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I. Introduction

A. *The Lead-up to Arizona SB 1070*

Restrictions on the rights or status of non-citizens have been a recurring feature of state law extending back to the nineteenth century before *any* federal immigration law was in place. Such measures are particularly common in times of economic distress and tend to target those perceived as non-white. Although there is broad acknowledgement that immigration is one of the areas where the federal government has plenary authority, states have long pushed on (and crossed) the borders of this jurisprudential line. Through explicit federal authorization and through room in the joints of legal doctrine allowing some regulation of *immigrants*, states are increasingly again seeking to regulate *immigration* by imposing differential burdens and sanctions on non-citizens.

In the past few years, state legislatures have considered and enacted a wide range of bills focusing on *undocumented* non-citizens, including the very controversial and high profile immigration law in Arizona known as Senate Bill (or SB) 1070.² The new state laws fall into three overlapping categories. The first are laws restricting access of undocumented non-citizens to benefits and programs offered by a state, or by the states in cooperation with the national government. The second are laws providing for cooperation between state and federal authorities on immigration enforcement, including information sharing. The third, and most controversial, are state laws designed to achieve the actual removal, formal or informal, of undocumented non-citizens from the United States. These new state immigration laws are a reflection of the substantial national attention to issues of immigration policy, attention that has been amplified by the war on terror. These new state laws are also a reflection of the ability of a powerful new idea to significantly alter the legal and policy landscape.³

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¹ This Issue Brief draws from our prior work. See Gabriel J. Chin, Carissa Byrne Hessick, Toni Massaro, & Marc L. Miller, *An Analysis of Legal Issues Raised by Arizona Senate Bill 1070*, GEO. IMMIGR. L.J. (forthcoming 2011), and Gabriel J. Chin & Marc L. Miller, *Cracked Mirror: SB1070 and Other State Regulation of Immigration Through Criminal Law*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1648685.

² Immigration-related bills from 2010 can be found here. See NATIONAL CONFERENCE OF STATE LEGISLATURES, 2010 IMMIGRATION-RELATED LAWS AND RESOLUTIONS IN THE STATES (January-June 2010), <http://www.ncsl.org/default.aspx?TabId=20881>.

³ SB 1070 demonstrates the ability of a well-framed idea, and a successful policy entrepreneur, to significantly alter the legal and policy landscape. The idea of using state criminal laws to effectuate immigration policy was originally championed by Kris Kobach, a former Justice Department attorney, professor at University of Missouri-Kansas City, and recently successful 2010 Republican candidate for Kansas Secretary of State. Inside the Justice Department, Kobach pursued the idea of enabling state actors to enforce federal law, but without apparent success. After leaving the Department, he took his ideas on the road in the form of a law review article and other writings. See Kris W. Kobach, *Reinforcing the Rule of Law: What States Can and Should Do to Reduce Illegal Immigration*, 22 GEO. IMMIGR. L.J. 459 (2008).

The basic policy innovation is that energetic enforcement of state immigration laws can achieve “attrition through enforcement.” One dimension of this innovation is that it recognizes that the policy responses to illegal immigration are not limited to criminalization and punishment on the one hand, or entry and amnesty on the other. The new state laws are built on the idea that as states become more aggressive and less hospitable, undocumented non-citizens, fearing arrest and sanctions, will choose not to enter in the first place, and that current illegal residents will choose to “self-deport.”

B. The Scope of the Challenge

The emergence of these new state immigration laws and enforcement efforts takes place against the backdrop of a national public and political debate over immigration policy. Whatever the ultimate mix of federal and state criminal enforcement that courts and Congress allow, it is useful to recognize the scale of the migration—historical and ongoing—that any mix of policies ought to fully address. The Department of Homeland Security estimates that out of 31 million foreign-born residents of the United States as of January 2009, 10.8 million were unauthorized.⁴ Of those, 92% entered before 2005, and 63% before 2000. Over half were from Mexico. The next top “source” countries were El Salvador, Guatemala, Honduras, the Philippines, India, Korea, Ecuador, Brazil and China. The top states of residence for newcomers were California, Texas, Florida, New York and Illinois. There is substantial overlap in the origins and states of residence of lawful permanent residents.

Even if the immigration issue that the new state laws seek to address is the influx of undocumented persons, the scale of the issue remains beyond the imaginable capacity of any criminal justice system — state or federal — to address. In Arizona alone, each year for the past 5 years between 320,000 and 500,000 undocumented aliens have been arrested, the majority by federal agents. (The total number of deportable aliens located each year over the past decade has ranged as high as 1.8 million people in 2000, and as low as 791,000 in 2008). About 200 immigrants a year die crossing the border. More aggressive border enforcement changes traditional patterns of legal and illegal migration, and ironically may encourage illegal entrants to remain in the United States.⁵ Of those undocumented persons arrested in Arizona (and beyond), the fundamental policy question is how they will be treated. Criminal prosecution for immigration offenses in the federal system has been increasing dramatically, but such prosecutions are still a modest fraction of the total arrests. Against this backdrop, we turn to the Arizona law.

II. What Arizona SB 1070 Actually Provides

State laws intended to drive out undocumented non-citizens include laws that make it virtually impossible for non-citizens to live without criminal liability, such as laws that prevent

⁴ Michael Hoffer et al., *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2009* (Jan. 2010), http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2009.pdf.

⁵ Douglas Massey, Keynote Address, Conference on the Role of States in Immigration Policy and Enforcement, Arizona State University School of Law (Oct. 8, 2010); see also Douglas Massey, *Undocumented Migration from Latin America in an Era of Rising U.S. Enforcement*, 630 ANNALS AM. ACAD.POL. & SOC. SCI. 294 (2010).

them from renting apartments. They also include Arizona's SB1070 and other state criminal laws patterned to greater or lesser degree on federal immigration statutes. Supporters of these provisions argue that they enable states to arrest, prosecute and punish for violations of federal immigration law, or, more precisely, that they allow states to enforce federal immigration law when federal agencies will not. Some proponents of more aggressive state immigration laws claim the federal government has failed to enforce immigration law. However, immigration is a central and, indeed, increasing priority of federal justice.⁶

One aim of SB1070 is to make local police investigate and report the status of a larger number of potentially undocumented non-citizens. When a person is lawfully stopped, detained or arrested, and there is reasonable suspicion to believe he or she is undocumented, that person's status must be investigated. This investigation could be as simple as examining a driver's license or could involve contacting federal authorities. The status of all persons arrested must be checked with the federal government. When an undocumented person convicted of an offense is released from confinement or fined, his or her status must be reported to the federal government. Agencies are prohibited from enforcing federal immigration law to less than the full extent permitted by federal law. Officials or agencies that disobey are subject to suit from any lawful resident of Arizona.⁷

SB 1070 also created or amended a set of state-level immigration crimes, all said to be based on federal law. One statute criminalizes violations of a federal law that requires non-citizens to register and carry immigration documents.⁸ Another statute prohibits transportation of undocumented non-citizens, or concealing, harboring or shielding them.⁹ The scope of the latter statute is not clear. It may apply only to active smuggling, but it conceivably could apply to ordinary conduct, such as driving a neighbor to the hospital.

Arizona's SB1070 has been challenged in federal court by civil rights groups including the ACLU and MALDEF, as well as by the United States Department of Homeland Security, Department of State, and Department of Justice. On July 28, 2010, one day before the law was scheduled to take effect, federal district judge Susan Bolton ruled in favor of the federal government's motion for a preliminary injunction as applied to significant parts of the bill.¹⁰ Judge Bolton blocked immediate enforcement of the following key provisions:

⁶ The four largest federal law enforcement agencies as of 2004 were U.S. Customs and Border Protection, the Federal Bureau of Prisons, the FBI, and the U.S. Immigration and Customs Enforcement. *See* Brian A. Reaves, U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN, FEDERAL LAW ENFORCEMENT OFFICERS, 2004 (July 2006), <http://bjs.ojp.usdoj.gov/content/pub/pdf/fleo04.pdf>. CBP, BOP and ICE have substantial roles in immigration enforcement. Moreover, immigration violations are among the top charges brought by federal criminal prosecutors. In FY 2008, they were second only to drug offenses, and in FY 2009 immigration prosecutions accounted for 54% of all federal criminal cases, dwarfing federal drug offenses, which accounted for 30%. *See* TRAC REPORTS, FY 2009 FEDERAL PROSECUTIONS SHARPLY HIGHER (2009), <http://trac.syr.edu/tracreports/crim/223/>. Admittedly, the comparison of federal drug and immigration prosecutions is misleading because federal authorities answer immigration violations with a far wider range of responses. Even after significant increases in federal immigration prosecutions, federal authorities conduct many more civil removals or voluntary departures of non-citizens apprehended at the border.

⁷ ARIZ. REV. STAT. ANN. § 11-1051 (2010).

⁸ ARIZ. REV. STAT. ANN. § 13-1509 (2010).

⁹ ARIZ. REV. STAT. ANN. § 13-2929 (2010).

¹⁰ *United States v. Arizona*, No. 10-01413, 2010 WL 2926157 (D. Ariz. July 28, 2010).

- the requirement that police officers must investigate the immigration status of all people whom they arrest, if the officers suspect the people are in the United States unlawfully (Section 2(B); A.R.S. sec. 11-1051(B)).
- the mandatory detention of individuals who are arrested, even for minor (e.g. traffic) offenses, that would normally result in a ticket if they cannot verify that they are authorized to be in the United States (Section 2(B); A.R.S. sec. 11-1051 (B)).
- the new state criminal penalties for non-citizens' violation of federal registration laws and failure to carry registration documents (Section 3; A.R.S. sec. 13-1509).
- the new law that makes it a misdemeanor for a person "who is unlawfully present in the United States and who is an unauthorized alien to knowingly apply for work, solicit work in a public place, or perform work as an employee or independent contractor in this state." (Section 5; A.R.S. sec. 13-2928(C)).
- the warrantless arrest of individuals whom state or local police officers have probable cause to believe have committed any public offense that makes them "removable" from the United States (Section 6; A.R.S. sec. 13-3883(A)).

Judge Bolton upheld other sections of the bill, and denied the Government's more sweeping request that the bill be enjoined *in toto*. She acknowledged the State's strong interest in a more effective national response to immigration issues, and recognized areas where the states do retain power over matters that are incidental to federal regulatory power. She also noted that parts of SB 1070 were drafted inartfully, and implied that at least some of the defects might be cured by more narrow and more carefully tailored state measures. But the main thrust of the opinion took most of the wind out of Arizona's sails, insofar as she enjoined the parts of the bill that had provoked the most strenuous opposition by detractors. Her concerns were twofold: that the offending provisions would have substantial spillover effects on legal aliens, and that a patchwork of state enforcement would undermine federal control over the prosecution and enforcement of law in an area of primary federal power.

Arizona Governor Jan Brewer described this ruling as a "bump in the road" and vowed to appeal.¹¹ The State acted on this vow the very next day, asking that the case be heard by the Ninth Circuit Court of Appeals in mid-September, on an expedited basis, a request that the Ninth Circuit refused.¹² Instead, the case was set for a regular briefing and oral argument schedule, and was heard by a three-judge panel of the appellate court on November 1, 2010.

¹¹ See Miriam Jordan, *Judge Blocks Arizona Law*, WALL ST. J., July 29, 2010, available at <http://online.wsj.com/article/SB10001424052748703940904575395314079925720.html>.

¹² *United States v. Arizona, et al.*, No. 10-16645 (9th Cir. July 30, 2010) (order denying the expedited appeal beyond the provisions of Ninth Circuit Rule 3-3(b)).

As described in the next section, the arguments for preemption of at least some sections of SB 1070 do seem overpowering, particularly given the foreign relations fallout of the measure, the threat by other states to follow Arizona's lead, and the spirit of defiance that animates the Act. But SB 1070 is a complex matter of law *and* politics. The law of preemption is written in shades of gray, not in black and white, and politics matters in an area where the federal government's argument rests, in part, on a claim of interference with international relations. Whatever happens with the SB 1070 litigation, the trend of which the statute is part shows no signs of weakening. SB1070 has induced copycat legislation in a number of states. If more states enact statutes resembling the Arizona law, then the "patchwork" argument against state legislative authority grows stronger. In the court challenges that are sure to follow, appellate and other judges faced with determining whether SB 1070 or any copycat laws are preempted likely will follow Judge Bolton's lead. That is, they will carefully parse the laws – section by section – and strive to find a way to uphold federal power over immigration and naturalization, while preserving state authority over matters incidental to that power. No court is likely to strike down SB 1070 in its entirety, and none is likely to be cavalier about the state interests at stake.

III. Is the Arizona Law Constitutional?

Laws dealing with non-citizens are traditionally divided into two branches. The first is immigration law, which addresses which non-citizens can come to the United States and who must leave, the procedures for admission and exclusion at the border, and removal (also known as deportation) from the interior of the United States. The second is alienage law, which describes the rights and burdens of non-citizens in the United States. Exclusive federal power over immigration flows from the Constitution's explicit textual authority in Article I, Section 8 to regulate commerce¹³ and to establish "an uniform Rule of Naturalization."¹⁴ Because non-citizens by definition come from other countries, the Supreme Court has recognized that their treatment implicates foreign affairs, also an exclusively federal political power.¹⁵ While states have some authority with regard to alienage law,¹⁶ they face a daunting burden when attempting to regulate immigration. That is to say, as a rule of thumb, states have some limited direct power to regulate *immigrants*, but no direct power to regulate *immigration*.¹⁷ Accordingly, and as state

¹³ U.S. CONST. Art. I, § 8, cl. 3.

¹⁴ U.S. CONST. Art. I, § 8, cl. 4.

¹⁵ *Fiallo v. Bell*, 430 U.S. 787, 792 (1976) ("Our cases have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.") (citation omitted).

¹⁶ State "[c]lassifications based on alienage" the Court has said, "are inherently suspect and subject to close judicial scrutiny." *Graham v. Richardson*, 403 U.S. 365, 371 (1971) (invalidating Arizona law restricting the access of legal aliens to benefits). Thus, lawful permanent residents and other non-citizens allowed into the United States by law cannot be denied most rights. *See, e.g., In re Griffiths*, 413 U.S. 717 (1973) (non-citizens cannot be excluded from the bar). State authority is broader in areas related to core political functions. For example, states can deny even legally admitted non-citizens the right to be peace officers, *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982), or school teachers, *Ambach v. Norwick*, 441 U.S. 68 (1979). Older case law, now controversial in the state courts, holds that lawful aliens may be prohibited from owning firearms. Pratheepan Gulasekaram, *Aliens With Guns: Equal Protection, Federal Power, and the Second Amendment*, 92 IOWA L. REV. 891 (2007).

¹⁷ The coherence of the current regime is not without critics, but few deny its existence at the level of doctrine. *See* Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787 (2008).

as well as federal courts acknowledge, “federal power over aliens is exclusive and supreme in matters of their deportation and entry into the United States.”¹⁸

A. *Preemption*

The centerpiece of the federal government’s challenge to SB 1070 is that the state law is preempted by federal law in this area.¹⁹ Article VI, Clause 2 of the United States Constitution provides as follows:

This Constitution, and the Laws of the United States which shall be made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges of every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Preemption of state laws comes in three forms: express congressional preemption by statute; implied preemption, where the breadth and depth of federal authority indicates an intention to “occupy the field;” and conflict preemption, where state and federal law impose conflicting duties or state law otherwise conflicts with the achievement of federal goals.

The long history of federal authority over naturalization and immigration, along with federal authority over foreign affairs,²⁰ give the federal government a strong argument that parts of SB 1070, at the least, are preempted under “field” and conflict preemption principles. As the Government argued:

The Constitution and federal law do not permit a patchwork of state and local immigration policies throughout the country. Although a state may adopt regulations that have an indirect or incidental effect on aliens, a state may not establish its own immigration policy or enforce state laws in a manner that interferes with federal immigration law. Arizona has crossed this constitutional line.²¹

But there is a hazy line between plenary and exclusive federal authority over naturalization and immigration on the one hand, and state power to regulate internal affairs under traditional state “police powers” on the other. Courts have stated that there is a presumption against preemption

¹⁸ State v. Camargo, 537 P.2d 920, 922 (Ariz. 1975).

¹⁹ United States v. Arizona et al., No. 10-1413 (D. Ariz. filed July 6, 2010).

²⁰ The Constitution grants the federal government power to “establish a uniform Rule of Naturalization,” U.S. CONST. art. I, § 8, cl. 4, and to “regulate Commerce with foreign Nations,” U.S. CONST. art. I, sec. 8, cl. 3.

²¹ Plaintiff’s Motion for Preliminary Injunction and Memorandum of Law in Support Thereof, United States v. Arizona et al., No. 10-1413 (D. Ariz. filed July 6, 2010). As the government’s brief notes, federal supremacy in the field of foreign affairs, including naturalization, immigration, and deportation, was addressed by the authors of The Federalist, in 1787. *Id.* at 11-12; *see also* Hines v. Davidowitz, 312 U.S. 52, 62 (1941).

of state power in areas of traditional state authority,²² but they have also explained that the presumption is weak or even disappears when the federal government historically has exercised primary authority in a given area.²³

Pointing toward preemption of sections of SB 1070, if not the Act as a whole, are the following concerns:

- The Supreme Court has struck down state alien registration laws that in some ways duplicated federal laws, and that involved the same federal laws that Arizona borrowed from in A.R.S. sec. 13-1509(A).²⁴
- The Arizona law subjects non-citizens to the possibility of two convictions for failing to register – one state, one federal – and thus substantially more incarceration and fines than contemplated by federal law.
- SB 1070 refers to the “removable” status of an individual, which status is exclusively the province of the federal government to determine.
- Arizona has made clear that its intention in passing SB 1070 was to achieve “attrition through enforcement,” openly declaring its plan to require full enforcement of federal law where the federal government itself may not perceive prosecution as efficient or otherwise sound policy, and where it has stated that massive deportation is infeasible.²⁵
- SB 1070 has sparked international condemnations, travel advisories and other responses that trigger significant foreign relations concerns.²⁶

²² See *Chicanos Por La Causa v. Napolitano*, 558 F. 3d 856, 864 (9th Cir. 2009) (quoting *United States v. Locke*, 529 U.S. 89, 108 (2000)), *cert. granted sub nom.* *Chamber of Commerce v. Candelaria*, __USLW__ (June 28, 2010) (Case No. 09-115).

²³ *United States v. Locke*, 529 U.S. 89, 108 (2000).

²⁴ See *Hines*, 312 U.S. 52 (1941) (invalidating Pennsylvania alien registration law on the ground that the state scheme interfered with a uniform federal program).

²⁵ Republican and Democratic Chief Executives have rejected even civil deportation as an overall solution to the problem of a large undocumented immigrant population, which would be a cheaper and more moderate response than criminal prosecution. See George W. Bush, President of the United States, *Immigration Reform: Address in California* (Apr. 24, 2006), available at <http://www.presidentialrhetoric.com/speeches/04.24.06.html>; see also Barack H. Obama, President of the United States, *News Conference in Guadalajara* (Aug. 10, 2010), available at http://www.nytimes.com/2009/08/11/world/americas/11prexy.text.html?_r=1&ref=americas&pagewanted=all (“We can create a system in which you have strong border security, we have an orderly process for people to come in, but we’re also giving an opportunity for those who are already in the United States to be able to achieve a pathway to citizenship.”); cf. *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000) (striking down Massachusetts law restricting purchases from companies doing business with Burma, on ground that it interfered with national policy on Burma-U.S. relations).

²⁶ See Jonathan Cooper & Paul Davenport, *Lawsuits Target New Arizona Immigration Law*, ASSOCIATED PRESS, Apr. 29, 2010, available at http://www.msnbc.msn.com/id/36853483/ns/us_news-crime_and_courts/ (discussing travel advisories); Brian Knowlton, *Calderon Assails Arizona Immigration Law on Detention*, N.Y. TIMES, May 20, 2010, at A6; see also Eliane Engeler, *UN Human Rights Experts Say Arizona Immigration Law Could Violate International Standards*, ASSOCIATED PRESS, May 11, 2010, available at

- SB 1070 goes beyond criminal law, where state regulatory authority is arguably strongest, and intrudes into civil immigration enforcement where the argument for concurrent power is weakest.²⁷
- The sheer expanse of SB 1070 is an unprecedented effort by any state to exercise control over a broad range of immigration issues, which itself may be seen as an undue and intentional encroachment into federal regulatory authority, rather than a legitimate exercise of state power over domestic affairs.
- Several other states now are threatening to adopt similar legislation, potentially giving rise to a “patch work” of laws and a face-off between state and federal power that may only be resolved by a ruling that restores federal power over the field.²⁸
- Many observers anticipate that enforcement of SB 1070 will affect not only non-citizens, but even citizens who are lawfully in the United States that are detained while authorities determine that status.²⁹
- As a border state, Arizona law effectively restricts entry into the United States, not just into a particular state within the nation.
- The federal government now has spoken: both the President and the Department of Justice have argued that SB 1070 is unwise policy and unconstitutional.

Pointing toward the constitutionality of the Act, at least in part, are the following:

- Federal power over “pure” immigration and naturalization does not divest states of all power to regulate in areas incidental to such matters.³⁰

<http://www.washingtonexaminer.com/nation/un-human-rights-experts-say-arizona-immigration-law-could-violate-international-standards-93510164.html>.

²⁷ See *Gonzalez v. City of Peoria*, 722 F.2d 468, 476 (9th Cir. 1983) (noting that state and local power to enforce criminal provisions of federal immigration and naturalization law was “limited to criminal violations”).

²⁸ Judge Bolton addressed this same issue in the Order. *United States v. Arizona*, 703 F. Supp. 2d 980, 996 n.7 (D. Ariz. 2010); see also Stephanie Gaskell, *Republicans in Michigan, Oklahoma, Move to Adopt Arizona-Like Anti-Immigration Laws*, N.Y. DAILY NEWS, July 24, 2010, available at http://www.nydailynews.com/news/national/2010/05/10/2010-05-10_politicians_move_to_adopt_tough_arizonalike_antiimmigration_laws.html; Michael W. Savage, *Oklahoma, South Carolina and Utah May Follow Arizona’s Lead on Immigration Law*, WASH. POST, July 8, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/07/AR2010070703017.html>.

²⁹ *Cf. United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975) (noting that rules allowing searches for undocumented non-citizens had to account for “the Fourth Amendment rights of citizens who may be mistaken for aliens”).

³⁰ *De Canas v. Bica*, 424 U.S. 351, 355(1976) (noting that the Court “has never held that every enactment which in any way deals with aliens is a regulation of immigration and thus per se preempted by this constitutional power”).

- The Supreme Court has upheld state power to criminalize employment of non-citizens who were not authorized to work in the United States, although that particular holding was subsequently preempted by federal statute.³¹
- Case law striking down state power over alien registration dealt primarily with “law-abiding aliens,” i.e. those permitted to be in the United States,³² whereas SB 1070 punishes only those who are not authorized to be in the United States.
- State regulation of non-citizens who are not lawfully present, at least outside the area of registration, arguably raises fewer international issues than does state regulation of non-citizens who are lawfully present.
- Federal law anticipates, at least in some specific areas, that states will assist the federal government in enforcement of federal immigration laws.³³
- Arizona insists that it has worked assiduously to track, not supplant, federal law, and is merely seeking to assist in the enforcement of federal law. This arguably is “cooperative federalism,” not an invasion of federal authority.
- States’ regulatory powers over “health, safety and welfare” typically are strongest in areas of traditional local control, which include criminal law enforcement.
- Unchecked, unlawful immigration can have a negative impact on a state’s economy, and therefore states have a right to deter it.³⁴

On balance, courts may conclude that not only is immigration an important special federal power, but states are largely *disabled* in this arena. Although state disability with regard to immigration is related to the possibility of conflict with federal policy, it is a distinct limitation. The foundational cases asserting the centrality of federal immigration power were decided in 1876 and invalidated state immigration regimes enacted *before* the first general federal immigration laws.³⁵ That is, even when the federal government did not regulate

³¹ *Id.*, preempted by the Immigration Reform and Control Act of 1986 (IRCA) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). See 8 U.S.C. § 1324(a)(h)(2)(2010). The constitutionality of the Legal Arizona Workers Act, a related measure to SB 1070, will be considered by the United States Supreme Court this term. See *Chamber of Commerce v. Whiting*, (U.S. June 28, 2010) (No. 09-115), *infra* p. 20.

³² See *Hines v. Davidowitz*, 312 U.S. 52 (1941).

³³ See, e.g., 8 U.S.C. § 1357(g)(10) (noting power of state and local police to make immigration *arrests*); 8 U.S.C. § 1373(c) (requiring that federal officials respond to inquiries by state and local officials seeking to verify immigration status of aliens).

³⁴ See *Plyler v. Doe*, 457 U.S. 202, 228 n.23 (1982).

³⁵ *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1876) (“The passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the States. It has the power to regulate commerce with foreign nations: the responsibility for the character of those regulations, and for the manner of their execution, belongs solely to the national government. If it be otherwise, a single State can, at her pleasure, embroil us in disastrous quarrels with other nations.”); *Henderson v. New York*, 92 U.S. 259 (1876); see generally Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833 (1993). The

immigration at all, the states were still disabled. The Supreme Court has repeatedly explained that “[c]ontrol over immigration and naturalization is entrusted exclusively to the Federal Government, and a State has no power to interfere.”³⁶

Despite opening the door to more substantial state regulation of immigrants, and therefore incidentally and indirectly of immigration, modern cases reaffirm the foundational point that states have no direct power to regulate the substance or procedure of immigration to this country, documented or undocumented. For example, in *Plyler v. Doe*, the Justices split 5-4 on whether Texas could deny a free public education to undocumented children, but they all agreed that states could not control immigration, even of undocumented persons. Justice Brennan, writing for the majority, explained that the “State has no direct interest in controlling immigration into this country, that interest being one reserved by the Constitution to the Federal Government. . . .”³⁷ Chief Justice Burger, joined by Justices White, Rehnquist and O’Connor dissented because they concluded Texas could deny access to public schools. However, they agreed that “[a] state has no power to prevent unlawful immigration, and no power to deport illegal aliens; those powers are reserved exclusively to Congress and the Executive.”³⁸

Exclusive federal jurisdiction includes the procedure for removal as well as the substantive grounds warranting removal of a non-citizen.³⁹ Accordingly, states cannot create de facto methods of deportation through laws or procedures using other terms. Offering a defendant a choice between prison and deportation is unconstitutional because it is equivalent to deportation by a state.⁴⁰ Restrictions so severe that they practically compel departure have also been held to be equivalent to deportation.⁴¹ Thus, a law making it a criminal offense for a non-

reports indicate that the cases were from the 1875 Term, the actual dates are here:

<http://www.supremecourt.gov/opinions/datesofdecisions.pdf>.

³⁶ *Nyquist v. Mauclet*, 432 U.S. 1, 10 (1977); *see also DeCanas v. Bica*, 424 U.S. 351, 354 (1976) (“Power to regulate immigration is unquestionably exclusively a federal power.”); *cf. Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 964 (9th Cir. 2010) (“Courts have consistently struck down state laws which purport to regulate an area of traditional state competence, but in fact, affect foreign affairs.”). In addition to preemption concerns, SB 1070 may also have an adverse impact on interstate commerce that implicates overlapping Dormant Commerce Clause concerns, since Arizona’s restriction of the flow of undocumented persons into its borders may impose economic and other pressures on contiguous states.

³⁷ *See* 457 U.S. at 228 n.23.

³⁸ *Id.* at 242 n.1 (Burger C.J., dissenting).

³⁹ *See, e.g., Chy Lung*, 92 U.S. at 280 (noting the national government has responsibility for immigration rules “and for the manner of their execution.”); *Commonwealth v. Nava*, 966 A.2d 630, 634 (Pa. Super. 2009) (citing *United States v. Abushaar*, 761 F.2d 954, 960 (3d Cir.1985)).

⁴⁰ Sentencing cases hold that states may not impose deportation even by agreement as a condition of probation. *See, e.g., Rojas v. State*, 450 A.2d 490, 492 (Md. Spec. App. 1982); *Hernandez v. State*, 613 S.W.2d 287, 289-90 (Tex. Crim. App. 1980).

⁴¹ In *Truax v. Raich*, 239 U.S. 33 (1915), the Court found that an Arizona law denying legal aliens the right to work in many jobs violated the 14th Amendment, and also interfered with the “authority to control immigration - to admit or exclude aliens” which “is vested solely in the Federal government.” *Id.* at 42. Prohibition on employment “would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work.” *Id.* *Truax* involved lawfully admitted non-citizens, but that does not undermine the practical point that state laws making it impossible to live will induce departure from the state or United States.

citizen to be in the state is invalid.⁴² A law prohibiting undocumented non-citizens from occupying rental housing is invalid.⁴³ This is so even if the non-citizens subject to the laws fit the substantive standards for removal under the federal Immigration and Nationality Act of 1952 (the “INA”). These actions still amount to deportation by a state other than in accordance with the procedures provided in the INA. On the other hand, states may take actions within state power, such as denial of public benefits at the direction of federal authorities or cooperation with federal law enforcement.⁴⁴ This is so even if compliance makes a state a less attractive destination for undocumented noncitizens, and therefore foreseeably results in some self-deportation.

B. *Looking Into The “Mirror Image” Theory*

Although immigration is generally thought to be an exclusively federal power, supporters of state criminal regulation contend that states may act in the field so long as state laws are a “mirror image” of federal law. Kris Kobach has argued that “[a]s long as such state statutes mirror federal statutory language and defer to the federal government’s determination of the legal status of any alien in question, they will be on secure constitutional footing.”⁴⁵ The theory is that if there is no conflict between state and federal law, then state action should be allowed. In more popular rhetorical terms, so long as a state statute is a “mirror image” of a federal law, how can it be objectionable for a state to help carry out federal policy? Proponents of the new state criminal laws also correctly note that both case law and certain provisions of the INA contemplate state assistance in enforcing federal criminal law. For example, state officers may make arrests for federal crimes, including immigration crimes. Proponents of the mirror image theory claim that this grants states legislative power and trial jurisdiction as well.

Despite these seemingly logical assertions, the mirror-image justification for state action fails on a number of levels. First, no one would seriously claim that state efforts in areas of exclusive federal power are permissible simply because they help carry out federal policy. States may not send state ambassadors to seek peace in the Middle East or state militias to Afghanistan to help defeat the Taliban, no matter how consistent with federal policy those unilateral state actions may be. Moreover, the power to assist by arrest does not imply the power to legislate or try, because arrests leave crucial decision-making power in the hands of the federal government. There are many situations where arrest is permitted but the person performing the arrest has no legislative authority, e.g., arrests of military deserters by local law enforcement, arrests by out-of-state officers pursuant to warrants placed on the National Crime Information Center database, and even citizens’ arrests by private parties. An officer with authority to arrest frequently does not represent a jurisdiction with legislative or trial authority over the matter.

⁴² See *State v. Barros-Batistele*, No. 05-CR-1474 (N.H. Dist. Ct. Aug. 12, 2005) (dismissing trespass charges based on being in the state without documentation), available at http://www.courts.state.nh.us/district/orders/criminal_trespass_decision.pdf.

⁴³ *Villas at Parkside Partners v. City of Farmers Branch, Tex.*, 701 F. Supp. 2d 835 (N.D. Tex. Mar. 24, 2010).

⁴⁴ *Sudomir v. McMahon*, 767 F.2d 1456 (9th Cir. 1985) (state may comply with uniform federal directive making some non-citizens ineligible for benefits).

⁴⁵ Kobach, *supra* note 3, at 476.

The notion that states can help enforce federal criminal law also must account for the long-established policy of exclusive federal criminal jurisdiction. In the Judiciary Act of 1789, the First Congress provided that “the circuit courts shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law” involving the United States as a plaintiff and certain of the other familiar categories.⁴⁶ However, the presumption has been the opposite with respect to federal crimes. Again, the authority is foundational: the Judiciary Act of 1789 provided that “the district courts shall have, *exclusively of the courts of the several States*, cognizance of all crimes and offenses that shall be cognizable under the authority of the United States.”⁴⁷ In the celebrated 1816 decision of *Martin v. Hunter’s Lessee*,⁴⁸ the Supreme Court observed that “[n]o part of the criminal jurisdiction of the United States can, consistently with the Constitution, be delegated to state tribunals.”⁴⁹ While there will be concurrent jurisdiction with respect to many crimes, such as drug offenses or robberies of federally insured banks, as the Supreme Court said in *United States v. Morrison*,⁵⁰ “[t]he Constitution requires a distinction between what is truly national and what is truly local.”⁵¹ As discussed above, immigration seems to be “truly national” and therefore not within the jurisdiction of the states.

The claim that states are only helping the federal government achieve its own purposes fails in two additional ways. When states say “we are acting in support of federal policy,” they are in fact doing precisely the opposite. The justification offered by Arizona and other states for their new state immigration laws is not that they are in agreement with federal policy, but rather, that they are disappointed with (or opposed) to it. More fundamentally, the federal criminal power includes both the affirmative power to charge, *and the negative power to not charge*. The Supreme Court has recognized that governments have the power *not* to prosecute.⁵² When in the mid-1990s Arizona and other states sued the United States demanding that it more aggressively enforce immigration laws, the Ninth Circuit rejected the claim, citing the Supreme Court for the proposition that “[a]n agency’s discretion not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency’s absolute discretion.”⁵³

For many kinds of conduct, including conduct that might trigger federal criminal immigration statutes, federal law authorizes several possible responses. The power to choose between acting and not acting, or pursuing criminal charges or civil sanctions or administrative

⁴⁶ 1 Stat. 73, 78 § 11.

⁴⁷ 1 Stat. 73, 76, § 9. (emphasis added).

⁴⁸ 14 U.S. (1 Wheat.) 304 (1816).

⁴⁹ *Id.* at 337.

⁵⁰ *United States v. Morrison*, 529 U.S. 598 (2000).

⁵¹ *Id.* at 617-18; *see also* *United States v. Comstock*, 130 S. Ct. 1949, 1982 (2010) (Thomas J., dissenting) (generally, “the duty to protect citizens from violent crime, including acts of sexual violence, belongs solely to the States”).

⁵² *Abuelhawa v. United States*, 129 S. Ct. 2102, 2107 n.3 (2009) (“Congress legislates against a background assumption of prosecutorial discretion.”); *see also* *Gonzales v. Oregon*, 546 U.S. 243, 296 (2006) (Scalia J., dissenting) (recognizing the “the policy goals and competing enforcement priorities that attend any exercise of prosecutorial discretion”); Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 2 *CONN. PUB. INT. L.J.* 243 (2010).

⁵³ *California v. United States*, 104 F.2d 1086, 1094 (9th Cir. 1997) (quoting *Heckler v. Chaney*, 470 U.S. 821, 831 (1985)). Arizona’s suit was rejected for the same reason. *Arizona v. United States*, 104 F.3d 1095 (9th Cir. 1997). *See generally* Gerald L. Neuman, *Discretionary Deportation*, 20 *GEO. IMMIGR. L.J.* 611 (2006).

remedies (such as voluntary deportation or removal) or some combination thereof, is an inherent part of the structure of the INA. Take, for example, an undocumented person who entered the United States by surreptitiously crossing the Mexico-Arizona border. That person will have committed the most common immigration crime: entering the United States “at any time or place other than as designated by immigration officers” in violation of 8 U.S.C. §1325(a)(1). However, §1325 specifically provides for a civil penalty of between \$50 and 250 dollars “in addition to, and not in lieu of, any criminal or other civil penalties that may be imposed.”⁵⁴ That is, the statute itself recognizes that there could be a mix of civil penalties and criminal penalties — neither is specifically required, but in the exercise of discretion, multiple civil and criminal penalties can be imposed. To the point, federal law assigns responsibility for deciding which judicial penalties to seek. Congress has reserved “the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested . . . to officers of the Department of Justice, under the direction of the Attorney General.”⁵⁵

The problem of discretion is even more profound in an administrative regime like the INA, under which the Department of Homeland Security and the Department of Justice have a range of options to deal with a particular undocumented person. These include criminal prosecution,⁵⁶ formal removal from the United States,⁵⁷ and voluntary departure.⁵⁸ Each of these options has substantially different legal consequences. And the INA authorizes benefits as well as sanctions. For example, federal law creates opportunities for an undocumented person to remain in the United States, temporarily or permanently.⁵⁹ Moreover, the agencies have elaborate administrative regimes to evaluate and consider claims, such as Immigration Judges and the Board of Immigration Appeals, which are part of the Justice Department. There is no serious argument that the states can administer most of this regime. They cannot, for example, grant registry or voluntary departure under the INA, even if a particular non-citizen is eligible and satisfies every requirement of the statute.⁶⁰ That the states are unquestionably disabled from applying most of the provisions of the INA is solid evidence that they have no power to administer any of it, except as it expressly provides.⁶¹

⁵⁴ 8 U.S.C. § 1325(B) (2010).

⁵⁵ 28 U.S.C. § 516 (2010).

⁵⁶ 8 U.S.C. §1325(a)(1) (2010).

⁵⁷ 8 U.S.C. § 1182(a)(6)(A)(1) (2010) (“An alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible.”)

⁵⁸ 8 U.S.C. § 1229c(a)(1) (2010) (“The Attorney General may permit an alien voluntarily to depart the United States at the alien’s own expense under this subsection, in lieu of being subject to proceedings under section 1229a of this title or prior to the completion of such proceedings.”).

⁵⁹ 8 U.S.C. § 1101(a)(15)(T) (2010).

⁶⁰ *But see* Barney Miller, Episode 3.19 (1977), available at <http://www.imdb.com/title/tt0518996/> (discussing 1977 episode of TV show *Barney Miller* entitled “Asylum” in which New York Police Detective Wojo prematurely grants asylum to a Russian defector).

⁶¹ *See also* 457 U.S. 202, 226 (1982) (“But there is no assurance that a child subject to deportation will ever be deported. An illegal entrant might be granted federal permission to reside in this country, or even to become a citizen.”)

C. *Transportation: The Driving Wedge*

Colorado, Missouri, Oklahoma, and South Carolina, like Arizona, have enacted criminal laws roughly patterned on 8 U.S.C. §1325, which prohibits transporting undocumented non-citizens in furtherance of their unlawful presence in the United States, or harboring, concealing or shielding them.⁶² The statutes are susceptible to at least two general readings. The first reading is broad: any transportation that makes it easier for an undocumented non-citizen to live in the United States furthers that person's unlawful presence and is thus a violation. For example, driving an undocumented non-citizen neighbor to a supermarket or pharmacy makes it easier for her to live in the United States and thus violates the statute. If this interpretation is correct, then there is a strong argument that the statute is the equivalent to deportation, because if the law is enforced, it presents a choice between self-deportation and severe physical deprivation. A narrow reading is also possible, which would limit prohibited conduct to that which is more directly connected with the unlawful immigration itself. Transportation to an emergency room would not violate the statute, but transportation from a "stash house" near the border to the interior of the United States would. But in that case, the statute is very close to a direct regulation of the process of immigration itself, which is generally thought not to be within state power.

All of these statutes adopt their own versions of federal law, but none is identical to federal law or to each other. Accordingly, they are inevitably non-uniform. The Supreme Court faced a similar problem when it determined that state courts could hear civil RICO claims.⁶³ The Court concluded that "[a]lthough petitioners' concern with the need for uniformity and consistency of federal criminal law is well taken," there was no danger of inconsistent state court determinations, because "[s]tate court judgments misinterpreting federal criminal law would, of course, also be subject to direct review by this Court."⁶⁴ In the immigration context, by contrast, the Supreme Court would review not a determination of federal law, but a determination of state law that is patterned to some degree on federal law. If the states have authority to legislate in the area, they may do so in ways that deviate from the federal statute, and they have done so.

D. *Equal Protection Issues*

1. *De Jure Racial Profiling*

Racial considerations loom large in state immigration enforcement. Undocumented immigration, like documented immigration, is a function of demand. The same forces that make the demand for legal immigration highest in people from Latin and South America and Asia draw undocumented people disproportionately from those regions as well. A state policy of arresting undocumented immigrants, intentionally or not, will necessarily have a disproportionate impact on racial minorities. And since there is no way for the police to tell in advance with

⁶² Arizona actually has two such statutes dealing with transportation of undocumented immigrants, one part of SB1070 and one enacted several years before. The earlier law, Arizona Revised Statute section 13-2319(A), was held not preempted by the Arizona Court of Appeals in *State v. Flores*, 188 P.3d 706 (Ariz. Ct. App. 2008), and Judge Bolton declined to enjoin the transportation section of SB 1070.

⁶³ *Tafflin v. Levitt*, 493 U.S. 455 (1990).

⁶⁴ *Id.* at 465.

complete accuracy who is undocumented, inevitably citizens and authorized immigrants who are racial minorities will also be disproportionately affected.

Much of the initial public debate over SB 1070 turned on whether or not the statute mandated, allowed, or prohibited racial profiling, defined as “the reliance on race, skin color and/or ethnicity as an indication of criminality, reasonable suspicion, or probable cause, except when part of a description of a suspect, and said description is timely, reliable, and geographically relevant.”⁶⁵ In actuality, racial profiling is not merely incipient in the statute (and proposed copycats in Florida, Michigan, Rhode Island, and South Carolina), it is expressly authorized. SB1070 provides:

A law enforcement official or agency of this state or a county, city, town or other political subdivision of this state may not consider race, color or national origin in implementing the requirements of this subsection *except to the extent permitted by the United States or Arizona Constitution.*

Like a statute prohibiting “all non-obscene pure speech on political matters, except to the extent permitted by the First Amendment,” all of the operative force is in the exception.⁶⁶ The Supreme Court in 1975 held in *United States v. Brignoni-Ponce* that the Constitution allows race to be considered in immigration enforcement, stating that “[t]he likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor.”⁶⁷ Similarly, the Arizona Supreme Court agrees that “enforcement of immigration laws often involves a relevant consideration of ethnic factors.”⁶⁸ Thus, apparent race is itself some evidence warranting investigation of being in the United States without authorization.

To be sure, federal law prohibits decisions to stop made on race alone. But few stop or arrest laws or policies anywhere operate based on race alone, without regard to other factors, such as location or conduct. Even the most explicit forms of racial profiling use race as one factor among others. In the immigration context, the cases allowing racial profiling evaluate what constitutes reasonable suspicion or probable cause, and do not rely on special powers of federal authorities. Nevertheless, many of these cases involved stops by the U.S. Border Patrol or its successor Customs and Border Protection, not by state or local police. Thus it may be that the power to racially profile will be limited to specialized federal immigration law enforcement officers.

⁶⁵ Settlement Agreement at 8, *Arnold v. Arizona Dept. of Pub. Safety*, No. 01-01463 (D. Ariz. 2005) ; JOYCE MCMAHON ET AL., HOW TO CORRECTLY ANALYZE RACIAL PROFILING DATA: YOUR REPUTATION DEPENDS ON IT! 97 (2002) (defining “bias-based policing” as “[t]he act (intentional or unintentional) of applying or incorporating personal, societal, or organizational biases and/or stereotypes as the basis, or factors considered, in decision-making, police actions, or the administration of justice”).

⁶⁶ See 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>.

⁶⁷ *United States v. Brignoni-Ponce*, 422 U.S. 873, 886-87 (1975); see also, e.g., *United States v. Hernandez-Moya*, 335 Fed. Appx. 930 (5th Cir. 2009) (unpublished) (reaffirming relevance of race in affirming roving border patrol stop).

⁶⁸ *State v. Graciano*, 653 P.2d 683, 687 n.7 (Ariz. 1982) (citing *State v. Becerra*, 534 P.2d 743 (Ariz. 1975)).

There is also the possibility that *Brignoni-Ponce* and its state analogues in Arizona and elsewhere are dead. Perhaps the idea of making race or ethnicity — and particularly having a Hispanic appearance, as that is the background at stake in the “race can be a relevant factor” cases — is now outside the pale. The Supreme Court of the United States and state high courts have yet to make the death official, but legislators, executive branch officials, and the general public understand the change. There are hints of a new wind in lower federal court caselaw. In 2000, the Ninth Circuit held that there are too many citizens and lawful residents of Hispanic ancestry for racial appearance to be a valid factor in Southern California, and suggested the result would be the same for much of the Southwest.⁶⁹ The Ninth Circuit noted that both demographics and the general case law on government decisions in other areas based on race called the holding of *Brignoni-Ponce* into question. The same reasoning could be extended nationwide.⁷⁰

The problem with declaring *Brignoni-Ponce* dead as a matter of legal and political culture or demographics, however, is that the case continues on a regular basis to be used by both the Department of Justice and courts of the United States. For example in May 2009, in *United States v. Hernandez-Moya*, the United States Attorney’s Office for the Western District of Texas argued to the U.S. Court of Appeals for the Fifth Circuit that a traffic stop in an immigration case was based on reasonable suspicion in part because the “ethnicity of a vehicle’s occupants . . . is a relevant factor” in such cases.⁷¹ The Fifth Circuit unanimously affirmed, agreeing that “[t]he Supreme Court has held that ethnic appearance may be considered as one of the relevant factors in supporting reasonable suspicion that a vehicle is involved in the transportation of illegal aliens.”⁷² The Obama Administration’s Department of Justice regularly makes such arguments,⁷³ and the courts regularly accept them.⁷⁴

⁶⁹ *United States v. Montero-Camargo*, 208 F.3d 1122, 1131 (9th Cir. 2000) (en banc) (affirming stop by Border Patrol agents 50 miles north of the Mexican border, but rejecting apparent race and glancing in the rear-view mirror as relevant factors).

⁷⁰ The Pew Hispanic Center reports that 30% of the Arizona population is Hispanic (1.96 million), of which 91% is of Mexican ancestry. Two thirds of the Arizonans of Mexican ancestry were born in the United States. See PEW HISPANIC CENTER, DEMOGRAPHIC PROFILE OF HISPANICS IN ARIZONA, 2008 (2008), available at http://pewhispanic.org/states/pdf/AZ_08.pdf.

⁷¹ Brief for the United States, *United States v. Aldo Antonio Hernandez-Moya*, No. 08-51128, 2009 WL 5858722, at *17 (5th Cir. May 18, 2009).

⁷² *United States v. Hernandez-Moya*, 353 Fed. Appx. 930, 934 (5th Cir. 2009) (per curiam).

⁷³ See, e.g., *United States’ Response in Opposition to Defendant’s Motion to Suppress and Memorandum of Law, United States v. Gustavo Telles-Montenegro*, 2009 WL 6478237, at *7 (M.D. Fl. Dec. 21 2009) (reasonable suspicion supported by “the apparent Mexican ancestry of the occupants of the vehicle”), *defendant’s motion denied, United States v. Telles-Montenegro*, No. 09-502, 2010 WL 737640, at *7 (M.D. Fl. Feb. 4, 2010) (“Agent Fiorita testified that, in his experience, Hispanic males are typically the drivers of alien smuggling vehicles. Therefore, this is also a relevant consideration.”); Government’s Omnibus Opposition to Defendant’s Pretrial Motions, *United States v. Charles Davidson*, No. 07-204, 2009 WL 6539767, at *18 n.10 (N.D.N.Y. Dec. 22, 2009) (“[E]thnicity can be ‘a relevant factor’ in satisfying a reasonable suspicion standard.”); Government’s Memorandum in Resistance to Motion to Suppress, *United States v. Agriprocessors Inc.*, No. 08-1324, 2009 WL 2565858, at *27 n.11 (N.D. Iowa July 7, 2009) (“[W]hether a person is of Hispanic origin is a relevant factor for officers to consider, among others, in determining whether to detain someone.”), *denying motion to suppress for lack of standing, United States v. Agriprocessors, Inc.*, No. 08-1324, 2009 WL 2255729, at *5 (N.D. Iowa July 28, 2009).

⁷⁴ *United States v. Bautista-Silva*, 567 F.3d 1266, 1270 (11th Cir. 2009) (reversing suppression of evidence; reasonable suspicion existed based on seven factors, including that “the driver and all five passengers were Hispanic adult males”); *Barrera v. U.S. Dep’t of Homeland Sec.*, No. 07-3879, 2009 WL 825787, at *5 (D. Minn. Mar. 27,

A change in federal policy with regard to the use of race in immigration enforcement would be welcome. A similar statement of policy by Arizona executive branch officials would be welcome, too. But even then it would be hard for Arizona to plausibly interpret the phrase “*to the extent permitted by the United States or Arizona Constitution*” to limit the use of race, since it is the current constitutional doctrine, not “United States or Arizona law or policy” that (absent the current injunction) would have generated the obligation to consider race in decisions whether to inquire about immigration status.

2. *Quasi-Racial Factors in Reasonable Suspicion Analysis*

Even if SB1070-type laws are amended to eliminate express authorization of racial profiling, substantial issues regarding race would remain. A statement affirmatively not to consider something that is obvious, immediate, and central, will be as likely to cause people to consider that factor as not. In addition, the existing law of reasonable suspicion allows the use of multiple factors correlated with race and ethnicity. There is no hard and fast rule as to the number of factors necessary or the weight to be assigned to particular factors. “Reasonable suspicion” is a low standard. It is less than probable cause, which is less than a preponderance of the evidence, and federal and state courts have also said again and again that reasonable suspicion is context-specific and not quantifiable. Moreover, reasonable suspicion can be based upon entirely legal conduct and conduct consistent with innocence, since its only function is to determine whether it is appropriate to investigate further.

Federal and state law allows language, accent, clothing and hair style to be relevant factors. Well-established doctrine also allows factors such as neighborhood (including whether it is said to be a high-crime neighborhood, or a neighborhood with a high number of undocumented people), proximity to the border, origin and destination of travel, the nature and location of a vehicle, any evasive driving or walking, nervousness, and “furtive behavior,” to be taken into account. All of these factors are then filtered through the expertise, experience, and training of the officers involved. Some, and perhaps most, of these factors are so closely correlated with race that a ban on the use of race as a factor should lead to a ban on considering many of these factors as well. To the extent it is a logical impossibility to have a multi-factor, expertise-filtered test of “reasonable suspicion” that excludes race, color or national origin, then even an explicit ban on race in the law would not (and could not) result in a ban on the use of race in practice.

Federal and state courts have identified a number of factors in determining whether reasonable suspicion exists that a person is undocumented. In immigration proceedings, national origin may be considered: “*Evidence of foreign birth gives rise to a presumption that the person so born is an alien, and it is presumed that alienage continues until the contrary is shown.*”⁷⁵ So if the police learn that someone was not born in the United States, that information can be evidence that the person is not a citizen. In other words, as a matter of doctrine, experience and common sense, race and national origin are so closely linked and so pervasive to the underlying

2009) (“[R]ace may properly be considered by an official in making the determination to stop an individual to inquire about his immigration status.”).

⁷⁵ *Corona-Palomera v. Immigration & Naturalization Serv.*, 661 F.2d 814, 818 (9th Cir.1981).

question of immigration status that it would be hard to remove it from law enforcement decision-making, whether explicit or implicit, even if the legislature, executive branch officials and courts *tried* to do so. (And so far, for the reasons explained above, we do not believe the statute reflects the assertion that they have tried to do so).

3. *Non-criminal Measures*

Equal protection concerns also may arise with non-criminal state laws aimed at discouraging illegal immigration. Basic equal protection principles hold that states may not treat non-citizens lawfully admitted differently than citizens,⁷⁶ absent compelling reasons, except with regard to core state functions such as voting, law enforcement, or teaching schoolchildren.⁷⁷ Non-immigrants who have been admitted temporarily to the United States likewise are protected from certain forms of state discrimination; for example, some non-immigrants may not be denied resident tuition at public universities.⁷⁸ These equal protection principles, however, apply with full force only to those lawfully admitted. Although undocumented non-citizens are “persons” under the Fifth and Fourteenth Amendments, differential state treatment of undocumented non-citizens is permitted, provided it is rational and addresses undesirable conduct by the undocumented persons or protects state expenditures and functions.

Key decisions, such as *DeCanas v. Bica*⁷⁹ and *Plyler v. Doe*⁸⁰ distinguish between state laws that rationally protect traditional state interests or the state’s own activities and concerns – for example, provision of benefits and services – and ones that more directly regulate the immigration or removal of non-documented non-citizens. Even as to these activities and interests, however, the differential treatment must be rational and not based on mere animus. That is, the Constitution both limits state authority to act *at all* vis-a-vis immigration and removal of undocumented non-citizens, and *how* they may act where state power to regulate these persons is allowed.⁸¹

IV. State Cooperation with Federal Law Enforcement

States cooperate with the federal government in enforcing federal immigration law in several ways. First, under the so-called 287(g) program, named after a section of the Immigration

⁷⁶ “[C]lassifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny.” *Graham v. Richardson*, 403 U.S. 365, 371 (1971) (invalidating Arizona law restricting access of legal aliens to benefits); *see also In re Griffiths*, 413 U.S. 717 (1973) (non-citizens may not be excluded from practice of law).

⁷⁷ *See Cabell v. Chavez-Salido*, 454 U.S. 432 (1982); *Ambach v. Norwick*, 441 U.S. 68 (1979).

⁷⁸ *Toll v. Moreno*, 458 U.S. 1, 10 (1982).

⁷⁹ 424 U.S. 351, 355 (1976) (holding that restricting the ability of nondocumented non-citizens to work was not a “regulation of immigration, which is essentially a determination of who should or should not be admitted to the country, and the conditions under which a legal entrant may remain.”).

⁸⁰ 457 U.S. 202 (1982) (striking down state exclusion of children of undocumented non-citizens from public schools).

⁸¹ The fuller nuances of the equal protection limits on state power over undocumented non-citizens are beyond the scope of this Issues Brief. For a more comprehensive discussion, *see* Chin, Hessick, Massaro and Miller, *supra* note 1.

and Nationality Act,⁸² local law enforcement officers can be trained and empowered to carry out the duties of federal immigration officers while remaining in their regular positions. 287(g) programs are of two main varieties: some are based in jails, where the primary function is screening arrestees, and others involve officers on street patrol who might encounter undocumented or otherwise deportable non-citizens in the course of patrol. Critically, 287(g) programs are under the supervision and direction of federal authorities.

There is substantial authority for the proposition that state and local officers have inherent power to arrest for federal crimes, and therefore also for federal immigration crimes.⁸³ Accordingly, even without a 287(g) agreement, police may arrest based on probable cause and turn non-citizens over to federal authorities.⁸⁴ However, simply being in the United States without documentation is not a federal crime. For example, those who merely overstay temporary visas are guilty of no criminal offense, and thus may not be subject to arrest by local authorities.

Local law enforcement is involved in immigration enforcement in two other ways. Federal authorities issue immigration detainers to state jails and prisons to ensure that suspected deportable non-citizens are turned over to ICE when discharged, rather than being released outright.⁸⁵ In addition, the National Crime Information Center includes data on immigration violators, including those who have committed no crime. Accordingly, local officers have the ability to make arrests for civil immigration violations if there is a warrant in NCIC. The lawfulness of this program has not been definitively determined.⁸⁶

Some scholars, echoing the views of law enforcement leaders, argue that state and local enforcement is unwise because it will create distrust between minority communities and the police.⁸⁷ People will not call the police if they suspect, rightly or wrongly, that they themselves might be investigated. And if communities will not voluntarily contact the police, they become ripe for criminal victimization, which compromises public safety. In addition, vigorous local enforcement will inevitably impact citizens and legal permanent residents.⁸⁸ Several prominent

⁸² 8 U.S.C. 1357(g) (2010).

⁸³ See Assistance by State and Local Police in Apprehending Illegal Aliens, Op. Off. Legal Counsel (Feb. 5, 1996), available at <http://www.justice.gov/olc/immstopo1a.htm>. A 2002 opinion of the Office of Legal Counsel says that states have inherent authority to make arrests for civil immigration violations as well. See Non-Preemption of the Authority of the State and Local Law Enforcement Officials to Arrest Aliens for Immigration Violations, Op. Off. Legal Counsel (July 22, 2002), available at <http://www.aclu.org/files/FilesPDFs/ACF27DA.pdf>.

⁸⁴ See 8 U.S.C. 1357(g)(10)(b) (2010) (stating that no agreement is necessary “to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.”); see also 8 U.S.C. 1252c (2010) (authorizing state and local officers to arrest non-citizens who are unlawfully present and have previously been deported or left the United States and returned); 8 U.S.C. 1324(c) (2010) (“all . . . officers whose duty it is to enforce criminal laws” may arrest for violation of section).

⁸⁵ The statutory authority for this has been questioned. Christopher N. Lasch, *Enforcing The Limits Of The Executive's Authority To Issue Immigration Detainers*, 35 WM. MITCHELL L. REV. 164 (2008).

⁸⁶ *National Council of La Raza v. Gonzales*, 468 F. Supp. 2d 429 (E.D.N.Y. 2007) (dismissing challenge to including immigration warrants in NCIC for lack of standing), *aff'd*, 283 Fed. Appx. 848 (2d Cir. 2008).

⁸⁷ See, e.g., David Harris, *The War on Terror, Local Police, and Immigration Enforcement: A Curious Tale of Police Power in Post-9/11 America*, 38 RUTGERS L.J. 1 (2006).

⁸⁸ Anil Kalhan, *The Fourth Amendment and Privacy Implications of Interior Immigration Enforcement*, 41 U.C. DAVIS L. REV. 1137 (2008).

scholars have also criticized immigration arrests by local police as unconstitutional. Michael Wishnie argues that the text of the Immigration and Nationality Act, which allows arrests only in some limited circumstances, is inconsistent with a broad rule allowing local police to arrest in their discretion.⁸⁹ Huyen Pham argues that delegating practical enforcement discretion to local authorities inevitably results in a delegation of power over immigration and a resulting non-uniform system of regulation.⁹⁰ Nevertheless, as a matter of doctrine the power is widely recognized in the circuits.⁹¹

V. Conclusion: A Look Ahead

SB 1070 is not the only Arizona immigration law currently being challenged in federal court. The Legal Arizona Workers Act, passed in 2007, requires that employers check the immigration status of job applicants, on pain of sanctions that may include revocation of the employer's business license. The district court concluded that the Arizona law was not preempted by federal law, and the Ninth Circuit agreed. The United States Supreme Court accepted certiorari in *Chamber of Commerce v. Whiting*⁹² and will address whether the statute is preempted on a "comprehensive federal scheme" theory of preemption, and whether the state mandate is impliedly preempted by federal law, since the Immigration Reform and Control Act of 1986 expressly preempts "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."⁹³ Key to the lower court decisions in *Whiting* was that federal law does allow state or local law to impose sanctions "through licensing or similar laws." Consequently, even if the Court upholds the Arizona law, it may do so on narrow grounds without casting much light on the more intricate and general preemption issues posed by SB 1070. Nevertheless, many observers are watching this case closely, as well as several other important preemption cases pending this term for signals as to how the Roberts Court will treat the delicate balance between state and federal legislative power.

Battles between states and the federal government over immigration policy and enforcement have been a part of American history for more than 100 years. In the current political climate of increased skepticism about broad national powers and enthusiasm for state and local regulatory autonomy, these battles are likely to continue unabated. But the complex and huge nature of the challenge of national immigration law policy should not obscure the important but real limits that, at least for now, remain on state efforts to craft state-specific immigration agendas.

⁸⁹ Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084 (2004).

⁹⁰ Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 FLA. ST. L. REV. 965 (2004).

⁹¹ 3A Am. Jur. 2d Aliens & Citizens § 99 (citing *Gonzales v. City of Peoria*, 722 F.2d 468 (9th Cir. 1983) (overruled on other grounds by *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037 (9th Cir. 1999)). *But see* April McKenzie, *A Nation of Immigrations Or A Nation of Suspects? State and Local Enforcement of Federal Immigration Laws Since 9/11*, 55 ALA. L. REV. 1149 (2004) (distinguishing law in the United States Court of Appeals for the Tenth Circuit as requiring affirmative state authority to state agents to arrest for federal immigration violations).

⁹² (U.S. June 28, 2010) (No. 09-115).

⁹³ 8 U.S.C. § 1324a(h)(2) (2010).