



# Understanding Immigration Federalism in the United States

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# Introduction and summary

For nearly 150 years, the U.S. federal government has been pre-eminent in immigration policy.<sup>1</sup> At the same time, Congress and the Supreme Court have also granted limited room for states to regulate the lives and livelihoods of immigrants residing within their borders, such as issuing business licenses and providing health and welfare services.<sup>2</sup>

In the past decade, state and local governments have produced a flurry of legislation related to immigrants and immigration. Much of the legislation between 2004 and 2012 was restrictive in nature, making it more difficult for immigrants to reside in communities, work, and live their daily lives. Several cities, for example, imposed penalties on landlords who rented to unauthorized immigrants and employers who hired them.<sup>3</sup>

These restrictionist laws reached a fever pitch when Arizona passed its comprehensive anti-immigrant bill, S.B. 1070, in 2010, and states such as Alabama and Georgia passed copycat laws the following year.<sup>4</sup> S.B. 1070 and other similar legislation pursued a stated strategy of “attrition through enforcement” by making it a crime to be without legal status and authorizing local police to check the immigration status of anyone they suspect of being in the country without authorization.<sup>5</sup>

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## Factors fueling the anti-immigrant legislative buildup

Conventional wisdom on the rise of anti-immigrant state laws argues that the movement of immigrants into new destinations, such as Kansas, North Carolina, Georgia, and beyond, sparked fears of cultural and economic threats, concerns over crime, and local challenges such as overcrowded housing. These supposedly objective changes, combined with the lack of congressional action on immigration reform, put pressure on states and localities to respond to the influx of immigrants themselves.<sup>6</sup>

These factors, however, are insufficient to explain why many states passed such harsh and restrictive laws. Changing demographics alone did not make the rise

of S.B.-1070-like legislation inevitable, nor were they of primary importance to their rise. Instead:

- Political context matters: Republican-leaning cities and states were much more likely to be receptive to restrictive laws, while the relative importance of agricultural interests to a state makes the potential for restrictive laws less likely.
- Issue entrepreneurs took advantage of circumstances, such as extreme political polarization after the contested 2000 presidential election and the rise of border security concerns after 9/11, to spread attrition through enforcement, or self-deportation, laws throughout the country.
- A dual strategy: These issue entrepreneurs first blocked immigration reform at the national level and then simultaneously used federal inaction as an excuse to push the attrition-through-enforcement agenda at the state and local levels.

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## Factors reversing the course toward integration

In the past few years, the tide has largely turned, and a growing number of states are passing more-welcoming laws aimed at integrating immigrant residents and mitigating some of the harsh consequences of immigration enforcement. These laws have taken a range of forms, from providing driver's licenses and in-state tuition to limiting cooperation with federal immigration authorities. Importantly, states and localities are enacting these welcoming laws even as Congress has failed to pass immigration reform.

Two major factors influenced the shift away from restrictive laws and toward pro-integration laws. First, the Supreme Court struck down much of Arizona's S.B. 1070 in 2012,<sup>7</sup> paving the way for federal courts to place significant limitations on local enforcement of federal immigration law and much of the attrition-through-enforcement agenda.<sup>8</sup>

Second, the 2012 presidential election provided a turning point away from attrition-through-enforcement laws as a political strategy. Republican candidate and former Gov. Mitt Romney (R-MA), who ran on a platform of self-deportation, lost to President Barack Obama by record margins among both Latino and Asian American voters.<sup>9</sup> In the aftermath of the election, major conservative pundits such as Sean Hannity and Bill O'Reilly "evolved" on the need for immigration reform.<sup>10</sup>

In the past few years, the tide has largely turned, and a growing number of states are passing more-welcoming laws aimed at integrating immigrant residents and mitigating some of the harsh consequences of immigration enforcement.

And while pro-immigrant integration laws have been around for years—for example, in-state tuition laws for unauthorized immigrants—the number and scope of these laws have expanded significantly since 2012.<sup>11</sup> In the past year, for example, California and Connecticut have passed TRUST Acts, which limit state cooperation with federal immigration officials, and thirteen jurisdictions<sup>12</sup> now grant driver’s licenses to unauthorized immigrants.

States have moved toward more positive laws for a variety of reasons:

- As with restrictive laws, political contexts matter. Democratic-leaning cities and states are much more likely to pass such legislation than Republican-leaning areas. Municipal identification cards, for example, have only been passed in Democrat-controlled cities, while expanded driver’s licenses for the unauthorized have also generally been passed in Democratic-leaning states.
- The size of the Latino electorate, and the immigrant electorate more broadly, makes a difference, and states with more Latinos and naturalized immigrants are more likely to provide driver’s licenses, in-state tuition, and financial aid for unauthorized residents.

Beyond these state-specific circumstances, three other factors help explain the rise of pro-immigrant integration laws:

- A broader coalition of supporters: Pro-immigrant groups and coalitions have teamed up with clergy, police chiefs, labor unions, and business groups to help pass pro-integration legislation, particularly as progress on the national front has stalled.
- States are responding to ramped-up immigration enforcement by attempting to mitigate its harmful effects and ensure that only serious criminals are caught up in the immigration system, rather than, for example, people picked up for traffic violations or other low-level offenses.<sup>13</sup>
- Executive action, in the form of the Deferred Action for Childhood Arrivals, or DACA, program, has also made a difference. This program has pushed many states to take another look at their policies on driver’s licenses for unauthorized immigrants as they grapple with how to grant licenses to the DACA population.

With or without immigration reform at the national level, states and localities will continue to play a significant role in regulating the lives of immigrant residents.

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# The legal basis for state and local immigration laws

Both the U.S. Supreme Court and Congress have shaped states' and localities' ability to legislate on issues related to immigration. The Supreme Court has placed some important constraints on states' ability to enact laws that regulate the treatment of noncitizens, while those very constraints are also subject to Congress's potential changes to federal law.

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## The role of the judiciary

Since the late 1800s, the Supreme Court has ruled that the federal government is vested with the exclusive power to regulate the admission and expulsion of immigrants; these laws are traditionally referred to as "immigration laws."<sup>14</sup> As a corollary, the Supreme Court has consistently opined that states and localities do not have the power to regulate immigration as such.<sup>15</sup> Nevertheless, states and localities have been left with some authority to enact laws that regulate the treatment of immigrants once in the United States. These laws are often referred to as "alienage laws."<sup>16</sup>

States can, for example, require residents to be U.S. citizens or legal permanent residents in order to access certain benefits or gain certain types of public employment.<sup>17</sup> It is important to note, however, that while states are permitted to control some aspects of immigrants' lives, the extent to which states can regulate the treatment of noncitizens is far from clear. That is, within the sphere of alienage law, the court is still determining the dividing line between federal and state control. The Constitution and federal laws help determine these boundaries.

An example of a constitutional limitation on state and local lawmaking is the Supreme Court's 1982 ruling in *Plyler v. Doe*, which struck down a Texas law that allowed public schools to deny enrollment to undocumented children under the Constitution's Equal Protection clause.<sup>18</sup> The Court's opinion, however,

focused on the unique characteristics of the primary-school-age children at issue and declined to label them, or immigrants generally, a suspect class for Equal Protection analysis. Thus, *Plyler* has not been extended or applied outside the particular context of public primary schools. As a result, Equal Protection arguments have played a limited role in the ways that courts adjudicate state laws affecting noncitizens, particularly unauthorized immigrants.

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## The role of Congress

In addition to jurisprudence by the U.S. Supreme Court over the past 150 years, Congress has played a significant role in allowing or constraining state and local regulation of immigration. For example, the Immigration Reform and Control Act of 1986, or IRCA, contained a provision that instituted a federal enforcement system to punish employers for hiring unauthorized workers and expressly prohibited states from doing the same.<sup>19</sup> This action pre-empted prior laws in California and elsewhere that had imposed state fines and regulations on the hiring of unauthorized workers.

Laws that Congress passed in 1996 on welfare reform and immigration enforcement also had some important federalism implications. The 1996 Personal Responsibility and Work Opportunity Reconciliation Act, or PRWORA, for instance, allowed states to determine whether or not legal permanent residents would be eligible for benefits such as the Temporary Assistance for Needy Families, or TANF, program and Medicaid.<sup>20</sup> The 1996 Illegal Immigration Reform and Immigrant Responsibility Act, or IIRAIRA, also set the stage for state and local law enforcement cooperation on matters of immigration enforcement by adding Section 287(g) to the Immigration and Nationality Act.<sup>21</sup> This provision authorized the federal government to enter into agreements with states and localities that allow local law enforcement officers to engage in immigration enforcement.

Thus, while the Supreme Court has placed some important constraints on the ability of states to regulate the treatment of noncitizens, changes in federal law can expand or contract states' ability to regulate the livelihoods of legal and unauthorized immigrants alike.



Developments in federal law in 1986 and 1996 provided some important openings for states to get more involved in immigration enforcement and demonstrate the extent to which they would extend certain rights and benefits to immigrants. Importantly, however, these developments only created an opportunity for the subsequent proliferation of state and local legislation on immigration; they did not by themselves mandate or even encourage state action. Instead, catalytic political actors working in a ripe, post-9/11 political context took advantage of this legal leeway to proliferate state and local immigration policy.

In order to get a more complete picture of why state and local legislation on immigration increased in the past decade, an examination of the factors that propelled such legislation is necessary. The next two sections explain the rise of restrictive and permissive legislation, respectively, and draw attention to the kinds of laws passed in each instance.

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# The rise of restrictive measures

A significant amount of state and local policymaking from 2005 to 2012 focused on restrictionist efforts to increase enforcement possibilities.<sup>22</sup> Some measures, such as 287(g) agreements, were provided for in the 1996 federal immigration law overhaul. These written cooperative agreements, initiated by local jurisdictions and approved by the federal government, empower local officials to be trained in and enforce federal immigration law.<sup>23</sup>

Notably, despite providing for the possibility of supervised and delegated local enforcement of immigration laws in 1996, localities did not begin entering into such agreements with much frequency until after 2005, with political battles on immigration playing out both nationally and locally. U.S. Immigration and Customs Enforcement, or ICE, maintains 37 active 287(g) agreements in 18 states as of August 2013, a number that has been in decline since the U.S. Department of Homeland Security began rolling out its Secure Communities Program, also known as S-Comm.<sup>24</sup>

For the most part, these state and local enactments sought to involve local law enforcement officers in enforcement actions against unauthorized immigrants. In addition, states and localities created new state crimes triggered by unauthorized status. And states instituted employer-sanctions schemes in an attempt to penalize businesses that employed unauthorized workers.

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## Arizona takes the lead

Arizona was a leading proponent of restrictive legislation. The state's actions included:

- Proposition 200 in 2004, which required proof of citizenship for voter registration and tightened proof-of-identity standards for accessing state and local benefits<sup>25</sup>

- Proposition 300 in 2006, which denied in-state tuition rates to undocumented students<sup>26</sup>
- The Legal Arizona Workers Act, or LAWA, in 2007, which allowed the state to revoke the licenses of businesses that did not participate in E-Verify—the federal, Internet-based employment verification program
- S.B. 1070, which was a 2010 immigration enforcement law and drew national attention for its harsh treatment of immigrants

LAWA was an attempt to discourage unauthorized immigrants from seeking work in Arizona by mandating that all employers within the state utilize the federal E-Verify database to confirm that their employees are authorized to work.<sup>27</sup> Failure to do so or continuing to employ an unverified employee results in penalties to the business, including revocation of the entity’s business license. At the time of its enactment, LAWA was novel, cutting against two decades of state absence from such employer-sanctions schemes. A few states, including California, maintained prohibitions on in-state businesses from hiring unauthorized workers beginning in the 1970s.<sup>28</sup> Ten other states and one locality maintained similar laws.<sup>29</sup> However, Congress squelched these prior state laws when it passed the Immigration Reform and Control Act of 1986 with a provision that simultaneously instituted a federal system of employer sanctions and expressly prohibited states from doing the same.

That same provision in IRCA, however, left open the possibility for states to regulate employers through the power of licensing.<sup>30</sup> The Arizona legislature—with aid from lawyers such as conservative activist and now Kansas Secretary of State Kris Kobach—drafted LAWA in a manner that would avoid conflict with federal law and fit into its exception.<sup>31</sup> Taking advantage of IRCA’s language, Kobach and then-Sen. Russell Pearce (R-AZ) fashioned LAWA as a licensing law, with a revocation of a business license serving as the penalty for noncompliance. The U.S. Chamber of Commerce and various other organizations challenged the law’s enforceability in federal court. In *U.S. Chamber of Commerce v. Whiting*, the Supreme Court’s 2010 ruling upheld LAWA against a pre-emption challenge as a valid use of the licensing law exception.<sup>32</sup> In the wake of *Whiting*, seven states now maintain laws similar to LAWA that mandate E-Verify use by most employers—private or public<sup>33</sup>—and several other states require E-Verify use by public employers and contractors.<sup>34</sup>

Three years after the passage of LAWA, Kobach again teamed up with Sen. Pearce to pass S.B. 1070, a first-of-its-kind, omnibus state enforcement scheme intended to encourage self-deportation of unauthorized immigrants from the state. S.B. 1070 included provisions that:<sup>35</sup>

- Expressed the state's intent to expel unauthorized immigrants under the attrition-through-enforcement theory
- Prevented localities from enacting sanctuary or noncooperation types of policies
- Penalized unauthorized solicitation of work
- Implemented a state alien registration plan
- Mandated local law enforcement inquiry into immigration status
- Provided local law enforcement arrest authority based on officers' assessment of a person's potential removability

These controversial provisions drew national attention because they attempted to impose state penalties that mirrored federal sanctions for immigration violations and raised concerns about racial profiling.<sup>36</sup>

The Supreme Court struck down much of S.B. 1070 in its 2012 *Arizona v. United States* ruling. The case examined four of the law's provisions, and the Court struck down the three provisions that created a state alien registration scheme, criminalized workers for unauthorized solicitation of work, and empowered officers to make warrantless arrests based on their evaluations that people were removable from the country.<sup>37</sup> Although the Court left one major provision of the law intact—declining to enjoin the section requiring officers to check the immigration status of those they arrest—its ruling also suggested the possibility that even that provision might be vulnerable to a future challenge, depending on the manner in which it was enforced.<sup>38</sup>

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## Copycat legislation

Contemporaneous with S.B. 1070 and prior to the Supreme Court's ruling, several other states and localities enacted similar enforcement statutes. In the wake of the *Arizona* case, several federal appeals courts ruled on these other state laws, again producing mixed results, albeit heavily skewed toward invalidating these states' attempts at restriction. These cases invalidated omnibus schemes similar to S.B. 1070 in Alabama, Georgia, South Carolina, and Utah and also struck down provisions in those laws that were not present in S.B. 1070, such as attempts to bar undocu-

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mented children from public primary schools and invalidate contracts entered into by undocumented people. In other cases, federal courts invalidated employment and rental ordinances aimed at discouraging the presence of undocumented immigrants.<sup>39</sup> The Supreme Court has chosen not to hear appeals from this round of post-*Arizona* decisions, recently declining to review the ruling on Alabama's omnibus enforcement scheme and declining appeals from Farmers Branch, Texas, and Hazleton, Pennsylvania, on their employment and rental ordinances.<sup>40</sup>

Despite this general rebuke of restrictionist measures, one federal appeals court upheld a Nebraska city's rental ordinance post-*Arizona* and declined to strike down a Missouri city's ordinance prohibiting businesses from knowingly employing unauthorized immigrants prior to the *Arizona* decision.<sup>41</sup> These decisions allow jurisdictions within that circuit to use these types of laws to discover and discourage the presence of undocumented residents. Indeed, Fremont, Nebraska, recently reapproved its ordinance banning undocumented people from taking up residency.<sup>42</sup>

And based on the *Arizona* decision not to enjoin Section 2(B) of S.B. 1070, analogous provisions in Alabama, Georgia, and South Carolina that require law enforcement officers to check the immigration status of suspected unlawfully present people in their custody were left standing.<sup>43</sup> Notably, despite this partial victory, Alabama and South Carolina have agreed to a policy of not initiating or prolonging an investigation solely to discover an individual's immigration status.<sup>44</sup> However, for Arizona and Georgia, which are ostensibly still enforcing this provision, it will take some time for future litigation to resolve the important racial profiling and discrimination concerns implicated by local law enforcement participation in immigration matters.

# Why did states pass restrictive laws?

The conventional explanation for the rise in immigration restriction, as told in many newspaper stories and scholarly accounts, centers on the rapid increase in lesser-skilled and often largely undocumented Mexican immigrant labor in new destinations ranging from rural Kansas and North Carolina to the suburbs of Long Island and Georgia.<sup>45</sup> According to these accounts, the local policy responses result from a combination of cultural and economic threats, rising crime rates, and localized policy challenges such as overcrowded housing.<sup>46</sup> One variant of this conventional account is that these pressures from below, when combined with congressional gridlock on immigration reform, lead to significant pressure for policy change at the state and local levels.<sup>47</sup>

Moving beyond these conventional explanations, however, a select group of people harnessed federal inaction, public opinion, and perceived policy problems in order to advance restrictive immigration-related laws at the state and local levels. Legal developments from congressional legislation and Supreme Court decisions only provided the potential for greater immigration federalism; it was a political process set into motion after 2000 that enabled states and localities to realize this potential.<sup>48</sup>

This highly politicized process began with a spike in party polarization following the contested presidential election, the Supreme Court's *Bush v. Gore* decision, and the growth of border security and national security concerns after September 11, 2001.

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## The role of issue entrepreneurs

Despite a political context that was conducive to restriction, the rise of restrictive immigration laws at the state and local levels was not inevitable. Instead, it took the work of a handful of dedicated policy activists to capitalize on these political opportunities to block immigration reform at the national level and then proliferate restrictive legislation at the local level.

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There is ample evidence that activist groups such as the Federation for American Immigration Reform, or FAIR, and NumbersUSA sought to stall moderate legislation at the federal level while at the same time fomenting restrictive legislation at the state and local levels. These organizations pursued a dual strategy after 2004: purposefully promoting legislative gridlock at the federal level and then citing the very national legislative inaction they helped foment to justify restrictive solutions at the local level.<sup>49</sup>

The work of proliferating legislation at the subnational level has found its strongest champion in Kris Kobach, currently the Kansas secretary of state and a proponent of state and local policies designed to make life inhospitable for undocumented immigrants. Since 2006, Kobach has served as legal counsel for many states and localities that have passed restrictive legislation, both in an individual capacity and as an employee of the Immigration Reform Law Institute, or IRLI, the legal branch of the restrictive group FAIR.<sup>50</sup> Not only has he provided legal counsel for cities such as Hazleton, Pennsylvania, and Farmers Branch, Texas, but he has also played a pivotal role in crafting legislation for many of the same jurisdictions, including Hazleton, Arizona, and Alabama.<sup>51</sup>

Thus, while restrictive policies may have local sponsors in each jurisdiction, the evidence from a variety of news reports reveals a nationally involved group of actors—actors who we term “restrictive issue entrepreneurs.” These individuals and organizations advanced a proliferation of subnational policies through political rhetoric, legal justification, and the design and promotion of legislation aimed at attrition through enforcement.<sup>52</sup>

In many ways, the strategies of restrictive issue entrepreneurs came to fruition in 2010 with the passage of Arizona’s S.B. 1070. And there is no better example of this legal theory in action than S.B. 1070 itself. Authored with considerable assistance from Secretary Kobach, S.B. 1070 declares that:

*The intent of this act is to make attrition through enforcement the public policy of all state and local government agencies in Arizona. The provisions of this act are intended to work together to discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States.*<sup>53</sup>

The work of these restrictive issue entrepreneurs reached its apex in the 2012 presidential primary, during which the leading Republican presidential candidates voiced their support for restrictive legislation such as Arizona's S.B. 1070. Indeed, former Gov. Romney touted the endorsement of Secretary Kobach in January 2012 as he tried to shore up conservative voter support in advance of the South Carolina primary.<sup>54</sup> Gov. Romney also declared on his blog that his future administration would "support states like South Carolina and Arizona that are stepping forward to address this problem [of illegal immigration]."<sup>55</sup>

Despite the initial success of the strategy pioneered by Secretary Kobach and other issue entrepreneurs, the tide of state and local immigration measures began to shift significantly toward integration in 2012.

# The shift to integration

Two major developments in 2012 led to a steep decline in the legal and political fortunes of these restrictive issue entrepreneurs and their plans for attrition through state enforcement. First, the U.S. Supreme Court struck down most provisions of Arizona's S.B. 1070 in *Arizona v. United States*.<sup>56</sup> In the wake of the ruling, federal courts also placed significant limitations on local enforcement schemes, leaving the future legal status of much restrictive enforcement legislation in doubt.<sup>57</sup> As a matter of legal theory, courts have been much more likely to side with the long-standing notion of federal supremacy on immigration enforcement than to side with the theories of Secretary Kobach and others who claim inherent authority for states to engage in the policing of immigrants.

In addition to facing significant legal headwinds, the theory of attrition through state enforcement was heavily discredited as a political strategy starting in November 2012.<sup>58</sup> In the presidential election, Gov. Romney lost to President Obama by record margins among Latino voters—71 percent to 27 percent—and Asian American voters—73 percent to 26 percent.<sup>59</sup> These voting patterns were a far cry from the modest losses Republicans faced in 2004 when then-President George W. Bush lost the Latino vote by 9 percent and the Asian American vote by 12 percent.<sup>60</sup>

Soon, many Republican officials began calling for the party to move swiftly in favor of immigration reform as a way to win back some of these voters and remain viable in the 2016 presidential election and beyond.<sup>61</sup> Even conservative opinion leaders on immigration such as Sean Hannity and Bill O'Reilly dropped their prior opposition to immigrant legalization and started calling for comprehensive immigration reform at the national level.<sup>62</sup> A few Republican jurisdictions that had previously been hotbeds for immigration restriction also began passing resolutions in support of immigration reform, including states such as North Carolina and Missouri<sup>63</sup> and localities such as Riverside County, California.<sup>64</sup> Thus, a shift in both the legal and political tides against further restrictive legislation at the state and local levels began in 2012.

As a counterpoint to restrictive measures, many state and local jurisdictions have attempted to promote the integration of foreign-born residents, regardless of their legal status. These integrationist measures have taken various forms, from carving out exceptions to cooperating with federal enforcement and issuing municipal identification cards to providing expanded access to public higher education, public welfare, and professional licensing.

### Pro-integration state laws as of February 2014

	Limits on detainers or TRUST Acts*	Limits on E- Verify	Driver's licens- es for DACA recipients	Driver's licenses for unauthorized immigrants	In-state tu- ition**	Financial aid
Alabama			✓			
Alaska			✓			
Arizona						
Arkansas			✓			
California	✓	✓	✓	✓	✓	✓
Colorado			✓	✓	✓	
Connecticut	✓		✓	✓	✓	
Delaware			✓			
District of Columbia	✓		✓	✓		
Florida			✓			
Georgia			✓			
Hawaii			✓			
Idaho			✓			
Illinois		✓	✓	✓	✓	✓
Indiana			✓			
Iowa			✓			
Kansas			✓		✓	
Kentucky			✓			
Louisiana			✓			
Maine			✓			
Maryland			✓	✓	✓	
Massachusetts			✓			
Michigan			✓			
Minnesota			✓		✓	✓
Mississippi			✓			

	Limits on detainers or TRUST Acts*	Limits on E- Verify	Driver's licens- es for DACA recipients	Driver's licenses for unauthorized immigrants	In-state tu- ition**	Financial aid
Missouri			✓			
Montana			✓			
Nebraska					✓	
Nevada			✓	✓		
New Hampshire			✓			
New Jersey			✓		✓	
New Mexico			✓	✓	✓	✓
New York			✓		✓	
North Carolina			✓			
North Dakota			✓			
Ohio			✓			
Oklahoma			✓			
Oregon			✓	✓	✓	
Pennsylvania			✓			
Puerto Rico			✓	✓		
Rhode Island			✓			
South Carolina			✓			
South Dakota			✓			
Tennessee			✓			
Texas			✓		✓	✓
Utah			✓	✓	✓	
Vermont			✓	✓		
Virginia			✓			
Washington			✓	✓	✓	✓
West Virginia			✓			
Wisconsin			✓			
Wyoming			✓			

\* Twenty localities also limit cooperation with federal immigration detainers.

\*\* The university systems of Hawaii, Michigan, and Rhode Island also grant in-state tuition.

Sources: National Immigration Law Center, "Current & Pending State Laws & Policies on Driver's Licenses for Immigrants," February 27, 2014; National Conference of State Legislatures, "In-State Tuition and Unauthorized Immigrant Students," February 19, 2014; Catholic Legal Immigration Network, Inc., "States and Localities That Limit Compliance with ICE Detainer Requests" (2014); author analysis of State Department of Motor Vehicle websites.

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## Mitigation of federal enforcement

For a few decades now, several localities have conspicuously positioned themselves as “sanctuary” cities.<sup>65</sup> This is a broad term intended to describe jurisdictions that have placed limits on the efforts of local law enforcement officials to discover and investigate immigration status and the amount of assistance they will provide to federal enforcement authorities to enforce immigration laws, though they cannot limit Immigration and Customs Enforcement itself from operating in these localities.<sup>66</sup> One of the primary goals of sanctuary, or noncooperation, policies is to enhance community policing efforts and improve relationships between local law enforcement and immigrant communities who would otherwise be reluctant to contact the police for fear of their immigration status.<sup>67</sup> While sanctuary jurisdictions have been present for some time, more recent federal enforcement efforts have spurred newer forms of noncooperation and enforcement-resistance policies in the past few years.

While these attempts to remove immigration enforcement functions from local law enforcement have gained support from various quarters, including a range of associations of law enforcement officers,<sup>68</sup> they have also encountered resistance in some states and from the federal government. States such as Arizona and Alabama have passed laws forbidding localities from implementing sanctuary ordinances.<sup>69</sup> Perhaps more significantly, the federal government recently completed rollout of its Secure Communities Program, effectively co-opting local law enforcement authorities into providing federal immigration authorities with information regarding undocumented people.<sup>70</sup>

Initiated by the U.S. Department of Homeland Security in 2008 and then tested and implemented nationwide over the past six years, S-Comm is an information-leveraging program that forwards information about every arrestee in a local jurisdiction to a federal database that checks for lawful status.<sup>71</sup> When local law enforcement authorities enter information about an arrestee into the Federal Bureau of Investigation’s national crime database to check for outstanding warrants or past criminal history, that criminal background check will also result in an immigration status check. Thus, even if local officers, pursuant to a sanctuary policy, endeavor not to investigate or discover the immigration status of an individual they take into custody, the federal immigration authorities will still receive information about that individual’s immigration status. At that point, federal officials may decide to further investigate or prosecute the individual in question, often beginning their process by issuing a “hold request” or “immigration detainer” requesting that the local agency hold the individual in custody until federal enforcement officials can interview or otherwise take custody of the individual.<sup>72</sup>



Although the federal government has declared the program mandatory,<sup>73</sup> some states and localities have resisted aspects of S-Comm. Specifically, a detainer-resistance movement, or anti-cooperation trend, has been developing across several jurisdictions in the past two years. Santa Clara County in California, for example, has passed resolutions that effectively decline to honor immigration detainer requests from ICE.<sup>74</sup> These jurisdictions offer varied policy reasons for resisting ICE hold requests, including the high costs of detention, the desire to focus on more pressing public safety priorities, and the risk to law enforcement’s relationship with immigrant communities, who might be less willing to come forward and contact the police if they fear they could be put into removal proceedings for doing so.<sup>75</sup>

Their legal argument is premised on well-established Supreme Court jurisprudence that forbids the federal government from commanding or directing local law enforcement to enforce federal law. This principle—based on the 10th Amendment and known as the “anti-commandeering” doctrine—means that a federal immigration detainer amounts to, at most, a request from federal authorities. While the federal government can incentivize and encourage state and local compliance with ICE holds, they cannot force local officials to use their own resources and personnel to hold noncitizens. The federal Court of Appeals for the 3rd Circuit recently adopted this reasoning in holding that Lehigh County, Pennsylvania, was not obligated to comply with an ICE detainer that resulted in the unlawful detention of a U.S. citizen.<sup>76</sup> In addition, because the holds are issued without warrant or probable cause, they may violate the Fourth Amendment’s prohibition against unreasonable searches and seizures, and the risk of racially inequitable application threatens to violate Equal Protection guarantees.<sup>77</sup>

Along with Santa Clara County, Cook County, Illinois; Miami-Dade County, Florida; the Newark Police Department in New Jersey; and Washington, D.C., also maintain policies that function as refusals to respond to federal detainer requests.<sup>78</sup> In addition to this type of resistance, other jurisdictions have passed civil detainer statutes that limit their response to some, but not all, federal detainer requests. California and Connecticut maintain such policies at the state level through their TRUST Acts, and at least 20 other local jurisdictions or county penal institutions maintain some form of a detainer-resistance or anti-cooperation policy.<sup>79</sup> Maryland is currently debating similar legislation.<sup>80</sup>

Finally, states have also voiced noncooperation stances on employer verification and employer sanctions. For example, California passed a law that expressly states neither the state nor jurisdictions within it can mandate use of the federal E-Verify database.<sup>81</sup> Illinois maintains a similar policy intended to limit E-Verify use and bars localities from requiring it.<sup>82</sup> These states' policies cannot prevent employers' voluntary use of the database, and other federal laws that prohibit employment of unauthorized workers still apply.<sup>83</sup> Regardless, the states' anti-E-Verify bills stand in sharp contrast to Arizona's approach with the Legal Arizona Workers Act. Notably, Utah passed a unique set of laws creating a state-sanctioned guest worker program for undocumented workers in 2011.<sup>84</sup> State lawmakers, however, recently put the program on hold until 2017; if eventually implemented, the program would raise serious constitutional concerns.<sup>85</sup>

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### Driver's licenses

The REAL ID Act of 2005 maintains minimum standards for state-issued licenses and identification cards if those cards are to be used for federal purposes, such as access to federal buildings, identification for airline travel, and proof of identity for accessing benefits.<sup>86</sup> Importantly, REAL ID provides states with the discretion to issue federally approved licenses to unlawfully present people who are recipients of deferred action.<sup>87</sup> Using this statutory discretion, many states maintained a policy even prior to 2012 of allowing temporary immigrants and undocumented people who had received deferred action and obtained employment authorization documents, or EADs, from the federal government to apply for driver's licenses. States, however, may maintain more stringent standards than the minimum allowed by REAL ID<sup>88</sup> or may choose to provide licenses that fail to meet the minimum federal status-verification standard with the understanding that such licenses may not be acceptable for federal purposes once the REAL ID Act becomes fully implemented.

While a few states provided licenses to undocumented people prior to REAL ID, seven states that previously granted driving privileges to undocumented immigrants stopped doing so from 2003 to 2010.<sup>89</sup> The Obama administration's implementation of the Deferred Action for Childhood Arrivals program in mid-2012, however, appears to have galvanized a significant reversal in that trend.<sup>90</sup> In the wake of DACA, 46 states now offer driver's licenses to DACA recipients who are eligible to receive EADs during the time of deferral.

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More broadly, the momentum created by DACA moved state policy on driver's licenses for undocumented people generally. Eleven states, along with Washington, D.C., and Puerto Rico, currently provide or are preparing to provide licenses regardless of immigration status.<sup>91</sup> Of those 13 jurisdictions, 10 changed their policies in the past 18 months, most likely as a response to the policy climate created by DACA. Furthermore, other states, such as New York, New Jersey, Pennsylvania, and Massachusetts, are considering a similar change.<sup>92</sup>

Because of REAL ID Act requirements, however, states issuing licenses to unauthorized people must either designate or mark those licenses differently, so that it is clear they cannot be used for federal purposes, or accept that none of their residents will be able to use their state-issued identification cards and licenses for those purposes. Several states that have recently changed their policies on driver's licenses have opted to designate or mark the licenses provided to unauthorized people in a manner that renders them unusable for federal concerns.<sup>93</sup> Notably, at this early stage in license availability, general concerns regarding turning over information to government officials has kept some undocumented immigrants from taking advantage of their newfound eligibility in enacting jurisdictions.<sup>94</sup>

The move toward broader availability of driver's licenses is based on public safety concerns and practical necessity. Policies such as DACA that provide employment authorization require states to confront how those individuals will travel to work or school. In addition, broader provision of licenses allows states to ensure that more drivers are insured, regardless of immigration status. Finally, the licenses also operate as identity documents, facilitating interaction between immigrants and state agencies, including law enforcement. In the words of California Gov. Jerry Brown (D), driver's licenses "enable millions of people to get to work safely and legally" and "send a message to Washington that immigration reform is long past due."<sup>95</sup>

Although a significant number of states are now welcoming undocumented driver's license applicants and the overwhelming majority of them allow DACA recipients to apply, at least two states have conspicuously bucked this trend. Both Arizona and Nebraska have announced their intention to deny driver's licenses to DACA recipients and subsequently engaged in litigation over their policies. A federal trial court recently declined to preliminarily enjoin Arizona's policy, and the legality of the state's denial is now before a federal appeals court.<sup>96</sup> Nebraska's denial of licenses is also under federal court review.<sup>97</sup>

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## Municipal identification card programs

Beginning with the city of New Haven, Connecticut, in 2007, several cities began issuing municipal identity cards to local residents regardless of immigration status.<sup>98</sup> In San Francisco—the second city to offer a resident card—applicants must show some form of identification—such as a foreign passport or consular card, which many undocumented people possess—and proof of residency within the city, such as a utility bill.<sup>99</sup> Although any city resident can theoretically obtain and use the cards, they present the greatest utility to groups such as the undocumented or the indigent, who generally do not have or are prevented from obtaining driver’s licenses and other forms of federal or state identification. In other jurisdictions, such as Mercer County, New Jersey, the card is technically offered by a nongovernmental, nonprofit advocacy group but is endorsed and accepted by several county agencies.<sup>100</sup>

As with driver’s licenses that fail to meet federal standards, the REAL ID Act prevents these resident cards from being used for any federal purpose, and they do not provide proof of lawful status. Moreover, private businesses and other localities are not required to accept the cards. Despite these limitations, the cards remain useful for undocumented immigrants within the enacting jurisdictions. Within those cities, the cards have enabled holders to access local medical clinics, interact with and receive services from city agencies, and borrow books from local libraries, and some resident cards also have debit card functionality. In addition, many private businesses within those cities have been receptive, allowing holders to use the cards as sufficient identification to pick up packages, cash checks, or open bank accounts.<sup>101</sup> The cards may also facilitate interaction with local law enforcement, especially in jurisdictions that also maintain noncooperation policies. Moreover, the cards provide a form of local documentation for many undocumented people that creates a sense of belonging and membership in the local community.<sup>102</sup>

The San Francisco municipal identification program survived a pre-emption challenge in state court, with the court dismissing the claim that the card violated the federal prohibition on harboring an unlawfully present person.<sup>103</sup> Such programs have not otherwise been tested in litigation. In addition to New Haven and San Francisco, Los Angeles, Richmond, and Oakland, California, as well as Trenton and Mercer County, New Jersey, and Washington, D.C., maintain some form of local identity card that can be obtained by undocumented residents.<sup>104</sup> Iowa City, Iowa, and Philadelphia are currently considering municipal card policies, and New York’s newly elected mayor, Bill de Blasio, indicated his intention to provide city identity cards in his recent State of the City speech.<sup>105</sup>

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## Education and tuition-equity laws

The 1996 federal immigration law, IIRIRA, restricted the states' ability to provide residency and in-state tuition benefits for undocumented students. Specifically, the law prohibits states from making undocumented students eligible for any postsecondary education benefit on the basis of state residency, unless a U.S. citizen from another state would also be eligible for that benefit.<sup>106</sup> Since the enactment of that federal law, several states have, as Florida House Speaker Will Weatherford characterized it, “realiz[ed] that there are a lot of kids who are not being given an opportunity [for higher education]” and decided to offer in-state tuition benefits to undocumented students, with Texas starting the trend in 2001.<sup>107</sup> Thanks in large part to sustained undocumented-youth activism, these state enactments continued from 2001 through 2013, with 15 states currently offering admission and in-state tuition rates to undocumented students who attend public institutions of higher learning.<sup>108</sup> Three additional state university systems allow the same benefit.<sup>109</sup> In addition, six states—California, Illinois, Minnesota, New Mexico, Texas, and Washington—also offer certain forms of access to financial aid to undocumented students.<sup>110</sup>

Although these policies have not been litigated in the U.S. Supreme Court, the California Supreme Court has upheld the state's in-state tuition policy against a challenge—from Kris Kobach, among others—that it violated the 1996 federal law.<sup>111</sup> California overcame the federal prohibition by allowing anyone—including undocumented students or U.S. citizens from other states—who attends three years of high school in the state to pay in-state tuition at state colleges and universities, and many other states have followed this lead.<sup>112</sup> In contrast to this trend of facilitating postsecondary education for undocumented students, five states have denied tuition equity, with two states taking the further step of prohibiting unlawfully present immigrants from attending state institutions of higher learning.<sup>113</sup>

As for other education-related laws, the recent round of federal appeals court and U.S. Supreme Court decisions has not altered the existing status quo on state-level education policy regarding unauthorized immigrants. Importantly, the federal appeals court reaffirmed in *United States v. Alabama* the now 30-year-old constitutional principle, established by the Supreme Court's 1982 decision in *Plyler v. Doe*, that states and localities may not exclude or otherwise deter undocumented students from attending public primary schools.<sup>114</sup> Alabama's attempt to discover the immigration status of such students or their family members was dismissed by both the trial court and the appeals court, and thus far, the Supreme Court has shown no inclination to overturn *Plyler*.

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## Public welfare laws

State public assistance policies have not received significant legal attention in the past decade. There have been contested claims, however, about the net fiscal impacts of immigration and unauthorized immigration at the state and local levels, both in the short and long terms.<sup>115</sup> The major legislative changes to state welfare schemes vis-à-vis noncitizens took place in the wake of the federal government's 1996 Personal Responsibility and Work Opportunity Reconciliation Act. PRWORA rendered many groups of noncitizens ineligible for important federal benefits.<sup>116</sup> Specifically, PRWORA limited federal benefits to only “qualified” noncitizens and prohibited undocumented immigrants from nonemergency relief programs. Furthermore, the act purported to devolve some decision making over noncitizen eligibility for jointly funded federal-state programs and state-only public assistance programs to state governments.<sup>117</sup> Importantly, states that desired to provide public assistance to unauthorized immigrants would have to do so through enactment of affirmative legislation after 1996.<sup>118</sup>

The two most notable cases that litigated post-1996 restrictions on immigrant eligibility for public assistance programs yielded mixed results. In *Aliessa v. Novello*, the New York Court of Appeals struck down the state's restrictions on immigrant eligibility in 2001, opining that the Supreme Court's prior decision in *Graham v. Richardson* prevented states from adopting divergent requirements for certain welfare programs, despite PRWORA's devolution of decision-making authority.<sup>119</sup> In contrast, a federal appeals court reached the opposite result in *Soskin v. Reinertson*, opining that states in 2004 could use the authority provided by PRWORA to limit noncitizen eligibility for certain forms of public assistance.<sup>120</sup>

Because the Supreme Court has not weighed in on the question, there is no definitive or uniform legal standard for adjudicating such cases. In the wake of PRWORA, some states, especially those with high immigrant populations such as California and New York, continued to provide extensive benefits to their immigrant populations, including undocumented residents.<sup>121</sup> Currently, the state situation remains in flux, with some states maintaining programs that are more generous than federal law requires and others choosing to rescind benefits to unqualified immigrants in light of the economic downturn over the past several years.<sup>122</sup> For the most part, undocumented immigrants remain outside the protection of federal and most state public assistance programs.



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## Admission to the state bar

A few states, such as California, New York, and Florida, are also contending with the question of undocumented law students applying for admission to the state bar. Although this is not a wide-ranging concern that affects a significant portion of the undocumented population, the underlying issues are both legally and symbolically important. State bar admission explores the possibility of states providing certain benefits, such as professional licenses, to undocumented immigrants in a manner consistent with federal law. In addition, it is likely that issues of professional licensing will become of increasing concern as more students begin to take advantage of DACA.

Licenses to practice law are primarily a matter of state law, generally left to state bars and state supreme courts. The State Bar of California, for example, preliminarily reviews applications and then sends recommendations to the California Supreme Court. The California Supreme Court was presented with an undocumented applicant in 2012 who had completed law school and passed the state's bar exam and whose admission was recommended by the state bar association.<sup>123</sup> The legal hurdle for the applicant was a provision of the 1996 IIRAIRA that generally prohibits states from conferring a "public benefit," including a professional license, to an unauthorized immigrant unless the state affirmatively enacted a state law providing the benefit after 1996.<sup>124</sup> Just weeks after oral arguments in the case, the California legislature enacted such a law, expressly providing for the possibility that undocumented applicants could become members of the state bar.<sup>125</sup> Relying on that statute, the state supreme court ruled to admit the undocumented applicant.<sup>126</sup>

In contrast, the Florida Supreme Court recently reached the opposite result.<sup>127</sup> The Florida high court based its ruling on the lack of state legislation specifically granting the benefit to undocumented bar applicants, thereby rendering the provision of a bar license a violation of federal law in its view. A similar suit regarding bar admission is pending in New York.<sup>128</sup>

Of course, even if they gain admission to the state bar, undocumented licensees still face federal prohibitions that would prevent employers from hiring them without obtaining employment authorization or benefiting from a change in federal law. Nevertheless, even without federal reform, such professional licensees might work for themselves, work on a pro bono basis, or practice in a foreign country.

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## ‘Welcoming America’ initiative

In the wake of the federal stalemate on immigration reform, several cities and local jurisdictions have affiliated themselves with the “Welcoming America” initiative by passing legislative resolutions that recognize and celebrate the presence of immigrants, as well as the potential economic windfalls of foreign trade and commerce.<sup>129</sup> Jurisdictions are pursuing this type of action to increase their populations and economic base, distance themselves from state-level policies such as S.B. 1070, and change the tenor of national discourse on immigration policy.<sup>130</sup>

The resolutions themselves are nonbinding and generally do not create legal obligations or prohibitions, but they are nevertheless intended to advertise an integrative and welcoming stance toward immigrants. At the same time, these resolutions are only the first step in the municipal coalition that the “Welcoming America” initiative is building. As the commitment form indicates, partner cities also pledge to adopt policies and practices that promote inclusion, appoint at least one key municipal staff contact for the project, and participate in conference calls and annual meetings with other members of the network.<sup>131</sup>

Currently, 29 cities and counties are participating in the program, and most are new immigrant destinations, varying from large cities such as Atlanta, Georgia, and Nashville, Tennessee, to medium-sized cities such as Boise, Idaho, and High Point, North Carolina, to smaller cities such as Dodge City, Kansas, and Clarkston, Georgia.<sup>132</sup>

So far, the early evidence from welcoming programs indicates that they are indeed working. For example, Dayton, Ohio, a city facing big problems with abandoned housing and population decline, adopted a welcoming program that drew support from various government agencies, community organizations, and local nonprofits. As an article in *The New York Times* noted:

*The city found interpreters for public offices, added foreign-language books in libraries and arranged for English classes ... Local groups gave courses for immigrants opening small businesses and helped families of refugees and foreign students.*<sup>133</sup>

Dayton also partnered with local universities to help high-skilled immigrants better translate their skills and credentials to the local labor market, and the police department decided to no longer check on the legal status of immigrants for minor offenses. The overall effort “cost them one salary for a program coordinator and some snacks for meetings,” and the benefits of reversing depopulation and reviving the local economy seem to be taking root.<sup>134</sup>

Since many welcoming efforts in other cities are still in their early stages, there have not yet been extensive studies of their effectiveness in promoting economic growth, bolstering local housing markets, and improving attitudes among native-born and foreign-born populations. What is very clear, however, is that these efforts open up new possibilities for the study of immigration federalism moving forward, not only in respect to state and local laws but also in respect to other policies related to workforce development and economic growth that are explicitly tied to attracting more immigrant residents.

# Why have states shifted to integrative laws?

What factors account for the spread of integrationist legislation toward immigrants, particularly unauthorized immigrants? As the overview of these various integrationist measures demonstrates, the timing of these assorted laws and ordinances have varied, stretching back decades in the case of local sanctuary ordinances but appearing much more recently in the case of allowing unauthorized immigrants to practice law in a particular state.

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## Political context

Local political contexts are important across most of these types of integrative policies. First, Democratic-leaning areas are much more likely to resist federal enforcement efforts than Republican-leaning areas.<sup>135</sup> The relationship is even stronger in the case of municipal identification laws, which have been passed only in Democrat-heavy cities.<sup>136</sup> Finally, most states that have expanded access to driver's licenses to unauthorized immigrants have Democrat-controlled legislatures.<sup>137</sup> Partisanship also plays a significant role in predicting whether a state allows in-state tuition for undocumented residents, though it is important to note that there are four Republican-led states—Kansas, Texas, Nebraska, and Utah—that have provided this benefit, along with 11 states with Democrat-controlled legislatures.<sup>138</sup>

Similar to the importance of state agricultural interests in making restrictive legislation less likely, this factor is important in making expanded access to in-state tuition more likely. There is not a similar relationship for driver's licenses, though this relationship might become significant in the future as more states contemplate expanding driver's license access.

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## Size of the Latino electorate

In addition to partisanship at the state level, the size of the Latino electorate, and the size of the immigrant electorate more generally, makes a difference. States with a greater proportion of Latinos and naturalized immigrants are significantly more likely to pass legislation that provides driver's licenses, in-state tuition, and financial aid for unauthorized immigrant residents. Indeed, in the case of in-state tuition and financial aid for unauthorized immigrants, the size of the Latino electorate holds the greatest predictive power.<sup>139</sup>

At the same time, it is important to remember that these are findings based on statistical analysis involving all 50 states. Consequently, there are outlier cases such as Arizona, which has a sizable Latino population that accounts for 30 percent of the state's population<sup>140</sup> but also has a set of extremely conservative activists that have pushed their elected officials further to the right on immigration and other issues, largely by mounting primary challenges from the right.<sup>141</sup> By contrast, New Mexico has not had a similar partisan dynamic, even though it is also a border state with a sizable Latino population.

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## Building pro-integration coalitions

There are other ways in which local political contexts may matter. Journalistic accounts from states that have passed these laws indicate that immigrant and civil rights organizations have often teamed up with clergy, police chiefs, labor unions, state chambers of commerce, and other business organizations to pass legislation that is pro-integration.<sup>142</sup> While it is difficult to get a consistent 50-state measure of the electoral reach and policy influence of such coalitions, these developments are certainly suggestive of the power of a broad coalition of pro-immigrant integration interests that are influential even in states where Latinos and immigrants are not major segments of the electorate.

The ways in which pro-immigrant organizations are engaged on state-level policies have been critical to this shift. Using the example of California, the past few years have seen a significant buildup in the regional infrastructure of immigrant advocacy organizations and a coordinated legislative and advocacy strategy that has included acts of civil disobedience by immigrant youth, outreach to business organizations and clergy, and research on messaging strategies designed to sway public opinion toward more-welcoming strategies.<sup>143</sup>

This is a significant reversal of what occurred in 2006 and 2007, when restrictionist issue entrepreneurs generated gridlock on comprehensive immigration reform at the national level and simultaneously proliferated restrictive legislation at the state level. Pro-immigrant advocacy groups are now more attuned to state-level policies. As late as 2009, many immigrant advocacy organizations were confident that comprehensive immigration reform was within reach, and they reacted belatedly to the set of restrictionist measures wending their way through various states. Many pro-immigrant organizations were also hoping that litigation against various new restrictive laws would succeed and the flare-up in such legislation would soon subside—either through pre-emption by federal law or invalidation in the courts. Indeed, interviews with restrictive as well as pro-immigrant organizations reveal that between 2006 and 2009, pro-immigrant organizations were reacting defensively and belatedly against restrictive legislation that had already been enacted.<sup>144</sup>

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### Stalemate at the federal level and increased immigration enforcement

Federal courts have struck down many restrictive ordinances, and many pro-immigrant organizations are shifting to a more proactive strategy on subfederal legislation. Part of this is a result of having built pro-immigrant coalitions in reaction to prior restrictive legislation, but part of it is also due to growing recognition among pro-immigrant advocates that comprehensive immigration reform may again fall victim to a stalemate at the national level.<sup>145</sup>

And as federal reform has stalled, immigration enforcement has only continued to increase: The Obama administration has deported more immigrants than any other previous administration and is closing in on its 2 millionth deportation.<sup>146</sup>

Thus, instead of pinning all their hopes on federal legislation, organizations are now increasingly looking to improve the livelihood of immigrants, particularly unauthorized immigrants, through state laws such as California's TRUST Act—which mitigates the effects of increased enforcement—and permissive measures on driver's licenses, in-state tuition, and professional licensing.

It is still too early to tell if the whole "California package" of pro-integration legislation will spread to other states. However, if it seems increasingly likely that national legislation on immigration reform will stalemate for another year or more, we can certainly expect to see efforts to replicate some of that legislation in states such as Illinois, New Jersey, New York, Florida, Texas, Utah, Colorado, Washington, and Oregon.



# Conclusion

In sum, states and localities still possess some leeway to enact policies that have the intention and effect of either discouraging the presence of undocumented immigrants—and perhaps immigrants more generally—or helping integrate that population.

It is important to note, however, that as far as legislation in the past decade is concerned, restrictive laws have fared less well in the eyes of federal courts than pro-immigrant integration laws. In general, courts have upheld some restrictive policies but have mostly remained skeptical of state efforts to discourage the presence of undocumented people. In contrast, integrationist policies have fared much better in court. As the U.S. Department of Justice noted when it filed suit against Arizona’s S.B. 1070, “There is a difference between a state or locality saying they are not going to use their resources to enforce a federal law, as so-called sanctuary cities have done, and a state passing its own immigration policy that actively interferes with federal law.”<sup>147</sup>

This asymmetry noted by the Justice Department and evident in the results of litigated cases is potentially explained by a few key factors:

- First, restrictive laws, especially state enforcement provisions, hew closer to the regulation of core immigration functions such as entry, exit, and the terms of remaining in the country—in other words, the area exclusively delegated to federal control by court cases such as *Chy Lung v. Freeman*.<sup>148</sup>
- Second, federal regulations already define immigration violations and cover the investigation, prosecution, and removal of immigration law violators. Thus, supplemental state and local immigration enforcement measures are vulnerable to claims that they are pre-empted by extensive federal regulation in the field. Indeed, federal law provides for specific circumstances and limitations under which states and localities may participate in enforcement efforts.<sup>149</sup>

As far as legislation in the past decade is concerned, restrictive laws have fared less well in the eyes of federal courts than pro-immigrant integration laws.

- Third, unlike restrictive policies, subfederal integrationist policies often do not rely on immigration status at all. In general, policies such as municipal identity cards or in-state tuition programs are agnostic to immigration status, conditioning state or local benefits on the basis of residency within the jurisdiction without regard for immigration status.
- Fourth, constitutional restrictions on the reach of federal power shield certain forms of state and local resistance to or noncooperation with federal enforcement directives. Accordingly, the anti-commandeering dictates of the 10th Amendment, as well as Fourth Amendment concerns, provide constitutional cover for subfederal noncooperation policies and denials of federal immigration detainer requests.
- Finally, although federal law evinces a nebulous intent to discourage the presence of many undocumented people, specific provisions of federal law expressly contemplate that states may provide benefits to undocumented people. Regarding eligibility for public benefit programs, federal law expressly allows states to provide unlawfully present people with access to such benefits under certain conditions.<sup>150</sup> Similarly, federal law contemplates states choosing to provide higher-education benefits to unlawfully present persons.<sup>151</sup>

Of course, immigration legislation and executive action at the national level could alter the opportunities for state and local legislation on immigration. For example, the House of Representatives is considering as part of its immigration proposals a measure known as the Strengthen and Fortify Enforcement, or SAFE, Act, a bill focused entirely on immigration enforcement, creating criminal penalties for immigration violations and authorizing state and local authorities to create their own immigration enforcement schemes.<sup>152</sup> While it is highly unlikely that the Senate or President Obama would consent to these provisions, some aspects of the SAFE Act may find their way into future legislation, perhaps in future Congresses. It is also likely that some aspect of national immigration reform will involve modifications to the E-Verify program that will affect current state laws on the matter.

If immigration reform with a provision for immigrant legalization does indeed pass, state policies will play an important role in shaping how well newly regularized immigrants are integrated into the labor force and society. During the last program of immigration legalization in 1986, for example, state-level assistance in the form of English as a Second Language, or ESL, programs proved critical in helping people adjust their status to permanent residents,<sup>153</sup> and we can expect that state-level variation in the provision of such assistance will matter in any future legalization program.

Whatever the shape of immigration reform at the national level, the financing and implementation of federal grants, state programs, and state grants to nonprofits will play a critical role in the extent to which immigrants are able to adjust their status in a timely manner. Indeed, the recent and ongoing experiences with the DACA program suggest that state-level differences in policy frameworks and nonprofit activity can play an important role in ensuring the success of federal programs that aim toward immigrant integration.<sup>154</sup>

If efforts at national immigration reform are delayed, we face the prospect of a continued patchwork of state laws that coexist with congressional legislation and executive enforcement. Thus, more states and counties are likely to consider and adopt laws similar to the Connecticut and California TRUST Acts, and this development may put greater pressure on the federal executive and legislative branches to reconsider the design and implementation of the Secure Communities program. Developments at each locus of immigration regulation—state policies, congressional lawmaking, and presidential action—can have powerful implications for immigration policy. It is important to continue monitoring and researching the ways in which they may be mutually supportive, of or work at cross-purposes, with each other.

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## Endnotes

- 1 In the 1870s and 1880s, Congress passed the first set of national laws restricting immigration, and the U.S. Supreme Court issued a series of decisions that affirmed this exercise of national power and severely curtailed the ability of states to regulate immigration. See Kerry Abrams, "Polygamy, Prostitution, and the Federalization of Immigration Law," *Columbia Law Review* 105 (3) (2005): 641. Abrams describes the federal Page Act and the subsequent Chinese Exclusion Act. See also Hidetaka Hirota, "The Moment of Transition: State Officials, the Federal Government, and the Formation of American Immigration Policy," *Journal of American History* 99 (4) (2013): 1092–1108. Hirota recounts the transition from state-focused to federal immigration policy. See also *Chae Chan Ping v. United States*, 130 U.S. 581 (1889), which upheld the Chinese Exclusion Act of 1882 on the principle of federal plenary power, and *Chy Lung v. Freeman*, 92 U.S. 275 (1875), which struck down California's law regulating admission at state ports of entry. The subsequent rise of the United States as a global power further reinforced the notion of immigration policy as intimately related to U.S. foreign policy. See, for example, *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941), which struck down the state alien registration scheme and stated that "our system of government is such that the interests of cities, counties and states ... imperatively requires that the federal power in the field affecting foreign relations be left entirely free from local interference."
- 2 See, for example, *Foley v. Connelie*, 435 US 291 (1978), available at [- 3 Gebe Martinez, "Unconstitutional and Costly: The High Price of Local Immigration Enforcement" \(Washington: Center for American Progress, 2011\), available at <http://www.americanprogress.org/issues/immigration/report/2011/01/24/8939/unconstitutional-and-costly/>.
- 4 On Georgia's and Alabama's laws, see Tom Baxter, "How Georgia's Anti-Immigration Law Could Hurt the State's \(and the Nation's\) Economy" \(Washington: Center for American Progress, 2011\), available at <http://www.americanprogress.org/issues/immigration/report/2011/10/04/10486/how-georgias-anti-immigration-law-could-hurt-the-states-and-the-nations-economy/>; Tom Baxter, "Alabama's Immigration Disaster: The Harsh Law in the Land Harms the State's Economy and Society" \(Washington: Center for American Progress, 2012\), available at <http://www.americanprogress.org/issues/immigration/report/2012/02/15/11117/alabamas-immigration-disaster/>.
- 5 Arizona Senate, 49th Legislature, 2nd session \(2010\), S.B. 1070, available at \[www.azleg.gov/legtext/49leg/2r/bills/sb1070s.pdf\]\(http://www.azleg.gov/legtext/49leg/2r/bills/sb1070s.pdf\).
- 6 See, for example, Paul Vitello, "As Illegal Workers Hit Suburbs, Politicians Scramble to Respond," \*The New York Times\*, October 6, 2005, available at \[http://www.nytimes.com/2005/10/06/nyregion/06immigrate.html?pagewanted=print&\\\_r=0\]\(http://www.nytimes.com/2005/10/06/nyregion/06immigrate.html?pagewanted=print&\_r=0\); Alex Kotlowitz, "Our Town," \*The New York Times\*, August 5, 2007, available at <http://www.nytimes.com/2007/08/05/magazine/05Immigration-t.html?pagewanted=print>. Alabama H.B. 56 § 2: "The State of Alabama finds that illegal immigration is causing economic hardship and lawlessness ... Because the costs incurred by school districts for \[the primary school education of illegal aliens\] can adversely affect the availability of \[resources for citizens\]..." See also Statement of Hon. Louis Barletta, Testimony before the Subcommittee on the Judiciary, "Comprehensive Immigration Reform: Examining the Need for a Guest Worker Program," July 5, 2006, available at <http://www.gpo.gov/fdsys/pkg/CHRG-109shrg30254/pdf/CHRG-109shrg30254.pdf>.
- 7 Sahil Kapur, "Supreme Court Overturns Key Parts of Arizona Immigration Law," Talking Points Memo, June 25, 2012, available at <http://talkingpointsmemo.com/dc/supreme-court-overturns-key-parts-of-arizona-immigration-law>.
- 8 See \*Ga. Latino Alliance for Human Rights v. Governor of Georgia\*, 691 F.3d 1250 \(11th Cir. 2012\), enjoining most of the challenged provisions of the state's Illegal Immigration Reform and Enforcement Act of 2011; \*United States v. Alabama\*, 691 F.3d 1269 \(11th Cir. 2012\), cert. denied, 133 S.Ct. 2022 \(2013\), preempting most challenged provisions of H.B. 56; \*United States v. South Carolina\*, 720 F.3d 518 \(4th Cir. 2013\), affirming injunction of three sections of the state's immigration enforcement law; \*Villas at Parkside Partners v. City of Farmers Branch\*, No. 10-10751 \(2013\), WL 3791664 \(5th Cir. 2013\) \(en banc\). See generally Pratheepan Gulasekaram, "Immigration Federalism Post-Arizona," ACSBlog, August 8, 2013, available at <https://www.acslaw.org/acsblog/immigration-federalism-post-arizona/>; Alabama's law also contained provisions requiring undocumented public school students to identify themselves to school officials. See H.B. 46, 2011 Leg., reg. sess. \(Ala. 2011\), codified in part at Ala. Code § 31-13 \(2011\). In 2012, for example, the 11th Circuit struck down parts of Alabama's and Georgia's S.B. 1070-copycat laws. In March 2014, South Carolina settled with plaintiffs to drop its defense of an Arizona-style law. See Harriet McLeod, "South Carolina, rights groups settle immigration law challenge," Reuters, March 3, 2014, available at <http://www.reuters.com/article/2014/03/04/us-southcarolina-immigration-idUSBREA2305220140304>. Notably, the court in \*U.S. Chamber of Commerce v. Whiting\* did uphold an earlier Arizona law, the Legal Arizona Work Act of 2007, which made the federal government's Internet-based work authorization system mandatory for all employers in the state. The Court upheld the law as part of the business licensing law exception granted by Congress to the states. \*U.S. Chamber of Commerce v. Whiting\* 563 U.S. \\_\\_\\_\\_ \(2011\).
- 9 \*The New York Times\*, "Election 2012: President Exit Polls," available at <http://elections.nytimes.com/2012/results/president/exit-polls> \(last accessed March 2014\).](https://www.google.com/url?url=http://scholar.google.com/scholar_case%3Fcase%3D11150186465523468283%26hl%3Den%26as_sdt%3D6%26as_vis%3D1%26oi%3Dscholar&rc=1&sa=X&ei=0nEoU_rwBMeQ0gHMxoGgCQ&ved=0CCKqGAMoADAA&q=Foley+v.+Connelie+1978&usq=AFQjCNGae2tpmfi7a78UFNSJSegy-4X_A&cad=rja; Ambach v. Norwick</a>, 441 US 68 (1979), available at <a href=)

- 10 Rachel Weiner, "Sean Hannity: I've 'Evolved' on Immigration," *The Washington Post*, November 8, 2012, available at <http://www.washingtonpost.com/blogs/post-politics/wp/2012/11/08/sean-hannity-ive-evolved-on-immigration/>; Burgess Everett, "Bill O'Reilly Backs Immigration Deal," *Politico*, June 20, 2013, available at <http://www.politico.com/story/2013/06/bill-oreilly-immigration-deal-93151.html>.
- 11 See, for example, Ann Morse, "2013 Immigration Report" (Denver, CO: National Conference of State Legislatures, 2014), available at <http://www.ncsl.org/research/immigration/2013-immigration-report.aspx>.
- 12 National Immigration Law Center, "Toolkit: Access to Driver's Licenses," February 27, 2014, available at <http://nilc.org/DLaccess toolkit2.html#map>.
- 13 See Marshall Fitz, "The California TRUST Act: Take 2," Center for American Progress, October 4, 2013, available at <http://www.americanprogress.org/issues/immigration/news/2013/10/04/76369/the-california-trust-act-take-2/>.
- 14 See S. Karthick Ramakrishnan and Pratheepan Gulasekaram, "The Pratheepan Gulasekaram and S. Karthick Ramakrishnan, "Immigration Federalism: A Reappraisal," *New York University Law Review* 88 (2014) (2013).
- 15 *Chy Lung v. Freeman*, 92 U.S. 275 (1875).
- 16 Ramakrishnan and Gulasekaram, "The Importance of the Political in Immigration Federalism"; Gulasekaram and Ramakrishnan, "Immigration Federalism: A Reappraisal."
- 17 See, for example, *Ambach v. Norwick*, 441 U.S. 68 (1979), which held that New York's citizenship requirement for public school teachers did not violate the Equal Protection clause.
- 18 *Plyler v. Doe*, 457 U.S. 202 (1982).
- 19 8 U.S.C. § 1324a(h)(2), which reads: "The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens."
- 20 Personal Responsibility and Work Opportunity Reconciliation Act, Pub.L. 104-193.
- 21 Illegal Immigration Reform and Immigrant Responsibility Act, Pub.L. 104-208.
- 22 While California voters passed Proposition 187 in 2004, a federal district court in California issued an injunction a month after its passage, and it was ultimately ruled unconstitutional. See Patrick McDonnell, "Prop. 187 Found Unconstitutional by Federal Judge," *Los Angeles Times*, November 15, 1997, available at <http://articles.latimes.com/1997/nov/15/news/mn-54053>. Subsequent to Proposition 187, there was no significant state legislation on immigration until the passage of Proposition 200 in Arizona in 2004.
- 23 Illegal Immigration Reform and Immigrant Responsibility Act, Pub.L. 104-208.
- 24 See 8 U.S.C. §1357(g); U.S. Immigration and Customs Enforcement, "Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act," August 7, 2013, available at <http://www.ice.gov/news/library/factsheets/287g.htm>; Immigration Policy Center, "Local Enforcement of Immigration Laws through the 287(g) Program" (2010). The former notes that as of March 2010, ICE maintains 67 active 287(g) agreements in 24 states. It is also worth noting that in 2012, following the *Arizona v. United States* decision, the federal government withdrew several 287(g) agreements with Arizona law enforcement agencies. See Stephen Dinan, "Homeland Security suspends immigration agreements with Arizona police," *The Washington Times*, June 25, 2012, available at <http://www.washington-times.com/news/2012/jun/25/homeland-security-suspends-immigration-agreements-/?page=all>.
- 25 Arizona Secretary of State, "2004 Ballot Propositions," available at <https://www.azsos.gov/election/2004/Info/PubPamphlet/english/prop200.htm> (last accessed March 2014).
- 26 Office of Arizona Secretary of State Ken Bennett, "2006 Ballot Propositions & Judicial Performance Review," available at <http://www.azsos.gov/election/2006/info/pubpamphlet/english/Prop300.htm> (last accessed at March 2014).
- 27 Arizona House Bill 2779, 48th Leg. 1st reg. sess. (Ariz. 2007).
- 28 *De Canas v. Bica*, 424 U.S. 351 (1976), which upheld California's law penalizing the hiring of undocumented workers.
- 29 Huyen Pham, "The Private Enforcement of Immigration Laws," *Georgetown Law Journal* 96 (3) (2008): 777, 778, n. 41. The author noted that Connecticut; Delaware; Florida; Kansas; Maine; Massachusetts; Montana; New Hampshire; Vermont; Virginia; and Las Vegas, Nevada, all had employer-sanctions schemes.
- 30 8 U.S.C. § 1324a(h)(2), which pre-empts state sanctions on the employment of unauthorized aliens, "other than through licensing and similar laws."
- 31 Cristina Corbin, "Legal Architect Behind Arizona Law Becomes Sought-After Immigration Guru," Fox News, June 25, 2010, available at <http://www.foxnews.com/politics/2010/06/25/legal-architect-arizona-law-sought-immigration-guru/>.
- 32 *U.S. Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011).
- 33 Other states that require private employers, or most private employers, to use E-Verify are as follows: Alabama, Arizona, Georgia, Mississippi, North Carolina, South Carolina, Tennessee, and Utah. See National Immigration Law Center, "The State of the States: E-Verify Bills 2012" (2012), available at <http://www.nilc.org/stateeverifypolicyresrcs.html>; National Conference of State Legislatures, "E-Verify" (2012), available at <http://www.ncsl.org/research/immigration/everify-faq.aspx#2012%20State%20Action>.
- 34 Ibid.
- 35 Arizona Senate Bill 1070, 49th Leg., 2d reg. sess. (Ariz. 2010), which codified in various sections of Ariz. Rev. Stat. Ann. (2011); Suzy Khimm, "Kris Kobach, Nativist Son," *Mother Jones*, March/April 2012, available at <http://www.motherjones.com/politics/2012/03/kris-kobach-anti-immigration-laws-sb-1070>.

- 36 See Marshall Fitz and Jeanne Butterfield, "Arizona's 'Show Me Your Papers' Law in the U.S. Supreme Court: What's at Stake?" (Washington: Center for American Progress, 2012), available at <http://www.americanprogress.org/issues/immigration/news/2012/04/04/11394/arizonas-show-me-your-papers-law-in-the-u-s-supreme-court-whats-at-stake/>.
- 37 *Arizona v. United States*, 132 S. Ct. 2492 (2012), which enjoined three out of four challenged provisions of S.B. 1070.
- 38 *Arizona*, 132 S. Ct. at 2509-10 (2012), declining to enjoin §§ 2(B) but noting that "there is a basic uncertainty about what the law means and how it will be enforced."
- 39 See *Ga. Latino Alliance for Human Rights v. Governor of Georgia*, 691 F.3d 1250 (11th Cir. 2012), enjoining most of the challenged provisions of the state's Illegal Immigration Reform and Enforcement Act of 2011; *United States v. Alabama*, 691 F.3d 1269 (11th Cir. 2012), cert. denied, 133 S.Ct. 2022 (2013), pre-empting most challenged provisions of H.B. 56; *United States v. South Carolina*, 720 F.3d 518 (4th Cir. 2013), affirming injunction of three sections of the state's immigration enforcement law; *Villas at Parkside Partners v. City of Farmers Branch*, No. 10-10751, 2013 WL 3791664 (5th Cir. 2013) (en banc). See generally Gulasekaram, "Immigration Federalism Post-Arizona."
- 40 See *ibid.*, n. 8. The Supreme Court denied certiorari for both *Hazleton v. Lozano and Farmers Branch v. Villas Parkside Partners*, 571 U.S. – (March 3, 2014); David G. Savage, "Supreme Court won't revive Alabama immigration law," *Los Angeles Times*, April 29, 2013, available at <http://articles.latimes.com/2013/apr/29/nation/la-na-court-immigration-20130430>.
- 41 *Keller v. City of Fremont*, 719 F.3d 931 (2013), upholding rental ordinance; *Gray v. City of Valley Park*, 567 F.3d 976 (8th Cir. 2009), declining to strike down employment ordinance.
- 42 Josh Funk, "Fremont, Nebraska to Keep Undocumented Immigration Rules," *HuffPost Politics*, February 12, 2014, available at [http://www.huffingtonpost.com/2014/02/12/fremont-nebraska-immigration\\_n\\_4774027.html](http://www.huffingtonpost.com/2014/02/12/fremont-nebraska-immigration_n_4774027.html). The city held a vote and reaffirmed its rental ordinance targeting undocumented immigrants.
- 43 See *United States v. South Carolina* 906 F. Supp. 2d. 463 (D.S.C. 2012); Kevin R. Johnson, "Eleventh Circuit Strikes Down Portions of Alabama and Georgia Immigration Enforcement Law," *ImmigrationProf Blog*, August 20, 2012, available at <http://lawprofessors.typepad.com/immigration/2012/08/eleventh-circuit-strikes-down-large-portion-so-alabama-and-georgia-immigration-enforcement-laws.html>.
- 44 Muzaffar Chishti and Faye Hipsman, "Alabama Settlement Marks Near End of a Chapter in State Immigration Enforcement Activism," *Migration Information Source*, November 14, 2013, available at <http://www.migrationpolicy.org/article/alabama-settlement-marks-near-end-chapter-state-immigration-enforcement-activism>; Alan Gomez, "South Carolina Puts Brakes on Immigration Law," *USA Today*, March 3, 2014, available at <http://www.usatoday.com/story/news/nation/2014/03/03/south-carolina-immigration-law/5971023/>; The Editorial Board, "A Smart Retreat on Immigration," *The New York Times*, March 6, 2014, available at [http://www.nytimes.com/2014/03/07/opinion/a-smart-retreat-on-immigration.html?\\_r=0](http://www.nytimes.com/2014/03/07/opinion/a-smart-retreat-on-immigration.html?_r=0).
- 45 Vitello, "As Illegal Workers Hit Suburbs, Politicians Scramble to Respond"; Kotlowitz, "Our Town."
- 46 See, for example, Alabama H.B. 56 § 2: "The State of Alabama finds that illegal immigration is causing economic hardship and lawlessness . . . Because the costs incurred by school districts for [the primary school education of illegal aliens] can adversely affect the availability of [resources for citizens] . . ." Statement of Hon. Louis Barletta, Testimony before the Subcommittee on the Judiciary.
- 47 Letter from Gov. Janet Napolitano to Rep. Jim Weiers, July 2, 2007, available at <http://www.countysupervisors.org/uploads/07-07-02%20HB%202779%20State-mnt.pdf>.
- 48 In our analysis of municipal-level ordinances, we started with a baseline of municipalities—defined as "places" in most states but also including "county subdivisions" in others. Next, we obtained lists of municipalities that have proposed restrictive ordinances and regulations from various sources, including the American Civil Liberties Union, LatinoJustice PRLDEF, the Fair Immigration Reform Movement, the National Immigration Law Center, and the Migration Policy Institute. We then validated these lists by making phone calls to jurisdictions noted as considering or passing ordinances, as well as by monitoring news stories on local ordinances through December 2011. Finally, we merged information on the proposal and passage of ordinances with demographic data from the 2000 Census and the 2005–2009 American Community Surveys. In our analyses of state-level laws, we coded restrictive legislation tracked by the National Conference of State Legislatures from 2005 to 2010 and analyzed variation in the passage of legislation across states. We also analyzed a smaller subset of legislation on immigration enforcement and employer mandates using a database from FindLaw. FindLaw, "State Immigration Laws," available at <http://immigration.findlaw.com/immigration-laws-and-resources/state-immigration-laws/> (last accessed January 2014). See also Ramakrishnan and Gulasekaram, "The Importance of the Political in Immigration Federalism"; Gulasekaram and Ramakrishnan, "Immigration Federalism: A Reappraisal."
- 49 Ramakrishnan and Gulasekaram, "The Importance of the Political in Immigration Federalism," n. 25.
- 50 Southern Poverty Law Center, "The Man: A Biography of Kris Kobach," January 2011, available at <http://www.splcenter.org/get-informed/publications/when-mr-kobach-comes-to-town/the-man-a-biography-of-kris-kobach>.
- 51 George Talbot, "Kris Kobach, the Kansas lawyer behind Alabama's immigration law," *Press-Register blog*, October 16, 2011, available at [http://blog.al.com/live/2011/10/kris\\_kobach\\_the\\_kansas\\_lawyer\\_1.html](http://blog.al.com/live/2011/10/kris_kobach_the_kansas_lawyer_1.html).
- 52 NumbersUSA, "How Attrition Through Enforcement Works," June 20, 2008, available at <https://www.numbersusa.com/content/learn/issues/american-workers/how-attrition-through-enforcement-works.html>. See also Michael Williamson, "Self-Deportation Proponents Kris Kobach, Michael Hethmon Facing Time Of Trial," *The Washington Post*, April 24, 2012, available at [http://www.washingtonpost.com/politics/time-of-trial-for-proponents-of-self-deportation/2012/04/24/gIQA-e6lHeT\\_story.html](http://www.washingtonpost.com/politics/time-of-trial-for-proponents-of-self-deportation/2012/04/24/gIQA-e6lHeT_story.html). The article quotes an Oklahoma representative who notes that Kobach and his partner at the Immigration Reform Law Institute, Michael Hethmon, "were the face and the muscle behind the effort that really synthesized it into a movement. Do I think it would have happened without them? Most certainly it would not have."



- 53 Full text of Arizona S.B. 1070 as signed by Gov. Jan Brewer: *Support Our Law Enforcement and Safe Neighborhoods Act*, State of Arizona, 49th Legislature, 2d sess. (April 23, 2010), available at [http://azgovernor.gov/dms/upload/SB\\_1070\\_Signed.pdf](http://azgovernor.gov/dms/upload/SB_1070_Signed.pdf).
- 54 Elizabeth Llorente, "Mitt Romney Touts Endorsement by Architect of Tough State Immigration Laws," Fox News Latino, January 11, 2012, available at <http://latino.foxnews.com/latino/politics/2012/01/11/mitt-romney-touts-endorsement-by-architect-toughest-state-immigration-laws/>.
- 55 The American Presidency Project, "Mitt Romney Announces Support Of Kansas Secretary Of State Kris Kobach," January 11, 2012, available at <http://www.presidency.ucsb.edu/ws/?pid=99028>.
- 56 *Arizona v. United States*, 132 S. Ct. 2492 (2012).
- 57 See, for example, *United States v. South Carolina* 906 F. Supp. 2d. 463 (D.S.C. 2012).
- 58 It is important to note as well that attrition-through-enforcement schemes failed in their stated purpose of driving immigrants out of the country. See Leah Muse-Orlinoff, "Staying Put but Still in the Shadows: Undocumented Immigrants Remain in the Country Despite Strict Laws" (Washington: Center for American Progress, 2012), available at <http://www.americanprogress.org/issues/immigration/report/2012/02/22/11126/staying-put-but-still-in-the-shadows/>.
- 59 CNN, "America's Choice 2012: Election Center," available at <http://www.cnn.com/election/2012/results/race/president> (last accessed March 2014).
- 60 *The New York Times*, "Election 2012: President Exit Polls."
- 61 Michael O'Brien, "GOP resistance to immigration reform could be casualty of 2012 election," NBC News, November 9, 2012, available at [http://nbcpolitics.nbcnews.com/\\_news/2012/11/09/15040894-gop-resistance-to-immigration-reform-could-be-casualty-of-2012-election?lite](http://nbcpolitics.nbcnews.com/_news/2012/11/09/15040894-gop-resistance-to-immigration-reform-could-be-casualty-of-2012-election?lite); Rebecca Elliott, "Grover Norquist, Rahm Emanuel: House Will Pass Immigration," *Politico*, July 15, 2013, available at <http://www.politico.com/story/2013/07/immigration-grover-norquist-rahm-emanuel-94235.html>.
- 62 Weiner, "Sean Hannity: I've 'Evolved' on Immigration"; Everett, "Bill O'Reilly Backs Immigration Deal."
- 63 Morse, "2013 Immigration Report."
- 64 David Olson, "Politics: Riverside County supervisors back immigration reform," *The Press-Enterprise*, February 26, 2013, available at <http://www.pe.com/local-news/riverside-county/riverside/riverside-headlines-index/20130226-politics-riverside-county-supervisors-back-immigration-reform.ece>.
- 65 Although estimates vary—partly based on how one defines "sanctuary"—several dozen jurisdictions across the country maintain some form of what might reasonably be deemed a sanctuary policy. See Lynn Tramonte, "Debunking the Myth of 'Sanctuary Cities'" (Washington: Immigration Policy Center, 2011), available at [http://www.immigrationpolicy.org/sites/default/files/docs/Community\\_Policing\\_Policies\\_Protect\\_American\\_042611\\_update.pdf](http://www.immigrationpolicy.org/sites/default/files/docs/Community_Policing_Policies_Protect_American_042611_update.pdf). Tramonte states that "more than 70 cities and states" maintain some form of noncooperation policy. Oregon and Utah, however, maintain statewide policies. See H.B. 116, 2011 Gen. Ses. (West 2011); Ore. Code Ann. St. Police §181.850 (West 2011). The sanctuary movement gained significant momentum during the 1980s, with religious organizations and cities responding to the concerns of Central American migrants facing deportation to countries that were then embroiled in civil conflicts. The Los Angeles Police Department, or LAPD, had, starting in 1979, prohibited officers from commencing interactions or investigations solely to inquire about immigration status or to arrest immigrants for unlawful presence. See Bill Ong Hing, "Immigration Sanctuary Policies: Constitutional and Representative of Good Policing and Good Public Policy," *UC Irvine Law Review* 2 (247) (2012); Rose Cuisson Villazor, "What is a Sanctuary?," *Southern Methodist University Law Review* 61 (133) (2008). Decades after its implementation, the LAPD's policy withstood a post-1996 legal challenge, with a California state court ruling that local law enforcement need not administer or enforce federal immigration law. See *Sturgeon v. Bratton*, 95 Cal. Rptr. 3d 718 (Ct. App. 2009).
- 66 San Francisco's sanctuary ordinance, first passed in 1985 but later modified in 1989, specifies that local law enforcement officers and city agencies—for example, school districts, public assistance institutions, and public health clinics—would not aid federal enforcement efforts to the extent that such noncooperation was consistent with state and federal law. See S.F. Bd. Of Supervisors Res. 1087-85 (1985, superseded by S.F. Admin. Code § 12H.2 (1989). In 1989, New York City's policy went even further, virtually prohibiting any direct contact between local law enforcement and federal agencies to identify or reveal undocumented status. See City Policy Concerning Aliens, New York City Executive Order No. 124 (August 7, 1989). Responding to New York City's type of sanctuary policy, the 1996 federal immigration law prohibited states from banning voluntary communication with federal agencies. See 8 U.S.C. § 1373; 8 U.S.C. § 1644. In light of this law, a federal appeals court struck down the portion of New York City's law that prevented voluntary communication between local agents and immigration authorities. *City of New York v. United States*, 179 F.3d 29 (2nd Cir. 1999).
- 67 See Hing, "Immigration Sanctuary Policies"; Villazor, "What is a Sanctuary?"
- 68 See International Association of Chiefs of Police, "Police Chiefs Guide to Immigration Issues" (2007), available at <http://www.theiacp.org/Portals/0/pdfs/Publications/PoliceChiefsGuidetoImmigration.pdf>; City of Houston, "Major Cities Chiefs Statement on Immigration," Press release, June 8, 2006, available at <http://www.houstontx.gov/police/nr/2006/june/nr060806-1.htm>.
- 69 For Arizona's law, see S.B. 1070 §2(A). For Alabama's law, see H.B. 56 §5(a).



- 70 U.S. Immigration and Customs Enforcement, "Secure Communities," available at [http://www.ice.gov/secure\\_communities/](http://www.ice.gov/secure_communities/) (last accessed March 2014); Adam B. Cox and Thomas J. Miles, "Policing Immigration," *University of Chicago Law Review* 80 (87) (2013): 87–136.
- 71 Ibid.
- 72 Notably, ICE hold requests can also result from the Criminal Alien Program—under which ICE officials, by either formal or informal agreement, may visit local jails to interview inmates they suspect may be deportable—or under the 287(g) program, under which local law enforcement officers, under an agreement with federal authorities, are deputized to make immigration arrests.
- 73 Although it is theoretically possible for officers not to arrest an individual as a means of assuring that individuals' information is not entered into the database, or for them to choose not to utilize the federal crime database altogether, neither form of resistance is practical.
- 74 Santa Clara County Board of Supervisors Policy Manual § 3.54 (Civil Immigration Detainer Requests) (adopted October 18, 2011; reaffirmed November 5, 2014).
- 75 Tracey Kaplan, "Jailed illegal immigrants: Santa Clara County sticks with lenient policy," *San Jose Mercury News*, November 6, 2013, available at [http://www.mercurynews.com/crime-courts/ci\\_24460689/supervisors-stick-lenient-santa-clara-county-immigration-policy](http://www.mercurynews.com/crime-courts/ci_24460689/supervisors-stick-lenient-santa-clara-county-immigration-policy); Letter from Jayashri Srikanthiah and others to Mike Wasserman, "Letter of Law Professors in Support for Santa Clara County Civil Detainer Policy 3.54," November 4, 2013, available at [available at sccgov.iqm2.com/Citizens/FileOpen.aspx?Type=4&ID=122446](http://www.sccgov.iqm2.com/Citizens/FileOpen.aspx?Type=4&ID=122446).
- 76 *Galarza v. Lehigh County*, No. 12-3991 (3rd Cir. March 4, 2014), holding that immigration detainers are requests and cannot be mandatory pursuant to the Supreme Court's "anti-commandeering" interpretation of the 10th Amendment.
- 77 Letter from Srikanthiah and others to Wasserman, "Letter of Law Professors in Support for Santa Clara County Civil Detainer Policy 3.54."
- 78 Cook County Code, Ch. 46 Law Enforcement, § 46-37; D.C. Official Code § 24-211.01 ("Immigration Detainer Compliance Amendment Act of 2011"); Miami-Dade County Board of County Commissioners Resolution No. \_\_\_\_ (December 3, 2013). See also Samuel A. Demaio, "Detainer Policy, Newark Police Department General Order" (2013), which states that, "All department personnel shall decline ICE detainer requests."
- 79 Champaign County, Illinois; Chicago, Illinois; Amherst, Massachusetts; Berkeley, California; Los Angeles, California; Milwaukee County, Wisconsin; New York, New York; Newark Police Department, New Jersey; Multnomah County, Oregon; Alameda County, California; Newark, New Jersey; Orleans Parish, Louisiana; San Francisco, California; Sonoma County, California; San Bernardino County, California; Mesilla, New Mexico; San Miguel County Detention Center, New Mexico; Taos Detention Center, New Mexico; and King County, Washington. For general information, see Catholic Legal Immigration Network Inc., "States and Localities that Limit Compliance with ICE Detainer Requests (Jan 2014)" (2014), available at <https://cliniclegal.org/resources/articles-clinic/states-and-localities-limit-compliance-ice-detainer-requests-jan-2014>.
- 80 John Fritze, "Advocates Square Off Over State Immigration Bill," *The Baltimore Sun*, February 27, 2014, available at <http://www.sun-sentinel.com/topic/bs-md-trust-act-hearing-20140227,0,5382052.story>.
- 81 Notably, federal law requires some employers, such as federal contractors, to use E-Verify. See U.S. Citizenship and Immigration Services, "E-Verify: For Federal Contractors," available at <http://www.uscis.gov/e-verify/federal-contractors> (last accessed March 2014).
- 82 National Conference of State Legislatures, "E-Verify."
- 83 8 U.S.C. § 1324, making employment of unauthorized aliens unlawful and providing for federal employer-sanctions schemes; 8 U.S.C. § 1373, ruling that "a Federal, State, or local government entity... may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, [federal immigration authorities] information regarding the citizenship or immigration status ... of any individual."
- 84 See Utah Office of Legislative Research and General Counsel, "Summary of Selected Immigration-Related Laws" (2011), highlighting aspects of Utah's immigration guest worker and enforcement laws from the 2011 legislative session.
- 85 Robert Gehrke, "Landmark Immigration Bill on Hold," *The Salt Lake Tribune*, March 8, 2014, available at <http://www.sltrib.com/sltrib/politics/57639225-90/2011-2017-bill-delay.html.csp>; Julia Preston, "Utah G.O.P. Adopts Immigration Alternative," *The New York Times*, March 6, 2011, available at <http://www.nytimes.com/2011/03/07/us/07utah.html?pagewanted=all>. The column notes likely constitutional challenges to the guest worker program.
- 86 REAL ID Act, 49 U.S.C. § 30301 note § 202(c)(2)(B)(viii).
- 87 Ibid. Importantly, the federal government has delayed full implementation of REAL ID, and has extended the deadline for state compliance several times. Several states have expressly stated their intention to continue resisting REAL ID requirements. See Daniel C. Vock, "Real ID is slowly changing state drivers' licenses," *USA Today*, January 22, 2014, available at <http://www.usa-today.com/story/news/nation/2014/01/22/stateline-real-id/4772785/>; Jo Ingles, "Ohio delays joining Real ID because of concerns of federal overreach," 89.7 WKSU, December 9, 2013, available at <http://www.wksu.org/news/story/37638>.
- 88 The Iowa Supreme Court upheld a state law requiring applicants to produce a Social Security number or other federal documentation attesting to their authorized status to obtain a license. *Sanchez v. State*, 692 N.W. 2d 812 (Iowa 2005). Similarly, a federal appeals court upheld Tennessee's statute limiting driver's licenses to citizens and legal permanent residents. *League of United Latin Am. Citizens v. Bredesen*, 500 F.3d 523 (6th Cir. 2007). Notably, while preventing lawfully present nonimmigrants and undocumented immigrants from receiving licenses, the Tennessee law did provide "certificates of driving" for lawfully present nonimmigrants.
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