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### Blue States, Red States: The United States?

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# Blue States, Red States: The United States?\*

CATHERINE POWELL<sup>†</sup>

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## INTRODUCTION

This essay focuses on the role of states, cities, and other subnational jurisdictions (collectively “localities”) in local incorporation of international law norms aimed at protecting the climate and immigrants. As a case study, this essay considers local innovation in climate and immigration policy in the United States within the twin concepts of federalism and glocalization—the interaction between “global scripts” and “local norms.”<sup>1</sup> In a parallel project, I analyze climate change and immigration in developing a

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\* In Barack Obama’s 2008 presidential election victory speech, he reiterated an idea he had popularized: “Americans sent a message to the world that we have never been [just a collection of individuals or] a collection of red states and blue states. We are, and always will be, the United States of America.” Barack Obama, President-Elect, 2008 Presidential Victory Speech (Nov. 4, 2008) (transcript available on National Public Radio website), <https://www.npr.org/templates/story/story.php?storyId=96624326>.

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1. See Roland Robertson, *Glocalization: Time-Space and Homogeneity-Heterogeneity*, in *GLOBAL MODERNITIES* 25, 28 (Michael Featherstone et al. eds., 1995); see also John Gillespie, *Developing a Framework for Understanding the Localisation of Global Scripts in East Asia*, in *THEORISING THE GLOBAL LEGAL ORDER* 209, 209 n.2 (Andrew Halpin & Volker Roeben eds., 2009) (defining “global scripts” as “the globalization of norms, standards, principles and rules”).

2020] BLUE STATES, RED STATES: THE UNITED STATES? 135

theory about federalism to justify lawmaking from above and below the nation-state as a critical role in addressing national political market failures—particularly when: (1) underrepresented minorities are systematically locked out of the political process (as immigrants quintessentially are) or, by contrast, (2) influential minorities can externalize the costs of their negative conduct through regulatory capture (as the fossil fuel sector in the climate context).<sup>2</sup>

The present essay builds on that project, but investigates a different dynamic. Taking as a given my point about the circumstances justifying local innovation to address particular failures of national politics, this essay looks to the process of transplanting legal norms across jurisdictions—horizontally and vertically. Since my starting point is that local innovation and transplantation of innovative ideas is useful under defined circumstances, this essay takes a closer look at the *efficacy* of federalism and glocalization as processes for tipping norms and creating norm cascades<sup>3</sup> to address the negative distributional consequences of national policies.

In examining the political geography of debates on climate and immigration law, this essay explores how both federalism and (its close cousin) glocalization serve as mechanisms for not only managing and shaping polite disagreement, but sharpening and consolidating forceful resistance to significant threats to rule of law we face today. More generally, political polarization and the “Big Sort” have resulted in a divide between blue states and red states on a range of issues.<sup>4</sup>

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2. Portions of this Essay are substantially drawn from my earlier, parallel project. See Catherine Powell, *We the People: These United Divided States*, 40 CARDOZO L. REV. 2685, 2690 (2019) (adapting John Hart Ely’s concept of judicial review, which focuses on horizontal separation of powers, to develop a theory of federalism, that is, vertical separation of powers). For further discussion of the broader normative framework, see also JOHN HART ELY, *DEMOCRACY AND DISTRUST* 103 (Harv. Univ. Press, 1980) (Ely famously notes: Malfunction occurs when the process is undeserving of trust, when (1) the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out, or (2) though, no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority[.]). See also Nestor Davidson, *The Dilemma of Localism in an Era of Polarization*, 128 YALE L. J. 956, 960-62 (2019) (articulating parallel theory that involves intertwining structure and normativity in determining when local innovation is warranted).

3. Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT’L ORG. 887, 893 (1998).

4. See generally Bill Bishop & Robert Cushing, *The Big Sort: Migration, Economy and Politics in the United States of “Those people”*, (Feb. 29, 2008), [https://www.brookings.edu/wp-content/uploads/2012/04/0228\\_america\\_bishopppt.pdf](https://www.brookings.edu/wp-content/uploads/2012/04/0228_america_bishopppt.pdf) (describing trend for more people to live in proximity to others with similar views). Thanks to Vicki Jackson for drawing my attention to this book. Vicki C. Jackson, *The Democratic Deficit of United States Federalism? Red State, Blue State, Purple?*, 46 Fed. L. Rev. 645, 662 n.76, 663 (2018), <https://journals.sagepub.com/doi/pdf/10.1177/0067205X1804600410>. As

What is particularly interesting about the climate change and immigration disputes is that they are both inherently *transnational* matters (regarding, respectively, the future of the planet and the global labor supply).<sup>5</sup>

On the climate side, in the wake of President Trump's announcement in summer of 2017 that he will withdraw the United States from the 2015 Paris Agreement on climate change, California Governor Jerry Brown called on the President to fight climate change or to "get out of the way" while the rest of the world works to reduce emissions and invest in clean energy.<sup>6</sup> Similarly, former New York City Mayor Michael Bloomberg, now a UN Special Envoy for Cities and Climate Change, said, "If Washington won't lead, the mayors and governors will."<sup>7</sup> Indeed, Trump's plans to withdraw has not only met with widespread criticism and derision abroad and at home, it arguably sparked greater action, with numerous U.S. mayors and governors pledging to meet emissions-reductions goals outlined in the agreement.<sup>8</sup>

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Professor Jackson notes, some disagree with Bishop's analysis. *See Id.* at 662 n.76; *see also* Samuel J. Abrams & Morris Fiorina, *The Myth of the "Big Sort"*, HOOVER DIGEST (Aug. 13, 2012), <https://www.hoover.org/research/myth-big-sort>.

5. What is often referred to as the "immigration" debate also implicates political refugees—along with economic (or labor) migrants—to the extent we can draw a line between the two categories. President Trump has sought to eviscerate who counts as a refugee as well, by: narrowing who qualifies for refugee status (through eliminating domestic violence-based asylum, for example); lowering the refugee admissions ceiling; stopping refugees before they arrive at the U.S. southern border (through designating Mexico a "safe third country" under a new "third-country asylum rule"); and restricting public assistance to foreign-born legal residents. For further discussion on how Trump uses not only race, but gender tropes to restrict immigration and asylum protections, *See, e.g.*, Catherine Powell, *Race, Gender, and Nation in an Age of Shifting Borders*, UCLA J. of INT'L L. & FOR'N AFF. 133 (2020).

6. *The Latest: Jerry Brown to Trump: "Get out of the way,"* THE ASSOCIATED PRESS (Dec. 12, 2017), <https://apnews.com/1098c54326f14a61b149e4e2030a40f4>.

7. Jonathan Watts, *Alternative US group honouring Paris climate accord demands 'seat at the table' – The America Pledge group claims to represent US majority opinion on carbon emissions, despite Trump's withdrawal from the Paris agreement*, THE GUARDIAN (Nov. 11, 2017), <https://www.theguardian.com/environment/2017/nov/11/alternative-us-group-honouring-paris-climate-accord-demands-seat-at-the-table-bonn>.

8. We might understand this reaction to Trump's threatened withdrawal within the context of the literature on backlash, even though the response here is to the White House, not a court decision. *Cf.* William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy By Lowering the Stakes of Politics*, 114 YALE L. J. 1279, 1326 (2005) (arguing that courts should avoid rulings like *Roe v. Wade* and *Bowers v. Hardwick* because of backlash, where *Roe* forced traditionalists to exit American politics, while *Bowers* prevented gays from entering it); *see generally* Michael J. Klarman, *How Brown Changed Race Relations: The Backlash Thesis*, 81 J. AM HIST. 81 (1994) (analyzing backlash to *Brown*); *see also* Cass R. Sunstein, *Three Civil Rights Fallacies*, 79 CAL. L. REV. 751, 766 (1991) (discussing backlash against *Roe v. Wade* and attributing the birth of the Moral Majority to the case). *But see* Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and*

On the immigration side, a similar dynamic is playing out, where Trump has vowed to “end” sanctuary jurisdictions, which extend varying levels of protection (or “sanctuary”) to immigrants. Despite Trump’s threats to cut these jurisdictions off from federal funding for failure to cooperate with his draconian deportation policies,<sup>9</sup> a growing number of state and local governments are refusing to participate in the enforcement of federal immigration law by disentangling their criminal justice systems from the federal immigration regime. Rather than using an era of mass incarceration to facilitate a new era of mass deportation, these jurisdictions have adopted a set of reforms to protect immigrants from deportation when they interact with the criminal justice system.<sup>10</sup>

While Donald Trump remains a huge obstacle to protecting the climate and immigrants, localities in the United States are playing a large role in adopting protective measures—encouraging other subnational jurisdictions to do the same and building support for these norms across the country for potential uptake by national leaders in the future. Scholarly analyses of such bottom-up governance fits within the trend toward popular constitutionalism that has become widespread among constitutional law theorists,<sup>11</sup> as well as the embrace of devolution and decentralized authority which animate core doctrine in international law.<sup>12</sup>

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*Backlash*, 42 HARV. C.R.-C.L. L. REV. (2007) (responding to Eskridge, Klareman, and Sunstein and proposing a theory about democratic constitutionalism to rebut concerns about backlash).

9. Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017).

10. See generally Christopher N. Lasch et al., *Understanding “Sanctuary Cities*, 58 B.C. L. REV. 1703 (2018).

11. See, e.g., Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998); LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (Oxford Univ. Press 2004); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (Princeton Univ. Press 1999).

12. See, e.g., Oslo, *The Principle of Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes*, FORUM FOR INT’L HUMAN. L. (Sept. 4, 2009), <https://www.fichl.org/activities/the-principle-of-complementarity-and-the-exercise-of-universal-jurisdiction-for-core-international-crimes/> (“The complementarity principle on which the International Criminal Court (ICC) is based entails that the ICC can only investigate and prosecute core international crimes when national jurisdictions are unable or unwilling to do so genuinely”); Charles F. Sabel & Jonathan Zeitlin, *Learning from Difference: The New Architecture of Experimentalist Governance in the European Union*, EURO. GOV. PAPERS (2007) (noting, “Subsidiarity in this architecture implies that in writing framework rules the lower-level units should be given sufficient autonomy in implementing the rules to be able to propose changes to them”) (citing EU scholar, Gráinne de Búrca).

## I. GLOCALIZATION IN AN AGE OF TRUMP

As an entanglement process between global scripts and local norms, glocalization is not necessarily a one-way process, “but rather is a mutual interactive process among different” sites.<sup>13</sup> Scholars have described this interaction as “dialogue,”<sup>14</sup> the “diffusion of law,”<sup>15</sup> or a “‘creole’ situation bounded by the macro flow of normative ideas through various legal traditions.”<sup>16</sup> Beyond involving a mere drawing down or uncritical transmission of norms, at its best, glocalization allows for *critical* engagement with new norms, so community members can remake and translate law to fit their own circumstances.<sup>17</sup>

The climate and immigration debates reflect this critical engagement. While these debates largely map onto the blue state/red state divide, localities adopting legal policies to protect the environment and immigrants are often grounded in *local*, pragmatic “states’ rights” and “local sovereignty” concerns—values often embraced by conservatives. At the same time, subnational climate and immigration policy innovation reflects local manifestations of the international realities of a warming planet and the rights of individuals, regardless of status. Even if not self-styled as part of “The Resistance” to Donald Trump’s “America First” perspective,<sup>18</sup> these local policies

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13. Fan Kun, *Globalization of Arbitration: Transnational Standards Struggling with Local Norms Through the Lens of Arbitration Transplantation in China*, 18 HARV. NEGOT. L.J. 175, 186 (2013).

14. See, e.g., Anne-Marie Slaughter, *A New World Order* (Princeton: Princeton University Press, 2004) (on “dialogue” among judges of different nations).

15. William Twining, *Diffusion of Law: A Global Perspective*, 49 J. LEGAL PLURALISM & UNOFFICIAL L. (2004).

16. See Kun, *supra* note 13.

17. For a discussion of the importance of *translation*, rather than mere *transmission* of law, see Catherine Powell, *Lifting Our Veil of Ignorance: Culture, Constitutionalism, and Women’s Human Rights in Post-September 11 America*, 37 HASTINGS L. J. 331, 375 (2005-2006); see Karen Knop, *Here and There: International Law and Domestic Courts*, 32 N.Y.U. J. INT’L L. & POL. 501, 504-05 (2000); see also Harold Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 184 (1996); Catherine Powell, *Dialogic Federalism: Constitutional Possibilities for Incorporation of Human Rights Law in the United States*, 150 U. PA. L. REV. 245, 251 (2001) (arguing that the translation metaphor is particularly well-suited to the U.S. context because it describes the foreignness that many Americans associate with international law); Madhavi Sunder, *Piercing the Veil*, 112 YALE L.J. 1401, 1444 (2003) (describing translation as a core empowerment strategy used by feminists in Muslim countries where women are reconceiving human rights in ways that are relevant to their particular local religious and cultural contexts).

18. I am not referring to Trump’s “America First” slogan as “nationalist,” because the slogan itself is a distortion of what policies are truly in the United States’ interest, even on realist grounds. Elsewhere, I (and many other scholars) have discussed how U.S. interests are not fixed, but constantly reshaped and redefined through interaction with other states and international institutions (per the constructivist theory of international relations theory). See generally Hans Peter Schmitz and Kathryn Sikkink, “International Human Rights”, in

are often geared toward *disentanglement* from federal government policies that advance the President's climate denialism and anti-immigrant stance. On the opposite end of the spectrum, emboldened in part by Trump's narrow populist *cri de coeur*, other subnational jurisdictions have adopted or even doubled-down on the President's policies, in some instances setting up a direct clash between red states (such as Texas) and blue cities (such as Austin).<sup>19</sup>

Rather than characterize this clash as a divide between globalists and nationalists, this essay views the climate and immigration debates as disagreements about nation—what type of nation the United States is (and is becoming) internally and how to project U.S. leadership externally with regard to existential questions concerning the future of the planet and the future of humanity. As regards the future of the planet (and the role of the United States in it), recent UN and U.S. government reports indicate that the effects of climate change are likely to become dire by 2040, far earlier than previously thought, if greenhouse gas emissions (and the resulting warming of the atmosphere) continue at the current rate, unless rapid steps are taken to transform the world's economy.<sup>20</sup> As regards the future of our role as humans, while Trump blames immigrants for “taking your jobs,”<sup>21</sup> many studies indicate that the workplace is on the cusp of transformation involving large scale job displacement as a result of technology and automation of jobs, due to the rise of artificial intelligence.<sup>22</sup> If Trump were truly concerned about jobs, *this* is the

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HANDBOOK OF INTERNATIONAL RELATIONS (Walter Carlsnaes, Thomas Risse, and Beth A. Simmons eds. 2013).

19. For discussion of *anti-sanctuary* localism, see generally Pratheepan Gulasekaram, et al., *State Anti-Sanctuary & Immigration Localism*, 119 COLUM. L. REV. 837 (2019).

20. Coral Davenport, *Major Climate Report Describes a Strong Risk of Crisis as Early as 2040*, N.Y. TIMES (Oct. 7, 2018), <https://www.nytimes.com/2018/10/07/climate/ipcc-climate-report-2040.html> (reporting on UN reports findings and recommendations, including necessary steps to address climate change – such as reducing carbon dioxide emissions – but speculating that such measures are politically impossible under Trump). See also Coral Davenport & Kendra Pierre-Louis, *U.S. Climate Report Warns of Damaged Environment and Shrinking Economy*, N.Y. TIMES (Nov. 23, 2018), <https://www.nytimes.com/2018/11/23/climate/us-climate-report.html> (reporting that “if significant steps are not taken to rein in global warming, the damage will knock as much as 10 percent off the size of the American economy by century's end... American exports and supply chains could be disrupted, agricultural yields could fall to 1980s levels by midcentury and fire season could spread to the Southeast”).

21. Donald Trump, CPAC Speech (Mar. 6, 2014) [https://www.washingtonpost.com/video/politics/trump-immigrants-are-taking-your-jobs/2014/03/06/6998bb82-a576-11e3-b865-38b254d92063\\_video.html](https://www.washingtonpost.com/video/politics/trump-immigrants-are-taking-your-jobs/2014/03/06/6998bb82-a576-11e3-b865-38b254d92063_video.html).

22. MCKINSEY GLOBAL INSTITUTE, *Jobs Lost, Jobs Gained: Workforce Transitions in a Time of Automation*, at 51 (Dec. 2017), <https://www.mckinsey.com/~media/mckinsey/featured%20insights/future%20of%20organiz>

challenge he would be focused on, not immigrants.

The climate and immigration debates reflect ways that glocalization involves not only a drawing down of global norms to the local, but also a scaling up and diffusion of norms across jurisdictions. As one scholar notes: “On the one hand, global processes are incorporated into the local setting—‘localized globalism’ or ‘micro-globalization.’ On the other hand, local ideals, practices, and institutions are also projected onto global scenes— “globalized localism” or “macro-localization.”<sup>23</sup>

Federalism scholars have made similar observations, using concepts such as “iterative federalism”<sup>24</sup> to describe how localities can scale-up innovation, spurring the federal government to act (and vice versa). Even though U.S. Supreme Court precedent tells us that the *federal* government has authority over environmental and immigration policy,<sup>25</sup> the Court has recognized a role for subnational governments as well.<sup>26</sup>

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ations/what%20the%20future%20of%20work%20will%20mean%20for%20jobs%20skills%20and%20wages/mgi%20jobs%20lost-jobs%20gained\_report\_december%202017.ashx (reporting that up to 30 percent of jobs may be displaced by 2030, though many jobs will be created – perhaps more than will be lost, but will require reskilling and retraining); Illanes, et al., *Retraining and Reskilling Workers in an Age of Automation*, MCKINSEY GLOBAL INSTITUTE (Jan. 2018), <https://www.mckinsey.com/featured-insights/future-of-work/retraining-and-reskilling-workers-in-the-age-of-automation?cid=eml-web> (indicating that “in terms of magnitude, [this transition] is akin to coping with the large-scale shift from agricultural work to manufacturing that occurred in the early 20th century in North America and Europe, and more recently in China.”).

23. Fan Kun, *Glocalization of Arbitration* at 253-54.

24. Ann Carlson, *Iterative Federalism and Climate Change*, 103 NW. U. L. REV. 1097, 1099 (2009).

25. Regarding environment law, the Supreme Court upheld the federal government authority in regulating the environment based on the role of the national government as a sovereign nation involved in negotiating the global commons with other nations, rejecting a 10<sup>th</sup> Amendment challenge. See *Missouri v. Holland*, 252 U.S. 416 (1920). Similarly, immigration is understood to be bound up in the federal government’s control over matters related to sovereignty and foreign affairs. See generally Jennifer Gordon, *Immigration as Commerce: A New Look at the Federal Immigration Power and the Constitution*, 93 IND. L.J. 653 (2018).

26. Regarding environment law, see, e.g., *Massachusetts v. EPA*, 549 U.S. 497, 524-25 (2007) (agreeing with Massachusetts and the other states, the Court found the federal EPA’s rationale for not regulating particular greenhouse gas emissions from motor vehicles under the Clean Air Act to be inadequate and required the agency to articulate a reasonable basis in order to avoid regulation). Regarding immigration law, see, e.g., *Cty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 539 (N.D. Cal. 2017) (granting preliminary injunction and finding likelihood of success on the merits of the plaintiffs’ claim that President Trump’s Executive Order 13758 (threatening to defund “sanctuary jurisdictions”) is unconstitutional on the grounds that it violates both horizontal and vertical separation of powers concerns). The Northern District of California also denied a renewed motion to dismiss from the government, holding the city of



The current context calls for urgent analysis of the possibilities for interaction between local and global, given the rise of President Donald Trump, who regularly assaults the independence of the judiciary and the press, checks and balances, rule of law, the rights of minorities and women, transparency and truth, and other fundamental pillars of democracy. Growing out of the western enlightenment period, the American and French revolutions popularized these essential constitutional guarantees, which were eventually internationalized and universalized through the global human rights movement in the aftermath of World War II.<sup>27</sup>

## II. CLIMATE CHANGE

Trump's vow to withdraw from the Paris climate accord galvanized bottom-up local climate policy innovation. While localities have long played a role in local environmental concerns, such as pollution-control, the 2018 National Climate Assessment confirms, "a growing number of states, cities, and businesses have pursued or deepened initiatives aimed at reducing [greenhouse gas] emissions."<sup>28</sup> Local innovation with climate policy is not only drawing down on international climate commitments, but is also being channeled back up through participation in global meetings and bi-lateral negotiations between U.S. localities and foreign governments, given that the green economy is seen as a profitable market for many localities worldwide.<sup>29</sup>

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San Francisco had demonstrated a "real and immediate controversy" between itself and the federal government. *Cty. of Santa Clara v. Trump*, 267 F.Supp.3d 1201, 1216 (N.D. Cal. 2017). Note that the Trump administration has also sued California, claiming that California sanctuary laws "reflect a deliberate effort by California to obstruct the United States' enforcement of federal immigration law." See Katie Benner & Jennifer Medina, *Trump Administration Sues California Over Immigration Laws*, N.Y. TIMES (Mar. 6, 2018), <https://www.nytimes.com/2018/03/06/us/politics/justice-department-california-sanctuary-cities.html>. The Eastern District of California has granted in part and denied in part the United States' motion for preliminary injunction, in a case which, at the time of this writing, is pending certiorari per the Trump administration's request. See generally *United States v. California*, 314 F. Supp. 3d 1077 (E.D. Cal. 2018 2018), *aff'd in part, rev'd in part and remanded*, 921 F.3d 865 (9th Cir. 2019), *cert. denied*, 207 L. ed. 2d 1072 (2020).

27. See LOUIS HENKIN, *THE RIGHTS OF MAN TODAY* 21-25 (1979). More broadly, U.S. leadership helped pave the way for the establishment of modern international law and institutions, following the war, which laid the foundation for international legal principles concerning the environment and basic human rights for all, regardless of status.

28. U.S. GLOB. CHANGE RES. PROG., *Fourth Nat'l Climate Assmt.*, Chapter 29, at 1347 (2018), [https://nca2018.globalchange.gov/downloads/NCA4\\_Ch29\\_Mitigation\\_Full.pdf](https://nca2018.globalchange.gov/downloads/NCA4_Ch29_Mitigation_Full.pdf).

29. See generally Powell, *supra* note 4, at 2705-14 (discussing how the Paris Climate Accord facilitates this form of bottom up lawmaking).

In fact, state and local governments in the United States, across party lines, have a long history of involvement in addressing climate change and in spurring the federal government to act through a form of iterative federalism.<sup>30</sup> Because of the problems of traffic and smog in the Los Angeles area, California had an early incentive to act in ways that few other states did. In 1967, then California State Governor Ronald Reagan signed legislation paving the way for the state to strictly curb auto vehicle emissions.<sup>31</sup>

While a strong federal role can address the tragedy of the commons problem in environmental law, climate change is also a tipping problem.<sup>32</sup> Given that states, such as California in the automobile context (and Gulf states in the context of rising sea levels and the problem of flooding), are affected by climate change in disparate ways, certain states in fact do have incentives to be first movers to address *local* issues with *global* dimensions.

Congress had preempted other states from adopting “any standard relating to the control of emissions from new motor vehicles,” but it exempted California.<sup>33</sup> In effect, the federal government quasi-deputized California as a “superregulator,” wherein other states could chose to follow the federal or the California standard.<sup>34</sup> Because California has the largest automobile market in the country, most manufacturers opt to follow the California (more stringent) standard. As a laboratory of experimentation, California was able to take on the risks (and enjoy the benefits) of innovation. By allowing California to experiment, some costly missteps were limited to one jurisdiction, providing opportunities for learning and improvement as policy innovation was taken up at the federal level.<sup>35</sup> The Obama administration provided a waiver for California’s progressively more stringent auto emission standards.

While Trump announced he was revoking the Obama waiver,

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30. Ann Carlson, *Iterative Federalism and Climate Change*, 103 NW L. REV. 1097, 1100 (2009).

31. Jody Freeman, *Trump’s Biggest Climate Move Yet is Bad for Everyone*, N.Y. TIMES (Aug. 2, 2018), <https://www.nytimes.com/2018/08/02/opinion/trumps-biggest-climate-move-yet-is-bad-for-everyone.html?action=click&module=RelatedCoverage&pgtype=Article&region=Footer>.

32. Thomas E. Hale, *Catalytic Institutions for the Global Commons: Tragedy or Tipping Point?*, PERRY WORLD HOUSE & UNIV. PA., at 16 (2017), <https://global.upenn.edu/sites/default/files/halepaper.original.pdf>.

33. 42 U.S.C. §§ 1857f-1(a), 1857f-6(a) (Supp. IV. 1965-1968) (1967 amendment to the Clean Air Act); see Carlson, *supra* note 26, at 1111.

34. Carlson, *supra* note 24, at 1100.

35. *Id.* at 1137-38.

2020] BLUE STATES, RED STATES: THE UNITED STATES? 143

California (and 23 other states) have filed suit against the revocation.<sup>36</sup> Trump's proposal to revoke the waiver sets the stage for a legal conflict that could split the nation's auto market in two—"[o]ne for California and the dozen other aligned states that account for one-third of the U.S. auto market, and another for the rest of the country"<sup>37</sup> – a situation that auto company executives themselves want to avoid.<sup>38</sup>

A. *Localities to Trump: "Get Out of the Way"*

Since President Trump's announcement to withdraw from the Paris climate accord, state and local engagement in *global* environmental governance is on the rise in a visible, coordinated, networked fashion. By attending international meetings of states-parties to the Paris agreement (and through their actions and statements at home), state and local government officials have pledged to fight for the commitments the United States made through the Paris process—in the absence of federal leadership (and more to the point, in the presence of federal hostility).

In so doing, these state and local leaders are embracing a shared community (at least concerning our shared planet and climate) that is both local and global—and that concerns "We the People" today and "We the People" tomorrow (future generations). Thus, these commitments are being made not only transnationally, but trans-temporally. These leaders are forcefully rebutting the efforts of powerful economic interests to externalize their responsibility for the costs of climate change to the rest of us, both at home and abroad, for today's and future generations. While state and local officials ground their primary concerns in their unique *local* pragmatic priorities, these leaders have also linked these very concrete concerns to the global (indeed planetary) phenomenon of climate change and the recognition that we are all in this together (in a quite existential way) and depend on cooperation with each other.

Localities became visibly more engaged in global governance

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36. Complaint for Declaratory and Injunctive Relief, Cal., et al. v. Chao, et al., (2019) (No. 1:19-cv-02826).

37. Tony Barboza, *California counters Trump on car emissions standards, expands other climate rules*, L.A. TIMES (Sept. 28, 2018), <https://www.latimes.com/local/lanow/la-me-carbon-fuels-20180928-story.html>.

38. See Coral Davenport, *Trump Administration Unveils Its Plan to Relax Car Pollution Rules*, N.Y. TIMES (Aug. 2, 2018), <https://www.nytimes.com/2018/08/02/climate/trump-auto-emissions-california.html> (The Trump administration "proposal goes much further than many major automakers wanted, and manufacturers are now worried that years of legal challenges and regulatory uncertainty could complicate their business.").

during the December 2017 UN climate talks in Bonn, Germany—a meeting marking the second anniversary of the Paris accord. The White House sent a small delegation to in Bonn climate talks, Germany.<sup>39</sup> While the official U.S. delegation scheduled a meeting to discuss the future of coal, an alternative, high-level, bi-partisan coalition, including California Governor Jerry Brown, former New York City Mayor Michael Bloomberg, and several senators, mayors, and business leaders, launched the “America Pledge” report.<sup>40</sup> Demanding a “seat at the table” in Bonn, Bloomberg—who is also a UN special envoy for cities and climate change—said of the America Pledge group, “If this group were a country, we’d be the third-biggest economy in the world.”<sup>41</sup> Citing recent violent wildfires in California as an example of extreme weather made worse by human-made climate change, Governor Brown noted that “the fires are burning in California [and] [t]hey’ll be burning in France, burning all around the world” if countries fail to reduce emissions.<sup>42</sup>

That same month, in another bi-partisan initiative, led by Chicago Mayor Rahm Emmanuel, more than fifty mayors from across the United States and Canada participated in the North American Climate Summit in Chicago. The group of mayors signed “an official agreement, the Chicago Climate Charter, in which they pledged to meet the emissions-reduction goals set out by the Paris agreement.”<sup>43</sup>

In September 2018, California Governor Brown hosted a

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39. See Umair Irfan, *The Trump Administration went to the UN climate talks to promote coal*, VOX (Nov. 14, 2017), <https://www.vox.com/energy-and-environment/2017/11/14/16634480/us-coal-nuclear-climate-change-cop23-protest> (In fact, “rather than sending high-level Cabinet secretaries to the meeting as the Obama White House did, the U.S. delegation is being led by Under Secretary of State for Political Affairs Thomas A. Shannon, Jr.”).

40. Jonathan Watts, *Alternative US group honouring Paris climate accord demands ‘seat at the table’ – The America Pledge group claims to represent US majority opinion on carbon emissions, despite Trump’s withdrawal from the Paris agreement*, GUARDIAN (Nov. 11, 2017), <https://www.theguardian.com/environment/2017/nov/11/alternative-us-group-honouring-paris-climate-accord-demands-seat-at-the-table-bonn>.

41. *Id.*

42. The Associated Press, *The Latest: Jerry Brown to Trump: “Get out of the way,”* ABC NEWS (Dec. 12, 2017), <https://apnews.com/1098c54326f14a61b149e4e2030a40f4>. For analysis of other ways that state and local governments have played a role in advancing international environmental and other policy goals, see, e.g., BENJAMIN R. BARBER, *IF MAYORS RULED THE WORLD: DYSFUNCTIONAL NATIONS, RISING CITIES* (Yale Univ. Press) (2013).

43. Jeremy Berke, *More than 50 US mayors just signed a charter to meet the Paris agreement goals without Trump*, THE BUSINESS INSIDER (Dec. 12, 2017), <https://www.businessinsider.com/paris-agreement-2-year-anniversary-us-mayors-step-up-2017-12>.

2020] BLUE STATES, RED STATES: THE UNITED STATES? 145

domestic climate change conference in San Francisco, featuring representatives of sub-national governments, businesses, investors, musicians, and others to highlight action that could “spur deeper commitment” from national governments to fight global warming.<sup>44</sup> A coalition of 16 states, Puerto Rico, hundreds of cities, and almost 2,000 businesses have pledged to ensure that the United States meets former President Obama’s Paris pledge to cut greenhouse gas emissions 26 to 28 percent below 2005 levels by 2025.<sup>45</sup> However, the group has acknowledged that “United States emissions are on track to fall only about 17 percent over that span” and that these “states and cities would have to pursue ambitious new policies [] to get closer to the target” and persuade “several other states beyond the blue coastal enclaves to join them[.]”<sup>46</sup>

Even so, California Governor Brown has met with China’s chief climate negotiator and “announced plans for California and China to work together on zero-emissions vehicles and fuel-cell research[,]” and “several blue-state governors met behind closed doors with the environment ministers of Canada and Mexico to forge new partnerships on issues like electric vehicles and curbing emissions of methane[.]”<sup>47</sup> While it is unusual for American governors to, in effect, take the lead on international climate diplomacy, Canada’s Minister of Environment and Climate Change notes, “It is important to show the world that we’re still working with U.S. states,” and that “[t]here really are practical things we can do together.”<sup>48</sup>

### B. *Protecting the Climate as a Tipping Problem*

In considering the diffusion of policies aimed at climate change, it is tempting to view the norm cascade sweeping through at least some

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44. Mythili Sampathkumar, *California launches new climate change conference to help fulfill Paris Agreement targets – The U.S. is withdrawing from the deal, but states and cities vow to continue fighting global warming*, THE INDEPENDENT (July 6, 2017), <https://www.independent.co.uk/news/world-0/us-politics/california-climate-change-conference-paris-agreement-deal-targets-a7828076.html>. Along with Governors from New York, Maryland and Connecticut, Governor Brown’s team said they would work on new regulations to restrict hydrofluorocarbons, extremely potent greenhouse gasses used in air-conditioners and refrigerators. See Brad Plumer, *California Had Its Own Climate Summit. Now What?*, N.Y. TIMES (Sept. 15, 2018), <https://www.nytimes.com/2018/09/15/climate/california-climate-summit.html> (noting “In 2016, nations agreed on a treaty to phase out these gases, but Mr. Trump has not submitted the pact for ratification or written federal regulations.”).

45. See Plumer, *supra* note 45.

46. *Id.*

47. *Id.*

48. *Id.*

localities as motivated by a common purpose. Under the standard tragedy of the commons analysis, we may assume that all jurisdictions have similar, if not identical, motives.<sup>49</sup> However, the fact that certain jurisdictions have been first and more aggressive movers in reducing greenhouse gas emissions, such as California, indicates different interests and motives.

As international relations Professor Thomas Hale explains, certain mitigation steps taken by particular jurisdictions may not even be viewed as primarily climate policy *per se*:<sup>50</sup> “[Rather,] [m]any ‘co-benefits’ can be gained [] including reducing local air pollution and improving human health, increasing energy security and reliability, developing new industrial sectors, preserving forests, [reducing traffic,] ideational preferences, such as the value of upholding a ‘green’ policy[.]”<sup>51</sup>

For these reasons, it makes sense to assess climate policy not only within the framework of the standard tragedy of the commons analysis, but also to recognize that climate policy involves a “tipping problem structure.”<sup>52</sup> While Hale makes this point in the context of tipping norms globally, I am adapting his insight applies with equal force domestically.

In sum, the initiative of state and local governments in addressing environmental protection concerns, such as climate change, is critical. Certainly the federal government has an important coordination role to play. But, in the meantime, the leadership of subfederal government actors can build support for climate change policy across the nation and, eventually, at the national level.

### III. SANCTUARY JURISDICTIONS

A parallel bottom-up approach has unfolded in U.S. immigration policy in the context of state, counties, and cities that have developed “sanctuary” policies for immigrants. The term “sanctuary jurisdiction” is itself somewhat of a misnomer today, in the sense that it now applies to a range of localities motivated by a variety of concerns beyond the original ones in the 1980s that were more geared toward providing true

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49. See Hale, *supra* note 32.

50. *Id.*

51. *Id.*

52. *Id.* at 2.

sanctuary from deportation.<sup>53</sup>

Unlike the climate context, international law norms protecting the rights of immigrants are weak.<sup>54</sup> During the first wave of sanctuary policies – which was largely focused on political *refugees* (where international law protections are stronger) in contrast to economic migrants – sanctuary cities *were* in fact responding to what they perceived as the federal government’s lack of compliance with international law, based on the U.S. government’s rejection of refugee applications from Central Americans.<sup>55</sup> Along with the emergence of these early sanctuary cities, religious activists in the church-centered movement drew on the emerging use of international human rights norms by U.S. advocates more broadly, invoking the principles of personal accountability developed in the Nuremberg tribunals, to justify what the federal government considered alien smuggling.<sup>56</sup> But the more recent waves of sanctuary policies have focused on immigrants (not necessarily more narrowly on refugees), where there is a dearth of binding international legal protections.

#### A. *Typology of Sanctuary Policies aimed at Disentanglement*

A study of over 3,000 counties identifies seven different types of sanctuary policies.<sup>57</sup> As counties become either increasingly or

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53. American Immigration Council, *Fact Sheet: Understanding Trust Acts, Community Policing, and “Sanctuary Cities,”* (Oct. 10, 2015), <https://www.americanimmigrationcouncil.org/research/sanctuary-cities-trust-acts-and-community-policing-explained>.

54. See Catherine Powell, *We the People: These United Divided States*, 40 CARDOZO L. REV. 2685, 2689 (2019).

55. See Rose Cuison Villazor, *What is a Sanctuary?*, 61 SMUL. REV. 133, 142-43 (2008) (discussing that in the 1980s, municipalities – which we now refer to as “sanctuary cities” – adopted non-cooperation policies alongside churches that provided safe havens to Central American migrants).

56. Susan Gzesh, *Central Americans and Asylum Policy in the Reagan Era*, MIGRATION POLICY INSTITUTE (Apr. 1, 2006), <https://www.migrationpolicy.org/article/central-americans-and-asylum-policy-reagan-era>; see also Catherine Powell, *The United Divided States: San Francisco Sues Donald Trump for Sanctuary Cities Order*, JUST SECURITY (Feb. 13, 2017), <https://www.justsecurity.org/37589/united-divided-states-san-francisco-sues-donald-trump-sanctuary-cities-order/>.

57. See Immigration Legal Resource Center, *The Rise of Sanctuary: Getting Local Officers Out of the Business of Deportations in the Trump Era*, IMMIGR. LEGAL RESOURCE CTR. (Jan. 25, 2018), [https://www.ilrc.org/sites/default/files/resources/rise\\_of\\_sanctuary-lg-20180201.pdf](https://www.ilrc.org/sites/default/files/resources/rise_of_sanctuary-lg-20180201.pdf) (surveying 3,015 of the 3,140 counties and county equivalents in the United States) [hereinafter ILRC, *The Rise of Sanctuary*]; see also Christopher N. Lasch, *et al.*, *Understanding “Sanctuary Cities,”* 58 B.C. L. REV. 1703, 1723-36 (describing similar “types of criminal justice policies that cities have adopted to disentangle their law enforcement systems from federal immigration enforcement”). Note also that the Congressional Research Service describes a useful typology by noting that sanctuary policies are often described as falling under one of three categories: First, so-called “don’t enforce” policies generally bar the

decreasingly disengaged from the federal immigration enforcement regime, collectively, these counties could overtime tip these norms in one way or another. The findings here illustrates trends that are corroborated through qualitative research concerning the emergence of a network of sanctuary jurisdictions that influence one another.<sup>58</sup> By adopting sanctuary policies—and “dissenting by deciding,” to use Heather Gerken’s formulation<sup>59</sup>—“these multiple points of sanctuary allow their specific constituencies, as well as broader local, state, and national ones, to weigh competing conceptions of rule of law, moral legitimacy, public safety outcomes, and social justice[.]”<sup>60</sup>

My description here begins with the category of sanctuary policies that seek the *least* amount of disentanglement from the federal immigration enforcement apparatus (and are the most common). The subsequent categories discussed move up a spectrum of increasing disengagement with Immigration and Customs Enforcement (ICE) (with data referring to 2017, unless otherwise indicated):

*Refusal to enter into 287(g) agreements:* Ninety-eight percent of counties did not have a 287(g) agreements with the federal government.<sup>61</sup> The 287(g) program involves an *optional* agreement between the jurisdiction and ICE, which essentially deputizes particular local law enforcement agents to enforce immigration laws. Because such agreements are optional, it is fairly easy for counties to opt against entering into such agreements.

*No ICE Detention Contract:* Nearly ninety-four percent of counties did not have a contract with ICE.<sup>62</sup> Such ICE detention contracts are contracts between ICE and local jails, where ICE pays the jails to hold immigrants in detention during their deportation proceedings. As with 287(g) agreements, entering into an ICE detention contract is also optional (though there are financial

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state or local police from assisting federal immigration authorities. Second, “don’t ask” policies generally bar certain state or local officials from inquiring into a person’s immigration status. Third, “don’t tell” policies typically restrict information sharing between state or local law enforcement and federal immigration authorities. See Sarah S. Herman, *State and Local “Sanctuary” Policies Limiting Participation in Immigration Enforcement*, CONGRESSIONAL RESEARCH SERVICE (March 23, 2017).

58. Rose Cuison Villazor & Pratheepan Gulasekaram, *Sanctuary Networks*, 103 MINN. L. REV. 1209, 1251-52 (2019).

59. Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1747-51 (2005); see also Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L. J. 1256, 1293-94 (2009).

60. Villazor, et al., *supra* note 58, at 1276.

61. ILRC, *The Rise of Sanctuary*, *supra* note 57, at 9.

62. *Id.*



2020] BLUE STATES, RED STATES: THE UNITED STATES? 149

incentives to rent out space in local jails to ICE).

*Limits on ICE Detainers (ICE Holds):* Twenty-four percent of counties have policies *refusing* to cooperate with ICE requests to hold individuals beyond their release date, which would provide ICE with additional time to take custody of these individuals—a practice numerous officials in these jurisdictions view (and some courts have held) violate the 4th Amendment rights of those detained.<sup>63</sup>

*Restricting notifications to ICE about information, such as release dates:* Only six percent of counties had policies against sharing information about detainees, such as release dates, with ICE.<sup>64</sup> ICE asks local agencies to provide advance notice of when immigrants will be released from custody, so that ICE can arrest these individuals upon release.

*Limiting ICE access to local jails and ICE interrogations of detainees:* Only four percent of counties restrict ICE's access to jails or have put in place safeguards on ICE's ability to interrogate detainees.<sup>65</sup>

*Prohibiting inquiries into immigration status and/or place of birth:* Only four percent of counties limit their officers from asking individuals about their immigration status.<sup>66</sup> General bans on participating in immigration enforcement. Only four percent of countries have a general rule against spending time or resources on immigration enforcement.<sup>67</sup>

## B. *What Motivates Sanctuary Policies*

As with climate policy, jurisdictions have different motivations for adopting sanctuary policies,<sup>68</sup> ranging from more pragmatic rationales to human rights-oriented considerations.

### 1. *Preserving Local Control over Criminal Justice*

One reason for sanctuary policies (for example, in New Haven,

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63. *Id.* at 9.

64. *Id.*

65. *Id.* at 9. Such counties may require a judicial warrant for ICE to access limited areas or adopt procedural protections for imprisoned immigrants so that they can refuse interrogation by ICE agents. *Id.* at 4

66. *Id.* at 9.

67. *See id.* (this might include restrictions on participating in joint operations involving immigration enforcement).

68. *See* Lasch, et al., *supra* note 10, at 1752-71.

Pittsburg, San Francisco) is to assert that state and local governments should be in control of criminal justice priorities, separate and apart from the federal government's responsibilities over immigration enforcement.<sup>69</sup> These "don't enforce" policies bar local criminal law enforcement officials from federal civil immigration enforcement. Drawing the line between these two spheres of authority is supported by the Supreme Court's federalism jurisprudence concerning the Tenth Amendment. According to the Court's anti-commandeering cases,<sup>70</sup> the federal government cannot compel state and local governments into participating in a federal regulatory program. At the same time, criminal justice matters fall within the realm of traditional state and local police powers.<sup>71</sup>

As the sanctuary policy in Cooks County, Illinois notes, "the federal government only reimburses part of the costs associated with ICE detainees"<sup>72</sup>—a classic concern of the Supreme Court's anti-commandeering jurisprudence. Moreover, in considering whether ICE has violated the Fourth Amendment (by requesting that states and localities hold immigrants beyond the release dates), at least some courts have found that ICE detainer requests infringe on federalism and the Tenth Amendment concerns.<sup>73</sup> Furthermore, courts have enjoined the provision in the President's "sanctuary jurisdictions" Executive Order that threatens to cut off funds to such jurisdictions, citing the Spending Clause, reflecting Tenth Amendment concerns.<sup>74</sup>

## 2. *Enhancing Community Trust and Community Policing*

A second basis for sanctuary policies, which blends pragmatic and human rights considerations, is the concern that the entanglement of street-level policing in federal immigration enforcement undermines the trust that is necessary for community members to feel

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69. *Id.* at 1754-55.

70. *See, e.g.,* *New York v. United States*, 505 U.S. 144 (1992); *Printz v. United States*, 521 U.S. 898 (1997).

71. *See* *United States v. Morrison*, 529 U.S. 598 (2000) ("[t]he regulation and punishment of intrastate violence . . . has always been the province of the states"); *United States v. Lopez*, 514 U.S. 549 (1995) (holding the prohibition on guns in school zones as "a general police power of the sort retained by the States").

72. *Cook County, Ill. Ord. 11-O-73* (2011); *see also* Lasch, et al., *supra* note 10, at 1756, n 270 (discussing similar concerns expressed in the sanctuary policies of California, Philadelphia, PA, and Miami-Dade County).

73. *See, e.g.,* *Galarza v. Szalczyk*, 745 F.3d 634, 645 (3d Cir. 2014).

74. *See, e.g.,* *Cty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497 (N.D. Cal. 2017) (granting preliminary injunction and finding likelihood of success on the merits of the plaintiffs' claim that the EO is unconstitutional on the grounds that it violates both horizontal and vertical separation of powers concerns).

confident in cooperating with local law enforcement. A range of sanctuary jurisdictions, including California, Milwaukee County, and New Haven, have pointed to the importance of building community trust as rationales for disengaging with federal immigration efforts.<sup>75</sup> Trump's hostile statements and policies toward immigrants have renewed fears in immigrant communities that interaction with local police (and other local authorities) will result in deportation.

As many studies have demonstrated, “[c]ommunity trust is critical for effective policing programs.”<sup>76</sup> Such fear “can cause immigrants and individual in mixed status families to refrain from coming forward as victims of, or witnesses to crime.”<sup>77</sup> When reports of sexual assaults and spousal abuse dropped among Latinos, in 2017, the Los Angeles Police Department indicated that “deportation fears may be preventing Hispanic members of the community from reporting when they are victimized.”<sup>78</sup>

### 3. *Averting Unlawful Arrests*

A third ground for sanctuary policies, which also mixes pragmatic and human rights considerations, is the concern that unlawful arrests leads to legal and monetary liability. This concern has paved the way for sanctuary policies in Oregon, Colorado, Washington, and California, which have each declared they would no longer consent to ICE detainer requests.<sup>79</sup> Concerns about liability, as a result of entanglement with federal immigration enforcement, have grown with the emergence of crim-immigration.

Furthermore, three lines of cases actually cabin the ability of states and localities to participate in making and enforcing immigration law. First is *Arizona v. United States*,<sup>80</sup> which struck down aspects of Arizona's SB 1070 as preempted by federal immigration law. A second line of cases reflects a concern that federal immigration detainees violate the Fourth Amendment.<sup>81</sup> State and local law

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75. Lasch, et al., *supra* note 10, at 1761-64.

76. *Id.* at 1761.

77. *Id.* at 1762. See also Nik Theodore, *Insecure Communities: Latino Perceptions of Police Involvement in Immigration Enforcement*, POLICY LINK (May 2013), <http://raceandpolicing.issuelab-dev.org/resources/15261/15261.pdf> (reporting on the impact of police involvement in immigration enforcement on Latinos' perceptions of public safety and their willingness to contact the police).

78. News Release, *L.A. Police Dep't, Decline in Reporting of Crime Among Hispanic Population* (Mar. 21, 2017), [http://www.lapdonline.org/home/news\\_view/61998](http://www.lapdonline.org/home/news_view/61998).

79. Lasch, et al., *supra* note 10, at 1758-61.

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

81. See, e.g., *Galarza v. Szalczyk*, 745 F.3d 634, 645 (3d Cir. 2014); *Miranda-Olivares*

enforcement officials (such as, prominently, then-California State Attorney General Kamala Harris) have also expressed unease with federal detainer requests and that cooperation with such requests could expose states and localities to liability.<sup>82</sup> A third line of cases “built on the notion, reflected in some sanctuary policies, that civil immigration arrests by local officials must not only be authorized by federal law but by state or local law as well.”<sup>83</sup>

#### 4. *Securing Equal Protection*

A fourth reason for sanctuary policies—which focuses more directly and primarily on the question of human rights—is grounded in two concerns based on equal protection: biased policing and discriminatory access to police services.<sup>84</sup> Many jurisdictions—including East Haven, New Orleans, and Vermont—have adopted sanctuary policies aimed at addressing these concerns.<sup>85</sup>

Even where race or ethnicity is not an explicit factor, entangling police in immigration matters can incline officers to use race, ethnicity, and English-language ability as proxies for immigration status, for example, in determine who to stop, question, and investigate.<sup>86</sup> Several sanctuary policies reflect a concern with fair, nondiscriminatory policing.

Many disentanglement policies also seek to address discriminatory barriers to accessing police services. When local law enforcement officials are involved in federal immigration policy, policing practices can discourage immigrants and individuals in mixed status families from cooperating with the police as victims of or witnesses to crime.<sup>87</sup>

Beside the Fourteenth Amendment,<sup>88</sup> which bars state officials from intentional discrimination (based on, *inter alia*, race, ethnicity,

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v. Clackamas Cty., No. 3:12-cv-02317-ST, 2014 WL 1414305 at \*11 (D. Or. Apr. 4, 2014).

82. See, e.g., Attorney General Kamala D. Harris Issues Bulletin to Law Enforcement on Federal Immigration Detainers (June 25, 2014), <https://www.oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-issues-bulletin-law-enforcement-federal>.

83. Lasch et al., *supra* note 10, at 1760 (citing Lunn v. Commonwealth, 78 N.E.3d 1143 (Mass. 2017)).

84. *Id.* at 1764-65.

85. *Id.* at 1767.

86. See, e.g., Devon W. Carbado & Cheryl I. Harris, *Undocumented Criminal Procedure*, 58 UCLA L. REV. 1543, 1545-47 (2011) (discussing the use of race as a proxy for citizenship).

87. Lasch et al., *supra* note 10, at 1768.

88. U.S. CONST. amend. XIV, § 1.

nationality, an alienage),<sup>89</sup> Title VI of the 1964 Civil Rights Act prohibits discrimination in state and local federally funded programs.<sup>90</sup> Moreover, states and localities often have their own antidiscrimination protections.

### 5. *Encouraging Diversity and Inclusivity*

A fifth basis for sanctuary policies—which is also centered more directly on the human rights of immigrants—is promoting inclusive and diverse communities.<sup>91</sup> For example, the sanctuary policies in Santa Monica, California reflects these concerns.<sup>92</sup> President Trump has made numerous statements and supported policies that are viewed as undermining inclusivity and even racist. In response to what Santa Monica’s mayor described as steps by the Trump administration that failed to “align with our vision of diversity and inclusion,”<sup>93</sup> the city adopted a 2017 resolution that rooted a new policing policy in the city’s embrace of diversity based on religion, race, national or ethnic origin, gender, and sexual identity or orientation.<sup>94</sup>

Promoting inclusive and diverse communities “is related to but distinct from the more legalistic emphasis on equality and nondiscrimination that is seen in some disentanglement policies.”<sup>95</sup> The goal of inclusivity is more forward-looking, in contrast to the backward-looking goal of remediating past discriminatory practices in the criminal justice system and in police services.<sup>96</sup>

### C. *The Treatment of Immigrants as a Tipping Problem*

Just as not all climate change mitigation steps taken by particular jurisdictions may be viewed as primarily climate policy per se—but rather as co-benefits—so too sanctuary jurisdictions adopt policies are based on a number of grounds. Sanctuary policies framed in more

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89. See, e.g., *Korematsu v. United States*, 323 U.S. 214 (1944) (holding discrimination against persons of Japanese ancestry to be presumptively unconstitutional, though upholding the internment of such persons); *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (determining that state classifications based on alienage “are inherently suspect and subject to close judicial scrutiny”).

90. 42 U.S.C. § 2000d.

91. Lasch et al., *supra* note 10, at 1766-70.

92. *Id.* at 1769.

93. Ted Winterer, *An Open Letter from Santa Monica Mayor Ted Winterer on Diversity and Immigration*, SANTA MONICA NEXT (March 1, 2017), <http://www.santamonicanext.org/2017/03/an-open-letter-from-santa-monica-mayor-ted-winterer-on-diversity-and-immigration/>.

94. Lasch et al., *supra* note 12, at 1769-70.

95. *Id.* at 1769.

96. *Id.*

pragmatic terms—and that build alliances with law enforcement—may have greater appeal in red and purple localities states.

While the first wave of sanctuary policies involved religious leaders who sought to actively prevent federal immigration officials from deporting Central American refugees who faced persecution at home, “[t]oday’s sanctuary laws, while bearing the same name, are markedly different.”<sup>97</sup> Rather than blocking federal action, today’s sanctuary jurisdictions are simply stepping aside so that they will not be involved in federal immigration policy at all. Asserting its interest in local sovereignty and criminal justice, California’s attorney general, Xavier Becerra, has noted, “California is in the business of public safety, not in the business of deportations.”<sup>98</sup>

Even while often framed in pragmatic terms, these policies have the effect of responding to the intimidation, exclusion, and humiliation of federal immigration policy. While these sanctuary jurisdictions do not have the power, nor are they necessarily seeking to provide legal citizenship to undocumented immigrants, these policies often demonstrate the importance of factors beyond legal citizenship, including broader norms of inclusion, equality, family unification, respect, and dignity.<sup>99</sup>

## CONCLUSION

As mentioned in the acknowledgement at the outset of this essay, as this goes to press, the COVID-19 pandemic has ravaged communities across the world, posing enormous challenges for governance at every level. While this essay was written prior to the pandemic and cannot account for these challenges, I add these concluding remarks as a postscript for future lines of research.

As regards COVID-19 relief for immigrants, the federal relief provided pursuant to the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) and Families First Coronavirus Response Act contain provisions excluding undocumented workers and mixed-status families from eligibility for COVID-19 stimulus checks and

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97. Peter L. Markowitz, *Trump Can't Stop the Sanctuary Movement*, N.Y. TIMES (Mar. 9, 2018), <https://www.nytimes.com/2018/03/09/opinion/trump-california-sanctuary-movement.html>.

98. *Id.*

99. Jennifer M. Chacón, *Citizenship Matters: Conceptualizing Belongings in an Era of Fragile Inclusions*, 52 U.C. DAVIS L. REV. 1 (2018).

2020] BLUE STATES, RED STATES: THE UNITED STATES? 155

coverage of coronavirus testing.<sup>100</sup> However, a few state and local governments have stepped forward to provide various forms of relief to many of these workers and families.<sup>101</sup>

As for climate policy, while COVID-19 has reduced auto-emissions, the United Nations reports that this reduction alone will not stop climate change.<sup>102</sup> Meanwhile, just as President Trump has taken steps to withdraw from the Paris climate accord, he has also threatened to cut U.S. funding to the World Health Organization (WHO).

In light of these preliminary observations—as well as the significant role of states and cities in responding to the health crisis more broadly—additional research on the links between glocalization and federalism would be valuable.<sup>103</sup>

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<sup>100</sup> Rosio Perez, *My immigrant parents lost their jobs, but the CARES Act won't help mixed-status families like mine*, LA Times (May 3, 2020) (noting relief provided by Chicago Mayor Lori Lightfoot, New York City Mayor Bill de Blasio, and California Governor Gavin Newsom), <https://www.latimes.com/opinion/story/2020-05-03/undocumented-immigrants-cares-act-coronavirus-covid>.

<sup>101</sup> *Id.*

<sup>102</sup> UN News, *Fall in COVID-linked carbon emissions won't halt climate change—UN weather agency chief* (April 22, 2020), <https://news.un.org/en/story/2020/04/1062332>.

<sup>103</sup> See, e.g., Catherine Powell, *Quarantined: Federalism in Action at Home and Abroad*, Think Global Health (March 2, 2020), <https://www.thinkglobalhealth.org/article/quarantined-federalism-action-home-and-abroad>.