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## “I Am Undocumented and a New Yorker”: Affirmative City Citizenship and New York City’s IDNYC Program

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**“I AM UNDOCUMENTED AND A NEW YORKER”:  
AFFIRMATIVE CITY CITIZENSHIP  
AND NEW YORK CITY’S  
IDNYC PROGRAM**

*Amy C. Torres\**

*The power to confer legal citizenship status is possessed solely by the federal government. Yet the courts and legal theorists have demonstrated that citizenship encompasses factors beyond legal status, including rights, inclusion, and political participation. As a result, even legal citizens can face barriers to citizenship, broadly understood, due to factors including their race, class, gender, or disability. Given this multidimensionality, the city, as the place where residents carry out the tasks of their daily lives, is a critical space for promoting elements of citizenship.*

*This Note argues that recent city municipal identification-card programs have created a new form of citizenship for their residents. This citizenship, which this Note terms “Affirmative City Citizenship,” is significant for both marginalized populations generally, as well as undocumented immigrant city residents who, because of their noncitizen legal status, face additional hurdles to city life. Utilizing “IDNYC”—New York City’s municipal identification-card program—as a case study, this Note examines the strengths and limitations of Affirmative City Citizenship as a means for supporting undocumented immigrant city residents. It concludes that while Affirmative City Citizenship is a powerful tool for confronting barriers to citizenship, its success with the immigrant population relies in part on the city’s adoption of other proimmigrant policies that more directly conflict with federal law. Accordingly, it recommends that cities seeking to protect their undocumented immigrant city residents adopt both types of policies.*

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#### INTRODUCTION

Imagine a day like this: you wake up in the morning to a text from your daughter saying that she forgot her school project at home and asking you to bring it to her. You hurry to get dressed and walk to your daughter's school, flashing your identification card as you run past the building's security to get your daughter her poster board before second period. After you hand it off, you head to the local library where you use that same identification card to reserve time on the computer and borrow a few books on English and cooking. You are currently working at a local restaurant but have dreams of becoming a chef or starting your own restaurant. Studying at the library has become a ritual of yours now that your children are in school and you have spare time.

After the library, you head to city hall where you again show your identification card before entering a public forum. At the forum, you speak out against the recent use of trains for the transportation of potentially explosive chemicals by your apartment in Queens. On your way home, you witness a hit-and-run and you call 911. When the police arrive, they question you about what you saw, noting that you were the only witness nearby and warning that you may be called in to testify. You do not hesitate to share

your contact information and identification card with them, and you assure them that you are more than willing to help.

Finally, imagine that in addition to all of this, you are an undocumented immigrant. You have been in the United States for almost fifteen years, yet your presence in the United States is not authorized by law and you are subject to deportation at any time. Your undocumented status and lack of right to remain in the United States are realities that never escape you. Yet, reflecting on your day, you also recognize that in the city in which you reside—the city that never asked about your legal status before issuing you a city identification card—your presence is valid. You still eagerly await a time when your presence will become lawful and you will not have to live in fear. You know that nothing but legal status can change that. Still, you appreciate that, in your city, you do not have to hide while you wait.

In January 2015, New York City launched the IDNYC program, making a New York City identification card available to all city residents irrespective of legal immigration status in the United States.<sup>1</sup> The card provides its holders access to city services and buildings; functions as a library card; and is considered a valid form of identification by the New York City Police Department, city health care centers and hospitals, and select banking institutions.<sup>2</sup> New York City is not the first city to develop a municipal identification program, and it is not the last. Since its launch, similar programs have either been implemented or considered in various cities across the country.<sup>3</sup> By facilitating access to the agencies and businesses with which city residents are likely to interact, these cards present a creative way to address some of the challenges posed by federal immigration law for undocumented immigrants.<sup>4</sup>

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1. See Matt Flegenheimer, *New York City to Formally Start Its Municipal ID Card Program*, N.Y. TIMES (Jan. 11, 2015), [http://www.nytimes.com/2015/01/12/nyregion/new-york-city-to-formally-start-its-municipal-id-card-program.html?\\_r=0](http://www.nytimes.com/2015/01/12/nyregion/new-york-city-to-formally-start-its-municipal-id-card-program.html?_r=0) [<https://perma.cc/S3CC-CJJY>].

2. The first municipal city identification program was launched in New Haven, Connecticut, in 2007. See CTR. FOR POPULAR DEMOCRACY, WHO WE ARE: MUNICIPAL ID CARDS AS A LOCAL STRATEGY TO PROMOTE BELONGING AND SHARED COMMUNITY IDENTITY 11 (2013), <https://populardemocracy.org/sites/default/files/municipal%20id%20report.pdf> [<https://perma.cc/K8BK-GXRL>]. Today, similar programs exist in cities in California, New Jersey, and the District of Columbia. *Id.*

3. Interview with Sam Solomon, Deputy Dir. of Policy, N.Y.C. Mayor's Office of Immigrant Affairs, in N.Y.C., N.Y. (Oct. 28, 2016) [hereinafter Solomon Interview] (on file with the author).

4. See, e.g., *Undocumented Immigrants in the Workplace: The Fallacy of Labor Protection and the Need for Reform*, 36 HARV. C.R.-C.L. L. REV. 345, 347–48 (2001) (arguing that despite the existence of some federal legal protections for undocumented immigrant laborers, undocumented immigrants lack meaningful remedies for labor exploitation and are vulnerable to deportation if they assert their protected rights); see also Christopher Choe, *Bringing in the Unbanked off the Fringe: The Bank On San Francisco Model and the Need for Public and Private Partnership*, 8 SEATTLE J. SOC. JUST. 365, 384 (2009) (noting that undocumented immigrants are less likely than other populations to use mainstream banking out of fear of deportation, resulting in their having to pay higher costs for basic financial services).

IDNYC, however, was not designed solely for the benefit of the city's undocumented immigrant population.<sup>5</sup> The program's legislative history reveals that the lack of valid identification was a widespread problem that affected many groups, including the city's homeless, elderly, youth, and LGBTQ populations.<sup>6</sup> In this way, IDNYC aims to do more than just defend against the consequences of federal immigration law for city communities.<sup>7</sup> By treating undocumented status as merely one of many factors inhibiting a New Yorker from being able to fully engage with the city's services and institutions, IDNYC challenges the traditional role cities play in the citizenship of their residents. While the federal monopoly over immigration and citizenship is well settled,<sup>8</sup> significant legal scholarship asserts that citizenship as a legal concept encompasses factors that go beyond federally bestowed legal status, including a sense of belonging or an ability to participate fully in society.<sup>9</sup> The multidimensionality of citizenship, in turn, hints that actors other than the federal government can and do play a legally permissible role in citizenship enhancement.

This Note argues that city municipal identification-card programs present a new role for the city in citizenship. While city legislation or policy relating to immigration is not a new phenomenon,<sup>10</sup> municipal identification-card programs differ from other city policies. They do not seek to bolster, or resist, existing federal immigration laws. Instead, cities that adopt these policies take on an affirmative role, aiming to remove barriers to citizenship for all their residents, including undocumented immigrants. In this way, cities bestow a new form of citizenship, which this Note terms "Affirmative City Citizenship," on those within their territorial boundaries.<sup>11</sup> While Affirmative City Citizenship is neither a substitute for a federally recognized citizenship status nor without limitations,<sup>12</sup> it can nevertheless have powerful impacts on the undocumented immigrant population.

To articulate this theory of Affirmative City Citizenship, this Note proceeds in four Parts. Part I discusses citizenship as a multidimensional phenomenon and the central importance of the city as the place where many of the dimensions of citizenship are realized. Next, Part II examines barriers to citizenship in the city, beginning with a discussion of vulnerable

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5. See Solomon Interview, *supra* note 3.

6. See N.Y.C. COUNCIL COMM. ON IMMIGRATION, COMMITTEE REPORT OF THE GOVERNMENTAL AFFAIRS DIVISION, at 3–4 (2014) [hereinafter COMMITTEE REPORT], <http://www.legistar.council.nyc.gov/View.ashx?M=F&ID=3059634&GUID=63E7AD26-877A-4D95-A053-1237DB1571B0> [https://perma.cc/KYT9-QVWJ].

7. See *infra* Part II.B.4.

8. See *Arizona v. United States*, 132 S. Ct. 2492, 2498 (2012) ("The federal power to determine immigration policy is well settled.").

9. See, e.g., LINDA BOSNIAK, *THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP* 27 (2006) (articulating a broader theory of "citizenship as membership" which encompasses "[s]tatus, rights, political engagement and identity").

10. See *infra* Part II.C.

11. Affirmative City Citizenship is not a substitute for formal legal status. This Note does not argue that local governments can effectively replace formal legal status or render the need for federally developed legal pathways to citizenship any less important.

12. See *infra* Part IV.B.

populations generally and then turning to look at the case of undocumented immigrants specifically. Part III considers city responses to these challenges, briefly examining sanctuary city policies and then analyzes New York City's IDNYC program. Finally, Part IV articulates a theory of Affirmative City Citizenship, exploring its strengths and potential challenges. This Note concludes that while municipal identification programs can remove barriers to citizenship for constituents, their success among undocumented immigrants relies in part on a coexistence with other proimmigrant policies that do not directly conflict with federal immigration law. Therefore, this Note recommends that cities seeking to support their undocumented immigrant residents adopt municipal identification-card programs together with sanctuary city policies.

### I. CITIZENSHIP AND THE CITY

Throughout American legal history, the judiciary has treated citizenship differently in different contexts.<sup>13</sup> As a result, the meaning of citizenship and the privileges and rights associated with it are more contested than acknowledged.<sup>14</sup> Part I.A provides an overview of the different theories of citizenship as articulated by courts and scholars of citizenship. Part I.B then demonstrates that citizenship is multidimensional and encompasses elements beyond formal legal status. Next, Part I.C discusses the contemporary role that cities play in the lives of American residents. Part I.D concludes with a presentation of cities as spaces where residents exercise many of the rights and privileges inherent in citizenship.

#### A. *Citizenship as Legal Status*

In U.S. immigration law, the term “citizen” refers to a legal status bestowed onto nonnatives by the federal government for which attainment is most commonly associated with the right to vote in federal elections.<sup>15</sup> In addition to voting rights, legal citizenship is also required to run for public office, to become eligible for most federal jobs, and to receive priority when petitioning to bring family members to the United States.<sup>16</sup> Only U.S. citizens can obtain citizenship for children born outside of the United States or obtain a U.S. passport, which is a prerequisite for receiving assistance from the U.S. government while traveling abroad.<sup>17</sup> The federal government also

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13. *See infra* Part I.A.

14. Even one of the most central elements of modern-day citizenship—its association with the nation-state—is contested by citizenship scholars. *See, e.g.*, BOSNIAK, *supra* note 9, at 5 (“Citizenship’s intimate relationship to the nation-state is not intrinsic but contingent and historical, and the forms and locations of citizenship, as we conventionally understand the term, are more varied than ordinarily acknowledged.”); *see also* Monica Varsanyi, *Interrogating “Urban Citizenship” Vis-à-Vis Undocumented Migration*, 10 CITIZENSHIP STUD. 229, 229–30 (2006).

15. *What Are the Benefits and Responsibilities of Citizenship?*, USCIS, <https://www.uscis.gov/sites/default/files/files/article/chapter2.pdf> [https://perma.cc/D8GY-E4WS] (last visited Sept. 21, 2017).

16. *Id.*

17. *Id.*

grants others forms of lawful status to noncitizens, including lawful permanent residence, or green cards,<sup>18</sup> and temporary work and student visas.<sup>19</sup>

The power to confer or deny national citizenship is derived from Article I, Section 8, clause 4 of the Constitution, which entrusts Congress with the power to “establish an uniform Rule of Naturalization.”<sup>20</sup> This power is unique to the federal government and courts have consistently been unwilling to scrutinize Congress or the executive branch’s decisions in this area.<sup>21</sup> The U.S. Supreme Court first articulated this high level of deference in 1889 in *Chae Chan Ping v. United States*.<sup>22</sup> *Chae Chan Ping* involved a challenge to the federal government’s decision to retroactively prohibit a Chinese laborer who had gone abroad from returning to the United States.<sup>23</sup> The Court upheld the federal government’s denial of reentry, even though such a policy conflicted with the terms of an international treaty, stating that the national government’s right to exclude foreigners was “an incident of sovereignty” and a power that “cannot be granted away or restrained on behalf of any one.”<sup>24</sup>

Despite this unquestioned authority to grant and deny lawful immigration status, the same deference has not been applied toward the federal government’s treatment of noncitizens already residing in the United States.<sup>25</sup> An early example of this contrast is the Supreme Court’s 1896 decision in *Yick Wo v. Hopkins*,<sup>26</sup> where the Court held that Chinese immigrants had standing to challenge the constitutionality of a local ordinance on equal protection grounds, even though they were noncitizens.<sup>27</sup> Ten years later, in *Wong Wing v. United States*,<sup>28</sup> the Court also rejected the federal government’s argument that it could imprison Chinese laborers for violations of immigration law without a trial by jury as a result of their illegal entry into the country.<sup>29</sup> The rights of noncitizens have been reaffirmed as recently as 1982 when the Court decided in *Plyer v. Doe*<sup>30</sup> that a Texas law

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18. *Lawful Permanent Residents*, DEP’T HOMELAND SECURITY, <https://www.dhs.gov/immigration-statistics/lawful-permanent-residents> [https://perma.cc/SLB8-UJMU] (last visited Sept. 21, 2017).

19. *Nonimmigrant Classes of Admission*, DEP’T HOMELAND SECURITY, <https://www.dhs.gov/immigration-statistics/nonimmigrant/NonimmigrantCOA> [https://perma.cc/8MYJ-Z3R5] (last visited Sept. 21, 2017).

20. U.S. CONST. art. I, § 8, cl. 4.

21. A recent affirmation of this federal power can be found in *Arizona v. United States*, 132 S. Ct. 2492, 2498 (2012).

22. 130 U.S. 581 (1889).

23. *Id.* at 623–24.

24. *Id.* at 609.

25. See BOSNIAK, *supra* note 9, at 55.

26. 118 U.S. 356 (1886).

27. *Id.* at 369 (describing the provisions of the Fourteenth Amendment as “universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality”).

28. 163 U.S. 228 (1896).

29. *Id.* at 238.

30. 457 U.S. 202 (1982).

denying public education to undocumented immigrant children was a violation of the Equal Protection Clause.<sup>31</sup>

Courts' inconsistent treatment of the federal government's ability to deny citizenship or lawful status,<sup>32</sup> on the one hand, and to treat noncitizens differently,<sup>33</sup> on the other, demonstrates that, in the legal context, the term "citizen" encompasses more than federal status. In *The Citizen and the Alien*, Linda Bosniak reconciles this disparate treatment by arguing that citizenship in the United States is a "hybrid legal category" that crosses over into two distinct legal domains.<sup>34</sup> The first, "membership in the national community," includes the federal government's power to admit or exclude immigrants into the United States and its power to deport those unlawfully present, both of which are broad.<sup>35</sup> The second domain, the "rights of persons," includes the federal government's ability to regulate the daily lives of undocumented immigrants residing in the United States, which she argues is much more limited.<sup>36</sup>

### B. Multidimensional Citizenship

Bosniak's "hybrid legal category" theory has broader implications for understanding citizenship. If undocumented immigrants present in the United States are entitled to basic constitutional protections even as noncitizens, it follows that only some of the rights and privileges associated with a U.S. residence are tied to the legal title of "citizen."<sup>37</sup> In other words, while the American understanding of citizenship undoubtedly encompasses a federally recognized legal status, it also encompasses other rights and privileges that could exist regardless of one's federal immigration status.

Support for a multidimensional understanding of citizenship comes from the well-documented struggles of certain groups, such as minorities or people with disabilities, to exercise rights typically associated with citizenship despite their status as citizens.<sup>38</sup> There have also been instances where those

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31. *Id.* at 202.

32. *See Arizona v. United States*, 132 S. Ct. 2492, 2498 (2012).

33. *See, e.g., Plyer*, 457 U.S. at 210.

34. BOSNIAK, *supra* note 9, at 39.

35. *Id.* at 13–14.

36. *Id.* at 14; *see also infra* Part III.B.

37. *See, e.g., JENNIFER GORDON, SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS 107, 275* (2005) (chronicling how a group of undocumented immigrants in the Long Island suburbs, through effective organizing, "acted in the way citizens act, and changed the law").

38. *See, e.g., Rabia Belt, Contemporary Voting Rights Controversies Through the Lens of Disability*, 68 STAN. L. REV. 1491, 1497–98 (2016) (detailing the different challenges people with disabilities in the United States face when voting, including transportation, polling facility inadequacies, and insensitive poll workers); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1291 (2004) (stating that the mass incarceration of African American males in the United States "dramatically constrains the participation of African American communities in the mainstream political economy"); Dawinder S. Sidhu, *The Unconstitutionality of Urban Poverty*, 62 DEPAUL L. REV. 1, 2 (2012) (arguing that the treatment of the urban poor is so mired with discrimination and limited access to education and housing opportunities as to constitute a violation of the U.S. Constitution's Thirteenth Amendment); *see also* Rose Cuisson Villazor,



without legal status have successfully exercised some of citizenship's rights and privileges.<sup>39</sup> In *Suburban Sweatshops: The Fight for Immigrant Rights*, Professor Jennifer Gordon chronicles the efforts of a group of immigrants, including undocumented immigrants, to combat labor exploitation and abusive working conditions in the Long Island suburbs.<sup>40</sup> She examines how the group successfully drafted and lobbied for what became the first law in the nation to drastically raise the sanctions against employers for failing to pay earned wages.<sup>41</sup> Their story demonstrates that “the right to seek social change through the political process” is one that, although seemingly central to modern notions of citizenship, can successfully be exercised by immigrants without formal status.<sup>42</sup>

In sum, the barriers that some legal citizens face in exercising elements of citizenship<sup>43</sup> and the ability of noncitizens to exercise elements of citizenship without legal status<sup>44</sup> both demonstrate that citizenship in practice entails more than federal legal status. It follows, then, that actors other than the federal government can play a role in enhancing or inhibiting a U.S. resident's ability to exercise the rights and privileges associated with, but not conferred by, traditional conceptions of citizenship.

### C. *The City as the Overseer of Daily Life*

Much has been written about the role of cities in progressive policy-making,<sup>45</sup> but exploring this role requires an understanding of the reach and limits of city power. Cities today are empowered through the home rule doctrine to oversee the majority of functions and services relied upon by their residents on a daily basis.<sup>46</sup> Under the home rule doctrine, local governments derive their power from the states through “a state legislative provision or action allocating a measure of autonomy to a local government, conditional on its acceptance of certain terms.”<sup>47</sup> Developed in the late nineteenth and early twentieth centuries, the home rule movement marked a significant departure from the then-existing “Dillon's Rule,” under which municipalities

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*American Nationals and Interstitial Citizenship*, 85 FORDHAM L. REV. 1673, 1712 (2017) (“[T]here are certain rights that are enjoyed by all persons regardless of citizenship.”).

39. See GORDON, *supra* note 37, at 298.

40. *Id.* at 3–5.

41. *Id.* at 277.

42. *Id.* at 278.

43. See, e.g., Belt, *supra* note 38, at 1497–98.

44. See GORDON, *supra* note 37, at 278.

45. See, e.g., Richard Briffault, *Home Rule and Local Political Innovation*, 22 J.L. & POL. 1, 2 (2006) (characterizing reforms adopted by San Francisco and New York City in the early 2000s as “illustrative of a broader phenomenon—political innovation and reform at the local level”); Kirsten Engel, *State and Local Climate Change Initiatives: What Is Motivating State and Local Governments to Address a Global Problem and What Does This Say About Federalism and Environmental Law?*, 38 URB. LAW. 1015, 1016 (2006) (analyzing the significance of emerging state and local environmental law initiatives); Matthew J. Parlow, *Progressive Policy-Making on the Local Level: Rethinking Traditional Notions of Federalism*, 17 TEMP. POL. & C.R.L. REV. 371, 375 (2008) (stating “local governments have led the way in many areas of public policy”).

46. See generally Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113 (2007).

47. *Home Rule*, BLACK'S LAW DICTIONARY (10th ed. 2014).

possessed only the powers expressly conferred onto them, much like corporations.<sup>48</sup> Almost all states have adopted some form of the home rule doctrine<sup>49</sup> and the home rule movement is seen as a legal recognition of the importance of city power and enhanced local autonomy.<sup>50</sup> Today, while not sovereigns in their own right, cities possess significant power to govern matters of local concern.<sup>51</sup>

Home rule doctrines vary across states.<sup>52</sup> Nonetheless, most local governments have been granted power over most of the functions that have the greatest impact on the lives of their residents.<sup>53</sup> As one scholar states, cities are responsible for the services “most vital to the preservation of life . . . liberty . . . property . . . and public enlightenment.”<sup>54</sup> These include local police, fire, public health, local courts and prosecutors, street maintenance, trash collection and sanitation, zoning, taxing, education, and libraries.<sup>55</sup> This also means that when things go wrong, city residents are more likely to turn to local leaders, converting city governments into “first responders.”<sup>56</sup>

In addition to overseeing local activity, cities may also be uniquely positioned to confront the factors, such as discrimination and ignorance, that have historically created barriers to daily life for vulnerable populations.<sup>57</sup> Professor Gerald E. Frug, a legal scholar in local and city governments, argues that cities are different from any other entity because, unlike voluntary associations such as country clubs or church groups, cities attract diverse populations who are then forced to interact with each other in a shared

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48. See Diller, *supra* note 46, at 1124.

49. New York State’s home rule doctrine, for example, is in Article IX of the State Constitution. N.Y. CONST. art. IX. Section 1 establishes the premise that “[e]ffective local self-government and intergovernmental cooperation are purposes of the people of the state,” N.Y. CONST. art. IX, § 1, and grants local governments the power to adopt laws “in relation to its property, affairs, or government,” N.Y. CONST. art. IX, § 2(b)(2). Section 2 lists areas in which local governments may legislate, including the “government, protection, order, conduct, safety, health and well-being of persons or property within.” N.Y. CONST. art. IX, § 2(c)(10).

50. See Diller, *supra* note 46, at 1125.

51. *Id.*

52. See generally Darin M. Dalmat, Note, *Bringing Economic Justice Closer to Home: The Legal Viability of Local Minimum Wage Laws Under Home Rule*, 39 COLUM. J.L. & SOC. PROBS. 93 (2005) (surveying home rule doctrines across the United States to assess which support local minimum wage laws).

53. See Diller, *supra* note 46, at 1127.

54. ROBERT L. LINEBERRY, EQUALITY AND URBAN POLICY: THE DISTRIBUTION OF MUNICIPAL PUBLIC SERVICES 10 (1977).

55. *Id.*

56. See Parlow, *supra* note 45, at 373 (“In this regard, local governments can be viewed as perhaps the most critical level of government in terms of responding—through regulation, goods, or services—to the needs and wants of its constituents.”).

57. As an example of discrimination interfering with the daily life of city residents, in a federal district court certified a class of Black and Latino men in their suit alleging that they had been unlawfully stopped and frisked by New York City police officers without reasonable suspicion. See generally *Daniels v. City of New York*, 198 F.R.D. 409 (S.D.N.Y. 2001). There, the plaintiffs argued that unlawful police practices caused them harm and suffering, including having to live in fear of future stops. *Id.* at 412.

space.<sup>58</sup> This “fortuitous association” makes the city ideally situated to promote the type of “community building” required to develop political solutions to divisiveness.<sup>59</sup> As Frug states, cities “offer an opportunity to expand our capacity to understand, cope with, and, hopefully, enjoy the variety of people who live in America,” which he sees as vital to overcoming contemporary divisiveness.<sup>60</sup>

#### *D. The City as Supporter of Democracy*

Beyond daily activities, cities also promote civic participation and foster the kind of experimentation required to help fundamental rights transition from ideals to practice, both of which are central to citizenship.<sup>61</sup> When governance occurs in closer, more localized units, city residents are more inclined to be interested in politics because they are more likely to have access to information and to feel that they have a chance to influence the outcome of decisions.<sup>62</sup> Thus, local governments promote civic participation in a way that state and federal governments cannot.<sup>63</sup> As Frug states, “On a local level, democracy can be a lived experience . . . . In a state or metropolitan region where millions of people live, popular control of public policy becomes more rhetorical than real.”<sup>64</sup>

Cities are also central to converting rights from ideals to practice. In their theory of democratic experimentalism, Professors Michael C. Dorf and Charles F. Sabel argue that the desire to see fundamental rights as inherent, regardless of circumstance, often obscures how even fundamental rights require adaptation to local circumstances before they can be fully realized.<sup>65</sup> Pointing to women’s rights as an example, they point out that even though women have been recognized as equal citizens for almost 100 years, litigation continues over policies for pregnancy in the workplace and the legality of all-women’s colleges.<sup>66</sup> According to Sabel and Dorf, experimentation on the local level is crucial because plaintiffs bring challenges to local courts for rights violations, and remedies are often crafted in consideration of local circumstances.<sup>67</sup> This kind of adaptation occurs even if the rights themselves stem from federal laws but would not be possible at the state or federal level.<sup>68</sup>

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58. See Gerald E. Frug, *City Services*, 73 N.Y.U. L. REV. 23, 35 (1998) (“Cities are characterized . . . by the wide variety of different kinds of people who live in them: gay and straight, cosmopolitan and streetwise, elderly and college grad, Latino and Anglo, office employee and service worker.”).

59. *Id.* at 37.

60. *Id.* at 36.

61. See Diller, *supra* note 46, at 1128.

62. See *id.*

63. See *id.*

64. Gerald E. Frug, *The Central-Local Relationship*, 25 STAN. L. & POL’Y REV. 1, 2 (2014).

65. See generally Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998).

66. *Id.* at 450–51.

67. *Id.* at 316.

68. *Id.* at 314–15.

Thus, as overseer of daily activity, promoter of civic participation, and supporter of fundamental rights, the city is well positioned to promote many of the dimensions of citizenship beyond legal status. Yet various city residents continue to face impediments to exercising these elements of citizenship.

## II. BARRIERS TO CITIZENSHIP

Many different marginalized and vulnerable groups are unable to exercise dimensions of citizenship. Part II begins with a discussion of barriers to citizenship for a variety of vulnerable groups and then turns to the special case of undocumented immigrants.

### A. Vulnerable Groups Generally

Academic scholars across fields argue that factors such as bias, discrimination, and special circumstances operate to deny different vulnerable or marginalized populations some of the rights and privileges to which they are equally entitled.<sup>69</sup> Several examples illustrated below demonstrate how elements of city life continue to marginalize certain groups, including racial and ethnic minorities, women, and people with disabilities.

Despite possessing the legal right to vote, some groups face challenges to participation in the political process. Throughout American history, various groups including African Americans have struggled to exercise their voting rights even after becoming legally entitled to them.<sup>70</sup> Legal scholars maintain that certain groups continue to face barriers to political participation. One such group is disabled Americans, who remain challenged by poorly selected voting locations with limited wheelchair accessibility, inadequate voting technology, and ignorant election officials, despite legislative efforts aimed at improving access.<sup>71</sup> Another scholar has shown that minority voters are more likely than white voters to move close to voter registration deadlines, thus missing their chance to vote in an election.<sup>72</sup>

Racial profiling and discrimination also inhibit certain minority groups from fully participating in American society. For instance, in a recent class action lawsuit certified against the New York City Police Department, African American and Latino plaintiffs argued that the city's stop and frisk procedures caused them to live in fear.<sup>73</sup> The mass incarceration of African Americans is another example because, not only are incarcerated African Americans unable to live as free citizens while in jail, but their opportunities

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69. See, e.g., Belt, *supra* note 38, at 1497–98; Roberts, *supra* note 38, at 1291; Sidhu, *supra* note 38, at 2.

70. See, e.g., *Voting Rights Act, Major Dates in History*, ACLU, <https://www.aclu.org/timelines/history-voting-rights-act> [https://perma.cc/HM2J-PYSK] (last visited Sept. 21, 2017) (describing the history of legislation meant to ensure “the right to vote is not denied on account of race or color”).

71. See Belt, *supra* note 38, at 1497–1504.

72. Andrea M. Lee, *Don't Save the Date: How More Restrictive State Voter Registration Deadlines Disenfranchise Minority Movers*, 43 COLUM. J.L. & SOC. PROBS. 245, 248 (2010).

73. See *Floyd v. City of New York*, 959 F. Supp. 2d 540, 557 (S.D.N.Y. 2013).

for economic advancement are often foreclosed by their criminal record upon exiting.<sup>74</sup>

### B. *The Special Case of Undocumented Immigrants*

In addition to the above challenges shared by citizens and noncitizens alike, undocumented immigrants face hurdles to city life that stem uniquely from their unlawful status. Part II.B turns to a discussion of these hurdles, explaining how limited legal protections, an emerging role for local actors in the enforcement of federal immigration law, and the rise in local immigration legislation combine to create additional challenges to city life for undocumented immigrant residents.

#### 1. The Consequences of Undocumented Status

Undocumented immigrants share similar impediments with their citizen-neighbors and encounter others that uniquely stem from their lack of lawful presence.<sup>75</sup> There are an estimated 11.1 million undocumented immigrants living in the United States today who can be deported by the federal government at any time.<sup>76</sup> While undocumented immigrants do not possess any of the rights or privileges that accompany legal U.S. citizenship,<sup>77</sup> the Supreme Court has recognized that undocumented immigrants are “persons” under the Constitution, entitled to both equal protection and due process of law.<sup>78</sup>

Beyond these constitutional protections, federal law makes undocumented immigrants ineligible for many federal public service programs, including the Supplemental Nutrition Assistance Program (SNAP) and nonemergency Medicaid, empowering state and local governments to do the same.<sup>79</sup> Additionally, even though undocumented immigrants constitute approximately five percent of the United States workforce,<sup>80</sup> it remains

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74. See Roberts, *supra* note 38, at 1293.

75. As discussed in Part I.B, citizenship is a multidimensional phenomenon that encompasses factors beyond legal status. Once that is understood, it is tempting to view undocumented status as merely one of many factors that can hinder citizenship. However, as Bosniak points out, the “hybrid legal status” of being undocumented is distinct from other forms of disadvantage because, unlike race or class, the federal government can lawfully discriminate based on legal status. See BOSNIAK, *supra* note 9, at 38. Thus, the relationship between undocumented status and U.S. citizenship is unique.

76. Jeffrey S. Passel & D’Vera Cohn, *Unauthorized Immigrant Population Stable for Half a Decade*, PEW RES. CTR. (Sept. 21, 2016), <http://www.pewresearch.org/fact-tank/2016/09/21/unauthorized-immigrant-population-stable-for-half-a-decade/> [https://perma.cc/5RU6-ZW24]. An estimated 850,000 undocumented immigrants currently reside in New York State. See *Profile of the Unauthorized Population: New York*, MIGRATION POL’Y INST. (2015), <http://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/NY> [https://perma.cc/UC5F-DX9Z].

77. See *supra* Part I.A.

78. See *supra* Part I.A.

79. See Stephen H. Legomsky, *Immigration, Federalism, and the Welfare State*, 42 UCLA L. REV. 1453, 1457 (1995).

80. See Jens Manuel Krogstad et al., *5 Facts About Illegal Immigration in the U.S.*, PEW RES. CTR. (Apr. 27, 2017), <http://www.pewresearch.org/fact-tank/2016/11/03/5-facts-about-illegal-immigration-in-the-u-s/> [https://perma.cc/8AKN-8Q8M].

illegal to hire them, and those who are employed enjoy fewer federal workplace protections than their lawfully present coworkers.<sup>81</sup>

Although all states have the same power to regulate the health, safety, and welfare of their residents, they have made very different decisions about what rights to grant undocumented residents.<sup>82</sup> For example, in New York State, undocumented immigrants have a right to emergency hospital care, worker's compensation, labor protections, state public benefits, and in-state tuition at the State University of New York so long as they attended a New York high school for at least two years.<sup>83</sup> By contrast, in Ohio, undocumented immigrant residents are not eligible for in-state tuition, scholarships, or state driver's licenses, and are not named as eligible for worker's compensation.<sup>84</sup> Under Ohio's public health system, undocumented children are not entitled to health insurance, and Medicaid is not available to undocumented pregnant women.<sup>85</sup>

An obvious alternative to living with an undocumented status would be to undergo the naturalization process and become a U.S. citizen. However, since 1986,<sup>86</sup> the federal government has failed to pass comprehensive immigration reform (CIR) or legislation providing for visas, paths to citizenship, and enforcement mechanisms,<sup>87</sup> essentially foreclosing the opportunity for today's undocumented immigrants to naturalize.<sup>88</sup> There are

81. While in the past workplace rights were frequently extended to undocumented immigrants, the Supreme Court weakened those protections when it held that undocumented immigrants were not entitled to monetary compensation after being illegally fired for supporting a union. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 140 (2002).

82. See, e.g., Haeyoun Park, *Which States Make Life Easier or Harder for Illegal Immigrants*, N.Y. TIMES (Mar. 29, 2015), [http://www.nytimes.com/interactive/2015/03/30/us/laws-affecting-unauthorized-immigrants.html?\\_r=0](http://www.nytimes.com/interactive/2015/03/30/us/laws-affecting-unauthorized-immigrants.html?_r=0) [<https://perma.cc/66YT-KM2V>].

83. See James L. Seward, *What Benefits Can Illegal Aliens Receive?*, N.Y. ST. SENATE, <https://www.nysenate.gov/newsroom/articles/james-l-seward/what-benefits-can-illegal-alien-receive> [<https://perma.cc/35U6-7N4T>].

84. MICHAEL A. RODRIGUEZ ET AL., GLOB. HEALTH INST., UNIV. OF CAL., *CREATING CONDITIONS TO SUPPORT HEALTHY PEOPLE: STATE POLICIES THAT AFFECT THE HEALTH OF UNDOCUMENTED IMMIGRANTS AND THEIR FAMILIES* 8 (2015), <http://healthpolicy.ucla.edu/publications/Documents/PDF/2015/immigrantreport-apr2015.pdf> [<https://perma.cc/U8AD-V953>].

85. *Id.*

86. The Immigration Reform and Control Act of 1986 (IRCA) included provisions prohibiting the hiring of illegal immigrants and employer sanctions, and it also legalized groups of undocumented immigrants provided they met certain criteria regarding length of residency, lack of criminal background, and an admission of guilt. See generally *Immigration Reform and Control Act of 1986*, Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.).

87. See *Comprehensive Immigration Reform*, MIGRATION POL'Y INST., <http://www.migrationpolicy.org/topics/comprehensive-immigration-reform> [<https://perma.cc/R8LE-3VJT>] (last visited Sept. 21, 2017) (describing CIR as legislation that "would marry increased border enforcement with legalization for unauthorized immigrants and the ability to bring in future workers needed by the U.S. labor market").

88. The last CIR bill proposed was the Border Security, Economic Opportunity, and Immigration Modernization Act, which included provisions for enhanced border protection as well as a means for undocumented immigrants to legalize after a ten-year probationary period known as "Registered Provisional Immigrant" status. See *Border Security, Economic Opportunity, and Immigration Modernization Act*, S. 744, 113th Cong. § 2101 (as passed by Senate, June 27, 2013); see also S. REP. NO. 113-40, at 83-86 (2013). The bill passed the

many reasons attributed to the government's inaction. Some argue that the federal government's refusal to address illegal immigration is motivated by the economic benefits it derives from exploiting undocumented immigrant labor,<sup>89</sup> while others take a more neutral position, asserting that the national sentiment toward immigration is simply too politically polarized to ever achieve national consensus.<sup>90</sup> Regardless of the justification, Congress's inability to pass CIR has, until recently, coincided with a steady increase in the number of undocumented immigrants in the country—a rising share of whom have lived in the United States for at least ten years.<sup>91</sup>

## 2. The Shift to Local Immigration Law Enforcement

Despite the failure of CIR, Congress has passed immigration-related legislation since 1986, but its focus has been on creating an increasingly enhanced role for state and local actors in immigration enforcement.<sup>92</sup> Following Congress's lead, the executive branch has also developed programs and authorized activity that empowered local actors to enforce civil and criminal immigration law.<sup>93</sup>

Congress first called on local cooperation in 1996 with the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).<sup>94</sup> IIRIRA expanded the role of local and state officials in enforcing federal immigration law in three ways. First, it added a provision to immigration law permitting the Attorney General to empower local officials to enforce civil immigration laws whenever there was “an actual or

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Senate on June 27, 2013, but died shortly thereafter when the House of Representatives refused to consider it. See Philip E. Wolgin, *2 Years Later, Immigrants Are Still Waiting on Immigration Reform*, CTR. FOR AM. PROGRESS (June 24, 2015), <https://www.americanprogress.org/issues/immigration/news/2015/06/24/115835/2-years-later-immigrants-are-still-waiting-on-immigration-reform/> [<https://perma.cc/S8QB-LQK3>].

89. See, e.g., Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 590 (2008) (“The federal government is therefore walking the line between giving full effect to the limitations it has set on immigrant admissions and thwarting the decisions and preferences of U.S. consumers, whose market preferences have helped give rise to the unauthorized population.”).

90. See generally S. Karthick Ramakrishnan & Pratheepan Gulasekaram, *The Importance of the Political in Immigration Federalism*, 44 ARIZ. ST. L.J. 1431 (2012).

91. In 1990, there were an estimated 3.5 million undocumented immigrants living in the United States, whereas today that number is closer to 11.3 million. See Krogstad et al., *supra* note 80. For an interesting discussion into potential causes for this increase, see generally Daniel Griswold, *Comprehensive Immigration Reform: What Congress and the President Need to Do to Make It Work*, 3 ALB. GOV'T L. REV. ix (2010). Griswold contends that the federal government's failure to pass CIR and its focus on enforcement has actually contributed to the growth of the undocumented immigrant population in the United States in two ways. *Id.* at xiv. First, harsher enforcement at the border has diverted smuggling routes to more remote areas which are, in turn, harder to police. *Id.* at xv. Second, the more difficult it becomes for immigrants to enter the country illegally, the more likely they are to stay once in the United States since they understand that if they leave again, they may not be able to return. *Id.* at xvi.

92. See Barbara E. Armacost, “Sanctuary” Laws: *The New Immigration Federalism*, 2016 MICH. ST. L. REV. 1197, 1205–1206.

93. See Jennifer M. Chacón, *The Transformation of Immigration Federalism*, 21 WM. & MARY BILL RTS. J. 577, 598 (2012).

94. Pub. L. No. 104-208, 110 Stat. 3009 (1996) (codified as amended in scattered sections of 8 and 18 U.S.C.).

imminent mass influx of aliens . . . requiring an immediate Federal response.”<sup>95</sup> Second, it added section 287(g) to the Immigration and Nationality Act, empowering trained local law enforcement officers to enforce federal immigration law.<sup>96</sup> Finally, it prohibited states and localities from barring employees from reporting immigration status data to the federal government.<sup>97</sup>

That same year, Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, which denied noncitizens public benefits and explicitly authorized state and local officials to do the same.<sup>98</sup> This act increased the burden on local actors because its passage meant that social service, healthcare, and education workers who provided federal services were also expected to verify immigration statuses and share that information with the federal government.<sup>99</sup> Congress also passed the Anti-Terrorism and Effective Death Penalty Act of 1996,<sup>100</sup> which included a provision that authorized state officers to arrest and detain noncitizens who had “previously been convicted of a felony in the United States.”<sup>101</sup> While some localities have nonetheless enacted local laws to protect the information of their undocumented residents,<sup>102</sup> these federal laws at a minimum marked an ideological shift among national legislators that local actors had a role to play in the enforcement of federal immigration laws.<sup>103</sup>

After September 11, 2001, the executive branch picked up where Congress left off, further empowering local actors through three main acts. First, Attorney General John Ashcroft issued a revised memorandum stating that state and local officials had inherent authority to arrest and detain violators

95. 8 U.S.C. § 1103(a)(10) (2012).

96. Immigration Reform and Immigrant Responsibility Act § 133, 110 Stat. at 3009-563 (codified at 8 U.S.C. § 1357(g) (2012)).

97. Pub. L. 104-208, § 642(c), 110 Stat. 3009, 3009-707 (1996) (codified as amended at 8 U.S.C. § 1373).

98. Pub. L. No. 104-193, § 400, 110 Stat. 2105, 2260 (1996) (codified as amended in scattered sections of 8, 26, 42 U.S.C.).

99. Jennifer Ridgley, *Cities of Refuge: Immigration Enforcement, Police, and the Insurgent Genealogies of Citizenship in U.S. Sanctuary Cities*, 29 URB. GEOGRAPHY 53, 61 (2008).

100. Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 8, 18, 22, 28, 42 U.S.C.).

101. 8 U.S.C. § 1252(c) (2012).

102. For example, New York City’s Executive Order No. 41, signed by Mayor Michael Bloomberg on September 17, 2003, prohibits city agency employees from inquiring about the immigration status of their applicants unless such an inquiry is required by law or to determine eligibility for a particular program. OFFICE OF THE MAYOR OF THE CITY OF N.Y., EXEC. ORDER NO. 41 (2003). In addition, it prohibits city employees from disclosing confidential information, including immigration status, unless required by law or:

In the case of information relating to immigration status, (i) the individual to whom such information pertains is suspected by such officer or employee or such officer’s or employee’s agency of engaging in illegal activity, other than mere status as an undocumented alien or (ii) the dissemination of such information is necessary to apprehend a person suspected of engaging in illegal activity, other than mere status as an undocumented alien or (iii) such disclosure is necessary in furtherance of an investigation of potential terrorist activity.

*Id.*

103. See Ridgley, *supra* note 99, at 59.



of the immigration laws, including civil laws.<sup>104</sup> Second, the Immigration and Naturalization Service (INS)<sup>105</sup> began to enter various categories of civil immigration information into the National Crime Information Center (NCIC) database, thereby providing law enforcement at various levels with the ability to access immigration information during routine police activity.<sup>106</sup> Finally, the attorney general and his staff began to attend local meetings and informally encourage state and local law enforcement officials to take part in immigration law enforcement efforts.<sup>107</sup>

In addition to these agency database and policy changes, perhaps the most controversial executive branch activity came from its development of two programs: the 287(g) and Secure Communities programs.<sup>108</sup> The 287(g) program was established by IIRIRA in 1996, but it was not until after September 11, 2001, that its provisions were first utilized.<sup>109</sup> It authorizes local and state law enforcement agents to enter into agreements with the federal government by executing Memoranda of Understanding (MOUs).<sup>110</sup> Once an MOU is established, local police officially possess the authority not only to enforce criminal immigration law but also to enforce civil immigration law so long as the local actors agree to be trained and supervised by Immigration and Customs Enforcement (ICE).<sup>111</sup>

As of August 2017, ICE has 287(g) agreements with sixty law enforcement agencies in eighteen states.<sup>112</sup> Although historically there were three types of 287(g) agreements,<sup>113</sup> all agreements in existence today fall under the “jail

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104. See Memorandum from Jay S. Bybee, Assistant Attorney Gen., Office of Legal Counsel, U.S. Dep't of Justice, to John Ashcroft, U.S. Attorney Gen. (Apr. 3, 2002), <https://www.aclu.org/files/FilesPDFs/ACF27DA.pdf> [<https://perma.cc/HG9P-GCKN>].

105. INS was the name of the federal agency tasked with immigration law enforcement prior to 2003 when it was dissolved and the majority of its functions were transferred to the three federal agencies in existence today—U.S. Citizenship and Immigration Services, U.S. Immigration and Customs Enforcement, and U.S. Customs and Border Protection—all of which operate under the Department of Homeland Security. See *Our History*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <https://www.uscis.gov/about-us/our-history> [<https://perma.cc/2BN5-WV68>] (last visited Sept. 21, 2017).

106. See Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084, 1086–87 (2004).

107. See *id.* at 1087.

108. See Armacost, *supra* note 92, at 1207–10.

109. See Chacón, *supra* note 93, at 602.

110. Developments in the Law, *Policing Immigrant Communities*, 128 HARV. L. REV. 1771, 1776 (2015).

111. *Id.* at 1776. This training was frequently criticized for being inadequate and ineffective, criticisms that were later corroborated by the federal government itself. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-109, IMMIGRATION ENFORCEMENT: BETTER CONTROL NEEDED OVER PROGRAM AUTHORIZING STATE AND LOCAL ENFORCEMENT OF FEDERAL IMMIGRATION LAWS (2009).

112. See *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT [hereinafter *Delegation of Immigration*], <https://www.ice.gov/factsheets/287g> [<https://perma.cc/EQ92-AAHR>] (last visited Sept. 21, 2017).

113. See *The 287(g) Program: An Overview*, AM. IMMIGR. COUNCIL 2 (Mar. 2017), [https://www.americanimmigrationcouncil.org/sites/default/files/research/the\\_287g\\_program\\_an\\_overview\\_0.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/the_287g_program_an_overview_0.pdf) [<https://perma.cc/29T4-CSMW>].

enforcement model.”<sup>114</sup> Under this model, local officers are empowered to interrogate individuals arrested on state or local charges about their citizenship status and to place immigration detainees on arrestees who they believe to be eligible for removal.<sup>115</sup>

A more recent executive branch program to further collaborate with local and state immigration law enforcement is the Secure Communities program.<sup>116</sup> Launched in 2008, the program requires local jails to share fingerprinting data with the federal government, which is then submitted and compared to the FBI’s criminal and ICE’s immigrant databases.<sup>117</sup> Thus, the program alerts the federal government whenever noncitizens are arrested and in the custody of local and state law enforcement.<sup>118</sup> Even though the federal government was explicit that this program would target only high-level offenders, many criticized the program, claiming that it was actually intended to facilitate the deportation of undocumented immigrants who either lacked criminal records altogether or whose criminal record consisted only of minor offenses, such as traffic violations.<sup>119</sup>

The Secure Communities program has proven instrumental in deportation efforts. By September 2011, ICE reported having received over 11 million fingerprint submissions, resulting in almost 700,000 database matches and the removal of more than 142,000 people.<sup>120</sup> Although the Secure Communities program was terminated in 2014 after significant criticism,<sup>121</sup> it was reactivated on January 25, 2017, following the inauguration of President Donald Trump.<sup>122</sup> Today, ICE reports that since its revival, the Secure Communities program has led to the removal of more than 10,290 “criminal aliens.”<sup>123</sup>

### 3. The Rise in Local Immigration Regulation and Questions of Federal Preemption

In addition to the federal government’s enlisting of local actors, and perhaps in response to it, unprecedented numbers of states and cities have

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114. *See Delegation of Immigration*, *supra* note 112.

115. *See id.*

116. *See* Michelle Waslin, *Secure Communities: A Fact Sheet*, AM. IMMIGR. COUNCIL (2010), <https://www.americanimmigrationcouncil.org/research/secure-communities-fact-sheet> [<https://perma.cc/8R68-5GJS>].

117. *Id.*

118. *Id.*

119. *See* Armacost, *supra* note 92, at 1210.

120. *See* Waslin, *supra* note 116.

121. *See* Armacost, *supra* note 92, at 1209.

122. Under the leadership of former President Barack Obama, the Secure Communities program was suspended and replaced by the Priority Enforcement Program (PEP), which sought to limit the former program’s reach by targeting individuals convicted of significant criminal offenses. *See Priority Enforcement Program*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <https://www.ice.gov/pep#wcm-survey-target-id> [<https://perma.cc/GD64-E4DA>] (last visited Sept. 21, 2017). PEP was terminated in 2017. *Id.*

123. *See Secure Communities*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <https://www.ice.gov/secure-communities> [<https://perma.cc/6PEP-TCT7>] (last visited Sept. 21, 2017).

also begun to make their own immigration law and policy.<sup>124</sup> In the first six months of 2007, for example, over 1400 immigration-related bills were introduced, more than 170 of which were enacted in forty-one states.<sup>125</sup> This was more than triple the number of state immigration laws enacted in the entire year of 2005.<sup>126</sup> For cities, by July 2007, one source documented over 250 local ordinances either in existence or under consideration.<sup>127</sup> While these policies have diverged in their intent and treatment of immigrant communities, they are united in that they represent powerful potential challenges to the federal monopoly over immigration regulation.<sup>128</sup>

Some local immigration laws and ordinances have adopted policies seeking to further exclude immigrants from their communities.<sup>129</sup> These policies take a variety of forms but generally seek to “enforce linguistic assimilation”; “deny constitutional and civil rights”; “prohibit ‘illegal immigrants’ from accessing public services, housing, and employment”; or any combination thereof.<sup>130</sup> Examples of such policies include laws prohibiting landlords from renting to undocumented immigrants or denying business licenses to employers who hire undocumented residents.<sup>131</sup> In addition, cities have sought to achieve similar exclusionary goals by way of facially neutral policies, such as an antiloitering law that targets undocumented day laborers who congregate while waiting for work.<sup>132</sup> Through these policies, localities further their role in immigration law enforcement indirectly by making life harder for immigrants and making them less likely to settle there.

#### 4. City Life for Undocumented Immigrant Residents

The blurring of roles between the federal government and local actors in immigration law enforcement poses substantial challenges for city communities.<sup>133</sup> Scholars and civil rights lawyers argue that these practices

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124. See Stephen W. Yale-Loehr & Ted J. Chiappari, *Immigration: Cities and States Rush in Where Congress Fears to Tread*, 34 CORNELL L.F. 8, 8 (2007).

125. *Id.*; see also Lisa Maria Garza, *Number of Immigration Measures Passed by U.S. States Jumps in 2013: Report*, REUTERS (Sept. 11, 2013), <http://www.reuters.com/article/us-usa-politics-immigrationlaws-idUSBRE98B03J20130912> [<https://perma.cc/2LKA-WWGF>].

126. See Yale-Loehr & Chiappari, *supra* note 124, at 8.

127. See *Database of Recent Local Ordinances on Immigration*, FAIR IMMIGR. REFORM MOVEMENT (2007), <http://www.ailadownloads.org/advo/FIRM-LocalLegislationDatabase.doc> [<https://perma.cc/N6KX-JAZ4>].

128. See Yale-Loehr & Chiappari, *supra* note 124, at 10–11.

129. See Jesse Newmark, *Legal Aid Affairs: Collaborating with Local Governments on the Side*, 21 B.U. PUB. INT. L.J. 195, 228 (2012).

130. Keith Aoki et al., *(In)visible Cities: Three Local Government Models and Immigration Regulation*, 10 OR. REV. INT'L L. 453, 481–82 (2008).

131. Newmark, *supra* note 129, at 228–29.

132. *Id.* at 229. For a discussion of the preemption doctrine’s application to city and state immigration policies, see generally Lauren Gilbert, *Immigrant Laws, Obstacle Preemption and the Lost Legacy of McCulloch*, 33 BERKELEY J. EMP. & LAB. L. 153 (2012).

133. See generally Orde F. Kittrie, *Federalism, Deportation and Crime Victims Afraid to Call the Police*, 91 IOWA L. REV. 1449 (2006); Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373 (2006).

increase civil rights violations by police<sup>134</sup> and disenfranchise immigrant members of the city community—consequences that hurt the public welfare, health, and safety of the entire city.

When undocumented immigrants are scared to interact with law enforcement, they become easy targets for criminal activity because their attackers know they are unlikely to report the crime.<sup>135</sup> One example is the domestic violence context, in which “[u]nauthorized alien women across the country are battered by spouses who exploit the women’s fear of deportation in order to continue the abuse.”<sup>136</sup> Undocumented immigrants are also frequently targets of scams promising status adjustment or legalization, of bribery by corrupt officials, and of labor exploitation by employers.<sup>137</sup> Not only does a lack of trust deter undocumented immigrants from reporting crimes against them, but it also makes it less likely that they will come forward to report crimes against others or to cooperate as witnesses.<sup>138</sup> This hinders local law enforcement’s ability to catch criminals and keep communities safe.<sup>139</sup> Congress itself has acknowledged this reality by creating special visa categories for undocumented-immigrant victims that report certain crimes, but these visas have not been able to counteract the reporting deterrent already caused by federal policies.<sup>140</sup>

Fear of deportation instills a lack of trust in public institutions beyond law enforcement, diminishing the public health and welfare of undocumented-immigrant communities.<sup>141</sup> When immigrants with serious and potentially contagious health problems are afraid to seek help for fear that hospitals and other public health centers will report them, they harm not only themselves, but also their family members, coworkers, neighbors, classmates, and any others who interact with them.<sup>142</sup> Undocumented immigrants may also be

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134. See, e.g., Armacost, *supra* note 92, at 1223–33 (arguing that the 287(g) and Secure Communities programs incentivize members of law enforcement to stop residents that they think might be undocumented, even if they would not have done so otherwise).

135. See Kittrie, *supra* note 133, at 1451–54.

136. *Id.* at 1451.

137. *Id.* at 1451–54.

138. *Id.* Statements from Mayor Bloomberg support this assertion. In a statement following the mayor’s signing of Executive Order 41 regarding city services for immigrants, he stated, “we all suffer when an immigrant is afraid to tell the police that she has been the victim of a sexual assault or domestic violence.” Mayor Michael R. Bloomberg, Remarks at Signing of Executive Order 41 (Sept. 17, 2003), <http://www1.nyc.gov/office-of-the-mayor/news/262-03/mayor-michael-bloomberg-signs-executive-order-41-city-services-immigrants> [<https://perma.cc/69UY-74V4>].

139. This argument is frequently used as a justification for sanctuary city policies. For example, when the Houston Police Department enacted its nonenforcement policy, a Houston Police Department representative stated, “[w]ithout the assurances they will not be deported, many illegal immigrants with critical information would not come forward” and “[p]olice depend on the cooperation of immigrant communities to help them solve all sorts of crimes and to maintain public order.” Peggy O’Hare, *Houston Police’s Policy on Immigrants: Hands Off*, HOUS. CHRON. (Mar. 3, 2003), <http://www.chron.com/news/houston-texas/article/Houston-police-s-policy-on-immigrants-hands-off-2109308.php> [<https://perma.cc/J4WD-KB87>].

140. See Kittrie, *supra* note 133, at 1454–55.

141. See Pham, *supra* note 133, at 1375.

142. *Id.* at 1400.

less likely to receive routine preventive care, increasing the likelihood that they will need to be hospitalized later on.<sup>143</sup> In addition, if parents are afraid to talk to their children's teachers and school administrators, this could hurt the success of their children, further hindering their ability to succeed and to assimilate into U.S. culture.<sup>144</sup>

Beyond public health, safety and welfare, critics of the 287(g) and Secure Communities programs argue that these programs incentivize officers to stop people who "appear" undocumented, leading to increased incidents of racial profiling and civil rights violations.<sup>145</sup> Although the federal government claimed that these programs were intended chiefly to target undocumented immigrants with serious criminal convictions,<sup>146</sup> a report submitted by the American Civil Liberties Union (ACLU) to the U.S House of Representatives Committee on Homeland Security in 2009 found that many undocumented immigrants sent to federal authorities as a result of the 287(g) program had actually committed only a minor crime, such as a traffic violation.<sup>147</sup> Utilizing data combined with various investigations throughout the country, the ACLU concluded that the 287(g) program was leading to illegal, race-based immigration law enforcement, including racial profiling.<sup>148</sup> Other critics of the program argue that ICE does not provide sufficient guidance or supervision to local law enforcement and that these programs are costly for localities to implement.<sup>149</sup>

Under the Obama administration, the federal government itself acknowledged the civil rights violations promoted by the Secure Communities and 287(g) programs.<sup>150</sup> In 2011, a Task Force on Secure Communities developed by the Homeland Security Advisory Committee issued a report identifying a disparity between the program's aim to target high-level offenders and its practices.<sup>151</sup> ICE itself acknowledged this finding in its response to the report a year later and announced new procedures that would aim to remedy this disparity.<sup>152</sup> Despite these acknowledgements, however, critics maintained that even under the revised

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143. *Id.* at 1400 n.126.

144. *Id.* at 1400.

145. *See, e.g.,* Armacost, *supra* note 92, at 1223–33.

146. *Id.* at 1210.

147. *See* ACLU, WRITTEN STATEMENT FOR A HEARING ON EXAMINING 287(G): THE ROLE OF STATE AND LOCAL ENFORCEMENT IN IMMIGRATION LAW 6 (2009), [https://www.aclu.org/files/images/asset\\_upload\\_file717\\_39062.pdf](https://www.aclu.org/files/images/asset_upload_file717_39062.pdf) [<https://perma.cc/35DN-X3Z2>].

148. *Id.* at 19–20.

149. *See The 287(g) Program: An Overview*, *supra* note 113, at 4–7.

150. HOMELAND SEC. ADVISORY COUNCIL, U.S. DEP'T OF HOMELAND SEC., TASK FORCE ON SECURE COMMUNITIES FINDINGS AND RECOMMENDATIONS 25 (2011), <https://www.dhs.gov/xlibrary/assets/hsac-task-force-on-secure-communities.pdf> [<https://perma.cc/U7CG-V7XZ>].

151. *See id.*

152. ICE OFFICE OF THE DIR., U.S. IMMIGRATION & CUSTOMS ENF'T, ICE RESPONSE TO THE TASK FORCE ON SECURE COMMUNITIES FINDINGS AND RECOMMENDATIONS 18 (Apr. 7, 2012), <https://www.dhs.gov/xlibrary/assets/hsac/ice-response-to-task-force-on-secure-communities.pdf> [<https://perma.cc/WL2T-M8MR>].

program, little progress was made in curbing unlawful police practices.<sup>153</sup> Under the Trump administration, known for its tough stance on immigration,<sup>154</sup> a continued effort at reforming the Secure Communities program seems unlikely.

### III. CITY EXPERIMENTATION

Given that a wide range of American residents today, including undocumented immigrants, face impediments to exercising elements of citizenship in the city, what can cities do? Part III begins with a discussion of scholarship addressing this question and argues that existing resolutions fail to recognize an affirmative role for cities in the citizenship space, regardless of federal immigration law. It next analyzes the IDNYC program to explore whether municipal identification-card programs can offer an alternative mechanism for addressing some of the impediments to citizenship undocumented city residents face.

#### A. Sanctuary Cities

One approach adopted by progressive cities in the face of federal immigration law has been to adopt noncooperation or “sanctuary city” policies.<sup>155</sup> While the concept of a sanctuary city actually predates the federal immigration law changes of 1986, a sanctuary city today is understood to mean a municipality that has refused to partake in actions that would contribute to the deportation of its undocumented residents.<sup>156</sup> Sanctuary policies come in a variety of forms, including city council resolutions, municipal ordinances, executive orders from city mayors, and local law enforcement memoranda.<sup>157</sup> Some policies also incorporate additional public health and welfare benefits or are simultaneously supported by other initiatives, such as educating public service employees on non-English languages or providing additional benefits to their undocumented immigrant residents that would not be available at the federal level.<sup>158</sup>

Localities that adopt sanctuary city policies publicly refuse to assist the federal government in the enforcement of federal immigration laws.<sup>159</sup> Such policies have been officially challenged only twice in the courts,<sup>160</sup> and

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153. See Armacost, *supra* note 92, at 1241.

154. See, e.g., Peter Baker, *Trump Supports Plan to Cut Legal Immigration by Half*, N.Y. TIMES (Aug. 2, 2017), <https://www.nytimes.com/2017/08/02/us/politics/trump-immigration.html> [https://perma.cc/JD6F-D392].

155. See Rose Cuison Villazor, *What Is a “Sanctuary”?*, 61 SMUL. REV. 133, 140 (2008).

156. *Id.* at 142.

157. See Kittrie, *supra* note 135, at 1474.

158. See Newmark, *supra* note 129, at 213–14.

159. See, e.g., Liz Robbins, *New York’s City Council Seeks to Bolster ‘Sanctuary City’ Status*, N.Y. TIMES (Apr. 26, 2017), <https://www.nytimes.com/2017/04/26/nyregion/new-york-city-council-sanctuary-city-bills.html> [https://perma.cc/7PA2-XRY7] (describing New York City’s recent efforts to expand protections for undocumented immigrants and describing New York City as one of the first cities to “enact laws limiting cooperation with federal immigration enforcement officials”).

160. See *City of New York v. United States*, 179 F.3d 29, 37 (2d Cir. 1999) (upholding the constitutionality of two federal immigration law statutes despite the city’s argument that it

neither case established a definitive answer as to their legality.<sup>161</sup> In the current political climate, the most frequent threat to sanctuary policies comes not from the courts, but from state and federal legislators threatening to cut or altogether withhold funding to localities that have adopted such policies.<sup>162</sup> Thus, while proimmigrant sanctuary city policies across the country have largely gone unchallenged, their strength remains vulnerable to changes in political leadership at both the state and federal levels.<sup>163</sup>

Professor Rose Cuison Villazor uses San Francisco's sanctuary city policy to demonstrate how such policies can bestow elements of citizenship on their residents.<sup>164</sup> Utilizing Bosniak's multidimensional theory of citizenship,<sup>165</sup> Villazor looks at the ways in which San Francisco's sanctuary city policy managed to promote alternative forms of citizenship for its undocumented residents, including what she terms "Citizenship as Rights," premised on the right not to be reported and thus to obtain full access to services within the city.<sup>166</sup> Villazor also discusses "Citizenship as Public Engagement," which she defines as the right to engage in public discourse<sup>167</sup> and "Citizenship as Identity," which she argues extended a sense of identity and belonging to the city's residents.<sup>168</sup> By refusing to assist the federal government in

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violated its sanctuary city policy); *see also* *Sturgeon v. Bratton*, 95 Cal. Rptr. 3d 718 (Ct. App. 2009) (upholding the constitutionality of the Los Angeles Police Department's sanctuary city policy in the face of a challenge by a city taxpayer).

161. For a discussion of the legality of sanctuary city policies, *see generally* Bill Ong Hing, *Immigration Sanctuary Policies: Constitutional and Representative of Good Policing and Good Public Policy*, 2 U.C. IRVINE L. REV. 247 (2012).

162. *See, e.g.*, Matthew Burns, *Proposal Would Punish 'Sanctuary Cities' in N.C.*, WRAL.COM (May 11, 2016), <http://www.wral.com/proposal-would-punish-sanctuary-cities-in-nc/15696381/> [<https://perma.cc/B6QH-65MU>] (tracking the progress of Senate Bill 868, sponsored by North Carolina Senator Buck Newton, which would deny road and school funding to any sanctuary cities in the state); *see also* Alan Neuhauser, *Sanctuary Cities Brace for Trump Crackdown on Immigration*, U.S. NEWS & WORLD REP. (Nov. 18, 2016), <http://www.usnews.com/news/national-news/articles/2016-11-18/sanctuary-cities-brace-for-trump-crackdown-on-immigration> [<https://perma.cc/J2TS-MA8E>].

163. The most recent presidential election provides a timely example. During his campaign, President Trump vowed to cut all federal funding to sanctuary cities, although he failed to detail which policies he would target or to provide an explanation for the legality of such an action. *See* Neuhauser, *supra* note 162. In April 2017, Attorney General Jeff Sessions announced that the federal government would begin to withhold grant money to cities that do not remove barriers to the enforcement of federal immigration law. *See* Charlie Savage, *Sanctuary Cities Face Aid Cuts as Justice Dept. Tightens Screws*, N.Y. TIMES (Apr. 21, 2017), <https://www.nytimes.com/2017/04/21/us/politics/sanctuary-city-justice-department.html> [<https://perma.cc/B7SK-MJD4>]. A similar order issued by the Trump administration in January 2017, however, was recently blocked from going into effect by a California judge who determined the order was likely to be found unconstitutional. *See* Dan Levine, *U.S. Judge Blocks Trump Order to Restrict Funding for 'Sanctuary Cities'*, REUTERS (Apr. 25, 2017), <http://www.reuters.com/article/us-usa-immigration-ruling-idUSKBN17R2QO> [<https://perma.cc/CWW5-CS74>].

164. Rose Cuison Villazor, *"Sanctuary Cities" and Local Citizenship*, 37 FORDHAM URB. L.J. 573, 575 (2009).

165. *See supra* Part I.B.

166. *See* Villazor, *supra* note 164, at 592–95.

167. *Id.* at 595–97.

168. *Id.* at 597.

immigration law enforcement, sanctuary cities bestow elements of citizenship on their undocumented city residents.<sup>169</sup>

Sanctuary city policies undoubtedly present a mechanism for cities to support their undocumented immigrant residents. However, such policies remain vulnerable to changing political landscapes, as the recent election of President Donald Trump has demonstrated.<sup>170</sup> Scholarship focused on sanctuary city policies neglects to consider how cities can and do promote the inclusion of all residents, including undocumented immigrant residents, while remaining within the purview of city power.<sup>171</sup> Municipal identification programs represent such an alternate possibility.

### B. New York City's IDNYC Program

As discussed in the Introduction, progressive cities across the country have begun to experiment with making a city identification card available to all city residents, irrespective of immigration status.<sup>172</sup> One such experiment is New York City's IDNYC program, which launched in January 2015 and which, as of March 31, 2017, has over 1 million enrollees.<sup>173</sup> As the largest municipal identification program in the country,<sup>174</sup> IDNYC offers a useful lens through which to analyze city identification-card programs generally. The problems New York City sought to remedy through IDNYC, its core features, challenges that arose during its design and implementation phases, and early data from the program's mixed-methods evaluation<sup>175</sup> all speak to the strength of these programs as city policy on a broader scale.

#### 1. Overview of IDNYC

Creating a municipal identification-card program was part of Mayor Bill de Blasio's campaign and became an immediate priority when he assumed office.<sup>176</sup> The bill, Introduction 253, was signed into law in July 2015 and shortly afterwards, Mayor de Blasio issued an order designating the New York City Human Resources Administration (HRA) to administer the program.<sup>177</sup> HRA released proposed regulations which underwent a period of notice and comment rulemaking and were ultimately issued in final form

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169. *Id.* at 597–98.

170. *See supra* note 163 and accompanying text.

171. *See* Parlow, *supra* note 45, at 373.

172. *See supra* Introduction.

173. *See Mayor de Blasio and Speaker Mark-Viverito Announce IDNYC Reaches 1 Million Cardholders*, NYC (Mar. 31, 2017) [hereinafter *IDNYC Reaches 1 Million*], <http://www1.nyc.gov/office-of-the-mayor/news/194-17/mayor-de-blasio-speaker-mark-viverito-idnyc-reaches-1-million-cardholders> [https://perma.cc/9SK5-BTD8].

174. *Id.*

175. *See* TAMARA C. DALEY ET AL., *IDNYC: A TOOL OF EMPOWERMENT: A MIXED-METHODS EVALUATION OF THE NEW YORK MUNICIPAL ID PROGRAM* 25 (2016), [https://www1.nyc.gov/assets/idnyc/downloads/pdf/idnyc\\_report\\_full.pdf](https://www1.nyc.gov/assets/idnyc/downloads/pdf/idnyc_report_full.pdf) [https://perma.cc/VEB5-H757].

176. *See* Solomon Interview, *supra* note 3.

177. *See* OFFICE OF THE MAYOR OF THE CITY OF N.Y., EXEC. ORDER NO. 6 (2014).



in November 2014.<sup>178</sup> The card officially became available to New Yorkers and within weeks, interest in the card so exceeded expectations that the city had to create what they called “pop-up” enrollment centers—additional short-term registration areas—in places with high demand.<sup>179</sup>

To apply for an IDNYC card, applicants are required to show proof of identity and address, which can be satisfied in part using foreign identification documents including a non-U.S. passport, driver’s license, or consular identification card.<sup>180</sup> Applicants are not asked about their immigration status, and the application information on the IDNYC website is available in over thirty languages.<sup>181</sup> Once obtained, the New York City Police Department, city agencies, and public buildings consider the IDNYC card an acceptable form of identification.<sup>182</sup> The card also functions as a library card, can be synced to the New York City Health and Hospitals medical records database, and provides prescription drug benefits and discounts at various gyms and entertainment centers throughout the city.<sup>183</sup> In addition, over forty cultural institutions offer free or discounted memberships to cardholders, and over a dozen banks and credit unions accept the card as proof of identity when cardholders apply to open a bank account.<sup>184</sup>

## 2. IDNYC’s Legislative History and Amendments Since Launch

The legislative history of IDNYC reveals that the program’s chief aim was to help New York City residents who needed a valid form of identification<sup>185</sup>—a need the city discovered was widespread.<sup>186</sup> While this undeniably applied to undocumented immigrants living in the city, of which there are an estimated 525,000,<sup>187</sup> a committee report on Introduction 253 also discusses many other groups of New Yorkers who are frequently unable to obtain a valid form of identification, including homeless residents, formerly incarcerated residents, youths, elderly people, and members of the LGBTQ community.<sup>188</sup> For example, the report states:

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178. See RULES OF THE CITY OF N.Y., tit. 68, § 6 (2017).

179. See Daley et al., *supra* note 175, at 6, 9.

180. *How to Apply: Document Calculator*, IDNYC, <http://www1.nyc.gov/site/idnyc/card/documentation.page> [https://perma.cc/V7LG-CBWN] (last visited Sept. 21, 2017).

181. See *How to Apply: Application Materials*, IDNYC, <http://www1.nyc.gov/site/idnyc/card/application-materials.page> [https://perma.cc/2Z98-23MP] (last visited Sept. 21, 2017).

182. *Benefits*, IDNYC, <http://www1.nyc.gov/site/idnyc/benefits/benefits.page> [https://perma.cc/7W9X-RXU3] (last visited Sept. 21, 2017).

183. *Id.*

184. *Id.*

185. See Daley et al., *supra* note 175, at 1.

186. See Solomon Interview, *supra* note 3.

187. See Jeffrey S. Passel & D’Vera Cohn, *20 Metro Areas Are Home to Six-in-Ten Unauthorized Immigrants in U.S.*, PEW RES. CTR. (Feb. 9, 2017), <http://www.pewresearch.org/fact-tank/2017/02/09/us-metro-areas-unauthorized-immigrants/> [https://perma.cc/KT58-Y8TS].

188. COMMITTEE REPORT, *supra* note 6, at i.

LGBTQ youth who are rejected by their family because of their sexual orientation and gender identity may end up homeless without any documentation to establish their identity. In New York State, the average age at which lesbian, gay, and bisexual youth become homeless is 14 and the average age that transgender youth become homeless is 13. The problems for transgender youth are often exacerbated. Like transgender adults, transgender youth struggle when trying to obtain appropriate identification that accurately reflects their gender.<sup>189</sup>

Not having proper identification proved to be a significant barrier for New Yorkers seeking to access a variety of services and even buildings within the city.<sup>190</sup> The report points out that identification is often required to access buildings, receive medical care, get prescriptions, and open a bank account.<sup>191</sup>

The widespread lack of identification card was also a challenge for the New York City Police Department whose officers are not permitted to issue summonses—even for low level violations such as riding a bike in violation of traffic rules or disorderly conduct—to anyone without an identification card.<sup>192</sup> The report further notes that “[p]eople rely on identification for a myriad of reasons, including . . . for their own self-esteem.”<sup>193</sup> Testimony from the hearing on Introduction 253 before the New York City Council Committee on Immigration provides further evidence of this need, as representatives from a wide range of organizations representing different localities within the city as well as different constituents including immigrants, the homeless, LGBTQ communities, and domestic violence victims, articulated support for the program.<sup>194</sup>

Throughout the program’s rollout and implementation, IDNYC program leaders learned just how great the need for identification was.<sup>195</sup> As previously mentioned, interest in the card far exceeded expectations and program leaders had to work quickly to expand their enrollment capacity.<sup>196</sup> In addition, the first year of the program’s existence shed light on the extent of the need in additional communities and groups.<sup>197</sup> According to Deputy

189. *Id.*

190. *Id.* at 2.

191. *Id.*

192. See N.Y.C. POLICE DEP’T, PATROL GUIDE PROCEDURE NO. 208-28, IDENTIFICATION STANDARD FOR DESK APPEARANCE TICKETS (2015); N.Y.C. POLICE DEP’T, PATROL GUIDE PROCEDURE NO. 208-08, PERSONAL SERVICE OF SUMMONSES RETURNABLE TO TRAFFIC VIOLATIONS BUREAU OF CRIMINAL COURT (2013).

193. See COMMITTEE REPORT, *supra* note 6, at 2 (quoting Christine Schanes, *Homeless People Need ID*, HUFFINGTON POST (Apr. 3, 2011), [http://www.huffingtonpost.com/christine-schanes/how-homeless-people-feel-\\_b\\_835216.html](http://www.huffingtonpost.com/christine-schanes/how-homeless-people-feel-_b_835216.html) [<https://perma.cc/P86V-TKUW>]).

194. See, e.g., *Hearing on Intro No. 253 to Create a New York City Identity Card Program Before the N.Y.C. Council Comm. on Immigration* (N.Y.C. 2014) (statements of Diana Reyna, Deputy Brooklyn Borough President and Virginia Goggin, Legal Director of N.Y.C. Gay and Lesbian Anti-Violence Project), <http://www.legistar.council.nyc.gov/View.ashx?M=F&ID=3096972&GUID=39A1E010-1D63-4D34-BE00-DBB231048F81> [<https://perma.cc/2L2K-GSV6>].

195. See Solomon Interview, *supra* note 3.

196. *Id.*

197. *Id.*

Director of Policy Sam Solomon from the Mayor's Office of Immigrant Affairs, one of the city's first-year observations was that some disconnected New York City youths need identification because they live apart from their families but are too young to get a driver's license.<sup>198</sup> This need is reflected in the amendments to the rules adopted in early 2016, which include an expanded definition of "caretaker," enabling underage residents to more easily meet the four-point identification requirement.<sup>199</sup>

Even as the city recognized that the need for identification did not lie solely within the city's immigrant population, IDNYC's marketing materials make clear that the program also has a purpose tied to undocumented immigrants.<sup>200</sup> For example, one of the stated goals of the program was to keep the card "stigma-free" so that the card would not immediately be associated with documentation status.<sup>201</sup> In his statements to the public relating to IDNYC, Mayor de Blasio has also emphasized the importance of the card for the immigrant community.<sup>202</sup>

### 3. City-Specific Adjustments

During the design and implementation phases of the IDNYC program, adjustments made to the program demonstrate that the city was ideally situated to remove the barriers identified, as many of them were New York City-specific.<sup>203</sup> According to Solomon, while doing research for the program, the city discovered that almost half of the adults living in New York City do not have a New York State driver's license.<sup>204</sup> Recognizing this helped to explain why the need for an identification card in New York City was so vast and the kinds of identification materials New York City residents were likely (or unlikely) to have when applying for a card.<sup>205</sup> These distinct characteristics were also factored into the city's marketing and outreach efforts and placement of pop-up centers.<sup>206</sup>

According to Solomon, size is another difference between New York City and other cities whose municipal identification-card programs they looked to

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198. *Id.*

199. See N.Y.C. Human Resources Administration, Notice of Public Hearing and Opportunity to Comment on Proposed Rule (Feb. 4, 2016), <https://www1.nyc.gov/assets/hra/downloads/pdf/news/notices/2016/feb/Notice%20of%20Hearing%20and%20Opportunity%20to%20Comment%20-%20Amendment%20of%20IDNYC%20Rule%20-%20C.pdf> [<https://perma.cc/WG6B-APAQ>].

200. See *About IDNYC*, IDNYC, <http://www1.nyc.gov/site/idnyc/about/about.page> [<https://perma.cc/V4P6-4ABR>] (last visited Sept. 21, 2017) (stating on the second line of the "About IDNYC" section "[i]mmigration status does not matter").

201. See Daley et al., *supra* note 175, at iii.

202. For example, in his forward to IDNYC's independent evaluation, Mayor de Blasio touts the program's success by noting that a quarter of IDNYC cardholders report the card as their only form of U.S. identification and that 77 percent of New York City's immigrants, both documented and undocumented, reported feeling a stronger sense of belonging. See Bill de Blasio, *Preface* to Daley et al., *supra* note 175.

203. Solomon Interview, *supra* note 3.

204. *Id.*

205. *Id.*

206. *Id.*

as a model.<sup>207</sup> For example, New Haven's identification program is administered out of one central building, a model that would have been impossible to imitate in New York City.<sup>208</sup> It would not have been reasonable, Solomon pointed out, to ask someone to come from the Bronx to New York City's city hall in downtown Manhattan, and, if the program had expected such of its applicants, it likely would not have had anywhere near as many enrollees as it did.<sup>209</sup> Ultimately, the city established eleven permanent enrollment centers and six nonpublic centers across the five boroughs.<sup>210</sup>

Another challenge for the IDNYC program arose from the vast array of diverse languages spoken by New York City's residents.<sup>211</sup> Whereas in New Haven, the population being served by its municipal identification program was largely Spanish speaking, Solomon pointed out that only providing application materials in English and Spanish would have excluded a huge portion of New York City's residents.<sup>212</sup> As proof of this challenge, IDNYC's website offers a manual detailing the IDNYC application process in over thirty languages.<sup>213</sup> According to Solomon, even with so many options, there are times when the IDNYC coordinators need to use language interpreters to meet the needs of an applicant.<sup>214</sup>

#### 4. Banks and Document Retention: Challenges to Be Determined

IDNYC has faced challenges since its launch. One of the most well-publicized challenges has been the program's early struggle to get the cooperation and support of the city's financial institutions.<sup>215</sup> IDNYC made the decision not to incorporate a debit card into its identification card, as other programs have, and to focus instead on partnering with banks in the city so that cardholders could set up bank accounts, a practice which encourages long-term savings.<sup>216</sup> Despite this goal, many of the largest banks and financial institutions in the city, including Bank of America and J.P. Morgan, refused to accept the IDNYC card as proof of identification, citing federal antifraud laws.<sup>217</sup> Even after federal regulators formally approved the

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207. *Id.*

208. *Id.*

209. *See id.*

210. *See* Daley et al., *supra* note 175, at 5.

211. Solomon Interview, *supra* note 3.

212. *Id.*

213. *See How to Apply: Application Materials*, *supra* note 181.

214. *See id.*; *see also IDNYC Program Language and Disability Access Plan*, IDNYC (Jan. 2, 2015), <https://www1.nyc.gov/assets/idnyc/downloads/pdf/language-disability-access-plan.pdf> [<https://perma.cc/PZ8C-96C2>].

215. *See* Michael Corkery & Jessica Silver-Greenberg, *Banks Reject New York City IDs, Leaving 'Unbanked' on Sidelines*, N.Y. TIMES (Dec. 23, 2015), [https://www.nytimes.com/2015/12/24/business/dealbook/banks-reject-new-york-city-ids-leaving-unbanked-on-sidelines.html?\\_r=0](https://www.nytimes.com/2015/12/24/business/dealbook/banks-reject-new-york-city-ids-leaving-unbanked-on-sidelines.html?_r=0) [<https://perma.cc/5JKF-ZGXB>].

216. Solomon Interview, *supra* note 3.

217. *See Mayor de Blasio Wants to "Educate" Banks That Refuse New Identity Card*, N.Y. BUS. J. (Dec. 24, 2015), <http://www.bizjournals.com/newyork/news/2015/12/24/mayor-de-blasio-wants-to-educate-banks-that-refuse.html> [<https://perma.cc/2PMG-VRP5>].

IDNYC card as acceptable identification to open a bank account, many banks continued to refuse, and Mayor de Blasio cannot compel them to accept the card.<sup>218</sup>

The refusal of major banks to accept the IDNYC card proved functionally and optically problematic.<sup>219</sup> Currently, thirteen banks and credit unions in New York City accept IDNYC as a primary form of identification to open a bank account.<sup>220</sup> However, misinformation surrounding which banks would accept the card in the early stages of the card's implementation caused confusion and even embarrassment for some IDNYC cardholders who found themselves turned away from banks when trying to use their IDNYC as identification.<sup>221</sup>

More recently, IDNYC has also faced challenges to its document retention policy.<sup>222</sup> This policy empowers HRA to destroy application documents after two years if it determines that keeping the documents is no longer necessary and to reassess and make any changes to the policy that the agency deems necessary at the two-year mark.<sup>223</sup> The policy was built into the program as a way to ensure security, verify identify, and to provide an opportunity for review of the necessity of such retention in light of the need to protect the privacy of applicants.<sup>224</sup>

Shortly before the end of 2016, when the underlying documents used to demonstrate identity and eligibility were to be destroyed, two Republican members of the New York State Assembly, Ron Castorina Jr. and Nicole Malliotakis, filed a Freedom of Information Law (FOIL) request for all IDNYC applicant records.<sup>225</sup> When their request was denied, they filed suit, and on April 3, 2017, a Staten Island judge denied the request and refused to

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218. See Andrew J. Hawkins, *Feds Give Municipal ID Thumbs-Up, But Warn It May Not Be Enough for Some Banks*, CRAIN'S (July 28, 2015), <http://www.craainsnewyork.com/article/20150728/BLOGS04/150729865/feds-give-municipal-id-thumbs-up-but-warn-it-may-not-be-enough-for-some-banks> [https://perma.cc/9LJM-UK33].

219. See Daley et al., *supra* note 175, at iv.

220. See *Benefits: Banks and Credit Unions*, IDNYC, <https://www1.nyc.gov/site/idnyc/benefits/banks-and-credit-unions.page> [https://perma.cc/NBC2-DDCD] (last visited Sept. 21, 2017).

221. See, e.g., Daley et al., *supra* note 175, at 23.

222. See Liz Robbins, *New York City Should Keep ID Data for Now, Judge Rules*, N.Y. TIMES (Dec. 21, 2016), <http://www.nytimes.com/2016/12/21/nyregion/new-york-city-should-keep-id-data-for-now-judge-rules.html> [https://perma.cc/UE32-RVDT].

223. RULES OF THE CITY OF N.Y., tit. 68, § 6-11(b) (2017). (“On or before December 31, 2016, HRA will review data collected in the report described in section 3-115(h) of the Administrative Code and make a determination regarding the continuing need to retain records pursuant to section 3-115(e)(1) of such code in order to effectively administer the IDNYC Card Program and will make any appropriate modifications to the policy for retention of records related to the IDNYC Card Program.”).

224. See Solomon Interview, *supra* note 3. The decision to keep documents in the first place was controversial and elicited criticism by groups concerned with privacy. See, e.g., Johanna Miller, *Statement of the NYCLU Regarding the New York City Municipal ID Bill*, NYCLU, <http://www.nyclu.org/content/statement-of-nyclu-regarding-new-york-city-municipal-id-bill> [https://perma.cc/5KD9-TBS5] (last visited Sept. 21, 2017).

225. See *In re Ronald Castorina, Jr.*, No. 80258/16, slip op. at 6 (N.Y. Sup. Ct. Apr. 3, 2017).

order the city to produce the records.<sup>226</sup> Although an appeal of this decision was recently dismissed, Castorina and Mallitakis have since filed a second suit.<sup>227</sup> Although this case is still pending, lawyers for the city maintain that the document request is unnecessary and inappropriate under state law, a statement supported by the New York State Attorney General.<sup>228</sup>

Beyond these two issues, the program has not faced significant opposition, interference, or challenges of preemption.<sup>229</sup> Following the launch of IDNYC, one New York State legislator sponsored a bill that would prohibit municipalities from creating municipal identification cards, but it was never passed.<sup>230</sup>

Despite these challenges, the IDNYC program has managed to continuously expand the number of cardholders enrolled in the program and the benefits associated with the card.<sup>231</sup> Data from the Mayor's Office of Immigrant Affairs and media reports also indicate that the program has been successful in reaching and enrolling the immigrant community.<sup>232</sup>

#### IV. THE CITY TRANSFORMED

The case study analysis of New York City's IDNYC program reveals that cities can bestow a form of citizenship—Affirmative City Citizenship—on their residents. Part IV draws on lessons from New York City's experiment to draw broader conclusions about the strengths and limits of Affirmative City Citizenship as a means for progressive cities to support their undocumented immigrant residents.

##### A. Affirmative City Citizenship

Through its IDNYC program, New York City became an actor in the citizenship space. The problems the city identified associated with a lack of identification, including an inability to enter public buildings or to interact easily with law enforcement,<sup>233</sup> are not mere inconveniences. Instead, they

226. *See id.* at 19.

227. *See* Nicholas Rizzi, *IDNYC Data Not Shredded Yet as New Lawsuit Keeps Personal Info in Limbo*, DNAINFO (May 2, 2017), <https://www.dnainfo.com/new-york/20170502/st-george/idnyc-document-destroy-manhattan-supreme-court-shred> [https://perma.cc/U2VP-A245].

228. *See* Robbins, *supra* note 222.

229. *See* Solomon Interview, *supra* note 3.

230. Bill A03687, sponsored by New York State Assembly Member Kieran M. Lalor, would “prohibit[] municipalities from issuing government identification cards to illegal aliens.” N.Y. State Assemb., 2015-2016-A03687, Reg. Sess. (N.Y. 2015). This bill was sent to Committee in January 2015 and on January 27, 2015, it was “referred to local governments.” *See A03687 Summary*, N.Y. ST. ASSEMBLY, [http://nyassembly.gov/leg/?default\\_fld=&leg\\_video=&bn=A03687&term=2015&Summary=Y&Actions=Y&Committee%26nbspVotes=Y&Floor%26nbspVotes=Y&Memo=Y&Text=Y](http://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A03687&term=2015&Summary=Y&Actions=Y&Committee%26nbspVotes=Y&Floor%26nbspVotes=Y&Memo=Y&Text=Y) [https://perma.cc/HLU9-34KU] (last visited Sept. 21, 2017).

231. *See IDNYC Reaches 1 Million*, *supra* note 173.

232. *See, e.g.*, Samar Khurshid, *New Data Indicates IDNYC Popularity Among Immigrants*, GOTHAMGAZETTE (Jan. 14, 2016), <http://www.gothamgazette.com/index.php/government/6085-new-data-indicates-idnyc-popularity-among-immigrants> [https://perma.cc/SV7S-5846].

233. *See supra* Part III.B.2.

directly correlate with many of the key elements of multidimensional citizenship identified by Bosniak and others, such as the right to participate in local politics; the confidence to fully engage with city services, cultural centers, and law enforcement; and the simple ability to feel like a welcome member of the community.<sup>234</sup>

By offering an identification card that facilitates access to banks, city agencies, public buildings, cultural centers, and law enforcement, New York City opens pathways to civic participation and engagement that can be blocked for even U.S. citizens. Beyond undocumented immigrants, New York City found a need for identification among various other groups, including the city's homeless, elderly, and LGBTQ youth population.<sup>235</sup> Without an identification card, these groups cannot attend a meeting in city hall or open a bank account.<sup>236</sup> The IDNYC program not only removes these barriers, but it also sends a message to the members of these groups, many of whom are marginalized from city life for a variety of reasons, that their participation matters. In doing so, New York City bestows a form of citizenship on its residents.

This citizenship bestowed onto New Yorkers by the IDNYC program is "affirmative" because it is not crafted solely with the aim of resisting federal immigration policy. Instead, Affirmative City Citizenship proactively "adds on" to the existing rights and privileges of all city residents, regardless of their legal standing with the federal government.<sup>237</sup> In this way, Affirmative City Citizenship policies are distinct from other proimmigrant local policies because they do not embrace a policy of noncooperation toward the federal government. These policies treat undocumented status as just one of many factors that can act as a barrier to city life, and in doing so, they allow for a more peaceable coexistence with federal law.

How does this Affirmative City Citizenship stand up against a lawful immigration status conferred by the federal government? The short answer is that it does not. Local efforts at supporting undocumented immigrants can never replace or be a substitute for a lawful status bestowed by the federal government. Even so, there are reasons to believe that Affirmative City Citizenship is a powerful tool to support undocumented immigrant city residents. First, because local governments exercise power over the areas of governance most immediately related to daily life,<sup>238</sup> the impact of city policies that improve access to these services for undocumented immigrant residents is likely to be significant. Second, because goals such as building a relationship of trust with local government and law enforcement are central to effective local governance,<sup>239</sup> cities have leeway to address these issues while still falling within traditional city powers. Affirmative City Citizenship

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234. *See supra* Part I.B; *see also* Villazor, *supra* note 164, at 592–95.

235. *See supra* Part III.B.2.

236. *See id.*

237. *See, e.g., supra* note 200 and accompanying text.

238. *See supra* Part I.C.1.

239. *See supra* notes 138–41 and accompanying text.

policies, then, are strong in the face of legal challenges or attempted interference by state or local actors.

Affirmative City Citizenship policies are not only legally strong but also justified for two reasons. First, the federal government's refusal to comprehensively address the large undocumented immigration population has created serious challenges for city governments seeking to protect the public health, welfare, and safety of their constituents.<sup>240</sup> Second, accepting the assertion that rights require local adaptation,<sup>241</sup> local governments will always be critical to ensuring that rights transition from ideals to realities. Since local governments legislate in the closest proximity to their constituents,<sup>242</sup> cities may have an inherent obligation to enact policies that promote rights and civic engagement, regardless of federal policies.

### *B. Limitations of Affirmative City Citizenship*

While Affirmative City Citizenship is powerful in its own right, it is not a substitute for legal citizenship status. As Part II demonstrated,<sup>243</sup> many of the challenges faced by undocumented immigrants in the city space arise out of a fear that interacting with city institutions and services will result in their prosecution and deportation. While Affirmative City Citizenship can seek to overcome this boundary by providing a discreet way for undocumented immigrants to interact with city institutions, the importance of federal comprehensive immigration reform and legal pathways to citizenship cannot be overstated.

The importance of trust with city officials for effective Affirmative City Citizenship policies also hints that their success among undocumented immigrants is reliant, in part, on a coexistence with sanctuary city policies. While nothing in municipal identification-card policies relate to the enforcement of immigration laws, IDNYC's goal of trust with local law enforcement would have been significantly harder to achieve if New York City did not have a long history of declining to conduct immigration enforcement and taking actions to protect its immigrant residents.<sup>244</sup> In spite of this history, IDNYC's evaluation found that "the single greatest reason people hesitated to get the ID was related to concerns that it was being used to monitor New Yorkers."<sup>245</sup> Thus, if New York City had not had such a longstanding proimmigrant stance, it would be even less likely that undocumented immigrants would feel safe turning over their documents to apply for an identification card.

Since this Note has focused on a city with both types of policies in place, the extent of these identification-card programs' reliance on sanctuary city

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240. *See supra* Part II.B.4.

241. *See supra* Part I.C.2.

242. *See supra* Part I.C.2.

243. *See supra* Part II.B.4.

244. *See supra* note 102 and accompanying text.

245. Daley et al., *supra* note 175, at iv. This fear has likely been revived by the current media attention given to IDNYC's document retention litigation, regardless of its legal outcome. *See, e.g.*, Robbins, *supra* note 222.



policies cannot be conclusively determined. Such a finding, however, simply leads to the conclusion that cities contemplating adopting municipal identification-card programs as a means of helping undocumented immigrants should do so together with other policies that promote a sense of trust with local government and law enforcement.

#### CONCLUSION

Cities today play a central role in the lives of American residents, citizen and noncitizen alike. As spaces where residents exercise many of the elements of multidimensional citizenship, the city can promote citizenship for all residents, regardless of immigration status. New York City's IDNYC program aims to do just that. In doing so, it becomes an actor in the citizenship space. The Affirmative City Citizenship it creates challenges traditional understandings of legal citizenship and offers a promising way for local governments to support their undocumented immigrant residents.

From the inception of this Note through the time of its publication, the environment surrounding U.S. immigration law and policy has changed drastically. Sanctuary cities now face immediate threats to their federal funding and the goal of achieving comprehensive immigration reform seems even less likely than under the Obama administration. This changing political climate has undoubtedly increased the vulnerability of the undocumented immigrant population. It follows that cities seeking to support their undocumented immigrant residents must be more committed now than ever.