A CASE STUDY OF COLOR-BLIND RHETORIC: THE RACIALLY DISPARATE IMPACTS OF ARIZONA'S S.B. 1070 AND THE FAILURE OF COMPREHENSIVE IMMIGRATION REFORM

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INTRODUCTION

Over the last twenty years, immigration unquestionably has emerged as a hot button issue in the American culture wars. It currently ranks up there with abortion, gay marriage, and guns as divisive topics of national debate. Along these lines, the nation's first African-American President, Barack Obama, himself challenged by a distinct but vocal minority of Americans as a foreigner,[2] has been accused by immigration extremists of failing to enforce the U.S. immigration laws and, in fact, not-so-secretly plotting to grant a much-maligned "amnesty"[3] to millions of undocumented immigrants.

One can only wonder why the immigration debate has become so heated and, at times, can best be described as nothing less than vicious. This Article offers some insights into why that is the case.

Let us begin with an examination of the modern debate over immigration in the United States. The U.S. immigration laws readily provide color-blind, facially neutral proxies that are often conveniently employed by groups that, among other things, seek to target for immigration investigation, enforcement, and prosecution persons of particular races and classes, specifically working class Latina/os. To make matters worse, the terms employed in the heated rhetoric of the immigration debate facilitate superficially coded discussions of race and civil rights, without the need to squarely confront the "sticky mess of race" and racism in American social life, and with the ability to plausibly deny that one is racist.[4]

As a matter of fact, the U.S. immigration laws and their enforcement have distinctly disparate racial impacts on people of color both inside and outside the United States.[5] Indeed, immigration law, by permitting the unfavorable treatment of noncitizens—a convenient, albeit imperfect, proxy for race—allows in the aggregate for racial discrimination on a massive scale, without the need for the express (and delegitimizing)

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2. The claim of this vocal minority is that President Obama is not eligible for the Presidency. The U.S. Constitution provides that "[n]o Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President." U.S. CONST. art. II, § 1, cl. 4. Despite the release of public records establishing that President Obama was born in Hawaii, his eligibility for the Presidency has repeatedly been challenged on the ground that he allegedly was born outside of the United States. *See* Samuel G. Freedman, *In Untruths About Obama, Echoes of a Distant Time*, N.Y. TIMES, Nov. 1, 2008, at A21; Frank Rich, *The Obama Haters' Silent Enablers*, N.Y. TIMES, Jun. 14, 2009, at 8; Dana Milbank, *President Alien, and Other Tales From the Fringe*, WASH. POST, Dec. 9, 2008, at A3. There is even a website devoted to the so-called "birther" movement, see http://www.birthers.org/, to which CNN's Lou Dobbs gave mainstream credence on his prime time news show before his abrupt departure in late 2009, *see* Michael Shain & David K. Li, *Dobbs Gave Up on $9M*, N.Y. POST, Nov. 13, 2009, at 15.

Besides being challenged as a foreigner, President Obama has been accused of being Muslim, even though he emphatically insists that he is Christian. *See* Angie Drobnic Holan, *Fact: Obama Isn't a Muslim*, ST. PETERSBURG TIMES, Aug. 27, 2010 ("The Pew Research Center last week reported that 18 percent of Americans believe Obama is a Muslim, up from 11 percent in March 2009. A Time magazine poll also released last week found even more people—24 percent—said he was a Muslim.").

3. *See infra* text accompanying notes 131-34 (discussing intense public controversy over proposals for an "amnesty" of undocumented immigrants).

4. Leslie Espinoza & Angela P. Harris, *Afterword: Embracing the Tar-Baby—LatCrit Theory and the Sticky Mess of Race*, 85 CAL. L. REV. 1585 (1997); *see* Michael Omi, *Racial Identity and the State: The Dilemmas of Classification*, 15 LAW & INEQ. 7, 23 (1997) ("The real world is messy with no clear answers. Nothing demonstrates this convolution better than the social construction of racial and ethnic categories.").

5. *See infra* Parts I.B., II.

reliance on race.[6] One might even view the enforcement of the U.S. immigration laws as a facially neutral, and thus presumably legal and legitimate, form of racial discrimination.

This Article develops the theme that U.S. immigration laws allow for coded, and thus more legitimate, arguments in favor of racial discrimination as well as for the pursuit of immigration law and policies with as extreme a set of racially disparate consequences as can be found in American law. Such arguments find legitimacy in the public discourse because they highlight notions of racial neutrality, color-blindness, and the moral call for obedience to the rule of law.

In this regard, the color-blind, pro-law enforcement approach[7] to the debate over immigration serves an important legitimating function. That approach provides plausible deniability to accusations of racism for advocates of immigration positions with blatantly discriminatory impacts. One glaring example is the law known as S.B. 1070 passed by the Arizona legislature in 2010 to address the state's perceived immigration crisis. Opponents of comprehensive immigration reform also, by defeating reform, seek to achieve racially disparate ends through facially neutral means.[8] When the color-blind approach prevails, it effectively ensures racially disparate impacts in the operation of the immigration laws.[9]

Part I of the Article provides an analysis of the deficiencies of the state of Arizona's controversial endeavor to participate in immigration enforcement, as well as a study of the current debate over national immigration reform. In so doing, this Part explains how debates over laws permitting discrimination based on a person's immigration status, given the racial demographics of immigration to the United States today, allows for coded discussions about race and civil rights.

Part II of the Article analyzes the most obvious racially disparate impacts of the failure of comprehensive immigration reform, as well as the less visible racially disparate impacts of the failure of Congress to act now on immigration. It further spells out how the failure to reform the U.S. immigration laws, albeit in a facially neutral way, will injure people of color both inside and outside the United States.

One might wonder why race, even though perhaps animating the positions advocated by some restrictionists and certain elements of the general public, tends to be buried in the modern debate about immigration. The answer is relatively simple. Times

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6. For analysis of the general concept of racial discrimination by proxy as well as the application of the concept to a California law banning bilingual education in the public schools, see Kevin R. Johnson & George A. Martínez, *Discrimination by Proxy: The Case of Proposition 227 and the Ban on Bilingual Education*, 33 U.C. DAVIS L. REV. 1227 (2000).

7. For a general critique of the color-blind approach to remedying the vestiges of racial discrimination in American social life and the argument that "the United State Supreme Court's use of color blind constitutionalism—a collection of legal themes functioning as racial ideology—fosters white racial domination," see Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1, 2 (1991); *see also* Mary Kathryn Nagle, Parents Involved *and the Myth of the Colorblind Constitution*, 26 HARV. J. ON RACIAL & ETHNIC JUST. 211 (2010) (discussing critically the color-blind analysis of Parents Involved v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007)); Tucker Culbertson, *Another Genealogy of Equality: Further Arguments Against the Moral-Politics of Colorblind Constitutionalism*, 4 STAN. J. C.R. & C.L. 51, 53-54 (2008) (criticizing the theory of the color-blind Constitution as a denial of the pervasive and complex effects of racial discrimination throughout U.S. history); Julian Wonjung Park, Comment, *A More Meaningful Citizenship Test? Unmasking the Construction of a Universalist, Principle-Based Citizenship Ideology,* 96 CAL. L. REV. 999, 1025 (2008) (contending that the theory of color-blindness ignores, rather than confronts, the legacy of racial discrimination in the United States).

8. *See infra* Part I.B.

9. *See infra* Part II.

unquestionably have changed, even if not as much as those who would like to think that the election of a Black President marks the beginning of a new post-racial America. Unlike the hey-day of Jim Crow, people in polite company today rarely contend that racial discrimination in the immigration laws—or in the law generally—can be justified by the biological, or innate, inferiority of people of color.[10] Indeed, the civil rights movement contributed to the removal of the most blatant forms of racial discrimination from the U.S. immigration laws in 1965.[11] However, racism still exists in the modern United States and, as I have argued elsewhere, has arguably been transferred or displaced from domestic minorities to immigrants of color.[12]

Restrictionists often argue that immigrants, especially "illegal aliens," warrant discriminatory treatment, punishment, and little sympathy because of their unlawful immigration status. An often-accompanying argument is that race has nothing to do with the desire to make distinctions on the basis of immigration status and to punish "illegal aliens." Rather, the claim is that the demand for increased immigration enforcement is motivated solely by a desire to "enforce the law" and "secure the borders." Whatever the justification, the harsh treatment of immigrants has disparate racial impacts. It, however, is not expressly justified by discredited notions of racial inferiority, which certainly would bring out in force those committed to the protection and preservation of civil rights.

In the end, what does this all mean? In the modern United States, the debate over immigration ultimately functions as a convenient and legitimate forum for people to vent racial antipathy and frustrations, whether it be about new groups of people in the neighborhood, changing population demographics and shifting political power, languages other than English being spoken in public places, the decline in the economy (and resulting loss of jobs), the poor quality of the public schools, health care reform, the fact that workers congregate on street corners, and virtually anything and everything.

I. THE TUMULTUOUS IMMIGRATION DEBATE OF 21st CENTURY

Many Americans, including President Obama, have characterized the current U.S. immigration system as nothing less than "broken."[13] Consequently, for most of the 21st century, Congress has debated what is frequently referred to as "comprehensive

10. For example, Samuel Huntington laments the "Hispanization" of immigration but contends that it is the inferior non-Anglo *culture* of today's immigrants, not their *race*, which justifies severe restrictions on immigration of Hispanics to the United States. *See* SAMUEL P. HUNTINGTON, WHO ARE WE? THE CHALLENGES TO AMERICA'S NATIONAL IDENTITY 221-46 (2004). For a stern rebuttal to Huntington, see Kevin R. Johnson & Bill Ong Hing, *National Identity in a Multicultural Nation: The Challenge of Immigration Law and Immigrants*, 103 MICH. L. REV. 1347 (2005).

11. For discussion of the impacts of the Immigration Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (1965), on the racial demographics of modern immigration, see Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. REV. 273 (1996).

12. For elaboration on this theory, see Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" Into the Heart of Darkness*, 73 IND. L.J. 1111, 1148-58 (1998).

13. *See* President Barack Obama, Remarks by the President on Comprehensive Immigration Reform (July 1, 2010) (transcript available at the American University, School of International Service website), *available at* http://www.american.edu/sis/Obama-Transcript.cfm.

immigration reform,"[14] although the many reform proposals out there vary widely.[15] A more general, and often over-heated, debate over immigration continues to rage on a daily basis in cities and towns across the United States.[16] Unfortunately, the public debate is not always conducted in a particularly sophisticated manner.[17]

Supporters of increased immigration enforcement often insist that they are not in the least bit anti-immigrant, anti-Mexican, or racist. Rather, they contend that they simply are anti-"illegal" immigrant.[18] This claim is frequently buttressed with the all-too-common rebuke to any suggested reform that arguably benefits undocumented immigrants, or the claim that they possess legal rights: "what part of illegal don't you

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14. *See infra* text accompanying notes 127-30 (discussing the components common to many of the comprehensive immigration reform proposals). For analysis of various immigration reform proposals and their failure, see MARC R. ROSENBLUM, "COMPREHENSIVE" LEGISLATION VS. FUNDAMENTAL REFORM: THE LIMITS OF CURRENT IMMIGRATION PROPOSALS (Migration Policy Institute, Jan. 2006) (analyzing critically immigration reform proposals); T. Alexander Aleinikoff, *Administrative Law: Immigration, Amnesty, and the Rule of Law, 2007 National Lawyers Convention of the Federalist Society*, 36 HOFSTRA L. REV. 1313, 1314 (2008) (observing that reform proposals had failed to come up with a reliable way to reduce undocumented migration to the United States); Muzaffar Chishti, *A Redesigned Immigration Selection System*, 41 CORNELL INT'L L.J. 115 (2008) (proposing a redesign of the contemporary U.S. immigration system); Marisa Silenzi Cianciarulo, *Can't Live With 'Em, Can't Deport 'Em: Why Recent Immigration Reform Efforts Have Failed*, 13 NEXUS 13 (2008) (analyzing reasons for failure of immigration reform proposals); Robert Gittelson, *The Centrists Against the Ideologues: What Are the Falsehoods that Divide Americans on the Issue of Comprehensive Immigration Reform?*, 23 NOTRE DAME J.L. ETHICS & PUB. POL'Y 115 (2009) (identifying factors contributing to the divisiveness of the debate over immigration reform); Katherine L. Vaughns, *Restoring the Rule of Law: Reflections on Fixing the Immigration System and Exploring Failed Policy Choices*, 5 U. MD. J. RACE RELIGION GENDER & CLASS 151 (2005) (offering thoughts on improving the current U.S. immigration system). For a capsule summary of the myriad immigration reform proposals floated in Congress in the last several years, see BILL ONG HING, DEPORTING OUR SOULS: VALUES, MORALLITY, AND IMMIGRATION POLICY 17-38 (2006).

15. For a summary of some of the commonalities of comprehensive immigration reform proposals, *see infra* text accompanying notes 127-30.

16. *See infra* text accompanying notes 24-50.

17. *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 CHAP. L. REV. 583 (2010) (analyzing the harsh, hyperbolic rhetoric all-too-common in the modern debate over immigration in the United States).

18. *See, e.g.*, Lawrence Downes, *What Part of "Illegal" Don't You Understand?*, N.Y. TIMES, Oct. 28, 2007 ("[O]ut on the edges of the debate—edges that are coming closer to the mainstream every day—bigots pour all their loathing of Spanish-speaking people into the word [illegal]. Rant about 'illegals'—call them congenital criminals, lepers, thieves, unclean—and people will nod and applaud. They will send money to your Web site and heed your calls to deluge lawmakers with phone calls and faxes. Your TV ratings will go way up."), *available at* http://www.nytimes.com/2007/10/28/opinion/28sun4.html?_r=2; Ruben Navarrette Jr., *No Such Thing as a Good Immigrant*, SAN DIEGO UNION-TRIBUNE, Mar. 29, 2006, at B7 ("Most Republicans in Congress insist they're not anti-immigrant. . . . They and their political posse have insisted all along that—in what has become a convenient sound bite—they aren't anti-immigrant, only anti-illegal immigration. In fact, [then-CNN's] Lou Dobbs said exactly that on his show . . . in response to viewer mail that accused him of being anti-immigrant."). While hosting a CNN nightly show, Dobbs vigorously denied that his attacks on immigrants were racist or anti-Mexican. *See* Rachel L. Swarns, *Dobbs's Outspokenness Draws Fans and Fire*, N.Y. TIMES, Feb. 15, 2006, at E1.

Historically, race and civil rights often has been slightly below the surface of the recurrent calls for tougher enforcement of the criminal laws. *See* Richard Dvorak, *Cracking the Code: "De-coding" Colorblind Slurs During the Congressional Crack Cocaine Debates*, 5 MICH. J. RACE & L. 611, 626-27 (2000); *see also* Leland Ware & David C. Wilson, *Jim Crow on the "Down Low": Subtle Racial Appeals in Presidential Campaigns*, 24 ST. JOHN'S J. LEGAL COMMENT. 299, 312-14 (2009) (reviewing examples of coded racial appeals in modern Presidential campaigns, including Richard Nixon's "southern strategy," Ronald Reagan's reference to "welfare queens," *see infra* note 61, and George Bush's Willie Horton television advertisements, which alleged that his Democratic opponent was responsible for the release from prison of a violent Black criminal).

understand?"[19] Although ostensibly framed as a question, this statement more often than not is intended to cut off, not commence, any serious discussion of the complexities of immigration law and its enforcement. On the other hand, proponents of more generous immigration rules at times have been perhaps too eager to dismiss and disregard any and all claims of the pro-enforcement crowd as "racist," "nativist," and anti-immigrant.[20] Each approach effectively ends serious, and much-needed, discussion and debate over reform of the immigration laws.

If nothing else, one thing is crystal clear in the modern debate over immigration to the United States; Latina/os, whose numbers have grown dramatically as a percentage of the overall U.S. population (and, consequently, as a political force) over the last fifty years, have strenuously advocated for immigration reform and, by virtually all accounts, support reform by a wide margin.[21] This has been relatively constant over time and seems unlikely to change in the immediate future.

The reason for the decidedly pro-reform tilt among Latina/os is readily understandable. The enforcement of the U.S. immigration laws disparately affect Latina/os, U.S. citizens, as well as immigrants and potential immigrants.[22] Many Latina/os would benefit from the comprehensive immigration reform proposals currently being contemplated. Conversely, many Latina/os would be negatively affected by the failure of Congress to enact meaningful immigration reform legislation.[23]

This part of the Article considers recent developments on the immigration front-lines that tell volumes about the true meaning and impacts of the facially neutral, generally race-less and color-blind debate over the U.S. immigration laws and their reform. Despite strongly asserted claims of racial neutrality by those who ostensibly seek to simply "enforce the law" or "secure our borders," the U.S. immigration laws are replete

19. *See, e.g.*, Editorial, *Suing Arizona*, L.A. TIMES, July 8, 2010, at A16 ("Immigration foes don't believe the government has any interest in halting illegal immigration and have responded to U.S. policy with simplistic slogans such as 'What part of illegal don't you understand?' and 'Illegal is a crime.'").

20. This is not to suggest that racism and nativism does not influence the immigration debate. It unquestionably does. *See infra* text accompanying note 23 (citing authorities).

21. *See Poll: Latinos View Immigration, Economy as Top Concerns*, CHATTANOOGA TIMES FREE PRESS (Tennessee), July 15, 2010, at A4.

22. *See* Keith Aoki & Kevin R. Johnson, Latinos and the Law: Cases and Materials: *The Need for Focus in Critical Analysis*, 12 HARV. LATINO L. REV. 73, 95-100 (2009).

23. *See infra* Parts I.B, II.

with racially disparate consequences.[24] Consequently, actions that call for changes to immigration law and enforcement will have discrete, visible, and unquestionable racial consequences. Although often ignored in the vigorous ongoing debate, failure to reform the immigration laws would clearly have disparate racial consequences as well.

A. Meltdown in the Desert: Arizona's S.B. 1070

In the last few years, a growing—indeed, unprecedented—number of state and local governments have adopted harsh measures that target undocumented immigrants for punishment, such as prohibiting rental of properties to undocumented immigrants, enhancing punishments for the employment of undocumented immigrants, and similar measures.[25] The vigor of those efforts can be explained in part by the changing distribution of immigrants across the United States, which has contributed to increasing uneasiness over the real and imagined changes brought by new immigrants to their communities. In addition, state and local governments are passing the measures in response to frustration over the failure of Congress to enact comprehensive immigration reform.

Since 1990, new immigrant communities have emerged in parts of the nation, such as Arkansas, South Carolina, Iowa, Nebraska, and other rural areas of the Midwest and South, which had not previously seen large numbers of immigrants from Latin America.[26] Consider that, in the much-publicized 2009 raid on the meat and poultry processing plant in rural Postville, Iowa, 95 percent-plus of the immigrant workers arrested were from Guatemala and Mexico.[27]

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24. For critical analysis of the role of race in the history of the U.S. immigration laws, see Johnson, *supra* note 11; *see also* Liav Orgad & Theodore Ruthizer, *Race, Religion and Nationality in Immigration Selection: 120 Years After the Chinese Exclusion Case*, 26 CONST. COMMENT. 237 (2010). For calls on the need for closer investigation of the salience of race to the formation of American immigration law and its enforcement, see Jennifer Gordon & R.A. Lenhardt, *Citizenship Talk: Bridging the Gap Between Immigration and Race Perspectives*, 75 FORDHAM L. REV. 2493 (2007); Kevin R. Johnson, *Race Matters: Immigration Law and Policy Scholarship, Law in the Ivory Tower, and the Legal Indifference of the Race Critique*, 2000 U. ILL. L. REV. 525.

For a contemporary review of patterns of nativism in U.S. immigration history, see PETER SCHRAG, NOT FIT FOR OUR SOCIETY (2010). *See generally* JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860–1925 (3d ed. 1994) (analyzing political history surrounding congressional passage of the national-origins quotas system in 1924 and that remained an integral part of U.S. immigration laws until 1965); BILL ONG HING, MAKING & REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY, 1850–1990 (1993) (documenting history of Chinese exclusion and related laws and the resulting impacts on the emergence of Asian American communities in the United States); KEVIN JOHNSON, THE "HUDDLED MASSES" MYTH: IMMIGRATION AND CIVIL RIGHTS (2004) (tracing history of exclusions and removal of poor, political minorities, racial minorities, disabled, gays and lesbians, and other groups in U.S. immigration laws); LUCY E. SALYER, LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS & THE SHAPING OF MODERN IMMIGRATION LAW (1995) (analyzing the impacts of the Chinese exclusion laws on the development of U.S. immigration law). George A. Martinez, *Race, American Law and the State of Nature*, 112 W. VA. L. REV. 799 (2010) (offers an insightful philosophical explanation for American law's harsh treatment of immigrants, as well as people of color generally).

25. *See* NAT'L CONFERENCE OF STATE LEGISLATURES, 2010 IMMIGRATION-RELATED BILLS AND RESOLUTIONS IN THE 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.

26. *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, 1493-96 (2002); Lisa R. Pruitt, *Latina/os, Locality, and Law in the Rural South*, 12 HARV. LATINO L. REV. 135, 138 (2009).

27. *See* Kevin R. Johnson, *The Intersection of Race and Class in U.S. Immigration Law and Enforcement*, 72 LAW & CONTEMP. PROBS. 1, 30-34 (2009).

Tensions unquestionably have resulted from the changing Latina/o face of America. Due to the wider national distribution of immigrants (and Latina/os), the debate over immigration in modern times most definitely is not limited to the West and large urban cities in the East, as historically had been the case over much of U.S. history.

Some of the state and local immigration measures appear to be motivated by the alleged "failure" of the U.S. government to enforce the U.S. immigration laws.[28] Such claims are commonplace despite the fact that deportations and detentions of noncitizens by the U.S. government have set numerical records for several years running;[29] indeed, the Obama administration, to this point, ha arguably emphasized enforcement over almost all else with respect to immigration.[30] Ongoing, if not growing, concerns with the class and race of many of today's immigrants,[31] as well as more legitimate grievances over matters such as the unequal distribution of the costs and benefits of immigration between the federal and state and local governments,[32] unquestionably have fueled support for the state and local immigration measures.

The rapid growth of state and local involvement in immigration regulation is a relatively new phenomenon in the United States. For more than a century,[33] the conventional wisdom had been that federal power over immigration is exclusive, leaving little room for state and local regulation. More than 160 years ago, the Supreme Court 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.[34] The classic modern, and most emphatic, statement of federal supremacy over immigration can

28. *See* Jeremy Duda, *Arizona Gov. Brewer Lauded by the Right, Jeered by the Left*, ARIZONA CAPITOL TIMES, July 22, 2010 (quoting Arizona Governor Jan Brewer advisor: "…She's become the tip of the spear on the issue of border security and the failure of the Obama administration to execute on policies which protect this state and the citizens of the country . . . .").

29. *See infra* text accompanying notes 167-70.

30. *See infra* text accompanying notes 116-17.

31. *See* Johnson, *supra* note 26, at 23-30. The influence of race and class can also be seen in local regulation of day laborers and taco trucks, as well as the enforcement of housing codes and anti-loitering ordinances, which in many localities have disparate impacts on working class Latina/o immigrants. *See* Hispanic Taco Vendors of Wash. v. City of Pasco, 994 F.2d 676, 677 (9th Cir. 1993) (affirming the denial of injunctive relief seeking to halt enforcement of local law requiring the licensing of taco trucks and other street vendors); Ernesto Hernández-Lopez, *LA's Taco Truck War: How LA Cooks Food Culture Contests*, (Chapman University School of Law Working Paper, Paper No. 10-90, Oct. 19, 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1694747 (analyzing critically efforts to regulate taco trucks in Los Angeles County); Rick Su, *Local Fragmentation as Immigration Regulation*, 47 HOUS. L. REV. 367, 406 (2010) (noting various local measures "to address the contemporary immigration crisis, [including] housing code sweeps . . . and anti-loitering ordinances in communities . . . targeting congregations of immigrant day laborers") (footnotes omitted).

32. *See* KEVIN R. JOHNSON, OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDER AND IMMIGRATION LAWS 152–55 (2007).

33. For analysis of state regulation of immigration before the U.S. Congress occupied the field in the late 1800s, see Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833 (1993).

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

be found in the Court's 1976 decision in *DeCanas v. Bica*: "Power to regulate immigration is *unquestionably exclusively a federal power*."[35]

Despite the high Court's clear, and relatively recent, reaffirmation of the virtually unfettered federal power over immigration, state and local governments have increasingly acted in the realm of immigration in recent years. Colloquially speaking, the state and local governments have sought to take immigration law into their own hands.

Unfortunately, the lower courts have not been entirely consistent in addressing to the proper role of state and local governments, vis-à-vis the federal government, in the regulation of immigration and immigrants.[36] In a case in which it granted *certiorari* shortly after Arizona passed S.B. 1070, the Supreme Court currently has the opportunity to clarify the respective roles of the federal and state governments with respect to immigration regulation.[37]

Immigration law and enforcement in the United States has been the near-exclusive province of the federal government, at least since the late nineteenth century. State and local governments, for example, unquestionably cannot enact their own Immigration and Nationality Acts,[38] the name of the comprehensive federal immigration law, with their own rules for the admission and deportation of noncitizens. Imagine the chaos likely to result if Tennessee and New York, or Iowa and Texas, or for that matter, Arizona, could regulate immigration in their own separate ways.

The nation understandably needs a uniform set of national immigration rules, not a patchwork of fifty different systems of immigration regulation.[39] A national immigration

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35. Washington v. Davis, 424 U.S. 351, 354 (1976) (citations omitted) (emphasis added). At the same time, the Court found that the California law in question in that case, which barred the employment of undocumented workers before Congress made it unlawful in 1986, *see infra* text accompanying notes 175-76, was not preempted by federal law, *see* DeCanas v. Bica, 424 U.S. at 365. This holding, which might seem somewhat incongruous with the idea that immigration is "exclusively a federal power," arguably created the ambiguity resulting in the subsequent inconsistency in the lower courts about the proper scope of state and local power over immigration.

The flip side of the coin is that the federal government has been said to have "plenary power" over immigration, with extremely limited judicial review of substantive immigration decisions. *See* Kevin R. Johnson, *Minorities, Immigrant and Otherwise*, 118 YALE L.J. JOURNAL POCKET PART 77 (Oct. 2008), *available at* http://yalelawjournal.org/2008/10/28/johnson.html. *See generally* KEVIN R. JOHNSON, RAQUEL E. ALDANA, BILL ONG HING, LETICIA SAUCEDO, & ENID TRUCIOS-HAYNES, UNDERSTANDING IMMIGRATION LAW 101-15 (2009) (summarizing the scope of federal power to regulate immigration).

36. *Compare* Chamber of Commerce v. Edmonson, 594 F.3d 742 (10th Cir. 2010) (holding that major portions of Oklahoma law sanctioning employers for employing undocumented immigrants were preempted by federal law) *and* Lozano v. Hazleton, 620 F.3d 170 (3d Cir. 2010) (invalidating most of city immigration ordinance on federal preemption grounds), *with* Gray v. City of Valley Park, 567 F.3d 976, 979-80 (8th Cir. 2009) (affirming judgment on procedural grounds that similar city ordinance was not preempted by federal law), *and* Chicanos Por La Causa, Inc. v. Napolitano, 544 F.3d 976 (9th Cir. 2008) (holding that Arizona law denying business licenses to employers that employed undocumented immigrant workers was not preempted by federal immigration law), *cert granted sub nom.*, 130 S. Ct. 3498 (2010).

37. *See* Chicanos Por La Causa, Inc. v. Napolitano, 544 F.3d 976 (9th Cir. 2008) (holding that Arizona law denying business licenses to employers that employed undocumented immigrant workers was not preempted by federal immigration law), *cert granted sub nom.*, 130 S. Ct. 3498 (2010).

38. Immigration & Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8, 18, and 22 U.S.C.).

39. Importantly, the Supreme Court reached that conclusion decades ago. *See supra* text accompanying notes 33-34.

scheme is also needed so that individual states do not simply shift migration from their state to other states.[40]

For similar practical reasons, the Supreme Court has made it clear that states cannot conduct their own foreign policies.[41] Only the federal government may articulate a foreign policy for the entire nation. In that vein, immigration law and enforcement can have serious foreign policy implications for the United States as a whole, which militate against states having their own immigration policies. For example, Arizona's recent well-known foray into immigration[42] provoked harsh condemnation from the President of Mexico.[43] Previous state immigration measures, such as California's Proposition 187,[44] also generated criticism from high levels of the Mexican government.[45]

The history surrounding California's Proposition 187 is instructive. The measure, among other things, would have denied undocumented immigrant children access to the public schools and would have required school teachers, administrators, and other state and municipal employees to report suspected undocumented immigrants to federal authorities. After a campaign that most scholars today would agree was deeply marred by anti-Mexican, anti-immigrant sentiment,[46] the Golden State's voters in 1994 overwhelmingly passed this initiative only to have it unceremoniously struck down by a district court for intruding on the federal power to regulate immigration.[47] Thus, Arizona

40. *See* Sergio Quintana, *Immigrants Might Leave Arizona But Not the Country*, NAT'L PUB. RADIO, All Things Considered, Aug. 27, 2010, *available at* http://www.npr.org/templates/story/story.php?storyId=129400993&ft=1&f=1003 (reporting that, after passage of Arizona S.B. 1070, *see infra* text accompanying notes 55-81, immigrants were moving from Arizona to other states, including New Mexico). States cannot constitutionally infringe on the right of U.S. citizens to travel between the states. *See* Saenz v. Roe, 526 U.S. 489 (1999) (holding that state could not impose durational requirements for new residents to be eligible for public benefits that interfered with the right to travel).

41. *See, e.g.*, Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 401 (2003) (invalidating California law requiring insurance companies to provide information about Holocaust-era policies as impermissible interference with the President's foreign affairs power); Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 366 (2000) (striking down Massachusetts law barring state agencies from purchasing goods and services from companies doing business with Burma as intruding on the national government's foreign affairs power); *see also* Carol E. Head, Note, *The Dormant Foreign Affairs Power: Constitutional Implications for State and Local Investment Restrictions Impacting Foreign Countries*, 42 B.C. L. REV. 123, 124-25 (2000) ("[T]he Dormant Foreign Affairs Power reserves power over foreign affairs exclusively to the federal government and precludes states and municipalities from interfering with the foreign affairs power of the federal government."); Jeremy K. Schrag, Note, *A Federal Framework for Regulating the Growing International Presence of the Several States*, 48 WASHBURN L.J. 425, 449 (2009) ("The federal government can still preempt and invalidate state statutes that impermissibly interfere with the federal government's foreign policy.").

42. *See infra* text accompanying notes 56-82.

43. *See Calderón Advises Mexicans Against Travel to Arizona*, DIGITAL JOURNAL.COM, May 3, 2010, http://www.digitaljournal.com/article/291513; Jerry Seper, *Mexico's Illegals Laws Tougher than Arizona's; Calderon Condemns "Racial Discrimination"*, WASH. TIMES, May 3, 2010, at 1.

44. *See infra* text accompanying notes 45-46.

45. *See* Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignties*, 35 VA. J. INT'L L. 121, 158, 165-66 (1994).

46. *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 the discriminatory nature of the initiative campaign); Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class*, 42 UCLA L. REV. 1509 (1995) [hereinafter Johnson, *Public Benefits and Immigration*] (scrutinizing racial and gender impacts of Proposition 187).

47. *See* League of United Latin Am. Citizens v. Wilson, 908 F. Supp. 755, 769 (C.D. Cal. 1995) ("Because the federal government bears the exclusive responsibility for immigration matters, the states 'can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States or the several states.'") (quoting Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 419 (1948) (other citations omitted).

in 2010 was far from the first state to embroil itself in the national debate over immigration by seeking to become involved in regulating immigration.[48]

Over the last few years, there has been considerable scholarly ferment concerning the role of state and local governments in regulating immigration and immigrants.[49] There has also been much debate on the ground about the topic, as state and local governments continue to pass immigration laws.

To explore the contours of the ongoing debate, compare two distinctly different perspectives on state and local involvement in immigration regulation. One observer, sympathetic to the rights of immigrants, has claimed that the state and local immigration laws have discriminatory racial impacts on Latina/os similar to those that the Jim Crow laws had on African Americans.[50] From a very different perspective, advocates of strict enforcement of the immigration laws regularly rail on "sanctuary cities," cities that, believing it to be better policy, restrict the exchange of information between local law enforcement agencies and federal immigration authorities.[51]

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48. *See infra* text accompanying notes 56-82.

49. A number of scholars have questioned the conventional wisdom and advocated greater state and local involvement in immigration and immigrant regulation. *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); Spiro, *supra* note 44; *see also* Matthew Parlow, *A Localist's Case for Decentralizing Immigration Policy*, 84 DENV. U. L. REV. 1061, 1071–73 (2007) (contending that local governments should be permitted to regulate immigration in a manner consistent with federal immigration law and policy). Other scholars have raised serious questions about state and local attempts to regulate immigration and immigrants. *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); 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); 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); 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); 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 (2010); *see also* 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) (analyzing critically local ordinances seeking to prohibit landlords from renting to undocumented immigrants).

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

51. *See* Rose Cuison Villazor, *What Is a "Sanctuary"?*, 61 S.M.U. L. REV. 133 (2008) (analyzing precisely the meaning of various municipal "sanctuary" ordinances involving the treatment of immigrants and the controversy surrounding them); *see also* Rose Cuison Villazor,*"Sanctuary Cities" and Local Citizenship*, 37 FORDHAM URB. 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, if viewed as part of the immigration enforcement machinery of the nation, immigrants will be less likely to cooperate with police in criminal investigations. *See* Huyen Pham, *The Constitutional Right Not to Cooperate?: Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373, 1375 (2006).

Whether good or bad policy, state and local cooperation with the federal government in immigration enforcement has increased significantly over the last decade. Subsection 287(g) of the Immigration & Nationality Act, which was added by Congress in 1996,[52] has greatly increased the collaboration of state and local governments with the federal immigration authorities in enforcing the U.S. immigration laws.[53]

Similarly, "Secure Communities," a 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 to remove criminal offenders from the United States.[54] "Criminal aliens," of course, are among the most unpopular subsets of all noncitizens, with precious few defenders in the political process.[55] Despite the claim by the Obama administration that the governmental 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*."[56]

1) S.B. 1070: One State's Effort to Bolster Immigration Enforcement

Perhaps the most well known recent example of a state effort to aggressively move into the realm of immigration enforcement came, not surprisingly, from a border state. In the last few years, Arizona, which shares a lengthy southern border with Mexico, has experienced a significant increase in undocumented immigration due to much-publicized federal enforcement operations put into place in Texas and California in the 1990s. Among other consequences, these enforcement operations redirected migrants toward the U.S./Mexico border in the southern part of the state.[57]

Over time, public concerns in Arizona over immigration grew and eventually reached a boiling point in 2010. That year, the Arizona legislature passed a law that through a variety of means sought to make "attrition through enforcement the public policy of all state and local government agencies in Arizona."[58] Known popularly as S.B. 1070, the law includes provisions that proponents and opponents of the Arizona law

52. *See infra* note 165 (citing authority).

53. *See* Immigration & Nationality Act (INA) § 287(g), 8 U.S.C. § 1357(g). For critical analysis of agreements authorized by § 287(g), 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); *see also* Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084 (2004) (examining the claim that local law enforcement possesses "inherent authority" to make immigration arrests); Mimi E. Tsankov & Christina J. Martin, *Measured Enforcement: A Policy Shift in the ICE 287(g) Program*, 31 U. LA VERNE L. REV. 403, 422 (2010) (evaluating the implementation of the Department of Homeland Security's model "Agreement for State and Local Immigration Enforcement Partnerships").

54. *See* Jena Baker McNeill, *Secure Communities: A Model for Obama's 2010 Immigration Enforcement Strategy*, WEBMEMO #2746 (Jan. 6, 2010), http://www.heritage.org/Research/Reports/2010/01/Secure-Communities-A-Model-for-Obamas-2010-Immigration-Enforcement-Strategy.

55. *See* Johnson, *Public Benefits and Immigration*, *supra* note 45, at 1531-34.

56. Editorial, *Immigration Bait and Switch*, N.Y. TIMES, Aug. 17, 2010, at A22 (emphasis added).

57. *See infra* text accompanying notes 188-89.

58. S.B. 1070, 49th Leg., 2d Sess., Ariz. Sess. Laws ch. 113 (2010) (as amended); *see* Gabriel J. Chin, Carissa Byrne Hessick, Toni M. Massaro & Marc L. Miller, *A Legal Labyrinth: Issues Raised by Arizona Senate Bill 1070*, 25 GEO. IMMIGR. L. J. 47 (2010).

agreed make it the toughest enforcement-oriented state or local immigration measure currently in existence. Not surprisingly, the law sparked nothing less than a firestorm of national controversy.

Section 1 of S.B. 1070 provides that "[t]he provisions of this act are intended to work together to discourage and deter the *unlawful entry and presence of aliens* . . . ."[59] This statement of legislative intent, which sounds like an emphatic statement of a state immigration policy (albeit one with a myopic emphasis on enforcement), alone offers a textbook example of how facially neutral language can obscure and rationalize racial impacts, if not a discriminatory intent.[60]

On its face, "aliens" is a race-neutral term borrowed from the U.S. immigration laws.[61] However, in the context of the modern immigration demographics of Arizona, the terminology[62] serves as thinly-disguised code for immigrants from Mexico and

59. *See* Ariz. S.B. 1070, *supra* note 57, § 1 (emphasis added).

60. *See* Washington v. Davis, 426 U.S. 229 (1976) (holding that state action resulting in a disparate racial impact does not violate the Equal Protection Clause of the Fourteenth Amendment unless it was adopted or is maintained with a "discriminatory intent").

61. *See* INA § 101(a) (3), 8 U.S.C. § 1101(a)(3) ("The term 'alien' means any person not a citizen or national of the United States.").

62. The terminology employed often proves critical to the framing of the entire immigration debate. *See* Kevin R. Johnson, "*Aliens" and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons,* 28 U. MIAMI INTER-AM. L. REV. 263 (1996-97) (contending that the term "alien" in the Immigration & Nationality Act helps to legitimize the harsh treatment of noncitizens under the law and effectively denies them personhood). *See generally* MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA (2003) (examining emergence of "illegal aliens" in the United States).

Another pejorative that is regularly employed by restrictionists in the modern immigration debate is "anchor babies." *See, e.g.*, Kevin Alexander Gray, *14th Amendment Nullification Threatens Core of Citizenship,* CHARLESTON GAZETTE (WV), Sept. 2, 2010, at A4 (criticizing Senator Lindsey Graham's threat to revisit birthright citizenship under the 14th Amendment because of undocumented immigrants having "anchor babies" or, as he put it, the "drop and leave"); Thomas Elias, *More Fiction Than Fact About "Anchor Babies" Born in U.S.*, THE SALINAS CALIFORNIAN, Aug. 30, 2010 (discussing the misconceptions surrounding "anchor babies" or "maternity tourism," a term used by groups attempting to abolish birthright citizenship under the 14th Amendment); Rex W. Huppke, *Terror Babies, Anchor Babies, and Beanie Babies, Oh My!*, CHI. TRIB., Aug. 24, 2010 (criticizing concern over "anchor babies" and a new fear espoused by politicians of "terror babies"). "Opponents of birthright citizenship use the term `anchor babies' to refer to the U.S.-born, U.S. citizen children of undocumented parents." Stephen H. Legomsky, *Portraits of the Undocumented Immigrant: A Dialogue*, 44 GA. L. REV. 65, 86 n.52 (2009); *see* Nicole Newman, Note, *Birthright Citizenship: The Fourteenth Amendment's Continuing Protection Against an American Caste System*, 28 B.C. THIRD WORLD L.J. 437, 441 (2008) ("[The] threat of chain migration, pejoratively called the 'anchor baby' phenomenon, is the most inflammatory rhetoric that opponents of birthright citizenship employ.") (footnote omitted); *see also* Keith Aoki, *Arizona – Pick on Someone Your Own Size*, S.F. CHRON., June 17, 2010, at A16 (analyzing critically an Arizona proposal to not issue birth certificates to "anchor babies"). Concerns with "anchor babies," allegedly able to sponsor the lawful immigration of their undocumented parents, have contributed to the recent call for the abolition of birthright citizenship guaranteed by the Fourteenth Amendment. *See* Julia Preston, *Senator Picks Up the Fight Against Citizenship at Birth*, INT'L HERALD TRIB., Aug. 9, 2010, at 4. There is a racial component to the "anchor babies" slur, which plays on racial, gender, and class stereotypes about Latina/os, see Gebe Martinez, Ann Garcia & Jessica Arons, *Birthright Citizenship Debate Is a Thinly Veiled Attack on Immigrant Mothers*, CENTER FOR AMERICAN PROGRESS (Aug. 18, 2010), *available at* http://www.americanprogress.org/issues/2010/08/citizenship_debate.html, just as there is to the stereotypical African American "welfare queen," see Catherine R. Albiston & Laura Beth Nielsen, *Welfare Queens and Other Fairy Tales: Welfare Reform and Unconstitutional Reproductive Controls,* 38 HOWARD L.J. 473, 476-88 (1995) (analyzing the racialized images of Black women in the debate over welfare and welfare reform in the United States); Angela Onwuachi-Willig, *The Return of the Ring: Welfare Reform's Marriage Cure as the Revival of Post-Bellum Control*, 93 CAL. L. REV. 1647, 1665-73 (2005) (same).

For a vigorous defense of birthright citizenship under the 14th Amendment, see Garrett Epps, *The Citizenship Clause: A "Legislative History,"* 60 AM. U. L. REV. 331 (2010).

Central America.[63] This simple truth could not be lost on anyone with a superficial knowledge of modern immigration trends or the demographics of Arizona, which has a population that is roughly one-third Hispanic and nearly thirteen percent foreign-born.[64] The potentially racially disparate impacts of the law help explain why Latina/os across the United States reacted so negatively, and with great passion, to S.B. 1070.

The use of code from the U.S. immigration and nationality laws as a surreptitious, as well as a color-blind and facially neutral, way to discriminate on the basis of race would not be without historical precedent. Especially popular in the West during the early twentieth century, discriminatory state laws known as the "alien land laws," borrowed from U.S. immigration and nationality law, prohibited the ownership of certain real property by "aliens ineligible to citizenship." In operation, the land laws targeted immigrants from Asia,[65] because noncitizens at the time (the dominant and most unpopular group of immigrants of that era were from Japan) had to be "white" to be eligible for naturalization under American law.[66] The alien land laws arguably served as a prelude to the infamous internment of persons of Japanese ancestry during World War II, which is now a dark stain on the American memory.[67]

As predicted by some prognosticators,[68] the day before the Arizona law was to go into effect, a federal district court granted a preliminary injunction prohibiting the state from enforcing key immigration provisions of S.B. 1070.[69] The district court barred implementation of the provisions of the law that it concluded most directly impinged on the federal prerogative over immigration regulation and would most likely be found to be pre-empted by federal law.[70] Parts of the law not directly intruding on the federal power to regulate immigration, such as the prohibition on state officials from limiting enforcement of the U.S. immigration laws,[71] or the portion of Section 5 that makes it a

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63. In this way, S.B. 1070 was enacted with similar racial code as seen in California, in which Governor Pete Wilson, who reinvigorated his lagging re-election campaign by strongly supporting the measure, ran nightly television advertisements in support of Proposition 187 stating ominously "They keep coming," accompanied by dark news footage of persons appearing to be scrambling across the U.S./Mexico border. *See* Richard Delgado & Jean Stefancic, *California's Racial History and Constitutional Rationales for Race-Conscious Decision Making in Higher Education*, 47 UCLA L. REV. 1521, 1555-56 (2000). For discussion of the anti-immigrant, anti-Mexican undercurrent to the Proposition 187 campaign, *see supra* text accompanying notes 45-47.

64. *See* U.S. CENSUS BUREAU, STATE & COUNTY QUICKFACTS, *available at* http://quickfacts.census.gov/qfd/states/04000.html.

65. *See* Johnson, *supra* note 45, at 648-50 (discussing how state "alien land laws," although facially neutral and incorporating federal nationality law, served to discriminate against immigrants from Japan); *see also* Rose Cuison Villazor, *Rediscovering* Oyama v. California*: At the Intersection of Property, Race, and Citizenship*, 87 WASH. U. L. REV. 979 (2010) (critically analyzing major Supreme Court decision invalidating application of California Alien Land Law).

66. *See* Johnson *supra* note 26, at 18-19. *See generally* IAN F. HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (10th anniversary ed. 2006) (analyzing development in the courts of the caselaw interpreting the whiteness requirement for naturalization in force in the nationality laws from 1790 to 1952).

67. *See* Keith Aoki, *No Right to Own?: The Early Twentieth-Century "Alien Land Law" As a Prelude to Internment*, 40 B.C. L. REV. 37 (1998); *see, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944) (refusing to disturb U.S. government's decision to intern persons of Japanese ancestry on West Coast). *See generally* ERIC K. YAMAMOTO ET AL., RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT (2001).

68. I was one of them. *See* Kevin R. Johnson, *Arizona Law Will Likely Collide With Constitution—and Lose*, SACRAMENTO BEE, May 2, 2010, at 1E.

69. *See* United States v. Arizona, 703 F. Supp. 2d 980 (D. Ariz. 2010). An appeal before the U.S. Court of Appeals for the Ninth Circuit is pending.

70. *See id.* at 986-87.

71. *See* S.B. 1070, *supra* note 57, § 2(A); *supra* text accompanying & note 50 (discussing public concern with "sanctuary cities").

crime under certain circumstances for a motor vehicle to pick up day laborers,[72] were not subject to the injunction and went into effect.

Although vehemently criticized by the supporters of the law,[73] the district court ruling acknowledged the legitimate concerns of the Arizona legislature with immigration. The court noted at the outset of its ruling that the legislature passed S.B. 1070 "[a]gainst a backdrop of rampant illegal immigration, escalating drug and human trafficking crimes, and serious public safety concerns."[74] Demonstrating sensitivity to the state's legitimate interests, the court carefully analyzed each section of the law and scrutinized whether the specific provision intruded on the federal power to regulate immigration.[75]

In essence, the court found that the U.S. government is likely to prevail on its claims that the portions of S.B. 1070 that most directly purport to regulate immigration are pre-empted by federal law. Importantly, the court concluded that the portion of Section 2[76]—one of the central, and most controversial, portions of the law[77]—that would have required a law enforcement "officer [to] make a reasonable attempt to determine the immigration status of a person stopped, detained or arrested if there is a reasonable suspicion that the person is unlawfully present in the United States," is likely to be pre-empted by federal law.[78]

Significantly, the court made its initial substantive ruling in the challenges to S.B. 1070 in the case brought by the U.S. government in *United States v. Arizona*.[79] In actions filed before the one brought by the U.S. Department of Justice, civil rights organizations had made similar federal pre-emption arguments in separate challenges to the Arizona law.[80] However, the argument that a state law is pre-empted by federal law is most powerfully made by the national government itself when it asserts that a state is intruding on *its* power to regulate immigration. Conversely, the force of the argument is correspondingly weaker when made by groups not representing the U.S. government.

In addition, the U.S. government prudently limited its legal challenges to those sections of the Arizona law that most directly impinged upon the federal power to regulate immigration and thus were most vulnerable to a federal preemption claim.[81] In this regard, the U.S. government studiously avoided any allegations that the law would result in racial profiling or racial discrimination, thereby attempting to minimize claims that it was engaging in racial politics.

Moreover, the U.S. government assigned a seasoned and respected attorney from the Solicitor General's office, which ordinarily only appears on behalf of the United States in the U.S. Supreme Court, to argue the case on behalf of the United States in the district

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72. *See* S.B. 1070, § 5; *see* United States v. Arizona, 703 F. Supp. 2d at 986.

73. *See, e.g.*, Casey Newton, *Critics Denounce `Activist Judge'; State Appeals Injunction*, ARIZ. REP., July 30, 2010, at A1.

74. *See United States v. Arizona*, 703 F. Supp. 2d at 985.

75. *See supra* text accompanying notes 67-71.

76. *See* Ariz. S.B. 1070, *supra* note 57, § 2.

77. *See infra* text accompanying notes 83-94.

78. *See* United States v. Arizona, 703 F. Supp. 2d at 987. Before being amended, the language of this section of S.B. 1070 had been broader and applied to any "lawful contact" by police with persons. *See id.* at 994.

79. *See id.* at 980.

80. *See* Complaint for Declaratory and Injunctive Relief, Friendly House v. Whiting, No. CV 10-1061, Count 1 (D. Ariz. May 17, 2010).

81. *See* Complaint, United States v. Arizona, CV 10-1413 PHX SRB (D. Ariz. July 6, 2010) (limiting federal challenges to Sections 1-6 of Arizona S.B. 1070).

court in Arizona—an extraordinary step that unquestionably signaled to the district court the great importance of the case to the federal government.[82]

In my estimation, because of its studied analysis of the law, as well as the sensitivity to state interests and scrupulous adherence to Supreme Court precedent, the district court's ruling in *United States v. Arizona* stands a good chance of surviving—in large part if not in whole—an appeal to the court of appeals and, if reviewed, by the U.S. Supreme Court. It follows relevant precedent, is consistent with the conventional wisdom, and is firmly within the constitutional mainstream.[83]

2) One Color-Blind Defense: S.B. 1070 Bans Racial Profiling

Many of the objections to S.B. 1070 centered around the contention that the law would inevitably result in increased racial profiling of Latina/os by state and local police in the name of immigration enforcement.[84] Such claims carry special force in light of the history of discrimination against Latina/os.

For many years, Latina/os have registered complaints of discrimination by state and local law enforcement authorities in Arizona.[85] Despite claims of racial neutrality, the focus on immigration status in virtually any law often generates fears among Latina/os, who often are stereotyped as "foreigners,"[86] that enforcement in fact will be based on

82. *See* Jerry Markon, *Edwin Kneedler a "Savvy" Choice to Argue Suit Against Ariz. Immigration Law*, WASH. POST, July 31, 2010, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/07/30/AR2010073006222.html.

83. *See supra* text accompanying notes 32-34.

84. *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.

85. *See, e.g.*, Jacques Billeaud, *Feds Sue Arizona Sheriff in Civil Rights Probe*, ASSOC. PRESS, Sept. 2, 2010, *available at* http://www.washingtontimes.com/news/2010/sep/2/feds-sue-arizona-sheriff-civil-rights-probe (reporting on U.S. Department of Justice suit against Maricopa County Sheriff Joe Arpaio for refusing to produce documents in an 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, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/08/17/AR2010081703637.html ("Justice Department officials in Washington have issued a rare threat to sue Maricopa County [Arizona] 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); 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 CLEV. ST. L. REV. 75, 79-86 (2005) (criticizing immigration dragnet, and its impacts on the Latina/o community generally, in public places of Chandler, Arizona, a suburb of Phoenix); 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, including how those stereotypes contributed to the killing of a Latino male by Phoenix police); James Thomas Tucker, *The Battle Over "Bilingual Ballots" Shifts to the Courts: A Post-Boerne Assessment of Section 203 of the Voting Rights Act*, 45 HARV. J. ON LEGIS. 507, 565 (2008) (analyzing the targeting of Latina/os for segregation in Arizona ostensibly on the basis of their language abilities); 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 with harsher employer sanctions provisions than under federal law, but lacking anti-discrimination measures that exist under federal law); *see also* Sofia D. Martos, Note, *Coded Codes: Discriminatory Intent, Modern Political Mobilization, and Local Immigration Ordinances*, 85 N.Y.U. L. REV. 2099 (2010) (offering Equal Protection analysis of how local immigration ordinances constitute unlawful racial discrimination)..

86. *See* Kevin R. Johnson, *Some Thoughts on the Future of Latino Legal Scholarship*, 2 HARV. LATINO L. REV. 101, 117-29 (1997) (analyzing the stereotype of Latina/os, including U.S. citizens, as "foreigners" who refuse to assimilate into American society). *See generally* STEVEN W. BENDER, GREASERS AND GRINGOS: LATINOS, LAW AND THE AMERICAN IMAGINATION (2005) (analyzing critically stereotypes of Latina/os in U.S. popular culture).

race as a proxy for immigration status.[87] This in no small part is because of the racial demographics of the modern stream of immigrants, including undocumented immigrants to the United States—a majority of whom are Latina/o.

The district court in *United States v. Arizona* failed to directly address the harshest criticisms of S.B. 1070, namely, that the law might well have resulted in widespread racial profiling of Latina/os.[88] This failure resulted from the nature of the U.S. government's relatively narrow challenge to the law.[89]

The defenses to claims that the Arizona law would result in racial discrimination, exemplify the central role of color-blindness as a tool employed by restrictionists in the modern debate over immigration. Defenders of S.B. 1070 aggressively claim that the law does not encourage racial discrimination. To support that claim, they assert that racial profiling violates the law.[90] That contention, however, is not entirely true in the realm of immigration enforcement.

The Arizona law, as drafted, permits the consideration of race in its enforcement to the extent permitted by the U.S. Constitution,[91] which, as interpreted by the Supreme Court, sanctions the consideration of race as a relevant factor in immigration enforcement. In 1975, the Court expressly stated that "Mexican appearance"—whatever that phrase precisely means—may be one of many factors considered by border enforcement officers in making an immigration stop consistent with the Fourth Amendment's prohibition of unreasonable searches and seizures.[92] The Arizona Supreme Court later agreed with this assessment.[93] Given that judicial endorsement, it should not be surprising that law enforcement authorities have regularly been charged

87. *See supra* text accompanying notes 4-8 (mentioning concept of discrimination by proxy). Similarly, Arizona previously saw a racially-polarized debate over an English-only law passed by the voters that had negative consequences on Latina/os. *See* Cristina M. Rodríguez, *Language Diversity in the Workplace*, 100 NW. U. L. REV. 1689, 1742 (2006); Juan Carlos Linares, *Si Se Puede? Chicago Latinos Speak on Law, the Law School Experience and the Need for an Increased Latino Bar*, 2 DEPAUL J. SOC. JUST. 321, 334-35 (2009).

88. *See* Randal C. Archibold, *Pre-emption, Not Profiling, in Challenge to Arizona*, N.Y. TIMES, July 8, 2010, at A15 (noting that U.S. government was not expressly challenging S.B. 1070 on racial profiling grounds).

89. *See supra* text accompanying notes 80-81.

90. *See* Chin & Johnson, *supra* note 83.

91. *See* S.B. 1070, *supra* note 57, at § 2(H) (providing that Section 2 "shall be implemented in a manner *consistent with federal laws regulating immigration*, protecting the civil rights of all persons and respecting the privileges and immunities of United States citizens.") (emphasis added).

92. *See* United States v. Brignoni-Ponce, 422 U.S. 873, 885-87 (1975). *See generally* Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land:* United States v. Brignoni-Ponce *and* Whren v. United States *and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005 (2010) (analyzing how Supreme Court decisions effectively sanction racial profiling in both criminal law enforcement and immigration law enforcement).

The U.S. Court of Appeals for the Ninth Circuit, whose geographic jurisdiction includes the state of Arizona, held that Latina/o appearance could not be considered by border enforcement officers in the U.S./Mexico border region. *See* United States v. Montero-Camargo, 208 F.3d 1122, 1128-35 (9th Cir. 2000) (en banc); *see also* Johnson, *supra*, at 1033-35 (analyzing *Montero-Camargo*). In other circuits, the courts regularly state in a conclusory manner that racial and ethnic appearance can be one factor in an immigration stop. *See, e.g.*, United States v. Hernandez-Moya, 353 Fed. Appx. 930, 934 (5th Cir. 2009) (per curiam) ("The Supreme Court has held that ethnic appearance may be considered as one of the relevant factors in supporting a reasonable suspicion that a vehicle is involved in the transportation of illegal aliens."); United States v. Bautista-Silva, 567 F.3d 1266, 1270 (11th Cir. 2009) (ruling that reasonable suspicion justifying a stop existed based on seven factors, including that "the driver and all five passengers were Hispanic adult males"); *see also* Barrera v. U.S. Dep't of Homeland Sec., Civ. No. 07-3879 (JNE/SRN), 2009 WL 825787, *5 (D. Minn. Mar. 27, 2009) (stating that "race may be properly considered by an official in making the determination to stop an individual to inquire about his immigration status.").

93. *See* Arizona v. Graciano, 653 P.2d 683, 687 n.7 (1982).

with engaging in a pattern and practice of racial profiling, with "Mexican" or "Latino" appearance as the touchstone, in immigration enforcement.[94]

Consequently, racial profiling is likely to be exacerbated if state and local law enforcement officers are permitted to enforce the U.S. immigration laws. The risks are especially great if law enforcement is not adequately trained in the notorious complexities of U.S. immigration law and its enforcement.[95]

3) Another Color-Blind Defense: S.B. 1070 Simply "Mirrors" Federal Law

Another defense offered by supporters of S.B. 1070 is that the law simply "mirrors" federal law, and therefore cannot be unconstitutional.[96] As the district court found in *United States v. Arizona*,[97] however, the Arizona law criminalizes conduct related to immigration that is *not* criminalized by federal law, thus on its face going beyond—not simply mirroring—federal law.

Arizona's S.B. 1070 also would extend state and local government's enforcement authority over the U.S. immigration laws and *mandate* that police exercise it,[98] another major enforcement-oriented change wrought by the Arizona law. It is true that concurrent enforcement of federal law by state and federal authorities is ordinarily permitted. Immigration regulation in the modern era has, however, been viewed as exclusively a federal power.[99] State and local enforcement must be done consistent with federal law, federal enforcement priorities, and with appropriate federal oversight.[100]

To the extent that parts of the Arizona law in fact mirror federal law, the state law builds on existing U.S. immigration laws, which are replete with racial and class impacts resulting from facially neutral language.[101] Even though such impacts may not serve as the basis for challenging the law, they help us gain a better understanding of the vehemence of the reactions of many Latina/os to S.B. 1070.

4) Conclusion

Before the Arizona legislature intervened, immigration reform and immigration, after

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94. *See generally* Kevin R. Johnson, *The Case Against Race Profiling in Immigration Enforcement*, 78 WASH. U. L.Q. 675, 697-702 (2000) (reviewing consistent claims of racial profiling of Latina/os in immigration enforcement).

95. *See* Castro-O'Ryan v. INS, 847 F.2d 1307, 1312 (9th Cir. 1988) ("With only a small degree of hyperbole, the immigration laws have been termed 'second only to the Internal Revenue Code in complexity.'") (citation omitted); *see also* Lok v. INS, 548 F.2d 37, 38 (2d Cir. 1977) (stating that U.S. immigration laws resemble "King Minos's labyrinth in ancient Crete").

96. *See* Leslie Berestein, *Arizona Law Passes Constitutional Test, Professors Say*, SAN DIEGO UNION-TRIB., May 14, 2010, at B3 (discussing claim of one of the drafters of S.B. 1070 that the state law simply mirrored federal law).

97. *See* United States v. Arizona, 703 F. Supp. 2d at 1000. For analysis of the complexities arising when states seek to criminalize violations of federal immigration law, see Gabriel J. Chin & Marc L. Miller, Cracked Mirror: SB 1070 and Other State Regulation of Immigration through Criminal Law (July 2010, revised Oct. 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1648685.

98. *See* S.B. 1070, *supra* note 57, § 2(B).

99. *See supra* text accompanying notes 32-34.

100. For example, pursuant to agreements authorized by INA § 287(g), state and local law enforcement officers agree to federal training to assist them in assisting the federal government in enforcing the U.S. immigration laws. *See supra* text accompanying notes 51-52.

101. *See generally* Johnson, *supra* note 26 (analyzing racial and class impacts of the operation of the facially neutral U.S. immigration laws).

hitting a highwater mark of public awareness with mass marches in cities across the United States in spring 2006,[102] had receded somewhat in the national consciousness. If nothing else, S.B. 1070 returned immigration to the front pages of newspapers across the country and around the world. After the Arizona legislature passed the law, for example, opponents made impassioned pleas for economic boycotts of the state.[103] The law also renewed the heated national debate over immigration.

Like it or not, Arizona's S.B. 1070 reflected the widespread public concern with undocumented immigration and perceived deficiencies in immigration enforcement in the United States. Nonetheless, this Article contends that the proper response to concern with enforcement is not through state and local efforts to regulate immigration. Rather, it is best handled by Congress on a national level through a uniform, comprehensive system of immigration rules and regulations.[104] National problems must be addressed at the national level, not by piecemeal attempts by state and local governments.

Put differently, Congress could calm immigration tensions in states and localities across the United States through passing meaningful immigration reform that addresses the true causes of the undocumented migration of workers, that is, the availability of jobs in this country,[105] and by directly assisting state and local governments with the costs of immigration.[106] Absent a clear declaration by the Supreme Court about the role of state and local governments in immigration regulation or Congressional enactment of some kind of meaningful comprehensive immigration reform, the proliferation of state and local immigration laws will likely continue. Given the broad public concern, politicians have much to gain politically through promoting and defending such laws.

In sum, state and local laws seeking to regulate immigration and the activities of immigrants have been on the rise over the last decade. They disparately impact Latina/o immigrants as well as U.S. citizens. The United States likely will continue to see the enactment of such laws so long as state and local governments are permitted to operate in the realm of immigration, and Congress fails to enact comprehensive immigration reform.

B) The Rise, Fall, Rise, and Fall of Comprehensive Immigration Reform

The U.S. Congress has spent a good amount of time during the first decade of the 21st century debating immigration reform. Initially, after the tragic events of September 11, 2001, a flurry of legislative activity resulting in the passage of two acts of Congress that significantly tightened the U.S. immigration laws in the name of the national security.[107] In addition, around the same time, a myriad of immigration-related steps

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102. *See infra* text accompanying notes 110-13.

103. *See, e.g.*, Russ Britt, *Nationwide Boycotts Are Hurting Arizona's Hospitality Business*, ST. PAUL PIONEER PRESS (Minnesota), June 6, 2010, at S1.

104. *See supra* text accompanying notes 25-55.

105. *See infra* text accompanying notes 145-52.

106. *See* JOHNSON, *supra* note 31, at 152-54.

107. *See* REAL ID Act of 2005, Division B of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 109 Pub. L. No. 12, 119 Stat. 231 (2005); Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

were taken by the U.S. government in the name of the "war on terror," many of which were harshly criticized for their negative civil rights consequences.[108]

Right or wrong, in the wake of September 11, immigration politics came to be dominated by national security concerns. Consequently, the debate over immigration reform and border security quickly morphed into a debate about national security.[109] Ultimately, the security measures directed at noncitizens had dramatic impacts on—including record levels of deportations of—noncitizens from Mexico and Central America, almost all of whom had nothing whatsoever to do with terrorism.[110]

A few years after September 11, Congress considered immigration reform legislation that went beyond a narrow focus of national security. In December 2005, the House of Representatives passed the Sensenbrenner Bill, replete with enforcement-oriented provisions such as the mere status of being undocumented. The harshness of the bill resulted in unprecedented (unprecedented because they were decidedly pro-immigrant) mass marches of tens of thousands of people in cities across the United States in support of nothing less than justice for undocumented immigrants.[111] Responding in part to the marchers' demand for justice, the Senate subsequently passed a more balanced immigration reform bill that included a legalization program; however, Congress ultimately failed to enact this, or any meaningful reform bill, into law.[112]

Despite the incredible flurry of activity, the end result was that in 2006, Congress could only agree to authorize an extension of the fence along the U.S./Mexico border.[113] The extension was ultimately little more than a symbolic gesture at immigration reform, and one that few would contend has directly resulted in a decline in the undocumented population in the United States.[114]

With the election of President Obama in 2008, some immigrant rights advocates expressed optimism about the possibility that Congress might pass comprehensive immigration reform. Besides the fact that the administration expressed support for immigration reform, Barack Obama as a U.S. Senator had demonstrated consistent support for a number of immigrant causes. In the face of strong criticism, he advocated

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108. *See* Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURVEY AM. L. 295 (2001-2003); Sameer M. Ashar, *Immigration Enforcement and Subordination: The Consequences of Racial Profiling After September 11*, 34 CONN. L. REV. 1185 (2002); David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953 (2002); Thomas W. Joo, *Presumed Disloyal: Executive Power, Judicial Deference, and the Construction of Race Before and After September 11*, 34 COLUM. HUM. RTS. L. REV. 1 (2002); Victor C. Romero, *Decoupling "Terrorist" From "Immigrant:" An Enhanced Role for the Federal Courts Post 9/11*, 7 J. GENDER RACE & JUST. 201 (2003); Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575 (2002).

109. *See* Kevin R. Johnson & Bernard Trujillo, *Immigration Reform, National Security After September 11, and the Future of North American Integration*, 91 MINN. L. REV. 1369, 1376-1404 (2007).

110. *See* Kevin R. Johnson, *September 11 and Mexican Immigrants: Collateral Damages Comes Home*, 52 DEPAUL L. REV. 849 (2003); Steven W. Bender, *Sight, Sound, and Stereotype: The War on Terrorism and Its Consequences for Latinas/os*, 81 OR. L. REV. 1153 (2002); Nora V. Demleitner, *Misguided Prevention: The War on Terrorism as a War on Immigrant Offenders and Immigration Violators*, 40 No. 6 CRIM. L. BULL. 550 (2004).

111. *See* Kevin R. Johnson & Bill Ong Hing, *The Immigrant Rights Marches of 2006 and the Prospects for a New Civil Rights Movement*, 42 HARV. C.R.-C.L. L. REV. 99 (2007); Sylvia R. Lazos Vargas, *The Immigrant Rights Marches (Las Marchas): Did the"Gigante" (Giant) Wake Up or Does It Still Sleep Tonight?*, 7 NEV. L.J. 780 (2007).

112. *See* Johnson & Hing, *supra* note 110, at 103-04. The inability of Latina/os to be able to secure passage of immigration reform in part results from the fact that a significant number of Latina/os are not U.S. citizens and therefore cannot vote. *See* Kevin R. Johnson, *A Handicapped. Not "Sleeping," Giant: The Devastating Impact of the Initiative Process on Latina/o and Immigrant Communities*, 96 CAL. L. REV. 1259 (2008).

113. *See* Secure Fence Act of 2006, Pub. L. No. 109-367, 120 Stat. 2638 (2006).

114. *See infra* text accompanying note 159-85.

for driver's license eligibility for undocumented immigrants during the presidential campaign.[115] He also consistently advocated for passage of some version of the DREAM (Development, Relief, and Education for Alien Minors) Act,[116] which would provide a way for undocumented college students to, among other things, regularize their immigration status.

The initial optimism about the possibility for meaningful immigration reform during the Obama administration, however, has dimmed in light of the administration's initial steps on immigration, which have focused almost exclusively on increased enforcement. As discussed in Part II of this Article, disparate negative impacts on Latina/os—including but not limited to deaths on the border, increases in human trafficking, racial profiling and other civil rights deprivations—result from increased border enforcement.

President Obama's first major step affecting immigration was to appoint Janet Napolitano, the former Governor of Arizona, to head the U.S. Department of Homeland Security. With respect to immigration, she has made enforcement a top priority, with the promise of future positive improvements for immigrants if Congress passes immigration reform.[117] After the passage of S.B. 1070 in the spring of 2010, the Obama administration attempted to calm tensions in Arizona by deploying more than a thousand National Guard troops to the U.S./Mexico border region.[118]

Some lawmakers, particularly Latina/o members of Congress,[119] continue to advocate for comprehensive immigration reform. In early 2010, two proposals were floated in the U.S. Congress, one in the House and one in the Senate.[120] In the summer of 2010, President Obama made a major speech calling for Congress to pass comprehensive immigration reform.[121] The fall 2010 midterm elections, however, cooled interest in Congress for immigration reform, as it remained deeply controversial among the public at large.

Despite the stalling of immigration reform, it continues to be an especially important issue to many Latina/os, who turned out in record numbers for President Obama in the 2008 election. The current "broken" immigration system[122] has a direct and palpable

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115. *See* Patricia Smith, *Who's* [sic] *Side Are You On? Here's Where John McCain and Barack Obama Stand on 10 Key Issues: Who Would You Vote For?*, N.Y. TIMES UPFRONT, Nov. 3, 2008, at 8(7).

116. *See* Tyche Hendricks, *McCain, Obama Avoiding Fray on Immigration*, S.F. CHRON., Oct. 13, 2008, at A1. For analysis of the political debate over the DREAM Act, see Michael A. Olivas, *The Political Economy of the DREAM Act and the Legislative Process: A Case Study of Comprehensive Immigration Reform*, 56 WAYNE L. REV. 1757 (2009); Michael A. Olivas, *IIRIRA, The DREAM Act, and Undocumented College Student Residency*, 30 J.C. & U.L. 435, 452-56 (2004). After a flurry of political activity, a version of the DREAM Act failed to come up for a vote in the Senate at the end of 2010. *See* Lisa Mascaro & Michael Muskal, *DREAM Act Fails to Advance in Senate,* L.A. TIMES, Dec. 18, 2010.

117. *See* Kevin R. Johnson, *Ten Guiding Principles for Truly Comprehensive Immigration Reform: A Blueprint*, 55 WAYNE L. REV. 1599, 1608 (2009).

118. *See* Michael D. Shear, *National Guard Will Bolster Mexico Border; Obama to Deploy 1,200 Troops in Volatile Area*, BOSTON GLOBE, May 26, 2010, at 11. For an analysis of the administration's immigration and civil rights agenda in the initial years of the Obama Presidency, see Cristina M. Rodriguez, *The Early Obama Administration: Immigration and the Civil Rights Agenda*, 6 STAN. J. C.R.-C.L. 125 (2010).

119. *See, e.g.*, *Rep. Gutierrez: "Immigration Reform Still Possible This Year,"* CONG. DOCS. AND PUBS., July 14, 2010.

120. *See* Gary Martin, *Obama Makes His Case for Immigration Reform*, HOUS. CHRON., July 2, 2010, at A1; *Remarks by the President on Comprehensive Immigration Reform*, WHITE HOUSE, OFFICE OF THE PRESS SECRETARY, July 1, 2010, *available at* http://www.whitehouse.gov/the-press-office/remarks-president-comprehensive-immigration-reform.

121. *See id.*

122. *See supra* text accompanying notes 12-16.

impact on the greater Latina/o community, including many U.S. citizens of Latina/o descent.[123] More generally, immigration law and enforcement is viewed by many Latina/os and U.S. citizens as a central civil rights issue, touching on deeply important issues of race and class, as well as full membership in U.S. society.[124]

In the face of disparate racial consequences due to the failure of comprehensive immigration reform, opponents of comprehensive immigration reform frequently employ as justification for their positions, the claim of color-blindness and an expressed desire to simply enforce existing U.S. immigration laws.[125] We saw the same general phenomenon with respect to the disparate racial impacts of S.B. 1070, which some commentators had claimed (not entirely accurately, in my estimation), simply sought to enforce the U.S. immigration laws.[126]

This Article contends that color-blindness is an effective rhetorical tool for restrictionists and others to legitimately pursue racial ends, namely to limit immigration from Mexico, as well as Latin America, Asia, and Africa more generally.[127] Even if one disagrees with the claim that supporters possess any discriminatory intent, it is clear that the immigration measures pursued by restrictionists have disparate impacts on people of color. To deny that fact by claiming not to be racist but to simply want to enforce existing law, fails to respond to the legitimate concerns of those communities directly affected by the disparate racial impacts.

II. THE RACIALLY DISPARATE IMPACTS OF THE FAILURE OF COMPREHENSIVE REFORM

Many of the so-called comprehensive immigration reform proposals that have been made in Congress in recent years include three basic components.[128] The first calls for increased immigration enforcement, which in many quarters is the least controversial.[129] Second, many comprehensive immigration reform proposals provide for a guest worker program and other incremental changes to the laws that would help to address U.S. labor needs, although most of them in my estimation, do not go far enough to truly bring U.S. immigration laws into line with those labor needs.[130] Third, comprehensive immigration reform generally includes some kind of path to earned legalization for millions of undocumented immigrants who satisfy certain requirements, such as learning English and paying a fine and any back-taxes; this component of reform is, by far, the most politically controversial.[131]

In operation, each of these components of comprehensive immigration reform would have disparate benefits for the greater Latina/o community. In turn, there are direct losses to Latina/os resulting from the failure of Congress to pass comprehensive

123. *See* Aoki & Johnson, *supra* note 21.
124. *See* Johnson, *supra* note 26.
125. *See supra* text accompanying notes 4-8.
126. *See supra* text accompanying notes 95-100.
127. *See supra* text accompanying notes 4-8.
128. *See supra* note 13 (citing authorities analyzing various comprehensive immigration reform proposals).
129. *See* Johnson, *supra* note 116, at 1608.
130. See Johnson, *supra* note 26, at 13-15. *See generally* JOHNSON, *supra* note 31 (advocating more liberalized U.S. immigration law).
131. *See infra* text accompanying notes 131-44.

immigration reform and maintenance of the immigration status quo. There are some indirect, yet tangible, harms to Latina/os as well.

This Part of the Article highlights some of the most obvious direct and indirect injuries to Latina/os, resulting from the congressional failure to enact comprehensive immigration reform.

A. The Clear Losses for Latina/os if Comprehensive Immigration Reform is Not Enacted.

This section of the Article identifies some direct harms that would result from the failure of Congress to enact comprehensive immigration reform. Despite the fervent denial that the aggressive efforts to halt reform are not based on the race of the people who would be affected, the harms caused by the continuation of the status quo due to the failure of reform will fall disproportionately on people of color, especially Latina/os.

1) The Maintenance of a Racial Caste of Undocumented Immigrants

Often denigrated and de-legitimized by its opponents as an unjust "amnesty" for law-breakers and criminals, any proposal to regularize the status of undocumented immigrants has encountered stiff, and deeply emotional, political opposition.[132] Much of that opposition is legalistic and moralistic in tone.[133] It often tries to minimize or ignore the disparate racial impacts from the failure to reform the U.S. immigration laws.

In the face of the vehement resistance to any sort of "amnesty," strong arguments have been made for earned legalization of certain categories of undocumented immigrants.[134] Indeed, for many immigrant advocates, a legalization program for long-term residents is a necessary ingredient of comprehensive immigration reform. Nor would an amnesty for undocumented immigrants be unprecedented in American history. Indeed, an amnesty was a critical component of the last major piece of comprehensive immigration reform legislation passed by Congress, the Immigration Reform and Control Act of 1986 (IRCA), signed into law by President Ronald Reagan, a conservative Republican icon.[135]

The adoption of an earned legalization program, with possible requirements including payment of a fine and any back-taxes, as well as learning English, would bring

132. *See* Bryn Siegel, Note, *The Political Discourse of Amnesty in Immigration Policy*, 41 AKRON L. REV. 291 (2008).

133. *See supra* text accompanying note & note 131. To the best of my knowledge, tax, parking ticket, or gun "amnesties" have generally failed to provoke similar outrage among large segments of the public.

134. *See, e.g.*, Richard Boswell, *Crafting an Amnesty with Traditional Tools: Registration and Cancellation*, 47 HARV. J. ON LEGIS. 175 (2010); Hiroshi Motomura, *What Is "Comprehensive Immigration Reform"?: Taking the Long View*, 63 ARK. L. REV. 225 (2010).

135. *See infra* text accompanying notes 163-64.

millions of undocumented immigrants in from life in the "shadows"[136] of American social life. Conversely, failure to adopt a legalization program will ensure that the undocumented will continue their lives at the margin.

Without legalization, for example, undocumented workers will continue to be denied the fundamental protections available to other workers under federal labor laws[137] and will be subject to ongoing exploitation in the workplace.[138] Their daily lives will also continue to be marked by the lingering fear of removal from the country, and separated from jobs, family and friends, for something as mundane and inconsequential to most Americans as being pulled over for a broken tail-light.[139]

It was estimated that, as of March 2008, approximately 11.9 million undocumented immigrants lived in the United States.[140] This number appears to have declined somewhat in the last two years because of the sharp downturn in the American

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136. President George W. Bush, Remarks by the President on Immigration Policy (Jan. 7, 2004) (transcript), *available at* http://www.nationalimmigrationreform.org/proposed/Bush/010704address (observing that undocumented immigrants "seek only to earn a living end up in the shadows of American life—fearful, often abused and exploited."); *see* GABRIEL THOMPSON, WORKING IN THE SHADOWS: A YEAR OF DOING THE JOBS (MOST) AMERICANS WON'T DO (2010) (offering first-hand account by journalist working with undocumented immigrants in various low wage jobs across the United States).

Some might object to the requirement of learning English for legalization on the ground that it constitutes a form of forced assimilation that frequently has been imposed on persons of Mexican ancestry in the United States. *See generally* Kevin R. Johnson, *"Melting Pot" or "Ring of Fire"?: Assimilation and the Mexican-American Experience*, 85 CAL. L. REV. 1259 (1997) (analyzing the historical demand for assimilation placed on persons of Mexican ancestry in the United States).

137. *See, e.g.*, Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 140, 151 (2002) (holding that undocumented workers were not entitled under federal labor law to the remedy of backpay for employer's violation of their rights to organize). For criticism, see generally Christopher David Ruiz Cameron, *Borderline Decisions*: Hoffman Plastic Compounds, *The New Bracero Program, and the Supreme Court's Role in Making Federal Labor Policy*, 51 UCLA L. REV. 1 (2003); Robert I. Correales, *Did* Hoffman Plastic Compounds, Inc., *Produce Disposable Workers?*, 14 BERKELEY LA RAZA L.J. 103 (2003); *Developments in the Law—Jobs and Borders*, 118 HARV. L. REV. 2171, 2224-41 (2005); *see also* Ruben J. Garcia, *Ghost Workers in an Interconnected World: Going Beyond the Dichotomies of Domestic Immigration and Labor Laws*, 36 U. MICH. J. L. REFORM 737, 738 (2003) ("[T]he immigrant workers' movement suffered another severe and shocking setback when the U.S. Supreme Court decided Hoffman Plastic Compounds, Inc. v. NLRB in March 2002."); Lori A. Nessel, *Undocumented Immigrants in the Workplace: The Fallacy of Labor Protection and the Need for Reform*, 36 HARV. C. R.-C. L. L. REV 345 (2001) (analyzing lack of labor protections for undocumented workers).

138. *See infra* text accompanying notes 194-96.

139. Undocumented immigrants are not eligible for driver's licenses in almost all states. *See* Kevin R. Johnson, *Driver's Licenses and Undocumented Immigrants: The Future of Civil Rights Law?*, 5 NEV. L.J. 213, 215 (2004) ("The ability to obtain a driver's license has civil rights implications for undocumented Mexican immigrants.") (citation omitted); Maria Pabon Lopez, *More Than a License to Drive: State Restrictions on the Use of Driver's Licenses by Noncitizens*, 29 S. ILL. U. L.J. 91, 92-93 (2004) (observing that obtaining a driver's license has "become a battleground in our country's debate regarding immigration policy"); *see also* Sylvia R. Lazos Vargas, *Missouri, the "War on Terrorism," and Immigrants: Legal Challenges Post 9/11*, 67 MO. L. REV. 775, 798-807 (2002) (analyzing controversy over driver's license eligibility for undocumented immigrants in Missouri); Raquel Aldana & Sylvia R. Lazos Vargas, *"Aliens" in Our Midst Post-9/11: Legislating Outsiderness within the Borders*, 38 U.C. DAVIS L. REV. 1683, 1711-22 (2005) (reviewing BILL ONG HING, DEFINING AMERICA THROUGH IMMIGRATION POLICY (2003); JOHNSON, *supra* note 23; and VICTOR C. ROMERO, ALIENATED: IMMIGRANT RIGHTS, THE CONSTITUTION, AND EQUALITY IN AMERICA (2004)) (analyzing the deeper implications of the driver's license controversy and the federal government's response to the controversy over driver's licenses in the states). Undocumented drivers therefore risk arrest—possibly even removal—if they are pulled over by police for a minor traffic violation.

140. *See* JEFFREY S. PASSEL & D'VERA COHN, PEW HISPANIC CENTER, A PORTRAIT OF UNAUTHORIZED MIGRANTS IN THE UNITED STATES (Apr. 14, 2009), *available at* http://pewresearch.org/pubs/1190/portrait-unauthorized-immigrants-states.

economy.[141] What appears to have remained roughly constant is that approximately 60% of all undocumented immigrants originate from Mexico.[142]

The statistics suggest that a legalization program would benefit many Mexican immigrants, as well as their lawful immigrant and U.S. citizen family members.[143] In turn, by continuing to deny legal immigration status to undocumented immigrants, maintaining the status quo would disparately affect Latina/os. Consequently, the failure of Congress to enact immigration reform containing an earned legalization program would disproportionately harm Latina/os.

Despite its benefits to undocumented immigrants, legalization, as with the IRCA amnesty, ultimately is little more than a short-term fix for the needs of a significant portion of the current undocumented population. However, as we learned from the 1986 reforms,[144] only broader reform that addresses the labor causes of migration will avoid the possibility of the future emergence of a new undocumented population after the current population is legalized. A long-term solution to undocumented immigration requires an overhaul of the rules for legal immigration, so as to reduce the incentives for noncitizens to violate the law to come to the United States for jobs.[145]

2) The Failure to Adjust the U.S. Immigration Laws to Meet U.S. Labor Needs (and Maintenance of the Incentives for Undocumented Immigration).

The U.S. immigration laws have been described as failing to account for the labor needs of the nation, which has contributed to a continuous flow of undocumented immigrants to this country from the developing world during the tail-end of the twentieth century.[146] At a most fundamental level, many, probably most, undocumented immigrants come to the United States to work,[147] and not to access the public benefit system, commit crime, or to have "anchor babies"[148]—just a few of the charges frequently leveled against them.

Without comprehensive immigration reform, there will be no guest worker program or any more significant, and much-needed, overhaul to the labor migration provisions of the U.S. immigration laws.[149] Without reform, the disconnect between the nation's labor needs and immigration laws will continue to disproportionately affect people of color from the developing world, especially Mexico and Latin America, who will continue to

141. The undocumented population appears to have declined to an estimated 11.1 million by March 2009. *See* JEFFREY PASEL & D'VERA COHN, U.S. UNAUTHORIZED IMMIGRATION FLOWS ARE DOWN SHARPLY SINCE MID-DECADE (Sept 1, 2010), *available at* http://pewhispanic.org/reports/report.php?ReportID=126.

142. *See supra* notes 139-40 (citing authorities).

143. *See infra* text accompanying note & note 171 (discussing prevalence of mixed immigration status families among Latina/os in the United States).

144. *See infra* text accompanying notes 163-71.

145. *See* Johnson, *supra* note 26, at 13-15.

146. *See id*.

147. *See id.*

148. *See supra* note 61 (analyzing pejorative "anchor baby" terminology)..

149. *See supra* text accompanying notes 143-44; *see also* BILL ONG HING, ETHICAL BORDERS: NAFTA, GLOBALIZATION, AND MEXICAN IMMIGRATION (2010) (analyzing the impacts of labor flows to the United States from Mexico created by the North American Free Trade Agreement and offering recommendations on steps to reduce those flows and gain control of labor migration from Mexico).

lack an avenue for legal immigration to the United States and will continue to have the incentive to come to, and remain in, this country in violation of the law.[150]

Without reform, we can expect undocumented workers, a majority of them Latina/o, to continue to be exploited in the workplace.[151] Despite being subject to exploitation, these workers will continue to have limited access to remedies under the law to ensure the enforcement of labor protections. Thus, employers will continue to have access to exploitable, and readily disposable, labor.

The truth be told, the incremental changes to the labor provisions in many of the current immigration reform proposals on the table would not fully address the current incentives for undocumented immigration in the U.S. immigration laws. Only major revisions to the law that ease the barriers to migration of low and medium-skilled workers to the United States would reduce the growth of a new undocumented population of low and medium-skilled workers if the current one were legalized.[152] Incremental revisions may be better than nothing, however, and may decrease the current pressures resulting in the current levels of undocumented immigration to this country.

Given that currently 60 percent of the undocumented population is of Mexican origin— almost all of whom have no lawful means for migrating to the United States[153]—it appears that a liberalization of the labor migration provisions in the U.S. immigration laws would disproportionately benefit people of color who want to come to the United States lawfully to work. In turn, a failure of reform of the current labor migration provisions would continue to disparately harm Latina/o immigrant workers and ensure their continued exploitation in the American workplace.

3) More Enforcement with Disparate Impacts on Latina/os

For reasons discussed in the next section of the Article,[154] it is likely that any increased immigration enforcement—with many enforcement-oriented measures having already come without the passage of comprehensive immigration reform[155]—will disparately impact Latina/os. This substantial cost to Latina/os warrants discussion in any proposal calling for increased immigration enforcement.

Specifically, removals and border apprehensions tend to fall squarely on Latina/os; other heightened enforcement efforts are likely to do so as well.[156] Thousands of Mexican citizens have died along the U.S./Mexico border due to increased enforcement efforts put into place by the U.S. government over the last twenty years.[157] Increased border enforcement efforts are likely to result in more deaths.

Moreover, as we have seen, the facially neutral immigration laws, under the guise of color-blindness,[158] have contributed to the creation of segmented labor markets with a racial caste quality; many undocumented Latina/o immigrants labor in the lowest paying

150. *See* Johnson, *supra* note 26, at 13-15.
151. *See infra* text accompanying notes 194-96.
152. *See* Johnson, *supra* note 26, at 13-15.
153. *See supra* text accompanying notes 143-44.
154. *See infra* text accompanying notes 159-223.
155. *See supra* text accompanying notes 116-17.
156. *See* Johnson, *supra* note 116, at 1608.
157. *See infra* text accompanying notes 186-89.
158. *See supra* text accompanying notes 3-8.

jobs and working under the most difficult conditions.[159] Absent meaningful changes to the current immigration laws, increased enforcement is likely to perpetuate the exploitation of undocumented immigrants, disproportionately harming Latina/o immigrant workers.

B. Collateral, But Not Inconsequential, Impacts of the Failure of Comprehensive Immigration Reform: The Human Costs of Continued and Increased Enforcement

Increased immigration enforcement, with the hope of convincing some members of Congress to support more far-reaching reform, is part of virtually any of the current proposed comprehensive immigration reform proposals. The kind of enforcement measures recently on the table run the gamut from biometric Social Security cards for better verification of employment eligibility to increasing the number of U.S. Immigration & Customs Enforcement officers.[160] There also are continued calls for extending the fence along the U.S./Mexico border, and increased detentions and deportations. Indeed, enhanced enforcement measures that appear to "secure the borders" and "enforce the law" are among the most politically popular feature of almost any multi-faceted immigration reform proposal.[161]

Along these lines, some have argued that the nation must establish that immigration enforcement is effective before Congress even considers enacting any immigration reforms that might benefit immigrants, such as earned legalization or a guest worker program.[162] Such a ploy might in effect operate as a poison pill, indefinitely delaying passage of comprehensive immigration reform.

Even without comprehensive immigration reform, the nation has seen increased enforcement activity in both the waning years of the Bush administration and the early years of the Obama administration.[163] Both Presidents presumably believed that increased enforcement would make other components of reform more politically palatable to members of Congress and the general public.

In evaluating future enforcement measures, it is only appropriate that we consider the effectiveness of increased enforcement since 1986, when Congress passed the last major piece of legislation that might be characterized as comprehensive immigration reform. The Immigration Reform and Control Act of 1986[164] was a package that included enhanced enforcement measures (including provisions allowing for the imposition of civil sanctions on the employers of undocumented workers), amnesty for undocumented

159. *See infra* text accompanying notes 194-96.

160. *See* Charles E. Schumer & Lindsey O. Graham, *The Right Way to Mend Immigration*, WASH. POST, Mar. 19, 2010, at A23, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/03/17/AR2010031703115.html (making both of these suggestions in outlining a comprehensive immigration reform proposal). In August 2010, the Senate passed a bill that would increase appropriations for border security. *See* Lisa Mascaro, *Border Buildup Sent to Obama; Backers Hope Move Paves Way for Full Overhaul*, CHI. TRIB., Aug. 13, 2010, at C12.

161. *See supra* text accompanying notes 127-30.

162. *See supra* text accompanying notes 131-44.

163. *See supra* text accompanying notes 116-17.

164. Pub. L. No. 99-603, 100 Stat. 3359 (1986).

immigrants, and guest worker programs.[165] A series of pieces of enforcement-oriented legislation and related measures followed that major reform.[166] This legislation criminalized the violation of the U.S. immigration laws and facilitated increased—indeed record—removals of "criminal aliens."[167] Deportations of noncitizens from the United States have been hitting record levels for a number of years.

Fiscal Year	Number of Removals	Undocumented Population
2008	358,886[168]	11.9 million[169]
1990	30,039[170]	5 million[171]

As the data shows, the U.S. government has dramatically increased the number of removals of noncitizens by more than tenfold in less than 20 years. Over the same time period, the undocumented population has not diminished in size. *In fact, it has roughly doubled.* This is a devastating statistic in evaluating the overall effectiveness of an enforcement-oriented immigration policy.

Based on the dramatic increase in the size of the undocumented population, one can legitimately question how effective increased immigration enforcement efforts, with their

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165. *See* T. ALEXANDER ALEINIKOFF, DAVID A. MARTIN, HIROSHI MOTOMURA, & MARYELLEN FULLERTON, 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); 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.").

166. *See, e.g.*, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996). For a capsule summary of the various immigration reform measures enacted since 1986, see Laurence M. Krutchik, Note, *Down But Not Out: A Comparison of Previous Attempts at Immigration Reform and the Resulting Agency Implemented Changes*, 32 NOVA L. REV. 455 (2008).

167. Both the criminalization of immigration offenses and the dramatic increase in the number of removals of "criminal aliens" have been much discussed in contemporary immigration law scholarship. *See* Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827 (2007); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469 (2007); Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. THIRD WORLD L.J. 81 (2005); Teresa A. Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611 (2003); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006).

168. *See* U.S. DEP'T OF HOMELAND SECURITY, OFFICE OF IMMIGRATION STATISTICS, IMMIGRATION ENFORCEMENT ACTIONS: 2008 (July 2009) (Table 2), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_08.pdf. The data shows that roughly one-half of the noncitizens deported from the country were removed for reasons other than criminal convictions. *See id.*

The Obama administration proceeded to surpass 2008 removals with more record-breaking number of removals. *See Department of Homeland Security, Press Release, Secretary Napolitano Announces Record-breaking Immigration Enforcement Statistics Achieved under the Obama Administration (Oct. 6, 2010), available at* http://www.dhs.gov/ynews/releases/pr_1286389936778.shtm (reporting announcement of "record-breaking immigration enforcement statistics . . . including unprecedented numbers of convicted criminal alien removals and overall alien removals in fiscal year 2010. . . . *In fiscal year 2010, [the U.S. government] set a record for overall removals of illegal aliens, with more than 392,000 removals nationwide.*") (emphasis added).

169. *See* PASSEL & COHN, *supra* note 139.

170. U.S. DEP'T OF HOMELAND SECURITY, YEARBOOK OF IMMIGRATION STATISTICS: 2003 (Table 40) (Aliens expelled: fiscal years 1892-2003), *available at* http://www.dhs.gov/files/statistics/publications/YrBk03En.shtm.

171. In 1997, the U.S. government estimated that 5 million undocumented immigrants resided in the United States as of October 1996. *See* U.S. DEP'T OF JUSTICE, IMMIGRATION & NATURALIZATION SERVICE, ESTIMATES OF THE UNDOCUMENTED POPULATION RESIDING IN THE UNITED STATES: OCTOBER 1996, at 2 (Aug. 1997).

huge fiscal and human costs, have been. Keep in mind that deportations of noncitizens often have devastating impacts on families and children, including many U.S. citizen children who may be effectively deported following the removal from the country of one or both parents.[172] Increased enforcement imposes more human and fiscal costs, but offer few tangible immigration benefits.

Nevertheless, many knowledgeable observers have viewed the immigration policies of the Obama administration as leaning heavily toward the enforcement end of the policy spectrum.[173] While steadily ramping up enforcement, the administration has dangled the promise of comprehensive immigration reform, with the caveat that such reform can only be accomplished once increased enforcement has proven to be effective.[174] The result of the failure to enact comprehensive immigration reform has been rapidly escalating enforcement without any of the benefits of promised reform for immigrants, and their U.S. citizen family members.

Logically, one might ask why there has been an increase in undocumented immigrants despite the dramatic ramp-up in immigration enforcement for more than two decades. Again, the reason is relatively obvious. Migration to the United States in modern times has largely been a labor migration, which has been spurred by the increasing globalization of the world economy, as typified by the North American Free

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172. *See, e.g.*, INTERNATIONAL HUMAN RIGHTS CLINIC—UC BERKELEY, CHIEF JUSTICE EARL WARREN INSTITUTE ON RACE, ETHNICITY AND DIVERSITY—UC BERKELEY, & IMMIGRATION LAW CLINIC – UC DAVIS, IN THE CHILD'S BEST INTEREST?: THE CONSEQUENCES OF LOSING A LAWFUL IMMIGRANT PARENT TO DEPORTATION (Mar. 2010), *available at* http://www.law.ucdavis.edu/news/images/childsbestinterest.pdf; Edith Z. Friedler, *From Extreme Hardship to Extreme Deference: United States Deportation of Its Own Children*, 22 HASTINGS CONST. L.Q. 491 (1995); Bill Piatt, *Born as Second Class Citizens in the U.S.A.: Children of Undocumented Parents*, 63 NOTRE DAME L. REV. 35 (1988). There are many mixed immigration status families—that is, families with members who are U.S. citizens, undocumented immigrants, and lawful immigrants—in the United States. *See* JEFFREY S. PASSEL, SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S. (Pew Hispanic Center, Mar. 7, 2006), *available at* http://pewhispanic.org/reports/report.php?ReportID=61 (stating that a growing number of American families are of mixed immigration status where some family members are citizens while others are undocumented); *see also* Evelyn H. Cruz, *Competent Voices: Noncitizen Defendants and the Right to Know the Immigration Consequences of Pleas Agreements*, 13 HARV. LATINO L. REV. 47, 48 (2010) ("Mixed status families are a fact of life in immigrant communities. Over half of the 16 million Latino children in the United States have at least one immigrant parent.") (footnote omitted).

There has been much scholarship in recent years on the impacts of the U.S. immigration laws on families. *See, e.g.*, Kerry Abrams, *Immigration Law and the Regulation of Marriage*, 91 MINN. L. REV. 1625 (2007); Bridgette A. Carr, *Incorporating a "Best Interests of the Child" Approach Into Immigration Law and Procedure*, 12 YALE HUM. RTS. & DEV. L.J. 120 (2009); Linda Kelly Hill, *The Right to Know Your Rights: Conflict of Interest and the Assistance of Unaccompanied Alien Children*, 14 U.C. DAVIS J. JUV. L. & POL'Y 263 (2010); María Pabón López, *A Tale of Two Systems: Analyzing the Treatment of Noncitizen Families in State Family Law Systems and Under the Immigration Law System*, 11 HARV. LATINO L. REV. 229 (2008); Lori A. Nessel, *Families at Risk: How Errant Enforcement and Restrictionist Integration Policies Threaten the Immigrant Family in the European Union and the United States*, 36 HOFSTRA L. REV. 1271 (2008); David B. Thronson, *Thinking Small: The Need for Big Changes in Immigration Law's Treatment of Children*, 14 U.C. DAVIS J. JUV. L. & POL'Y 239 (2010); David B. Thronson, *Creating Crisis: Immigration Raids and the Destabilization of Immigrant Families*, 43 WAKE FOREST L. REV. 391 (2008); David B. Thronson, *Custody and Contradictions: Exploring Immigration Law as Federal Family Law in the Context of Child Custody*, 59 HASTINGS L.J. 453 (2008).

173. *See supra* text accompanying notes 116-17; Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 56 (2010) (criticizing President Obama because, despite pledging to reform immigration detention, his administration instead has greatly expanded enforcement efforts); Shannon Gleeson, *Labor Rights for All?: The Role of Undocumented Immigrant Status for Worker Claims Making*, 35 LAW & SOC. INQUIRY 561, 562 (2010) (discussing the current commitment of the Obama administration to stricter interior enforcement of the immigration laws); Chacón, *supra* note 52, at 1575 ("In spite of vocal commitment to immigration reform, the Obama administration has continued to engage in record-setting levels of immigration prosecution.").

174. *See* Peter Slevin, *Record Numbers Being Deported; Rise is Part of Obama's Efforts to Remake Immigration Laws*, WASH. POST, July 26, 2010, at A1.

Trade Agreement.[175] Previous immigration reforms have unsuccessfully attempted to address the magnet of jobs. Most significantly, the Immigration Reform and Control Act of 1986[176] imposed civil penalties on the employers of undocumented immigrants; at the time of its passage, employer sanctions had been championed as ending undocumented immigration. As the statistics demonstrate, however, employer sanctions simply have not been particularly successful at deterring the employment of undocumented labor.[177]

Intuitively, we all know this truth to be self-evident; the employment of undocumented workers continues to be commonplace in homes, restaurants, construction, agriculture, and manufacturing.[178] Day laborer pick up points, with many undocumented immigrants in this pool of workers, can be found on street corners in towns and cities across the United States.[179] Put simply, the U.S. economy relies on undocumented labor.

The creation of high-tech systems that would allow for the effective enforcement of employer sanctions appears to be many years away. Years of efforts to create a computer database that accurately verifies the employment eligibility of persons, and which could be utilized to enforce IRCA's prohibition of the employment of undocumented immigrants, have yet to yield one with an error rate (so as not to incorrectly disqualify excessive numbers of lawful workers from employment) sufficiently low to survive legal challenge.[180]

Nor, as high-level governmental officials have readily admitted, does the U.S. government have the resources and commitment necessary to engage in a massive campaign that would cost billions of dollars to remove nearly 11-12 million undocumented immigrants from the country, as well as millions of workers from the U.S. economy.[181] This nation has never seen mass deportations of this scale. Given modern civil rights sensibilities, they simply are not a viable policy alternative.

The proof is in the pudding. Despite record-setting removals, millions of undocumented immigrants today live in the United States.[182] Even with ever-increasing interior enforcement and skyrocketing border enforcement budgets, the undocumented population has more than doubled since the mid-1990s. Enforcement measures,

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175. *See* Johnson, *supra* note 116, at 1610-17. The North American Free Trade Agreement arguably triggered economic changes in Mexico that contributed to increased migration. *See* Chantal Thomas, *Globalization and the Border: Trade, labor, Migration, and Agricultural Production in Mexico*, 41 MCGEORGE L. REV. 867 (2009-10).

176. Pub. L. No. 99-603, 100 Stat. 3359 (1986).

177. For critical analysis of employer sanctions as a means to deter the employment of undocumented immigrants, as well as the negative collateral consequences of sanctions, such as discrimination against U.S. citizens and lawful permanent residents of certain national origins, 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); 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 the enforcement); Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 U. CHI. LEGAL F. 193 (arguing that the employer sanctions regime has achieved neither of its goals of deterring illegal immigration or protecting U.S. labor markets from foreign workers).

178. *See* JOHNSON, *supra* note 31, at 169-70.

179. *See id.* at 174.

180. *See* Aleinikoff, *supra* note 13, at 1313-14 (observing that reform proposals to this point have failed to come up with a reliable way to reduce undocumented migration to the United States).

181. *See* JOHNSON, *supra* note 31, at 183-86.

182. *See supra* text accompanying notes & notes 167-68.

including hundreds of thousands of removals a year and the raiding of workplaces,[183] although causing much human suffering and misery, at most have put a small dent in reducing the size of the undocumented population in the United States.[184]

This bears repeating: record numbers of deportations year after year, the extension of the fence along the U.S./Mexico border, dramatically increased use of detention, the criminalization, along with heightened prosecution, of immigration offenses,[185] and the vastly expanded enforcement efforts over decades, have not significantly reduced undocumented immigration. In fact, they have been accompanied by a dramatic increase in the undocumented immigrant population in the United States.

There are collateral impacts of the failure of Congress to pass some kind of comprehensive immigration reform. Increased enforcement has been an integral part of a political effort to convince Congress to pass comprehensive immigration reform.[186] Unfortunately, the human consequences of the enforcement of the U.S. immigration laws are often ignored when discussing the need for ever-greater immigration enforcement. For whatever reason, they simply are not at center stage of the debate over immigration reform.

Specifically, the human costs that this Article highlights are:

(1) the deaths of Latina/os on the U.S./Mexico border resulting from increased border enforcement;

(2) human trafficking resulting from increased border enforcement; and

(3) other significant violations of the civil rights of immigrants and Latina/os resulting from increased border enforcement.

All of these human costs mean that immigration and immigration enforcement, in my estimation, raise some of the most pressing Latina/o civil rights issues of our times.

The failure of immigration reform and continued incentives for undocumented immigration will perpetuate costs of this type imposed on real people. Undocumented

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183. *See, e.g.*, INS v. Delgado, 466 U.S. 210, 211-12 (1984); INS v. Lopez-Mendoza, 468 U.S. 1032, 1035 (1984); Aguilar v. U.S. Immigration & Customs Enforcement Div. of Dep't. of Homeland Sec., 510 F.3d 1, 5 (1st Cir. 2007); Int'l Molders' & Allied Workers' Local Union No. 164 v. Nelson, 799 F.2d 547, 550 (9th Cir. 1986); Abby Sullivan, Note, *On Thin ICE: Cracking Down on the Racial Profiling of Immigrants and Implementing a Compassionate Enforcement Policy*, 6 HASTINGS RACE & POVERTY L.J. 101, 101 (2009) (footnotes omitted) ("Since 2006 the United States Immigration and Customs Enforcement ('ICE') has increasingly conducted workplace and residence raids as a prominent mechanism for the enforcement of immigration laws."). One massive immigration raid of a meat processing plant in 2008 in Postville, Iowa, *see supra* text accompanying notes 26, has been much-criticized. *See, e.g.*, Bill Ong Hing, *Institutional Racism, ICE Raids, and Immigration Reform*, 44 U.S.F. L. REV. 307 (2009); Peter R. Moyers, *Butchering Statutes: The Postville Raid and the Misinterpretation of Federal Criminal Law*, 32 SEATTLE U. L. REV. 651 (2009); Anna Williams Shavers, *Welcome to the Jungle: New Immigrants in the Meatpacking and Poultry Industry*, 5 J.L. ECON. & POL'Y 31 (2009); Cassie L. Peterson, Note, *An Iowa Immigration Raid Leads to Unprecedented Criminal Consequences: Why ICE Should Rethink the Postville Model*, 95 IOWA L. REV. 323 (2009).

The Obama administration has moved away from workplace raids and engaged in "silent raids" of employers through reviewing employee paperwork to identify potential undocumented workers. *See* Julia Preston, *Illegal Workers Swept From Jobs in "Silent Raids,"* N.Y. TIMES, July 9, 2010, at A1; *see also* Huyen Pham, *When Immigration Borders Move*, 61 FLA. L. REV. 1115 (2009) (critically analyzing the impacts of moving immigration enforcement efforts away from the physical border of the United States).

184. *See supra* text accompanying notes 167-70.

185. *See* JOHNSON, *supra* note 31, at 178-79.

186. *See supra* text accompanying note 128.

immigrants may not be U.S. citizens but they nonetheless are people. They have certain rights under American and international law. At a bare minimum, the nation should fully consider the human costs in deciding whether increased immigration enforcement is morally justifiable, as well as an efficient use of scarce budgetary resources.

1) Deaths (of Latina/os) on the Border

At a most fundamental level, more border enforcement has meant more deaths of migrants—most from Mexico and Central America—along the U.S./Mexico border.[187] A rough low-end estimate is that one person a day dies a slow and agonizing death on migrant trails in the nation's southern border region.[188]

Border enforcement operations, such as Operation Gatekeeper and Operation Hold the Line put into place along the U.S./Mexico border in the mid-1990s, have redirected migrants from crossing in urban areas like San Diego, California and El Paso, Texas, to more isolated and geographically dangerous locations, including the deserts of southern Arizona.[189] Despite these and other border enforcement operations, migrants in pursuit of jobs and economic opportunity continue to hazard the journey to the United States through isolated deserts and mountains. Tragically, some die horrible deaths. At the same time, despite greatly increased enforcement and a mounting death toll, the overall undocumented population in this country has increased dramatically.[190]

When discussing border enforcement and increasing that enforcement, proponents tend not to discuss the rising death toll. Ever-increasing Latina/o deaths unfortunately do not appear to have made much of a mark on the national consciousness.

187. *See* JOHNSON, *supra* note 31, at 111-16; *see also* Daniel Griswold, *Comprehensive Immigration Reform: What Congress and the President Need to Do to Make it Work*, 3 ALB. GOV'T L. REV. ix, xiv (2010) (criticizing the "enforcement-only" efforts by the U.S. government that have led to an increase in the deaths along the U.S./Mexico border since the 1990s); Natsu Taylor Saito, *Border Constructions: Immigration Enforcement and Territorial Presumptions*, 10 J. GENDER RACE & JUST. 193, 194 (2007) ("Each year hundreds of people die of exposure, thirst, or drowning while attempting to cross the border from Mexico.") (citation omitted); Mary D. Fan, *When Deterrence and Death Mitigation Fall Short: Fantasy and Fetishes as Gap-Fillers in Border Regulation*, 42 LAW & SOC'Y REV. 701 (2008) (criticizing the increase of border enforcement and its soaring death tolls).

188. *See infra* notes 188-89 (citing authorities).

189. *See* JOHNSON, *supra* note 31, at 112-14; Wayne A. Cornelius, *Death at the Border: Efficacy and Unintended Consequences of US Immigration Control Policy*, 27 POPULATION & DEV. REV. 661 (2001); Karl Eschbach et al., *Death at the Border*, 33 INT'L MIGRATION REV. 430 (1999); Bill Ong Hing, *The Dark Side of Operation Gatekeeper*, 7 U.C. DAVIS J. INT'L L. & POL'Y 121 (2001).

190. *See supra* text accompanying notes 167-70.

2) Human Trafficking

As many commentators have written, the trafficking of human beings across international borders for profit has risen dramatically in recent years.[191] The phenomenon is not limited to the sex industry as the media frequently sensationalizes, although this is a significant problem in the United States and around the world. Rather, human trafficking is a more general labor migration problem.[192]

Greater enforcement of the U.S./Mexico border has resulted in dramatic increases in smuggling fees as the U.S. government has increased the barriers to entry, with smugglers charging a few hundred dollars per migrant crossing in the early 1990s, and today collecting thousands of dollars per crossing.[193] As a result, criminal elements have entered into the lucrative business of human trafficking. Consequently, we have seen increasing reports of indentured as well as involuntary servitude as migrants "work off" their smuggling debts.[194]

3) Civil Rights Impacts on Immigrant and Latina/o Communities

The current immigration system has contributed to the creation of dual labor markets with an accompanying racial caste quality to them.[195] One job market is comprised of undocumented workers, many of whom are Latina/o, with workers often paid less than the minimum wage and enjoying precious few enforceable health and safety protections. Professor Leticia Saucedo has aptly dubbed this the "brown collar workplace."[196] The other labor market is comprised of U.S. citizens and lawful immigrants, with the workers enjoying the full (even if not fully enforced) protections of the law. Those in one market are exploited while workers in the other market face shrinking job opportunities as

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191. *See generally* Jennifer M. Chacón, *Tensions and Trade-Offs: Protecting Trafficking Victims in the Era of Immigration Enforcement*, 158 U. PA. L. REV. 1609 (2010) (analyzing legal relief for victims of trafficking in modern era of increasing immigration enforcement); Jennifer M. Chacón, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 FORDHAM L. REV. 2977 (2006) (analyzing the prevalent problem of trafficking human beings); Jayashri Srikantiah, *Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law*, 87 B.U. L. REV. 157 (2007) (to the same effect); Enrique A. Maciel-Matos, Comment, *Beyond the Shackles and Chains of the Middle Passage: Human Trafficking Unveiled*, 12 SCHOLAR 327 (2010) (analyzing the failures of the law's ability to protect victims of human trafficking).

Often, "[s]muggling is distinguished from human trafficking by several elements, the two most important being a lack of force, fraud, or coercion, and lack of exploitation after the person has been transported. Despite these asserted differences, many smuggled migrants are exploited, and it is not clear whether they should be classified as victims of human trafficking. Smuggled migrants may be forced into debt bondage to pay for the smuggling, or abused before, during, or after the illegal entry, so that the exploitative end result is the same." Rebecca L. Wharton, Note, A New Paradigm for Human Trafficking: Shifting the Focus from Prostitution to Exploitation in the Trafficking Victims Protection Act, 16 WM. & MARY J. WOMEN & L. 753, 755 (2010) (studying the conflation of prostitution and "other" human trafficking). This Article employs the terms human trafficking and smuggling interchangeably.

192. *See* James Gray Pope, *A Free Labor Approach to Human Trafficking*, 158 U. PA. L. REV. 1849 (2010).

193. *See* JOHNSON, *supra* note 31, at 173.

194. *See id.* at 113-14.

195. *See* JOHNSON, *supra* note 31, at 129-30.

196. *See* Leticia M. Saucedo, *Three Theories of Discrimination in the Brown Collar Workplace*, 2009 U. CHI. LEGAL F. 345; Leticia M. Saucedo, *Addressing Segregation in the Brown Collar Workplace: Toward a Solution for the Inexorable 100%*, 41 U. MICH. J.L. REFORM 447 (2008); Leticia M. Saucedo, *The Employer Preference for the Subservient Worker and the Making of the Brown Collar Workplace*, 67 OHIO ST. L.J. 961 (2006).

employers pursuing rational economic ends shift jobs from the "legal" (and more expensive) to "illegal" (and less expensive) labor markets.[197]

To many observers, several other aspects of the current U.S. immigration laws have particularly unfair impacts on immigrants,[198] especially Latina/os, as well as their U.S. citizen family members. Abuses in immigrant detention often make the news,[199] as do deportations of generally law-abiding long-term residents.[200] The public regularly hears sad stories of undocumented students, many of whom are long-term residents educated at public schools in our K-12 system, who face nearly insurmountable barriers to attending public colleges and universities.[201]

But the costs are even greater and more divisive than the rising numbers of removals and detentions, as well as other hardships imposed on immigrants and their families, alone might suggest. Racial profiling remains an endemic problem in ordinary immigration enforcement.[202] This practice, which has a huge impact on U.S. citizens as well as lawful immigrants of Mexican and other national origin ancestries likely to be subject to profiling, continues to be part and parcel of immigration enforcement.

Unlike racial profiling in ordinary law enforcement, little public concern is expressed about racial profiling in immigration enforcement. There does not appear to be much

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197. *See* JOHNSON, *supra* note 31, at 121-25.

198. *See* Johnson, *supra* note 116, at 1620-22.

199. *See, e.g.*, Nina Bernstein, *Two Groups Find Faults In Immigrant Detentions*, N.Y.TIMES, Dec. 3, 2009, at A25 (reporting on two reports critical of U.S. government's detention of immigrants); Henry Weinstein, *Feds' Actions "Beyond Cruel" Immigration Officials Failed to Treat Detainee Who Later Died of Cancer, a Judge Says.*, L.A. TIMES, Mar. 13, 2008, at B1 ("In a stinging ruling, a Los Angeles federal judge said immigration officials' alleged decision to withhold a critical medical test and other treatment from a detainee who later died of cancer was `beyond cruel and unusual' punishment.").

For reports on the excess of detention, see generally HUMAN RIGHTS WATCH, DETAINED AND AT RISK: SEXUAL ABUSE AND HARASSMENT IN UNITED STATES IMMIGRATION DETENTION (Aug. 25, 2010), *available at* http://www.hrw.org/en/news/2010/08/25/us-immigration-detainees-risk-sexual-abuse; HUMAN RIGHTS WATCH, LOCKED UP FAR AWAY: THE TRANSFER OF IMMIGRANTS TO REMOTE DETENTION CENTERS IN THE UNITED STATES (Dec. 2, 2009), *available at* http://www.hrw.org/en/node/86789. There also has been much scholarship critical of the dramatic expansion of immigrant detention in the United States. *See, e.g.*, Margaret H. Taylor, *Dangerous by Decree: Detention Without Bond in Immigration Proceedings*, 50 LOY. L. REV. 149 (2004); Margaret H. Taylor, *Promoting Legal Representation For Detained Aliens: Litigation and Administrative Reform*, 29 CONN. L. REV. 1647 (1997); Margaret H. Taylor, *Detained Aliens Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine*, 22 HASTINGS CONST. L.Q. 1087 (1995); Kalhan, *supra* note 172 (detailing the growth and excessiveness of immigration detention); Geoffrey Heeren, *Pulling Teeth: The State of Mandatory Immigration Detention*, 45 HARV. C.R.-C.L. L. REV. 601 (2010) (criticizing holding noncitizens in prolonged and indefinite custody); Bridget Kessler, Comment, *In Jail, No Notice, No Hearing… No Problem?: A Closer Look at Immigration Detention and the Due Process Standards of the International Covenant on Civil and Political Rights*, 24 AM. U. INT'L L. REV. 571 (2009) (analyzing the procedures used in immigrant detention under the due process standards of international law); *see also* Raha Jorjani, *Ignoring the Court's Order: The Automatic Stay in Immigration Detention Cases*, 5 INTERCULTURAL HUM. RTS. L. REV. 89 (2010) (analyzing the effects of the automatic stay regulation on mandatory detention). *See generally* MARK DOW, AMERICAN GULAG: INSIDE U.S. IMMIGRATION PRISONS (2004) (documenting the excesses of immigrant detention in the United States); MICHAEL WELCH, DETAINED: IMMIGRATION LAWS AND THE EXPANDING I.N.S. JAIL COMPLEX (2002) (to the same effect).

200. *See, e.g.*, Susan Dominus, *The Vendor Disappears, Leaving a Void*, N.Y. TIMES, Dec. 30, 2009, at A20; *see also* Lori A. Nessel, *The Practice of Medical Repatriation: The Privatization of Immigration Enforcement and Denial of Human Rights*, 55 WAYNE L. REV. 1725 (2009) (analyzing trends of the deportation of seriously ill and hospitalized noncitizens).

201. *See, e.g.*, HELEN THORPE, JUST LIKE US: THE TRUE STORY OF FOUR MEXICAN GIRLS COMING OF AGE IN AMERICA (2009); *see also* text accompanying note & note 115 (discussing the DREAM Act, which would help ameliorate some of the challenges facing undocumented college students). The Supreme Court in Plyler v. Doe, 457 U.S. 202 (1982) held that a state could not effectively deny access to a public K-12 education to undocumented immigrant students.

202. *See supra* text accompanying notes 83-94.

visible effort to eliminate it, or even to consider profiling in immigration enforcement to be a civil rights concern. Fears of a potential increase in racial profiling and related civil rights abuses are one reason that Arizona's S.B. 1070 struck a raw nerve with Latina/os, not just in Arizona, but from coast to coast.[203]

Moreover, the rise in hate crimes against Latina/os and immigrants in recent years correlates closely to the nation's ongoing contentious debate over immigration and immigration reform. The more spectacular cases include the killings of Latino men by rogue youth in Shenandoah, Pennsylvania (not far from Hazleton, Pennsylvania, a city that passed a controversial immigration ordinance)[204] and Patchogue, New York, the site of a local controversy over the costs of a growing immigrant population.[205] In 2010, police found it necessary to respond to a spate of hate crimes directed at Mexican immigrants on Staten Island.[206] More generally, FBI statistics indicate that hate crimes directed at Latina/os—U.S. citizens as well as immigrants—rose a whopping 40 percent from 2003 to 2007.[207]

As the spike in hate crimes against Latina/os suggests, racism and xenophobia to some degree often, infect the public debate over immigration in the United States.[208] For that reason, it is not entirely surprising, and hardly mere coincidence, that hate crimes directed at immigrants and Latina/os have increased over time, while at the same time public concern and emotion has erupted over immigration and Congress' failure to respond in a meaningful way.[209] The harsh tone of the debate, replete with references to "illegals", "anchor babies," and Mexicans, can be nothing less than chilling, particularly to immigrants and U.S. citizens of particular national origin ancestries.

To facilitate meaningful debate over possible reform of the U.S. immigration laws, a commitment to reasonable dialogue and the exchange of ideas in a calm and respectful manner is critically important.[210] Unfortunately, some advocates of restrictionist immigration laws and policies often use inflammatory rhetoric in seeking to inflame, rather than soothe and calm, anti-immigrant sentiment to build political support for a stringent pro-enforcement immigration agenda.[211] Restrictionists regularly seek to capitalize on public fears—racial, economic, cultural, social, environmental, and otherwise—about immigration and immigrants.[212]

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203. *See supra* text accompanying notes 83-94.

204. *See* Lozano v. Hazleton, 620 F.3d 170 (3d Cir. 2010) (invalidating most of city immigration ordinance on federal preemption grounds).

205. *See* Johnson, *supra* note 16, at 611.

206. *See* Kirk Semple, *Young Residents on Staten Island Try to Make Sense of a Spate of Violence*, N.Y. TIMES, Aug. 5, 2010, at A23.

207. *See* FBI, FBI 2008 HATE CRIME STATISTICS (2008), *available at* http://www.fbi.gov/newyork/press-releases/2009/nyfo112409a-1.htm/; *Latinos Increasingly Targeted For Hate Crimes*, NAT'L PUBLIC RADIO, Show: Tell Me More (Nov. 12, 2008), *available at* http://www.npr.org/templates/story/story.php?storyId=96895255.

208. *See supra* note 206 (citing authorities).

209. *See supra* text accompanying notes 203-06.

210. *See* Johnson, *supra* note 16, at 608.

211. *See id*.

212. *See id*.; *see, e.g.*, PETER BRIMELOW, ALIEN NATION: COMMON SENSE ABOUT AMERICA'S IMMIGRATION DISASTER (1995); VICTOR DAVIS HANSON, MEXIFORNIA: A STATE OF BECOMING (2003); SAMUEL P. HUNTINGTON, WHO ARE WE?: THE CHALLENGES TO AMERICA'S NATIONAL IDENTITY (2004); MICHELLE MALKIN, INVASION: HOW AMERICA STILL WELCOMES TERRORISTS, CRIMINALS, AND OTHER FOREIGN MENACES TO OUR SHORES (2002). Anti-immigrant blogs can be even more incendiary. *See, e.g.*, VDARE.com, *available at* http://www.vdare.com (last visited Apr. 5, 2011); Michelle Malkin, *available at* http://michellemalkin.com (last visited Apr. 5, 2011).

A glaring example of hyperbole employed by restrictionists is Arizona Governor Jan Brewer's statement that border violence had resulted in the finding of headless bodies in the desert, a statement that she later admitted was false.[213] A fast-and-loose (and, at times, false) characterization of the alleged problems caused by immigration and immigrants, such as contending that immigrants are primarily responsible for the nation's crime, drug, fiscal, and national security problems, plays into, and reinforces, the oft-made dire claims of an "alien invasion" of the United States—a war-like situation in which foreigners are viewed as unwanted intruders, if not hostile and dangerous invaders, who restrictionists frequently claim deserve immediate, drastic, and almost invariably harsh action.[214]

We as a nation ignore at our peril the simple fact that anti-immigrant sentiment exists among some segments of the general public, and that it at times finds expression in especially virulent ways at the state and local levels.[215] The racially-tinged anti-Mexican, anti-immigrant campaign culminating in the landslide passage of California's Proposition 187 was nothing less than *the* anti-immigrant landmark of the 1990s, if not of all U.S. history.[216] Arizona's S.B. 1070, with fiery rhetoric combined with legitimate concerns, is a more recent example of such anti-immigration legislation.[217] Along these lines, Joe Arpaio, Sheriff of Maricopa County, Arizona and popularly known as "America's Toughest Sheriff," has vowed to, regardless of its legality, pursue controversial immigration and other law enforcement policies (such as forcing detainees to wear pink underwear) that regularly draw the ire of the civil rights and immigrant communities.[218] In the last few years, hate groups have increasingly played on nationalistic slogans and anti-immigrant themes.[219]

Although arguably less prominent in the national debate over immigration, racism almost inexorably animates some of the vociferousness of the debate over immigration reform at the national level. It also influences national immigration law and policy.

For example, despite its judicial invalidation, Proposition 187, with anti-Mexican sentiment at its core,[220] unquestionably grabbed the attention of the U.S. government and shaped more than a decade of enforcement-oriented measures. The passage of the

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213. *See* Paul Davenport & Amanda Lee Myers, *Jan Brewer Admits She Was Wrong About Beheadings*, HUFFINGTON POST, Sept. 4, 2010, *available at* http://www.huffingtonpost.com/2010/09/04/jan-brewer-admits-she-was_0_n_705722.html.

214. For critical analysis of the "alien invasion" trope commonly invoked by immigration alarmists, see Ediberto Román, *The Alien Invasion?*, 45 HOUS. L. REV. 841, 843-46 (2008); *see also* Martinez, *supra* note 23 (analyzing from a philosophical perspective how law treats people of color and immigrants without legal constraints in a "state of nature").

215. *See* Johnson, *supra* note 26, at 25-30.

216. *See supra* text accompanying notes 43-46. Not coincidentally, this measure contributed to a large increase in naturalization rates and greater political activism among Latina/os. *See* Michael Finnegan, *State GOP Haunted by Ghost of Prop. 187*, L.A. TIMES, Feb. 21, 2004, at A1; Louis Freedberg, *Prop. 187 Rises Again*, S.F. CHRON., Oct. 6, 2003, at A20.

217. *See supra* Part I.A.

218. *See* Finnegan, *supra* note 84; Jacques Billeaud, *Thousands Protest Sheriff's Immigration Efforts*, ASSOC. PRESS, Jan. 17, 2010, *available at* http://seattletimes.nwsource.com/html/nationworld/2010814297apusarizonasheriffprotest.html; JJ Hensley, *Activists Aim to Continue Fight Despite Election Results*, ARIZ. REP., Nov. 7, 2008, at 1; *supra* note 84 and accompanying text. Many observers were not surprised that, after years of political agitation and harsh, at times violent, rhetoric in the state, Arizona was the site of the tragic shooting of a member of the U.S. Congress in 2011. *See* Marc Lacey & David M. Herszenhorn. *Congresswoman Critical, 6 Dead in Tucson Rampage*, BOSTON GLOBE, Jan. 9, 2011, at 1.

219. *See* Southern Poverty Law Center, Intelligence Report, Anti-Immigration Groups, spring 2001, *available at* http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2001/spring/blood-on-the-border/anti-immigration-.

220. *See supra* text accompanying notes 43-46.

measure led to aggressive federal action by the Clinton administration to tighten the border, and resulted in immigration reform legislation[221] that limited eligibility for relief from deportation for *lawful* immigrants who had resided in the United States for many years, and dramatically increased noncitizen detention and deportation.[222] Similar state and local action toward immigrants in recent years also appear to have contributed to ever-increasing federal immigration enforcement.[223] However, because such measures fail to go to the root of undocumented immigration, that is the magnet of jobs in the United States,[224] undocumented immigration continues and human misery grows.

With the failure of comprehensive immigration reform, the eruption of racism and hate directed at the immigrants and Latina/os, as well as the civil rights deprivations, will likely continue. This unfortunately is another unstated cost of the failure of Congress to pass comprehensive immigration reform.

4) Conclusion

To put simply, border enforcement has human consequences that affect the civil rights of Latina/o citizens and immigrants, ranging from deaths, human trafficking, and other violations of rights. Increased enforcement, which apparently will come with or without comprehensive immigration reform, increases those consequences.

Few would dispute that immigration and border enforcement of some kind is necessary, if for nothing more than to ensure public safety in the United States. Any proposal for increased enforcement must, however, be carefully scrutinized to ensure that its costs—including the human costs—are outweighed by its benefits.[225] For many, it is difficult to justify the human costs even if the benefits outweigh the costs. But it is next to impossible to justify those costs if there are little, if any, enforcement benefits. Importantly, the failure to enact comprehensive immigration reform means that the tragic human costs of enforcement will continue to mount, with few perceived benefits (other than political ones for certain politicians).

CONCLUSION

The failure of Congress to pass any form of comprehensive immigration reform, as well as state and local immigration laws like Arizona's S.B. 1070, will have disparate racial impacts on Latina/o citizens and noncitizens. The knowledge of the disparate impacts among Latina/os, combined with race-neutral defenses of increasing immigration enforcement and denial of any racial animus, contributes to a passionate racially-polarized debate over immigration reform and immigrants that the United States has experienced for over more than a decade. To fully understand the debate over

221. *See supra* note 165 (citing laws). For in-depth criticism of some of the harsh impacts of the reform legislation, see HING, *supra* note 13.

222. *See* JOHNSON, *supra* note 31, at 150–55, 193.

223. *See supra* text accompanying notes 24-55. Soon after the Arizona legislature passed S.B. 1070, President Obama deployed the National Guard to the U.S./Mexico border as a sign of the administration's commitment—symbolic more than anything because the measure will unlikely decrease undocumented immigration in any meaningful way—to border enforcement. *See supra* text accompanying notes 116-17.

224. *See supra* text accompanying notes 145-49.

225. C*f.* Stephen H. Legomsky, *The Ethnic and Religious Profiling of Noncitizens: National Security and International Human Rights*, 25 B.C. THIRD WORLD L.J. 161, 179 (2005) (calling for the weighing of the costs of measures taken by U.S. government in its "war on terror" as well as the potential security benefits).

immigration reform, and to rationally weigh the possible policy alternatives for reform, we must first acknowledge the racially disparate impacts from the operation of current immigration laws.[226]

The maintenance of the immigration status quo results in a myriad of other harms as well. The current system results in uncertainty both to immigrants and employers in the labor market. Immigrants are uncertain about the availability of work and access to legal protections, thereby making them especially vulnerable to exploitation, as well as the constant, daily threat of deportation and separation from friends, family, and community in the United States.[227] In addition, heightened immigration enforcement at its most fundamental level results in increasing numbers of deaths and despair for immigrants and their U.S. citizen families, with disparate impacts on communities of color inside and outside the United States.[228]

As outlined in the Article, a color-blind defense to aggressive immigration enforcement measures, as well as similar opposition to comprehensive immigration reform, allows the advocates of such positions to claim that they are not acting with racial animus. Rather, they assert time and time again that the goal is not to pursue racist ends, or to accomplish racially disparate impacts, but is merely to "enforce the law" and "secure our borders." However, given the modern demographics of immigration, many immigration-oriented enforcement measures invariably have clear and unequivocal disparate racial impacts; impacts that Latina/os and Asians vehemently resist. Maintenance of the status quo has such disparate impacts as well.

Claims by restrictionists that they only want to "enforce the law" and "secure our borders," cannot change the fact that, at a fundamental level, immigration law and its enforcement has disparate racial impacts. Ignoring those impacts and attempting to obscure, marginalize, and discredit them through the invocation of catchy slogans, will not make them go away.

Neither will ignorance regarding human costs help move forward the debate over immigration, or make enforcement any more just or morally right. Indeed, a refusal to acknowledge the human costs of immigration enforcement will likely increase the passions of those who feel that their calls for racial justice are being ignored. This is especially true for Latina/os who continue to fight for full membership in American social life.

The facially neutral nature of the immigration debate can be seen in Arizona's S.B. 1070 and the failure of comprehensive immigration reform, both of which, as outlined in this Article, would have racially disparate impacts on Latina/os. The fact that race is implicated—even though often shrouded in color-blind rhetoric and resort to enforce the race-neutral U.S. immigration laws—contributes to the passion of the debate. The fact that race is often buried in the discussion, however, does not change the simple fact that racially disparate impacts result from maintaining or changing the immigration laws. This is because, in modern times, immigration unquestionably touches on race and civil rights.

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226. *See* Johnson, *supra* note 116, at 1635-37.
227. *See supra* text accompanying notes 145-52.
228. *See supra* Part II.

In the end, the nation must grapple with the disparate racial impacts of the law and its maintenance and seek to fashion immigration laws and solutions that promote social justice, not maintain, expand, and reinforce racial injustice in American society. Until the nation takes that important first step, we can expect to see the passion and divisiveness of the current immigration debate in the United States continue unabated, with no end in sight.