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Expression by Ordinance: Preemption and Proxy in Local Legislation

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ABSTRACT

Local laws based on immigration status have prompted heated national debate on federalism and discrimination. A second strain of nuisance-related legislation has emerged in recent years, which often targets these same immigrant communities. This article examines the hitherto-understudied correlation between ordinances explicitly related to immigrants and legislation regarding nuisance—as illuminated through first-time primary research into municipal legislation across the nation. Evaluating these laws and the context of their enactment, this research shows when and how nuisance laws target certain populations. Ultimately, this inquiry reveals troubling parallels to previous community responses to disfavored subgroups and the harm resulting from proxy legislation.

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I. INTRODUCTION

At the public hearing preceding the enactment of one of the strongest anti-blight ordinances in the country, a single table of brown folks stood out in the large room amidst an otherwise white audience. One brown woman, a resident of East Haven, rose. She approached the podium and asked why the legislation under consideration failed to define blight and what the drafters imagined such a definition to mean. In response, one of the drafters explained the expansive provisions of the proposed law: "We are not just going after blight, but also quality of life."

Almost everybody in the room knew what he meant. Against a backdrop of a community divided by reactions to the new immigrant population, a fissure no longer abstract after allegations of race-based enforcement by the police department,[1] East Haven residents had no illusions about the fact that protecting "quality of life" meant strengthening legal tools to use against the

1. These allegations were well-founded, corroborated by the recent opening of a Department of Justice investigation into the pattern and practice of racial profiling, reports of local hate-crimes and retaliation against immigrant businesses, and the vibrant debate in more informal community forums. *See* Nina Bernstein, *Connecticut Town Grapples with Claims of Police Bias*, N.Y. TIMES, Apr. 23, 2010, at A20.

new immigrant community.[2]

Legislatively constructing a legal framework to protect local preferences is nothing new. Decades ago, when the City of Jackson, Mississippi closed the municipal pools for reasons of "local policy"—referencing financial constraints and preservation of peace—everybody in Jackson knew what that meant, too.[3] After a contentious, race-inflected battle with plaintiffs seeking to desegregate Jackson's public facilities, the city opted to close the pools rather than operate integrated pools that would allow "intermingling."[4] On its face, this municipal decision was devoid of racial implications; the Mayor simply made a budgetary choice to cease operation of public facilities that had long operated at a deficit. In context, however, it was clear that this was an act of defiance against the *Brown* decision[5] and that race was actually the motivating factor.

In both East Haven and Jackson, the cities' actions evinced no clear relationship to protected characteristics,[6] but discrimination underlay the purpose and the impact of the action nonetheless.[7] These cases show how, whereas explicit classification on the basis of characteristics like race and national origin may warrant heightened scrutiny when confronted by anti-discrimination laws, prejudice—and the actions it inspires—can oftentimes be far more difficult to challenge through traditional equal protection tests.

This article identifies and examines a recent and relatively unexamined strain of seemingly innocuous nuisance legislation, and offers, for the first time, data describing this trend and suggesting that disturbingly discriminatory motivations may underlie these local decisions. Under-examined and ill-adjudicable, the ordinances at issue in this study characterize a trend that

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2. Divorced from the controversies dividing the East Haven community, the discrimination based on race, differentiation between new and old residents, and the use of state authority against local residents, the quality of life aspect of the blight ordinance might appear unremarkable.

3. Paul Brest, Palmer v. Thompson: *An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95, 95 (1971).

4. *Id.* at 96-97 (describing Jackson's legal battles with plaintiffs seeking to enforce the Supreme Court's desegregation decrees in *Mayor and City Council of Baltimore v. Dawson*, 350 U.S. 877 (1955), and *Holmes v. City of Atlanta,* 350 U.S. 879 (1955)).

5. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

6. "Protected characteristic" refers to traits, including race, national origin, and gender, that are not considered to be constitutionally permissible grounds for discrimination. U.S. CONST., amend. XIV, § 1. In the case of Jackson's municipal action, the trait at issue was race. In the case of East Haven, the municipal action might be described as targeting race, national origin, or ethnicity, depending on both the way that Hispanic or Latino communities are identified and the challenger's view of the city's intent.

7. *See* Brest, *supra* note 3 (discussing discriminatory purpose behind the Jackson pool closure); Mark Spencer, *East Haven Police Draw Civil Rights Scrutiny*, HARTFORD COURANT, Dec. 13, 2009 (discussing the hearing on the blight ordinance); Town Council Meeting, Aug. 4, 2009, http://easthavenpolitics.blogspot.com/ (on "2009" page) (providing video of the public hearing on the blight ordinance in which community members ask how the code enforcement officers will handle calling Homeland Security to deal with "immigrants that we (a) don't want here and (b) don't take care of their property?" to which the speaker for the city assures her that there can be actors involved from the local, state, and federal levels, thereby suggesting that this blight enforcement relates to immigration enforcement).

is unforeseen but not unprecedented.[8] This study identifies municipalities that appear to have invoked nuisance law as a form of local expression, employing lawmaking as a mechanism of self-definition—the significance of which is inextricable from its social and historical context. Understanding the multi-layered meaning of this type of legislation both bolsters claims of discriminatory motivation and explains the extent of the damage to which such proxy legislation[9] gives rise.[10]

This article is comprised of four parts. The first section begins by sketching out the background questions in the local ordinance debate, a debate which is overwhelmingly focused on ordinances that seek to regulate and discriminate on the basis of immigration status.[11] The second section describes the correlation between ordinances explicitly related to immigra-

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8. *See, e.g., infra* note 84 (describing use of nuisance law to regulate actions of the new immigrant community in Chicago at the turn of the century). These ordinances may be understood as one type of the local self-definition and local-national norm-negotiation described and theorized in Rick Su's scholarship. *See* Rick Su, *Local Fragmentation as Immigration Regulation*, 47 HOUS. L. REV. 367, 372-73 (2010) [hereinafter Su, *Local Fragmentation*] (drawing upon longstanding principles of community organization and membership to argue that local legislation regulating immigration is yet another point along "an expansive spectrum of legal techniques by which we demarcate, define, and enforce the role of space and community in American society"); Rick Su, *Localist Reading of Local Immigration Regulations*, 86 N.C. L. REV. 1619, 1624 (2008) [hereinafter Su, *Localist Reading*] (arguing that immigration-regulating ordinances are not merely an expression of dissatisfaction with federal immigration enforcement, but instead "products of, and complicated by, how localism organizes and defines the powers and interests of local governments"); Rick Su, *Notes on the Multiple Facets of Immigration Federalism*, 15 TULSA J. INT'L L. 179 (2008) [hereinafter Su, *Notes*].

9. Deborah Hellman, *Two Types of Discrimination: The Familiar and the Forgotten*, 86 CALIF. L. REV. 315, 318 (1998) (defining "proxy discrimination" as the "use[] [of] one identifying characteristic as a proxy for another").

10. A forthcoming article by Mary D. Fan, *Post-Racial Proxies: Resurgent State and Local Anti-Alien Laws and Alternate Frames for Anti-Discrimination Values*, notes the long-standing use of proxy legislation to effect racialized ends and argues that the current doctrinal analysis, which skirts the potentially divisive issue of race, should focus instead on potentially cohesion-inducing equality principles. 32 CARDOZO L. REV. (forthcoming 2011).

11. "Immigration status," as used in this article, means a person's legal status under federal immigration law; this might include citizenship, long-term permanent residency, no status (i.e. not in compliance with federal immigration law), or a range of other work and circumstance-specific statuses. Immigration status is not considered an immutable characteristic and is generally considered to be grounds for differential treatment. Plyler v. Doe, 457 U.S. 202, 219 (1982) (rejecting the contention that undocumented immigrants are a suspect class). However, discrimination by local actors (generally not trained in the intricacies of federal immigration law) is problematic because, as a practical matter, decisions are often made based on *perceptions* about a person's immigration status. *See* Kevin Johnson, *How Racial Profiling in America Became the Law of the Land:* United States v. Brignoni-Ponce *and* Whren v. United States *and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1038 & n. 196 (explaining that "'[i]llegal alien' profiles usually rest at least in part on the stereotype that Latino/as are 'foreigners' of suspect immigration status" and explaining the fallacy of this assumption). These perceptions are based upon a person's ethnicity, national origin, race, and language capability. *See id.* at 1043 (noting that this practice often results in those local actors who, in "exercising immigration enforcement power[,] unfortunately engage in racial profiling and similar misconduct directed at minority communities"); U.S. GEN. ACCOUNTING OFFICE, REPORT TO CONGRESS, IMMIGRATION REFORM: EMPLOYER SANCTIONS AND THE QUESTION OF DISCRIMINATION 38-39 (1990) (finding a "widespread pattern of discrimination" in that ten percent of employers engaged in national origin discrimination by, for example, making determinations based on workers appearing or sounding foreign). *See* Sec. IV.B for an explanation of how immigration-status classifications, while not protected per se, may nonetheless trigger decision-making based on characteristics like race and national origin.

tion status and legislation regarding nuisance and blight through primary research into municipal legislation in sixty-three towns and cities across the nation. This data reveals when and in what contexts nuisance laws target certain populations by examining the way that nuisance is defined and evaluating it together with information about the environment in which it was enacted. The third section situates this new strain of legislation within the history of nuisance regulation, revealing troubling parallels to previous community responses to disfavored subgroups and elaborating the harms resulting from this particular brand of proxy legislation. The fourth section concludes by considering these local laws under current equal protection law and theories of discrimination and argues that the prevailing tests are ill-suited to this type of situation involving discrimination that does not explicitly distinguish on the basis of a protected trait. Ultimately, this research provides a basis for a more nuanced understanding of the way that isolationist sentiment and discrimination against new immigrant communities manifests by showing how local lawmakers impose facially neutral laws and shape community standards that disproportionately, negatively impact—or indeed target—immigrant community members.

II. BACKGROUND: LOCAL REGULATION RELATED TO IMMIGRATION STATUS

Despite the formally federal nature of immigration law, much of the real debate on these issues is currently playing out at the local level.[12] Those on both sides of the debate, whether for or against increased regulation at the local level, have expressed opinions through municipal legislation—ordinances and resolutions—that establish local codes of conduct that shape the environment in which all community members live.[13] This section describes the type of local legislation at the heart of the current controversy, explains its significance within the national dialogue on immigration issues, and describes the key concern regarding these ordinances: their propensity to

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12. This section briefly explains this debate for the purposes of contextualizing the study, which is the focus of this article. There is a wealth of scholarship on the many facets of this debate that are well beyond the scope of this article. *See, e.g.*, Michael Almonte, Note, *State and Local Law Enforcement Response to Undocumented Immigrants: Can We Make the Rules, Too?*, 72 BROOKLYN L. REV. 655 (2007); Michael A. Olivas, *Immigration-Related State and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement*, 2007 U. CHI. LEGAL F. 27; Mark S. Grube, Note, *Preemption of Local Regulation beyond* Lozano v. Hazelton*: Reconciling Local Enforcement with Federal Immigration Policy*, 95 CORNELL L. REV. 391, 422-24 (2010); Rigel C. Oliveri, *Between a Rock and a Hard Place: Landlords, Latinos, Anti-Illegal Immigrant Ordinances, and Housing Discrimination*, 62 VAND. L REV. 55 (2009) (arguing that anti-immigrant housing ordinances will lead to discrimination and subject landlords to suit for discrimination); Huyen Pham, *The Private Enforcement of Immigration Laws*, 96 GEO. L.J. 777, 782 (2008) (finding that local laws requiring employers to make determinations as to immigration status has lead to "increased discrimination [] toward job applicants who look or sound foreign"); Careen Shannon, *Regulating Immigration at the State Level: A Focus on Employment*, 3 ALB. GOV'T L. REV. 219 (2010).

13. *See* Su, *Local Fragmentation*, *supra* note 8 (explaining how localities define and determine their community through such ordering legislation); Su, *Localist Reading*, *supra* note 8 (same); Su, *Notes*, *supra* note 8 (same).

foster and facilitate discrimination against immigrant community members.[14]

Through these ordinances, municipalities have staked out positions on a spectrum of solicitude toward immigration enforcement, ranging from directives disavowing local participation in federal immigration law,[15] to mandates directing local authorities to actively enforce immigration law.[16] At the core of this conversation is a question fundamental to federalism itself: whether these local laws infringe on federal authority or merely constitute the lawful exercise of municipal regulatory power. This controversy, a central issue in the present immigration debate, remains unresolved, as evidenced by the unsettled law across various circuits.[17]

The Supreme Court recently granted certiorari on the issue of federal preemption, meaning that the prospect of a clearer and more cohesive guide for local laws overtly regulating on the basis of immigration status is now on the horizon.[18] This case, *Candelaria v. Chamber of Commerce*, presents a challenge to Arizona's Legal Arizona Workers Act, which requires employers to determine workers' immigration status by sanctioning those who hire undocumented workers.[19] Soon after this law was enacted, a coalition of business and civil-rights organizations joined in a facial challenge to this law, arguing that it was preempted by federal immigration law, and filed suit against state officials responsible for the Act's enforcement.[20] The district court upheld the Arizona law, finding that it was neither expressly nor implicitly preempted by federal immigration law.[21] On appeal, the Ninth Circuit affirmed the district court's decision, but noted that an as-applied challenge might come out differently.[22] In June of 2010, amidst national debate and a split amongst circuits, the Supreme Court granted certiorari,

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14. *See infra* note 30 (explaining how, at a practical level, these ordinances may result in discrimination).

15. *See, e.g.*, Cambridge, Mass., Amended Order O-16 (May 8, 2006) (reaffirming status as sanctuary city, supporting comprehensive immigration reform, and calling for moratorium on immigration raids).

16. See, *e.g.*, Farmers Branch, Tex., Ordinance 2892 (Nov. 13, 2006) (requiring landlords to verify immigration status); Farmers Branch, Tex., Res. 2006-99 (Sept. 5, 2006) (urging stronger enforcement of federal immigration law).

17. Lozano v. Hazleton, 620 F.3d 170 (3d Cir. 2010) (finding local ordinance preempted by federal immigration law); Chicanos Por La Causa v. Napolitano, 544 F.3d 976 (9th Cir. 2008), *cert. granted sub nom.*; Chamber of Commerce v. Candelaria, No. 09-115 (June 28, 2010) (finding state law not preempted by federal immigration law); Chamber of Commerce v. Edmonson, 594 F.3d 742 (10th Cir. 2010) (considering order enjoining state law as preempted by federal immigration law and affirming as to some provisions while reversing as to other provisions); Gray v. City of Valley Park, No. 4:07CV00881, 2008 U.S. Dist. LEXIS 7238 (E.D. Mo. Jan. 31, 2008), *aff'd on other grounds*, 567 F.3d 976 (8th Cir. 2009) (finding local ordinance not preempted by federal immigration law).

18. *Chicanos Por La Causa*, 544 F.3d 976.

19. *Id.*

20. Complaint, Valle del Sol v. Goddard, 2:07-cv-02518, (D. Ariz. filed Dec. 12, 2007), *dismissed by* Ariz. Contractors Ass'n, Inc. v. Candelaria, 526 F. Supp. 2d 968 (D. Ariz. 2007), *dismissal aff'd sub nom.*; *Chicanos Por La Causa*, 544 F.3d 976.

21. Ariz. Contractors Ass'n v. Candelaria, 526 F. Supp. 2d 968, 972 (D. Ariz. 2007).

22. *Chicanos Por La Causa*, 544 F.3d at 980.

accepting for resolution the question of whether local immigration regulation is preempted by federal law.[23]

This vibrant and virulent discussion amongst local lawmakers, communities, and courts should come as little surprise given the rapidity with which this type of ordinance, requiring local regulation on the basis of immigration status, has emerged in towns across the nation.[24] At the same time, municipalities on the other extreme of the ideological spectrum have enacted laws prohibiting inquiry into immigration status[25] or restraining local enforcement of federal immigration law.[26] The range of municipal laws within this debate are similar in that their relation to immigration status is clear, as the law either favors local regulation on the basis of immigration status[27] or opposes it;[28] both types of laws have been subjected to court challenge.[29] The principal harms arising from laws favoring local enforcement are most frequently described in terms of their propensity to foster discrimination.[30]

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23. *Chicanos Por La Causa*, 544 F.3d 976.

24. *See infra* notes 25 & 26; Appendix (documenting status-related legislation of 63 municipalities surveyed).

25. *See, e.g.*, St. Paul, Minn., Ordinance No. 04-316 (2004) (requiring that local police refrain from inquiring into immigration status and from disclosing immigration information); New Haven, Conn., General Order 06-2 (2006) (same); *see also* Oakland, California, Res. No. 80584 (May 15, 2007) (prohibiting use of city resources to inquire into immigration status violations).

26. *See, e.g.*, Oakland, California, Res. No. 80584 (May 15, 2007) (declaring Oakland a "refuge for immigrants" and that "[c]ity employees including members of the Oakland Police Department shall not enforce federal civil immigration laws and shall not use city monies resources or personnel to investigate question detect or apprehend persons whose only violation is or may be a civil violation of immigration law").

27. Laws described as "favoring local regulation" are those that mandate regulation based on immigration status. *See, e.g.*, City of Hazelton, Ordinance No. 2006-18, § 2 (requiring that landlord and business entities assist in regulation based on immigration status under threat of sanction); Valley Park, Mo., Ordinance No. 1708 ("An Ordinance Relating to Illegal Immigration Within the City of Valley Park, Mo.") (2006) (doing the same).

28. Laws described as "opposed to local regulation" impose policies such that city officials, including police, not impose restrictions on people based on their status under federal immigration law. *See, e.g.*, St. Paul, Minn., Ordinance No. 04-316 (2004) (requiring that local police refrain from inquiring into immigration status and do not disclose immigration information); New Haven, Conn., General Order 06-2 (2006) (same); *see also* Grand Rapids, Mich., Res. 74731 (Feb. 21, 2006) ("oppos[ing] H.R. 4437 and any legislation that would criminalize, permanently bar or otherwise harm the immigrant community.").

29. Compare cases cited *supra* note 12 (considering challenges to policies that mandate that employers and landlord make determinations as to immigration-status) with, City of New York v. United States, 179 F.3d 29 (2d Cir. 1996) (considering challenge to a policy that status information *not* be shared); United States v. Illinois, No. 07-3261, 2009 WL 662703, at *3 (C.D. Ill. Mar. 12, 2009) (considering challenge to subsection (a) of Illinois Human Rights Law, 820 ILL. COMP. STAT. ANN. 55/12 (West 2008) that sharply restricted employers' ability to enroll in national immigration status verification database).

30. Florida Commission on Human Relations, *Commission Expresses Concern With Illegal Immigration Ordinance* (July 14, 2006) (expressing concern about potential for "adverse[] impact[] by virtue of the hostile and divisive environment that will continue to develop. Hispanics and other ethnic groups could be subjected to hate crimes, racial/ethnic profiling, and unlawful discriminatory acts while applying for jobs and seeking housing"), *available at* http://fchr.state.fl.us/fchr/publications/news_releases/archives/2006_releases/commission_expresses_concern_with_illegal_immigration_ordinance; National Council of La Raza, State and Local Immigration Initiatives, Talking Points on Local Anti-Immigrant Initiatives (2006) ("[N]egative consequences include discrimination, harassment, and civil rights violations against people who are suspected of being undocumented immi-

Courts, however, have generally side-stepped legal challenges articulated in these terms in much the same way as the district court and Ninth Circuit handled *Candelaria*, and instead have adjudicated such disputes based on principles of federalism.[31] Where local laws relating to immigration status have been invalidated, courts generally invalidate them for deficiencies like overbreadth, vagueness, and, most notably, for preempting federal immigration law; these decisions make relatively little comment on the questions of whether and how such policies discriminate.[32] Where local laws mandating regulation or enforcement based upon immigration status have been upheld, courts rely on municipalities' authority to regulate housing and businesses, general police powers, and other areas of traditionally local authority.[33]

Local laws that hinge on immigration status are problematic, the argument goes, where they mandate some type of action or restriction based on that status.[34] Indeed, the primary challenges to ordinances mandating local regulation based on federal immigration law argue that the duties imposed by these ordinances manifest, as a practical matter, as acts undertaken on the basis of a person's real or perceived national origin.[35]

This focus on status has occupied the spotlight within this debate; in so doing, it has eclipsed a concurrent trend of quietly-enacted ordinances defining, describing, and proscribing various types of nuisance in many of

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grants"); *see also* Memorandum from the Congressional Research Service, Legal Analysis of Proposed City of Hazleton Illegal Immigration Relief Act Ordinance (June 29, 2006).

31. *See, e.g.*, Lozano v. Hazleton, 620 F.3d 170, 181 n. 12 (3d Cir. 2010) (noting that the district court dismissed equal protection claims); Villas at Parkside Partners v. Farmers Branch, 701 F. Supp. 2d 835, 859-860 (N.D. Tex. 2010) (declining to rule on equal protection grounds because a finding of preemption is sufficient to provide the relief sought). *But see* Gray v. City of Valley Park, No. 4:07CV00881, 2008 U.S. Dist. LEXIS 7238, *78. (E.D. Mo. Jan. 31, 2008), *aff'd on other grounds*, 567 F.3d 976 (8th Cir. 2009) (addressing the issue and finding that "any potential discrimination that results in the hiring of employees, or in the filing of complaints, cannot fairly be construed as being caused by State action").

32. *Lozano*, 620 F.3d at 181 n. 12; *Farmers Branch*, 701 F. Supp. 2d at 859-860.

33. *Chicanos Por La Causa*, 544 F.3d at 983 (finding that ordinance requiring employers to verify immigration status was valid exercise of the state's licensing authority); *Gray*, 2008 U.S. Dist. LEXIS 7238 (finding that law requiring landlords to verify immigration status is not preempted and instead is a lawful exercise of local licensing and police powers); *cf.* De Canas v. Bica, 424 U.S. 351 (1976) (describing, before the passage of federal immigration statutes regulating this field, a law regulating employment of unauthorized workers as within the state's police powers).

34. In terms of ordinances regulating specifically on the basis of alienage, discussion is extensive and consistently present in public as well as legal discourse. *See, e.g.*, Michael Almonte, Note, *State and Local Law Enforcement Response to Undocumented Immigrants: Can We Make the Rules, Too?*, 72 Brook. L. REV. 655 (2007); Michael A. Olivas, *Immigration-Related State and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement*, 2007 U. CHI. LEGAL F. 27; Mark S. Grube, Note, *Preemption of Local Regulation beyond* Lozano v. Hazelton*: Reconciling Local Enforcement with Federal Immigration Policy*, 95 CORNELL L. REV. 391, 422-24 (2010); Careen Shannon, *Regulating Immigration at the State Level: A Focus on Employment*, 3 ALB. GOV'T L. REV. 219 (2010); *see also supra* note 8 (describing Rick Su's scholarship).

35. Compl.¶¶ 146-155, *Lozano*, 620 F.3d at 181 n. 12; Br. of Pet'r at 11, 66, 75, U.S. Chamber of Commerce v. Edmondson, 594 F.3d 742 (10th Cir. 2010); Br. of Pet'r for Cert. at 25-26, U.S. Chamber of Commerce v. Candelaria, No. 09-115 (Aug. 27, 2009); Br. of Asian American Justice Ctr. as Amicus Curiae Supporting Pet'r for Cert., *U.S. Chamber of Commerce*, No. 09-115; Brief of Nat'l Employment Law Project, as Amici Curiae Supporting Pet'r for Cert., *U.S. Chamber of Commerce*, No. 09-115.

the same localities that have enacted immigration status-related legislation.[36] Though a simultaneous spate of nuisance-related legislation prohibiting blight, junk, and nuisance of all manner may appear unremarkable, many of these ordinances redefine unlawful nuisance in a way that target the same populations that are affected by status-focused laws. Because the nuisance-related laws do not explicitly address immigration status, they have thus far remained predominantly under the radar amidst the heated debate on immigration-related local legislation. The following sections first describe the relationship between ordinances that explicitly relate to immigration status and legislation that implicates—but does not expressly relate to—immigration status, and then proceed to evaluate this legislation under current doctrinal tests for discrimination on the basis of race and national origin.

III. THE LINK BETWEEN ANTI-IMMIGRANT AND NUISANCE REGULATION

With little commentary or scholarly note, nuisance laws have proliferated in many of the same towns and cities that have explicitly legislated to impose regulation that makes distinctions on the basis of immigration status.[37] While the previous section describes the trend in immigration-explicit laws, this section explores the trend's relation to nuisance law. The findings in this section derive from a survey that correlates municipal nuisance legislation with explicitly status-based legislation. The survey ultimately finds a troubling amount of anti-immigrant regulation that is devoid of explicit reference to immigration status but appears to target immigrant communities nonetheless.[38] This section describes my preliminary research into this hitherto underexplored connection,[39] first detailing the methodology used to gather

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36. *See infra* Section III (describing this trend); Appendix (recording and detailing local laws in 63 towns and cities).

37. This is not to discount the scholarship in this field, including that discussed in notes 8 and 10, but only to point out the relatively dearth of academic work on this issue.

38. This connection has been noted by the Immigration Law Reform Institute, which offers support to those seeking to regulate immigrant populations and which advocates creating such legislation in ways that are not vulnerable to such equal protection challenges. Shama Hammond, *State and Local Legislative Update*, 15 IRLI BULLETIN (July 2008), *available at* http://www.irli.org/bulletin0708.html ("If a city adopts a 'neutral' nuisance or public safety ordinance to furtively deal with what is really an immigration problem, and then issues most of its enforcement citations to persons of the same national origin, the city is at serious risk of an expensive racial profiling claim, with intrusive ongoing enforcement by civil rights agencies.").

39. After expansive searches through secondary literature discussing blight and nuisance as a general matter, I found minimal discussion of blight and nuisance legislation as social ordering in a way similar to the focus of this study. Rick Su's scholarship addresses these issues by delving deeply into the way that local legislation and community self-definition are deeply related and questioning whether it is realistic to distinguish between local attempts to regulate immigration and local efforts at self-definition. *See supra* note 8. Particularly pertinent is Su, *Localist Reading*, *supra* note 8, at 1652 ("What is characterized by some as a novel attempt to regulate immigration at the local level may be understood by others as nothing more than a local effort at community self-definition and self-determination."). Despite significant academic interest in these matters, *see, e.g.*, authors referenced, *supra* note 8, 10, and 12, and significant anecdotal evidence of this trend, there does not appear to be any comprehensive studies documenting the trend of apparently immigrant-focused nuisance legislation. This study seeks to provide this data and concretize this aspect of the discussion

data from the inconsistent patchwork of information on local legislation and then analyzing this correlative local legislative activity to identify and ultimately theorize the trends that emerge. Ultimately, this research yields a more concrete and holistic picture of how nuisance laws fit into a municipality's overall character and provides evidence that towns in favor of regulation on the basis of immigration status have tended to expand the scope of nuisance-related prohibitions by redefining "blight" and "nuisance" in ways that target immigrant populations,[40] while localities that have taken immigrant-supportive measures evince comparatively low rates of nuisance and blight-related legislative activity.[41]

A. *Methodology*

To understand nationwide trends in local legislation, this study examines the relationship between municipal legislative activity in two seemingly distinct subject areas: (1) that which explicitly relates to immigration status[42] and (2) that which relates to nuisance or "quality of life" standards. From a methodological perspective, examining the relationship between nuisance and status-based laws is difficult, as records related to local legislative activity are inconsistent and modes of recordkeeping vary considerably.[43] In

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in order to move forward the discussion of how discrimination occurs at the local level and forecast the future forms of this discrimination that may increase regardless of the outcome in *Candelaria*. *See supra* notes 18-123 and supporting text. It should be noted that there is a large amount of scholarship focusing on local regulation through nuisance laws aimed at homeless and gang-involved populations. *See, e.g.*, Donald Saelinger, Note and Comment, *Nowhere to Go: The Impacts of City Ordinances Criminalizing Homelessness*, 13 GEO. J. ON POVERTY L. & POL'Y 545 (2006); Kim Strosnider, *Anti-Gang Ordinances after* City of Chicago v. Morales*: The Intersection of Race, Vagueness Doctrine, and Equal Protection in the Criminal Law*, 39 AM. CRIM. L. REV. 101 (2002).

40. See Appendix for table detailing character and context of nuisance ordinances nationwide.

41. *See, e.g.*, Appendix, "Newark, N.J." at rows 89 and 90; *id.*, "New York City, N.Y." at rows 99 and 100.

42. This survey includes two kinds of legislation related to immigration status, both that which favors and that which opposes more stringent immigration regulation, especially as conducted by local actors. *See supra* notes 21 and 22 (see also the supporting text for more explanation); *infra* note 39 (see also the supporting text for methodology); *infra* Section III(A) (explaining coding to distinguish types of legislation); *infra*, Appendix, Column E (coding localities by posture towards immigration).

43. The most fruitful sources of local legislation are two online libraries, the Municode Library, http://www.municode.com/library/library.aspx, and the Online Ecode360 Library General Code, http://www.generalcode.com/webcode2.html. These do not, by any means, contain all localities' legislation. Though these are the most comprehensive sources available, the local legislation contained in these databases is not always consistently updated. Another primary source for local codes of ordinances are municipality websites; however, it is difficult to determine the quality of upkeep for these sources. In some cases, local codes of ordinances can only be accessed through self-published codes, the searchability of which varies dramatically; some are searchable by term, *see, e.g.*, Legislative Research Center, New York City, New York City Council, http://legistar.council.nyc.gov/Legislation.aspx, while others are entirely unsearchable PDF files, *see, e.g.*, Davidson County, N.C., Code of Ordinances, http://www.co.davidson.nc.us/media/pdfs/4/DavidsonCountyCodeofOrdinances.pdf. Still others merely offer samplings of some of the most recently-enacted ordinances. *See, e.g.*, East Union, Pennsylvania, East Union Township Online, http://www.eastuniontownship.com/index.php?option=com_content&view=section&id=11&Itemid=104.

an effort to balance consistency of data-gathering with the inconsistency of local record-keeping, I developed a consistent set of searches into municipal codes, databases, and municipal websites, and, where necessary, delved more deeply into localities' legislative practices, records of city council meetings, and local media accounts of the enactments.[44]

To construct a dataset for this study, I first identified a potential dataset of 120 jurisdictions that had considered or enacted immigration-related legislation, including both localities favoring local enforcement and localities opposed to it.[45] From this list, I omitted all legislative activity that was not explicitly related to immigration status. I then surveyed the municipal codes of each locality, either through online municipal code databases or through online versions of municipal codes available on town websites. Where the code was not available in a form that allowed for an adequate picture of municipal legislative practices,[46] I omitted the town, ultimately yielding a universe of sixty-three towns and cities. Next, I searched the municipal code of each town on this list for the following keywords: nuisance, blight, immigration, immigrant, and alien. In order to determine if nuisance-related legislation was intended to target the same groups the immigration-explicit legislation targeted, I needed to determine if it was enacted in response to the same concerns. To accomplish this, I identified provisions enacted close-in-time to the enactment of explicitly immigrant-related legislation. Where necessary to fill in gaps, I also reviewed local press accounts for information about the context in which the legislation was enacted.[47]

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44. This difficulty of the searches for single bills or laws and codes of ordinances generally—to say nothing of searching for legislative history—and inconsistency of the data, when found, reveals yet another obstacle which those seeking to challenge such laws must confront when attempting to demonstrate legislative intent.

45. To identify such laws, I began with a list of immigration-related local legislative activity in the 2006-2007 period that was jointly compiled by two advocacy groups at opposite extremes of the immigration-enforcement debate, the Immigrants' Rights Project of the American Civil Liberties Union and the Fair Immigration Reform Movement. FAIR Immigration Reform Movement, Overview of Recent Local Ordinances on Immigration (updated July 23, 2007), *available at* http://www.immigrantsolidarity.org/Documents/Nov06OverviewLocalOrdinances/OverviewofRecentLocal-ImmigrationOrdinancesandResolutions.pdf. Despite the clear ideological leanings of both the ACLU and FAIR, their strong positions on these issues do not introduce these normative biases into this study for two reasons. First, this list merely identifies local activity across the country on both sides of the debate, without focusing on a particular policy vis-à-vis immigration regulation. Second, this list is the product of two ideologically opposed organizations, thus further decreasing the likelihood that a particular bias affects this list.

46. It was necessary to be able to search the municipal code in at least enough detail to ascertain rates of nuisance-related legislation and general rates of legislation in order to determine the town's "legislative character," discussed *infra*, and deviation in legislative practice.

47. In some cases, this was the only place that the proposal or enactment of a local ordinance was made public. *See* Appendix (noting source for legislation passed in Princeton, N.J.). In other cases, searching local press provided significant information about the legislative environment in which the ordinance was enacted, revealing biases motivating the legislation that are not apparent from the statutory text. *Compare* Vista, California, Ordinance 2006-9 (enacted June 27, 2006) (regulating day laborer work in a manner apparently unrelated to race or national origin-related) *with* Beth Silver, *Vista is Examined for Bias*, L.A. TIMES, July 28, 2003, § 2, at 5 (reporting on concerns of anti-Latino bias in city government).

Finally, I sought to determine the overall "legislative character"—that is, the frequency of legislation overall and particularly in the area of nuisance—of each locality in order to determine the town-specific baseline of normalcy from which to evaluate any deviations in legislative practices. To achieve this, I needed to eliminate the other major potential causal factor for legislative patterns—the town's general rate of legislation. To determine a town's legislative character, a term that I use to describe the towns' past and present legislative practices, I calculated both the annual amount of legislation and cycles of legislating across years by using the code disposition tables (cataloging ordinances and codified provisions) to estimate the number of ordinances enacted annually in each jurisdiction. To ascertain a town's legislative character specifically related to nuisance laws, I reviewed the portions of the code related to nuisance regulation to develop a sense of typical cycles through which the town amends and updates these provisions.

To understand the breadth of this trend, each municipality examined was coded based upon several factors:

1. Posture towards immigration: To determine a local legislature's general posture toward immigration, I divided laws that explicitly related to immigration into two categories: those that favor local regulation on the basis of immigration status and those that oppose this type of local action.[48] Legislation that favored local regulation was coded as "L" for "local" and legislation opposing local enforcement was coded as "F" for federal. In one instance, a town (Columbus, Ohio) exhibited both tendencies and received the code "L/F."
2. Nuisance Legislation: Municipalities that enacted nuisance legislation within the relevant time period—that is, the time period in which the immigration-related legislation was enacted—were coded "Y" for yes. If the municipality did not enact nuisance legislation during that period, the municipality was coded "N" for no. Municipalities that enacted some, but minimal or narrowly-tailored nuisance legislation, were coded "Y-" for yes-minus.
3. Deviation: This factor tracks the degree that nuisance legislation in the relevant time period deviated from a municipality's prior practice. It is evaluated in relationship to its annual rate of legislation overall, as well as relative to the municipality's prior patterns within the area of nuisance legislation in particular. Municipalities were coded "N" for no deviation, "Y" for some deviation, "YY" for dramatic or otherwise heightened deviation,[49] and "I" for "inconclusive," where the nuisance legislation appears likely to have deviated from prior practice, but the difficulty of identifying clear prior

48. *See supra* text accompanying notes 21, 22 (explanation and examples of this distinction).

49. *See, e.g.*, Appendix, "St. Charles, Montana" at rows 79 and 80 (coding deviation as "YY" because nuisance-related legislation close-in-time to legislation related to immigration status is significant when compared with the relative scarcity of nuisance-related legislation since 1981).

> patterns makes it difficult to conclude that the law, in fact, deviated from ordinary practice.[50]

Incorporating deviation from prior practice as a factor in this evaluation is meant to compensate for different rates of nuisance legislation that merely reflect varying levels of activity from municipality to municipality. Consider, for example, Towns 1 and 2. Town 1 only enacts three ordinances per year and has not amended its nuisance provisions since the 1970s. Town 2, by contrast, is highly legislative and enacts one hundred ordinances per year in all subject matter, including nuisance law. If both towns enact three nuisance-related ordinances in a given year, this is far more significantly indicative of legislative expression in the context of Town 1 than in the context of Town 2.

B. *Findings*

This project is exploratory and qualitative rather then quantitative; accordingly, its findings are, by nature, descriptive. [51] As such, the relationships that emerge will be examined and described in a way that seeks to understand, as opposed to measure, the causes for this correlation and the implications—both legal and cultural—of the relationship between nuisance legislation and isolationist sentiment.

1. *Summary*[52]

Of the forty jurisdictions opposed to local regulation on the basis of immigration status (coded "L"), nine of the jurisdictions surveyed showed discernable deviation between nuisance legislation enacted in the relevant time period versus prior practice and so were coded as "Y" for yes. Relevant nuisance legislation deviated markedly from previous patterns in eleven jurisdictions; these were coded as "YY." In ten jurisdictions, the nuisance legislation enacted in the relevant time period was consistent with prior practice; these were coded as "N" for no deviation. The seven jurisdictions in which the research could not conclusively establish deviation were coded as "I," and the three localities in which there appeared to be significant deviation from prior legislative practice, but it could not be conclusively established, were coded as "I/Y."

Of the twenty-one jurisdictions that favored local regulation on the basis of

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50. *See, e.g.*, Appendix, "Rogers, Arkansas" at rows 9 and 10 (coding deviation as "I" because, although some nuisance-related legislation was enacted in the relevant time period, prior nuisance legislation was sporadic and so it could not be concluded that nuisance legislation close-in-time to immigration-related legislation indicates a fluctuation from that municipality's ordinary practice in the absence of immigration concerns); *id.* "Palm Bay, Florida" at rows 49 and 50 (same).

51. Even if statistics regarding rate of correlation could be established, it would be of limited utility given that a discrimination-based challenge to such an ordinance would need to establish that the legislature enacting the specific ordinance at issue did so with discriminatory intent.

52. See Appendix for detailed findings.

immigration status (coded "F"), nineteen exhibited nuisance legislation enacted in the relevant time period that was consistent with prior practice. Two "F" jurisdictions received an "I."

The one jurisdiction that enacted both legislation that would tend to favor and that which would tend to oppose local regulation on the basis of immigration status was coded "L/F." This jurisdiction exhibited an increase in nuisance-related legislation relative to prior practice, although the increase begins slightly before the immigration-related legislation, and so this jurisdiction received an "I/Y."

2. *Analysis*

Naturally, the existence of nuisance-related legislation is not necessarily probative of discriminatory intent. As this research makes clear, many jurisdictions that have considered or enacted anti-immigrant legislation show no appreciably incongruous rise in blight legislation.[53] However, even despite the methodological difficulties of this research, a troubling trend emerges: Municipalities that have evinced a propensity to impose restrictions on their immigrant community members generate a disproportionately high rate of nuisance-related legislation. The fact that nuisance-related legislative activity increases contemporaneously with status-based legislation suggests that the same intent underlies both types of legislation. Jurisdictions that legislated on the basis of immigration status or that expressed anti-immigrant sentiments showed a significantly higher rate of nuisance-related legislation, stiffer sanctions,[54] more expansive enforcement power,[55] and broadly-defined categories of actionable blight and nuisance.[56] Where nuisance-related legislation is significantly higher than the norm, the increase was most frequently in the context of housing (particularly occupancy rates)[57] and unmoved or unregistered cars.[58]

Conversely, localities that have legislated in support of immigrant commu-

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53. *See, e.g.*, Appendix, "Bullhead, Ariz.," at rows 13 and 14; *id.* "Forsyth County, N.C.," at rows 83 and 84.

54. *See, e.g.*, Appendix, "Suffolk County, N.Y." at row 102 (expanding authority to impound vehicles as penalty for violations); Escondido, Cal., Ordinance No. 2008-04 (Jan. 9, 2008) (increasing enforcement and penalties for multiple cars in front of single-family homes); Appendix, "San Bernadino, Cal." at row 34 (recording, inter alia, ordinances for broader enforcement powers and the awarding of attorneys fees to prevailing party in nuisance action).

55. *See, e.g.*, St. Charles, Mo., Ordinance 07-152 (Oct. 30, 2007) (adding search warrant power); Escondido, Cal., Ordinance No. 2008-04 (Jan. 9, 2008) (increasing enforcement authority); Appendix, "San Bernadino, Cal." at row 34 (same).

56. *See, e.g.*, Topeka, Kan., Ordinance, 18830, § 3 (Mar. 13, 2007) (criminalizing nuisances for the first time since 1981).

57. *See, e.g.*, Huntsville, AL., Ordinance No. 07-171 (Mar. 15, 2007) (augmenting the city's power to enforce housing occupancy rules).

58. *See, e.g.*, Appendix, "Suffolk County, N.Y." at row 102 (listing laws expanding municipal authority to impound vehicles); LL. No. 48-2008 (Nov. 19, 2008) (expanding authority to impound vehicles); LL. No. 26-2008EN (June 24, 2008); L.L. No. 32-2007 (Nov. 20, 2007).

nity members exhibit a relatively low rate of nuisance-related legislation.[59] In these jurisdictions, legislative practices related to nuisance tend to remain constant and do not appear to track the increase in immigrant-supportive activity. Jurisdictions that passed legislation favorable to immigrant communities often revealed lower rates of nuisance-related legislation and nearly uniformly revealed lower rates of nuisance-related legislation in relation to their own prior legislative character.[60] Moreover, the nuisance-related legislation in these municipalities tended to be more narrowly-tailored than nuisance-related legislation in jurisdictions favoring local enforcement, and target specific problems, like graffiti[61] or skateboards,[62] without significantly expanding the definition of nuisance or increasing enforcement authority broadly.

Certainly, nuisance and blight ordinances would seem to be permissibly confined to local regulation of quintessentially local matters—housing, zoning, public streets and areas, town lands—and unrelated to immigrant populations or immigration status. These ordinances purport to be public interest-oriented, designed to promote safety, health, property value, and quality of life.[63] Though facially benign, this rash of newly-enacted nuisance legislation often deviates from localities' own legislative practices and previous nuisance regulation in ways that suggest that there may be, in fact, something pernicious about this nuisance legislation.[64] Nuisance legislation

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59. *See, e.g.*, Appendix, "Minneapolis, Minn." at rows 75 and 76.

60. *See, e.g.*, Appendix, "Newark, N.J." at rows 89 and 90; *id.*, "New York City, N.Y." at rows 99 and 100.

61. *See, e.g.*, New York City, N.Y., Ordinance 2009/065 (Oct. 5, 2009); New York City, N.Y., Ordinance 2007/039 (Aug. 2, 2007); Huntington Park, Cal., Ordinance 673-NS, § 1 (Mar. 21, 2002).

62. *See, e.g.*, National City, Cal., Ordinance 2311 § 1 (2008).

63. *See, e.g.*, County of San Bernardino, Cal., Ordinance No. 4044 (Feb. 5, 2008) ("[T]he public interest of the people of the County of San Bernardino to protect and promote the existence of sound and wholesome residential buildings, dwelling units and neighborhoods by the adoption and enforcement of such standards, regulations and procedures as will remedy the existence or prevent the development or creation of dangerous, substandard, or unsanitary and deficient residential buildings and dwelling units; and . . . in the interest of the health, safety and welfare of the people of the County of San Bernardino."); Cherokee County, Ga., Ordinance No. 2008-O-004 (Nov. 4, 2008) (imposing property maintenance standards and occupancy restrictions to eliminate conditions "inimical to the welfare and [that] are dangerous and injurious to the health, safety, and welfare of the citizens of Cherokee County").

64. *See, e.g.*, Beaufort County, S.C., Ordinance No. O-07-04 (Mar. 23, 2004) (amending the code to expand enforcement against "slums and urban blight," whereas the vast bulk of other blight and nuisance-related legislation was from the 1960s, 1970s, and petered out in the mid-1980s). Though this deviation by no means confirms animus, increases in such legislation that may be used to target certain populations is worth recognizing as a potential indication of discriminatory intent. Blight and nuisance-related provisions in municipal codes of ordinances reveal other periods of significant nuisance-related legislative activity that often correlate to the moral and social concerns at that particular time which cast the contemporary concern as regulateable nuisance. Many codes of ordinances show a spurt of nuisance-related legislation, for example, in the 1980s, defining nuisance to proscribe crack or other drug-related activity. *See, e.g.*, Suffolk County, Code of Ordinances § 270 (Apr. 24, 1989) ("Loitering in Connection With Drug Use"). Another trend revealed is that localities have, at times, redefined "blight" so as to prohibit "adult" or sexually explicit, morally offensive activity or establishments. *See, e.g.*, Coweta County, Ga., Code of Ordinances, Art. VII (referring to sexually-oriented businesses as "urban blight"); Coweta County, Ga., Ordinance No. 91-1, §§ 1, 2,

in immigrant-supportive jurisdictions is more commonly tailored to address a particular issue; in Saint Paul, for example, amendments to the nuisance code within this time period consist of revising references to the current state code[65] and updating the address for service of correction notices upon landlords.[66] In jurisdictions that seek to regulate on the basis of immigration status, by contrast, nuisance-related legislative activity appears to be more frequent and more broadly-worded, often breaking with patterns of previously regular cycles of legislation[67] or decades-long quiescence.[68]

IV. ANALYSIS AND IMPLICATIONS: NUISANCE AS PROXY

Under current equal protection doctrine, challenges to this new wave of nuisance laws would not fare well.[69] Such challenges would be vulnerable to defenses that nuisance legislation is motivated by legitimate aims[70] and that regulation on the basis of aesthetic or neighborhood-ordering characteristics does not implicate protected traits.[71] In order to better understand why the difficulty of challenging these laws matters, this discussion first explores the nature of nuisance law generally, and second clarifies how such laws may indeed target protected classes. Understanding that nuisance law is a legal vehicle that has long accommodated social ordering and proxy legislation, this section concludes by evaluating the way in which this mode of targeting

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(May 22, 1991) (listing "the undesirable community conditions identified with nudity and alcohol are depression of property values in the surrounding neighborhoods, increased expenditure for and allocation of law enforcement personnel to preserve law and order, increased burden on the judicial system as a consequence of the criminal behavior described in this subsection, and acceleration of community blight by the concentration of such establishments in particular areas."); La Porte, Ind., Ordinance No. 39-1993, § I (Dec. 20, 1993) (describing adult business prohibition as intended to "deter spread of urban blight").

65. Beaufort County, S.C., Ordinance No. 05-740 (Sept. 14, 2005).

66. Beaufort County, S.C., Ordinance No. 04-814 (2004).

67. *See, e.g.*, Clarksville, Tennessee, Code of Ordinances, Title 8 (Health and Sanitation) (showing that the nuisance provisions from the 1963 code that remained were generally unamended until 1999 and that this relative dormancy was followed by a pronounced increase in legislative activity beginning in 2005).

68. Beaufort County, S.C., Ordinance No. 05-740 (Sept. 14, 2005).

69. Because of the high jurisprudential standard that has emerged in the past thirty years, it would be difficult to establish legislative intent underlying nuisance laws sufficiently to sustain an equal protection challenge, even where circumstantial evidence suggests that it is at odds with the purpose of equal protection. *See infra* Section V.B(a).

70. It has been argued in other contexts that nuisance and code regulation is a means to combat rising crime rates. *See* Neal Kumar Katyal, *Architecture as Crime Control*, 111 YALE L.J. 1039, 1078 (2002) (discussing the "broken window" theory of enforcing order-maintenance laws as a means of controlling more serious crime and noting that "[l]egal academics and politicians [] used its rationale to justify prosecution of quality-of-life offenses"); Dan M. Kahan & Tracey L. Meares, Foreword, *The Coming Crisis of Criminal Procedure*, 86 GEO. L. J. 1153, 1164 (1998) (crediting community policing, anti-loitering laws, gang curfews, and other order-maintenance policies with reducing the crime rate and proposing their expansion).

71. *See, e.g.*, Young Apartments, Inc. v. Town of Jupiter, No. 05-80765, 2007 U.S. Dist. LEXIS 24073 (S.D. Fla. Mar. 30, 2007), *rev'd on other grounds*, 529 F.3d 1027 (11th Cir.) (considering plaintiffs' claim that housing ordinance was discriminatory and accepting city's defense that it was not acting discriminatorily but instead to protect the public health, safety and welfare in day laborer gathering areas).

immigrant communities diverges from other means of local regulation and considers how this less obvious form of regulation may be more harmful than even laws that explicitly target the same population.

A. *Overview of Nuisance Law*

Communities have long turned to nuisance legislation as a means of group protection, first against natural disasters and subsequently against other manner of external threat, defining themselves by prohibiting manifestations of what the community believes it is not.[72] Though nuisance law has been described as a "legal garbage can,"[73] history shows that nuisance law may—and often does—do far more affirmative work than this passive description would suggest.[74] This section examines the concept of actionable nuisance as it has evolved in the previous century and its relationship to social concerns of local legislatures. This section then clarifies how nuisance legislation—generally devoid of explicit reference to national origin or race—may implicate these characteristics nonetheless.[75]

In nineteenth century America, many nuisance laws were considered intrusive,[76] and nuisance-based prohibitions met with some dispute, primar-

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72. *See, e.g.*, Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance, and Fines as Land Use Control*, 40 U. CHI. L. REV. 723, 748 (1973) (describing legally actionable nuisance as that which was "perceived as unneighborly under contemporary community standards"); John Copeland Nagle, *Moral Nuisances*, 50 EMORY L.J. 265, 265 (2001) (chronicling "[t]he deployment of nuisance law to combat immoral activities [] [like] nineteenth century cases involving brothels, saloons, gambling parlors, and other unsavory venues"); WILLIAM BLACKSTONE, COMMENTARIES *161, 167 (adopting the English definition of nuisance as "either the doing of a thing to the annoyance of all the king's subjects, or the neglecting to do a thing which the common good requires").

73. William L. Prosser, *Insurance Without Fault*, 20 TEX. L. REV. 399, 410 (1942) (lamenting that nuisance law has never been clearly defined or analyzed and can be "used to designate anything from an alarming advertisement to a cockroach baked in a pie.").

74. At the same time that nuisance-related prohibitions may penalize or even criminalize unwanted actions or traits, they may also perpetuate or strengthen perceptions that certain traits are bothersome or unacceptable. *See infra* note 92 and accompanying text (discussing the way that laws based on community norms of reasonableness perpetuate stereotypes); *see also* WILLIAM J. NOVAK, PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA 44 (1996) (arguing that "nuisance law was one of the most important regulatory tools of the nineteenth century American state.").

75. The description of nuisance law within this subsection is meant only to provide an overview of an area of law that has been described as ill-defined and a legal "jungle," *see supra* note 84, and should not be taken as an authoritative account of nuisance law. The rich and relatively underexplored development of this body of law is well-described by others scholars, including those cited within this section as well as those comprehensively addressing its long history in a 1990 Symposium by the Albany Law Review. *See* Jeff L. Lewin, Boomer *and the American Law of Nuisance: Past, Present, and Future*, 54 ALB. L. REV. 190 (1990); *see also* Robert Abrams & Val Washington, *The Misunderstood Law of Public Nuisance: A Comparison with Private Nuisance Twenty Years after* Boomer, 54 ALB. L. REV. 359 (1990); Louis A. Halper, *Nuisance, Courts and Markets in the New York Court of Appeals: 1580-1915*, 54 ALB. L. REV. 301 (1990).

76. *See generally* Mary B. Spector, *Crossing the Threshold: Examining the Abatement of Public Nuisances Within the Home*, 31 CONN. L. REV. 547, 549-50 (1999) (recounting evolution of nuisance law from English common law—initially generally constituted by petty criminal offenses in public rights of way—to eventually include conduct associated with modern-day private nuisance (use and enjoyment of land) and "interference[] with public rights in general"); Thomas Hippler, Comment, *Reexamining 100 Years of Supreme Court Regulatory Taking Doctrine: The Principles of "Noxious*

ily triggering concern that the regulation of private property imposed public matters on private life.[77] Such laws were, however, tolerated where considered necessary, which usually meant to protect against harms to health and safety that could wreak disaster on the community at large.[78] As industrialization and urbanization created increasingly dangerous conditions in crowded urban environments, progressively intrusive regulation was considered acceptable in order to prevent the disastrous effects of communicable disease and fire.[79]

Gradually, local legislatures' authority to protect against "offenses against public health or policy" was increasingly more broadly construed and ultimately came to justify imposing rules and sanctions to prohibit a wider swath of undesirable conditions.[80] Adult entertainment and offenses to

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Use," "Average Reciprocity Advantage," and "Bundle of Rights" from Mugler *to* Bituminous Keystone Coal, 14 B.C. ENVTL. AFF. L. REV. 653 (1987).

77. *See* J. MILTON, THE CONCEPT OF NUISANCE IN THE COMMON LAW 32, 80 (1978) (describing the tension created by nuisance laws, which "belong to social life, and upon which the peace and comfort of many depend, furnish an indefinite number of examples where some natural right is invaded, or some enjoyment [which] abridged to provide for the more general convenience or necessities of the whole community"); Harry N. Scheiber, Comment, *Public Rights and the Rule of Law in American Legal History*, 71 CALIF. L. REV. 217, 223 (1984) (describing the way that nuisance laws were absorbed into public law and the way that courts subsequently described private property ownership as subject to limitation for the good of the community at large). Caselaw of the time illustrates the tension between private interests and municipal authority to dictate community conduct via nuisance law; court decisions of that era reflect the degree of concern caused by such laws as well as varying judicial views of what conduct and how forcefully nuisance laws could regulate. *See, e.g.*, Wreford v. People, 14 Mich. 41 (1865) (striking down a law prohibiting the slaughter of animals in a particular part of town on the grounds that a town can only ban nuisances and cannot declare non-nuisances to be nuisances); Wynehamer v. People, 13 N.Y. 378 (1856) (striking down an alcohol prohibition law as destroying a property interest); Mayor of Hudson v. Thorne, 7 Paige Ch. 261 (N.Y. Ch. 1838) (striking down ordinance unilaterally prohibiting the building of wooden barns on nuisance grounds). *But see* Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641, 655-656 (2005) (discussing 1866 California law declaring Chinese houses of prostitution to be nuisances).

78. *See* Hippler, *supra* note 77, at 692 (describing the history of Supreme Court regulatory decisions that ultimately expanded "[t]he state's power to prohibit injurious or nuisance uses of property [which] was increasingly broadened to allow government to regulate use which was not a common law nuisance").

79. *Id.* (discussing how municipalities invoked "police power" to impose increasingly intrusive regulation in the name of protecting the general welfare); *id.* at notes 23, 84; *see, e.g.*, Bridgeport, Conn., Ordinance (regulating standing water) (adopted May 9, 1911); Chelsea, Mass., Regulation of May 10, 1910 (prohibiting allowing stagnating water, fruits, vegetables, or animal to prevent spread of "filth" and "disease"); Syracuse, N.Y., Sec. 7, Subdiv. C (providing for, inter alia, regulation of cesspools and privies in time of contagious disease (Ordinance adopted Mar. 27, 1911); *see also* Robert Abrams & Val Washington, *The Misunderstood Law of Public Nuisance: A Comparison with Private Nuisance Twenty Years after* Boomer, 54 ALB. L. REV. 359 (1990) (distinguishing between these "public nuisance" laws, the authority for which was derived from the sovereign's police power and "private nuisance" law, which is based on principles of tort law). For a detailed account of the intellectual roots of this tension and the way that the conception of property rights related to nuisance law, see Robert G. Bone, *Normative Theory and Legal Doctrine in American Nuisance Law: 1850-1920*, 59 S. CAL. L. REV. 1101 (1986).

80. Initially, common law nuisances, as set forth in Blackstone's Commentaries and incorporated from English law into American law, included "seven types of common nuisances: interfering with public highways, bridges and rivers, including building on real property owned by the crown; maintaining disorderly places; operating unlicensed lotteries; making, selling or using fireworks; eavesdropping; and being a 'common scold.'" Spector, *supra* note 77, at 551. These types of "public nuisances" were prosecuted as crimes. During the second half of the nineteenth century however,

commonly-accepted standards of morality were frequent targets of prohibitions on "undesirable community conditions."[81] As part of the expansion of municipal authority to regulate the conduct of community members, noise-related interferences eventually became the subject of nuisance-based prohibitions as well.[82] In fact, the Chicago City Council's amendment of noise regulations to target the new immigrant community provides one well-documented historical example of the trend that this article's research describes.[83]

Even as it became increasingly common for nuisance laws to mandate social conditions, aesthetics-based nuisance law was not wholly accepted until the middle of the twentieth century.[84] In 1954, the Supreme Court validated a broader municipal authority by recognizing the municipal interest in aesthetic regulation as part of general public welfare values, which are "spiritual as well as physical, aesthetic as well as monetary."[85] With this

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localities began expanding this regulatory power in an effort to protect the general welfare of the community. *See* Hippler, *supra* note 77 (noting that the Court found ever more "peculiar conditions affecting the public interest," and businesses to be "affected" or "clothed" with the public interest sufficient to justify increasing regulation as "'necess[ary]' and thus within the scope of the police power"). However, as the requirement of extreme public necessity as the justification for depriving the individual of non-noxious private property broke down and new and greater restrictions on private property were attempted under the police power.

81. Nagle, *Moral Nuisance, supra* note 33. This type of regulation has been retained in some local codes of ordinances. *See also* Coweta County, Ga., Ordinance No. 91-1 (May 22, 1991).

82. Derek Valliant, *Peddling Noise: Contesting the Civic Soundscape of Chicago, 1890-1913*, 96 ILL. STATE HIST. ILL. SOC'Y 257 (1998) (chronicling struggle against "codif[ication of] aural parameters that redefined aspects of civic inclusion and exclusion for a particular group of predominately poor immigrants in Chicago"); Carl Henry Mote, *The Effort to Control Municipal Noise*, AMERICAN CITY 10 (1914).

83. Valliant, *supra* note 83. During the turn-of-the-century waves of immigrant peddlers to the Midwest, the Chicago City Council rapidly augmented its Municipal Code, adding provisions "to prevent the ringing of bells, blowing of horns and bugles, crying of goods, and all other noises, performances and devices tending to the collection of persons on the streets or sidewalks, by auctioneers or others, for the purpose of business, amusement or other-wise." Specifically exempted from this prohibition, however, were "any band[s] of music or organized musical society engaged in serenading, or any civic or military parade." LAWS AND ORDINANCES GOVERNING THE CITY OF CHICAGO, JANUARY 1, 1866, §§ 288, 312, 359, 379 (1866). Lawyers at the time challenged this ordinance as discriminatory and violative of both the state constitution and the Due Process Clause. The Illinois Supreme Court, however, upheld the ordinance as a constitutionally valid, recognizing the city's authority to regulate public space and maintain order, and denying the existence of a right "to bawl away in a manner that is annoying to others." Valliant, *supra* note 83, at 271.

84. In the early 1900s, legislatures' authority to impose aesthetics-based rules was still an "unsettled question[]." People v. Rubenfeld, 172 N.E. 485, 486-87 (N.Y. 1930) (citations omitted) (Cardozo , C.J.) (describing the uncertainty of law surrounding aesthetic regulations in New York:

> The organs of smell and hearing, assailed by sounds and odors too pungent to be borne, have been ever favored of the law, more conspicuously, it seems, than sight which perhaps is more inured to what is ugly or disfigured. Even so, the test for all the senses, for sight as well as smell and hearing, has been the effect of the offensive practice upon the reasonable man or woman of average sensibilities. One of the unsettled questions of the law is the extent to which the concept of nuisance may be enlarged by legislation so as to give protection to sensibilities that are merely cultural or aesthetic.)

However, after the Supreme Court's 1954 decision, *see infra* note 89, at 25, local laws mandating compliance with certain aesthetic standards have become common and largely uncontroversial.

85. Berman v. Parker, 348 U.S. 26 (1954) (upholding Washington D.C. urban renewal plan).

validation of authority, town councils could then dictate the face of their communities under a theory of greater good; inherent in their newly-defined scope of regulation was the power to "determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled."[86] Through the course of the twentieth century, nuisance legislation proliferated, embraced by localities as a means to prescribe a wholly different vision of community health; no longer confined to matters of sanitation or health, contemporary nuisance law now protects property values, aesthetic preferences, morals, and traditions.[87]

B. *Nuisance Law and Protected Traits*

The relationship between nuisance law and protected traits is not always immediately obvious. Conceptually elastic and subjective by nature, nuisance law is a convenient tool for shaping communities and ordering populations.[88] Defined as a "condition, activity, or situation . . . that interferes with the use or enjoyment of a property,"[89] nuisance law's main limit is the touchstone of "reasonableness,"[90] an outer bound that offers little solace if this baseline of reasonableness is influenced by prejudices and stereo-

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86. *Id.* at 33; *see id.* at 37 ("[T]he legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia or the States legislating concerning local affairs." (citations omitted)).

87. Jeffrey S. Trachtman, Note, *Pornography, Padlocks, and Prior Restraints: The Constitutional Limits of the Nuisance Power*, 58 N.Y.U. L. REV. 1478, 1484. (describing nuisance law as focused on "the imposition of noise, smells, or physical danger on unwilling members of society" and "activities that prompt[] unanimous social disapproval, such as prostitution, gambling, and obscene displays."); *see, e.g.*, CAL. CIV. CODE § 3479 (West 1997) (defining nuisance to include anything injurious to health including, but not limited to, the illegal sale of controlled substances, anything indecent or offensive to the senses, or interferences with the comfortable enjoyment of life or property, or obstructions to the free passage or use of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway); N.M. STAT. ANN. § 30-8-1 (1978); N.D. CENT. CODE § 42-01-01 (1997); IND. CODE § 34-1-52-1 (1997); IOWA CODE § 657.1 (1997); MONT. CODE ANN. § 27-30-101 (1997); RESTATEMENT (SECOND) OF TORTS § 821B cmt. a (1977).

88. *See* Ellickson, *supra* note 73, at 704.(explaining that "[s]mall governments do seek to keep social and fiscal undesirables out of their communities entirely" through, for example, land-use regulations that segregate certain racial groups); Abraham Bell & Gideon Parchomovsky, *The Uselessness of Public Use*, 106 COLUM. L. REV. 1412, 1438 (2006) (noting the malleability of blight determinations which, like "all other policy decisions affecting private property, []are ultimately made on grounds of political utility and may involve a mix of government powers."); Spector, *supra* note 77, at 600 n. 24 ("Few terms have afforded so excellent an illustration of the familiar tendency of the courts to seize upon a catchword as a substitute for any analysis of a problem; the defendant's interference with the plaintiff's interests is characterized as a 'nuisance,' and there is nothing more to be said."); *see also* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 549-50 (5th ed. 1984) ("It has meant all things to all people, and has been applied indiscriminately to everything from an alarming advertisement to a cockroach baked in a pie." (footnotes omitted)); *id.* at 618 ("There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.'"); Prosser, *supra* note 74, at 410 (dubbing nuisance a "legal garbage can").

89. BLACK'S LAW DICTIONARY 496 (3d pocket ed. 1996).

90. John P. S. McLaren, *Nuisance Law and the Industrial Revolution—Some Lessons from Social History*, 3 OXFORD J. L. STUD. 155, 176 (explaining that the most common nuisance law standard is that of a "reasonable user"); Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965, 967 (2004) (describing reasonableness as "the hallmark of nuisance law").

types.[91] Because the breadth of subject matter is so expansive, nuisance laws may target the conduct of protected subgroups even without referencing the group itself.[92]

Even when broadly cast, nuisance law does not ordinarily specifically reference race or national origin, nor ethnicity, skin color, language, or any of the many other characteristics that often serve as proxies for protected traits.[93] Facially neutral language, however, is not alone determinative as to whether legislation is discriminatory.[94] When ordinances impose restrictions and sanctions on ways of living most often enjoyed by—and occasionally characteristic of—immigrant communities, they might be nonetheless discriminatory and equally as problematic as more readily identifiable bias.[95] One stark contemporary example is the prohibition on "repetitive outdoor activity" that the City of Danbury considered in 2005, which few doubted was intended to target Ecuavole games of the Ecuadorian immigrant commu-

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91. Scholars have noted the problematic nature of reasonableness standards in other areas of law, noting that using "reasonableness" may create a legal standard that relies upon general and commonly-held stereotypes while excluding minority views and unique dynamics. *See* Deborah Zalesne, *The Intersection of Socioeconomic Class and Gender in Hostile Housing Environment Claims Under Title VIII: Who is the Reasonable Person?*, 38 B.C. L. REV 861, 865, 877 (1997) (explaining how "reasonableness" standards may rely on and perpetuate preexisting stereotypes); Naomi R. Cahn, *The Looseness of Legal Language: The Reasonable Woman Standard in Theory and Practice*, 77 CORNELL L. REV. 1398, 1419 (1992) (explaining how reasonableness standards embody and perpetuate stereotypes, particularly by requiring people to conform to them).

92. *See* John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 197 (1985) (noting propensity for racial discrimination in local ordinances directed against some form of public nuisance, typically involving trivial misconduct, usually with no specifically identifiable victim, and carrying minor penalties).

93. *See, e.g.*, Lancaster, California, Ordinance 908 (Oct. 28, 2008) (adding new chapter relating to chronic nuisances). *But see* City Council, Rogers, Ark., Minutes of Meeting, RCCM p. 5454 (Nov. 14, 2006), *available at* http://www.rogersarkansas.com/citycouncil/pdf's/11-14-06.pdf ("The mayor went public with his intent to have the city attorney create a local ordinance that would declare illegal immigrants a public nuisance and impose fines for those employing or renting for those who lack proper documentation."). Daniel Ortiz has argued that the court in *Washington v. Davis*, 426 U.S. 229 (1976), actually intended to distinguish race-based discrimination from other, perhaps related classifications (like wealth), by imposing a rigid requirement of intent to *racially* discriminate, in order to preserve other foundational, even if potentially troubling, classifications of our culture. Daniel Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1139-1140 (1989).

> If these other classifications served as mere pretexts for race, intent condemned them. If they did not, intent preserved them from searching scrutiny. Intent aimed, in other words, to separate racial proxies from mere racial cohorts. This task was critical because race had become as culturally odious as some of its cohorts had become foundational. Seen this way, the intent requirement serves as much a protective as a condemnatory function. It works not just to identify troubling classifications but also to insulate others—which largely constitute our society—from serious review.

94. *Washington*, 426 U.S. at 241-242 (finding strict scrutiny appropriate analysis for statute with racially discriminatory purpose despite being facially neutral as to race).

95. In the current line of cases involving immigration regulation at the local level, equal protection claimants have had to disentangle national origin and race-based action from status-based regulation in order to demonstrate that the class of people targeted is, indeed, protected. However, this differentiation would not be required of challenges to nuisance legislation because, there, the legislature's intention is not to guard against undocumented residents, but instead purports to be unconcerned with the question of immigration status entirely.

nity, the playing of which produces a repetitive noise as the players hit the ball.[96] Tempting as it might be to assume that the repetitive games, and not the players, were the object of this regulation, the City's long anti-immigrant history suggests otherwise.[97] Indeed, this type of regulation in reaction to new ethnic populations has historical precedent. The noise ordinances of Chicago, as previously discussed, were widely recognized as intended to affect the new European immigrants by defining nuisance in ways that specifically targeted conduct arising from activities integral to this new immigrant population.[98]

Contemporary practitioners and scholars note the marked impact of blight and nuisance regulation on immigrant communities, describing similar experiences in specific cases and towns and providing anecdotal evidence of small-town councils responding to the arrival of new immigrant community members.[99] Case studies illustrate particular circumstances in which broadly defined or harshly punitive nuisance laws are another way that town councils target immigrant community members, many of whom subsist on limited incomes and, consequently, tend to "live in substandard housing [and] deteriorating apartment buildings which have low rents."[100] Occupancy standards, for example, are a common form of regulation thought to frequently target immigrant households.[101] Even within the limited scope of this article's research, at least two cities appear to have recognized the threat of nuisance-based regulation allowing for troubling enforcement practices—and legislated to alleviate such concerns by minimizing harsh penalties resulting from nuisance enforcement.[102]

To be sure, not all nuisance legislation targets immigrant communities or protected traits; the vast majority does not.[103] However, where this legislation is intended to impact immigrant communities, as this study shows may be the case in some jurisdictions, it should not be exempt from scrutiny for discrimination simply because it does not specifically reference race or alienage.

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96. Nathan Thornburgh, *Serving Up a Conflict*, TIME (May 25, 2005).

97. Jill P. Capuzzo, *Connecticut City Plans to Team Its Police With Federal Immigration Agents*, N.Y. TIMES, Feb. 6, 2008, at B1.

98. Valliant, *supra* note 83.

99. Stefan H. Krieger, *A Clash of Cultures: Immigration and Housing Code Enforcement on Long Island*, 36 HOFSTRA L. REV. 1227, 1235 (2008); Guadalupe T. Luna, *Immigrants, Cops, and Slumlords in the Midwest*, 29 S. ILL. U. L.J. 61 (2004) (describing the way that housing ordinances negatively and disproportionately impact Latino Illinois residents).

100. Krieger, *supra* note 100, at 1235.

101. *Id.*; Ann Southworth, *Lawyers and the 'Myth of Rights' in Civil Rights and Poverty Practice*, B.U. PUB. INT. L.J. 491 n.109 (1999); *see also* Katyal, *supra* note 120, at 1102-03, 1108 (describing the expressive nature of housing and zoning codes).

102. Fort Collins, Co., Ordinance 198m (2006) (decriminalizing nuisance); Detroit, Mich., Ordinance No. 23-04, § 1, Art. IX (July 2, 2004) (specifically prohibiting blight and nuisance enforcement agents from inquiring into immigration status).

103. *See supra* Section III(B)(1) (summarizing findings of study).

C. *The Damage (and Difference) in Discrimination by Proxy*

The difficulty of proving discriminatory intent underlying nuisance laws is bound up with the harm created through such legislation.[104] The tendency to psychologically merge the class of people targeted and the "nuisance" itself explains how legislation that targets immigrant communities under the guise of nuisance regulation fuses the negative implications of nuisance with the population on which it most heavily bears.[105] Here, the social and psychological harms occur through the stigmatization of immigrant communities by, in essence, labeling their ways of living as quality-of-life-diminishing and, in short, nuisance.[106] Understanding that the damage begins with the enactment of the legislation itself explains why the central harm of such legislation is not necessarily the size of the penalty nor the rate of enforcement; instead, the harm is the values that are validated when they are enacted as law.

From an integrationist perspective, laws conferring stigma like that described above may be far more damaging even than explicit immigration regulation.[107] Although legislation directing landlords and homeowners to ferret out and disclose residents' unlawful immigration status could provide a way to act on prejudice against immigrants,[108] the degree of stigma levied against those without lawful status is predicated on preexisting views related to the lack of immigration status. Discrimination-motivated nuisance laws, by contrast, link negative views associated with nuisance to immigrant communities whose ways of living are, by the new laws' terms, considered illegal and liabilities to a general quality of life. Of the negative effects of veiled racism, this legislation results in the more actively harmful impact: the way that it must necessarily affect certain populations serves as testimony to their inferior or undesirable characteristics.[109] This is all the more concerning

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104. This difficulty has been noted in the context of sex discrimination claims, where the judgment as to the legality of an action (the standard being reasonableness) may be based on stereotypes and, at the same time, those stereotypes influence the baseline of reasonableness. Consequently, the stereotype-influenced legal standard may not protect minority groups. *See* Zalesne *supra* note 92, at 865, 877; Cahn, *supra* note 92, at 1419.

105. *See* Cahn, *supra* note 92, at 1419 (describing this phenomenon in the context of gender discrimination); Zelesne, *supra* note 92, at 865, 877 (same).

106. *See* sources cited in note 92 *supra* (describing how legal standards can perpetuate stereotypes).

107. These laws may frustrate the integration of new immigrant community members into existing community structures and life. *See, e.g.*, Luna, *supra* note 100 (providing detailed account, on a practical level, of how legislation operates to alienate and exclude Latinos in Illinois); Valliant, *supra* note 83 and accompanying text (explaining how anti-noise legislation operated upon certain new immigrant communities in Chicago); Introduction, *supra* 2 (describing divisiveness of proposed blight ordinance in East Haven); see *also* Su, *Localist Reading*, *supra* note 8 (explaining how communities express preferences and set terms of memberships through local legislation). Although one could imagine the counterargument that laws such as these which, in a sense, codify community norms, could actually facilitate community integration by setting forth acceptable conduct in clear and unambiguous way, this does not seem to be the case.

108. See, for example, legislation at issue in *Lozano v. Hazleton*, 620 F.3d 170 (3d Cir. 2010) (requiring landlords to demand immigration documentation and verify immigration status), and *Villas at Parkside Partners v. Farmers Branch*, 701 F. Supp. 2d 835, 859-60 (N.D. Tex. 2010) (same).

109. *See infra* Section V.B & note 111.

given the nature of local legislation like the nuisance ordinances in this study, which may create in-group conditions that alienate and drive away out-group targets. As explained in more detail in the following section, nuisance-related legislation may also facilitate actions based on implicit biases if they diminish potentially salutary second order thoughts by providing an arguably legitimate reason to act on initially biased impulses.[110]

V. EQUAL PROTECTION AND NUISANCE LEGISLATION

Contextual evidence suggests that a significant number of the above-described blight ordinances may have been enacted, at least on some level, with the goal to regulate immigrant populations.[111] Taking as true, for the remainder of this article, the notion that immigration regulation may indeed be one goal of blight-related legislation, it becomes clear why this immigrant-targeting nuisance regulation is of concern; ordinances that explicitly implicate immigration status may be invalidated as preempted,[112] but ordinances that target immigrant communities without express relation to immigration status will not trigger the same analysis for preempting federal immigration law. This section first discusses the core elements of equal protection doctrine and then explores how the doctrine applies to claims of discriminatory action carried out through facially neutral government action—referred to here as proxy regulation. After evaluating several doctrinal approaches to proxy regulation, this section concludes with an in-depth look at how proxy-based equal protection claims fare in similarly complicated contexts, where stereotypes, bias, and the interrelatedness of protected and non-protected traits make it difficult to meet traditional standards of proof.[113]

A. *Overview of Equal Protection Law*

At its core, the Equal Protection Clause prohibits discrimination on the basis of race, religion, gender, and national origin.[114] Although described as a

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110. *See infra* Section V.B.3.

111. *See supra* Section II (describing findings of study); *see also* Introduction, *supra* (discussing the East Haven blight ordinance).

112. See the description of lower court adjudication of constitutional challenges, *supra* Section II.

113. This article discusses the doctrinal obstacles to equal protection challenges in this context. It is worth noting that significant practical obstacles exist as well. The methods for demonstrating that ordinances such as these were enacted *because of* a protected trait are difficult where such measures are passed at the municipal level and particularly where the proposed law may not, by its title alone, necessarily draw the attention of those it affects.

114. U.S. CONST. amend. VIX, cl. 1. This protection has been clarified and reaffirmed, appearing repeatedly in standards derived from the Constitution and the anti-discrimination provisions of Title VII of the Civil Rights Act of 1964. *See, e.g.*, Civil Rights Act of 1964, tit. VII, Pub. L. No. 82-352, 78 Stat. 241; *see also* Plyler v. Doe, 457 U.S. 202, 212 (1982) (interpreting the Equal Protection Clause to apply to anyone in within the jurisdiction of the state, regardless of alienage); *id.* at 225 & n. 21 ("[T]he Equal Protection Clause operates of its own force to protect anyone 'within [the State's] jurisdiction' from the State's arbitrary action."). The *Plyler* Court wrote:

robust protection against discrimination,[115] evidentiary hurdles make it a difficult protection to claim; in the latter half of the twentieth century, doctrinal requirements for proving such claims initially vacillated, alternatively focusing on intent and impact as courts struggled to determine the optimal measure for discriminatory intent. Early equal protection jurisprudence embraced a holistic approach[116] but, since the middle of the twentieth century,[117] the Court has consistently required that violations of the Equal Protection Clause be demonstrated through proof of racially discriminatory intent or purpose.[118] The question remaining at present, then, is one of proof: How does one demonstrate intentional discrimination in the absence of a smoking gun?

As a doctrinal matter, judicial inquiry into allegations of discrimination is guided by a focus on intent.[119] As a practical matter, this approach is complicated by the fact that prejudice often motivates discriminatory action in cases where the relationship to a protected trait may be less clear—or obscured entirely.[120] These actions—that is, actions undertaken *because of* an assumption about a non-protected trait or characteristic, but that are ultimately rooted in stereotypes regarding race or gender, are considered under a more nebulous body of doctrine, though they are nonetheless discriminatory.[121]

> The States enjoy no power with respect to the classification of aliens. This power is committed to the political branches of the Federal Government. Although it is a routine and normally legitimate part of the business of the Federal Government to classify on the basis of alien status and to take into account the character of the relationship between the alien and this country, only rarely are such matters relevant to legislation by a State.

Id. at 225 (internal citations omitted). *See also* Korematsu v. United States, 323 U.S. 214, 216 (1944) (Murphy, J. dissenting); Hirabayashi v. United States, 320 U.S. 81, 100 (1943) ("Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.").

115. *See, e.g.*, Deborah Hellman, *Two Types of Discrimination: The Familiar and the Forgotten*, 86 CALIF. L. REV. 315, 342 (1998); William Eskridge, *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419 (1993).

116. Strauder v. West Virginia, 100 U.S. 303, 307-08 (1879) (invalidating statute that "stimulat[ed] racial prejudice[,] which is an impediment to securing . . . equal justice"). Although subsequent decisions narrowed this liberal conception of equal protection law, the Supreme Court has made clear that legislation may violate equal protection standards even where the discrimination is not explicit in the face of the statute. *See generally* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

117. *See* Gerald Neuman, *Constitutional Equality: Equal Protection, "General Equality," and Economic Discrimination from a U.S. Perspective*, 5 COLUM. J. EUR. L. 281, 285 (1999) (describing post-*Brown* jurisprudence as the "modern era of equal protection law").

118. *Washington* v. Davis, 426 U.S. 229, 240, 446-48 (1976) ("[T]he basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose."); Village of Arlington Heights v. Metro. Dev. Hous. Corp., 429 U.S. 252, 265 (1977); Pers. Adm'r v. Feeney, 442 U.S. 256, 272 (1979).

119. *See supra* note 119.

120. Indeed, recent scholarship has drawn upon psychological research to argue that even the decisions motivated by private prejudice are driven by implicit bias. Gregory Mitchell, *Second Thoughts*, 40 MCGEORGE L. REV. 687 (2009).

121. Hellman, *supra* note 7, at 318 (defining "proxy discrimination" as the "use[] [of] one identifying characteristic as a proxy for another").

B. *Discrimination Through Proxy Classification*

Post-*Brown*, racial discrimination is socially stigmatized;[122] therefore, today's actions motivated by racial prejudice are likely to be articulated in race-neutral terms.[123] Consequently, actions that discriminate against a protected class are relatively more oblique and harder to detect. Even where such prejudices prompt discrimination based on protected traits, but use other characteristics as proxies, plaintiffs must demonstrate actual intent to discriminate.[124] In those instances, courts may probe more deeply into the facts underlying the proxy decision-making in order to infer intent.[125] This section looks at how courts evaluate proxy classification—by inquiring into the actor's intent, the effect of the action, and the social meaning of the action and effect—and then considers how challenges to the previously-described nuisance legislation would fare under contemporary doctrine.

1. *Intent and Impact*

Even if an action or decision does not explicitly refer to protected traits, the basic tenets of equal protection law should apply to protect against discrimination on the basis of those traits. An ostensibly non-suspect, facially neutral classification may nonetheless warrant greater scrutiny if the neutral classification is merely a surrogate for targeting protected groups.[126] Plaintiffs challenging an apparently neutral state action must demonstrate discriminatory intent, which "may often be inferred from the totality of the relevant facts,"[127] and must demonstrate that the state decision-maker "selected or reaffirmed a particular course of action at least in part '"because of,' not merely 'in spite of,' its adverse effects on an identifiable group."[128] Indeed, the majority of equal protection challenges are based on this very kind of

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122. Jonathan Simon, *On Their Own: Delinquency Without Society*, 47 KAN. L. REV. 1001, 1004 (1999) (describing traditional racial prejudice as socially stigmatized); Clark D. Cunningham, *Symposium: The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298, 1378 (1992) (describing racism as culturally unacceptable).

123. *See* Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1164 (1995) (arguing that "subtle forms of bias . . . represent today's most prevalent type of discrimination"); Theodore Eisenberg & Sheri Lynn Johnson, *The Effects of Intent: Do We Know How Legal Standards Work*, 76 CORNELL L. REV. 1151, 1168 (1991) (noting that, while overt bigotry is relatively rarer, prejudiced persons who do not articulate this prejudice are more common).

124. Washington v. Davis, 426 U.S. 229, 240 (1976).

125. Despite holdings in the early half of the nineteenth century refusing to inquire into legislative intent, race-based equal protection challenges revived this mode of inquiry to some degree, most notably in the context of claims of race-based gerrymandering in the post-*Brown* South. John Ely, *Motivation in Constitutional Law*, 70 YALE L.J. 1205, 1209 (1970) (describing *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), as illustrative of this trend).

126. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976) (reviewing alcohol regulations with greater scrutiny for its gender-based impact).

127. *Washington*, 426 U.S. at 242.

128. Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979).

invidiously discriminatory, pretextual action,[129] in which courts are asked to scrutinize facially neutral laws for inherent or disguised discrimination.[130] Inquiry in this area coalesces around the same central question of intent, but is additionally complicated by layers of speculation and attribution necessary to determine the nexus between facially neutral justification and intentionally-targeted, protected characteristics.

Intent-based tests for pretextual discrimination are predicated upon the notion that even "[a]cts generally lawful may become unlawful when done to accomplish an unlawful end."[131] John Ely theorized the intent-focused inquiry into legislative motivation in the post-*Brown* era, when Southern legislatures attempted to dodge *Brown*'s mandate to desegregate public entities through pretextual policies.[132] Analogizing an intent-based analysis of government policy to statutory interpretation, Ely argued that the test he proposed would allow courts to ascertain the purpose of a law by examining the context and goals.[133] Proponents of an intent-based test argue that this mode of inquiry—an ex ante analysis instead of an ex post, impact-based test—is generally preferable because the action, standing alone, does not lend itself to review and "must turn instead on the nature of the process which produced the choice."[134]

For a brief time after *Brown*, the Court moved away from inquiry focused *solely* on intent[135] and instead required plaintiffs to demonstrate the disadvan-

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129. *See* Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969, 980 (2006) ("[T]he central focus of existing antidiscrimination law is on prohibiting consciously biased decisionmaking . . . ."); *see also* Stacy E. Seicshnaydre, *Is the Road to Disparate Impact Paved With Good Intentions?: Stuck on State of Mind in Antidiscrimination Law*, 42 WAKE FOREST L. REV. 1141, 1142-44 (2007) (criticizing courts for importing intent requirements into disparate impact cases). *See generally* LU-IN WANG, DISCRIMINATION BY DEFAULT: HOW RACISM BECOMES ROUTINE 19-23 (2006); Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1102 (2008); Tristin K. Green, *A Structural Approach as Antidiscrimination Mandate: Locating Employer Wrong*, 60 VAND. L. REV. 849, 895-900 (2007); Martha Chamallas, *Deepening the Legal Understanding of Bias: On Devaluation and Biased Prototypes*, 74 S. CAL. L. REV. 747, 752-53 (2001); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1168-73 (1995); David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899 (1993).

130. *See, e.g.*, Gomillion v. Lightfoot, 364 U.S. 339 (1960) (considering challenge to voting redistricting statute); Lane v. Wilson, 307 U.S. 269 (1939) (considering race-based challenge to voting qualification requirement); Yick Wo v. Hopkins, 118 U.S. 356 (1886) (considering challenge to ordinance regulating building materials for laundry houses).

131. United States v. Reading Co., 226 U.S. 324, 357 (1912).

132. Ely, *supra* note 126, at 1209. *See also* Section I, *supra* (discussing post-*Brown* legislation that inhibited the desegregation of public pools in Jackson, Mississippi).

133. *Id.* at 1208 (arguing for consideration, in challenges to facially neutral policies, of legislative motivation and the "nature of the processes" that produced allegedly discriminatory action).

134. *Id.* The pragmatism of this approach is well-illustrated by the scores of post-*Brown* race cases in which towns throughout the South acted in ostensibly non-racialized ways that were, in actuality, an effort to skirt mandatory racial integration. *Id.* Though these cases remain relevant as models for challenging proxy legislation enacted, at base, *because of* peoples' race, subsequent doctrinal development has relegated this remedy largely to the Civil Rights Era.

135. United States v. O'Brien, 391 U.S. 367, 383 (1968) ("It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis

taging effects of discriminatory action.[136] The primary reason for this was practical; intent is difficult to determine, particularly to the degree of certainty required to impose liability.[137] Civil rights advocates likewise found the focus on intent problematic, arguing that, if the goal is to eradicate discrimination broadly, antidiscrimination doctrine must also provide redress for systemic effects of institutional and unconscious discrimination—which may not be considered "intentional" in the traditional sense.[138]

As the law stands now, discriminatory intent is key to liability; courts do not recognize claims based solely on disparate impact.[139] Since deciding *Washington v. Davis* in 1976, the Court has adhered to a high standard for proving purposive discrimination,[140] requiring claimants alleging discrimination to show purposeful intent.[141] Post-*Washington*, plaintiffs face a higher

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of an alleged illicit legislative motive."); *id.* (rejecting Ely's construction of *Gomillion* and clarifying that "[t]he decisions of this Court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted."); *id.* at 384 (rejecting the theory "that legislative motive is a proper basis for declaring a statute unconstitutional," and declaring instead that "the inevitable effect of a statute on its face may render it unconstitutional"); *accord* Palmer v. Thompson, 403 U.S. 217 (1971).

136. For a time, this focus on effects allowed for disparate impact-styled claims of discrimination to go forward based solely on effects. In recent years, disparate impact, alone, has generally not been considered sufficient to prove discrimination. See the discussion of subsequent doctrinal developments *infra* notes 140-143 and supporting text.

137. The "hazard[s]" of examining legislative motivation are explained in Chief Justice Warren's majority opinion in *O'Brien*, in which he distinguishes the permissible use of intent as an aid to statutory interpretation from the impermissible use of intent to invalidate a statute. *O'Brien*, 891 US. at 383-84 ("[T]hat is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it. What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork. We decline to void essentially on the ground that it is unwise legislation which Congress had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a "wiser" speech about it.").

138. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935, 951-54 (1989); *see also* Barbara J. Flagg, *"I Was Blind, But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 969-79 (1993) (making a similar argument more recently). Notably, even some who generally support intent-based challenges have agreed that disparate impact may be the best indication of discriminatory intent. Ely, *supra* note 126, at 52.

139. Washington v. Davis, 426 U.S. 229 (1976) (declaring that discriminatory intent is required, and holding that disparate impact, alone, does not necessarily prove discrimination); *see* City of Mobile v. Bolden, 446 U.S. 55, 66 (1980); *see also* Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L.REV. 493, 494-95 (2003) (characterizing this as the first of three rounds of questions about antidiscrimination law and facially neutral statutes). George Rutherglen and others have explained that this intent-standard is the Court's attempt to adopt a fault-based approach. George Rutherglen, *Discrimination and Its Discontents*, 81 VA. L. REV. 117, 124 (1995); *see also* Rachel Moran, *The Elusive Nature of Discrimination*, 55 STAN. L. REV. 2365, 2400 (2002) ("Legislative [actions] could violate the Fourteenth Amendment if their purpose were invidiously to minimize or cancel out the voting potential of racial or ethnic minorities. To prove such a purpose, it is not enough to show that the group allegedly discriminated against has not elected representatives in proportion to its numbers. A plaintiff must prove that the disputed plan was conceived or operated as [a] purposeful devic[e] to further racial . . . discrimination.").

140. Eisenberg & Johnson, *supra* note 124, at 1158-60.

141. Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977) (elaborating a seven-factor test for circumstantial evidence of intent: (1) adverse racial impact, (2)

bar for proof and, perhaps more importantly, rigorous tests intended to avoid jurisprudential difficulties in pinpointing and interpreting legislative motivation.[142] Post-*Washington*, intent claims fare dismally unless plaintiffs produce discriminatory statements by members of the decision-making body or demonstrate the presence of a clear pattern of discrimination that would be otherwise unexplainable.[143] Subtler showings of intent are unlikely to survive even initial motions practice, much less ultimately prevail on the merits.[144] The new wave of nuisance legislation, which may target immigrant populations without explicitly stating this goal, is unlikely to meet the high standard for proving discriminatory animus. Indeed, what unifies these policies emerging in disparate municipalities is the proffered non-racial basis for enactment.[145] As such, it is difficult to conceive that members of town councils, often in small and insular communities, would disavow their own enactment or that of their neighbors, and admit to being motivated by race or national-origin based factors.

2. *Cultural Meaning/Social Cognition*

Practical difficulties stemming from proving discriminatory intent have generated a variety of hybrid and alternative approaches to determine whether and how discriminatory intent attaches to a facially neutral action; one of the most notable of these approaches is the "cultural meaning" test.[146] Proposed by Charles Lawrence in 1987, this mode of evaluation was designed to evaluate laws that are motivated by unconscious discrimination or that generate stigmatizing effects by retaining or institutionalizing histori-

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historical background, (3) specific sequence of events leading up to the decision, (4) departure from normal procedure sequence, (5) substantive departure from routine decision, (6) contemporary statements made by decisionmakers, and (7) the inevitability or foreseeability of the consequence of the law); *see also* Eisenberg & Johnson, *supra* note 124, at 1157.

142. *See* Arthur S. Miller, *If the Devil Himself Knows Not the Mind of Man How Possibly Can Judges Know the Motivation of Legislators: Legislative Motivation in Constitutional Law*, 15 SAN DIEGO L. REV. 1169, 1170 (1978) (describing futility of inquiry into legislative motivation and warning against interpretive authority this inquiry gives to judges); Eisenberg & Johnson, *supra* note 124, at 1157 (describing proof required for race-based intent challenges and the relatively low rate of plaintiff success).

143. Eisenberg & Johnson, *supra* note 124, at 1157, 1179 (finding, based on survey of district court cases, that relative to other methods of proof, "statements by members of the decisionmaking body" and the presence of a "clear pattern, unexplainable on grounds other than race" are the two most frequent and most significant indicators of plaintiff success.").

144. Eisenberg & Johnson, *supra* note 124, at 1187-89; *see also id.* at 1197 (providing data from survey of race-based intentional discrimination claims to support the claim that intent is difficult to prove).

145. *See, e.g.*, Introduction, *supra* (discussing East Haven's characterization of the proposed ordinance as intended to combat blight in particular areas of the city); Appendix, "Suffolk, County" at row 102 (regulating occupancy to alleviate "quality of life" concerns).

146. *See, e.g.*, Lawrence, *supra* note 139 (proposing the "cultural meaning" test); Strauss, *supra* note 139 (proposing testing facially neutral action by imagining that impact affected the races in the reverse manner).

cally-rooted prejudices.[147] Under this test, the element of discrimination inherent in a governmental action may be demonstrated by "evidence detailing [contemporary manifestations] of the myth [of racial inferiority]."[148] An action would be considered to be impermissibly discriminatory when the outcome of the policy (and the groups on which the negative consequences fall) is viewed not as "the product of random selection or the differential educational background or socioeconomic status," but instead "as testimony to the inherent intellectual abilities of the racial groups to which [those affected by the policy] belong."[149]

Importantly, this test accounts for mixed motives, whether actual or pretextual, making it particularly—and perhaps uniquely—appropriate for evaluating claims of discrimination by proxy legislation. Anticipating that governmental decision-makers will assert rational reasons that could, and perhaps partially do, motivate their decision, plaintiffs must then demonstrate that the defendant, first, was motivated by race and, second, would not have otherwise taken such an action.[150] When evaluating whether plaintiffs sustain this responsive burden, contextual inquiry is not only appropriate, but may well be the only means for demonstrating discriminatory intent.[151] This is particularly relevant where the nature of local legislation and politics

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147. Lawrence, *supra* note 139, at 364 (arguing for this culturally-cognizant test because "[r]ace cannot have been irrelevant in a decision that all know has a racial meaning . . . . If the governmental decisionmaker has somehow blinded herself to the inevitable intrusion of the issue of race on the process by relegating the issue to her unconscious, the court should not follow suit"). Others have since adopted and elaborated upon this theory of analysis, describing it as a "social cognition" theory for ascribing meaning to an arguably discriminatory action. Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1168-73 (1995). For scientific research that supports Lawrence's assertions, *see generally* Samuel R. Bagenstos, *Implicit Bias, "Science," and Antidiscrimination Law*, 1 HARV. L. & POL'Y REV. 477 (2007); Anthony Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945 (2006); Anthony Greenwald et al., *A Unified Theory of Implicit Attitudes, Stereotypes, Self-Esteem, and Self-Concept*, 109 PSYCHOL. REV. 3 (2002); Anthony Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCHOL. REV. 4 (1995).

148. Lawrence, *supra* note 139, at 375; *see* Brown v. Bd. of Educ., 892 F.2d 851, 863 (10th Cir. 1989), *overruled on other grounds*, (applying that the theory underlying this test, "[w]here a plaintiff has established segregation in the past and the present, it is 'entitled to the presumption that current disparities are causally related to prior segregation, and the burden of proving otherwise rests on the defendants' [in order to] []ensure[] that subconscious racial discrimination does not perpetuate the denial of equal protection to our nation's school children[] [because] [a] focus on provable intent alone would deny a remedy to too many Americans") (citations omitted); *see also* Chin v. Runnels, 343 F. Supp. 2d 891, 907 (N.D. Cal. 2004) (applying this theory and explaining that "many of the facially neutral criteria used by those participating in the selection process echo the negative stereotypes that have long plagued Asian-Americans and others").

149. Lawrence, *supra* note 139, at 373 (applying the cultural meaning test to *Davis* and arguing that "the government's use of the [civil service] test has racial meaning if our culture has taught us to believe that blacks that fail the [civil service] test have done so because they are black").

150. *See supra* Section IV. A.

151. Lawrence, *supra* note 139, at 352, n.159 (arguing that examining context is "crucial" to determine the actor's intent and appropriate because it illuminates the meaning that others will give the actor's words or actions).

creates even greater obstacles for participation in the legislative process[152] and practical hurdles to establishing discriminatory intent and stigmatic harms.[153]

There is some evidence that courts have accepted the "cultural meaning" model, particularly where the racialized historical and cultural meaning of a governmental policy is relatively uncontested.[154] Evaluating allegations that a historically segregated school system discriminated on the basis of race, the Tenth Circuit in *Brown v. Board of Education* examined the school district's conduct in the context of other behavior that revealed its motivations.[155]

> [H]ow a district lobbies its patrons and government agencies on issues that affect desegregation, whether it seeks and then heeds the desegregation recommendations of others, and the cooperativeness of the district in complying with court orders, for example, bear on the manner in which the district has shaped the current conditions in the school district.[156]

Similarly, in *United States v. Bishop*, the Ninth Circuit invoked this same whole-context analysis to determine whether preemptory strikes against jurors from certain neighborhoods constituted racial discrimination and ultimately found discriminatory intent where a facially-neutral characteristic—here, the place of residence—is "utilized as a surrogate for racial stereotypes—as, for instance, a short hand for insensitivity to violence."[157] While the

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152. Barriers to new community members' politically participating include relatively easy capture by long-time political stakeholders, procedural difficulties involved in organizing new immigrant community members to be politically active and insert themselves in local politics, and the threat of retaliation for voicing opposition within small communities. Following the East Haven Town Council meeting, *see supra* Introduction, a first-time Council meeting attendee who had opposed the ordinance expressed fear that his house would be burned for his public statements. *See also* Lawrence, *supra* note 139, at 376 (describing the political prioritizing that occurs in such contexts, which can easily disguise or genuinely obscure racially discriminatory animus). Practical hurdles, in addition to the requirement that actual intent be established, include the difficulty of obtaining legislative history for municipal legislation and the difficulty, for new immigrants, of knowing and articulating well the ways in which the legislation at issue might depart from ordinary practice. *See supra* note 144 (describing this as one of two types of proof key to successful intent-based challenges).

153. Lawrence, *supra* note 139, at 353 (explaining how the stigmatizing injury occurs when cultural meaning is created as a result of unconsciously racist classification).

154. Gonzalez-Rivera v. INS, 22 F.3d 1441, 1450 (9th Cir. 1994) (recognizing that race motivates decisions at subconscious levels of thought and response).

155. Brown v. Bd. of Educ., 892 F.2d 851, 863 (10th Cir. 1989), *overruled on other grounds* ("focus[ing] on provable intent alone would deny a remedy to too many").

156. *Id.* at 865.

157. United States v. Bishop, 959 F.2d 820, 826 (1992), *overruled on other grounds*. Ultimately, the *Bishop* Court held that, when a facially neutral characteristic was used as a surrogate for impermissible stereotypes about a protected class, the invocation of that proxy characteristic violates equal protection. *Id.* In *Bishop*, the prosecutor argued that the preemptory strikes were based on a race-neutral reason—the prospective juror's insensitivity to violations—and said that race did not motivate the dismissal from the jury pool. *Id.* at 821-22. Acknowledging that race may well have been absent from the prosecutor's conscious decisions, the Court found salient that, "where residence is utilized as a surrogate for racial stereotypes—as, for instance, a short hand for insensitivity to

Washington standard requires plaintiffs to produce evidence of intent narrowly related to the challenged action, the cultural meaning analysis examines a wider set of meanings to understand the significance of the action at issue.[158] More holistic inquiry of this type is the likeliest, though by no means likely, standard by which challenges to proxy nuisance legislation might survive.[159]

3. *Unconscious Bias*

Embedded within the cultural meaning analysis is the question of how much consciousness or volition the "intent" standard requires.[160] Aside from the practical difficulty of meeting the evidentiary requirements for discriminatory intent within traditional equal protection law, there remains the equally significant problem of discrimination *based on* protected traits, but devoid of conscious intent.[161] As society has become increasingly vigilant against decisions made solely on the basis of immutable characteristics, psychologists and social scientists have provided evidence suggesting that the heuristics have shifted such that even the decision-maker may not be aware of the racial associations underlying his or her decision-making.[162] Regardless of at which level of consciousness these discriminatory motivations operate, discounting decisions or actions simply because the motivation operates at subconscious levels "obscures the continuing role of historic

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violence—its invocation runs afoul of the guarantees of equal protection." *Id.* at 826. Distinguishing between *Bishop* and cases, for example, in which jurors are preemptively struck for inability to trust in the translator, the courts emphasizes "the difference between a reason - whether valid or not - and a racial stereotype . . . between a criterion having a discriminatory racial impact, and one acting as a discriminatory racial proxy . . . between what the Constitution permits, and what it does not." *Id.* at 827-28. Arguing for the propriety of considering legislative motivation, Ely identified this very danger, pointing out that residence and neighborhood might well be used as "euphemism[s] . . . for race, nationality or wealth." Ely, *supra* note 126, at 1234.

158. *See, e.g.*, *supra* notes 149, 158 and supporting text.

159. Certain jurisdictions, like Escondido, California, and Rogers, Arkansas, that explicitly link nuisance or "quality of life" provisions to a desire to rid their communities of immigrant populations would be the likeliest candidates for this type of claim. *See, e.g.*, Anna Gorman, *Undocumented? Unwelcome*, L.A. TIMES, July 13, 2008, at B1 (quoting Escondido, Ca, Councilman Sam Abed as explaining "'We learned from the rental ordinance [which imposed immigration-related requirements],' Councilman Sam Abed said. 'We changed our focus to quality of life issues.'"); *Rogers Mayor Wants To Classify Illegal Immigrants As Nuisances*, 4029T.V.COM, Oct. 27, 2006, http://www.4029tv.com/news/10177338/detail.html (reporting that Rogers Mayor Steve Womack said he wants to make being an illegal immigrant tantamount to being a public nuisance).

160. *See* Moran, *supra* note 140, at 2393 (drawing a conceptual distinction between animus and "information processing," but pointing to mixed motive cases as illustrative of the practical difficulty of distinguishing between intentional and unintentional discrimination).

161. LESLIE HOUTS PICCA & JOE R. FEAGIN, TWO-FACED RACISM: WHITES IN THE BACKSTAGE AND FRONTSTAGE, vii-ix (2007) [hereinafter PICCA & FEAGIN] (explaining that this occurs as a result of historical framing that is so deeply entrenched in our historically understanding of our social structures that it is seen to be generic and non-racialized). This manifests in contemporary thought as *not* explicitly related to race itself, but instead based on cultural deficiencies that are often found in a particular minority. *Id.*

162. Moran, *supra* note 140, at 2392-93; Mitchell, *Second Thoughts*, *supra* note 121 (tracing the development of implicit bias-focused scholarship).

discrimination" in ongoing institutional and social decision-making.[163]

The impetus for social science research into implicit bias arose from the apparently inexplicable persistence of racial disparities even after years of strict prohibitions on racial categorization.[164] Charles Lawrence's attack on the intent-focused standard spurred social science and psychological scholars to look more closely into whether and how unconscious bias factors into cognitive decision-making.[165] Findings from this research have substantiated hypotheses that unconscious bias is enormously influential in individual decision-making and, on this basis, scholars have argued that *Washington v. Davis*'s intent-focused legal standard would foreclose taking action against the most pervasive kinds of discrimination.[166] Scientific developments in this area, such as the Implicit Association Test ("IAT"), provided a relatively more reliable mode of proof that identifies underlying animus based on protected traits.[167] Relevant for considering discrimination by proxy, the IAT is said to identify animus even in instances where the subject does not consciously recognize race-related motivations.[168] Although this test has generated significant support among implicit bias researchers,[169] it has also drawn attack by critics who took issue with the probativeness of the IAT, arguing that the preferences and choices that emerged in the results are merely indicative of test subjects associating people and characteristics from the subjects' personal experiences in an effort to create "manageable catego-

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163. Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 534 (2003) (focusing on the role of unconscious bias in employment context).

164. Mitchell, *Second Thoughts*, *supra* note 121.

165. Moran, *supra* note 140, at 2392-93. Some, however, are less sanguine about the involuntariness of this bias, describing modern-day racism as coterminous with historical racism, just moved behind closed doors and hidden by a "racially polite" façade. *See* PICCA & FEAGIN, *supra* note 162, at xii.

166. Moran, *supra* note 140, at 2393 ("Antidiscrimination laws that focus on conscious animus will overlook the ways in which unconscious stereotypes entrench and perpetuate racial differences."); Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action"*, 94 CAL. L. REV. 1063, 1078-79 (2006) (arguing that current antidiscrimination intent analysis, which does not take into account the magnitude of unconscious bias, is "woefully out-of-date").

167. The Implicit Association Test (IAT) is a speeded binary-classification task in which test-takers are shown stimuli including races and words that are positive or negative in character and asked to respond in such a way that their response time is thought to evidence test-takers implicit racial attitudes. Gregory Mitchell & Phillip E. Tetlock, *Facts Do Matter: A Reply to Bagenstos*, 37 HOFSTRA L. REV 737, 741 n.16 (2008-2009) [hereinafter Mitchell & Tetlock, *Facts Do Matter*]. This test is considered to be the most popular implicit measure of bias and provides the basis for must new legal scholarship on implicit bias and antidiscrimination. *Id.* Other inquiries into unconscious discrimination include self-reporting on questions designed to capture indirect manifestations of fundamentally race-related hostility and "unobtrusive indicators designed to pick up oblique manifestations of hostility that might manifest themselves when people think the sentiment cannot be traced to them personally." Hal R. Arkes & Philip E. Tetlock, *Attributions of Implicit Prejudice, or "Would Jesse Jackson 'Fail' the Implicit Association Test?"*, 15 PSYCHOL. INQ. 257, 258 (2004).

168. Mahzarin R. Banaji, Brian A. Nosed, & Anthony G. Greenwald, *No Place for Nostalgia in Science: A Response to Arkes and Tetlock*, 15 PSYCHOL. INQUIRY 279, 279-80 (2004).

169. Greenwald & Krieger, *supra* note 148, at 967 n. 23 (describing the IAT as the most widely used measure of implicit bias) (2006); *see also* Jolls & Sunstein, *supra* note 130 (describing impact of IAT test on field).

ries" that allow for cognitive ordering and efficient decision-making.[170]

Arguments similar to those in the debate amongst psychologists about whether race-based associations indicate prejudice or merely result from psychological ordering appear in the continuing dispute about the post-*Brown* meaning of equal protection law and discrimination. Looking at the question from a historical and cultural perspective, critical race theorists such as Ian Haney Lopez have argued that unconscious racism is at least as significant as conscious racism in shaping social status and producing social inequality.[171] Tracing modern antidiscrimination doctrine as it has evolved from *Brown*, Reva Siegel argues that allowing discrimination to be understood as a prohibition against classification solely on the basis of an immutable characteristic avoided a much more contentious debate that would have followed any attempt to treat *Brown* as a mandate against any action with racially-subordinating effects.[172] In her account, the evolution of equal protection law reveals that its prohibition of actions based on particular protected traits is rooted in a deeper constitutional commitment against government actions that enforce subordinated status and social stigma.[173] The history Siegel describes makes clear that equal protection law should be understood as protection against subordination and not merely against classification.[174] Taking into account the anti-subordination values underlying modern equal protection law, it is difficult to say that implicitly biased decision-making is any less problematic than overtly discriminatory action.

Even those who recognize that unconscious bias exists may remain uneasy about the propriety of legal liability in such cases; the absence of either intent or consciousness might suggest that the decision-maker is less blameworthy or perhaps that, even if he or she were aware of this bias, is unable to control his or her unconscious impulses.[175] Gregory Mitchell has criticized efforts to prove discriminatory motivation through implicit bias tests, arguing that even

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170. Gregory Mitchell & Phillip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 OHIO L. J. 1023, 1085 (2006) [hereinafter Mitchell & Tetlock, *Perils of Mindreading*] ("posit[ing] that implicit prejudice, as now conceived, labels perfectly rational reactions to existing socioeconomic conditions as prejudiced" and refuting anticipated counterarguments); Mitchell & Tetlock, *Facts Do Matter*, *supra* note 168, at 7 (refuting Bagenstos' argument that "the fact that 80% of Americans fail the IAT does not mean that 80% of Americans are unconsciously biased" and that it would be "naïve—to the point of reckless—to restructure employment law and key institutions along lines dictated by a still developing line of scientific inquiry with no record of applied success"); Mitchell & Tetlock, *Perils of Mindreading*, at 1029 (taking issue with the "mantle of science" that IAT research claims in furtherance of its agenda and refuting both the reliability of the data as well as the "real world implication" even where biased impulses exist); *see generally* Banaji, Nosed & Greenwald, *supra* note 169, at 284-86.

171. Moran, *supra* note 140, at 2413, 2418.

172. Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification in Constitutional Struggles Over Brown*, 117 HARV. L. REV. 1470, 1476 (2004).

173. *Id.* at 1492-93, 1542 (pointing out that, because "concerns about subordination shape the concept of classification itself . . . antidiscrimination law has no determinate criteria for deciding what practices are group-based classifications").

174. *Id.* at 1547.

175. *Cf.* Rutherglen, *supra* note 139 (positing that discrimination law's intent requirement is an attempt to link legal liability to blameworthiness).

where implicit bias exists, second thoughts offer an important opportunity for individuals to self-correct "irrational, discriminatory thoughts."[176] This second order choice, he contends, may be influenced by external efforts to expose and eradicate discrimination.[177] In his view, those with negative first order associations related to certain groups of people are not necessarily cognitively compelled to treat them negatively, and so legal prohibitions against discrimination may influence the ultimate decision even of those that experience discriminatory impulses in the first instance.[178]

Putting aside disputes as to methodology, inquiry into implicit bias seems a logical follow-on to inquiry into discriminatory animus underlying facially neutral legislation.[179] Indeed, one scholar in favor of IAT research has suggested mandatory IAT testing for legislators proposing arguably racist measures to "smoke-out" hidden discriminatory intentions.[180] On one hand, subjecting legislators enacting nuisance ordinances to such a test sounds appealing. It offers a science-clothed approach that might circumvent some of the controversy-creating potential which Siegel has identified as problematic for antidiscrimination law; scientific data provides a less contentious, if somewhat opaque, assessment of an action that could, theoretically, have many possible meanings.[181] On the other hand, neither the psychological nor the legal community has readily embraced the implicit bias model, as both seem reluctant to assign either blame or liability for impulses, assuming instead that rationality and control play a larger role in the cognitive process and the ultimate action.[182] Arguments against using evidence of implicit bias focus on the import of context and self-consciousness as factors in decision-

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176. Mitchell, *Second Thoughts*, *supra* note 121, at 705-06, 715. Ultimately, Mitchell contends that IAT-based analysis cannot reliably predict discriminatory decision-making, even where negative first order associations exist, because of the influence of second thoughts. This, moreover, means that legal standards prohibiting discrimination play an important debiasing role, even where the initial bias is largely unrecognized by the decision maker. *Id.* at 30. *But see* PICCA & FEAGIN, *supra* note 162 (noting that indications of racial bias increases proportionately with the degree of privacy the decision-makers believe he or she has when making the decision, which suggests that second thoughts may not be evidence of a genuine inclination not to discriminate).

177. Mitchell, *Second Thoughts*, *supra* note 121, at 708.

178. *Id.* Banaji, Nosed, and Greenwald note this, but their findings show that the salutary effects of consciously anti-discriminatory second thoughts diminishes in the absence of active attention. Banaji, Nosed & Greenwald, *supra* note 169, at 281; *see also* PICCA & FEAGIN, *supra* note 162.

179. In the context of already-enacted legislation, vulnerabilities that form the crux of Mitchell and Tetlock's criticism of implicit bias data are less relevant because both the first and second order choices have already been made.

180. Mitchell & Tetlock, *Perils of Mindreading*, *supra* note 171, at 1027 n. 13 (describing Reshma Saujani's argument).

181. James G. Wilson, *The Role of Public Opinion in Constitutional Interpretation*, 1993 B.Y.U. L. REV. 1037, 1093-94 (discussing social order-instilling effect of decisions grounded in science-like reasoning).

182. *See* Ash v. Tyson Foods, 546 U.S. 454 (2010) (focusing on *intended* meaning of the allegedly discriminatory action); League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 440 (2006) (focusing on intentional discrimination); Mitchell & Tetlock, *Facts Do Matter*, *supra* note 168. *But see* Kimble v. Wis. Dep't of Workforce Dev., 690 F. Supp. 2d 765, 778 (E.D. Wis. 2010) (finding that evidence of implicit bias established discrimination in violation of Title VII).

making.[183] Even if, the argument goes, the decision-maker harbors private prejudice, positive interactions with disfavored subgroup members may lead the decision-maker to react positively simply because he or she is favorably surprised.[184]

The potential for favorable surprise or cognitive self-correction is, in the context of discriminatory nuisance legislation, minimal. This is so because, even if one were to use Mitchell's optimistic conception of how intent-based standards could mitigate negative actions based on first order associations, that positive second order thought still requires some level of interaction with the object of discrimination in order to invalidate those first order impulses.[185] In his research, "ready access to stereotypic groups" and the presence of others in one's "in-group" served to invalidate first order stereotypic associations.[186] However, the nature of local legislation such as the nuisance ordinances in this study serves to create in-group conditions that alienate and drive away out-group targets, thus minimizing the potential for interaction.[187] Moreover, the particular nuisance-related character of the legislation may tend to exacerbate the frequency of negative instances resulting from notions of implicit bias as mere cognitive categorization. One strong argument against assigning legal significance to unconscious bias is that supervening factors or considerations may affect the ultimate decision and leave clear the opportunity for second-order, anti-discriminatory thoughts to absolve the resulting action.[188] Characterizing certain subgroups' activities as nuisance, however, clouds second order thoughts by providing an arguably non-racist reason to proceed with the initially biased first order impulses—even if that first order impulse was, in fact, rooted in race.

It could be argued that proving discriminatory intent underlying this legislation matters little, that a host of non-equal protection-invoking grounds for invalidation remain and may well offer surer relief.[189] Worth considering, however, is the point at which equal protection-avoidance ceases to be desirable. The federalism-focused discussion of local legislation thus far has

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183. *See* Mitchell & Tetlock, *Facts Do Matter, supra* note 168, at 744 (challenging the synonymity of implicit and unconscious bias, which leads to the arguably false assumption that implicit bias "operate[s] beyond control or beyond the influence of conscious knowledge and that the unconscious is not goal-driven.").

184. Mitchell & Tetlock, *Perils of Mindreading*, *supra* note 171, at 1113-14.

185. *See id.* (explaining that reactions of prejudice decrease as interaction increases, particularly where groups observe and learn about each other).

186. Mitchell, *Second Thoughts*, *supra* note 121, at 707-08.

187. *See supra* sources cited in note 108; *see also* Section IV(C).

188. *See supra* notes 185-87 and supporting text.

189. Drafting-related deficiencies, including vagueness and overbreadth, constitute comparatively less complicated or controversial grounds for invalidation. *See, e.g.*, Villas at Parkside Partners v. Farmer's Branch, 577 F. Supp. 2d 851 (N.D. Tex. 2008) (granting partial summary judgment); Br. of Pet'r, Lozano v. City of Hazleton, 496 F. Supp. 2d 477 (M.D. Pa. 2007); *but see* Debra Livingston, *Police Discretion and the Quality of Life in Public Places, Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 605 (1997) ("[C]hallenges to various public order laws produced disparate results in jurisdictions across the country.").

left much unsaid regarding the creation of stigma at the local level.[190]

Turning away from equal protection doctrine as a means to challenge measures that perpetuate stigmatization and racial prejudice suggests a largely symbolic commitment to antidiscrimination law. Allowing local lawmakers to couch racially-discriminatory local lawmaking in "quality of life" terms yields results that are difficult to harmonize with the goal of anti-discrimination law; this purpose, it is argued, is to guard against the subordination of people for their race or national origin—and not merely to prohibit classification.[191] In a nation with an indisputably immigrant-related past and present, the significance of local laws discriminating against such marginalized communities cannot be fully divorced from cultural context and meaning.

VI. CONCLUSION

This article identifies and describes a distinct strain of local legislation that has emerged quietly alongside the upswing in local immigration regulation. Textually unconnected, these concurrent trends are intimately intertwined, together telling stories about the ways and means by which towns across America are choosing to construct communities. As this study shows, these nuisance laws may be loaded with racial and ethnic significance, despite their neutral wording. Indeed, history illuminates the subjective nature of this body of law and affirms its easy adaptation as a tool for social ordering.

In light of the difficulties associated with challenging discriminatorily-animated nuisance legislation, even where it is widely understood as such, one might suggest a different approach than revisiting or revising tests for legally actionable discrimination. Theoretically, refashioning doctrinal tests to ensure that anti-subordination aspects of antidiscrimination law extend to such cases would seem an optimal reform. As a practical matter, however, this may not be likely to resolve the underlying concerns. Even if courts were to invalidate nuisance ordinances for discriminatory motives, it would be unlikely or impossible to restrain the legislature from reenacting it with a cleaner record, and judicial review of legislative motivation would not fully resolve the prejudices underlying both explicit and inexplicit species of immigrant-targeting legislation. Moreover, the fact that the character of local legislation has once morphed suggests that localities will find ways to

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190. *See* notes 31-34 & supporting text; *see also* Fan, *supra* note 10 (making similar observation).

191. For theoretical justification of antisubordination understanding of antidiscrimination law, *see generally* J.M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9 (2003) (arguing that "guarantees of equal citizenship cannot be realized under conditions of pervasive social stratification and argue that law should reform institutions and practices that enforce the secondary social status of historically oppressed groups."); J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313 (1997); Reva B. Siegel, *Why Equal Protection No Longer Protects*, 49 STAN L. REV. 1111 (1997); Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976).

express preferences about the face of their communities through some means, even where certain methods are restricted. Recognizing nuisance legislation as a way for invidiously discriminatory morays to animate local action is useful; however, it suggests a need for closer attention to community-constructing actions generally.

In the end, the real concern in either explicit or proxy regulation of immigrant communities is that these actions disadvantageously subordinate people within our communities. In the racially-cognizant civil rights era, municipal actions based on race spawned a discourse on the implications of local regulations for how communities incorporate or evade the core values of the Equal Protection Clause. As we see this scenario play out again, from East Haven to Escondido, we would do well to recall lessons learned during the civil rights era when considering the discriminatory import of this second wave of proxy legislation.

APPENDIX: TABLE OF LOCAL IMMIGRATION AND NUISANCE LEGISLATIVE ACTIVITY

Posture on Immigration

(L)–Laws expressly favor local enforcement on the basis of immigration status.

(F)–Laws expressly oppose local enforcement of federal immigration law.

Nuisance Legislation

(Y)–Enacted nuisance legislation during the period of time in which express immigration legislation was in effect.

(N)–Did not enact nuisance legislation during the period of time in which express immigration legislation was in effect.

(Y−)–Enacted minimal or narrowly tailored nuisance legislation during the period of time in which express immigration legislation was in effect.

Deviation

(Y)–Amount of nuisance legislation during the period of time in which express immigration legislation was in effect deviated from the traditional rate of new nuisance legislation.

(YY)–Amount of nuisance legislation during the period of time in which express immigration legislation was in effect deviated *dramatically* from the traditional rate of new nuisance legislation.

(N)–Amount of nuisance legislation during the period of time in which express immigration legislation was in effect *did not* deviate from the traditional rate of new nuisance legislation.

(I)–Amount of nuisance legislation during the period of time in which express immigration legislation was in effect *appears to have* deviated from the traditional rate of new nuisance legislation; however, because it was difficult to identify a clear prior rate of nuisance legislation, only limited conclusions can be drawn.

State	Town	Legislative Activity	Legislative Character	Posture on Immigration	Nuisance Legislation	Deviation
AL	Athens	Ord. No. 2007-1663 (Nov. 19, 2007) (regulating business licenses). *See* Athens City Council, Meeting Minutes (Apr. 9, 2007) (residents seeking municipal regulation "challenge all sub-division developers and building contractors to have the moral courage and integrity to avoid hiring illegal aliens" and to review business licenses of "property owners who are renting to illegal aliens.")		L	Y	Y
		Ord. No. 2007-1644, § 1 (June 25, 2007) (towing); Ord. No. 2007-1652, § 1 (Aug. 27, 2007) (blight, junk, noise); Ord. No. 2007-1643, § 1 (June 25, 2007) (authorizing peace officer to place person under custodial arrest). Prior practice appears to have been to enact legislation every ten years. *See, e.g.*, Sec. 1–9 (periodically updating nuisance penalties).	In recent years, Athens has generally enacted approximately 40 ordinances annually. Athens, Ala., Code of Ordinances, Code Comparative Table Ordinances. The vast majority of the nuisance provisions have been in place—and unamended—since 1983 and, prior to that, at the 1963 adoption of the code.			
AL	Gadsden	Res. (Aug. 2006) (English-Only, *English Now Gadsden's Official Language,* GADSDEN TIMES, Aug. 9, 2006, at A3).		L	Y	YY

State	Town	Legislative Activity	Legislative Character	Posture on Immigration	Nuisance Legislation	Deviation
		Ord. No. O-49-06, § 1 (May 30, 2006) (nuisance); Ord. No. O-155-05, § 2 (Nov. 15, 2005) (animal-related nuisance); Ord. No. O-32-03, (May 6, 2003) (expanding penalties).	Deviates from prior practice. Nuisance legislation prior to this recent spurt of activity was limited to roughly once per decade. *See* Gadsden, Ala., Code of Ord., ch. 86 (Nuisances). In terms of sheer numbers of legislative enactments, Gadsden's practice varies by year, ranging from 57 to 165 enactments annually in recent years. *Id.* at Code Comparative Table Ordinances.			
AL	**Huntsville**	City Councilman Glenn Watson proposed an ordinance to punish employers and landlords who hire and rent to undocumented immigrants.	Jeff Hansen, Kelli Hweette Tayler & Dawn Kent, *Jefferson County Judge Ordering Hispanics to Leave State*, BIRMINGHAM TIMES, Mar. 19, 2006 (reporting on Hoover District Court judge ordering Hispanic defendants in misdemeanor cases to leave the country).	L	Y	I
		Ord. No. 07-171, § 1 (Mar. 8, 2007) (expanding enforcement powers regarding housing occupancy for first time since 1990 and, before that, 1975).	Legislative pattern supports, but does not clearly indicate deviation from prior legislative practice.			

State	Town	Legislative Activity	Legislative Character	Posture on Immigration	Nuisance Legislation	Deviation
AR	**Rogers**	Mayor Steve Womack publicly proposed an ordinance that would declare illegal immigration a public nuisance and impose fines on those employing or renting to undocumented residents. *See* City Council. Rogers, Ark., Minutes of Meeting, RCCM p. 5454v (Nov. 14, 2006), *available at* http://www.rogersarkansas.com/citycouncil/pdf's/11-14-06.pdf ("The mayor went public with his intent to have the city attorney create a local ordinance that would declare illegal immigrants a public nuisance and impose fines for those employing or renting for those who lack proper documentation.").	*Rogers Mayor Wants To Classify Illegal Immigrants As Nuisance*, 4029TV.COM, http://www.4029tv.com/news/10177338/detail.html (discussing immigrants affecting quality of life); Lopez v. City of Rogers, Civil Action No. 01-5061 (W.D. A.K. 2001) (regarding racial profiling by the Rogers police department).	L	Y	I
		Ord. No. 06-51, § 1 (Mar. 28, 2006) (amending abatement procedures).	No clear pattern emerges from previous nuisance legislation. *See generally* Rogers, Ark. Code of Ordinances (recording nuisance legislation in 1969, 1971, 1982, and 1997).			

State	Town	Legislative Activity	Legislative Character	Posture on Immigration	Nuisance Legislation	Deviation
AR	**Springdale (Washington Cty)**	Res. 72 (Apr. 10, 2007) (resolving to apply for section 287(g) agreement to enforce federal immigration law locally).		L	Y	YY
		Ord. No. 3204 (Apr. 23, 2002) (amending and changing the title to "Unsanitary and Unsightly Conditions on Private Property"); Ord. No. 4231, § 1 (Aug. 8. 2008).	General nuisance-related provisions show little legislative activity since 1973 (aside from addition of graffiti as a nuisance element, Ord. No. 2371, § 2, (Mar. 14 1995), provision allowing for removal of dead or diseased trees, Ord. No. 4120, § 6 (Oct. 9, 2007), and noise-related nuisance, *see* Code of Ordinances, Ch. 42, Art. III). *See* Springdale, Ark., 2006 Analysis of Code Enforcement (2006), *available at* http://www.springdaleark.org/cosa/pdf/2006OrdinanceStudy.pdf.			

State	Town	Legislative Activity	Legislative Character	Posture on Immigration	Nuisance Legislation	Deviation
AZ	Bullhead	City Council considers legislation that would fine landlords $1,000 if they rent to undocumented immigrants and deny business licenses to companies that employ undocumented immigrants. *See Immigration Curbs Shunned by Council*, MOHAVE DAILY NEWS, Nov. 6, 2006.	Bullhead's representatives in Arizona state government supported bill classifying undocumented immigrants as terrorists. Dominika Maslikowski, *Migrant Terrorist Bill Gains Support*, MOHAVE DAILY NEWS, Feb. 17, 2007.	L	Y	N
		Ord. 2006-26 § 1 (2006) (nuisance); Ord. 2004-04 § 2 (2004).	This nuisance legislation is consistent with pattern of nuisance-related legislative activity. *See* Bullhead, Ariz. Code of Ordinances, *Ordinance List and Disposition Table.*			
AZ	Lake Havasu City	Ord. No. 07-869, § 1(Mar. 14, 2007) (requiring employer verification).		L	Y	Y
		Ord. 09-965 (Mar. 24, 2009) (regulating noise nuisance); Ord. 07-874 (May 8, 2007) (regarding trash collection).	The total number of annual enactments is unclear from the structure of this town's code, but the nuisance related provisions have been largely untouched since 1986. *See generally* Lake Havasu City, Ariz., Code of Ordinances, ch. 8.08 (nuisances).			

State	Town	Legislative Activity	Legislative Character	Posture on Immigration	Nuisance Legislation	Deviation
AZ	Payson	Am. Res. No. 2248 (Apr. 5, 2007); Ord. 709A (Apr. 5, 2007) (codified at ch. 110) ("Immigration Ordinance") (imposing immigration status verification requirements)		L	N	N
		Nothing responsive.				
CA	Apple Valley	Res. No. 2006-82 (2006) (stripping city contractors of contract if found to employ undocumented immigrants).		L	Y	Y
		Ord. 337 (Mar. 13, 2007) (amending and augmenting vehicular nuisance provisions); Ord. 333 (Feb. 13, 2007) (amending nuisance provisions); Ord. 302 (Nov. 25, 2005) (amending abatement and appeals procedures); Ord. 278 (Jan. 27, 2004) (adding nuisance-vehicle provision).	Code shows prior legislation in 1988,1993, and 1995. In 2000, Apple Valley enacted a narrow ordinance giving the town manager authority to confer enforcement authority on other government officials. Ord. 219 (June 13, 2000).			

State	Town	Legislative Activity	Legislative Character	Posture on Immigration	Nuisance Legislation	Deviation
CA	**Escondido**	Ord. 2006-38R (May 30, 3006) (anti-harboring with especially harsh sanctions including fines up to $1,000 per day, up to six months in jail, and suspension of business licenses).	Anna Gorman, *Undocumented? Unwelcome*, L.A. TIMES July 13, 2008, at B1 ("We learned from the rental ordinance," Councilman Sam Abed said. "We changed our focus to quality of life issues."). In 2009, Escondido also declared medical marijuana a nuisance. Ord. No. 2009-22 § 2 (Aug. 19, 2009).	L	Y	Y
		Ord. 2008-04 (Jan. 9, 2008) (increasing enforcement power and penalties for vehicular nuisance of multiple cars in front of single-family dwelling; debating a new ordinance that would restrict overnight street parking without a permit); *see also* Ord. No. 2006-28, § 1 (Aug. 9, 2006) (describing abandoned shopping carts as blighting influences); Ord. No. 2003-27(R), § 1 (July 9, 2003) (prohibiting street racing); Ord. No. 2003-03 (Feb. 12, 2003) (prescribing penalties for "public nuisance" violations of building regulations).	Escondido enacts approximately 30 ordinances annually. Escondido, Code of Ordinances, Comparative Table-Ordinances. Most of Escondido's nuisance-related provisions were passed in the mid-1970s or mid-1980s, with isolated provisions having been updated in 1996 or 2000. *See generally id.* Though recent enactments do not diverge wildly, there does appear to be a marked increase in nuisance-related legislation since approximately 2003.			

State	Town	Legislative Activity	Legislative Character	Posture on Immigration	Nuisance Legislation	Deviation
CA	**Huntington Park**	Res. 2006-8 (Feb. 6, 2006 (opposing CLEAR Act, which would have conferred local authority to enforce federal immigration law); Res. 2009-19 (Mar. 2, 2009) (supporting DREAM Act, which would facilitate undocumented youth attending college); Ord. 675-NS (May 1, 2002) (prohibiting giving impression of affiliation with immigration enforcement agents).		F	Y	N
		Ord. 710-NS (Sept. 2, 2003) (adult businesses); Ord. 709-NS (Oct. 16, 2003) (adult businesses); Ord. 673-NS (Mar. 21, 2002) (graffiti); *see also* tit. 9, ch. 4, art. 2 (regularly updating the zoning district development standards).	Each enactment is narrow and targeted. Huntington Park appears to be fairly active legislatively, but it is not particularly active in the ways that immigrant-restrictive jurisdictions tend to be. *See generally* Huntington Park, Cal., Municipal Code. Huntington Park's unauthorized parking regulations, for example, are minimal and have not been amended since the initial drafting of the code. Huntington Park, Cal., Municipal Code, tit. 4, ch. 7, art. 120.			

State	Town	Legislative Activity	Legislative Character	Posture on Immigration	Nuisance Legislation	Deviation
CA	Lancaster	Ord. No. 934 (Oct. 27, 2009) (mandating employers' use of status verification system); Resolution 07-41 (introduced Feb. 27, 2007) (anti-employment).		L	Y	Y
		Ord. No. 908, § 1 (Oct. 28, 2008) (regulating chronic nuisance); Ord. 869 (Jan. 23, 2007) (establishing rental housing enforcement program); Ord. 857 (July 25, 2006), codified at 8.28.030, A.15(f) (Public nuisance conditions). Lancaster also amended the nuisance vehicle provision in 2003 and 2004. *See* ch. 9.30.	One might be tempted to suggest that Lancaster may be example of a city that is highly legislative in all areas. *See, e.g.*, Lancaster City Council, Meeting Minutes (July 23, 2007) (considering numerous ordinances in variety of areas). On the other hand, see Lancaster, Ca List of Ordinances and Dispositions (listing 256 ordinances passed since 1993, averaging approximately fifteen ordinances per year).			
CA	Los Angeles	Res. No. 06-0002-S82 (Feb. 3, 2006) (supporting comprehensive immigration reform). For decades, Los Angeles has had a non-enforcement policy. Los Angeles Police Dept., Special Order 40 (1979), reaffirmed by City Council on June 11, 2007).		F	Y-	N

State	Town	Legislative Activity	Legislative Character	Posture on Immigration	Nuisance Legislation	Deviation
		Several ordinances were passed updating applications and fees related to zoning applications and procedures that do not significantly expand nuisance enforcement. *See, e.g.*, Ord. No. 180,847 (Oct. 4, 2009); Sec. 161.352, Housing Regulations (regularly updating fees for inspection). Aside from those, nuisance regulation was limited. *E.g.*, Ord. No. 177,103 (effective Dec. 18, 2005) (amending code to set forth terms of hearings and municipal injunctive authority); Ord. No. 179,324 (effective Dec. 10, 2007) (amending building regulations by updating, inter alia, fire protection system, building height provisions).	In general, very tailored nuisance provisions. *See* Ord. No. 180,889 (effective Oct. 31, 2009) (providing for the keeping of roosters).			
CA	Mission Viejo	Ord. No. 07-247, § 2 (Mar. 20, 2007) (requiring city contractors to enroll in Basic Pilot program to check immigration status of employees).		L	Y	Y

State	Town	Legislative Activity	Legislative Character	Posture on Immigration	Nuisance Legislation	Deviation
		Ord. No. 06-242, § 12, (May 15, 2006) (regarding nuisance abatement); Ord. No. 05-234, § 20 (Sept. 6, 2005) (same).	The vast majority of Mission Viejo's nuisance provisions are from 1988, with another round of amendment in 1998. Aside from those two spurts of legislative activity related to nuisance, there is little indication of significant legislative activity in this area prior to 2005.			
CA	National City	Proclamation (Sept. 30, 2006) (declaring city free of immigration enforcement).		F	Y-	N
		The vehicular nuisance code was added and updated recently. *See* Ord. 2266 § 1 (2005): Ord. 2255 § 1 (2004): Ord. 2239 § 1 (2004). The nuisance abatement provisions were updated regularly from 1994 through 2002, but the statutory amendments appear to have petered off. *See* tit.1, ch. 1.36. Aside from those, legislation was generally narrowly tailored. *See, e.g.*, Ord. 2218 § 1 (2003); Ord. 2311 (2008) (skateboard park prohibited activities); Ord. 2214 § 1 (2002) (prohibiting street racing).	According to the Code Comparative Table (which begins recording by year in 2009), National City enacted 11 ordinances in 2009. *See* National City, Code of Ordinances, Code Comparative Table and Disposition List. The majority of the nuisance-related provisions have not been acted upon since the mid-1970s or mid-1980s though various abatement, notice, and appeal provisions have been updated more regularly and recently. *See id.* (scattered sections) (recoding updates in various parts, in 1994, 1998, 2004).			

State	Town	Legislative Activity	Legislative Character	Posture on Immigration	Nuisance Legislation	Deviation
CA	**San Bernardino**	Introduced in May 2006, Escondido considered a proposal to (1) deny city money and permits to businesses that employ undocumented immigrants; (2) allow local police to seize the automobiles used by employers to pick up day laborers; (3) make it impossible for undocumented immigrants to rent property; and (4) require that all city business be conducted in English only. This ordinance spurred massive controversy and never came to a citywide vote because a judge ruled that there was not sufficient signatures as required to require a City Council vote. Miriam Jordan, *Grassroots Groups Boost Clout in Immigration Fight*, WALL ST. J., Sept. 28, 2006.	Has a memorandum of understanding for local enforcement of immigration law. Memorandum of Understanding between Immigration and Customs Enforcement and San Bernadino County (Sept. 20, 2005).	L	Y	YY

State	Town	Legislative Activity	Legislative Character	Posture on Immigration	Nuisance Legislation	Deviation
		Am. Ord. 4093 (2009) (providing for broader discretion in choosing sanction and allocating cost of abatement to prevailing party); Am. Ord. 4085, passed (2009) (providing for increased enforcement); Ord. 4044, codified at ch. 25 (2009) (regulating sanitation and condition of rental properties); Ord. 4043 (2008) (providing for increased enforcement); Ord. 4011, passed (2009) (augmenting development codes and providing attorney fees for prevailing party in civil nuisance action; Ord. MC-1214 (Feb. 16, 2006) (regulating animals in domestic spaces). Prior to this recent spate of legislation, nuisance legislation generally occurred about once every decade. *See, e.g.*, Ord. 3105 (1986); Am. Ord. 3611 (1995) (public nuisance abatement).	There is no publicly-available list of ordinances enacted by date or list analogous to a code comparative table for San Bernadino. Prior to this, nuisance-related legislation was enacted in late 1970s and early 1980s. Procedural provisions, related to abatement and notice requirements, have been updated more recently. *See, e.g.*, San Berdadino, Code of Ordinances, § 8.30.070 (Public Nuisances-Appeal).			

State	Town	Legislative Activity	Legislative Character	Posture on Immigration	Nuisance Legislation	Deviation
CA	San Francisco	Ord. 218-06, File No. 051919, App. (Aug. 4, 2006) (San Francisco Health Care Security Ordinance); Ord. 69-07, File No. 070255, App. (Apr. 2, 2007) (Ordinance authorizing municipal identification cards); Ord. 274-07 (Nov. 28, 2007); Ord. 279-08 (Nov. 25, 2008); *see also* Jim Christie, *San Francisco to Give Illegal Aliens ID Cards*, REUTERS (Nov. 21, 2007). San Francisco Administrative Code, ch. 12H (longstanding provision barring inquiry into immigration status, revised in 2007); Resolution in support of comprehensive immigration reform (Apr. 2006).		F	Y	N

State	Town	Legislative Activity	Legislative Character	Posture on Immigration	Nuisance Legislation	Deviation
		Significant amendments, but consistent with legislative character. Ord. 287-08, File No. 081340, App. (Dec. 5, 2008) (vehicular nuisance); Ord. 256-08, File No. 081118, App. (Nov. 11, 2008) (providing for blight enforcement); Ord. 04-9 § 2 (Aug. 24, 2004); Ord. 265-04, File No. 041178, App. (Nov. 4, 2004) (blight abatement).	San Francisco is highly legislative, demonstrated by its code, which indicates frequent updating in many subject areas, and as compared to other cities. A search of the San Francisco code, for example, yielded ninety-seven hits for "nuisance," which is two to five times as many hits as in other jurisdictions. The city is equally as highly legislative in the context of immigrant-protection. A search of "immigrant" yields fourteen hits, whereas even many other immigrant-protecting jurisdictions have yet to codify their policies.			
CA	Sonoma	Resolution 45-06 (July 2006) (supporting comprehensive immigration reform); *see also* Sheriff's Dept. General Law Enforcement Div., Immigration Violations Pol'y No. 428.		F	N	N

State	Town	Legislative Activity	Legislative Character	Posture on Immigration	Nuisance Legislation	Deviation
		Most recent legislative activity occurred in the mid-1990s. *E.g.* Ord. No. 5097 (1998) (general nuisance); Ord. No. 4606 § 1 (1992) (breach of peace as nuisance). The only relevant legislative activity in this area was in 2005. Ord. 02-2005.	Although the disposition list does not provide an account of ordinances by year, it appears, from a scan of yearly enactments, that the annual rate of enactments was about forty ordinances in 2006. Nuisance-related legislation has occurred at random intervals. *See, e.g.*, Sonoma County, Code of Ordinances, ch. 22.			
CO	Aurora	In July 2008, the City Council of Aurora considered two ordinances that would require employers to regulate on the basis of immigration status). Amy Goodman, Dozens of Minutemen Confront Day-Laborers Gathered For Work in Aurora, CO, Democracy Now (July 1, 2008), *available at* http://www.democracynow.org/2008/7/1/dozens_of_minutemen_confront_day_laborers.		L	Y	I
		Ord. No. 2006-78 (Jan. 8, 2007) (amending nuisance abatement provisions); Ord. No. 2005-12 (Apr. 11, 2005) (same); Ord. No. 2005-93 (Dec. 5, 2005) (graffiti).	Previously, nuisance abatement legislation was primarily enacted in 1979, with some amendments in 1996.			

State	Town	Legislative Activity	Legislative Character	Posture on Immigration	Nuisance Legislation	Deviation
CO	Fort Collins	In 2005, the City Council considered an ordinance barring discrimination based on immigration status. *See* Ordinances of the Council of the City of Fort Collins.		L	Y	N
		Ord. No. 16, 2003, § 10 (Feb. 18, 2003); Ord. No. 32, 2005 (Mar. 15, 2005); Ord. No. 126, 2005 (Nov. 15, 2005); Ord. No. 167, 2005 (Dec. 20, 2005); Ord. No. 198, 2006 (Dec. 19, 2006); Ord. No. 085, 2008, (Aug. 19, 2008); Ord. No. 136, 2009 (Jan. 5, 2010) (amending nuisance penalty provisions after only two other previous instances of legislation, the original code-drafted in 1972-and an amendment in 1990); Ord. No. 133, 1997 (Aug. 19, 1997); Ord. 108, 2008 §§ 2—72 (Oct. 21, 2008); Ord. 037, 2009 (May 5, 2009) (amending definitions of "dangerous elements" prohibited in occupancy standards). However, Fort Collins was one of the few cities to diminish nuisance enforcement. *See* Ord. 2006-198 , codified at § 1-15(f) (Dec. 19, 2006) (decriminalizing broad swath of nuisance violations).	Previously, nuisance provision has been updated and amended at regular intervals that do not suggest current legislation deviates in any cognizable way. *See* Code of Ordinances, ch. 20 (nuisance). Indeed, Fort Collins is extraordinarily highly legislative, enacting approximately 160 ordinances per year—and 226 in 2006. *See* City of Fort Collins, Public Records Database, City Clerk, Ordinances, http: //citydocs.fcgov.com/?dt=ORDINANCE& dn=CITY+CLERK&vid=3&cmd= showdt.			

State	Town	Legislative Activity	Legislative Character	Posture on Immigration	Nuisance Legislation	Deviation
CT	New Haven	Gen. Order 06-02 (Dec. 14, 2006) (directing police department to refrain from inquiring into immigration status); *see also* Office of the Mayor, City of New Haven, *Board of Alderman Approve Acceptance of Funds for Municipal Identification Card* (June 4, 2007) (reporting on approval of program affording municipal identification regardless of immigration status).		F	Y	N
		Ord. No. 1570 (Sept. 2, 2008) *and* Ord. No. 1575 (Dec. 1, 2008) (describing graffiti as public nuisance and providing for removal); Ord. No. 1426 (Sept. 28, 2006); Ord. No. 1587 (Apr. 20, 2009) (nuisance, generally).	Anti-blight provisions were updated in the responsive time period, but showed no deviation from prior legislative pattern. See Art. II, sec. 9-51. No sign of new legislation regarding vehicular nuisance, *see* sec. 18-40, or augmenting enforcement authority. *See* Art. II.			
FL	Cape Coral	English-only measure was pending as of Oct. 9, 2006. Wendy Koch, *Push for "Official" English Heats Up*, U.S.A. TODAY, Oct. 9, 2006, at 1A.	*See* Jose Cardenas, *Immigration Protest Draws 150*, ST. PETERSBURG TIMES, Oct. 23, 2006, at B3 (reporting on residents describing local battles over ordinances, their pro-enforcement stance, and decrying open border policies).	L	Y	Y/I

State	Town	Legislative Activity	Legislative Character	Posture on Immigration	Nuisance Legislation	Deviation
		Ord. 139-08 (Dec. 15, 2008) (providing for abatement of abandoned property-nuisances); Ord. 14-0 (Mar. 26, 2007) (prohibiting littering); Ord. 3-07, (Feb. 12, 2005) (relating to nuisance accumulations on private property and noting purpose of real property program as intended to combat blight).	Cape Coral is—and has historically been—fairly highly legislatively active, enacting approximately 136 to 172 ordinances annually in recent years. *See* Cape Coral, Fla, Code of Ordinances, Code, Reference to Ordinances. Cape Coral's nuisance law has not been significantly changed since the code was adopted, s*ee id.* at ch. 9, until 2000, *see* Ord. 7-00 (Feb. 28, 2000) (amending building-nuisance provisions), and the amendments after 2005.			
FL	**Miami Dade**	Miami-Dade County has passed numerous resolutions protecting immigrant community members. *See, e.g.*, Res. 07484 (Feb. 15, 2007) (seeking temporary moratorium on detentions and deportations); Res. 070374 (Feb. 5, 2007) (opposing increase in naturalization fees); Res. 050399 (Feb. 10, 2005) (urging state legislature to make drivers licenses more accessible to immigrants).		F	Y-	N

State	Town	Legislative Activity	Legislative Character	Posture on Immigration	Nuisance Legislation	Deviation
		The only nuisance-related activity is narrow and targeted. *See, e.g.*, Ord. No. 06-125 (Sept. 12, 2006) (permit procedures); Ord. No. 08-55 (May 6, 2008); Ord. No. 06-96, § 2 (June 20, 2006) (generators and subdivisions for sewers); Ord. No. 07-148 (Oct. 2, 2007) (updating notice-giving requirements incumbent upon Housing Enforcement Officer).	Blight ordinances have not been significantly updated since the 1960s, *see, e.g.*, Ord. No. 60-6 (Feb. 9, 1960), and most nuisance provisions have been relatively untouched, legislatively, as well. *See, e.g.*, Art. XIIIA (nuisance abatement).			
FL	Palm Bay	Considered—and nearly passed—Ordinance 2006-80, which would have required employers to verify immigration status and imposed heavy fines for failure to do so. Victor Manuel Ramos, *Cheers Greet Migrant Vote in Palm Bay,* ORLANDO SENTINEL, Aug. 19, 2006, at B1 ("The early morning vote was the culmination of nearly two months of debate surrounding immigrants in Palm Bay, a city of about 90,000 in Brevard County. About 8,760 of those residents are Hispanics, and 51 percent of them are U.S. citizens from Puerto Rico.").		L	Y	I

State	Town	Legislative Activity	Legislative Character	Posture on Immigration	Nuisance Legislation	Deviation
		Am. Ord. 2008-71 (Dec. 18, 2008); Ord. 2008-61 (Nov. 20, 2008) (regulating foreclosed-upon homes); Am. Ord. 2003-35 (Oct. 16, 2003) (amending anti-blight enforcement provisions that had previously been amended in 1999 and, before that, prior to 1976).	Palm Bay has enacted sixty-six to 136 ordinances annually since 2005. *See* Palm Bay, Fla., Code of Ordinances, References to Ordinances. With regard to nuisance, the primary legislation was set forth in the 1974 code and was amended in 1987. *See* Palm Bay, Fla., Code of Ordinances, ch, 95. There have been narrow amendments intermittently since then, occurring from 1995 to 1999, and again in 2003. *See id.* at ch. 93; *id.* at ch. 185.			
GA	**Cherokee County (Canton)**					
		Ord. No. 2006-003, (Dec. 5, 2006) (requiring landlords to verify immigration status, declaring English the official language); Ord. No. 2006-004 (Dec. 5, 2006) (prohibiting the use of other languages in many official actions).	Complaint at 52, Dkt. 07-cv-0015, Stewart v. Cherokee (filed Jan 4, 2007) (noting that Commission's proffered reason for the ordinance was to combat overcrowding, poor housing conditions, and crime, but it did not provide evidence that illegal immigration contributed to these blights).	L	Y	YY

State	Town	Legislative Activity	Legislative Character	Posture on Immigration	Nuisance Legislation	Deviation
		Ord. No. 2008-O-004 (Nov. 4, 2008) (property maintenance, unfit dwelling, vegetation); Ord. No. 2006-O-001 (Mar. 7, 2006) (nuisance conditions); Ord. No. 2006-O-002 (Sept. 5, 2006) (nuisance penalties and enforcement).	Note that, though this may not appear to be a large number of legislative acts in the relevant time period, the nuisance-related legislative activity occupies a proportionally large part of Cherokee County's legislation. *See* Code Comparative Table Ordinances (reporting four enactments in 2006, six in 2007, and five in 2008). In fact, the combination of explicitly immigration-related legislation and nuisance related-legislation constitute the full scope of all legislation enacted in 2006.			
GA	Coweta	Ord. No. 040-08 (Dec. 16, 2008) (requiring day laborers to verify immigration status).		L	Y	Y
		Ord. No. 008-09 (Apr. 16, 2009) (amending provision related to enforcement proceedings); Ord. No. 004-08 (Feb. 19, 2008) (regarding keeping of animals domestically); Ord. No. 043-07 (Dec. 6, 2007) (regulating nuisance in open spaces).	Coweta County enacted roughly forty-three and forty-five ordinances in 2007 and 2008, respectively. *See* Coweta County, Ga., Code of Ordinances, Code Comparative Table Ordinances. Prior to these recent nuisance ordinances, there was no discernible nuisance-related leg since 1984 and 1985.			

State	Town	Legislative Activity	Legislative Character	Posture on Immigration	Nuisance Legislation	Deviation
GA	Gwinnett County	Memorandum of Understanding between Immigration and Customs Enforcement and Gwinnett County (Sept.15, 2009) (approved by City); Ord. of Mar. 4, 2008 (requiring employers to verify immigration status).	"Some of the issues the commission is forced to confront are issues, obviously, of illegal immigration: While most of Gwinnett's immigrants are in the country legally, many are not. Georgia has one of the toughest laws against illegal immigrants anywhere in the country, providing in some cases for their deportation, but it has not been strictly enforced so far. Some Georgia counties, among them Cobb, just west of Gwinnett, have signed up for the 287-G federal program that trains local police to crack down on the undocumented. Some of Gwinnett's small towns have passed their own ordinances to deal with what many residents consider a public nuisance." Alan Ehrenhalt, *Immigrants and the Suburban Influx*, GOVERNING (Dec. 2009), *available at* http://www.governing.com/article/immigrants-and-suburban-influx.	L	Y	N

State	Town	Legislative Activity	Legislative Character	Posture on Immigration	Nuisance Legislation	Deviation
		Res. of Aug. 18, 2009 (regulating animals as public nuisance); § 14-303; Ord. of Aug. 15, 2006, (prohibiting junk vehicles); Ord. of Sept. 20, 2005 (same).	In 2008, for example, Gwinnett County passed seven ordinances, five resolutions, and one amendment. *See* Gwinnett County, Code of Ordinances, Code Comparative Table- Ordinances and Resolutions. It does not appear that there have been significant nuisance-related legislation in recent years, but I could not identify a clear pattern either way. *See generally id.*			
IL	**Hampshire Village**	English-only Ordinance. Ray Quintanilla, *Town Picks Official Language*, CHIC. TRIB., Apr. 21, 2007, at 18 (reporting legislator describing the ordinance as "largely symbolic").	Of the 4,400 residents, only about seventy are Hispanic. Ray Quintanilla, *Town Picks Official Language*, CHIC. TRIB., Apr. 21, 2007, at 18.	L	Y-	N
		Am. Ord. 08-40 (Nov. 13, 2008) (regulating landscaping and property aesthetics); Ord. 02-39 (Oct. 17, 2002) (amending junk and nuisance abatement provisions); Ord. 00-01 (Feb. 17, 2000) (creating historic preservation board).	Not a significant amount of legislation either in the context of nuisance or generally.			

State	Town	Legislative Activity	Legislative Character	Posture on Immigration	Nuisance Legislation	Deviation
KS	**Topeka**	Topeka City Council. Minutes of Aug. 12, 2008 Meeting, *available at* http://www.topeka.org/pdfs/council_minutes/081208m.pdf (considering imposing employment verification requirement).	Topeka has previously taken legislative action in non-racialized terms as a means to effect race-inflected policies. *See* Mary L. Dudziak, *The Limits of Good Faith: Desegregation in Topeka, Kansas, 1950–1956*, 5 L. & HIST. REV. 35, 367 n.75 (1987).	L	Y	YY
		Ord. No. 19106 (June 19, 2008) (providing for police enforcement of nuisance provisions and defining inoperative vehicles as nuisance); Ord. No. 18830 (Mar. 13, 2007) (providing for criminal enforcement of nuisance violations, which is the first time since 1981); Ord. No. 18420 (Apr. 19, 2005) (providing for historic preservation); Ord. No. 18210 (Apr. 6, 2004) (regarding blight, penalties, and property maintenance); Ord. No. 17784 (Jan. 15, 2002) (regulating domestic animals as nuisance); Ord. No. 17869 (July 23, 2002) (same).	Though this may seem insignificant, given that Topeka enacts approximately thirty ordinances annually, this recent legislation deviates significantly from prior practice in amending nuisance-legislation. *See* Topeka, Kan., Code of Ordinances, Code Comparative Table- Ordinances. Topeka's recent nuisance-related legislation was something of a reawakening; it amended and augmented nuisance provisions in the city code that had been generally dormant since 1981. *See generally* Topeka, Kan., Code of Ordinances.			

State	Town	Legislative Activity	Legislative Character	Posture on Immigration	Nuisance Legislation	Deviation
KY	Covington	The Covington City Council considered an ordinance that would make knowingly hiring or renting to an undocumented immigrant illegal. Board of Commissioners, Covington, Ky., Minutes of Meeting of Dec. 12, 2006, *available at* http://www.covingtonky.com/documents/MIN121206.pdf. At the Nov. 14, 2006 Council meeting, a City Commissioner responded to a comment that the town needs immigrant control, saying that they are working on an ordinance to address this. Board of Commissioners, Covington, Ky., Minutes of Meeting of Tuesday, Nov. 14, 2006, *available at* http://www.covingtonky.com/documents/MIN111406.pdf.		L	Y	YY

State	Town	Legislative Activity	Legislative Character	Posture on Immigration	Nuisance Legislation	Deviation
		Am. Ord. O-59-08 (Dec. 16, 2008) (updating public nuisance definition); Ord. O-40-08 (Sept. 23, 2008) (regarding waster and litter abatement); Am. Ord. O-2-07 (Feb. 6, 2007) (code enforcement); Ord. O-24-06 (May 9, 2006) (amending penalty provisions); Ord. O-15-06 (Apr. 11, 2006) (regarding junked vehicles); Am. Ord. O-15-05 (Mar. 8, 2005); Ord. O-15-06 (Apr. 11, 2006) (establishing regulations for junked vehicles, machines, salvage materials, and manufactured homes as nuisances); Am. Ord. O-23-05 (May 17, 2005) (regulating nuisance animals).	Though Covington's City Council enacts approximately sixty ordinances per year, *see* Code of Ordinances, Code Comparative Table- Ordinances, nuisance-related provisions were virtually untouched, legislatively, from 1982 though 2003, at which point the nuisance provisions suddenly became the site of a comparatively large amount of legislative activity. *See generally* Code of Ordinances.			

State	Town	Legislative Activity	Legislative Character	Posture on Immigration	Nuisance Legislation	Deviation
KY	Lexington	Exec. Order 2007-1 (establishing Commission on Immigration, which reports opposition to local enforcement of federal immigration law, but recommends vigorous code enforcement to correct issues that may be driving constituents' complaints that are articulated as a desire to more stringent immigration control). *See Lexington-Fayette Commission on Immigration Report to the Mayor* (Nov. 6, 2007), *available at* http://media.kentucky.com/smedia/2007/11/06/12/immigrationfinal.source.prod_affiliate.79.pdf. Resolution of Mar. 9, 2006 (in support of comprehensive immigration reform).		F	Y-	N

State	Town	Legislative Activity	Legislative Character	Posture on Immigration	Nuisance Legislation	Deviation
		The legislation enacted after 1998 appears narrow in scope. *See, e.g.*, Ord. 143-2009 (July 7, 2009) (adding slight amendments to penalty provisions); Ord. No. 78-2000 (Mar. 23, 2000) (providing for blighted and vacant property commission and defining blighted property narrowly, updating this section for the first time since 1983).	Lexington is generally highly legislative, passing 234, 285, and 297 resolutions *and* ordinances (total is combined) in 2009, 2008, and 2007 respectively. *See* Lexington, KY, Code of Ordinances, Code Comparative Table Ordinances. At least some of Lexington's nuisance-related provisions have been updated regularly, with 1 to 6 year intervals between amendments. *See, e.g.*, *id.* at art. IV, sec. 16-35; *id.* at ch. XII, art. I.			
MA	**Barnstable Town**	Ord. 2007-033 ("Comprehensive Occupancy and Rental Registration Ordinance") (June 1, 2006).		L	Y-	N

State	Town	Legislative Activity	Legislative Character	Posture on Immigration	Nuisance Legislation	Deviation
		There is not much new nuisance-related legislation in the relevant time period aside from narrow enactments related to alarm systems, *see* Part 1, ch. 17, and dog possession, *see* Part IV, ch. 403, and updates to fine structures. *See* Barnstable Town, Mass, Code of Ordinances, § 1.4 (amended in 2005 and 2008).	Barnstable enacted roughly forty pieces of legislation (of varying types) in 2006. Their nuisance provisions appear to be updated relatively infrequently, but roughly regularly. *See, e.g.*, Barnstable Town, Mass, Code of Ordinances, ch. 353 (updating "Nuisances" section).			
MA	**Boston/ Cambridge**	Ord. 1295 (June 12, 2006) (establishing Cambridge Commission on Immigrant Rights and Citizenship to provide support and "eliminate prejudice and discrimination against immigrants because of their status as immigrants and non citizens."); Amended Order O-16 (May 8, 2006) (reaffirming status as sanctuary city, supporting comprehensive immigration reform, and calling for moratorium on raids).		F	N	N

State	Town	Legislative Activity	Legislative Character	Posture on Immigration	Nuisance Legislation	Deviation
		Virtually nothing related to definition of nuisance or blight since 1989. *See generally* Cambridge, Mass., Code of Ordinances.	Note that Cambridge does not appear to be highly legislative, enacting, for example, only six ordinances in 2008. Nonetheless, Cambridge's nuisance provisions have been unusually touched, legislatively, for the past two decades (vehicular nuisance laws included).			
MD	**Taneytown**	Res. No. 2006- 20 (Nov. 14, 2006) (declaring English to be the official town language).	According to the U.S. Census, only 1.5% of Taneytown residents report themselves as Latino or Hispanic and the City Council acknowledged that there had not been any difficulties with dealing with non-English speakers. *Council Passes English as Official Language Measure*, WBAL TV, BALTIMORE NEWS, (Nov. 14, 2006), *available at* http://www.wbaltv.com/news/10314812/detail.html ("'Just passing the ordinance has caused the illegal immigrants to leave,' said [City Council President Joseph] Yannuzzi.").	L	N	I

State	Town	Legislative Activity	Legislative Character	Posture on Immigration	Nuisance Legislation	Deviation
		Ord. No. 5-2007 (July 9, 2007) (repealing entirety of 1980 version of ch.124m containing property maintenance, vehicle nuisance, and reenacting nuisance-related provisions).	Aside from signage requirements, Taneytown does not appear to be highly legislatively active. *Compare* Taneytown, Md., Code of Ordinances, *with id.* at ch. 205 (signage requirements).			
MI	**Detroit**	Ord. No. 09-08 (Apr. 9, 2008) (protecting against immigration status bias or police-solicitation of immigration status information); Ord. No. 10-07 (May 9, 2007) (same).		F	Y-	N
		Ord. No. 20-09 (Oct. 20, 2009) (updating civil fine structure for initial and repeat nuisance-related offenses); Ord. No. 41-04 (Nov. 17, 2004) (amending blight enforcement procedures of appeals and fees); Ord. No. 23-04 (July 2, 2004) (same).	Despite the fact that Detroit is fairly legislatively active, enacting approximately forty ordinances annually, *see* Detroit, Mich., Code of Ordinances, Ordinances Disposition Table, there has been comparatively little amendment to the nuisance-related provisions.			
MI	**Grand Rapids**	Res. (Feb. 21, 2006) (opposing Michigan state bill making English the official language and "oppos[ing] H.R. 4437 and any legislation that would criminalize, permanently bar or otherwise harm the immigrant community") (on file with author).		F	N	N

State	Town	Legislative Activity	Legislative Character	Posture on Immigration	Nuisance Legislation	Deviation
		Nuisance-related provisions have been virtually untouched since the code was created in 1978. *See generally* Grand Rapids, Mich., Code of Ordinances.	The City of Grand Rapids enacts roughly fifteen ordinances per year. *See* Grand Rapids, Mich., Code of Ordinances, Code Comparative Table Ordinances.			
MN	Minneapolis	Ord. 2003-Or-092 (July 11, 2003) (directing city employees not to inquire into immigration status).		F	N	N
		Aside from a graffiti-related nuisance provision, Ord. 2001-Or-090 (July 27, 2001), and an abatement-related provision in 1994, Ord. 94-Or-159 (Nov. 10, 1994), other legislation was enacted in or prior to 1989. *See generally* Minneapolis, Minn, Code of Ordinances.	Minneapolis is highly legislatively-active, enacting one-hundred to one-hundred-and-fifty ordinances annually. Minneapolis, Minn, Code of Ordinances, Code Comparative Table Ordinances, Supp. 1. Despite robust legislative activity, there has been little related to nuisance legislation.			
MN	St. Paul	C.F. No. 04-31 (May 5, 2004) (directing city employees not to inquire into immigration status).	Local police will not check immigration status	F	Y-	N

State	Town	Legislative Activity	Legislative Character	Posture on Immigration	Nuisance Legislation	Deviation
		Ord. 09-681(July 22, 2009) (adding provision for assessment procedure to collect unpaid property service costs); Ord. 05-740 (Sept. 14, 2005) (amending property maintenance to add updated references to current state codes); Ord. 04-814 (Sept. 8, 2004) (amending code to require service of correction notices upon landlords at the rental registration address as opposed to the archaic previous address requirements).	St. Paul is extraordinarily legislatively-active, enacting over 1,100 ordinances annually. St. Paul, Minn., Code of Ordinances, Republication Disposition Table. The nuisance-related legislation in the relevant time period introduced narrow issues and is consistent with city's prior pattern of updates. *See* St. Paul, Minn. Code of Ordinances, ch. 34, tbl. inset (listing prior amendments).			
MO	**St. Charles County**	Ord. 09-035 (Apr. 1, 2009) (requiring employers to verify federal immigration law status).		L	Y	YY
		Ord. 08-094 (Aug. 1, 2008) (providing for abatement enforcement, including search warrant powers); Ord. 07-152 (Oct. 30, 2007) (same); Ord. 07-178 (Sept. 27, 3007) (adding vehicle-related nuisances to property maintenance nuisance prohibitions).	The format of the code makes it difficult to ascertain the number of annual enactments. However, there is no indication of any amendments or updates to the relevant nuisance provisions since the enactment of the code.			

State	Town	Legislative Activity	Legislative Character	Posture on Immigration	Nuisance Legislation	Deviation
MO	Valley Park	Valley Park initially enacted an ordinance, Ordinance 1721 (Feb. 14, 2007), requiring landlords to verify immigration status, and an ordinance making English the official language and requiring employers to verify immigration status, Ordinance 1708 (July 17, 2006). Subsequently, these ordinances have been amended to withstand legal challenges. *See* Valley Park Municipal Code, City Ordinances, CITY OF VALLEY PARK, MISSOURI, http://030bf4c.netsolhost.com/citygovernment/municipalcodeordinances.html (listing amending ordinances, including Ord. 1732 (adding "knowingly" to Ord. 1722), Ord. 1725 (repealing Ord. 1723 and reenacting similar substantive requirements), Ord. 1724 (repealing Ord. 1722 and reenacting similar substantive requirements), Ord. 1723 (repealing Ord. 1721 and reenacting similar substantive provisions), and Ord. 1722 (repealing Ord. 1708 and reenacting similar substantive requirements)).		L	Y-	Y/I

State	Town	Legislative Activity	Legislative Character	Posture on Immigration	Nuisance Legislation	Deviation
		Ord. No. 1775 §§1—2 (Jan. 5, 2009) (declaring violations of business license procedures to be a nuisance and subject to criminal sanction); Ord. No. 1714 (Sept. 18, 2006) (regarding prosecution for health violations).	Prior to 2009, there does not appear to have been nuisance-related legislative activity since 1989. See Valley Park, Mo., Code of Ordinances, ch. 215 (Nuisances). I could not tell, from the format of the electronic version of the code, the total amount of legislation that Valley Park enacts annually.			
NC	Forsyth County	Resolution (Oct. 23, 2006) (mandating verification of immigration status and county upholding federal immigration law).	*See* Dan Galindo, *Illegal immigrants cause trouble, officials say*, WINSTON-SALEM J. (Apr. 13, 2006).	L	N	N
		No real nuisance or blight-related legislation in relevant time period.	Forsyth is consistently extremely inactive, legislatively, enacting only two ordinances in 2008, three in 2007, one in 2006, and none in 2005. Forsyth County, N.C., Code of Ordinances, Code Comparative Table Ordinances.			

State	Town	Legislative Activity	Legislative Character	Posture on Immigration	Nuisance Legislation	Deviation
		Resolution 2006-414 (Nov. 9, 2006) (adopting policies to limit city services to undocumented residents, to locally enforce against immigrants to the extent possible, and to partner with ICE in immigration enforcement). *See also* Gaston County, N.C., Minutes of Nov. 9, 2006 Board of Commissioners Meeting, *available at* http://www.co.gaston.nc.us/CountyCommission/minutes/2006/2006-11-09minutes.pdf (considering Resolution 2006-414 (proposing to adopt policies to limit city services to undocumented residents and to partner with ICE in immigration enforcement)).				
NC	Gaston County	Ord. No. 2009-146 (May 28, 2009) (animal-related nuisance); Res. No. 2004-416 (Oct. 28, 2004) (regarding vehicular nuisance.); Res. No. 2004-415 (Oct. 28, 2004) (enacting new provisions pertaining to minimum housing standards); Res. No. 2003-353 (Oct. 20, 2003) (regarding trash and waste).	Gaston County is not very legislatively active, making the nuisance-related legislation appear to occupy a significant portion of their annual legislation: six total resolutions in 2004; six in 2005; four in 2006; five in 2007; six in 2008; and four in 2009. Gaston County, N.C., Code of Ordinances, Code Comparative Table.	L	Y	YY

State	Town	Legislative Activity	Legislative Character	Posture on Immigration	Nuisance Legislation	Deviation
NC	**Lincoln County**	Res. to Adopt Policies and Provide Staff Direction Relating to Illegal Residents in Lincoln County (June 18, 2007) (ceasing funding for any local programs to the extent that they serve illegal residents and requesting that the Sheriff "diligently battle the ever-increasing criminal element which is growing daily with the influx of illegal residents and to consistently check the immigration status of each undocumented resident upon his or her arrest by such available means as fingerprints, federally-verified social security numbers, and other accessible data").		L	Y	I
		Ord. (Dec. 4, 2006) (amending penalty provisions); Ord. (Oct. 21, 2002) (same).	It is not entirely clear from the list appended to the Code of Ordinances, but it appears that about six ordinances were enacted in the year of 2008. *See* Lincoln County, N.C., Code of Ordinances, References to Ordinances.			

State	Town	Legislative Activity	Legislative Character	Posture on Immigration	Nuisance Legislation	Deviation
NJ	Newark	Res. 7RBB (Oct. 4, 2006) (enhancing access to services and precluding deputizing of local law enforcement by federal immigration authority), *available at* http://www.democracyinaction.org/dia/organizationsORG/NILC/images/CityofNewark.pdf.		F	N	N
		There is little recent activity aside from a change to the structure of the housing and economic development commission in 1998. Ord. 6 S+FE (S) (Sept. 16, 1998).	Newark is fairly legislatively active, passing roughly thirty enactments in 2006, sixty in 2007, and upwards of eighty in 2008 . Newark, N.J. Code of Ordinances, appx. 1, Ordinance Disposition List. Even so, there is almost nothing new in terms of nuisance-related legislation since 1966. *See generally id.* at ch. 7, 14, 15.			

State	Town	Legislative Activity	Legislative Character	Posture on Immigration	Nuisance Legislation	Deviation
NJ	Princeton	Resolution, Nov. 9 2004 (recognizing the contribution of immigrants and that the federal lawmakers should pass comprehensive legislation that provides undocumented immigrants a path to citizenship). *See* PABLO A. MITNIK, JESSICA HALPERN-FINNERTY & MATT VIDAL, CENTER ON WISCONSIN STRATEGY (COWS), CITIES AND IMMIGRATION: LOCAL POLICIES FOR IMMIGRANT-FRIENDLY CITIES at 15 (2008).		F	Y-	N
		Ord. No. 2004-11 (2004) (establishing the terms of specific zoning district).	Princeton has enacted approximately twenty-five to forty ordinances annually in recent years. *See* Princeton, N.J., Code of Ordinances, Appx. A., Table of Source Sections. In terms of nuisance-related legislation, there is some activity in housing regulations in 1995 and 1998, *see id.* at Div. 1, ch. 10B.			

State	Town	Legislative Activity	Legislative Character	Posture on Immigration	Nuisance Legislation	Deviation
NJ	**Trenton**	Exec. Order 04-01 (Dec. 22, 2004) (directing city officials and police not to inquire about immigration status), *available at* http://www.democracyinaction.org/dia/organizationsORG/NILC/images/CityofTrenton.pdf.		F	N	N
		Nothing responsive.	Despite enacting an average of one-hundred ordinances annually, Trenton has not enacted nuisance-related legislation since the 1960s. *See generally*, Trenton, N.J., Code of Ordinances, § DL 1 (Disposition of Legislation).			
NM	**Albuquerque**	Police Dept. Procedure (Aug. 6, 2007) (directing local police not to enforce federal immigration law); Res. 2004-00 (June 2004) (reaffirming equal access to all services and the non-inquiry directives originally enacted through Res. 2001-00-09); Res. R2001-00-09 (Nov. 2000) (prohibiting the use of municipal resources to inquire into immigration status).		F	Y	I

State	Town	Legislative Activity	Legislative Character	Posture on Immigration	Nuisance Legislation	Deviation
		Ord. 27-2007 ("Anti-Gang" Ordinance); Am. Ord. 45A-2004 (amending nuisance definition in substandard building section of zoning provisions); Ord. 36-2004 (conferring authority on police to declare clandestine drug laboratories to be nuisances); Ord. 19-2001 (adopting broad regulations to prevent nuisance).	The city of Albuquerque is highly legislative, adopting approximately 150–200 ordinances annually, *see generally* Albuquerque, NM, Code of Ordinances, Code of Resolutions, Table of Resolutions, and usually approximately forty ordinances annually. *Id.* at Parallel References, Reference to Ordinances. Albuquerque does seem to have increased nuisance legislation, generally, but their enactments clearly focus on particular concerns by explicitly targeting drug laboratories, gang activity, and truancy. *See generally id.*			
NV	**Pahrump**	Ord. PTO 54 (Nov. 14, 2006) (petitioning state and federal legislators to adopt English as the national language and supporting immigration-status regulation in employment and contracting) (subsequently repealed by PTO 61 (Feb. 14, 2007) for liability and enforceability reasons); Res. 2006-28 (encouraging legislators to adopt English-only policy).		L	Y	Y/I

State	Town	Legislative Activity	Legislative Character	Posture on Immigration	Nuisance Legislation	Deviation
		Ord. PTO-56 (Oct. 10, 2006) (establishing blight-related property registration requirements).	Pahrump has passed very few ordinances in recent years: just three in 2006, one in 2007, and none in 2008. Pahrump, Nevada, Pahrump Town Ordinances, PTO-Index, *available at* http://www.pahrumpnv.biz/town/index.php?option=com_content&task=view&id=187&Itemid=159.			

State	Town	Legislative Activity	Legislative Character	Posture on Immigration	Nuisance Legislation	Deviation
NY	New York	Res. 1250-2008 (Mar. 26, 2008) (calling on Congress to pass the Child Citizen Protection Act (H.R. 1176) in order to provide discretionary authority to immigration judges to determine that an alien parent of a United States citizen child should not be ordered removed, deported, or excluded from the United States.); Res. 1078-2007 (Dec. 9, 2008) (urging better workplace protections for domestic workers); Res. 0842-2007 (June 5, 2007) (urging the Congress to end federal raids to deport undocumented immigrants and institute comprehensive immigration reform that protects the fundamental civil liberties of immigrants and integrates immigrants fully into American society); Res. 1153-2005 (Dec. 21, 2005) (urging ICE to exercise prosecutorial discretion and decline to pursue orders of removal or to carry out removal orders in exceptional situations where deportation would cause extreme hardship and urging restoration of discretion to immigration judges); Exec. Order 40 (1996) (directing city employees to refrain from enforcing immigration law or inquiring into immigration status).		F	N	N

State	Town	Legislative Activity	Legislative Character	Posture on Immigration	Nuisance Legislation	Deviation
		There is little evidence of nuisance-related legislative activity and what does exist is narrow, primarily targeting graffiti-legislation. *E.g.*, Ord. 2009/065 (Oct. 7, 2009) (amending provision relating to the failure to remove graffiti from commercial and residential buildings and the city's removal of such graffiti through nuisance abatement proceeding); Ord. 2007/039 (Aug. 2, 2007) (regarding graffiti-related instruments); Ord. 2006/035 (Aug. 23, 2006) (expanding definition to include certain dance clubs in alcohol control code). That is all that was adopted or enacted—very little.	New York is highly legislative; in 2006, for example, the City Council enacted 137 ordinances in 2006 and adopted 384 resolutions. New York City Council, Legislative Research Center, *available at* http://legistar.council.nyc.gov/Legislation.aspx.			
NY	Suffolk Country	Res. 447-2008 (June 10, 2008) (requiring Suffolk Sheriff's Dept to inquire about immigration status and report to ICE); L.L. No. 52-2006 (Oct. 4, 2006) (requiring employers to verify compliance with federal immigration law).	"Suffolk County, in the eastern part of Long Island, has a history of tension between Latino immigrants and U.S.-born residents, and area teens were recently accused of killing an Ecuadorean immigrant and committing other ethnically motivated attacks." *Suffolk County Police Department*, MIGRATION INFORMATION SOURCE, http://www.migrationinformation.org/USFocus/display.cfm?ID=720.	L	Y	YY

State	Town	Legislative Activity	Legislative Character	Posture on Immigration	Nuisance Legislation	Deviation
		L.L. No. 1-2006 (Dec. 20, 2005) (regulating occupancy to alleviate "quality of life" concerns). Suffolk has recently expanded its authority to impound vehicles. *See* L.L. No. 48-2008 (Nov. 18, 2008); L.L. No. 26-2008EN) (June 24, 2008); L.L. No. 32-2007 EN (Nov. 20, 2007); L.L. No. 55-2006 (Oct. 17, 2006) (authorizing impound of cars by other jurisdictions' law enforcement). Much of prior nuisance-legislation was in relation to drug use and crack houses in the late 1980s (*e.g.*, L.L. No. 10-1989 (Apr. 24, 1989) (Loitering in Connection with Drug Use) and LL. 2-1989 (Dec. 13, 1988) (declaring nuisance enforcement authority against crack houses)). In the late 1990s, there was a spate of legislative activity cracking down on use of ATVs, laser pointers, and smoke bombs, as nuisances. *E.g.* L.L. No. 6-1996 (Mar. 5, 1996) (regulating smoke bombs).	Suffolk County appears to vary widely in terms of annual enactments, ranging from twenty to fifty-six enactments annually since 2003. The recent activity in vehicular impound and occupancy laws, however, signals a departure from legislative dormancy since the late 1980s. *See generally* Suffolk County, Code of Ordinances.			

State	Town	Legislative Activity	Legislative Character	Posture on Immigration	Nuisance Legislation	Deviation
OH	Cincinnati	Res. 0010-2006 (Mar. 15, 2006) (supporting comprehensive immigration reform).	Cincinnati is highly legislative, making approximately four-hundred enactments annually. Cincinnati, Ohio, Code of Ordinances, Table of Ordinances Modifying the 1979 Cincinnati Municipal Code.	F	Y-	N
		Only recent nuisance-related legislation is either part of regular pattern, *see* Cincinnati, Ohio, Code of Ordinances, § 1445 (routinely updating variance procedures), narrowly related to specific issues, *see* Ord. No. 296-2006 (Nov. 11, 2006) (relating to stalking), or creating administrative positions, *see* Emer. ord. No. 0471-2007 (Dec. 19, 2007) (creating position for oversight of abatement-related activities).				
OH	Cleveland	Res. of Feb. 27, 2006 (opposing H.R. 4437 and urging more compassionate treatment of undocumented workers).		F	Y	I

State	Town	Legislative Activity	Legislative Character	Posture on Immigration	Nuisance Legislation	Deviation
		Ord. No. 141-09 (Apr. 2, 2009) (criminalizing certain nuisance violations); Ord. No. 318-06 (Mar. 24, 2006) (updating property nuisance regulations). Interestingly, Cleveland also legislated to ensure nuisance-abatement powers related to storing nuclear materials under Lake Erie in 1982. Ord. No. 394-82 (Feb. 25, 1982).	It is difficult to ascertain either a pattern or deviation from practice based on the frequent, but irregular legislative activity in this area. *See generally* Cleveland, Ohio, Code of Ordinances.			
OH	**Columbus**	Res. 47X-2006 (Mar. 10, 2006) (opposing H.R. 4437 and urging more compassionate treatment of undocumented workers); Ord. 1144-02 § 9; Ord. 1697-2006 § 41 (imposing immigration status verification requirements on city contractors).		L/F	Y	Y/I

State	Town	Legislative Activity	Legislative Character	Posture on Immigration	Nuisance Legislation	Deviation
		Ord. 374-06 (2006) (defining public nuisance); Ord. 897-05 (2005) (updating abatement provision); Ord. 0946-04 (2004) (same); Ord. 897-05 (2005) (same); *id.* Columbus, Ohio, Code of Ordinances, tit. 45, § 4501.275 (defining and providing procedures for formal finding of public nuisances, as amended in 1998, 2001 and 2006).	It is difficult to ascertain the number of ordinances enacted, but it appears to be approximately thirty annually. *See* Columbus, Ohio, Code of Ordinances, Comparative Section Table. Since 1998, nuisance provisions appear to have been updated routinely. *See generally id.* at, § 4701; *id.* at § 4501.275 (amended in 1998, 2001 and 2006). Between 1975 and 1998, however, there was little legislative activity. *See, e.g., id.* at ch. 45. One might expect that this sudden increase in nuisance legislation is part of an overall trend toward more legislation generally, but it appears that the number of annual enactments has not risen commensurately with the rise in nuisance legislation. *See* Columbus, Ohio, Code of Ordinances, Comparative Section Table (recording approximately forty ordinances in 1994 and twenty-four ordinances added to the code in 1995).			

State	Town	Legislative Activity	Legislative Character	Posture on Immigration	Nuisance Legislation	Deviation
PA	Berwick	Ord. 2007-1 (Apr. 2007) (creating landlord registration requirements, conferring enforcement authority upon code enforcement officers, and imposing penalties).		L	Y	YY
		Nuisance-related provisions in Ord. 2007-1, App. A (conferring nuisance-related responsibilities on tenants).	Infrequent legislation in any area, as far as is ascertainable from online code. Borough of Berwick, Pa, Borough Code of Ordinances.			
PA	Bridgeport	Ord. No. 2006-005 (Nov. 28, 2006) (requiring landlords to register housing units, forbidding renting to undocumented immigrants, prohibiting overcrowding housing units, barring employers from employing undocumented immigrants, and declaring the town to be English-only).		L	N	N
		It appears that none of the nuisance-related provisions are new, but it is not entirely clear from the format of the 2008 recodified municipal code. Borough of Bridgeport, Municipal Code (2008); *see also id.* at Derivation Table (showing reorganization of 1975 code in 2008).				

State	Town	Legislative Activity	Legislative Character	Posture on Immigration	Nuisance Legislation	Deviation
SC	Beaufort County	Ord. No. 99/36 (Dec. 27, 2006) (requiring landlords and employers to verify immigration status).		L	Y-	N
		Ord. No. O-07-04 (Mar. 23, 2004) (amending the portion of the code related to the Redevelopment Commission's power to enforcement against "slums and urban blight"); Ord. No. 2002-5 (Feb. 11, 2002) (amending definition section of trash and litter provisions). Bulk of other blight and nuisance-related legislation was from 1960s, 1970s, and through mid-1980s.	In recent years, Beaufort County has enacted thirty-one to fifty-one ordinances annually. Beaufort County, Code of Ordinances, Code Comparative Table-Ordinances. Nuisance-related legislation does not constitute a significant portion of its legislative activity.			
TN	Clarksville	Ord. No. 30-2006-07 (Nov. 2, 2006) (providing for the sanctioning of entities with whom the government contracts if they have hired undocumented immigrants).		L	Y	YY

State	Town	Legislative Activity	Legislative Character	Posture on Immigration	Nuisance Legislation	Deviation
		Ord. No. 117-2006-07 (June 7, 2007) (amending property maintenance provisions); Ord. No. 98-2006-07 (May 3, 2007) (same); Ord. No. 59-2005-06 (Feb, 2, 2006) (amending abatement provisions); Ord. No. 57-2004-05 (Mar. 3, 2005) (amending abatement and maintenance provisions).	Clarksville is highly legislative, enacting ninety-two to one-hundred and forty-five ordinances in recent years. Clarksville, Tennessee, Code of Ordinances, Code Comparative Table Ordinances. Nonetheless, the majority of the nuisance provisions from the 1963 code remained untouched, legislatively, until 1999, and the code shows a marked increase in legislative activity around 2005. *See generally id.* at tit. 8 (Health and Sanitation).			
TX	**Austin**	Ord. 20071129-011(establishing Commission of Immigrant Affairs) (Nov. 29, 2007); Resolution 1/97 (Jan. 30, 1997) (creating "safety zone" where no services will be denied on the basis of immigration status): Ord. 031204-9; Code of Ordinances, § 2-8-1 (retained from 1992 codification) (providing for funding to all people, regardless of immigration status).		F	N	N

State	Town	Legislative Activity	Legislative Character	Posture on Immigration	Nuisance Legislation	Deviation
		No significant amendments to nuisance provisions since 1992 adoption of prior code. *See generally* Austin, Tex., Code of Ordinances.	Austin enacts roughly eighty to one-hundred ordinances annually. *See* Austin, Tex., Code of Ordinances, References to Ordinances.			
TX	El Paso	Res. "Mayor's Congreso on Immigration Reform" (Sept. 5, 2006); *see also* § 2.70.020 (as amended in 1992 and 1993) (establishing Border Control Accountability Commission, "to foster cooperative relations between the commission and border law enforcement agencies . . . to inform the mayor and council . . . particularly as [exhibiting] their common regard for human dignity and their conduct toward one another").		F	Y	N

State	Town	Legislative Activity	Legislative Character	Posture on Immigration	Nuisance Legislation	Deviation
		Ord. 16985 (2008) (adding "urban nuisance" to the list of definitions in building and construction provisions); Ord. 16945 (2008) (providing for criminal and civil enforcement penalties); Ord. 16653 (2007) (regarding enforcement penalties in zoning provisions); Ord. 16138 (2005) (regarding junked vehicles and abatement provisions); Ord. 15998 (2005) (providing enforcement power to Building and Standards Commission).	El Paso is highly legislative. El Paso, Tex., Code of Ordinances, Code Comparative Table and Disposition List (recording enactment of approximately 213 ordinances in 2009). The city has historically enacted some type of nuisance-related legislation every five to ten years. *See generally id.* at tit. IX.			
TX	**Farmers Branch**	Ord. 2892 (Nov. 13, 2006) (requiring landlords to verify immigration status); Res. 2006-99 (Sept. 5, 2006) (urging stronger enforcement of federal immigration law); Res. 2006-113 (Nov. 13, 2006) (declaring English to be the official language of Farmers Branch).		L	Y	Y

State	Town	Legislative Activity	Legislative Character	Posture on Immigration	Nuisance Legislation	Deviation
		Ord. No. 3038 (Aug. 9, 2009) (establishing "Apartment Complex Mandatory Crime Reduction Program" and strengthening building regulation in multi-family dwellings); *see* City of Farmer's Branch, Police Dept., Community Programs, *available at* http://www.ci.farmers-branch.tx.us/protect/police-department/community-programs/apartment-complex-mandatory-crime-reduction-program. Ord. 2893 (Nov. 23, 2006) (regulating property maintenance including banning empty flower pots and dirty garage doors). Reportedly, this ordinance was enacted after a bus tour of Hispanic neighborhoods.	Farmers Branch has enacted approximately fifty ordinances annually in recent years. Farmers Branch, Tex, Code of Ordinances, Code Comparative Table Ordinances. There is little nuisance-related legislative activity for the two decades prior to the mid-1990s. Since then, nuisance-related provisions have been updated more frequently. *See id.* at Art. 11, Div. 1, sec. 56-21; *id.* at Art. III, Div. I, sec. 56-146. Even so, some nuisance provisions evince a marked increase in amendment in recent years. *E.g.*, Art. II, Div. 1, sec. 56-81 (amending exterior of property regulations in 1991, 1997, and then 2006, 2007, and 2008)..			
TX	**Friendswood**	Res. R2006-29 (Oct. 16, 2006) (unanimous) (urging federal government to enforce immigration laws vigorously); *see also* Minutes of Meeting (Mar. 5, 2007) (considering and ultimately rejecting English-only resolution).		L	N	N

State	Town	Legislative Activity	Legislative Character	Posture on Immigration	Nuisance Legislation	Deviation
		Ord. No. 2009-13 (July 20, 2009) (junked vehicles). This 2009 amendment is consistent with intervals of amendments to this provision.	Friendswoods passed legislation an average of thirty times annually between 2004 and 2008. Friendswood, Tex., Code of Ordinances, Code Comparative Table-Ordinances/Resolutions. Friendswoods' nuisance-related legislation in recent years does not deviate from past practice.			
TX	**Oak Point**	Res. (June 18, 2007) (adopting English-only policy in close and hotly contested vote). Oak Point, Texas, Council Minutes (June 18, 2007), *available at* http://oakpointtexas.com/meeting_info/city_council/minutes/ccmin061807.pdf; *see also North Texas Town Makes English its Official Language*, ASSOC. PRESS, June 19, 2007. Note that this ordinance was subsequently repealed because it linked Oak Point with the Farmer's Branch ordinance-related controversy.		L	Y	I

State	Town	Legislative Activity	Legislative Character	Posture on Immigration	Nuisance Legislation	Deviation
		Ord. No. 2006-5-4 (May 5, 2006) (amending definitions of nuisance and enforcement provisions); Ord. No. 2003-21 (Sept. 8, 2003) (prescribing regulations to guard against community blight).	Oak Point is not highly legislative, passing 11–12 ordinances per year in 2006 and 2007, but appears to be relatively active, legislatively, in the area of nuisance regulation. *See, e.g.*, Oak Point, Tex. Code of Ordinances, arts. 6.4, 7.1 (updating at least some nuisance provisions every several years).			
VA	Prince William County	Res. 07-609 (July 10, 2007) (mandating local enforcement of federal immigration laws, directing the police department to enter into a cooperative agreement with ICE, and mandating immigration status verification as a condition of receiving public benefits).	Bill's sponsor described the measure as "taking back our community," while other supports "decried rapid cultural changes in their communities," saying that they were "tired of pressing '1' for English." Nick Miroff, *Pr. William Passes Resolution Targeting Illegal Immigration*, WASH. POST, July 11, 2007, at A01.	L	Y	Y

State	Town	Legislative Activity	Legislative Character	Posture on Immigration	Nuisance Legislation	Deviation
		Ord. No. 05-67 (Oct. 4, 2005) (updating vehicular nuisance); Ord. No. 05-43 (June 28, 2005) (same); Ord. No. 04-39 (June 22, 2004). Ord. No. 09-42, (June 23, 2009) (graffiti); Ord. No. 08-72 (July 22, 2008) (same); Ord. No. 07-23 (Apr. 3, 2007) (updating littering and trash removal provisions).	Prince William County is highly legislatively action, enacting approximately eighty to one-hundred and ten ordinances annually in recent years. Prince William County, Va. Code of Ordinances, Code Comparative Table Ordinances. In general, there appears to have been increase in nuisance legislation. The vehicular nuisance provision, for example, had been primarily in place since 1986, with slight amendments in 1987 and 1991. *See generally id.* at art. XVIII. There is no indication that the littering and trash removal provision had been the subject of legislative amendment prior to 2007. *See id.* at art. VI.			