c-11e8-94da-ebf9d112159c\\_story.html](https://www.washingtonpost.com/world/national-security/justice-dept-sues-california-over-sanctuary-laws-that-aid-those-in-us-illegally/2018/03/06/fd489c2e-215c-11e8-94da-ebf9d112159c_story.html) [<https://perma.cc/Q7QK-LGQ9>].

6. Richard Gonzales, *Federal Judge Temporarily Blocks SB4, Texas Law Targeting Sanctuary Cities*, NPR (Aug. 30, 2017), <https://www.npr.org/sections/thetwo-way/2017/08/30/547459673/federal-judge-temporarily-blocks-sb4-texas-law-targeting-sanctuary-cities> [<https://perma.cc/MT55-U274>] (describing public discourse around S.B. 4 which,

Governor has even transferred 10,000 state National Guard troops to patrol the Texas-Mexico border and apprehend unauthorized immigrants in what has been dubbed “Operation Lone Star.”<sup>7</sup> At the other extreme, California issues driver’s licenses to residents who meet state residency requirements without mandating proof of lawful immigration status.<sup>8</sup> The state also prohibits its law enforcement agencies from cooperating with federal immigration enforcement except under narrowly defined circumstances.<sup>9</sup>

On the surface, this polarization at the subfederal level could be seen as a mere extension of national polarization on immigration issues. After all, the immigration debates at the federal level have largely split along party lines, with Republicans advocating for immigration restrictions and greater enforcement while Democrats advocate for integrationist laws and comprehensive immigration reform, often with a legalization component.<sup>10</sup> But with the benefit of the Immigrant Climate Index, a unique index that collects and measures the climate created by subfederal immigration laws, we are able to discern more nuanced patterns. This research suggests that: (1) subfederal immigration regulation started with more non-partisan participation and has become increasingly polarized along party lines over time, and (2) rather than just reflecting national polarization on immigration issues, subfederal regulation itself has provided a mechanism for increasing polarization by enabling smaller, more partisan subfederal governments to enact increasingly restrictive or integrationist laws, which in turn have inspired copycat laws or protest laws.

This polarization between and within subfederal governments and its dynamic interactions with federal policy is underexplored. Studying the scope and determinants of polarization is complicated

---

although challenged and temporarily blocked, remains in effect in Texas).

7. Carolina Cuellar, *Members of the Texas National Guard Struggle with Working Conditions at the Border*, NPR (Mar. 1, 2022), <https://www.npr.org/2022/03/01/1083664547/members-of-the-texas-national-guard-struggle-with-working-conditions-at-the-bord> [<https://perma.cc/KL4R-X6DV>].

8. Benjamin Oreskes & Ruben Vives, *Giving Driver’s Licenses to Those Here Illegally Transformed Many Lives. Then Came Trump*, L.A. TIMES (Apr. 22, 2017), <https://www.latimes.com/local/lanow/la-me-ln-ab60-drivers-licenses-20170422-story.html> [<https://perma.cc/Y2VK-A8LB>].

9. *E.g.*, Adrian Florido, *California TRUST Act Moving Toward Passage*, KPBS (Aug. 29, 2013), <https://www.kpbs.org/news/border-immigration/2013/08/29/california-trust-act-moving-toward-passage> [<https://perma.cc/8FYA-MDX7>].

10. TOM K. WANG, *THE POLITICS OF IMMIGRATION: PARTISANSHIP, DEMOGRAPHIC CHANGE, AND AMERICAN NATIONAL IDENTITY* 177 (2017) (differentiating Republican representatives’ support of states and localities to enforce immigration laws from the more divided Democratic representatives).

by the ever-shifting subfederal legal landscape. Though federal immigration policies have also changed through the Bush, Obama, and Trump Administrations under study, and at times have done so quite drastically, those federal changes have been largely centralized and thus are easier to track.<sup>11</sup> By contrast, subfederal regulation by its nature is decentralized and much more difficult to record and analyze, as new laws take effect (and expire) and new governmental actors enter (and exit) the subfederal landscape. Regulation at the city and county levels is particularly difficult to track, as there is no centralized clearinghouse for those laws and policies.<sup>12</sup>

With the Immigrant Climate Index (ICI), we provide that centralization. We created the ICI to bring coherence to the study of subfederal immigration regulation by collecting the laws enacted at the state, county, and city levels, categorizing the laws, and assigning a score to each law—positive or negative—based on its effect on immigrants within the subfederal government’s jurisdiction. Our ICI scores give us the ability to take both a bird’s eye view of these laws over time and to drill down into specific laws enacted at the state, city, and county levels. Collecting data at all levels of subfederal governance also allows us to compare subfederal regulation across jurisdictions (state to state) and within jurisdictions (city and county activity within any particular state). We started our ICI data collection in 2005, when this modern chapter of subfederal immigration regulation began in earnest.<sup>13</sup>

Using the ICI’s unique data and the multiple views it provides over time, we find ample evidence that subfederal immigration regulation has indeed been organized around red-blue lines, with “red” jurisdictions<sup>14</sup> largely enacting negative laws (which restrict the protections and benefits extended to immigrants in their jurisdictions) and “blue” jurisdictions<sup>15</sup> largely enacting positive

---

11. *But see generally* Fatma E. Marouf, *Regional Immigration Enforcement*, 99 WASH. U. L. REV. 1593 (2021) (examining the regional disparities in immigration enforcement context).

12. *See* Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2020 (1988).

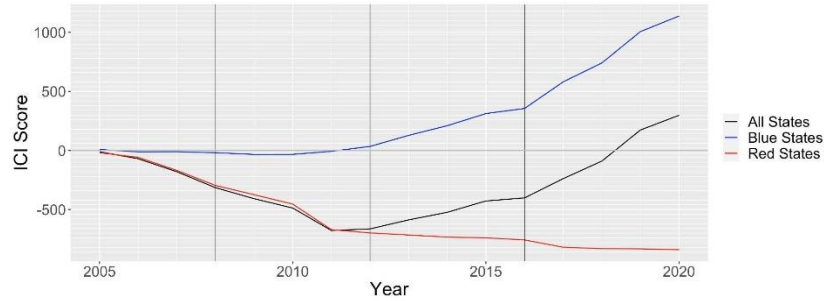
13. *See generally* Huyen Pham & Pham Hoang Van, *Measuring the Climate for Immigrants: A State-by-State Analysis*, in STRANGE NEIGHBORS: THE ROLE OF STATES IN IMMIGRATION POLICY 21–39 (Carissa Byrne Hessick & Gabriel J. Chin eds., 2014).

14. “Red” jurisdictions are defined as jurisdictions that voted for a Republican presidential candidate in the preceding presidential election.

15. “Blue” jurisdictions are defined as jurisdictions that voted for a Democratic presidential candidate in the preceding presidential election.

laws (which integrate immigrants by offering protections and benefits).<sup>16</sup>

**Figure 1: Tracking ICI by Red/Blue Origin**



But drilling down, we see that subfederal regulation was more non-partisan in the first phase than in subsequent years.<sup>17</sup> Specifically looking at laws enacted at the state level during the second Bush Administration (2005–2008), we observe that blue states enacted a significant number of negative laws (mostly laws establishing cooperation with federal immigration authorities), more than the number of positive laws enacted. Similarly, although red states enacted more negative laws during this initial phase, they also enacted a number of positive laws.<sup>18</sup>

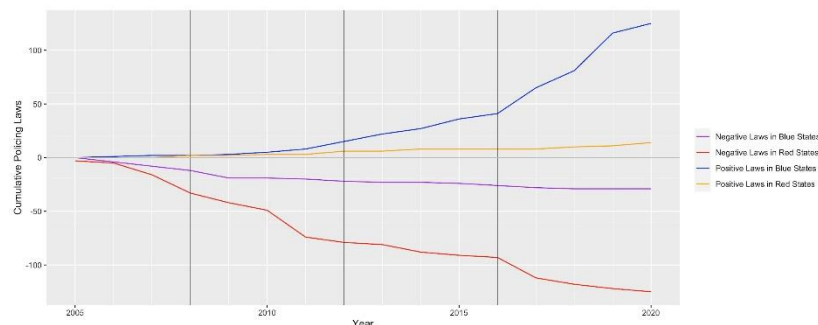
16. *See infra* Figure 1.

17. *See infra* Figure 2.

18. *Id.*



**Figure 2: Counting Positive-Negative State Policing Laws by Red/Blue Origin**



In subsequent administrations, however, subfederal immigration regulation became substantially more partisan as the number of red/negative and blue/positive laws increased, both in absolute numbers and as a percentage of laws originating from red or blue states.<sup>19</sup> This growing divide supports the theory of partisan federalism, where firmly polarized state actors channel their partisan fights through both state and federal forums, taking advantage of the institutional federalist framework.<sup>20</sup>

But partisan federalism only tells part of the story. When the ICI data is transposed against common measures of federal immigration enforcement (removals from the interior of the United States and detainer requests),<sup>21</sup> we see counterintuitive patterns: red jurisdictions were most active during a period of historically high federal enforcement (Obama I), and blue jurisdictions were most active during a period of historically average federal enforcement (Trump).<sup>22</sup>

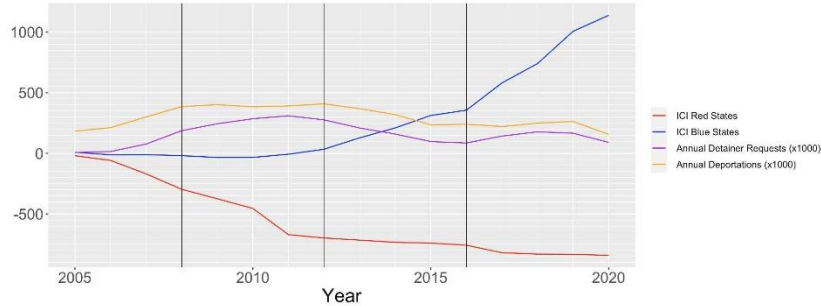
19. *Id.*

20. Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1080–81 (2014).

21. 8 C.F.R. § 287.7(a)–(d). Detainer requests are issued by a federal immigration officer to local law enforcement agencies, requesting the LEA to detain an immigrant who has been arrested for reasons not related to that person's immigration status. In issuing a detainer request, federal immigration authorities ask that the person in custody be detained for up to forty-eight hours beyond the time that the immigrant would ordinarily be released, giving ICE the opportunity to assume custody of the immigrant and place them in removal proceedings.

22. *See infra* Figure 3.

**Figure 3: Comparing ICI with Federal Enforcement Measures**



These patterns point to deep-rooted partisanship, to be sure. However, the counterintuitive trends in this activity data suggest that the partisanship could be driven by a desire for party and social identification, rather than by concern for actual policy change, which we explore further in this Article.<sup>23</sup>

We also find that subfederal immigration regulation has played a significant and independent role in increasing immigration partisanship. That role is twofold: first, as compared with Congress and federal processes for enacting laws, subfederal governments are smaller, often with simpler processes. Their relative size means it is often easier for a state legislature or a city council to reach agreement and to extend immigration regulation into a new policy area, either in a restrictive or integrationist manner. Using our ICI data, we can chart that exploration into new regulatory areas, such as the push to make access to rental housing and driver's licenses dependent on immigration status.<sup>24</sup> These developing areas of immigration regulation bring local issues into the highly polarized

23. James N. Druckman, Samara Klar, Yanna Krupnikov, Matthew Levendusky & John Barry Ryan, *Affective Polarization, Local Contexts and Public Opinion in America*, 5 *NATURE HUM. BEHAV.* 28, 28 (2021) (“Partisanship is a type of social identity and, by identifying with one party, individuals divide the world into two groups: their liked in-group (our own party) and a disliked out-group (the other party).”).

24. *E.g.*, Daniel Eduardo Guzman, *There Be No Shelter Here: Anti-Immigrant Housing Ordinances & Comprehensive Reform*, 20 *CORNELL J.L. & PUB. POL'Y* 399, 402 (2012) (highlighting how the immigration policy debate must shift because of changing municipal strategies to exclude immigrants in housing); Margaret Stevens, *Supporters Say Renewed 'Driver's License for All' Push About Safety, Dignity*, *MINN. H.R.* (Jan. 10, 2023), <https://www.house.mn.gov/sessiondaily/Story/17500> [<https://perma.cc/6G7Q-4MEL>] (stating that opponents of Minnesota's “driver's licenses for all” bill argue that this legislation could encourage illegal immigration).

national conversation, pushing subfederal governments and voters to take sides on these newly federalized issues.

The second important role that subfederal regulations play is the motivation they provide to other subfederal governments to act. Using the ICI data, we observe distinct patterns where a novel immigration regulation inspires both copying by like-minded jurisdictions and counter laws by differing jurisdictions, creating a copycat and counter law cycle. An example of this copycat and counter law cycle is Arizona's infamous S.B. 1070 law, also referred to as the "Support Our Law Enforcement and Safe Neighborhoods Act."<sup>25</sup> Enacted in 2010, the law's primary provisions imposed state criminal penalties on noncitizens who failed to carry their alien registration documents or who worked in Arizona without legal authorization, required law enforcement officers to verify the immigration status of detainees whom officers suspected were in the U.S. illegally and allowed those officers to arrest individuals for unlawful presence without a warrant.<sup>26</sup> S.B. 1070 inspired legislators in Utah,<sup>27</sup> Georgia,<sup>28</sup> Indiana,<sup>29</sup> Alabama,<sup>30</sup> and South Carolina<sup>31</sup> to enact similar legislation in 2011.<sup>32</sup> The successful enactment of S.B. 1070 and its copycat laws also engendered protest legislation. Most notably, California's "anti-Arizona"<sup>33</sup> TRUST Act greatly limits local law enforcement's ability to honor immigration detainees.<sup>34</sup> An important backdrop for this cycle is, of course, federal immigration law and policy, but our ICI data shows that subfederal governments are also reacting to other subfederal

---

25. Support Our Law Enforcement and Safe Neighborhoods Act, ch. 113, 2010 Ariz. Sess. Laws 450.

26. *Id.*; see *Arizona v. United States*, 567 U.S. 387, 413 (2012) (holding that only the mandatory status checks survived constitutional challenge).

27. Illegal Immigration Enforcement Act, ch. 21, 2011 Utah Laws 261.

28. Georgia Illegal Immigration Reform and Enforcement Act of 2011, 2011 Ga. Laws 794.

29. P.L.171-2011, 2011 Ind. Acts 1926.

30. Beason-Hammon Alabama Taxpayer and Citizen Protection Act, 2011 Ala. Laws 888.

31. South Carolina Act of June 27, 2011, 2011 S.C. Acts 325.

32. *SB 1070 Four Years Later*, NAT'L IMMIGR. L. CTR. (Apr. 23, 2014), <https://www.nilc.org/issues/immigration-enforcement/sb-1070-lessons-learned/> [<https://perma.cc/28UW-PY8L>].

33. Mary Slosson & Tim Gaynor, *California Senate Passes "Anti-Arizona" Immigration Bill*, REUTERS, <https://www.reuters.com/article/us-usa-california-immigration/california-senate-passes-anti-arizona-immigration-bill-idUSBRE86502720120706/> [<https://perma.cc/9MKW-AXQP>].

34. California TRUST Act, ch. 570, 2013 Cal. Stat. 4650 (listing limited circumstances in which law enforcement officials "have discretion to cooperate with federal immigration officials by detaining an individual on the basis of an immigration hold after that individual becomes eligible for release from custody").

governments' immigration regulations. This response means that a single subfederal immigration law can have powerful effects beyond its own jurisdiction. With this copycat counter-law dynamic, subfederal immigration regulation itself becomes a mechanism for increasing immigration polarization on a national scale.

This Article proceeds in three parts. In Part I, we explain the structure and inputs for our Immigrant Climax Index. Using the ICI, we describe in Part II our observed interactions between federal and subfederal immigration laws and between subfederal laws. We organize these observations by presidential administration and explain the copycat and counter law dynamic we observe between subfederal governments on immigration laws and policies. In Part III, we conclude by exploring some practical and theoretical implications for our empirical findings.

### I. The Immigrant Climate Index

We developed the Immigrant Climate Index (ICI) to measure and understand more systematically the climate created by subfederal immigration regulations.<sup>35</sup> The ICI collects and analyzes subfederal laws related to immigration, assigning numerical scores based on the laws' effect and scope. Information about these individual laws can be used to calculate scores for states and counties over time. With data collection starting in 2005, the ICI allows us to zoom in to see the immigrant climate at the individual county and state level and to zoom out to assess the climate for the nation as a whole.

In constructing the ICI, we included regulations enacted by cities, counties, and states that specifically affect the immigrants within their jurisdictions. With this parameter, we are less concerned with the legal form of the regulation (e.g., whether it is styled as an ordinance, a law, a resolution, or a policy) and more concerned with its effect: does it concretely affect the lives of immigrants in a positive or negative way? While subfederal governments often pass resolutions expressing support for, or opposition to, some federal immigration policy or principle,<sup>36</sup> those

---

35. See Huyen Pham & Pham Hoang Van, *State-Created Immigration Climates: The Influence of Domestic Migrants*, 38 U. HAW. L. REV. 181 (2016); Pham & Van, *supra* note 13.

36. See, e.g., H. CON. RES. NO. 3048, 67th Legis. Assemb., Reg. Sess. (N.D. 2021) ("Be it further resolved that the Sixty-seventh Legislative Assembly urges the President of the United States and the Department of Homeland Security not to transfer illegal aliens to North Dakota . . .").

resolutions do not substantively change how the subfederal governments operate.

To separate immigration regulation from subfederal regulation generally, we look for a specific effect on immigrants that differs from any possible effect on non-immigrants. Often, the link to immigrants is clear, as the regulation singles out immigrants in its text, such as by granting or denying a benefit based on immigration status.<sup>37</sup> Occasionally, the regulation does not mention immigrants or immigration at all but has an asymmetrical effect on immigrants. An example of these more indirect laws would be a regulation requiring or prohibiting the translation of government documents into other languages.<sup>38</sup> The asymmetrical effect that this regulation would have on immigrants would thereby cause it to be classified as a subfederal immigration regulation.

The laws used to build the ICI come from several sources, with the earliest data dating back to 2005. To collect state laws, we looked to the immigration-related legislation collected by the National Conference of State Legislatures (NCSL) and used our definition of subfederal immigration regulation to filter out laws that did not have a concrete effect on immigrants' lives.<sup>39</sup> We supplemented the NCSL data with our own news searches to capture state-level laws that were not enacted by legislatures, like executive orders issued by governors.

Collecting city and county laws was more complicated because there is no central clearinghouse for this type of local legislation.<sup>40</sup> For our ICI, those laws were compiled from a variety of sources, including data collected by advocacy groups,<sup>41</sup> government

---

37. *E.g.*, DENVER, COLO., REV. MUN. CODE ch. 28, art. VIII, § 28-250(a)(3) (2017); Oak Park, Ill., Oak Park Village Code ch. 13, art. 7, § 4 (2017); River Forest, Ill., Resolution No. 17-15 § 5 (Aug. 21, 2017); Rockville, Md., City Code ch. 11, art. 1, § 11-3(e) (2017); Salem, Mass., Salem Code of Ordinances ch. 2, art. XVII, § 2-2062(a) (2017); West Palm Beach, Fla., Resolution No. 112-17 § 5 (Mar. 27, 2017).

38. *See, e.g.*, MINN. STAT. § 120B.115(a)(7) (2017); Santa Fe, N.M., Resolution No. 2017-19 (8) (2017).

39. *About Us*, NAT'L CONF. STATE LEGISLATURES, <http://www.ncsl.org/aboutus.aspx> [<https://perma.cc/GTP3-AFP9>].

40. Subrin, *supra* note 12.

41. *See, e.g.*, MEXICAN AMERICAN LEGAL DEF. & EDUC. FUND, <http://maldef.org> [<https://perma.cc/2MNZ-ZPYY>]; LATINOJUSTICE PRLDEF, <http://latinojustice.org> [<https://perma.cc/MCP3-D9UV>]; NAT'L DAY LABORER ORG. NETWORK, <http://www.ndlon.org/en/> [<https://perma.cc/JF76-F7DF>]; OHIO JOBS & JUST. PAC, <http://www.ojjpac.org> [<https://perma.cc/W256-RDYR>].

websites,<sup>42</sup> and searches of electronic news databases.<sup>43</sup> For each law that we 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.

Not all subfederal laws will affect immigrants in the same way. To reflect that varying effect, we considered both a law's type and its geographic range when calculating its ICI score. We divided the laws into four basic types, assigning scores of 1–4, with higher point values assigned to laws with a greater impact (negative or positive) on the lives of immigrants. Tier 4 laws include 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>44</sup> or decreasing that risk (e.g., a “sanctuary law” that prohibits the use of subfederal resources to enforce immigration laws).<sup>45</sup> Tier 3 includes laws that affect access to the very important benefits that cannot be replaced or must be replaced at high personal cost, such as laws that affect access to general employment or driver's licenses.<sup>46</sup> 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>47</sup> while an example of a positive Tier 3 law

---

42. See Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act, ICE, <https://www.ice.gov/287g> [<https://perma.cc/33TG-6U4F>] (outlining and describing the requirements of 287(g) agreements which govern partnerships between state or local law enforcement agencies and ICE).

43. See *Westlaw News Headlines*, REUTERS (2018), <https://www.reuters.com/news/archive/westLaw> [<https://perma.cc/EV7P-9NBC>].

44. ICE, *supra* note 42.

45. See, e.g., DENVER, COLO., REV. MUN. CODE ch. 28, art. VIII, § 28-250(a) (2017); Honolulu, Haw., Res. No. 17-50, CD1 (Feb. 13, 2017); ITHACA, N.Y., MUN. CODE ch. 215, art. VI, § 215-44 (2017); NEWTON, MASS., REV. ORDINANCES ch. 2, art. VI, § 2-405 (2017); Santa Monica, Cal., Res. Embracing Diversity and Clarifying the City's Role in Enforcing Federal Immigration Law (Feb. 28, 2017), *available at* <https://www.santamonica.gov/diversity> [<https://perma.cc/PNE3-DFRV>].

46. See Kati L. Griffith, *When Federal Immigration Exclusion Meets Subfederal Workplace Inclusion: A Forensic Approach to Legislative History*, 17 N.Y.U. J. LEGIS. & PUB. POL'Y 881 (2014) (discussing employment access laws as immigration regulation); María Pabón López, *More than a License to Drive: State Restrictions on the use of Driver's Licenses by Noncitizens*, 29 S. ILL. U. L.J. 91 (2004) (surveying laws regulating driver's licenses).

47. See, e.g., TEX. NAT. RES. CODE ANN. § 81.072(b) (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 E-

would be a regulation granting driver's licenses regardless of immigration status.<sup>48</sup> In the ICI, Tier 2 laws affect access to benefits that are important but can be more easily replaced. Examples include laws requiring proof of legal immigration status to obtain publicly funded healthcare<sup>49</sup> or granting in-state college tuition rates to undocumented students.<sup>50</sup> Another common Tier 2 law limits access to a specific job by conditioning occupational requirements like licensure on immigration status.<sup>51</sup> All these benefits are important, but because alternatives exist, we assign laws that limit or increase access to these benefits two points. 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 would be assigned one point, either positive or negative.<sup>52</sup>

---

verify program to verify employee information"); TEX. TRANSP. CODE ANN. § 223.051 (stating 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 register with and participate in the E-verify program to verify employee information.").

48. *See, e.g.*, CAL. GOV'T CODE § 12926(v) (2018) (including "National Origin" as discrimination on the basis of possessing a driver's license granted under Section 12801.9 of the Vehicle Code); CAL. VEH. CODE § 12801.9(a) (2018) (stating that the Department of Motor Vehicles shall issue a driver's license to a person despite their inability to submit satisfactory proof of authorized presence in the United States if he or she meets all other qualifications for receiving 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) (amending previous legislation to permit individuals who had a Social Security Number but could not establish legal presence in the United States to obtain a limited purpose driver's license, permit, or identification).

49. *See, e.g.*, ARIZ. REV. STAT. § 36-2903.03(a) (2000) (requiring applicants for health benefits to provide documentation of citizenship or qualified alien status).

50. *See, e.g.*, COLO. REV. STAT. 23-7-103(2)(o) (2018); CONN. GEN. STAT. § 10a-29(9) (2018) (allowing undocumented immigrants to receive in-state tuition for Connecticut universities if they reside in the state, attended any educational institution in the state, completed at least two years of high school in the state, graduated from high school in the state (or the equivalent thereof), and are registered as an entering student or enrolled at a public institution of higher education in the state, so long as they file affidavits with that institution stating they have filed applications to legalize their immigration statuses or will file the applications as soon as they are eligible to do so); *see* Julie Stewart & Thomas Christian Quinn, *To Include or Exclude: A Comparative Study of State Laws on In-State Tuition for Undocumented Students in the United States*, 18 TEX. HISP. J.L. & POL'Y 1 (2012) (analyzing the policy of in-state tuition law for undocumented immigrants in Utah).

51. *See Professional and Occupational Licenses for Immigrants*, CATH. LEGAL IMMIGR. NETWORK, INC. (Aug. 22, 2019), <https://www.cliniclegal.org/resources/state-and-local/professional-and-occupational-licenses-immigrants> [<https://perma.cc/47SG-PT8U>].

52. *See, e.g.*, MINN. STAT. § 120B.115(a)(7) (2022); Santa Fe, N.M., Res. No. 2017-19 (8) (2017).

In calculating ICI scores, we also weigh laws differently, depending on their geographic reach. Statewide laws are assigned whole points (from 1–4 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. So, for example, when Las Vegas signed a 287(g) agreement in 2008, the negative four points that the 287(g) agreement would usually receive under the tier system was weighted to reflect the city’s smaller population, as compared with the larger population of Nevada<sup>53</sup>: 1,951,269 (population of Las Vegas metropolitan area) ÷ 2,700,551 (population of Nevada) × -4 (tier points) = -2.89 points.

## II. Horizontal and Vertical Subfederal Interactions

In this Article, we focus on subfederal government regulation, the horizontal interactions between subfederal governments, and the resulting polarizing effects on national immigration climate—interactions that are underexplored in the relevant literature. But because of their catalytic role, we start our analysis with an examination of federal immigration policies and their interactions with subfederal regulation.

### A. Federal-Subfederal Interactions

The modern chapter of subfederal immigration regulation—the chapter tracked by the ICI—starts with a federal invitation issued by Attorney General John Ashcroft in 2002, asking state and local police to use their “inherent authority” as sovereigns to enforce civil immigration laws.<sup>54</sup> This invitation was issued after the 9/11 attacks, when it was revealed that the hijackers entered on invalid or incomplete visas.<sup>55</sup> By acting as a “force multiplier” to piggyback federal immigration efforts onto significantly larger law enforcement agency forces, advocates argued that incorporating subfederal police into immigration enforcement would enable the nation to better enforce immigration laws.<sup>56</sup> Ashcroft’s invitation

---

53. ICE, MEMORANDUM OF AGREEMENT BETWEEN U.S. IMMIGRATION & CUSTOMS ENFORCEMENT AND LAS VEGAS METROPOLITAN POLICE DEPARTMENT SHERIFF’S OFFICE (2008).

54. Ashcroft, *supra* note 1.

55. Margaret D. Stock & Benjamin Johnson, *The Lessons of 9/11: A Failure of Intelligence, Not Immigration Law*, IMMIGR. POL’Y CTR. (Dec. 2003), <https://www.americanimmigrationcouncil.org/sites/default/files/research/PF%20911%20final.pdf> [<https://perma.cc/9V9P-L4VL>].

56. Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 FLA. ST. U. L. REV. 965, 966 (2004).



also reversed a longstanding federal position that the enforcement of civil immigration laws (e.g., laws prohibiting visa overstays) belonged exclusively to the federal government, with a carveout for state and local police to enforce criminal immigration laws (e.g., human trafficking laws).<sup>57</sup>

Initially, the subfederal response to this federal invitation was muted, as few law enforcement agencies were willing to take on the costs of immigration enforcement: the expense of paying officers to take on additional responsibilities,<sup>58</sup> the associated legal liability,<sup>59</sup> and the potential harm to their relationships with immigrant communities and community policing programs.<sup>60</sup> But with continued federal encouragement and national security concerns as a convenient foil, more and more subfederal governments became involved with immigration regulation.<sup>61</sup> Starting in 2005, subfederal governments at the city, county, and state levels enacted immigration regulations in measurably higher numbers; for that reason, we started our ICI tracking in that year.<sup>62</sup>

Because we are interested in studying possible red-blue interactions between the federal and subfederal levels, we tracked our ICI scores by presidential administrations below.<sup>63</sup>

57. *Id.* at 965, 966, 968–69.

58. James Pinkerton & St. John BARNED-SMITH, *Sheriff Cuts Ties with ICE Program over Immigrant Detention*, HOUS. CHRON. (Feb. 21, 2017), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Sheriff-cuts-ties-with-ICE-program-over-immigrant-10949617.php> [https://perma.cc/RBZA-3UKS] (citing costs as the principal reason for ending Harris County's participation in the 287(g) program).

59. *E.g.*, Complaint, *Davila v. N. Reg'l Joint Police Bd.*, No. 2:13-cv-00070 (W.D. Pa. Jan. 15, 2013), (bringing a civil action suit against Allegheny County's Northern Regional Joint Police Board for wrongfully detaining and imprisoning a U.S. citizen).

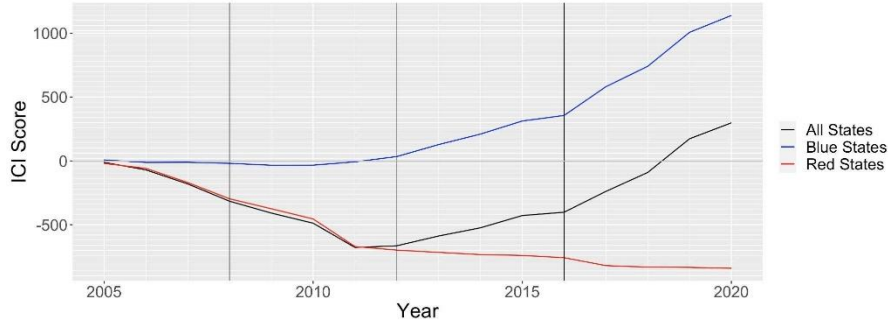
60. Nik Theodore, *Insecure Communities: Latino Perceptions of Police Involvement in Immigration Enforcement*, UNIV. ILL. CHI. (May 2013), [https://greatcities.uic.edu/wp-content/uploads/2014/05/Insecure\\_Communities\\_Report\\_FINAL.pdf](https://greatcities.uic.edu/wp-content/uploads/2014/05/Insecure_Communities_Report_FINAL.pdf) [https://perma.cc/M67E-26YA] (“Survey results indicate that the increased involvement of police in immigration enforcement has significantly heightened the fears many Latinos have of the police, contributing to their social isolation and exacerbating their mistrust of law enforcement authorities.”).

61. 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 Conf. State Legislatures, to Huyen Pham, Professor of L., Tex. A&M Univ. Sch. of L. (Aug. 12, 2009, 11:57 EST) (on file with authors).

62. *Id.*

63. *See infra* Figure 4.

**Figure 4: Cumulative ICI Through Presidential Administrations**



i. Bush II Administration (2005–2008)

During his second term, President George W. Bush was intently focused on comprehensive immigration reform, advocating for a pathway to legal status for the estimated 12 million unauthorized immigrants then living in the United States, paired with tougher border and workplace enforcement.<sup>64</sup> But as noted earlier, the 9/11 attacks dramatically reshaped the nation's immigration policy debates, elevating national security concerns over economic and humanitarian goals.<sup>65</sup> At the federal level, one of the most impactful changes was the creation of the Department of Homeland Security (DHS) and the reassignment of immigration functions that once belonged to the Immigration and Naturalization Service (INS) to three separate federal agencies under DHS authority (ICE for interior enforcement, Customs and Border Protection for border enforcement, and Citizenship and Immigration Services for visas and other service-related work).<sup>66</sup> In the post-9/11 environment, the Bush Administration also created the National Security Entry-Exit Registration System (NSEERS), which required visitors from specific countries, many majority-

64. *The Secure Fence Act: Fact Sheet*, WHITE HOUSE (2006), <https://georgewbush-whitehouse.archives.gov/news/releases/2006/10/20061026-1.html> [<https://perma.cc/9FGE-4NTU>].

65. Ashcroft, *supra* note 1.

66. Deepa Iyer & Jayesh M. Rathod, *9/11 and the Transformation of U.S. Immigration Law and Policy*, ABA (Jan. 1, 2011), [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/human\\_rights\\_vol38\\_2011/human\\_rights\\_winter2011/9-11\\_transformation\\_of\\_us\\_immigration\\_law\\_policy/](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol38_2011/human_rights_winter2011/9-11_transformation_of_us_immigration_law_policy/) [<https://perma.cc/XZ5N-23KA>] (discussing how immigration started to be conflated with security after 9/11 by the movement of immigration under DHS).

Muslim, to register when entering and exiting the United States.<sup>67</sup> The Administration also increased security screenings of admitted immigrants, including refugees, resulting in decreased admissions across immigrant categories.<sup>68</sup>

Given the federal focus on national security, it is not surprising that policing laws were the most popular type of subfederal immigration law (making up 30% of all laws).<sup>69</sup> Subfederal regulation in this first phase was markedly less partisan, with blue states enacting substantial numbers of negative laws, a pattern that was particularly pronounced in the realm of policing laws.<sup>70</sup> By the end of the Bush Administration, negative policing laws accounted for fully 20% of all immigration laws enacted in blue states, while positive policing laws accounted for only 12% of their enacted laws.<sup>71</sup> The most common type of immigration laws in blue states were the positive laws conferring government benefits, which accounted for 20.5% of all laws.<sup>72</sup> By this measure, blue states during Bush II looked a lot like red states, where 26% of their immigration laws were negative policing laws.<sup>73</sup> As discussed in more detail below, subfederal regulation became more partisan by the end of the Trump Administration; looking again at statewide policing laws, negative laws fell to only 6.7% of

67. *Id.* (discussing the NSEERS program's emphasis on trying to weed out "terrorists" based on nationality from majority-Muslim nations).

68. Somini Sengupta, *Refugees at America's Door Find it Closed After Attacks*, N.Y. TIMES (Oct. 29, 2001), <https://www.nytimes.com/2001/10/29/nyregion/nation-challenged-immigration-refugees-america-s-door-find-it-closed-after.html> [<https://perma.cc/2M22-9BAF>] (discussing temporary moratorium on refugee admissions after 9/11); Edward Walsh, *Effects of 9/11 Reduce Flow of Refugees to U.S.*, WASH. POST (Aug. 21, 2002), <https://www.washingtonpost.com/archive/politics/2002/08/21/effects-of-911-reduce-flow-of-refugees-to-us/87c5c2b1-60f2-459a-a96a-50c687dd0a24/> [<https://perma.cc/3UW5-3UZQ>] (stating that refugee admissions have slowed down).

69. *See, e.g.*, Oklahoma Taxpayer and Citizen Protection Act, 2007 Okla. Sess. Laws 112 (stating that when undocumented immigrants are "harbored and sheltered in this state and encouraged to reside in this state through the issuance of identification cards that are issued without verifying immigration status, these practices impede and obstruct the enforcement of federal immigration law, undermine the security of our borders, and impermissibly restrict the privileges and immunities of the citizens of Oklahoma."); Mark K. Matthews, *Lawmaker Fights Immigrant Invasion*, STATELINE (Sept. 1, 2005), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2005/09/01/lawmaker-fights-immigrant-invasion> [<https://perma.cc/F6PR-76JD>] ("[O]nce they (illegal immigrants) cross the border, it is our schools, our communities, our health care that is being destroyed.")

70. *See supra* Figure 1; *infra* Table 1.

71. *See infra* Table 1.

72. *See id.*

73. *See id.*

all blue state immigration laws but remained a steady percentage (29.3%) of all red state immigration laws.<sup>74</sup> Positive policing laws, by contrast, were now the most common form of regulation in blue states, making up 42.9% of all laws.<sup>75</sup>

**Table 1: Polarization in Immigrant Climate as Shown by Types of Laws Enacted**

Cumulative Laws by Type by Vote 2016						
Year	Vote2016	Number of Laws	Policing (+)	Policing (-)	Non-Policing (+)	Non-Policing (-)
2008	Red	288	4.2%	26.0%	12.5%	57.3%
2012	Red	582	7.2%	22.9%	15.3%	54.6%
2016	Red	832	12.1%	23.0%	17.5%	47.4%
2020	Red	1,319	19.9%	29.3%	17.7%	33.1%
2008	Blue	200	12.0%	20.0%	39.5%	28.5%
2012	Blue	439	16.6%	12.3%	40.5%	30.5%
2016	Blue	765	23.8%	9.2%	47.1%	20.0%
2020	Blue	1,890	42.8%	6.7%	41.0%	9.6%

ii. Obama I Administration (2009–2012)

Candidate Barack Obama made comprehensive immigration reform a campaign platform. In a May 2008 televised interview with Univision, he made this bold promise: “I can guarantee that we will have, in the first year, an immigration bill that I strongly support.”<sup>76</sup> Support from Hispanic and Asian voters was critical to Obama’s electoral success, and he won with 62% of the Asian vote and 67% of the Hispanic vote.<sup>77</sup> Many pundits linked this strong support, at least in part, to his promises for comprehensive immigration reform.<sup>78</sup>

74. *See id.*

75. *See id.*

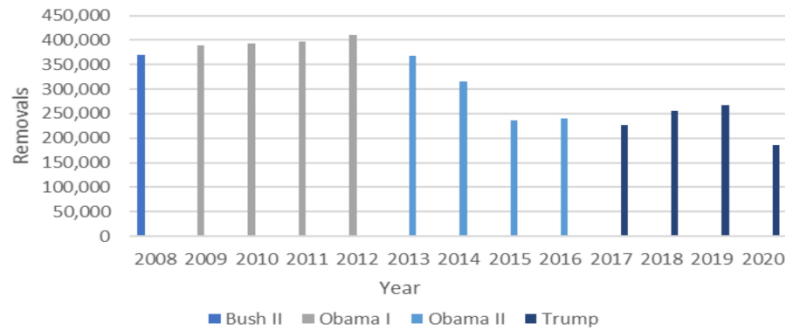
76. Tom McCarthy, *The Evolution of Immigration Reform Under Obama – A Timeline*, GUARDIAN (Nov. 20, 2014), <https://www.theguardian.com/us-news/2014/nov/20/immigration-reform-under-obama-timeline> [<https://perma.cc/WW8Q-THJX>].

77. *Id.*

78. *See* Cindy Y. Rodriguez, *Latino Vote Key to Obama’s Re-Election*, CNN (Nov. 9, 2012), <http://www.cnn.com/2012/11/09/politics/latino-vote-key-election/> [<https://perma.cc/T3MZ-N7DW>]; *see* John D. Skrentny & Jane Lilly López, *Obama’s*

In pursuing his campaign promise, Obama implemented an early strategy of aggressive enforcement, both at the border and in the interior. In these first years, the Obama Administration removed more people than any president before or after him, earning the derogatory moniker “Deporter-in-Chief” from immigration advocates.<sup>79</sup>

**Figure 5: Removals by Presidential Administration<sup>80</sup>**



This aggressive enforcement was partly strategic, a response to Republican demands that enforcement precede any discussion of legalization,<sup>81</sup> but the high numbers of removals also reflected the increased efficiency of the federal immigration enforcement apparatus that the Obama Administration inherited from previous administrations.<sup>82</sup> The main reason that the federal government

*Immigration Reform: The Triumph of Executive Action*, 3 IND. J. L. & SOC. EQUAL. 62, 63–64 (2013).

79. Reid J. Epstein, *NCLR Head: Obama ‘Deporter-in-Chief’*, POLITICO (Mar. 4, 2014), <https://www.politico.com/story/2014/03/national-council-of-la-raza-janet-murguia-barack-obama-deporter-in-chief-immigration-104217> [<https://perma.cc/TV3G-BPUP>]; see *infra* Figure 5.

80. 2015 ICE ENF’T & REMOVAL OPERATIONS REP., <https://www.ice.gov/sites/default/files/documents/Report/2016/fy2015removalStats.pdf> [<https://perma.cc/89P7-SWFU>]; 2018 ICE ENF’T & REMOVAL OPERATIONS REP., <https://www.ice.gov/doclib/about/offices/ero/pdf/eroFY2018Report.pdf> [<https://perma.cc/3WRC-92YP>]; 2020 ICE ENF’T & REMOVAL OPERATIONS REP., <https://www.ice.gov/doclib/news/library/reports/annual-report/eroReportFY2020.pdf> [<https://perma.cc/VH38-HF3N>].

81. See Julián Aguilar, *Immigration Reform Groups Urge Obama to Act Without Congress*, TEX. TRIB. (Feb. 27, 2014), <https://www.texastribune.org/2014/02/27/immigration-reform-groups-urge-obama-act-alone/> [<https://perma.cc/8M8X-254U>]; Julián Aguilar, *Obama Immigration Policies Satisfy Neither Right Nor Left*, TEX. TRIB. (Sept. 22, 2011), <https://www.texastribune.org/2011/09/22/will-obamas-immigration-policy-help-gop/> [<https://perma.cc/ND7V-WU84>].

82. Muzaffar Chishti, Sarah Pierce & Jessica Bolter, *The Obama Record on*

became better at finding and removing unauthorized immigrants was the incorporation of law enforcement agencies (LEAs) into federal immigration efforts.<sup>83</sup> Driving this increased enforcement efficiency were federal detainer requests issued by ICE, asking LEAs to continue to hold an immigrant who had been arrested for non-immigration reasons beyond the time of ordinary release so that ICE could take custody and place the individual into removal proceedings.<sup>84</sup> Together with the Secure Communities program (which automatically notifies ICE when an LEA has detained someone with an immigration record), detainer requests are a crucial component to the ‘force multiplier’ scheme envisioned by John Ashcroft and other advocates of LEA involvement in immigration enforcement.<sup>85</sup> And measured by this important metric of enforcement, the Obama Administration again hit records, issuing more detainer requests than any administration before or after it.<sup>86</sup>

---

*Deportations: Deporter in Chief or Not?*, MIGRATION POL’Y INST. (Jan. 26, 2017), <https://www.migrationpolicy.org/article/obama-record-deportations-deporter-chief-or-not> [<https://perma.cc/2JYL-KT36>].

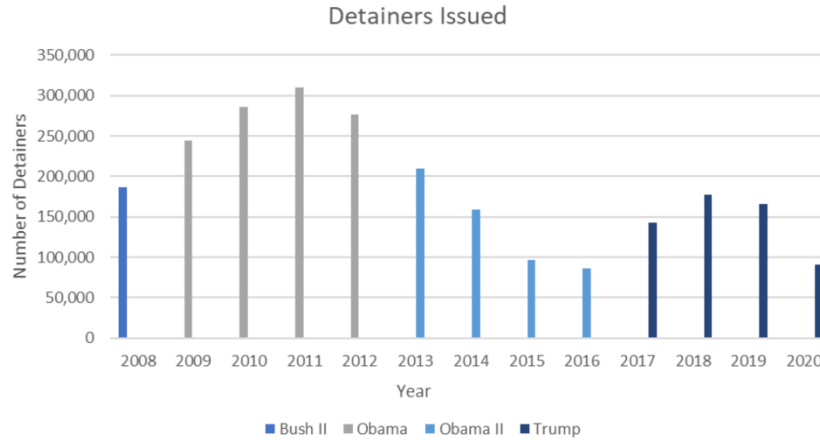
83. *Id.*

84. *Immigration Detainers: An Overview*, AM. IMMIGR. COUNCIL (Mar. 21, 2017), <https://www.americanimmigrationcouncil.org/research/immigration-detainers-overview> [<https://perma.cc/Z2FX-4GL6>].

85. *Id.*; Ashcroft, *supra* note 1.

86. Kristie De Peña, *The Slippery Slope of ICE Detainers*, NISKANEN CTR. (June 24, 2020), <https://www.niskanencenter.org/the-slippery-slope-of-ice-detainers/> [<https://perma.cc/FC3T-F8GM>]; *see* Figure 6.

**Figure 6: Annual Detainers Issued by Presidential Administration<sup>87</sup>**



Despite his enforcement-first immigration agenda, Obama was not able to persuade Congress to pass any comprehensive immigration reform. Even the widely popular DREAM Act,<sup>88</sup> which would have given permanent status to undocumented immigrants who arrived in the United States as children, failed in the Senate by a 55-41 vote after passing the House.<sup>89</sup> With his legislative agenda stymied, Obama turned to executive powers to try to advance his immigration goals, albeit in much more limited ways. One of the Obama Administration's most significant steps was to prioritize ICE's enforcement efforts, issuing memos in 2010 and 2011 that directed ICE attorneys and other employees to exercise prosecutorial discretion and not remove immigrants with familial, educational, military, or other ties in the United States.<sup>90</sup> Rather, the memos directed these federal enforcement employees to

87. *Latest Data: Immigration and Customs Enforcement Detainers*, TRAC IMMIGR., <https://trac.syr.edu/phptools/immigration/detain/> [<https://perma.cc/7PE9-QH9H>].

88. Also known as the Development, Relief, and Education for Alien Minors Act. *The Dream Act: An Overview*, AM. IMMIGR. COUNCIL (Mar. 16, 2021), <https://www.americanimmigrationcouncil.org/research/dream-act-overview> [<https://perma.cc/KHJ4-8RSZ>].

89. McCarthy, *supra* note 76.

90. Shoba Sivaprasad Wadhia, *The Morton Memo and Prosecutorial Discretion: An Overview*, IMMIGR. POL'Y. CTR. (July 2011), [https://www.americanimmigrationcouncil.org/sites/default/files/research/Shoba\\_-\\_Prosecutorial\\_Discretion\\_072011\\_0.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/Shoba_-_Prosecutorial_Discretion_072011_0.pdf) [<https://perma.cc/U438-BWB2>].

prioritize the removal of immigrants who posed public safety or national security risks.<sup>91</sup>

Perhaps Obama's most significant policy move during his first Administration was to create the Deferred Action for Childhood Arrivals (DACA) program in 2012.<sup>92</sup> Characterized as the systematic exercise of prosecutorial discretion, DACA gives temporary legal status to undocumented immigrants who arrived in the United States as children, passed criminal background checks, and either graduated from high school (or had the GED equivalent) or were honorably discharged from the military.<sup>93</sup> With temporary status, these immigrants are also eligible to apply for work authorization.<sup>94</sup> The legality of DACA was immediately challenged in court by red states, and the legal challenges continue; as of this publication date, however, DACA remains in effect, with almost 600,000 beneficiaries.<sup>95</sup>

At the subfederal level during Obama I, immigration regulation continued to grow at a rapid pace, with the total number of laws doubling in both red and blue states compared with the total number of laws at the end of Bush II.<sup>96</sup> With this growth, the divergence between red and blue states became starker. Though the ICI impact of negative red state laws does not hit its lowest point

---

91. *Id.*

92. McCarthy, *supra* note 76.

93. Memorandum from Janet Napolitano, Sec'y, Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot., et al. (June 15, 2012), <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [<https://perma.cc/5Q7D-QJ2Q>].

94. DHS, EXERCISING PROSECUTORIAL DISCRETION WITH RESPECT TO INDIVIDUALS WHO CAME TO THE UNITED STATES AS CHILDREN (2012), <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [<https://perma.cc/ZMU5-GBDZ>].

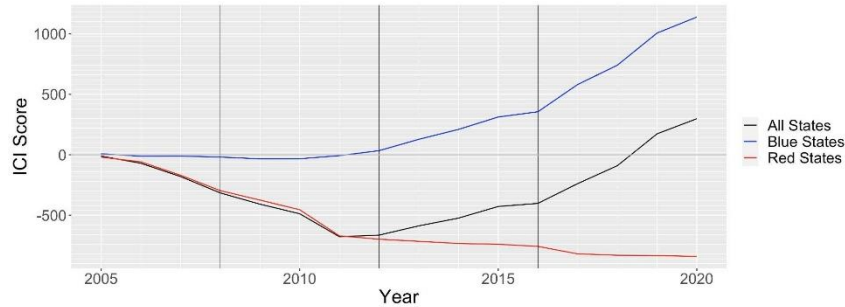
95. Nicole Prchal Svajlenka & Trinh Q. Truong, *The Demographic and Economic Impacts of DACA Recipients: Fall 2021 Edition*, CTR. FOR AM. PROGRESS (Nov. 24, 2021), <https://www.americanprogress.org/article/the-demographic-and-economic-impacts-of-daca-recipients-fall-2021-edition/> [<https://perma.cc/PFD9-YCTM>]; see *Consideration of Deferred Action for Childhood Arrivals (DACA)*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Sept. 18, 2023), <https://www.uscis.gov/DACA> [<https://perma.cc/EF6C-EJRF>] (noting that the U.S. District Court for the Southern District of Texas issued a decision finding the final DACA rule unlawful, enjoining and vacating the final rule so that initial DACA requests will not be processed); see also Tom K. Wong, Ignacia Rodriguez Kmec, Diana Pliego, Karen Fierro Ruiz, Debu Gandhi, Trinh Q. Truong & Nicole Prchal Svajlenka, *DACA Boosts Recipients' Well-Being and Economic Contributions: 2022 Survey Results*, CTR. FOR AM. PROGRESS (Apr. 27, 2023), <https://www.americanprogress.org/article/daca-boosts-recipients-well-being-and-economic-contributions-2022-survey-results/> [<https://perma.cc/L7RB-KAU2>] (providing continued data regarding the impact of DACA on recipients' lives in 2022).

96. See *infra* Figure 4.



until later, during Obama II, the rate of negative activity is the steepest during Obama I.<sup>97</sup>

**Figure 4: Cumulative ICI Through Presidential Administrations (repeated for convenience)**



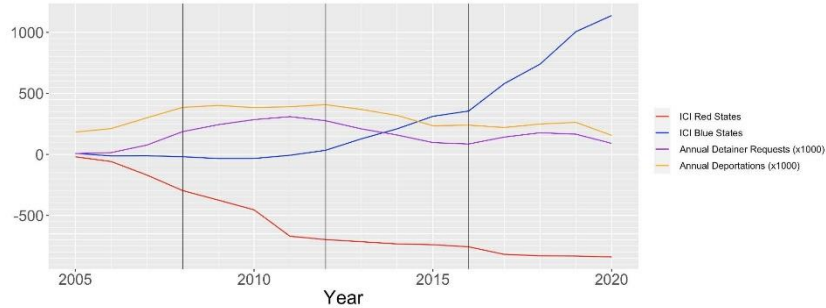
In other words, red states were the most active during this period, enacting the negative policing laws of Bush II while also branching into other areas, making immigration status a condition of access to housing, government benefits, education, and driver's licenses.<sup>98</sup> As shown in Figure 3 (replicated below for convenience), negative ICI activity during Obama I reached its lowest scores, just as federal enforcement was reaching its highest levels, as measured by removals and detainer requests.<sup>99</sup> The theoretical and practical implications of these non-intuitive results are further explored in Section III.

97. *Id.*

98. *See supra* Figure 4; *see, e.g.*, ARIZ. REV. STAT. § 1-502(A) (2010) (Arizona law conditioning access to housing assistance and public benefits on proof of legal status); ALA. CODE § 31-13-8 (2012) (prohibiting individuals without legal status from attending public postsecondary education institutions in Alabama); GA. CODE ANN. § 50-36-1 (2006) (Georgia law requiring proof of legal status for driver's licenses).

99. *See infra* Figure 3.

**Figure 3: Comparing ICI with Federal Enforcement Measures (repeated for convenience)**



By contrast, blue state activity during Obama I was limited but largely positive.<sup>100</sup> Positive policing laws were the most common addition in blue states, accounting for one out of five new laws from 2008 to 2012.<sup>101</sup> By the end of 2012, positive policing laws accounted for 16.6% of all blue state immigration regulation, while negative policing laws accounted for 12.3%.<sup>102</sup> In addition to the divergence emerging between red and blue states, one also emerges across jurisdictions within red states. While the trend for red states as a whole was clearly negative during Obama I, the proportion of local positive policing laws in red states increased to 7.2% of the total in 2012 from 4.2% in 2008.<sup>103</sup> For example, a 2012 Tucson Police Department General Order prohibited officers from inquiring about the immigration status of victims and witnesses of crimes unless it was necessary to further the investigation of the crime.<sup>104</sup>

### iii. Obama II Administration (2013–2016)

During his second term, President Obama focused on implementing his removal priorities, resulting in fewer removals as compared with his previous record highs,<sup>105</sup> and perhaps more significantly, changes in the composition of individuals removed.<sup>106</sup> Pursuant to the memos signed during Obama's first term detailing

100. *See supra* Figure 4.

101. *See supra* Figure 3.

102. *Id.*

103. *Id.*

104. Tucson Police Dep't, General Orders Vol. 2 § 2320 (Sept. 2012), <https://www.tucsonaz.gov/files/sharedassets/public/v/2/police/documents/general-orders/2300-immigration.pdf> [<https://perma.cc/3TMC-QCBD>].

105. *See supra* Figure 6.

106. Chishti et al., *supra* note 82.

the Administration's removal priorities, the Obama Administration narrowed the focus of removals to two main groups: those who had recently crossed the border illegally and those convicted of serious crimes.<sup>107</sup> In 2016, 85% of all removals had recently crossed the U.S. border unlawfully; of the remaining removals, more than 90% were convicted of what DHS described as serious crimes.<sup>108</sup>

The Obama Administration also focused on expanding executive relief for certain groups of individuals without legal immigration status, such as DACA recipients.<sup>109</sup> The Administration had to defend DACA from a legal challenge brought by attorneys general from red states.<sup>110</sup> President Obama tried to create a similar program for the undocumented parents of U.S. citizens and lawful permanent residents: Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA). But, due to the program's legal challenges and lack of support from the incoming Trump Administration, DAPA was never implemented.<sup>111</sup>

At the subfederal level, we see a deepening partisan divide between red and blue states, largely driven by increased positive activity from blue jurisdictions.<sup>112</sup> Recall that blue states were largely inactive during the first Obama Administration; pro-immigration and pro-immigrant groups during this time period may have been focused on trying to push comprehensive immigration reform through at the national level.<sup>113</sup> But when it became clear that no such reform was forthcoming, these groups focused their efforts on subfederal legislation, where the enactment of positive, integrationist laws seemed more likely.<sup>114</sup> Indeed, during the second Obama Administration, 90% of subfederal laws enacted within blue

---

107. *Id.*

108. *Id.*

109. Svajlenka & Truong, *supra* note 95.

110. See Mark Hugo Lopez & Jens Manuel Krogstad, *States Suing Obama Over Immigration Programs Are Home to 46% of Those Who May Qualify*, PEW RSCH. CTR. (Feb. 11, 2015), <https://www.pewresearch.org/fact-tank/2015/02/11/states-suing-obama-over-immigration-programs-are-home-to-46-of-those-who-may-qualify/> [<https://perma.cc/VFS2-76CQ>].

111. Tal Kopan, *Trump Administration Reverses DAPA in 'House Cleaning'*, CNN (June 16, 2017), <https://www.cnn.com/2017/06/16/politics/dhs-scraps-dapa-keeps-daca-deferred-action/index.html> [<https://perma.cc/L3GA-YEVL>].

112. See *supra* Figure 4.

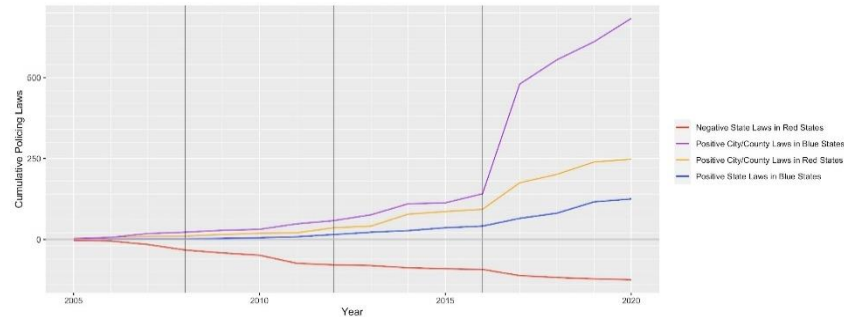
113. See *supra* Figure 3.

114. PRATHEEPAN GULASEKARAM & S. KARTHICK RAMAKRISHNAN, *THE NEW IMMIGRATION FEDERALISM* 145 (2015).

states were positive in nature, at both the state and local levels, with more than one-third being positive policing laws.<sup>115</sup>

At the other end of the political spectrum, restrictive activity from red jurisdictions continued during the second Obama Administration; indeed, the national cumulative ICI reached its lowest point during this time period.<sup>116</sup> But two important patterns are worth noting. First, the rate of restrictive legislative activity slowed during the second Obama Administration, significantly outpaced by the positive activity within blue states discussed above.<sup>117</sup> Second, legislative activity within red states diverged as cities and counties increasingly enacted positive local laws.<sup>118</sup> This polarization within states that started during Obama I became more visible under Obama II and exploded during the Trump years.<sup>119</sup> In the aggregate, positive activity outpaced negative activity as the national cumulative ICI began to turn in the positive direction during Obama II.<sup>120</sup>

**Figure 7: Contrasting State and City/County Level Laws by +/- Orientation**



#### iv. Trump Administration (2017–2020)

President Trump made immigration restrictions and anti-immigrant sentiment central platforms in his domestic agenda.<sup>121</sup>

115. See *supra* Table 1. In blue states, from 2012 to 2016, the number of subfederal laws increased by 326, of which 292 (90%) were positive laws. *Id.*

116. See *id.*

117. See *id.*

118. See *infra* Figure 7.

119. See *infra* Figure 7.

120. See *supra* Figure 4.

121. See Nolan D. McCaskill, *Trump Promises Wall and Massive Deportation Program*, POLITICO (Aug. 31, 2016), <https://www.politico.com/story/2016/08/donald->

Through a rapid-fire implementation of more than 400 executive orders, regulations, and policy changes,<sup>122</sup> the Trump Administration fundamentally changed the United States immigration system, contracting opportunities for authorized immigration and pushing for harsh enforcement against unauthorized immigration.<sup>123</sup>

The Trump Administration expanded the public charge rule, making it more difficult for immigrants to prove the financial resources to qualify for a visa,<sup>124</sup> set the refugee admission ceiling at the lowest levels in United States history,<sup>125</sup> denied work visa applications at historically high rates,<sup>126</sup> and fought for a ban on nationals of seven predominantly Muslim countries, a ban that was ultimately upheld by the U.S. Supreme Court.<sup>127</sup>

The Trump Administration also pushed for harsh enforcement policies against unauthorized immigration, eliminating discretionary relief<sup>128</sup> and punishing subfederal law enforcement agencies that did not cooperate in immigration enforcement activities.<sup>129</sup> Some of the Trump Administration's more significant actions in this area include a zero tolerance policy on illegal entry along the southwestern border,<sup>130</sup> prosecutions of unauthorized border crossings as crimes,<sup>131</sup> the separation of families that crossed unlawfully by sending children to separate detention facilities,<sup>132</sup>

---

trump-immigration-address-arizona-227612 [https://perma.cc/964A-ZRTL] (noting candidate Trump's vow to build a wall on the southern border and deport all detained undocumented migrants starting from "Day One").

122. SARAH PIERCE & JESSICA BOLTER, *DISMANTLING AND RECONSTRUCTING THE U.S. IMMIGRATION SYSTEM: A CATALOG OF CHANGES UNDER THE TRUMP PRESIDENCY 1* (2020), [https://www.migrationpolicy.org/sites/default/files/publications/MPI\\_US-Immigration-Trump-Presidency-Final.pdf](https://www.migrationpolicy.org/sites/default/files/publications/MPI_US-Immigration-Trump-Presidency-Final.pdf) [https://perma.cc/964A-ZRTL].

123. Anita Kumar, *Behind Trump's Final Push to Limit Immigration*, POLITICO (Nov. 30, 2020), <https://www.politico.com/news/2020/11/30/trump-final-push-limit-immigration-438815> [https://perma.cc/6THK-4N23].

124. PIERCE & BOLTER, *supra* note 122, at 94.

125. *Id.* at 64 (noting refugee admission ceilings of 50,000 in 2017, 45,000 in 2018, 30,000 in 2019, and 18,000 in 2020); *see also id.* at 67 (noting the refugee admission ceiling of 110,000 immediately before Trump entered office).

126. *NFAP Policy Brief February 2020: H-1B Approved Petitions and Denial Rates for FY 2019*, NAT'L FOUND. FOR AM. POL'Y 1, <https://nfap.com/wp-content/uploads/2020/02/H-1B-Denial-Rates-Analysis-of-FY-2019-Numbers.NFAP-Policy-Brief.February-2020-1.pdf> [https://perma.cc/9FS9-77B2].

127. PIERCE & BOLTER, *supra* note 122, at 86–87.

128. *Id.* at 38–39.

129. Huyen Pham & Pham Hoang Van, *Subfederal Immigration Regulation and the Trump Effect*, 94 N.Y.U. L. REV. 125, 147 (2019).

130. *See* PIERCE & BOLTER, *supra* note 122, at 50.

131. *Id.* at 52.

132. *Id.* at 30.

the requirement of asylum seekers at the southern border to make their claims in Mexico,<sup>133</sup> and the elimination of Obama's enforcement priorities, so that anyone without lawful immigration status became an enforcement target.<sup>134</sup> For so-called "sanctuary" jurisdictions that did not cooperate with federal immigration enforcement, the Administration threatened to revoke federal funding and targeted them for federal immigration raids.<sup>135</sup>

When COVID-19 infections spread to the United States, the Trump Administration used the pandemic as a reason to restrict immigration even further. His most dramatic policy change was to invoke Title 42, a 1944 public health statute, to expel immigrants seeking asylum without hearing their claims, effectively ending asylum at the southern border.<sup>136</sup> The Trump Administration also suspended the issuance of immigrant visas for most family and employment-based categories and for four non-immigrant work programs.<sup>137</sup>

Despite the harshness of the Trump Administration's policies, federal immigration enforcement (as measured by removals and detainer requests) was at historical averages during this period, certainly well below the historic highs seen during the Obama Administrations.<sup>138</sup> Some analysts suggest that, notwithstanding his tough anti-immigrant rhetoric, Trump failed in decreasing the size of the undocumented population in the United States.<sup>139</sup>

Nonetheless, the Trump presidency inspired a tidal wave of positive laws from blue jurisdictions.<sup>140</sup> We see this "Trump Effect" growing after Trump's election in November 2016, before he even took office in January 2017.<sup>141</sup> Jurisdictions within blue states were incredibly active during the Trump Administration, adding more than 1,100 laws, 85% of which were positive and 66% of which were positive policing laws.<sup>142</sup> Besides the sheer number of laws passed

---

133. *Id.* at 27.

134. *Id.* at 24.

135. *Id.* at 37.

136. *Id.* at 8.

137. *Id.*

138. *See supra* Figure 5; *supra* Figure 6.

139. *See, e.g.,* Muzaffar Chishti & Sarah Pierce, *Trump's Promise of Millions of Deportations Is Yet to be Fulfilled*, MIGRATION POL'Y INST. (Oct. 29, 2020), <https://www.migrationpolicy.org/article/trump-deportations-unfinished-mission> [<https://perma.cc/9TAL-2NZX>].

140. *See supra* Figure 7.

141. *See* Pham & Van, *supra* note 129, at 162 n.164 (2019) (noting the "flurry" of positive "sanctuary" legislation following President Trump's election in November 2016).

142. *See supra* Figure 5.

and the sharp upward trajectory of the national cumulative ICI during this period, other patterns in subfederal immigration regulation should also be noted.<sup>143</sup> First, cities and counties became more active, enacting more positive laws during the first year of the Trump Administration than they had during the previous twelve years combined (2005–2016).<sup>144</sup> Second, there was more diversity among sanctuary cities and counties; previously, large urban cities were the most active in enacting positive regulation, but medium-sized cities and suburbs (with populations under 100,000) surpassed them during the Trump Administration.<sup>145</sup> Finally, we see different types of governmental entities enacting immigration regulations, including school districts, transit authorities, and public universities.<sup>146</sup> Trump’s controversial policies and incendiary rhetoric pulled many more subfederal governments into the partisan immigration debate. With this surge of positive activity, the national cumulative ICI reached positive territory for the first time in 2018.<sup>147</sup>

By comparison, red states were much less active during the Trump Administration.<sup>148</sup> Almost one-half of new laws originating from red states were negative,<sup>149</sup> many of them police cooperation agreements signed under a newly invigorated 287(g) program.<sup>150</sup> Red states were not immune to the “Trump Effect,” however, as more than half of new laws were enacted by blue cities and counties implementing positive policing laws.<sup>151</sup> The partisan divide *within* red states that emerged during Obama I and expanded during Obama II exploded during the Trump Administration,<sup>152</sup> contributing to the national divide on immigration issues.

---

143. *See supra* Figure 4.

144. Pham & Van, *supra* note 129, at 156.

145. *Id.* at 131.

146. *Id.* at 164.

147. *See supra* Figure 4.

148. *See supra* Figure 7.

149. *See supra* Table 1. From 2016 to 2020, jurisdictions in red states added 487 subfederal laws of which 235 were new negative laws. *Id.*

150. *See, e.g.*, BRISTOL CTY. SHERIFF’S OFFICE, MEMORANDUM OF AGREEMENT (2017), <https://www.ice.gov/doclib/287gMOA/287gBristolMa2017-02-08.pdf> [<https://perma.cc/QG2V-A7VA>] (entering into a voluntary arrangement whereby local law enforcement is trained and authorized by ICE to perform functions of an immigration officer); OKMULGEE CTY. BD. OF COMM’RS, MEMORANDUM OF AGREEMENT (2018), [https://www.ice.gov/doclib/287gMOA/287gJEM\\_OkmulgeeCoCrimJusOk2018-01-25.pdf](https://www.ice.gov/doclib/287gMOA/287gJEM_OkmulgeeCoCrimJusOk2018-01-25.pdf) [<https://perma.cc/Q4XC-E92J>] (noting the same).

151. *See supra* Table 1. From 2016 to 2020, jurisdictions in red states added 487 subfederal laws of which 250 were new positive laws. *Id.*

152. *See supra* Figure 7.

In summary, we see several distinct trends in federal-subfederal interactions across presidential administrations. In the first phase (Bush II), subfederal immigration regulation was more non-partisan; blue and red jurisdictions enacted similar numbers of restrictive laws. During Obama I, subfederal immigration regulation became more partisan, as red jurisdictions were most active during this period. This red activity surged despite historically high numbers of removals and detainer requests issued by the Obama Administration, pointing to increased polarization along partisan lines. During Obama II, blue jurisdictions were more active than red jurisdictions, but it was during the Trump Administration that blue subfederal activity really took off. Historically high activity from blue cities and counties accounted for most of this surge, and new actors—school districts, college campuses, and even transit authorities—passed positive laws, mostly on policing, to protect immigrants in their jurisdictions from harsh Trump-era enforcement policies. Federal-subfederal immigration interactions provide an important backdrop for understanding interactions between subfederal governments on immigration policies.

*B. The Independent Role of Subfederal Regulations in Polarization*

Much of the legal and policy analysis of subfederal immigration regulation has focused on its interactions with federal laws and policies.<sup>153</sup> But subfederal laws merit their own analysis, focused on the ever-broadening subject matter of these laws and their horizontal interactions with each other. Both aspects are important because they illuminate the important and independent role that subfederal laws have played in increasing national polarization on immigration issues.

i. Increasing the Scope of Immigration Regulation

The modern chapter of subfederal immigration regulation began with Ashcroft's invitation for local police to join in federal immigration enforcement efforts.<sup>154</sup> Nevertheless, subfederal immigration regulations have grown beyond these policing roots into new regulatory areas. As explained below, that growth has played a crucial role in increasing national partisanship on

---

153. See, e.g., Pham & Van, *supra* note 129 (discussing the effect of presidential and federal immigration policy on the immigration policies of subfederal governmental entities).

154. Ashcroft, *supra* note 1.



immigration policies. In Section I, we divided subfederal immigration regulation into tiers, based on their impact on immigrants' lives; here, we build upon that tier classification to look more closely at the substance of the laws.

Though laws in these new regulatory areas vary widely in their substance, they do share two related similarities. First, these laws involve areas where subfederal governments have dominant regulatory power, with debates ordinarily focused on subfederal issues.<sup>155</sup> The debates in these fields become nationalized when federal and subfederal laws insert immigration status as a triggering condition for penalties or benefits. Second, we find both positive and negative laws in these regulatory areas, as subfederal governments use their regulatory positions to express their immigration policy preferences. Thus, in broadening the subject matter of immigration regulation, the subfederal laws have created more points for policy disagreements, resulting in increased national partisanship on these issues.

We start with policing laws and explore the different ways that subfederal governments have either enhanced or restricted the authority of their law enforcement agencies to enforce federal immigration laws. On the pro-enforcement side, subfederal governments have pushed for more cooperation with federal immigration enforcement formally, by signing 287(g) agreements,<sup>156</sup> or more informally, by notifying ICE when immigrants of interest are released from local detention.<sup>157</sup> By cooperating with federally initiated programs or actions, these subfederal governments are, in effect, funneling more immigrants into federal removal processes. Some subfederal governments have also taken unilateral steps to strengthen immigration enforcement

---

155. For example, policy debates about private housing permits usually focus on localized issues like zoning, parking, or traffic density. *See, e.g.*, Sarah Goh, *A Debate Over Height for the Central District's Acer House and its Afrofuturist Plans*, CAPITOL SEATTLE HILL BLOG (Dec. 16, 2021) <https://www.capitolhillseattle.com/2021/12/a-debate-over-height-for-the-central-districts-acer-house-and-its-afrofuturist-plans/> [<https://perma.cc/T99Z-HZEC>] (discussing the debate over the allowed height of a housing project).

156. *See, e.g.*, BARNSTABLE CTY., MASS., MEMORANDUM OF AGREEMENT 287(G) JAIL ENFORCEMENT MODEL (2020), [https://www.ice.gov/doclib/287gMOA/287gJEM\\_BarnstableCoMA2020-06-09.pdf](https://www.ice.gov/doclib/287gMOA/287gJEM_BarnstableCoMA2020-06-09.pdf) [<https://perma.cc/8Y7D-DXD4>] (effecting an arrangement under whereby local law enforcement is trained and authorized by ICE to perform functions of an immigration officer).

157. BROOKLYN PARK POLICE DEP'T, BROOKLYN PARK PD POLICY MANUAL 298 (2022), <https://www.brooklynpark.org/wp-content/uploads/2021/06/Updated-Policy-Manual-042922.pdf> [<https://perma.cc/8C3S-Q3E2>] (requiring notification to the federal authority issuing the detainer before release).

by criminalizing certain immigration-related acts<sup>158</sup> or restricting the availability of relief like bail for immigrant defendants.<sup>159</sup> These laws are not responding to any explicit federal action or invitation; rather, they are attempting to impose more local control over immigrants separate from the federal removal process. These unilateral acts have been vulnerable to legal challenges, often on preemption grounds. For example, Arizona tried to create two new state immigration crimes—criminalizing an immigrant’s failure to carry immigration papers and an immigrant’s working in the state without authorization—but both were struck down by the Supreme Court as preempted by federal law.<sup>160</sup>

On the protective side, some subfederal governments have moved in the opposite direction, restricting police from enforcing federal immigration laws. Most of these laws are written as prohibitions and are very specific in scope: prohibiting the signing of 287(g) agreements,<sup>161</sup> the honoring of immigration detainers except in narrowly defined circumstances,<sup>162</sup> or the use of local jail space by ICE to interview detainees.<sup>163</sup> The specific laws are usually coupled with a general prohibition on the use of subfederal resources to enforce immigration laws or cooperate with immigration law enforcement.<sup>164</sup> As noted earlier, positive subfederal immigration regulation surged during the Trump Administration; in the policing realm, that surge manifested in new types of subfederal entities—school districts,<sup>165</sup> university

---

158. Beason-Hammon Alabama Taxpayer and Citizen Protection Act, § 10(a), 2011 Ala. Laws 890, 904 (codified as amended at ALA. CODE § 31-13-10 (2023)) (creating a state violation for willful failure to complete or carry an alien registration document).

159. Act of May 26, 2011, ch. 385, sec. 6, § 1105.3(C), 2011 Okla. Sess. Laws 2950, 2958 (codified as amended at OKLA. STAT. tit. 22, § 22-1105.3 (2022)) (denying pretrial release for persons accused of or detained for any immigration charges).

160. *Arizona v. United States*, 567 U.S. 387, 417 (2012) (striking down sections 3 and 5(C) of S.B. 1070, which criminalized an immigrant’s failure to carry immigration papers and working in the state without authorization).

161. *See, e.g.*, Keep Illinois Families Together Act, § 5(b), 2019 Ill. Laws 1975, 1975 (codified as amended at 5 ILL. COMP. STAT. 835/5 (2023)) (prohibiting any law enforcement agency or official from entering into or remaining in a 287(g) agreement).

162. *See, e.g.*, California Values Act, ch. 495, § 3, 2017 Cal. Stat. 3737, 3738 (codified as amended at CAL. GOV. CODE § 7284.6 (2023)) (prohibiting detaining an individual based on a hold request with few exceptions).

163. *See, e.g., id.* (prohibiting the provision of office space exclusively dedicated for use by immigration authorities).

164. *See, e.g., id.* (“California law enforcement agencies shall not . . . [u]se agency or department moneys or personnel to investigate, interrogate, detain, detect, or arrest persons for immigration enforcement purposes . . .”).

165. *E.g.*, L.A. UNIFIED SCH. DIST., MOTIONS/RESOLUTIONS PRESENTED TO THE

campuses,<sup>166</sup> and even transit authorities<sup>167</sup>—jumping into the immigration fray, enacting laws limiting the enforcement of immigration laws on their premises and by their personnel.

Beyond policing laws, another subfederal area that experienced early immigration expansion was the area of private housing. In 2006, Hazleton, Pennsylvania enacted the first law requiring landlords to verify the legal immigration status of their tenants.<sup>168</sup> Titled the Illegal Immigration Relief Act Ordinance, the law required that tenants prove lawful immigration status to obtain occupancy permits.<sup>169</sup> Other like-minded jurisdictions followed, enacting similarly restrictive laws.<sup>170</sup> The restrictive housing laws motivated protest laws that either specifically prohibited landlords from checking their tenants' immigration status,<sup>171</sup> or more generally prohibited housing discrimination based on a tenant's immigration status.<sup>172</sup>

Subfederal governments have also been quick to interject employment access into the immigration policy debate. Here, though, subfederal governments have been limited by the

---

LOS ANGELES CITY BOARD OF EDUCATION FOR CONSIDERATION 2 (2016), <https://achieve.lausd.net/cms/lib08/CA01000043/Centricity/Domain/582/LA%20Unified%20Campuses%20as%20Safe%20Zones%20and%20Resource%20Centers%20for%20Students%20and%20Families%20Threatened%20by%20Immigration%20Enforcement.pdf> [<https://perma.cc/YY5A-QACW>] (declaring all school district sites as safe zones and resource centers for students and families threatened by immigration enforcement).

166. *E.g.*, COLO. STATE UNIV., COLORADO STATE UNIVERSITY POLICE DEPARTMENT POLICY MANUAL 1 (2020) <https://police.colostate.edu/wp-content/uploads/sites/85/2020/03/412-Immigration-Violations.pdf> [<https://perma.cc/HK8N-MWXC>] (“An officer should not detain any individual, for any length of time, for a civil violation of federal immigration laws or a related civil warrant.”).

167. *E.g.*, BAY AREA RAPID TRANSIT, IN THE MATTER OF SETTING A POLICY TO MOST EFFECTIVELY USE RESOURCES TO ENSURE SAFE AND QUALITY TRANSPORTATION FOR ALL RIDERS 3 (2017), [https://www.bart.gov/sites/default/files/docs/Safe\\_Transit\\_Policy\\_2017.pdf](https://www.bart.gov/sites/default/files/docs/Safe_Transit_Policy_2017.pdf) [<https://perma.cc/GA3J-PL9P>] (prohibiting employees' assistance or cooperation with any immigration enforcement procedures of federal agencies).

168. Hazleton, Pa., Ordinance 2006-18, § 5 (Sept. 12, 2006). This ordinance also prohibited all business entities from hiring or continuing to employ unauthorized migrants within the city. *Id.* at § 4.

169. This ordinance was adopted on the same day as another declaring English the official language of Hazleton. Hazleton, Pa., Ordinance 2006-19 (Sept. 12, 2006).

170. *See, e.g.*, Farmers Branch, Tex., Ordinance 2952, § 1(B)(5)(i) (Jan. 22, 2008) (requiring a showing of “lawful presence” to obtain a residential occupancy license).

171. *See, e.g.*, ALACHUA CTY., FLA., ALACHUA CTY. CODE § 111.40(a)(18) (2023) (prohibiting landlords from requesting or requiring tenants to disclose their immigration status).

172. *See, e.g.*, S.F., CAL., ADMINISTRATIVE CODE § 37.10B(a)(9) (2023) (prohibiting discrimination by landlords based on their tenants' immigration status).

Immigration Reform and Control Act of 1986 (IRCA), a federal statute that prohibits employers from hiring unauthorized workers and expressly preempts state and local governments from imposing employer sanctions “other than through licensing and similar laws.”<sup>173</sup> Within those federal limits, restrictive-minded governments have enacted laws requiring lawful immigration status to obtain certain professional licenses,<sup>174</sup> requiring employers to use the Federal E-Verify system (confirming the work eligibility of potential employees),<sup>175</sup> and revoking the business licenses of employers who hire unauthorized workers.<sup>176</sup>

Because the employment of unauthorized workers is expressly prohibited by federal law, subfederal governments inclined to enact positive laws in this area have also faced constraints. Positive employment laws have thus been largely limited to smaller measures, like requiring employers to inform employees when the employees’ work documents will be inspected by federal authorities,<sup>177</sup> prohibiting the requirement of lawful immigration status for professional licenses,<sup>178</sup> and including the reporting of immigration status to federal authorities as an adverse action under whistleblower acts.<sup>179</sup>

The immigration debate has also affected law on driver’s licensing, another subfederal regulatory area. Until the 1990s, no state required proof of lawful immigration status to get a driver’s license.<sup>180</sup> In 1993, California was the first to enact such a requirement, and Arizona passed a similar law in 1996.<sup>181</sup> By 2011,

173. 8 U.S.C. § 1324a(h)(2) (2023).

174. *See, e.g.*, Act of May 8, 2007, ch. 905, § 4, 2007 Tex. Gen. Laws 2255, 2256 (requiring lawful immigration status to receive a mortgage broker license).

175. *See, e.g.*, Legal Arizona Workers Act, ch. 279, § 2, 2007 Ariz. Sess. Laws 1312, 1317 (codified as amended at ARIZ. REV. STAT. ANN. § 23-214 (2023)) (upheld as not preempted by the IRCA in *Chamber of Commerce v. Whiting*, 563 U.S. 582 (2011)).

176. *See, e.g.*, § 2, 2007 Ariz. Sess. Laws at 1316.

177. *See, e.g.*, Act of June 6, 2019, ch. 260, § 1, 2019 Or. Laws 704, 705 (requiring an employer to give employees notice that forms used for verification of an employee will be inspected by a federal agency).

178. *See, e.g.*, Act of Sept. 21, 2018, ch. 659, § 1.5, 2018 Cal. Stat. 4356, 4362 (prohibiting licensing boards from requiring an individual to disclose either citizenship or immigration status).

179. *See, e.g.*, Act of July 13, 2021, ch. 394, § 1, 2021 R.I. Pub. Laws 1648, 1649 (codified as amended at R.I. GEN. LAWS § 28-50-3 (2021)) (amending the Rhode Island Whistleblower Act to include reporting or threatening to report to ICE as an adverse action).

180. *Deciding Who Drives: State Choices Surrounding Unauthorized Immigrants and Driver’s Licenses*, PEW CHARITABLE TR. 4 (Aug. 2015), <https://www.pewtrusts.org/-/media/assets/2015/08/deciding-who-drives.pdf> [<https://perma.cc/63X7-4WXB>].

181. *Id.*

unauthorized immigrants could only obtain driver's licenses in three states: Utah, New Mexico, and Washington.<sup>182</sup> The desire to crack down on unauthorized immigration motivated some of these restrictions,<sup>183</sup> as the ability to drive legally is a vital link to working and thriving in most communities in the United States.<sup>184</sup> These restrictive state-level laws may have also been spurred by the enactment of the Federal REAL ID Act in 2005.<sup>185</sup> REAL ID sets minimum standards that state-issued identification cards must meet to be accepted for federal purposes (e.g., to board an airplane); these standards require proof of lawful immigration status.<sup>186</sup> Though the deadline to fully comply with REAL ID has been extended several times,<sup>187</sup> the impending federal requirements and the desire to provide federally-compliant identification for their residents nonetheless motivated some states to enact restrictive laws.<sup>188</sup>

On the integrationist side, a minority of states issue driver's licenses to their residents without requiring proof of legal immigration status.<sup>189</sup> The rationales for these positive laws range from public safety to economic necessity and economic costs.<sup>190</sup> Interestingly enough, after being the first state to require proof of

182. *Id.*

183. See Sarah E. Hendricks, *Living in Car Culture Without a License: The Ripple Effects of Withholding Driver's Licenses from Unauthorized Immigrants*, IMMIGR. POL'Y CTR. 8 (Apr. 2014), [https://www.americanimmigrationcouncil.org/sites/default/files/research/living\\_in\\_car\\_culture\\_without\\_a\\_license\\_3.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/living_in_car_culture_without_a_license_3.pdf) [<https://perma.cc/W5VM-C4G5>] (noting the use of driver's license citizenship restrictions to further "self-deportation" policies).

184. *Id.* at 9 (illustrating how the lack of driver's licenses limits the livelihoods of immigrants).

185. REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302.

186. *Id.* at 313.

187. Elaine S. Povich, *Real ID, Real Problems: States Cope with Changing Rules, Late Rollouts*, STATELINE (Aug. 6, 2019), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2019/08/06/real-id-real-problems-states-cope-with-changing-rules-late-rollouts> [<https://perma.cc/N7P8-BQ4R>] ("DHS has postponed the original deadline of 2008 many times since the Real ID law was enacted in 2005, but the department says it has no plans to extend the Oct. 1, 2020, deadline."); Juliana Kim, *REAL ID Enforcement is Delayed Again to 2025*, NPR (Dec. 5, 2022), <https://www.npr.org/2022/12/05/1140778386/real-id-enforcement-delayed-2025-immigration-privacy> [<https://perma.cc/37U8-7YBA>] ("The Transportation Security Administration and other federal agencies were expected to only accept the nationally approved IDs starting May 3, 2023. But on Monday, the Department of Homeland Security announced that the deadline would be extended until May 7, 2025.")

188. Povich, *supra* note 187 (noting Kentucky's rollout of REAL ID to spare residents from having to use passports for air travel when the REAL ID Act takes effect).

189. PEW CHARITABLE TR., *supra* note 180.

190. *Id.*

lawful immigration status, California in 2013 enacted A.B. 60, allowing California residents to obtain driver's licenses without having to prove lawful immigration status.<sup>191</sup> California's reasons for its policy change were to allow for more licensed drivers to ensure that they are tested, trained, and insured.<sup>192</sup> Vermont enacted a similar law in 2013,<sup>193</sup> citing the need for unauthorized immigrants working on the state's dairy farms to get to work.<sup>194</sup> And in one of the most recent actions on this front, Massachusetts in 2022 enacted the Work and Family Mobility Act, allowing immigrants without legal status to obtain a driver's license.<sup>195</sup> This law, which survived an attempted voter repeal, was pushed by its supporters as a way to create safer roads because it reduces unlicensed drivers, a public safety benefit for the larger community.<sup>196</sup> As of March 2023, nineteen states issue driver's licenses without requiring proof of lawful immigration status.<sup>197</sup> To prepare for the eventual enforcement of REAL ID, most of these jurisdictions have created two different types of licenses: licenses that comply with REAL ID requirements, including the requirement of lawful immigration status, and licenses that are issued without that proof.<sup>198</sup>

Besides driver's licenses, state and local governments distribute other benefits, and the distribution of those benefits has increasingly been dependent on lawful immigration status or even of citizenship. In 1996, Congress enacted two laws—the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) and the Illegal Immigration Reform and Immigrant

---

191. Act of Oct. 3, 2013, ch.524, sec. 1, § 12801.9–11, 2013 Cal. Stat. 91 (amending the Vehicle Code relating to driver's licenses).

192. *Id.*

193. Act of Jan. 5, 2013, sec. 1, § 603, 2013 Vt. Legis. Serv. 1 (amending the section to expand eligibility for driving and identification privileges).

194. DEBORAH A. GONZALEZ & PETER MARGULIES, A LEGAL AND POLICY ANALYSIS OF DRIVER'S LICENSES FOR UNDOCUMENTED RHODE ISLANDERS 3 (Roger Williams Univ. L. Sch. 2016).

195. Act of June 9, 2022, sec. 1, ch. 81, § 8, 2022 Mass. Legis. Serv.

196. Sam Pollak, *Question 4 Arguments Cite Safety Concerns and Voter Fraud*, PROVINCETOWN INDEP., (Oct. 26, 2022), <https://provincetownindependent.org/local-journalism-project/2022/10/26/question-4-arguments-cite-safety-concerns-and-voter-fraud/> [<https://perma.cc/4NMX-37G8>].

197. *States Offering Driver's Licenses to Immigrants*, NAT'L CONF. STATE LEGISLATURES (Mar. 13, 2023), <https://www.ncsl.org/immigration/states-offering-drivers-licenses-to-immigrants> [<https://perma.cc/G9SH-X4P2>].

198. Kendra Sena, *Driver's Licenses and Undocumented Immigrants*, ALBANY L. SCH. (July 15, 2019), <https://www.albanylaw.edu/government-law-center/drivers-licenses-and-undocumented-immigrants> [<https://perma.cc/NED3-AYT8>] (explaining the tiered systems in California and New York).

Responsibility Act (IIRIRA)—that imposed broad restrictions on the ability of legal permanent residents to receive federal benefits and placed additional restrictions on the already limited ability of unauthorized immigrants to receive those benefits.<sup>199</sup> Importantly, PRWORA also made unauthorized immigrants ineligible to receive even state or local benefits unless the state passed specific legislation establishing eligibility.<sup>200</sup> Few states have done so, resulting in mostly negative regulation at the subfederal level. Some restrictive laws require citizenship or permanent status to participate in the state's health insurance pool<sup>201</sup> or to obtain benefits under laws assisting minority- or women-owned businesses.<sup>202</sup>

A notable exception to the restrictive benefits trend is a class of laws enacted by twenty-seven states that allow unauthorized immigrant students to attend public colleges and universities at in-state tuition rates.<sup>203</sup> Most of these laws do not mention immigration status explicitly but rather condition tuition rates on graduation from an in-state high school.<sup>204</sup> Perhaps not surprisingly, other states have enacted laws restricting in-state tuition or even admission to public colleges and universities to students with lawful immigration status.<sup>205</sup> But interestingly, positive college tuition laws have cut across the political spectrum, enacted by red states (e.g., Texas)<sup>206</sup> and blue states (e.g., California)<sup>207</sup> alike.

199. Act of Aug. 22, 1996, Pub. L. No. 104-193, § 411, 110 Stat. 2268 (codified as amended at 8 U.S.C. § 1621(2012)) (restricting state and federal benefits for certain immigrants); Act of Sept. 30, 1996, Pub. L. No. 104-208, § 505, 110 Stat. 3009-672 (codified as amended at 8 U.S.C. § 1623(2012)) (under Title V, people who are deportable, excludable, and on nonimmigrant visas are deemed ineligible for benefits).

200. Act of Aug. 22, 1996, Pub. L. No. 104-193, 110 Stat. 2268, § 411, 110 Stat. 2268 (codified as amended at 8 U.S.C. § 1621(2012)).

201. Act of May 26, 2009, ch. 533, sec. 4, § 1506.152., 2009 Tex. Gen. Laws 1232.

202. Act of May 6, 2009, ch. 869, sec. 1, § 2.2-1400, 2009 Va. Acts (relating to the Department of Minority Business Enterprise).

203. *Portal to the States*, HIGHER EDUC. IMMIGR. PORTAL, <https://www.higheredimmigrationportal.org/states/> [https://perma.cc/5FML-UKHU].

204. *E.g.*, Act of June 17, 2005, ch.21, sec. 1, § 21-1-4-6, 2005 N.M. Laws (requiring only graduation from a New Mexico high school and at least one year in a New Mexico middle school or high school).

205. *E.g.*, Act of May 10, 2011, ch. 11, sec. 1, § 12-14-11-1, 2011 Ind. Acts 2790; Act of May 14, 2008, no. 697, § 20-3-519.2, 2011 Ga. Laws 759.7.

206. Act of June 16, 2001, ch. 1392, sec. 1, § 54.051(m), 2001 Tex. Gen. Laws 3582.

207. Act of Oct. 13, 2001, ch. 814, sec. 1-2, § 68130.5, 2001 Cal. Stat. 6652-6654.

Our ICI also tracks laws that don't fit neatly into any of the previously described categories but nonetheless affect immigrants' lives. Some examples include laws that either require government transactions to be conducted only in English,<sup>208</sup> establish legal defense funds to pay for legal fees for immigrants in deportation proceedings,<sup>209</sup> create advisory councils to improve delivery of government services to immigrant groups,<sup>210</sup> or establish hotlines to report immigration violations.<sup>211</sup> The commonality among these miscellaneous laws is that they insert immigration status into otherwise local concerns, creating more points for the expression of immigration preferences and for immigration disagreements.

ii. The Copycat and Opposing Law Cycle

Beyond expanding the subject matter of immigration regulation, subfederal laws have also increased national polarization on immigration by interacting on the subfederal level. Using the multiple views afforded by the ICI over time, we see two main categories of subfederal-subfederal interaction: mimicking a law in approval (copycat laws) or enacting an opposing law in disapproval (opposing laws). These categories are not mutually exclusive or linear, as a subfederal immigration regulation could be both copied and opposed by different jurisdictions at different points in time. We focus our analysis here on two case studies—the Illegal Immigration Act Ordinance enacted by Hazleton, Pennsylvania in 2006 and the Support Our Law Enforcement and Safe Neighborhoods Act (S.B. 1070) enacted by Arizona in 2010—as illustrative of this intra-subfederal dynamic.

*The Copycat and Opposing Law Cycle: Hazleton's Housing Law*

With the case studies, we observed this pattern: a regulation that was novel in some way, pushing the boundaries of subfederal immigration regulation and garnering considerable press coverage

---

208. Compare Act of June 27, 2013, ch. 321C, sec. 3, § 321C-6, 2013 Haw. Sess. Laws 679, 681–682 (establishing a statewide language access resource center to help people with limited English language proficiency), with Act of May 11, 2007, ch. 186, sec. 1, § 73-2801, 2007 Kan. Sess. Laws 1666 (establishing English as the official state language).

209. *E.g.*, Act of June 25, 2021, ch. 352, sec. 2, § 8-3.8-101, 2021 Colo. Sess. Laws 2287.

210. *E.g.*, Act of July 15, 2009, no. 141, sec. 1, § 1222, 2009 La. Acts 1868, 1869–1870 (creating advisory councils to improve delivery of government services to Latin Americans).

211. *E.g.*, Act. of 2011, no. 73, sec. 65.12, 2011 S.C. Acts 1212.



along the way, would be enacted and quickly copied by like-minded jurisdictions. Then, jurisdictions with opposing viewpoints would enact laws that either prohibited the enactment of the original law or more proactively protected the right at issue.

Hazleton's 2006 Illegal Immigration Act Ordinance was certainly novel. The ordinance required landlords to check for tenants' "occupancy permits," which the tenants obtained from a city office after showing proof of legal immigration status.<sup>212</sup> At that time, no other jurisdiction in the United States made the renting of private housing dependent on legal immigration status; with its Illegal Immigration Act Ordinance, Hazleton took the unprecedented step of placing private landlords in an enforcement role, making them gatekeepers to an important necessity—housing.<sup>213</sup>

Hazleton's mayor, Lou Barletta, stated that the basic purpose of the law was to make Hazleton hostile for unauthorized immigrants and denied that there was any racial motive. "I had to declare war on the illegals," Barletta asserted.<sup>214</sup> "This isn't racial, because 'illegal' and 'legal' don't have a race."<sup>215</sup> Detractors argued that the ordinance encouraged discrimination against Hispanic residents, violated federal and state housing laws, and overstepped the powers of a local government.<sup>216</sup> Hazleton's housing law was quickly copied, first by surrounding Pennsylvania townships like West Hazleton and Hazle Township, but soon, by cities as far away as Valley Park, Missouri and Escondido, California; thirteen of these laws were enacted in 2006, the same year as Hazleton's law, and some of these laws copied the entirety of the Hazleton ordinance almost word for word.<sup>217</sup>

212. Hazleton, Pa., Ordinance 2006-18 (Sept. 8, 2006).

213. See Huyen Pham, *The Private Enforcement of Immigration Laws*, 96 GEORGETOWN L.J. 777 (2008).

214. Michael Powell & Michelle García, *Pa. City Puts Illegal Immigrants on Notice*, NBC NEWS (Aug. 22, 2006), <https://www.nbcnews.com/id/wbna14463098> [<https://perma.cc/RG7W-RJFU>].

215. *Id.*

216. *Id.*

217. Chico Harlan, *In These Six American Towns, Laws Targeting 'The Illegals' Didn't Go as Planned*, Wash. Post (Jan. 26, 2017), [https://www.washingtonpost.com/business/economy/in-these-six-american-towns-laws-targeting-the-illegals-didnt-go-as-planned/2017/01/26/b3410c4a-d9d4-11e6-9f9f-5cdb4b7f8dd7\\_story.html](https://www.washingtonpost.com/business/economy/in-these-six-american-towns-laws-targeting-the-illegals-didnt-go-as-planned/2017/01/26/b3410c4a-d9d4-11e6-9f9f-5cdb4b7f8dd7_story.html) [<https://perma.cc/9FTS-L8HJ>]; compare *supra* note 212 (Hazleton's ordinance stating that "United States Code Title 8, subsection 1324(a)(1)(A) prohibits the harboring of illegal aliens. The provision of housing to illegal aliens is a fundamental component of harboring."), with Escondido, Cal., Ordinance No. 2006-38 R (Oct. 18, 2006) (Escondido's ordinance stating that "United States Code Title 8, subsection 1324(a)(1)(A) prohibits the

These housing laws faced legal challenges in court, with both the Third and Fifth Circuit Courts of Appeals striking down these laws on preemption grounds.<sup>218</sup> The Third Circuit held that Hazleton’s ordinance impermissibly regulated immigration because it attempted to mandate that only those with lawful status may live in the community.<sup>219</sup> The court noted the danger of this type of local law, which would eviscerate the federal government’s sole authority to regulate immigration, if enacted in many municipalities.<sup>220</sup> In striking down the ordinance enacted in Farmers Branch, Texas, the Fifth Circuit held that the ordinance (which tracked Hazleton’s law) conflicted with federal anti-harboring laws and federal laws giving the federal government the sole authority to determine legal immigration status and to prosecute immigration violations.<sup>221</sup>

Interestingly, the Eighth Circuit upheld Fremont, Nebraska’s housing law, holding that the ordinance—which largely tracked the Hazleton and Farmers Branch laws—was not preempted by federal law.<sup>222</sup> The Fremont law, the court held, did not intrude on the federal government’s prerogative to determine the lawful presence of immigrants in the community or make removal determinations.<sup>223</sup> The court also held that Fremont’s ordinance did not violate federal anti-harboring law because, while it defined “harboring” more expansively than federal law, it expressly exempted types of harboring permissible under federal law from local prosecution.<sup>224</sup> Since that decision was issued, another Nebraska city, Scribner, enacted a similar restrictive housing ordinance.<sup>225</sup>

Facing these legal headwinds, the restrictive laws became less popular after the initial wave in 2006. But the restrictive laws existed long enough to inspire other subfederal governments to enact positive housing laws, either prohibiting any Hazleton-type

---

harboring of illegal aliens. The provision of housing to illegal aliens is a fundamental component of harboring.”).

218. See *infra* notes 219–21.

219. See *Lozano v. City of Hazleton*, 620 F.3d 170, 220–21 (3d Cir. 2010), *vacated sub nom. City of Hazleton, Pa. v. Lozano*, 563 U.S. 1030 (2011).

220. *Id.* at 221.

221. See *Villas at Parkside Partners v. City of Farmers Branch, Tex.*, 726 F.3d 524, 530–31 (5th Cir. 2013) (en banc).

222. See *infra* note 223.

223. *Keller v. City of Fremont*, 719 F.3d 931, 942 (8th Cir. 2013).

224. *Id.* at 943.

225. *Scribner Voters Approve Ordinance Barring Illegal Immigrants from Housing, Jobs*, AP NEWS (Nov. 9, 2018), <https://apnews.com/article/immigration-nebraska-fremont-46b86680fcf64a68aa69306160ef7d80> [https://perma.cc/78SV-RHW5].

requirement for landlords or more directly protecting the right of immigrant tenants to access private housing. For example, in 2007, the State of California passed the Immigrant Tenant Protection Act, which prohibits landlords from inquiring about the immigration or citizenship status of tenants or prospective tenants; landlords are also barred from disclosing a tenant or prospective tenant's immigration status, with the intent to harass, intimidate, retaliate, or influence a tenant to vacate.<sup>226</sup> The Act also prohibits any local government in the state from enacting contrary ordinances.<sup>227</sup> And in 2018, Boulder, Colorado enacted Ordinance 8249, which amended the city's Human Rights Code to prohibit landlords from inquiring into a prospective tenant's immigration status or refusing to rent to a prospective tenant based on immigration status.<sup>228</sup> Table 2 below has a list of Hazleton and Counter-Hazleton Housing Laws.

**Table 2: Hazleton, Copies, and Counter Housing Laws**

<b>Jurisdiction</b>	<b>Year Enacted</b>
Hazleton, PA	2006
Valley Park, MO	2006
West Hazleton, PA	2006
Hazle Township, PA	2006
Gilberton, PA	2006
Berwick, PA	2006
Riverside, NJ	2006
Escondido, CA	2006
Altoona, PA	2006
Bridgeport, PA	2006
Farmers Branch, TX	2006

---

226. Cal. Civ. Code § 1940.05 (West 2018).

227. Cal. Civ. Code § 1940.3 (West 2018).

228. Boulder, Co. Rev. Code tit. 12, § 12-1-2 (2018).

Gaston County, NC	2006
Inola, OK	2006
Cherokee County, GA	2006
State of California	2007
San Francisco, CA	2008
Fremont, NE	2014
State of California	2017
Boulder, CO	2018
Scribner, NE	2018
Alachua County, FL	2019
Annapolis, MD	2019
Pittsburgh, PA	2020
Denver, CO	2020

So, though the original restrictive laws may have had limited direct impact because of legal challenges, they had important ripple effects by connecting the availability of housing to lawful immigration status and entangling landlords with immigration law enforcement. For the first time, access to private housing became a frontline issue in immigration enforcement, with its denial seen by restrictionists as a way to deter unauthorized immigration and its protection seen by immigrant advocates as an important civil right.<sup>229</sup> With a significant number of subfederal governments

---

229. These housing laws have inspired thoughtful scholarship. *See, e.g.*, Rigel C. Oliveri, *Between a Rock and a Hard Place: Landlords, Latinos, Anti-Illegal Immigrant Ordinances, and Housing Discrimination*, 62 VAND. L. REV. 55 (2009) (calling on Congress to prohibit anti-immigrant housing ordinances because the ordinances will likely lead to discrimination against “foreign-seeming” people); Chad G. Marzen, *Hispanics in the Heartland: The Fremont, Nebraska Ordinance and the Future of Latino Civil Rights*, 29 HARV. J. RACIAL & ETHNIC JUST. 69 (2013) (analyzing the housing ordinances in the context of the movement for Latino civil rights); Kristina M. Campbell, *Local Illegal Immigration Relief Act Ordinances: A Legal, Policy, and Litigation Analysis*, 84 DENV. U. L. REV. 1041 (2007) (analyzing

taking a position on this issue, these restrictive housing laws, and the opposing laws they inspired, deepened the nation's partisan divide on immigration issues.

*The Copycat and Opposing Law Cycle: Arizona's S.B. 1070  
Enforcement Law*

Another example of this copycat-opposing law cycle started with Arizona's S.B. 1070, the Support Our Law Enforcement and Safe Neighborhoods Act, enacted in 2010 and described by its supporters as a way to stand up against "decades of federal inaction"<sup>230</sup> and remove political handcuffs to enable police to enforce immigration laws.<sup>231</sup> The law was novel in its attempts to create new state crimes for offenses that had previously only been penalized, if penalized at all, under federal immigration laws and to give state and local law enforcement more authority to enforce existing federal immigration laws. For example, Section 3 made it a state offense for an immigrant not to carry their federally issued alien registration card,<sup>232</sup> an offense previously only punishable under federal law.<sup>233</sup> And in perhaps its most controversial provision, Section 2(B) required all state law enforcement authorities to determine the immigration status of all persons who are detained, stopped, or arrested and are suspected of unauthorized status.<sup>234</sup>

Thus, the goal of S.B. 1070 was clear: to give more immigration enforcement control to state and local authorities in Arizona, who would presumably engage in more rigorous enforcement than federal authorities were perceived to be engaging in. "[W]illing to do the job that the federal government won't do" was a frequent rallying cry for those who supported the state's increasingly harsh immigration regulations.<sup>235</sup> Arizona had already enacted other negative immigration laws, including the Legal Arizona Workers

---

anti-immigrant housing ordinances and possible challenges to them based on Fair Housing Act and federal preemption arguments).

230. Scott Wong, *States Defy Arizona-law Backlash*, POLITICO (Apr. 27, 2011), <https://www.politico.com/story/2011/04/states-defy-arizona-law-backlash-053826> [<https://perma.cc/KNX2-CCW3>] (quoting then-Arizona governor Jan Brewer).

231. *Divisive Ariz. Immigration Bill Signed Into Law*, CBS NEWS (Apr. 23, 2010), <https://www.cbsnews.com/news/divisive-ariz-immigration-bill-signed-into-law/> [<https://perma.cc/MRC7-GRLC>].

232. ARIZ. REV. STAT. ANN. § 13-1509 (2010) (invalidated 2012).

233. Ann Morse, *Arizona's Immigration Enforcement Laws*, NAT'L CONF. STATE LEGISLATURES (July 28, 2011), [https://www.ncsl.org/research/immigration/analysis-of-arizonas-immigration-law.aspx#Similar\\_Bills](https://www.ncsl.org/research/immigration/analysis-of-arizonas-immigration-law.aspx#Similar_Bills) [<https://perma.cc/ZS3W-4TPK>].

234. ARIZ. REV. STAT. ANN. § 11-1051 (2010).

235. Wong, *supra* note 230.

Act that required Arizona employers to use the federal E-Verify system to verify the work eligibility of their employees and revoked the business licenses of those employers who hire unauthorized workers.<sup>236</sup> But it was S.B. 1070 that cemented Arizona's strident anti-immigration reputation. Described as "the nation's toughest legislation against illegal immigration," S.B. 1070 was widely condemned, including by then-President Obama, who said the measure would "threaten to undermine basic notions of fairness . . . as well as the trust between police and their communities."<sup>237</sup> Other opponents called the law a discriminatory policy that would result in "breaches of due process and equal protection."<sup>238</sup>

Advocates for and against S.B. 1070 found receptive ears in different state legislatures. First, arguments by proponents inspired copycat proposals in no less than ten states. Of those ten states, five—Utah,<sup>239</sup> Georgia,<sup>240</sup> Indiana,<sup>241</sup> Alabama,<sup>242</sup> and South Carolina<sup>243</sup>—moved forward to enact S.B. 1070-like legislation in 2011.<sup>244</sup> Typical of the copycat laws was Georgia's Illegal Immigration Reform and Enforcement Act of 2011. This law mirrored S.B. 1070's provisions by making it a crime to knowingly harbor or transport unauthorized immigrants, empowered law enforcement to check the immigration status of people reasonably suspected of being present in the country illegally, and also expanded the requirement for employers to use the federal E-Verify system.<sup>245</sup> Similarly restrictive laws were proposed but not enacted in the blue-ish states of Pennsylvania, Minnesota, Rhode Island, Michigan, and Illinois.<sup>246</sup>

Like the Hazleton housing law, S.B. 1070 also faced legal challenges, challenges that reached the Supreme Court. In a 5-3

---

236. ARIZ. REV. STAT. ANN. § 23-212 (2010).

237. CBS NEWS, *supra* note 231.

238. Kasie Hunt, *Arizona Gov. Signs Immigration Law*, POLITICO (Apr. 23, 2010), <https://www.politico.com/story/2010/04/arizona-gov-signs-immigration-law-036283> [<https://perma.cc/5B9Q-TCKQ>].

239. Utah Illegal Immigration Enforcement Act, H.B. 497, Gen. Sess. (2011).

240. Georgia Illegal Immigration Reform and Enforcement Act of 2011, H.B. 87, 151st Gen. Assemb., Reg. Sess. (2011).

241. S.B. 590, 117th Gen. Assemb., 1st Reg. Sess. (Ind. 2011).

242. Beason-Hammon Alabama Taxpayer and Citizen Protection Act, H.B. 56, 2011 Leg., Reg. Sess. (2011).

243. South Carolina Act of June 27, 2011, no. 69, 2011 S.C. Acts 325.

244. NAT'L IMMIGR. L. CTR., *supra* note 32.

245. Georgia Illegal Immigration Reform and Enforcement Act of 2011, H.B. 87, 151st Gen. Assemb., Reg. Sess. (2011).

246. Morse, *supra* note 233.

decision issued in 2012, the Court struck down three provisions of S.B. 1070 as preempted by federal law.<sup>247</sup> Those provisions purported to create new state crimes for immigration-related behavior (working without authorization and not carrying an alien registration card) and to give state law enforcement officers the power to make warrantless arrests for immigration offenses.<sup>248</sup> However, the Court upheld the most controversial provision of S.B. 1070—the “show me your papers” provision that requires law enforcement officers to check the immigration status of any person they stop, detain, or arrest if they suspect that the person does not have lawful immigration status.<sup>249</sup>

While these legal challenges were unfolding, other states were enacting laws to challenge S.B. 1070. In 2010, when S.B. 1070 was enacted, several states passed resolutions protesting the law, urging boycotts of Arizona and Arizona businesses.<sup>250</sup> But it wasn't until 2012 that the first state enacted an opposition law directly linked to S.B. 1070. In July 2012, California enacted the California Transparency and Responsibility Using State Tools Act (TRUST Act), which prohibits state law enforcement officers from honoring ICE detainer requests, except under certain circumstances (like detainer requests for individuals who have committed serious or violent felonies).<sup>251</sup> Although its legislative history suggests that state legislators were also protesting the federal Secure Communities and the high removal rates of the first Obama Administration, the history is also clear that the TRUST Act was designed to be an “anti-Arizona” law.<sup>252</sup> After the California Senate had approved the TRUST Act, its sponsor, Assemblyman Tom Ammiano, commented, “Today's vote signals to the nation that California cannot afford to be another Arizona.”<sup>253</sup>

---

247. *Arizona v. United States*, 567 U.S. 387, 416 (2012).

248. *Id.* at 400, 403, 407.

249. *Id.* at 416.; Alisa Reznick, ‘Show me your papers’: A decade after SB 1070, AZPMM NEWS (July 30, 2020), <https://news.azpm.org/p/news-splash/2020/7/30/177558-show-me-your-papers-a-decade-after-sb-1070/> [<https://perma.cc/V8FN-NBT8>].

250. Anna Gorman & Nicholas Riccardi, *Calls to Boycott Arizona Grow over New Immigration Law*, L.A. TIMES (Apr. 28, 2010), <https://www.latimes.com/archives/la-xpm-2010-apr-28-la-me-0428-arizona-boycott-20100428-story.html> [<https://perma.cc/E683-ZFRQ>].

251. CAL. GOV'T CODE § 7282 (West 2018).

252. *California Senate Passes “anti-Arizona” Immigration Bill*, REUTERS (July 5, 2012), <https://www.reuters.com/article/us-usa-california-immigration/california-senate-passes-anti-arizona-immigration-bill-idUSBRE86502720120706> [<https://perma.cc/X924-YPNX>].

253. *Id.*

To be sure, cities and counties had previously enacted sanctuary-type laws, limiting cooperation between local police and ICE, but California's TRUST Act was the first to bring sanctuary laws to the state level.<sup>254</sup> In 2013, Connecticut enacted its own TRUST Act, and Illinois did the same in 2017.<sup>255</sup> Both acts placed broad restrictions on the authority of state law enforcement officers to honor federal immigration detainers.<sup>256</sup> Though not labeled as TRUST acts, other states enacted similar laws that limited the authority of their law enforcement agencies to enforce or cooperate with federal enforcement of immigration laws. Colorado, for example, moved to TRUST-type status by enacting several different laws. First, the state revoked previous legislation that had prohibited sanctuary cities and required law enforcement agencies to report unauthorized persons to ICE in 2013.<sup>257</sup> Then Colorado prohibited the honoring of ICE detainers at all jails in 2014,<sup>258</sup> eventually extending the detainer prohibition to all law enforcement agencies and officers in 2019.<sup>259</sup>

Thus, Arizona's enactment of S.B. 1070 had wide-ranging effects, well beyond the state's borders. It inspired both copycat and counter laws, and in doing so, elevated subfederal disagreement about federal ICE cooperation to the state level. This elevation is compelling for several reasons. Most obviously, state laws have broader geographic reach, so a decision at the state level to cooperate or not cooperate with federal immigration enforcement will have more significant, and presumably more uniform, effects than a similar law enacted only at the city or county level. But perhaps more importantly, the elevated disagreement becomes more visible on the national stage, cementing a state's reputation on these issues and further increasing the national partisan divide on immigration issues.

---

254. Danielle Riendeau, *TRUST Act: California Could Set National Model for Correcting the Damage Done by S-Comm*, ACLU (July 23, 2012), <https://www.aclu.org/news/national-security/trust-act-california-could-set-national-model-correcting-damage-done-s-comm> [<https://perma.cc/P7R7-CU6D>].

255. CONN. GEN. STAT. § 54-192h; 5 ILL. COMP. STAT. 805/1 (2017).

256. *Id.*

257. 29 COLO. REV. STAT. 29-29, *repealed* by H.B. 13-1258 (2013).

258. Keith Coffman, *All County Sheriffs in Colorado Halt Federal Immigration Holds*: ACLU, REUTERS (Sept. 18, 2014), <https://www.reuters.com/article/us-usa-colorado-immigration/all-county-sheriffs-in-colorado-halt-federal-immigration-holds-aclu-idUKKBN0HD2PI20140918> [<https://perma.cc/W8GT-EY2E>].

259. 2019 Colo. Sess. Laws 2759. See Table 3 for a list of S.B. 1070 and counter-S.B. 1070 enforcement laws.



**Table 3: S.B. 1070, Copies, and Representative Counter-Enforcement Laws**

State	Year	Name	Description
Arizona	2010	S.B. 1070	Expanded state and local authority to enforce federal immigration law
Alabama	2011	H.B. 56	Required employers to verify employees' legal status
Georgia	2011	H.B. 87	Empowered police to check immigration status of suspected undocumented people
Indiana	2011	S.B. 590	Permitted police to arrest possessors of certain immigration-related documents
South Carolina	2011	S.B. 20	Required police to demand proof of legal status during traffic stops based on reasonable suspicion
Utah	2011	H.B. 497	Authorized police to verify immigration status of individuals they stopped
California	2013	TRUST Act	Prohibited honoring federal immigration detainers except in limited circumstances
Colorado	2013	H.B. 13-1258	Repealed state law that prohibited sanctuary cities and required law enforcement to report unauthorized persons to ICE

Connecticut	2013	Trust Act	Prohibited honoring federal immigration detainees except in limited circumstances
Colorado	2014	N/A	Stopped jails from honoring federal immigration detainees
Illinois	2017	TRUST Act	Prohibited honoring federal immigration detainees except in limited circumstances
Vermont	2017	Fair and Impartial Policing Policy	Required police to adopt policies prohibiting honoring immigration detainees
New Jersey	2018	Immigrant Trust Directive	Issued new rules to state, county, and local police and corrections officers prohibiting them from detaining immigrants at the request of ICE
Colorado	2019	H.B. 19-1124	Prohibited honoring of federal immigration detainees except in limited circumstances
Washington	2019	S.B. 5497	Prohibited honoring federal immigration detainees except in limited circumstances
D.C.	2020	D.C. Law 23-282	Prohibited honoring federal immigration detainees except in limited circumstances
Maryland	2021	H.B. 0016	Prohibited honoring of federal immigration detainees except in limited circumstances

*Opposing Law Cycle: Subfederal Interactions Within Jurisdictions*

We have focused thus far on interactions between subfederal governments that are either equal (e.g., state-state) or otherwise have no overlapping jurisdiction (e.g., state and city in another state). With the multiple views afforded by the ICI data, we have also observed interactions *within* jurisdictions which, because of their hierarchical relationships, create a complicated dynamic. The most common intra-jurisdiction interaction we have observed are red states enacting anti-sanctuary laws to respond to, and override, positive blue city or county policies.<sup>260</sup> Like the Hazleton and S.B. 1070 examples discussed above, the states are reacting to another subfederal government's immigration policies, but unlike the earlier examples, states have considerable legal and financial authority over cities and counties within their borders. Thus the end result, at least in terms of laws and policies, is not only the suppression by states of disfavored immigration laws and policies enacted at the city and county levels, but a widening partisan divide on immigration issues.

In our discussion of ICI trends across different presidential administrations, we noted that during Obama II, we started to see a partisan divide within red states, with positive policing laws enacted at the city and county levels.<sup>261</sup> That divide became a chasm during the Trump Administration, with red states enacting anti-sanctuary laws to prohibit positive policing laws at the city and county levels.<sup>262</sup> An instructive example comes from Texas. The sheriffs' offices in Dallas County and Travis County (including Austin) had developed policies limiting their cooperation with federal immigration enforcement.<sup>263</sup> In response, Governor Greg Abbott made passing anti-sanctuary laws a legislative priority. In an October 2015 letter to Dallas County Sheriff Lupe Valdez, Abbott wrote:

Your refusal to fully participate in a federal law enforcement program intended to keep dangerous criminals off the streets [(the immigration detainer program)] leaves the State no choice

---

260. *See infra* note 279.

261. *See supra* notes 25, 168.

262. *See infra* note 279.

263. Morgan Smith, *Abbott: No State Grants for Sheriffs Who Don't Work with ICE*, TEX. TRIB. (Nov. 4, 2015), <https://www.texastribune.org/2015/11/04/abbot-no-state-grants-sheriffs-who-dont-work-ice/> [https://perma.cc/B8DW-KQL4]; Patrick Svitek, *Gov. Abbott Demands Travis County Reverse New "Sanctuary" Policy*, TEX. TRIB. (Jan. 23, 2017), <https://www.texastribune.org/2017/01/23/abbott-demands-hernandez-reverse-new-sanctuary-pol/> [https://perma.cc/CK8H-MWWM].

but to take whatever actions are necessary to protect our fellow Texans. . . . At a minimum, Texas must pass laws that prohibit any policy or action like yours that promotes sanctuary to people in this state illegally. The State must also enact laws that make it illegal for a Sheriff's Department to not honor a federal immigration detainer request.<sup>264</sup>

He wrote a similarly threatening letter to Travis County Sheriff Sally Hernandez in January 2017.<sup>265</sup>

Several months later, in May 2017, Texas enacted S.B. 4, which requires all law enforcement agencies to honor all ICE detainer requests, allows law enforcement officers to question the immigration status of all those arrested or detained, and threatens agency leaders with fines, criminal penalties, and removal from office for violations.<sup>266</sup> The law also imposed penalties for statements or policies that hindered cooperation with federal immigration enforcement.<sup>267</sup> The biggest cities in Texas, including Austin, Dallas, and Houston (all under Democratic leadership), sued and won temporary relief when a district court judge held that S.B. 4 violated the First Amendment rights of agency officials.<sup>268</sup> But the law was eventually upheld by a panel of the Fifth Circuit, requiring the plaintiff cities to rescind their sanctuary policies and cooperate with federal immigration enforcement.<sup>269</sup> Without the benefit of preemption arguments or even the Tenth Amendment arguments that states invoke to fight federal commandeering, the plaintiff cities were forced to comply with S.B. 4.<sup>270</sup>

Another example of partisanship within states is the interaction between Kansas City/Wyandotte County and the state of Kansas. In February 2022, the Unified Government of Kansas City and Wyandotte County enacted a Safe and Welcoming City Act

264. Letter from Greg Abbott, Governor of Texas, to Lupe Valdez, Sheriff of Dallas County (Oct. 26, 2015), [https://gov.texas.gov/uploads/files/press/DallasCounty\\_FederalImmigrationDetainer\\_10262015.pdf](https://gov.texas.gov/uploads/files/press/DallasCounty_FederalImmigrationDetainer_10262015.pdf) [<https://perma.cc/UZU5-JRC9>].

265. Letter from Greg Abbott, Governor of Texas, to Sally Hernandez, Sheriff of Travis County (Jan. 23, 2017), [https://gov.texas.gov/uploads/files/press/TravisCountySheriffSanctuaryCity\\_01232017.pdf](https://gov.texas.gov/uploads/files/press/TravisCountySheriffSanctuaryCity_01232017.pdf) [<https://perma.cc/4C9F-B2BV>].

266. S.B. 4, 85th Tex. Leg. (2017).

267. *Id.*

268. Manny Fernandez, *Federal Judge Blocks Texas' Ban on Sanctuary Cities*, N.Y. TIMES (Aug. 30, 2017), <https://www.nytimes.com/2017/08/30/us/judge-texas-sanctuary-cities.html> [<https://perma.cc/DH75-JATB>].

269. *El Cenizo, Texas v. Texas*, 890 F.3d 164 (5th Cir. 2018).

270. Julián Aguilar, *Federal Appeals Court's Ruling Upholds Most of Texas' "Sanctuary Cities" Law*, TEX. TRIB. (Mar. 13, 2018), <https://www.texastribune.org/2018/03/13/texas-immigration-sanctuary-cities-law-court/> [<https://perma.cc/PU7F-MAKA>].

that codified long-standing prohibitions that prevented local police from: assisting ICE in enforcing immigration laws, collecting immigration information during policing activities, transferring information to ICE unless required by law, and entering into 287(g) agreements.<sup>271</sup> The Act also provided for the creation of identification cards, which could be used by undocumented immigrants.<sup>272</sup> As the most diverse county in Kansas, the Act's sponsors said that the law was intended to improve public services and quality of life for its residents.<sup>273</sup>

The reaction from the state was swift and severe. In April 2022, the state enacted HB 2717, which used broad, sweeping language to prohibit municipalities from limiting or restricting the enforcement of federal immigration laws.<sup>274</sup> The law also prohibited municipalities from issuing identification cards to be used for state purposes and authorizes the state attorney general or county district attorneys to file lawsuits to force compliance with its provisions.<sup>275</sup> In explaining his support for H.B. 2717, Republican Attorney General Derek Schmidt said that he objected to the Wyandotte law because it created a “sanctuary jurisdiction for illegal immigrants.”<sup>276</sup>

Although H.B. 2717's language was ambiguous, creating confusion for municipalities within Kansas,<sup>277</sup> Wyandotte County quickly rescinded the policing provisions of its Welcoming City Act. The County also modified its municipal ID program, renaming it a “community identification” program, specifying that the identification could not be used for state purposes, and switching

---

271. UNIFIED GOV'T OF WYANDOTTE CNTY./KANSAS CITY, KAN. CODE OF ORDINANCES ch. 18, §§ 18-162–18-168 (amended).

272. *See id.* The identification cards were also designed to be used by veterans, the elderly, and people with disabilities. *Id.*

273. Tim Carpenter, *Kelly Signs Bill Spiking Wyandotte County's Adoption of 'Sanctuary' City Policy*, KAN. REFLECTOR (Apr. 11, 2022), <https://kansasreflector.com/2022/04/11/kelly-signs-bill-spiking-wyandotte-countys-adoption-of-sanctuary-city-policy/> [https://perma.cc/5CEP-X7YT].

274. KAN. STAT. ANN. §§ 8-1327, 25-2908 (2022).

275. *Id.* The state law also contained language that prohibits municipalities from enacting any ordinance that would restrict communication with federal immigration authorities, language that largely tracks pre-existing prohibitions under federal law. 8 U.S.C. §§ 1373, 1644.

276. Carpenter, *supra* note 273.

277. Noah Taborda, *Kansas Immigrants Say They Face 'Unsafe and Unwelcome' State Under Law Banning Sanctuary Cities*, KANSAS REFLECTOR (May 28, 2022), <https://www.kcur.org/news/2022-05-28/kansas-immigrants-say-they-face-unsafe-and-unwelcome-state-under-law-banning-sanctuary-cities> [https://perma.cc/V3X2-883A].

the program's administration from city officials to a contracted nonprofit organization.<sup>278</sup>

With these *intrastate* examples, we see a different dynamic. Like the *interstate* conflicts, we see disagreement with immigration policy preferences expressed through reactive laws. But here, these conflicts do not manifest in the formal laws or policies that would measurably affect our ICI measures. Rather, because of the power imbalance, state preferences on immigration issues will override any contrary city and county laws if the state legislature decides to act.<sup>279</sup> But the policy disagreements remain, increasing the national polarization on immigration issues.

### Conclusion

To summarize our main empirical findings: in its most modern chapter, subfederal immigration regulation has expanded significantly, in both its geographic range and in its substance. By the end of 2020, there were more than 3,200 laws, reaching every state and important facets of daily life: policing and access to private housing, driver's licenses, employment, education, and public benefits. During Bush II, these laws were more non-partisan in nature, with a significant number of blue jurisdictions enacting negative laws and red jurisdictions enacting positive laws. But during the Obama Administrations, subfederal regulation took a decidedly partisan turn. Restrictive laws enacted by red jurisdictions skyrocketed, even though President Obama engaged in historically high levels of immigration enforcement, both at the border and in the interior of the country (measured by numbers of deportations and detainer requests). Following a similar pattern, blue jurisdictions enacted record numbers of positive laws during the Trump Administration, enough to pull the national ICI into

---

278. Safe and Welcoming City Act, Wyandotte County/Kansas City, KS, §§ 18-162–18-168 (2022)  
<https://civicclerk.blob.core.windows.net/stream/WYCOKCK/294585e9-138a-4b8c-98c7-eb6da8ecef9.pdf?sv=2015-12-11&sr=b&sig=K1wAlwKmb%2FIsqcnkMCJ4ziwILLuswMDfJaA6F2LNVY%3D&st=2022-08-25T03%3A40%3A15Z&se=2023-08-25T03%3A45%3A15Z&sp=r&rsc=no-cache&rsct=application%2Fpdf>  
[<https://perma.cc/LH5P-84QK>].

279. Pratheepan Gulasekaram, Rick Su & Rose Cuison Villazor, *Anti-Sanctuary and Immigration Localism*, 19 COLUM. L. REV. 837 (2019) (analyzing the tension between states and localities regarding anti-sanctuary laws); Karla Mari McKanders, *Immigration to Blue Cities in Red States: The Battleground Between Sanctuary and Exclusion*, 21 U. PA. J. CONST. L. 1051 (2019) (examining the political and ideological contours of state and local exclusionary and sanctuary laws in the context of the Trump Administration).

positive territory for the first time ever. Interestingly, these laws—mostly sanctuary laws designed to protect immigrants from deportations—were enacted even as the Trump Administration engaged in historically average levels of immigration enforcement (again measured by numbers of deportations and detainer requests).

What do these findings portend for immigration law and policy? Taking the long view afforded by the ICI data, we observe that the number of subfederal laws has tapered from its highs, but that partisanship continues to fuel their enactment. Others have identified partisanship as the main determinant of subfederal immigration regulation;<sup>280</sup> we use our ICI data to demonstrate the ways that subfederal regulation itself increases national partisanship on immigration issues. Specifically, in Section II we explained how subfederal regulation expanded the substantive reach of immigration regulation, creating new flashpoints for partisan identification and disagreement, and we also identified patterns of copycat and opposition enactments.<sup>281</sup> While partisanship as a determinant of subfederal activity has remained largely constant,<sup>282</sup> we note here that the political identification of subfederal jurisdictions can change, often resulting in changed immigration regulation. Colorado, for example, in 2006 enacted one of the first and most negative laws, S.B. 90, that prohibited local sanctuary legislation.<sup>283</sup> During the previous presidential election, Colorado had voted for George W. Bush.<sup>284</sup> But as Colorado turned bluer in its political identification,<sup>285</sup> its immigration regulations also became more positive. Some examples of those positive laws include prohibiting the honoring of federal immigration detainers except in limited circumstances,<sup>286</sup> establishing legal defense funds

---

280. *See, e.g.*, PRATHEEPAN GULASEKARAM & S. KARTHICK RAMAKRISHNAN, *THE NEW IMMIGRATION FEDERALISM* (2015), (focusing on the importance of advocates and policy entrepreneurs in the proliferation of state-level immigration legislation); *see also* Doris Marie Provine, Monica W. Varsanyi, Paul G. Lewis & Scott H. Decker, *POLICING IMMIGRANTS: LOCAL LAW ENFORCEMENT ON THE FRONT LINES* (2016) (examining the role of local police in immigration law enforcement).

281. *See supra* Part II.

282. As we note in Part II, subfederal immigration regulation started as a more non-partisan phenomenon.

283. 2006 Colo. Legis. Serv. ch. 177 (S.B. 06-090) (West).

284. *Colorado*, 270 TO WIN, <https://www.270towin.com/states/Colorado> [<https://perma.cc/KZ5D-MKYF>].

285. In 2016, for example, Colorado voted for Hillary Clinton for president, and in 2020, it voted for Joseph Biden. *Id.*

286. 2019 Colo. Legis. Serv. ch. 299 (H.B. 19-2759) (West).

to pay for legal fees for immigrants in deportation proceedings,<sup>287</sup> and allowing undocumented immigrants to access in-state tuition.<sup>288</sup> Now, Colorado has one of the most positive state scores in the ICI.

As we look to the future of subfederal immigration regulation, we see several likely developments. First, as the number of politically purple jurisdictions dwindles<sup>289</sup> and the congressional gridlock on immigration reform continues, we are likely to see more subfederal jurisdictions joining the fray of immigration regulation. An example of that increased immigration involvement is Virginia: in 2018, after Democrats took full control of state government for the first time in decades,<sup>290</sup> the state enacted one of its first substantial immigration regulations, H.B. 1211, which allows unauthorized immigrants to obtain driver's licenses.<sup>291</sup> And if Texas is representative, we may also expect to see more extreme subfederal regulations emerge. We noted earlier that Texas Governor Greg Abbott has mobilized state National Guard troops to arrest presumed unauthorized immigrants under Operation Lone Star.<sup>292</sup> Some of those immigrants have been transported back to the border to await federal deportation, but others have been charged with criminal trespass, a misdemeanor under state law, and are being detained and tried through criminal processes.<sup>293</sup> By punishing immigrants through its own criminal legal system, Texas' most recent laws are an escalation from previous negative policing laws that merely sought to increase the number of immigrants funneled into federal removal processes.

Finally, as we look further toward the future of subfederal regulation, we believe that perhaps the most accurate predictor of any particular jurisdiction's activity—both in terms of volume and

---

287. 2021 Colo. Legis. Serv. ch. 352 (H.B. 21-1194) (West).

288. 2013 Colo. Legis. Serv. ch. 156 (S.B. 13-033) (West).

289. Wendy Underhill & Ben Williams, *2022 Midterm Elections: 11 Takeaways*, NAT'L CONF. STATE LEGISLATURES (Nov. 17, 2022), <https://www.ncsl.org/research/elections-and-campaigns/2022-midterm-elections-11-takeaways-magazine2022.aspx> [<https://perma.cc/LZ8Q-EV5P>] (noting that the number of state governments under one-party control continues to increase).

290. *Virginia Democrats Take Control of State Legislature for First Time in over Two Decades*, NBC NEWS (Nov. 5, 2019), <https://www.nbcnews.com/politics/politics-news/democrats-capture-virginia-state-senate-first-time-years-house-grabs-n1077036> [<https://perma.cc/L8W4-EQ78>].

291. 2020 Va. Laws ch. 1227 (H.B. 1211).

292. Cuellar, *supra* note 7.

293. Julie McCullough, *More Than 100 Civil Rights Groups Ask Feds to Slash Texas Funding over Migrant Trespassing Arrests*, TEX. TRIB. (Dec. 15, 2021), <https://www.texastribune.org/2021/12/15/migrant-arrests-border-security-complaint/> [<https://perma.cc/K5CM-FRSM>].



the restrictive/integrationist orientation of its laws—is the combination of both the political identification of the jurisdiction (red/blue) and the political identification of the President. Specifically, a jurisdiction is most likely to be active when its political identification differs from the political identification of the President. We noted in Part II that (1) red jurisdictions were most active and most negative during President Obama’s first term, a period of historically high immigration enforcement, and (2) blue jurisdictions were most active and most positive during the Trump Administration, a period of historically average immigration enforcement. We see a similar pattern in current times: since the beginning of the Biden Administration, Texas has enacted some of its most restrictive policies (including Operation Lone Star), and its governor has harshly criticized the Administration’s “open-border policies,”<sup>294</sup> although Biden has largely continued many of Trump’s border policies.<sup>295</sup>

Looking at the bigger theoretical implications, these dynamics certainly present a strong case study of partisan federalism, where firmly polarized state actors channel their partisan fights through both state and federal forums, taking advantage of the institutional federalist framework.<sup>296</sup> But the ICI data, compared with federal enforcement data, suggests that the partisanship driving the enactment of subfederal laws is more tethered to party identification (and disassociation from the other party) and less connected to policy positions.<sup>297</sup> The target audience for these subfederal laws may not be the federal government at all, but rather voters within the subfederal jurisdictions, with the laws serving as political signaling. Our case study and these observations provide rich material for further exploration by federalism scholars.

Finally, our data collection and analysis of polarization trends in subfederal immigration law may add insights into other areas of

---

294. Armando Garcia, *Abbott Exhorts Biden to Help Curb Immigration at the Border, Claiming It’s an ‘Invasion’*, ABC NEWS (Nov. 20, 2022), <https://abcnews.go.com/Politics/abbott-exhorts-biden-curb-immigration-border-claiming-invasion/story?id=93445128> [<https://perma.cc/Y7FU-S5E7>].

295. Hamed Aleaziz & Courtney Subramanian, *Biden Announces Major Border Strategy Shift, Expands Trump Policy*, LA TIMES (Jan. 5, 2023), <https://www.latimes.com/politics/story/2023-01-05/biden-new-border-strategy> [<https://perma.cc/ML8S-T6GP>].

296. Bulman-Pozen, *supra* note 20.

297. See James N. Druckman, Samara Klar, Yanna Krupnikov, Matthew Levendusky & John Barry Ryan, *Affective Polarization, Local Contexts and Public Opinion in America*, 5 NATURE HUM. BEHAV. 28, 28 (2021) (suggesting that partisanship is a form of social identification, to divide our world into two groups: our liked in-group and the disliked out-group (the other party)).

law where polarization is emerging. With the reversal of *Roe v. Wade*<sup>298</sup> and the ending of federal abortion rights rooted in the United States Constitution, states are rushing to enact laws to either prohibit or protect abortion access within their jurisdictions. Interestingly, states are also reacting to other states' laws. For example, New Mexico Governor Michelle Lujan Grisham issued an executive order, allocating \$10 million to build an abortion clinic close to the state's border with Texas, where abortion access has been heavily restricted.<sup>299</sup> Our analysis of polarization in subfederal immigration regulation may provide insights into the polarization dynamics in the abortion debate and other contexts where lawmaking has devolved to the subfederal level.

---

298. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

299. Andrew Jeong, *N.M. Plans \$10M Abortion Clinic Near Tex. Border, Expecting Post-Roe Demand*, WASH. POST (Sept. 1, 2022), <https://www.washingtonpost.com/nation/2022/09/01/new-mexico-abortion-clinic-texas-border/> [<https://perma.cc/BP67-6R8C>].

