IMMIGRATION AND CIVIL RIGHTS: STATE AND LOCAL EFFORTS TO REGULATE IMMIGRATION

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My contribution to this timely symposium on "Civil Rights or Civil Wants" will explain why I believe that U.S. immigration law and enforcement raises some of the nation's most pressing civil rights concerns of the 21st century. To many people, immigration is not intuitively about civil rights. In my estimation, this is because immigration differs in at least two important ways from what one might consider to be "traditional" civil rights issues, or at least those issues conventionally thought of as implicating "civil rights."

First, immigration and immigration enforcement implicate a greater diversity of "people of color," including people of Latina/o and Asian ancestry, than that encapsulated by the black/white paradigm that historically has dominated thinking about civil rights in the United States.[1] Second, immigration enforcement implicates civil rights concerns different in kind than those raised by the monumental efforts to dismantle Jim Crow and desegregate American social life, which constituted the long and hard-fought civil rights achievement of the twentieth century.[2] But, at their most fundamental level, how can racial profiling in border enforcement, massive detentions of noncitizens, and record levels of deportations *not* implicate civil rights concerns?

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1 *See* Richard Delgado, *Rodrigo's Fifteenth Chronicle: Racial Mixture, Latino-Critical Scholarship, and the Black-White Binary*, 75 TEX. L. REV. 1181 (1997); Juan F. Perea, *The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought*, 85 CAL. L. REV. 1213 (1997).

2 *See* Kevin R. Johnson, *The End of "Civil Rights" as We Know It?: Immigration and Civil Rights in the New Millennium*, 49 UCLA L. REV. 1481 (2002).

Despite the fact that immigration and immigration enforcement directly and indirectly raise civil rights concerns, the legal analysis as well as the public discourse often ignore—or seek to ignore, or at a minimum obscure—the direct civil rights impacts of U.S. immigration law and its enforcement. Restrictionists commonly claim, for example, that immigration regulation and enforcement have nothing whatsoever to do with race and, when accused, fervently deny that they are racists. At the same time, they endorse and pursue aggressive policy measures that, intentionally or not, would have racially disparate impacts.[3] Advocates of immigration enforcement instead attempt to characterize their proposals as a garden-variety law enforcement matter entirely separate and apart from civil rights.

This Essay considers how the current legal analysis of the constitutionality of the spate of state and local immigration measures often focuses on federal preemption and the Supremacy Clause,[4] a relatively dry, if not altogether juiceless, body of law. The legal analysis in the courts of such measures often fails to directly address the civil rights impacts on minority communities.[5] Part I begins by looking generally at the law surrounding federal primacy over immigration. Part II reviews the Supreme Court's decision in *Chamber of Commerce v. Whiting*,[6] which interpreted a rather arcane provision of the U.S. immigration laws to reject a federal preemption challenge to Arizona's effort to regulate immigration through a business-licensing law. Part III considers the impact of the *Whiting* decision on the Ninth Circuit's invalidation of core immigration provisions of Arizona's S.B. 1070, perhaps the most controversial state immigration regulation measure in a time period in which state and local legislatures have passed a veritable avalanche of such measures.

Last but not least, Part IV analyzes the civil rights concerns at the core of state and local efforts to regulate immigration. This Essay conceptualizes immigration enforcement by any level of government as a civil rights issues but, given the greater likelihood of nativist sentiment

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3 *See infra* notes 29–31, 48–51 and accompanying text.

4 U.S. CONST., ART. VI, CL. 2 (This Constitution, and the Laws of the United States . . . . shall be the supreme law of the land . . . .").

5 *See* Mary B. Fan, *Post-Racial Proxies: Resurgent State and Local Anti-"Alien" Laws and Unity-Rebuilding Frames for Antidiscrimination Values*, 32 CARDOZO L. REV. 905, 932-38 (2011) (characterizing federal preemption challenges to local immigration ordinances as an "alternate frame for vindicating equality values").

6 131 S. Ct. 1968 (2011).

prevailing at the regional level, contends that the potential civil rights impacts as greater at the state and local levels than at the national level.

I. FEDERAL PREEMPTION AND IMMIGRATION

For well over a century, immigration law and its enforcement in the United States has been primarily the province of the federal government.[7] Long ago, for example, the Supreme Court in 1849 invalidated Massachusetts and New York laws that taxed passengers who arrived at their ports as an intrusion on the power of Congress to regulate interstate commerce.[8] Congressional efforts to restrict Chinese immigration because of race marked the near-complete federalization of immigration law, and general displacement of state and local regulation, in the late 1800s.[9] In modern times, state and local governments, generally speaking, cannot directly regulate immigration,[10] such as by denying admission into the state[11] or deporting people from the jurisdiction.

Despite unquestionable federal supremacy in the field, the Supreme Court has reserved room for states, even though it was not especially clear about how much room exists for states to regulate immigration.[12] In the 1976 decision of *DeCanas v. Bica*, the Court unequivocally stated

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7 *See generally* KEVIN R. JOHNSON ET AL., UNDERSTANDING IMMIGRATION LAW 89-115 (2009) (reviewing the emergence of the federal power to regulate immigration).

8 *See* Smith v. Turner (*The Passenger Cases*), 48 U.S. (7 How.) 283 (1849).

9 *See infra* note 108 and accompanying text. For analysis of the regulation of immigration by various states before Congress occupied the field in the late 1800s, see Gerald L. Neuman, *A Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833 (1993).

10 *See infra* notes 17–19 and accompanying text.

11 *Cf.* Saenz v. Roe, 526 U.S. 489 (1999) (striking down a California law that imposed a one-year residency requirement on receipt of certain public benefits on grounds that the law interfered with the right to travel); Shapiro v. Thompson, 394 U.S. 618, 629 (1969) (striking down a state statute limiting benefits to those who have resided in state for a year or more).

12 There has been a scholarly debate for more than a decade about the appropriate place for state and local involvement in immigration and immigrant regulation, with some seeing a more expansive role for the states, *see, e.g.*, Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787 (2008); Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567 (2008); Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57 (2007); Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignties*, 35 VA. J. INT'L L. 121, 158 (1994), than others, *see, e.g.*, Michael A. Olivas, *Immigration-Related State and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement*, 2007 U. CHI. LEGAL F. 27 (2007);

that the "[p]ower to regulate immigration is *unquestionably exclusively* a federal power."[13] This is expansive language extolling federal power. Nonetheless, in that same case, the Court rejected a federal preemption challenge to a California law imposing fines on employers of undocumented immigrants. The decision left vague the outer limits of what a state can do when it comes to regulating immigration and immigrants without encroaching on federal power.

A decade after the Supreme Court decided *DeCanas v. Bica*, Congress intervened and narrowed the role of the states in seeking to regulate the employment of undocumented immigrants. In 1986, Congress passed the Immigration Reform and Control Act ("IRCA"),[14] a multifaceted piece of immigration-reform legislation that, among other things, provides for the imposition of sanctions on the employers of undocumented immigrants. The IRCA states that it "preempt[s] any State or local law imposing civil or criminal sanctions (*other than through licensing and similar laws*) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens."[15]

Orde F. Kittrie, *Federalism, Deportation, and Crime Victims Afraid to Call the Police*, 91 IOWA L. REV. 1449 (2006); Karla Mari McKanders, *The Constitutionality of State and Local Laws Targeting Immigrants*, 31 U. ARK. LITTLE ROCK L. REV. 579 (2009); Michael A. Olivas, *Preempting Preemption: Foreign Affairs, State Rights, and Alienage Classifications*, 35 VA. J. INT'L L. 217 (1994); Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 FLA. ST. U. L. REV. 965 (2004); Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power Over Immigration*, 86 N.C. L. REV. 1557 (2008); Rick Su, *A Localist Reading of Local Immigration Regulations*, 86 N.C. L. REV. 1619 (2008); Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493 (2001).

[13] 424 U.S. 351, 354 (1976) (emphasis added). Interestingly, Chief Justice Roberts omitted the word "exclusively" from this quote in the majority opinion in *Chamber of Commerce v. Whiting*, which is discussed later in this Essay. *See Whiting*, 131 S. Ct. 1968, 1974 (2011) ("In [*DeCanas v. Bica*], we recognized that the `[p]ower to regulate immigration is unquestionably . . . a federal power.' "). The deletion presumably was made because the language in *DeCanas*, taken literally, would leave no room for state regulation of immigration. *See infra* text accompanying note 64.

[14] Pub. L. No. 99-603, 100 Stat. 3359 (1986); s*ee* T. ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 178 (6th ed. 2008) ("In 1986, after years of debate, Congress enacted the most far-reaching immigration legislation since the 1950s –" the Immigration Reform and Control Act (IRCA)); STEPHEN H. LEGOMSKY & CRISTINA M. RODRÍGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 1158 (5th ed. 2009) ("The central target of IRCA was illegal immigration, which the statute attacked on several fronts.").

[15] Immigration & Nationality Act (INA) § 274A(h)(2) (as amended by IRCA), 8 U.S.C. § 1324a(h)(2) (emphasis added).

Often a political trendsetter, California a little more than 15 years ago offered the nation a famous modern example of a state unsuccessfully seeking to regulate immigration. In 1994, the Golden State's voters overwhelmingly passed Proposition 187, which was similar in certain respects to Arizona's S.B. 1070;[16] a federal court struck down most of the initiative for impermissibly intruding on the federal power to regulate immigration.[17] Although not figuring into the court's legal analysis, the controversial campaign for the measure was replete with anti-immigrant, anti-Mexican sentiment; moreover, the proposition unquestionably would have had disparate racial impacts if it had gone into effect.[18]

Today, observers spanning the ideological spectrum, including President Obama, contend that the current U.S. immigration system is "broken."[19] It was estimated in 2010 that approximately 11 million undocumented immigrants live in the United States.[20] Many point to the size of the undocumented population, which more than doubled since the mid-1990s,[21] as evidence that IRCA's employer sanctions provisions have failed meaningfully to deter the employment of undocumented immigrants.[22] Besides being ineffective, sanctions also arguably

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16 *See supra* note **Error! Bookmark not defined.**.

17 League of United Latin American Citizens v. Wilson, 908 F. Supp. 755 (C.D. Cal. 1995).

18 *See generally* Kevin R. Johnson, *An Essay on Immigration Politics, Popular Democracy, and California's Proposition 187: The Political Relevance and Legal Irrelevance of Race*, 70 WASH. L. REV. 629 (1995) (analyzing racial rhetoric and politics of the heated Proposition 187 campaign); Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender and Class*, 42 UCLA L. REV. 1509 (1995) (outlining racial, class, gender, and immigration status impacts that would have resulted from the implementation of Proposition 187).

19 *President Obama on Fixing the Broken Immigration System: "Getting Past the Two Poles of This Debate,"* White House Blog, July 1, 2010, available at http://www.whitehouse.gov/blog/2010/07/01/president-obama-fixing-broken-immigration-system-getting-past-two-poles-debate.

20 *See* JEFFREY PASSEL & D'VERA COHN, U.S. UNAUTHORIZED IMMIGRATION FLOWS ARE DOWN SHARPLY SINCE MID-DECADE (Sept. 2010), *available at* http://pewhispanic.org/reports/report.php?ReportID=126. A recent decline in the undocumented population has been attributed to the economic downturn. *See id.*

21 *See* KEVIN R. JOHNSON, OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDERS AND IMMIGRATION LAWS 172-76 (2007).

22 *See, e.g.*, Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 U. CHI. LEGAL F. 193 (arguing that employer sanctions regime has achieved neither of its goals of deterring illegal immigration or protecting U.S. workers).

have had negative collateral civil rights consequences, including increasing discrimination by employers against U.S. citizens and lawful permanent residents of certain national origins.[23]

Despite efforts for more than a decade and a plethora of reform proposals, Congress has been unable to pass a comprehensive immigration reform package to remedy the perceived deficiencies in the current system.[24] Over the same general time period, Latina/o immigrant communities have emerged in parts of the United States, including in the Midwest and South (Georgia being an example), which previously had not seen significant numbers of Latina/o immigrants.[25] State and local governments also have experienced tremendous budgetary pressures, which have worsened with the onset of what some observers have referred to as the "Great Recession."[26]

These developments—the general view that the current U.S. immigration system is broken (and the corollary that the federal government has failed to enforce the immigration laws), the changing regional demographics of immigration, and ever-tightening state and local budgets—in combination have contributed to the enactment of a record number of state and local immigration laws. With palpable anti-federal government sentiment in the background, the Alabama, Arizona, Georgia, and South Carolina legislatures passed such laws in 2010 and

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[23] *See generally* Cecelia M. Espenoza, *The Illusory Provisions of Sanctions: The Immigration Reform and Control Act of 1986*, 8 GEO. IMMIGR. L.J. 343 (1994) (concluding that the elimination of employer sanctions is the most expedient way of remedying the increased racial discrimination caused by the enforcement of employer sanctions under IRCA); Huyen Pham, *The Private Enforcement of Immigration Laws*, 96 GEO. L.J. 777, 780-82 (2008) (analyzing the ineffectiveness of employer sanctions and the national origin discrimination against lawful workers resulting from their enforcement).

[24] *See* Kevin R. Johnson, *A Case Study of Color-Blind Rhetoric: The Racially Disparate Impacts of Arizona's S.B. 1070 and the Failure of Comprehensive Immigration Reform*, LAW JOURNAL FOR SOCIAL JUSTICE AT ARIZONA STATE UNIVERSITY, vol. 1, 2011, *available at* http://www.law.asu.edu/ljsj/LawJournalforSocialJusticeatASU/LJSJEditions/20102011.aspx (analyzing the disparate racial impacts of Congress's failure to pass comprehensive immigration reform).

[25] *See* Johnson, *supra* note 26, at 1493-96; Lisa R. Pruitt, *Latina/os, Locality, and Law in the Rural South*, 12 HARV. LATINO L. REV. 135 (2009).

[26] *See* Olatunde C.A. Johnson, *Stimulus and Civil Rights*, 111 COLUM. L. REV. 154, 180 (2011) ("Today, as at the time of the Great Depression, African Americans, Latinos, and other racial minorities are more likely to be low-income, to have been disparately affected by this latest recession, and to be particularly reliant on the state institutions and social welfare programs that are facing budget strain.") (footnote omitted).

2011.[27] The venerable *New York Times* has stated bluntly that the "new anti-immigrant laws are cruel, racist and counterproductive."[28]

Unfortunately, there is a long history of state and local governments passing laws that discriminate against immigrants. For example, the "alien land laws" popular in many states, but especially in the West, in the early twentieth century, sought to discriminate against particular groups of immigrants through facially neutral means.[29] Many immigrant and civil rights advocates contend that the modern state and local immigration laws have discriminatory impacts, if not invidious purposes.[30]

None of this is to suggest that immigration regulation at the federal level does not also have civil rights impacts. The U.S. government historically as well as in modern times has taken actions that have trampled on the civil rights of immigrants.[31] The operation and enforcement of the U.S. immigration laws has civil rights—and often racially disparate—impacts.[32]

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[27] *See Justice Department Challenges Alabama's Immigration Law*, CNN, Aug. 2. 2011, available at http://articles.cnn.com/2011-08-02/justice/alabama.immigration.law_1_immigration-law-immigration-status-illegal-immigrant?_s=PM:CRIME ("While immigration has long been a federal responsibility, . . . anti-illegal immigration measures have been passed in recent months in Arizona, Utah, Georgia, Indiana and South Carolina."); *see also* NAT'L CONFERENCE OF STATE LEGISLATURES, 2010 IMMIGRATION-RELATED BILLS AND RESOLUTIONS IN THE UNITED STATES (JANUARY-MARCH 2010) (2010) ("With federal immigration reform stalled in Congress, state legislatures continue to tackle immigration issues at an unprecedented rate."), available at http://www.ncsl.org/default.aspx?tabid=20244.

[28] Editorial, *It Gets Even Worse: New Anti-Immigrant Laws are Cruel, Racist and Counterproductive*, N.Y. TIMES, July 4, 2011, at A18.

[29] *See* Keith Aoki, *No Right to Own?: The Early Twentieth Century Alien Land Law As a Prelude to the Internment*, 40 B.C. L. REV. 371 (1998); *see also* Rose Cuison Villazor, *Rediscovering* Oyama v. California*: At the Intersection of Property, Race, and Citizenship*, 87 WASH. U. L. REV. 979 (2010) (analyzing critically major Supreme Court decision invalidating application of California alien land law).

[30] *See* Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 DUKE L.J. 1723, 1743 (2010) ("[T]he most forceful and often repeated criticism of state and local involvement in immigration enforcement is improper reliance on race and ethnicity. . . . [T]he concern is that not only unauthorized migrants, but also lawfully present U.S. citizens and noncitizens, will suffer targeting and discrimination by race and ethnicity.") (footnote omitted); *see, e.g.*, Ruben Navarette Jr., *Why Arizona's Law is a Hornet's Nest*, SAN DIEGO UNION-TRIB., June 2, 2010, at B7; Jonathan J. Cooper, *Vow to Hit the Streets; Civil Rights Activists Call Arizona Statute Racist*, NEWSDAY (New York), Apr. 26, 2010, at A9.

[31] *See generally* KEVIN R., JOHNSON, THE "HUDDLED MASSES" MYTH: IMMIGRATION AND CIVIL RIGHTS (2004) (reviewing the lengthy history of exclusion and removal of the poor,

My point here is that federal primacy over immigration does not mean that civil rights concerns disappear from the field just because the federal government is regulating immigration. Current heated controversies over various federal immigration enforcement programs belie such a claim.[33] However, the potential civil rights deprivations at the state and local levels are likely to be greater because of the fact that nativist and racist sentiments are more likely to prevail there by capturing the local political process than at the federal level.[34]

II. *CHAMBER OF COMMERCE V. WHITING*

In 2011, the Supreme Court in *Chamber of Commerce v. Whiting*,[35] addressed the constitutionality of one relatively tame—at least in comparison to subsequent measures—state immigration law, the Legal Arizona Workers Act of 2007.[36] The Court affirmed the ruling of the U.S. Court of Appeals for the Ninth Circuit that federal law did not preempt the Arizona law.[37] The basic legal challenge to the Arizona law was that it impermissibly infringed on the power of the U.S. government to regulate immigration. Such a claim is based on the relative distribution of immigration regulatory power between the state and federal governments under the U.S. Constitution. A Supremacy Clause claim, of course, is very different in kind than one alleging that the rights of immigrants had been violated under the Equal Protection Clause of the Fourteenth Amendment, for example.[38]

The Chamber of Commerce leveled preemption challenges at the provisions of the Arizona law that (1) authorized the suspension of business licenses of employers who knowingly or intentionally employ an alien not authorized to work, with a second violation possibly

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political minorities, racial minorities, the disabled, gays and lesbians, and other groups under U.S. immigration laws).

32 *See infra* notes 107–113 and accompanying text.

33 *See infra* note 62 and accompanying text.

34 Such concerns are part of the reason that Professors Aoki and Shuford call for a form of regional, rather than local, regulation of immigration. *See* Keith Aoki & John Shuford, *Welcome to Amerizona—Immigrants Out!: Assessing "Dystopian Dreams" and "Usable Futures" of Immigration Reform, and Considering Whether "Immigration Regionalism" is an Idea Whose Time Has Come*, 38 FORDHAM URB. L. J. 1 (2011).

35 131 S. Ct. 1968 (2011).

36 *See* ARIZ. REV. STATS. § 23-211 – 216 (2007).

37 Chicanos Por La Causa, Inc. Napolitano, 558 F.3d 856 (9th Cir. 2009).

38 *See infra* note 92 and accompanying text.

resulting in license revocation—the so-called "business death penalty"—and (2) required employers in Arizona to use the federal E-Verify system, a computer database that is intended to allow for the verification of employee work eligibility,[39] which Congress made clear the federal government itself could not make mandatory.[40]

Writing for a 5-3 Court, Chief Justice John Roberts[41] focused on the plain meaning of IRCA's preemption language.[42] The majority reasoned that, because the Arizona law is a business licensing law and IRCA allows states to use "licensing and similar laws" in immigration enforcement, it is not preempted.[43] Nor did the Court see any conflict between Arizona and U.S. immigration law that justified a finding of federal preemption.[44]

Justice Stephen Breyer, joined by Justice Ruth Bader Ginsburg, dissented. [45] According to Justice Breyer, the "licensing and similar laws" language in IRCA's preemption provision should be limited to employment-related licensing systems; employment, after all, was the

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[39] *See* U.S. Dep't of Homeland Security, E-Verify, available at http://www.dhs.gov/files/programs/gc_1185221678150.shtm. The E-Verify database has been criticized as being excessively prone to error. *See* Jennifer Ludden, *Immigrant Verification System Flawed, Critics Say*, NPR, Nov. 8, 2007, available at http://www.npr.org/templates/story/story.php?storyId=16126268; *see also* Farhang Heydari, Note, *Making Strange Bedfellows: Enlisting the Cooperation of Undocumented Employees in the Enforcement of Employer Sanctions*, 110 COLUM. L. REV. 1526, 1538-40 (2010) (discussing flaws of E-Verify program).

[40] *See* Illegal Immigration Reform and Individual Responsibility Act § 402(a), Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-656 (1996).

[41] Chamber of Commerce v. Whiting, 131 S. Ct. 1968 (2011).

[42] *See supra* text accompanying note 15 (quoting language). For the classic analysis of the modern textualist approach to statutory interpretation by the Supreme Court, see William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990).

[43] *Whiting*, 131 S. Ct. at 1977-81.

[44] *Id*. at 1981-87. The general approach of *Whiting* is much more deferential to state law than the Court's approach in another federal preemption case from last Term. *See* ATT Mobility v. Concepcion, 131 S. Ct. 1740 (2011). In that case, the Court held that the Federal Arbitration Act preempted a California law that voided waiver of consumer class action provisions in an adhesion contract. The decision has been roundly criticized because of its impacts on the legal rights of consumers. *See, e.g.*, Michael Appleton, AT&T Mobility v. Concepcion*: Has Consumer Protection Law Been Preempted*, JONATHAN TURLEY BLOG (July 3, 2011), available at http://jonathanturley.org/2011/07/03/att-mobility-v-concepcion-has-consumer-protection-law-been-preempted/.

[45] *Whiting*, 131 S. Ct. at 1987 (Breyer, J., dissenting).

primary focus of IRCA's employer-sanctions provisions.[46] A literal interpretation of the text, Justice Breyer cautioned (as one might expect from a former law professor), would allow states to suspend or revoke automobile licenses, marriage licenses, or dog licenses based on a business's employment of unauthorized workers, a result that Congress could not have intended.[47]

In addition, Justice Breyer made a very important observation. He feared that enforcement of the Arizona business licensing law would result in increased discrimination against perceived "foreigners" by excessively cautious employers who wanted to steer clear of IRCA's sanctions provisions.[48] To minimize the potential for such impermissible conduct by employers, IRCA prohibits discrimination by employers against foreign nationals who are authorized to work.[49] In Justice Breyer's words, "the state statute seriously threatens the federal Act's anti-discriminatory objectives by radically skewing the relevant penalties"[50] and "will impose additional burdens upon lawful employers and consequently lead those employers to erect ever stronger safeguards against the hiring of unauthorized aliens—without counterbalancing protection against unlawful discrimination."[51]

Dissenting separately, Justice Sonia Sotomayor would have held that state penalties should only be imposed after a federal—not a state, as authorized by the Arizona law—adjudication of a violation of IRCA's employer sanctions provisions.[52]

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46 *Id.* at 1988.

47 *Id.*

48 *Id.* at 1990.

49 INA § 274B, 8 U.S.C. 1324b.

50 *Whiting*, 131 S. Ct. at 1990 (Breyer, J., dissenting).

51 *Id.* at 1992 For similar concerns with the possibly discriminatory consequences of the Arizona law, see Patrick S. Cunningham, Comment, *The Legal Arizona Worker's Act: A Threat to Federal Supremacy over Immigration?*, 42 ARIZ. ST. L.J. 411, 418-19 (2010) (criticizing Arizona's Legal Arizona Worker's Act harsher employer sanctions provisions than under federal law, while also lacking anti-discrimination measures that exist under federal law). Employer discrimination against persons of particular ancestries who can lawfully work has long been a concerns with employer sanctions under IRCA. *See supra* note 32 (citing authorities).
In briefly responding to Justice Breyer, the majority noted that IRCA and a number of federal laws bar discrimination and that "Arizona law does nothing to displace those" and that "there is no reason to suppose that Arizona employers will choose not to" obey the law). *Whiting*, 131 S. Ct. at 1055–56.

52 *Whiting*, 131 S. Ct. at 1998 (Sotomayor, J., dissenting).

Recusing herself, the Court's newest Justice, Elena Kagan, did not participate in the consideration or decision in *Whiting*.[53] Even though she was not Solicitor General when the U.S. government filed an amicus brief in the case, Justice Kagan had been Solicitor General when the Court had invited the United States to provide its views about the constitutionality of the Legal Arizona Workers Act. [54] As Solicitor General, she likely would have been involved in discussions in the office about the U.S. government's position in the case.[55]

For the most part, the Supreme Court approached *Whiting* as a cut-and-dried federal preemption case. There was little discussion, except in Justice Breyer's dissent, of the civil rights concerns underlying the challenge to the Arizona law.

III. ARIZONA'S S.B. 1070 AND *UNITED STATES V. ARIZONA*

Before considering *Whiting*'s impact on Arizona S.B. 1070, we must look at the Ninth Circuit's decision in *United States v. Arizona*.[56] Unlike the Arizona business-licensing law, S.B. 1070 unleashed a firestorm of national and international controversy.[57] As a result, Arizona is in

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53 *Id.* at 1987.

54 *See* Elena Kagan and the Arizona Business Licensing Case (Chamber of Commerce of the United States v. Candalaria), ImmigrationProf blog (May 12, 2011), http://lawprofessors.typepad.com/immigration/2010/05/elena-kagan-and-the-arizona-business-licensing-case-.html.

55 *See id*.

56 641 F.3d 339 (9th Cir. 2011), *cert. pending*.

57 *See* Marc Lacey, *Arizona Law Said to Harm Convention Businesses*, N.Y. TIMES, Nov. 18, 2010, at A18; *Vandalism, Protests Over Arizona Immigration Law*, CNN, SHOW: RICK'S LIST, April 26, 2010; *see also* United States v. Arizona, 641 F.3d at 353 (noting that "the following foreign leaders and bodies have publicly criticized Arizona's [S.B. 1070]: The Presidents of Mexico, Bolivia, Ecuador, El Salvador, and Guatemala; the governments of Brazil, Colombia, Honduras, and Nicaragua; the national assemblies in Ecuador and Nicaragua and the Central American Parliament; six human rights experts at the United Nations; the Secretary General and many permanent representatives of the Organization of American States; the Inter-American Commission on Human Rights; and the Union of South American Nations").

For a detailed analysis of the Arizona law, see Gabriel J. Chin et al., *A Legal Labyrinth: Issues Raised by Arizona Senate Bill 1070*, 25 GEO. IMMIGR. L.J. 47 (2010); Johnson, *infra* note 87; *see also* Kristina M. Campbell, *Arizona S.B. 1070: The Road to S.B. 1070: How Arizona Became Ground Zero for the Immigrants' Rights Movement and the Continuing Struggle for Latino Civil Rights in America*, 14 HARV. LATINO L. REV. 1, 2 (2011) (examining "the road leading to the passage of S.B. 1070 . . . and attempt[ing] to demonstrate how it and other state

certain respects the national poster child for states taking immigration enforcement into their own hands and standing up to the federal government on immigration.

In beginning the opinion, Judge Richard Paez tellingly introduced the case as follows:

> [I]n response to a serious problem of unauthorized immigration along the Arizona–Mexico border, *the State of Arizona enacted its own immigration law enforcement policy*. Support Our Law Enforcement and Safe Neighborhoods Act . . . ("S.B. 1070"), "*make[s] attrition through enforcement the public policy of all state and local government agencies in Arizona*." S.B. 1070 § 1. The provisions of S.B. 1070 are distinct from federal immigration laws. To achieve this policy of attrition, S.B. 1070 establishes a variety of immigration-related state offenses and defines the immigration-enforcement authority of Arizona's state and local law enforcement officers.[58]

The Ninth Circuit held that the district court did not abuse its discretion in enjoining the implementation of four sections of S.B. 1070.[59] A review of those sections highlights the differences between it and the much narrower Arizona law addressed by the Supreme Court in *Whiting*:

1. Section 2(B), which requires law enforcement to verify the immigration status of persons subject to a lawful stop, detention, or arrest when the officers have a "reasonable suspicion . . . that the person is an alien and unlawfully in the United States";
2. Section 3, which would make it a crime under Arizona law, in addition to a violation of federal law, to fail to complete or carry an "alien registration document";
3. Section 5(C), which would make it a crime for a person to apply for, solicit, or perform work without proper immigration authorization; and

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immigration laws purporting to be legitimate exercises of governmental authority are, in fact, tools of oppression, racism, and xenophobia, particularly against Latinos").

[58] *United States v. Arizona*, 641 F.3d at 343-44 (emphasis added). Judge John Noonan wrote a forceful concurrence, emphasizing that federal preemption could be justified on the fact that the Arizona law impinged on the U.S. government's power over foreign relations. *Id.* at 366 (Noonan, J., concurring).

[59] *Id.* at 344.

4. Section 6, which would allow police to arrest a person without a warrant if the officer has "probable cause to believe . . . [t]he person to be arrested has committed a crime that makes the person removable from the United States."

The Ninth Circuit unanimously invalidated Sections 3 and 5(c). Judge Carlos Bea dissented from the majority's holding with respect to Sections 2(B) and 6.[60]

In explaining the court's holding, the majority observed several times that the Immigration & Nationality Act authorizes state and local governments, with federal oversight, to assist the federal government in enforcing the U.S. immigration laws; it does so through the process of entering into a memoranda of understanding between the governmental agencies involved and training of state and local law enforcement in the U.S. immigration laws.[61] Congress thus created a mechanism for state and local governments, with the appropriate degree of federal oversight determined by Congress and left for implementation by the Executive Branch, to assist the U.S. government in immigration enforcement.[62]

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60 *Id.* at 369 (Bea, J., concurring in part, dissenting in part).

61 *See United States v. Arizona*, 641 F.3d at 348-50, 364-65; Immigration & Nationality Act § 287(g), 8 U.S.C. § 1357(g). For critical analysis of what are known as 287(g) agreements, which allow state and local police with federal training and oversight to assist in the enforcement of the U.S. immigration laws, see Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563, 1582-86 (2010); Carrie L. Arnold, Note, *Racial Profiling in Immigration Enforcement: State and Local Agreements to Enforce Federal Immigration Law*, 49 ARIZ. L. REV. 113 (2007); Mimi E. Tsankov & Christina J. Martin, *Measured Enforcement: A Policy Shift in the ICE 237(g) Program*, 31 LA VERNE L. REV. 403, 408 (2010) (evaluating the implementation of the Department of Homeland Security's model "Agreement for State and Local Immigration Enforcement Partnerships"); *see also* Michael J. Wishnie, *State and Local Policy Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084 (2004) (examining the implication of local police enforcement's alleged "inherent authority" under federal law to make immigration arrests).

62 "Secure Communities," a controversial federal program touted by the Obama administration, also promotes cooperation between state and local police agencies with the federal government as part of an aggressive effort—at least ostensibly—to remove serious criminal offenders from the United States. *See Secure Communities: A Model for Obama's 2010 Immigration Enforcement Strategy*, STATES NEWS SERVICE, Jan. 5, 2010. Despite the claim by the Obama administration that the information-sharing program would focus on criminal offenders who posed a serious danger to the public, "Immigration and Customs Enforcement records show that a vast majority, 79 percent, of people deported under Secure Communities had no criminal records or had been picked up for low-level offenses, like traffic violations and juvenile mischief." Editorial, *Immigration Bait and Switch*, N.Y. TIMES, Aug. 17,

A. *The Impact of* Chamber of Commerce v. Whiting *on* United States v. Arizona *and S.B. 1070*

This background takes us to the all-important question: How might *Chamber of Commerce v. Whiting* affect the Ninth Circuit's decision in *United States v. Arizona*? Both cases involve the question of federal preemption of state efforts to regulate immigration. However, as is outlined below, the Supreme Court's decision in *Whiting* to uphold the constitutionality of the Legal Arizona Workers Act does not necessarily mean that the Court will uphold S.B. 1070.

At the outset, several important distinctions are readily apparent between *United States v. Arizona* and *Whiting*. The court of appeals characterized S.B. 1070 as Arizona's "own

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2010; *see* Kavitha Rajagopalan, *Deportation Program Casts Too Wide a Net*, NEWSDAY (New York), June 24, 2011, at A34 ("Secure Communities purports to search for repeat illegal immigrant offenders or those charged with major crimes. In practice, most people deported under the program have had no criminal record at all and were picked up on minor offenses, like speeding."); *see also* Shadi Masri, Current Development: Development in the Executive Branch, *ICE's Initiation of Secure Communities Program Draws More Criticism Than Praise*, 25 GEO. IMMIGR. L.J. 533 (2011) (summarizing criticisms of the Secure Communities Program). After implementation of Secure Communities, the Obama administration generated considerable controversy when it announced that the program was mandatory and thus that states and local law enforcement agencies could not opt out of participation. *See* Bob Egelko, *Advocates Blast Change in U.S. Fingerprint Policy*, S.F. CHRON., Aug. 9, 2011, at C1.

There has been controversy over whether state and local police can decide for law enforcement reasons not to participate in federal immigration enforcement efforts. *See* Rose Cuison Villazor, *What is "Sanctuary"?*, 61 SMU L. REV. 133 (2008) (analyzing precisely the meaning of various municipal "sanctuary" ordinances involving treatment of immigrants and the controversy surrounding them); *see also* Rose Cuison Villazor, *"Sanctuary Cities" and Local Citizenship*, 37 FORD. URBAN L.J. 573 (2010) (examining ways in which local "sanctuary laws" demonstrate the tension between notions of national and local citizenship); Jennifer M. Hansen, Comment, *Sanctuary's Demise: The Unintended Effects of State and Local Enforcement of Immigration Law*, 10 SCHOLAR 289 (2008) (recognizing the threat of local enforcement of immigration laws on sanctuary cities); Christopher Carlberg, Note, *Cooperative Noncooperation: A Proposal for an Effective Uniform Noncooperation Immigration Policy for Local Governments*, 77 GEO. WASH. L. REV. 740 (2009) (analyzing the origins and effectiveness of noncooperation laws in encouraging undocumented immigrants to report crimes to local law enforcement). Some local police departments fear that immigrants will be less likely to cooperate with police in crime investigations if police are viewed as part of the immigration enforcement machinery of the nation. *See* Huyen Pham, *The Constitutional Right Not to Cooperate?: Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373, 1375 (2006).

immigration law enforcement policy,"[63] which ominously suggests that the law intrudes on the "unquestionably exclusively federal power" to regulate immigration as declared in *DeCanas v. Bica*.[64] Arizona's "attrition through enforcement" public policy on immigration, as well as the breadth of its enforcement provisions, makes it clear that S.B. 1070 most definitely is not a narrow business-licensing statute akin to the Legal Arizona Workers Act.[65] Rather, the Arizona law by design and clear intent is a much broader omnibus immigration *enforcement*, as opposed to a more general immigration, law.

Another distinction between *United States v. Arizona* and *Whiting* may figure prominently in determining the final legal fate of S.B. 1070. The U.S. government, not a private party, challenged S.B. 1070 and contended that the state of Arizona is intruding on *its* power to regulate immigration. The fact that the U.S. government itself made a claim of federal supremacy places the case in a very different position than *Whiting*, in which the Chamber of Commerce, a private association of businesses collectively pursuing commercial interests, contended that a state had usurped the immigration power of the federal government.[66] Indeed, the majority identified several points about which the U.S. government agreed with certain of Arizona's contentions in *Whiting*.[67] At bottom, the Supreme Court would seem much more likely to take seriously the U.S. government's claim of federal supremacy than a similar claim by the Chamber of Commerce.

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63 *United States v. Arizona*, 641 F.3d at 343.

64 *See supra* text accompanying note 13.

65 *See supra* text accompanying notes 39–44 & 50.

66 In August 2011, the United States challenged the constitutionality on federal preemption grounds of a tough Alabama immigration law. *See* Richard Fausset, *US Sues Over Immigration Law*, L.A. TIMES, Aug. 2, 2011, at A5.

67 *Whiting*, 131 S. Ct. at 1985-87 (noting that, contrary to the contentions of the Chamber of Commerce, the U.S. government stated that the E-Verify system could accommodate increased usage as required by Arizona law and that E-Verify was the best means available to determine employee eligibility); *see also* text accompanying note 39 (discussing E-Verify).

B. *What Will Happen in the Supreme Court in* United States v. Arizona

In August 2010, the state of Arizona filed a petition for certiorari in *United States v. Arizona*.[68] Given the national importance of the issues raised in the case, the flood of states passing similar laws,[69] and the great public interest in S.B. 1070,[70] the Court might well grant certiorari and address the Arizona's law constitutionality. The Court could proceed in several different ways.

One possibility would be for the Court to grant Arizona's petition for certiorari, vacate the Ninth Circuit's decision, and remand the case for further consideration in light of *Whiting*. This is the precise approach that the Court took with respect to a Third Circuit decision invalidating a controversial immigration ordinance enacted by the City of Hazleton, Pennsylvania.[71] Although the Third Circuit decided the case on federal preemption grounds, the Hazleton ordinance goes well beyond the state business-licensing law at issue in *Whiting*; indeed, the ordinance goes so far as to prohibit landlords from renting to undocumented immigrants.[72]

If the Court does not simply vacate and remand to the Ninth Circuit for further consideration in light of the Court's decision in *Chamber of Commerce v. Whiting* but addresses the merits of the case at this time, two critical variables come into play.

1. *Justice Kennedy*

The most important variable to a Supreme Court decision on the merits of *United States v. Arizona* is whether Justice Kennedy—as he did in *Whiting*—sides with Chief Justice Roberts and Justices Scalia, Alito, and Thomas. If he does, then there will be a five-Justice majority (as

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68 *See* Lyle Denniston, *Arizona Appeals on Alien Control Law*, SCOTUSBLOG, Aug. 10, 2011, available at http://www.scotusblog.com/2011/08/arizona-appeals-on-alien-control-law/.

69 *See supra* text accompanying note 27.

70 *See supra* note 57 and accompanying text.

71 City of Hazleton v. Lozano, 180 L.Ed.2d 243 (2011).

72 *See* Fan, *supra* note 5, at 920-24; Karla Mari McKanders, *Welcome to Hazleton! "Illegal" Immigrants Beware: Local Immigration Ordinances and What the Federal Government Must Do About It*, 39 LOY. U. CHI. L.J. 1 (2007); *see also* Aoki & Shuford, *supra* note 34 (critically analyzing state and local efforts to regulate immigration); 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) (questioning local ordinances seeking to prohibit landlords from renting to undocumented immigrants).

in *Whiting*) in favor of reversing the Ninth Circuit and upholding S.B. 1070. Alternatively, Justice Kennedy (and possibly other Justices)—as a compromise of sorts—could conclude, as Judge Bea did in his dissent,[73] that only two of the four provisions subject to the injunction are preempted by federal immigration law.

Justice Kennedy has written opinions holding that federal law preempted state law when the specific federal law at issue justified that conclusion.[74] He appears to decide preemption cases on an individual basis. Justice Kennedy might well agree with Judge Bea on the invalidation of two sections and with the Ninth Circuit majority on the other two. Unlike the Arizona law at issue in *Whiting*, S.B. 1070 by its own admission "make[s] attrition through enforcement" official state immigration policy, a significant—and intentional—intrusion on federal immigration power.[75]

2. *Justice Kagan*

If Justice Kennedy sides with the Ninth Circuit's majority, he would join Justices Ginsburg, Breyer, and Sotomayor. In that instance, a second variable kicks in. Recall that Justice Elena Kagan recused herself in *Whiting*.[76] It is uncertain whether she will do the same in *United States v. Arizona*.

In May 2010, Justice Kagan stepped down as Solicitor General. The U.S. government did not file suit in *United States v. Arizona* until July 2010.[77] In a rare move, an attorney from the Solicitor General's office argued the case in the district court.[78] It is not clear whether, as Solicitor General, Justice Kagan participated in the United States' decision to bring *United States v. Arizona*.

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73 *See supra* text accompanying notes 59–60 .

74 *See* United States v. Locke, 529 U.S. 89 (2000) (holding that a Washington oil-tanker regulation was preempted by federal law); Boggs v. Boggs, 520 U.S. 833 (1997) (ruling that Employee Retirement Income Security Act preempted state community-property law addressing interests in pension plan benefits).

75 *See supra* text accompanying note 58.

76 *See supra* text accompanying note 53.

77 *See* Complaint, United States v. Arizona, Case No. CV 10-1413-PHX-SRB (D. Ariz. July 6, 2010), available at http://www.justice.gov/opa/documents/az-complaint.pdf.

78 *See* Jerry Markon, *In Immigration Uproar, an Attorney With Subtlety; Kneedler Brings Experience, Apolitical Reputation to Job Arguing Against Ariz. Law*, WASH. POST, July 31, 2010, at A3.

If Justice Kagan recuses herself and Justice Kennedy sides with the Ninth Circuit majority, there likely would be a 4-4 split on the Court, which would mean affirmance of the Ninth Circuit decision by an equally divided Court.[79] If Justice Kagan participates, there might well be a 5-4 majority for affirmance of the Ninth Circuit's invalidation of S.B. 1070.

C. *The Civil Rights Issues Likely to Be Ignored*

There is one extremely important issue that, however *United States v. Arizona* is resolved, the Supreme Court might not squarely address in any detail. As Justice Breyer touched on in his dissent,[80] both *Whiting* and *United States v. Arizona*, as well as many of the other cases addressing the constitutionality of state and local immigration laws,[81] arguably have civil rights impacts on communities of color.[82] That is precisely why, in my estimation, the debate over the efficacy of the laws is so frequently heated.[83]

For example, one of the most controversial features of S.B. 1070, which was struck down by the Ninth Circuit,[84] is Section 2(B)'s requirement that local police verify the immigration status of persons whom they have a "reasonable suspicion" to believe are undocumented.[85] It is not clear what might legitimately lead to such suspicion. Consequently, many observers expressed fears that enforcement of Section 2(B) and its "reasonable suspicion" standard would increase racial profiling of Latina/os in Arizona.[86]

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79 This occurred with another immigration case from last Term. *See* Flores-Villar v. United States, 131 S. Ct. 2312 (2011) (affirming, by an equally divided Court, the rejection of a constitutional challenge to gender and age distinctions in the nationality laws, with Justice Kagan not participating in the consideration or decision in the case).

80 *See supra* text accompanying notes 48–51.

81 *See infra* note 120 and accompanying text (citing cases).

82 *See supra* text accompanying notes 30-31.

83 *See supra* notes 28 & 57.

84 *See supra* text accompanying note 59

85 *See supra* text accompanying note 60.

86 *See* Randal C. Archibold, *Arizona Law is Stoking Unease Among Latinos*, N.Y. TIMES, May 28, 2010, at A11; Gabriel J. Chin & Kevin R. Johnson, *Profiling's Enabler: High Court Ruling Underpins Arizona Immigration Law*, WASH. POST, July 13, 2010, available at http://www.washingtonpost.com/wp-dyn/content/article/2010/07/12/AR2010071204049.html. Racial profiling in immigration enforcement is a more general problem that afflicts U.S. immigration enforcement. *See generally* Kevin R. Johnson, *The Case Against Race Profiling in*

Concerns with state and local law enforcement engaging in racial profiling are not fanciful. In 1997, in Chandler, Arizona, a suburb of Phoenix, local police—with state and federal support—engaged in what is hard to call anything other than a dragnet. Local law enforcement officers targeted businesses that served Latina/os, people who spoke Spanish, and Latina/os generally for stops and inquiries about their immigration status.[87] Civil rights lawsuits, as well as a critical report by the Arizona Attorney General, followed.[88]

In addition, Maricopa County, Arizona, Sheriff Joe Arpaio—dubbed "America's Toughest Sheriff" and a vocal supporter of aggressive local enforcement of the immigration laws—is regularly accused of civil rights violations of Latina/os and immigrants.[89] As one law professor described it, "Sheriff Joe Arpaio . . . runs the most notorious of [the] local programs [to enforce the U.S. immigration laws], in which he houses immigrants in tents, marches them through the streets in black and white striped prison clothing, sowing terror throughout the Latino community."[90]

Immigration Enforcement, 78 WASH. U. L.Q. 675 (2000) (scrutinizing problem of racial profiling in U.S. immigration enforcement).

87 *See generally* Mary Romero & Marwah Serag, *Violation of Latino Civil Rights Resulting From INS and Local Police's Use of Race, Culture and Class Profiling: The Case of the Chandler Roundup in Arizona*, 52 CLEVE. ST. L. REV. 75 (2005 (analyzing critically the civil rights impacts of what has been called the "Chandler Roundup").

88 *See* OFFICE OF THE ATTORNEY GENERAL GRANT WOODS, CIVIL RIGHTS DIVISION: SURVEY OF THE CHANDLER POLICE DEPARTMENT – INS/BORDER PATROL JOINT OPERATION (1997).

89 *See* Jacques Billeaud, *Feds Sue Arizona Sheriff in Civil Rights Probe*, WASH. TIMES, Sept. 2, 2010 (reporting on U.S. Department of Justice suit against Maricopa County Sheriff Joe Arpaio for refusing to produce documents into investigation of civil rights violations); Jerry Markon & Stephanie McCrummen, *U.S. May Sue Arizona's Sheriff Arpaio for Not Cooperating in Investigation*, WASH. POST, Aug. 18, 2010 ("Justice Department officials in Washington have issued a rare threat to sue Maricopa County Sheriff Joe Arpaio if he does not cooperate with their investigation of whether he discriminates against Hispanics."); William Finnegan, "*Sheriff Joe*," NEW YORKER, July 20, 2009, at 42 (reporting on Maricopa County's controversial sheriff, Joe Arpaio, who regularly has been accused of violating the civil rights of Latina/o immigrants and citizens); *see also* Mary Romero, *State Violence, and the Social and Legal Construction of Latino Criminality: From El Bandido to Gang Member*, 78 DENV. U. L. REV. 1081, 1087-98 (2001) (studying tangible impacts of stereotypes of Latino criminality resulting in the killing of a Latino male by Phoenix police).

90 Barbara Hines, T*he Right to Migrate as a Human Right: The Current Argentine Immigration Law*, 43 CORNELL INT'L L.J. 471, 492 (2010) (footnotes omitted); *see also supra* note 61 and accompanying text (discussing 287(g) agreements).

For better or worse, the Supreme Court likely will not directly address the potential for racial profiling or any of the other civil rights deprivations raised by Arizona's S.B. 1070 (and immigration enforcement generally). This is in large part stems from the fact that because the Obama administration framed the primary constitutional challenge to S.B. 1070 in *United States v. Arizona* on federal preemption grounds.[91] The complaint of the United States fails to include an Equal Protection claim under the Fourteenth Amendment based on the possible racial profiling impacts of S.B. 1070.[92] The Supremacy Clause and federal preemption arguments are cleaner arguments and easier for the U.S. government to prevail upon than rights-based claims, while also avoiding the claim that the administration is playing the proverbial "race card."[93]

D. *The Implications of* United States v. Arizona

United States v. Arizona unquestionably raises complex policy, civil rights, and international human rights issues, among other important issues.[94] Nonetheless, we are likely to see the Supreme Court, if it decides to review the Ninth Circuit's decision, approach the case in a lawyer-like fashion and apply the relevant federal preemption precedent to the specific provisions of the Arizona immigration law. Even if ultimately reaching different conclusions, its approach will likely mirror the Ninth Circuit's approach.

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91 *See supra* text accompanying note 66

92 *See supra* note 77 (citing Complaint in *United States v. Arizona*). Equal Protection claims are difficult to prevail upon because the Supreme Court has required that, to establish a constitutional violation, the state actor act with a "discriminatory intent." *See* Washington v. Davis, 426 U.S. 229 (1976) (holding that state action resulting in a disparate racial impact did not necessarily violate the Equal Protection Clause of the Fourteenth Amendment unless adopted or maintained with a "discriminatory intent"). Many commentators have criticized the discriminatory intent standard as ignoring unconscious or implicit racial bias. *See, e.g.*, Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1 (2006); Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969 (2006); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

93 *See* Johnson, *supra* note ___.

94 Various issues are raised by the contributions to an on-line symposium on *United States v. Arizona* on SCOTUSblog. *See* http://www.scotusblog.com/2011/07/announcing-an-on-line-symposium-on-arizona-v-united-states/ (listing symposium contributions).

A technical legal approach may in the end be somewhat unsatisfying to immigrant- and civil rights advocates. Still, it is exactly what we would expect a court of law, especially a conservative Supreme Court, to do. In any event, such an approach by this Court seems inevitable, especially given the deeply contested nature of modern U.S. immigration law and its enforcement as well as the ideological composition of the Court.

Professor Rogers Smith claims that Arizona and its ideological supporters passed S.B. 1070 to pursue an immigration policy other than that enacted by the U.S. Congress and enforced by the Executive Branch.[95] Smith's contention seems to be true in light of the "attrition through enforcement" statement of purpose in the Arizona law.[96] This is, of course, precisely what the U.S. government, as the plaintiff in *United States v. Arizona*, contends. And, in my estimation, it is one of the most powerful arguments for finding that federal immigration law preempts S.B. 1070.[97]

One further comment is in order here. In evaluating S.B. 1070 as a matter of immigration policy, it seems to me that we should strive to consider and reasonably respond to, rather than denigrate and dismiss, the concerns of its critics as well as its supporters. Many Latina/os—including U.S. citizens—fear that the spate of state and local immigration regulation will result in racial discrimination.[98] If nothing else, the era of Jim Crow, which only ended with federal intervention in parts of the United States,[99] amply demonstrates that state and local governments are not always sensitive to the civil rights of racial minorities.

At the same time, many voters across the country are frustrated with the current enforcement of the U.S. immigration laws, vocal frustrations that have increased with the economic downturn and tightening state and local budgets. Just as we should not disregard the pleas of those who fear the civil rights implication of immigration enforcement, we should not

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95 *See* Rogers Smith, *The Constitutionality of "Attrition Through Enforcement"*, SCOTUSBLOG (July 13, 2011), available at http://www.scotusblog.com/2011/07/the-constitutionality-of-%E2%80%9Cattrition-through-enforcement%E2%80%9D/

96 *See supra* text accompanying note 58.

97 *See supra* text accompanying note 75.

98 *See supra* note 86 and accompanying text.

99 *See generally* C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW (2002 ed.) (analyzing history of Jim Crow in the United States); RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (1975) (documenting history of litigation to desegregate public schools culminating in *Brown v. Board of Education*, 347 U.S. 483 (1954)).

disregard the claims of those who fear the perceived problems caused by immigration, immigrants, and the alleged failure of the U.S. government to enforce the rule of law.[100] Recognizing this political reality, most supporters of comprehensive immigration reform advocate additional enforcement measures as a central plank for reform.[101]

In the long run, Congress will need to do something to address the issues of all concerned with immigration in a responsible, national, and comprehensive fashion.[102] Immigration reform, by most accounts, is necessary.[103] But an enforcement-only approach dubbed "attrition through enforcement" passed by one state—or 10 or 20—will not solve the immigration problems that confront the nation as a whole. Ironically enough, one possible positive impact of laws like S.B. 1070, as well as copycat pieces of legislations in Alabama, Georgia, and South Carolina,[104] is that they might help to push Congress to act.

In order for Congress to enact true immigration reform, what the nation needs is an open and fair discussion, based on the facts, of the issues surrounding U.S. immigration law and its enforcement. Academics, policy-makers, and commentators should strive to promote and facilitate such a discussion of the issues,[105] not foment divisions among us through mean-spirited sloganeering.[106] Careful analysis, learning about and adhering to the facts, and listening to peoples' concerns, whether one agrees with them or not, are what are necessary to move meaningful reform forward.

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100 This claim seems dubious in light of the Obama administration's string of record-setting number of deportations annually. *See* Johnson, *supra* note __.

101 *See* Johnson, *supra* note __ (reviewing the general contours of many comprehensive immigration reform proposals).

102 For an outline of principles for meaningful immigration reform, see Kevin R. Johnson, *Ten Guiding Principles For Truly Comprehensive Immigration Reform: A Blueprint*, 55 WAYNE L. REV. 1599 (2009).

103 *See supra* text accompanying notes 19–27.

104 *See supra* note 27 and accompanying text.

105 *See* Kevin R. Johnson, *It's the Economy, Stupid: The Hijacking of the Debate Over Immigration Reform By Monsters, Ghosts, and Goblins (or the War on Drugs, War on Terror, Narcoterrorists, Etc.)*, 13 CHAPMAN L. REV. 583 (2010).

106 *See, e.g.*, PETER BRIMELOW, ALIEN NATION: COMMON SENSE ABOUT AMERICA'S IMMIGRATION DISASTER (1995); VICTOR DAVIS HANSON, MEXIFORNIA: A STATE OF BECOMING (2003); MICHELLE MALKIN, INVASION: HOW AMERICA STILL WELCOMES TERRORISTS, CRIMINALS, AND OTHER FOREIGN MENACES TO OUR SHORES (2002); Carol Swain, *Why the Court Should Uphold S.B. 1070*, SCOTUSBLOG, July 14, 2011, available at http://www.scotusblog.com/2011/07/why-the-court-should-uphold-s-b-1070/.

IV. IMMIGRATION AND CIVIL RIGHTS

U.S. history reveals that immigration law often has implicated civil rights concerns.[107] Looking back today on the era of the Chinese exclusion laws passed by Congress in the late 1800s, we now understand how these discriminatory laws adversely affected the civil rights of Chinese immigrants in the United States.[108]

Later chapters of U.S. immigration history, such as the "repatriation" of persons of Mexican ancestry—including hundreds of thousands of U.S. citizens—during the Great Depression;[109] deportations of communist party members during the McCarthy era;[110] exploitation of Mexican workers through the Bracero Program;[111] the mass arrests, detentions, and removals of Muslim and Arab noncitizens after September 11, 2001;[112] and the raids, detention, and removal of noncitizens in contemporary times,[113] all demonstrate how the nation at various times has violated the basic civil rights of noncitizens as well as U.S. citizens of certain national origin ancestries.

Modern immigration raises civil rights issues that differ in salient ways from those that dominated the legal and social segregation of Jim Crow America. It clearly implicates issues of

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107 *See generally* JOHNSON, *supra* note __ (reviewing the intersection of immigration and civil rights in the U.S. immigration laws).

108 *See, e.g.*, The Chinese Exclusion Case, 130 U.S. 581 (1889). *See generally* LUCY E. SALYER, LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW (1995) (studying the harsh impacts of the Chinese exclusion laws). *See generally* Kevin R. Johnson, *Minorities, Immigrant and Otherwise*, YALE L.J. POCKET PART (Oct. 2008), at http://yalelawjournal.org/2008/10/28/johnson.html.

109 *See generally* FRANCISCO E. BALDERRAMA & RAYMOND RODRIGUEZ, DECADE OF BETRAYAL**:** MEXICAN REPATRIATION IN THE 1930S (rev. ed. 2006) (summarizing history of "repatriation" during Great Depression).

110 *See, e.g.*, Galvan v. Press, 347 U.S. 522, 528-32 (1954) (upholding deportation because of noncitizen's prior membership in communist organization); Harisiades v. Shaughnessy, 342 U.S. 580, 591-92 (1952) (same).

111 *See generally* KITTY CALAVITA, INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION, AND THE I.N.S. (1992); ERNESTO GALARZA, MERCHANTS OF LABOR: THE MEXICAN BRACERO STORY (1964).

112 *See generally* David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953 (2002) (reviewing harsh measures through immigration and other laws directed at Arab and Muslim noncitizens in the name of the "war on terror").

113 *See* Johnson, *supra* note __.

race and class in new, different, and more expansive ways than the past.[114] Moreover, immigration enforcement has disparate impacts on communities of color.[115] Undocumented workers are exploited in the workplace, with a new Jim Crow alive and well in racially segregated labor markets.[116]

Not surprisingly, the state and local efforts to enter into immigration regulation also have civil rights impacts, as can be seen in *Chamber of Commerce v. Whiting* and *United States v. Arizona*.[117] The same also is true with respect to Georgia's foray earlier this year into immigration regulation. Immigration has been an issue in this state, with Georgia, after much political wrangling, following the lead of Arizona's S.B. 1070.[118]

Nativism and racism can more easily prevail at the state and local levels than at the national level.[119] The growing number of court decisions addressing those laws tends to focus on federal preemption and the role of the states in regulating immigration, rehashing seemingly old debates about federalism in a nation of fifty states.[120] It is no coincidence that claims of "states' rights" —a race-neutral and seemingly principled defense—often were invoked to resist federal efforts to dismantle American apartheid.[121]

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114 *See, e.g.*, Johnson, *supra* note __.

115 *See generally* Kevin R. Johnson, *The Intersection of Race and Class in U.S. Immigration Law and Enforcement*, 72 LAW & CONTEMP. PROBS. 1 (2009) (analyzing the disparate racial and class impacts of operation of U.S. immigration laws and their enforcement).

116 *See* Karla Mari McKanders, *Sustaining Tiered Personhood: Jim Crow and Anti-Immigrant Laws*, 26 HARV. J. RACIAL & ETHNIC JUST. 163 (2010).

117 *See supra* Parts II & III.

118 *See* Kim Severson, *Immigrants Are Subject of Tough Bill in Georgia*, N.Y. TIMES, Apr. 16, 2011, at A14; *see also* Richard Fausser, *Georgia Moves Toward Law Like Arizona's,* L.A. TIMES, Apr. 15, 2011, at AA1 (reporting on Georgia law and quoting a legislator: "`We're a law-abiding state. . . . And we want people to abide by the laws.'").

119 *See supra* notes 16–18 and accompanying text (summarizing California's experience with Proposition 187).

120 *See e.g.*, Chamber of Commerce v. Edmondson, 594 F.3d 742 (10th Cir. 2010); Lozano v. City of Hazleton, 620 F.3d 170 (3d Cir.), *vacated and remanded*, 180 L. Ed.2d 243 (2011); Villas at Parkside Partners v. City of Farmers Branch, 701 F. Supp. 2d 835 (N.D. Tex. 2010); Garrett v. City of Escondido, 465 F. Supp. 2d 1043 (S.D. Cal. 2006).

121 *See* Leland Ware & David C. Wilson, *Jim Crow on the "Down Low": Subtle Racial Appeals in Presidential Campaigns*, 24 ST. JOHN'S J.L. COMM. 299, 309 (2009) ("`States' rights' were code words for resistance to the federal government's efforts to desegregate schools and Civil Rights laws that protected the rights of African Americans.").

Of course, federal immigration regulation also implicates race and civil rights issues.[122] However, it is one national government regulating immigration, not a patchwork of laws from fifty different states. The national government is less likely to be commandeered by nativist and racist elements than state and local governments.[123] Still, those concerned with the civil rights consequences of immigration regulation and enforcement always need to be vigilant with the civil rights impacts of a uniform national system of immigration regulation. Even if the Supreme Court ultimately bars efforts to regulate immigration as seen in Arizona's S.B. 1070, efforts to protect immigrants from the excesses of the exercise of federal power over immigration will be necessary.

CONCLUSION

Immigration is one of the dominant civil rights issues of the 21st century. The recent spate of state and local efforts seeking to regulate immigration demonstrate this basic truth. Even though often couched in law enforcement and federalism-styled legal arguments, the core of the public debate over immigration enforcement concerns the rights of people and how they will be treated by government. The fact that many, although far from all, of those affected are noncitizens does not change that fact. The nation needs to face up squarely to the fact that race and the civil rights of people are at the core of the modern debate over immigration. Until it does, we will not to be able to fully understand and address what is at stake in the continuing national discussion of immigration reform and U.S. immigration law and its enforcement.

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122 *See supra* note 31 and accompanying text.

123 *See supra* note 119.