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Immigration and Civil Rights: State and Local Efforts to Regulation Immigration

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IMMIGRATION

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

Kevin R. Johnson[*]

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I. INTRODUCTION

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

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

Despite the fact that immigration and immigration enforcement directly and indirectly raise civil rights concerns, the legal analysis and the public discourse often ignores, or at least obscures, the

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[1] *See* Richard Delgado, *Rodrigo's Fifteenth Chronicle: Racial Mixture, Latino-Critical Scholarship, and the Black-White Binary*, 75 TEX. L. REV. 1181, 1190 (1997) (reviewing LOUISE ANN FISCH, ALL RISE: REYNALDO G. GARZA, THE FIRST MEXICAN AMERICAN FEDERAL JUDGE (1996) and contending that the Equal Protection Clause has failed to achieve equality for non-Black minorities); Juan F. Perea, *The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought*, 85 CAL. L. REV. 1213, 1222 (1997) (arguing that race scholars have mistakenly conceptualized race and civil rights as involving African-Americans and whites while ignoring non-Black racial minorities).

[2] *See* Kevin R. Johnson, *The End of "Civil Rights" as We Know It?: Immigration and Civil Rights in the New Millennium*, 49 UCLA L. REV. 1481, 1492 (2002) ("[T]he growing Latina/o population in the United States, fueled in large part by immigration, has brought forth new civil rights demands . . . .").

direct civil rights impacts of U.S. immigration law and its enforcement. Restrictionists commonly claim, for example, that demands for increased immigration enforcement have nothing whatsoever to do with race and, when pressed, fervently deny that they are racists.[3] At the same time, they endorse and pursue aggressive policy measures that unquestionably will have racially disparate impacts. Advocates of immigration enforcement instead attempt to characterize their proposals as a garden variety law enforcement matter—"enforcing the law"—entirely separate and apart from civil rights.[4]

This Essay considers how the current legal challenges to the constitutionality of the spate of state and local immigration measures often focuses on federal preemption and the Supremacy Clause[5]—a relatively dry, if not altogether juiceless, body of law. The legal analysis in the courts of such measures often fails to directly address the civil rights impacts on minority communities.[6] Part II begins by looking generally at the law surrounding federal primacy over immigration. Part III reviews the Supreme Court's decision in *Chamber of Commerce v. Whiting*,[7] which interpreted a narrow provision of the U.S. immigration laws to reject a federal preemption challenge to Arizona's effort to regulate immigration through a business licensing law. Part IV considers the impact of the *Whiting* decision on the Court of Appeal's invalidation of core immigration provisions of Arizona's S.B. 1070[8] in *United States v. Arizona*,[9] perhaps the most controversial state immigration

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[3] *See* HEIDI BIERICH, S. POVERTY LAW CTR., *NumbersUSA*, *in* THE NATIVIST LOBBY: THREE FACES OF INTOLERANCE 18, 18 (Mark Potok ed., 2009), *available at* http://www.splcenter.org/sites/default/files/downloads/splc_nativistlobby.pdf (observing that mainstream restrictionist groups claim to oppose all forms of racism).

[4] *See, e.g.*, Mary D. Fan, *Post-Racial Proxies: Resurgent State and Local Anti-"Alien" Laws and Unity-Rebuilding Frames for Antidiscrimination Values*, 32 CARDOZO L. REV. 905, 927 (2011) (observing that Arizona's immigration legislation "was fueled by incendiary politics painting Arizona as a state under siege and equating immigration with rampant crime").

[5] U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land . . . .").

[6] *See* Fan, *supra* note 4, at 932–38 (characterizing federal preemption challenges to local immigration ordinances as an "alternate frame for vindicating antidiscrimination values").

[7] 131 S. Ct. 1968 (2011).

[8] S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

[9] 641 F.3d 339 (9th Cir. 2011), *cert. granted*, 132 S. Ct. 845 (2011).

regulation measure in a time in which state and local legislatures have passed a veritable avalanche of such measures.

Last but not least, Part V analyzes the civil rights concerns at the core of state and local efforts to regulate immigration. This Essay considers how immigration enforcement by any level of government raises civil rights concerns but, given the greater likelihood of nativist sentiment prevailing at the regional level, contends that the potential civil rights impacts are greater with state and local immigration enforcement measures than national ones.

II. FEDERAL PREEMPTION AND IMMIGRATION

For well over a century, immigration law, and its enforcement in the United States, has been the primary province of the federal government.[10] More than 150 years ago, for example, the Supreme Court invalidated Massachusetts and New York laws that taxed passengers who arrived at their ports on the ground that they intruded on the power of Congress to regulate interstate commerce.[11] Congressional efforts in the late 1800s to drastically curtail Chinese immigration marked the near-complete federalization of immigration law and general displacement of state and local regulation.[12] In modern times, state and local governments, generally speaking, cannot directly regulate immigration, such as by denying admission into the state[13] or deporting people from their jurisdiction.

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

[11] Smith v. Turner (*The Passenger Cases*), 48 U.S. (7 How.) 283, 392, 409 (1849).

[12] *See, e.g.*, The Chinese Exclusion Case, 130 U.S. 581, 603 (1889) (upholding federal immigration law excluding Chinese immigrants from the United States). For analysis of the regulation of immigration by various states before 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, 1883–84 (1993) (analyzing state immigration laws in effect prior to 1875).

[13] *Cf.* Saenz v. Roe, 526 U.S. 489, 492, 511 (1999) (striking down a California law that imposed a one-year residency requirement on receipt of certain public benefits on the grounds that the law interfered with the constitutional right to travel); Shapiro v. Thompson, 394 U.S. 618, 629 (1969) (invalidating state law limiting benefits to those who have resided in state for a year or more).

Despite unquestionable federal supremacy in the field, the Supreme Court has reserved room for states to regulate immigration, even though it has not been especially clear about how much room there is.[14] In the 1976 decision of *De Canas v. Bica*,[15] the Court unequivocally stated that the "[p]ower to regulate immigration is *unquestionably exclusively* a federal power."[16] This

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[14] There has been a scholarly debate for more than a decade about the appropriate role for state and local governments in immigration and immigrant regulation. Some commentators see a more expansive role for the states than currently exists. *See, e.g.*, Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787, 792 (2008) (arguing that the Constitution allows for shared federal and state power over immigration regulation); Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 570–71 (2008) (contending that states should play an important role in immigration regulation); Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57, 59 (arguing that states should have a greater role than they currently do in immigration policy); Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignties*, 35 VA. J. INT'L L. 121, 123 (1994) (contending that states should have an expansive role in regulating immigration). Others propose limited state and local government involvement in immigration enforcement. *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, 34 (arguing that "state, county, and local ordinances aimed at regulating general immigration functions are unconstitutional"); Orde F. Kittrie, *Federalism, Deportation, and Crime Victims Afraid to Call the Police,* 91 IOWA L. REV. 1449, 1456 (2006) (proposing the replacement of local sanctuary policies with a federal law protecting undocumented immigrants who report crimes); Karla Mari McKanders, *The Constitutionality of State and Local Laws Targeting Immigrants*, 31 U. ARK. LITTLE ROCK L. REV. 579, 580–81 (2009) (arguing that state and local governments should not regulate immigration); Michael A. Olivas, *Preempting Preemption: Foreign Affairs, State Rights, and Alienage Classifications,* 35 VA. J. INT'L L. 217, 219–20 (1994) (resisting the claim that states should have a greater role than they currently do in regulating immigration); 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, 967 (2004) (arguing "that the immigration power is an exclusively federal power that must be exercised uniformly"); Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power over Immigration*, 86 N.C. L. REV. 1557, 1616–18 (2008) (identifying problems that have arisen with state and local immigration regulations); Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism,* 76 N.Y.U. L. REV. 493, 500 (2001) (arguing that "Congress's 1996 effort to devolve its federal immigration power is constitutionally impermissible").

[15] 424 U.S. 351 (1976).

[16] *Id.* at 354 (emphasis added). Interestingly, Chief Justice Roberts omitted the word "exclusively" from this quote in *De Canas* in the majority opinion in *Whiting*, which is discussed later in this Essay. Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 1974 (2011) ("In [*De Canas*], we recognized that the '[p]ower to regulate immigration is unquestionably . . . a federal power.' "). The deletion presumably was made because the language in *De Canas*, taken literally, would leave no room for state regulation of immigration. *See infra* text accompanying notes 44–47.

is expansive language extolling federal power. Nonetheless, in that same case, the Court rejected a federal preemption challenge to a California law imposing fines on employers of undocumented immigrants.[17] The decision left vague the outer limits of what a state can do when it comes to regulating immigration and immigrants without encroaching on federal power.

A decade after the Supreme Court decided *De Canas*, Congress intervened and narrowed the role of the states in seeking to regulate the employment of undocumented immigrants. In 1986, Congress passed the Immigration Reform and Control Act (IRCA),[18] a multifaceted piece of immigration reform legislation that, among other things, provides for the imposition of sanctions on the employers of undocumented immigrants. IRCA states that it "preempt[s] any State or local law imposing civil or criminal sanctions (*other than through licensing and similar laws*) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens."[19]

Often a political trendsetter, California, more than fifteen years ago, offered the nation a famous modern example of a state unsuccessfully seeking to regulate immigration. In 1994, the Golden State's voters overwhelmingly passed Proposition 187, which was similar in certain respects to Arizona's S.B. 1070.[20] The measure, among other things, would have required governmental employees to report suspected undocumented immigrants to U.S. authorities. A federal court struck down most of the initiative for impermissibly intruding on the federal power to regulate immigration.[21] Although not factoring directly into the court's

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[17] *See De Canas*, 424 U.S. at 354.

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

[19] Immigration & Nationality Act (INA) § 274A(h)(2), 8 U.S.C. § 1324a(h)(2) (2006) (emphasis added) (as amended by IRCA).

[20] *Compare* 1994 Cal. Legis. Serv. Prop. 187 (West), *with* S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

[21] *See* League of United Latin Am. Citizens v. Wilson, 908 F. Supp. 755 (C.D. Cal. 1995).

preemption analysis, the controversial campaign for the measure was replete with anti-immigrant, anti-Mexican sentiment.[22] Moreover, the proposition unquestionably would have had disparate racial impacts if it had gone into effect.[23]

Today, observers spanning the ideological spectrum, including President Barack Obama, contend that the current U.S. immigration system is "broken."[24] A 2010 report estimated that approximately eleven million undocumented immigrants live in the United States.[25] Many point to the size of the undocumented population, which has tripled since 1990,[26] as evidence that IRCA's employer-sanctions provisions have failed to meaningfully deter the employment of undocumented immigrants.[27] Besides being ineffective, sanctions also have arguably had negative collateral civil rights consequences, including increasing discrimination by employers against U.S. citizens and lawful permanent residents of certain national origins.[28]

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[22] *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 racially-charged Proposition 187 campaign).

[23] *See generally* Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class*, 42 UCLA L. REV. 1509 (1995) (outlining racial, class, gender, and immigration status impacts that would have resulted from the implementation of Proposition 187).

[24] *See* Barack Obama, President, Remarks by the President on Comprehensive Immigration Reform (July 1, 2010) (transcript available at http://www.whitehouse.gov/the-press-office/remarks-president-comprehensive-immigration-reform) (calling for reforms of the "broken" U.S. immigration system); Mitt Romney, *Mitt's Remarks to Republican National Hispanic Assembly*, ROMNEY: BELIEVE IN AMERICA (Sept. 2, 2011), http://mittromney.com/blogs/mitts-view/2011/09/mitts-remarks-republican-national-hispanic-assembly (noting problems with the current operation of U.S. immigration laws).

[25] *See* JEFFREY S. PASSEL & D'VERA COHN, PEW HISPANIC CTR., U.S. UNAUTHORIZED IMMIGRATION FLOWS ARE DOWN SHARPLY SINCE MID-DECADE, at i (Sept. 1, 2010), *available at* http://pewhispanic.org/files/reports/126.pdf. A recent decline in the undocumented population has been attributed to the economic downturn. *See id.* at iii (noting that economic conditions contribute to the magnitude of immigration flows).

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

[27] *See, e.g.*, Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 U. CHI. LEGAL F. 193, 195 (arguing that the employer-sanctions regime has failed to deter illegal immigration or protect U.S. workers).

[28] *See* Cecelia M. Espenoza, *The Illusory Provisions of Sanctions: The Immigration Reform and Control Act of 1986*, 8 GEO. IMMIGR. L.J. 343, 389 (1994) (concluding that the elimination of employer sanctions is the most expedient way to remedy the increased racial

Despite efforts for more than a decade and a plethora of reform proposals, Congress has been unable to pass a comprehensive immigration reform package to remedy the perceived deficiencies in the current system.[29] Over the same general time period, Latina/o immigrant communities have emerged in parts of the United States, including in the Midwest and South, which had not previously seen significant Latina/o migration.[30] State and local governments also have experienced tremendous budgetary pressures, which have worsened with the onset of what some observers have called the "Great Recession."[31]

These developments—the general view that the current U.S. immigration system is broken (and the corollary that the federal government has failed to enforce the immigration laws), the changing regional demographics of immigration, and ever-tightening state and local budgets—in combination have contributed to the enactment of a record number of state and local immigration laws.[32] Often in response to considerable anti-federal government sentiment, the Alabama, Arizona, Georgia, and South Carolina legislatures passed strict immigration enforcement laws

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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 their enforcement).

[29] *See* Kevin R. Johnson, *A Case Study of Color-Blind Rhetoric: The Racially Disparate Impacts of Arizona's S.B. 1070 and the Failure of Comprehensive Immigration Reform*, 1 L.J. SOC. JUST. 3, 25–40 (2011), http://www.law.asu.edu/LinkClick.aspx?fileticket=;Ae044Cu1kQ%3d&tabid=2604&mid=5942 (analyzing the disparate racial impacts of the failure of Congress to pass comprehensive immigration reform).

[30] *See* Johnson, *supra* note 2, at 1493–96 (noting migration to new regions of the United States); Lisa R. Pruitt, *Latina/os, Locality, and Law in the Rural South*, 12 HARV. LATINO L. REV. 135, 144 (2009) (discussing Latina/o migration to the rural south).

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

[32] *See States Took Up Record Numbers of Immigration Bills this Year*, ARIZ. DAILY STAR, Aug. 10, 2011, http://azstarnet.com/new/local/border/article_c5ca778b-8588-5594-9e8f-1ab95c06c601.html (discussing state lawmakers' consideration of a "record number" of immigration-related bills).

in just the past few years.[33] The editorial page of the *New York Times* stated bluntly that the "new anti-immigrant laws are cruel, racist[,] and counterproductive."[34]

Unfortunately, there is a long history of state and local laws that discriminate against immigrants. For example, the "alien land laws" popular in many states, but especially the West, in the early twentieth century, sought to discriminate against particular groups of immigrants (specifically those from Japan) through facially neutral means.[35] Many immigrant and civil rights advocates contend that the modern state and local immigration laws have discriminatory impacts, if not invidious purposes.[36]

None of this is to suggest that immigration regulation at the federal level does not also have civil rights impacts. The U.S. government, historically as well as in modern times, has taken actions that some observers contend trample on the civil rights of

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[33] *See Justice Department Challenges Alabama's Immigration Law*, CNN, Aug. 2, 2011, http://articles.cnn.com/2011-08-02/justice/alabama.immigration.law_1_immigration-law-immigration-status-illegal-immigrant?_s=PM:CRIME ("While immigration has long been a federal responsibility, . . . anti-illegal immigration measures have been passed in recent months in Arizona, Utah, Georgia, Indiana and South Carolina."); *see also* NAT'L CONFERENCE OF STATE LEGISLATURES, 2010 IMMIGRATION-RELATED BILLS AND RESOLUTIONS IN THE STATES (JANUARY–MARCH 2010) (Apr. 27, 2010), *available at* http://www.ncsl.org/portals/1/documents/immig/immigration_report_april2010.pdf ("With federal immigration reform stalled in Congress, state legislatures continue to tackle immigration issues at an unprecedented rate.").

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

[35] *See* Keith Aoki, *No Right to Own?: The Early Twentieth-Century "Alien Land Laws" As a Prelude to Internment*, 40 B.C. L. REV. 37, 38–39 (1998) (arguing that state governments designed land laws to discriminate against Japanese immigrants); *see also* Rose Cuison Villazor, *Rediscovering* Oyama v. California*: At the Intersection of Property, Race, and Citizenship*, 87 WASH. U. L. REV. 979, 985 (2010) (analyzing critically major Supreme Court decision invalidating application of California alien land law).

[36] *See* Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 DUKE L.J. 1723, 1743 (2010) ("[T]he most forceful and often repeated criticism of state and local involvement in immigration enforcement is improper reliance on race and ethnicity. . . . [T]he concern is that not only unauthorized migrants, but also lawfully present U.S. citizens and noncitizens, will suffer targeting and discrimination by race and ethnicity." (footnote omitted)); *see, e.g.*, Ruben Navarrette, Jr., Op-Ed., *Why Arizona's Law Is a Hornet's Nest*, SAN DIEGO UNION-TRIB., June 2, 2010, at B7 ("[O]ne would have to be naive to . . . label [S.B. 1070], or the passions fueling it, race-neutral . . . ."); Jonathan J. Cooper, *Vow to Hit the Streets; Civil Rights Activists Call Arizona Statute Racist; Urge Obama to Fight Law Targeting Illegal Immigrants*, NEWSDAY, Apr. 26, 2010, at A9 ("Opponents say [S.B. 1070] would undoubtedly lead to racial profiling.").

immigrants.[37] The operation and enforcement of U.S. immigration laws has civil rights—and often racially disparate—impacts.[38]

My point here is that federal primacy over immigration does not mean that civil rights concerns disappear from the field just because the federal government is regulating immigration. Current heated controversies over various federal immigration enforcement programs belie such a claim. However, the potential civil rights deprivations at the state and local levels are likely to be greater because of the fact that nativist and racist sentiments are more likely to prevail. Such sentiments are more likely to dominate local politics than the political process at the national level.[39]

III. *CHAMBER OF COMMERCE V. WHITING*

In 2011, the Supreme Court in *Chamber of Commerce v. Whiting*, addressed the constitutionality of one relatively tame—at least in comparison to subsequent measures—state immigration enforcement law, the Legal Arizona Workers Act of 2007.[40] The Court affirmed the Ninth Circuit's ruling that federal law did not preempt the Arizona law.[41]

The basic legal challenge to the Arizona law was that it impermissibly infringed on the power of the U.S. government to regulate immigration. Such a claim is based on the relative distribution of immigration regulatory power between the state

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[37] *See generally* KEVIN R. JOHNSON, THE "HUDDLED MASSES" MYTH: IMMIGRATION AND CIVIL RIGHTS (2004) (reviewing the lengthy history of exclusion and removal of the poor, political and racial minorities, the disabled, gays and lesbians, and other groups under U.S. immigration laws).

[38] *See infra* Part V.

[39] Such concerns are part of the reason that Professors Keith Aoki and John Shuford call for a form of regional, rather than local, regulation of immigration. *See* Keith Aoki & John Shuford, *Welcome to Amerizona—Immigrants Out!: Assessing "Dystopian Dreams" and "Usable Futures" of Immigration Reform, and Considering Whether "Immigration Regionalism" is an Idea Whose Time Has Come,* 38 FORDHAM URB. L.J. 1, 5 (2010) (arguing that regional regulation would avoid local "legislators tak[ing] dangerous, overreaching self-help measures").

[40] *See* ARIZ. REV. STAT. ANN. §§ 23-211, 23-216 (Supp. 2010).

[41] *See* Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 1973 (2011) (affirming Chicanos Por La Causa, Inc. v. Napolitano, 558 F.3d 856, 861 (9th Cir. 2009)).

and federal governments under the U.S. Constitution. A Supremacy Clause claim, of course, is very different in kind from one alleging that the rights of immigrants have been violated under the Equal Protection Clause of the Fourteenth Amendment.[42]

The Chamber of Commerce leveled preemption challenges at the provisions of the Arizona law that (1) authorized the suspension of business licenses of employers who knowingly or intentionally employ an alien not authorized to work, with a second violation possibly resulting in license revocation—the so-called "business death penalty"—and (2) required employers in Arizona to use the federal E-Verify system, a computer database that is intended to allow verification of employee work eligibility, which Congress made clear the federal government itself could not make mandatory.[43]

Writing for a 5-to-3 majority, the Court, in an opinion by Chief Justice Roberts,[44] focused on the plain meaning of IRCA's preemption language.[45] The majority reasoned that, because the Arizona law is a business licensing law and IRCA allows states to use "licensing and similar laws" in immigration enforcement, the Arizona law is not preempted.[46] The Court saw no conflict

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[42] In this context, a Supremacy Clause claim alleges that the state has encroached on federal power while an Equal Protection claim contends that the state action results in unlawful discrimination.

[43] *Whiting*, 131 S. Ct. at 1977. For more information on the E-Verify system, see *E-Verify*, U.S. DEP'T OF HOMELAND SECURITY (May 13, 2011), http://www.dhs.gov/files/programs/gc_1185221678150.shtm. The E-Verify database has been criticized as being prone to error. *See* Jennifer Ludden, *Immigrant Verification System Flawed, Critics Say*, NPR (Nov. 8, 2007), http://www.npr.org/templates/story/story.php?storyId=16126268 (summarizing criticism); *see also* Farhang Heydari, Note, *Making Strange Bedfellows: Enlisting the Cooperation of Undocumented Employees in the Enforcement of Employer Sanctions*, 110 COLUM. L. REV. 1526, 1538–40 (2010) (discussing flaws of the E-Verify program). For the relevant statutory instructions on the use of E-Verify, see Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 402(a), Pub. L. No. 104-208, 110 Stats. 3009-546, 3009-656 (1996).

[44] *Whiting*, 131 S. Ct. at 1973. For the classic analysis of the modern textualist approach on the Supreme Court to statutory interpretation, see William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990).

[45] *See supra* text accompanying note 19 for the relevant IRCA language.

[46] *See Whiting*, 131 S. Ct. at 1977, 1981.

between Arizona and U.S. immigration law that required a finding of federal preemption.[47]

Justice Breyer, joined by Justice Ginsburg, dissented.[48] According to Justice Breyer, the "licensing and similar laws" language in IRCA's preemption provision should be limited to employment-related licensing systems, as employment was the primary focus of IRCA's employer-sanctions provisions.[49] A literal interpretation of the text, Justice Breyer cautioned (as one might expect from a former law professor), would allow states to suspend or revoke automobile licenses, marriage licenses, or dog licenses based on a business's employment of unauthorized workers—a result that Congress could not have intended.[50]

In addition, Justice Breyer made an important observation. He feared that enforcement of the Arizona business licensing law would result in increased discrimination against perceived "foreigners" by excessively cautious employers who wanted to steer clear of IRCA's sanctions provisions.[51] To minimize the potential for such impermissible conduct by employers, IRCA prohibits discrimination by employers against foreign nationals who are authorized to work.[52] In Justice Breyer's words, "the state statute seriously threatens the federal Act's antidiscriminatory objectives by radically skewing the relevant penalties"[53] and "will impose additional burdens upon lawful employers and consequently lead those employers to erect ever stronger safeguards against the

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[47] *Id.* at 1981–87. The general approach of *Whiting* is much more deferential to state law than the Court's approach in another federal preemption case from last term. *See* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1753 (2011). In that case, the Court held that the Federal Arbitration Act preempted California law that voided waiver of consumer class action provisions in adhesion contracts. The decision has been roundly criticized because of its impacts on the legal rights of consumers. *See, e.g.*, Michael Appleton, AT&T Mobility v. Concepcion*: Has Consumer Protection Law Been Preempted?*, JONATHAN TURLEY BLOG (July 3, 2011), http://www.jonathanturley.org/2011/07/03/att-mobility-v-concepcion-has-consumer-protection-law-been-preempted/.

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

[49] *See id.* at 1988.

[50] *See id.*

[51] *See id.* at 1990 (describing how even the less severe penalties of IRCA encouraged some employees to engage in discriminatory practices).

[52] Immigration & Nationality Act (INA) § 274B, 8 U.S.C. § 1324b (2006).

[53] *Whiting*, 131 S. Ct. at 1990 (Breyer, J., dissenting).

hiring of unauthorized aliens—without counterbalancing protection against unlawful discrimination."[54]

Dissenting separately, Justice Sotomayor would have held that state penalties should only be imposed after a federal—not a state, as authorized by the Arizona law—adjudication of a violation of IRCA's employer-sanctions provisions.[55]

Recusing herself, the Court's newest Justice, Elena Kagan, did not participate in the consideration or decision in *Whiting*.[56] Justice Kagan had been Solicitor General when the Court had invited the United States to provide its views about the constitutionality of the Legal Arizona Workers Act.[57]

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

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

Before considering *Whiting*'s impact on Arizona S.B. 1070, the Ninth Circuit's decision in *United States v. Arizona* must be examined. Unlike the largely ignored Arizona business licensing law, S.B. 1070 unleashed a firestorm of national and international controversy.[58] As a result Arizona, in certain respects, became the

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[54] *Id.* at 1992. For similar concerns about the possibly discriminatory consequences of the Arizona law, see Patrick S. Cunningham, Comment, *The Legal Arizona Worker's Act: A Threat to Federal Supremacy over Immigration?*, 42 ARIZ. ST. L.J. 411, 418–19 (2010) (criticizing the employer sanctions provisions of Arizona's Legal Arizona Worker's Act as harsher than those under federal law, while also lacking anti-discrimination protections that exist under federal law). Employer discrimination against persons of particular ancestries who can lawfully work has long been a concern with employer sanctions under IRCA. *See supra* note 28 and accompanying text.

In briefly responding to Justice Breyer, the majority noted that IRCA and a number of federal laws bar discrimination and that "Arizona law certainly does nothing to displace those" laws and that "there is no reason to suppose that Arizona employers will choose not to" obey the law. *Whiting*, 131 S. Ct. at 1984.

[55] *Whiting*, 131 S. Ct. at 1998 (Sotomayor, J., dissenting).

[56] *Id.* at 1987 (Kagan, J.).

[57] *See Elena Kagan and the Arizona Business Licensing Case (*Chamber of Commerce of the United States v. Candelaria*)*, IMMIGRATIONPROF BLOG (May 12, 2010), http://lawprofessors.typepad.com/immigration/2010/05/elena-kagan-and-the-arizona-business-licensing-case-.html.

[58] *See* Marc Lacey, *Arizona Law Said to Harm Convention Businesses*, N.Y. TIMES, Nov.

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

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

> [I]n response to a serious problem of unauthorized immigration along the Arizona-Mexico border, *the State of Arizona enacted its own immigration law enforcement policy*. Support Our Law Enforcement and Safe Neighborhoods Act . . . ("S.B. 1070"), "*make[s] attrition through enforcement the public policy of all state and local government agencies in Arizona*." S.B. 1070 § 1. The provisions of S.B. 1070 are distinct from federal immigration laws. To achieve this policy of attrition, S.B. 1070 establishes a variety of immigration-related state offenses and defines the immigration-enforcement authority of Arizona's state and local law enforcement officers.[59]

18, 2010, at A18 ("The state's convention business as a whole is down $45 million this year, hurt by controversy over the state's immigration crackdown . . . ."); Rick Sanchez, *Rick's List: Vandalism, Protests over Arizona Immigration Law* (CNN television broadcast Apr. 26, 2010) (discussing the "fallout from Arizona's tough new law"); *see also* United States v. Arizona, 641 F.3d 339, 353 (9th Cir. 2011) (noting that "the following foreign leaders and bodies have publicly criticized Arizona's [S.B. 1070]: The Presidents of Mexico, Bolivia, Ecuador, El Salvador, and Guatemala; the governments of Brazil, Colombia, Honduras, and Nicaragua; the national assemblies in Ecuador and Nicaragua and the Central American Parliament; six human rights experts at the United Nations; the Secretary General and many permanent representatives of the Organization of American States; the Inter-American Commission on Human Rights; and the Union of South American Nations"), *cert. granted*, 132 S. Ct. 845 (2011).

For detailed analyses of S.B. 1070, see Gabriel J. Chin et al., *A Legal Labyrinth: Issues Raised by Arizona Senate Bill 1070*, 25 GEO. IMMIGR. L.J. 47 (2010), and Johnson, *supra* note 29. *See also* Kristina M. Campbell, *The Road to S.B. 1070: How Arizona Became Ground Zero for the Immigrants' Rights Movement and the Continuing Struggle for Latino Civil Rights in America*, 14 HARV. LATINO L. REV. 1, 2 (2011) ("[E]xamin[ing] the road leading to the passage of S.B. 1070 . . . and attempt[ing] to demonstrate how it and other state immigration laws purporting to be legitimate exercises of governmental authority are, in fact, tools of oppression, racism, and xenophobia, particularly against Latinos.").

[59] *Arizona*, 641 F.3d at 343–44 (emphasis added). Judge John Noonan wrote a forceful concurrence, emphasizing that federal preemption could be justified on the ground that the

The Ninth Circuit held that the district court did not abuse its discretion in enjoining the implementation of four sections of S.B. 1070.[60] A review of those sections highlights the differences between it and the much narrower Arizona law addressed by the Supreme Court in *Whiting*: (1) section 2(B), which requires state and local law enforcement to verify the immigration status of persons subject to a lawful stop, detention, or arrest when the officers have a "reasonable suspicion . . . that the person is an alien and is unlawfully present in the United States";[61] (2) section 3, which would make it a crime under Arizona law, in addition to a violation of federal law, to fail to complete or carry an "alien registration document";[62] (3) section 5(C), which would make it a crime for a person to apply for, solicit, or perform work without proper immigration authorization;[63] and (4) section 6, which would allow a policeman to arrest a person without a warrant if the officer has "probable cause to believe . . . [t]he person to be arrested has committed any public offense that makes the person removable from the United States."[64]

The Ninth Circuit unanimously invalidated sections 3 and 5(C).[65] Judge Carlos Bea dissented from the majority's holding with respect to sections 2(B) and 6.[66]

In explaining the court's holding, the majority observed that the Immigration and Nationality Act (INA)[67] authorizes state and local governments, with federal oversight, to assist the federal government in enforcing the U.S. immigration laws. It does so through the process of entering into a memoranda of understanding between the governmental agencies involved and training of state and local law enforcement in the U.S. immigration laws.[68] Congress

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Arizona law impinged on the U.S. government's power over foreign relations. *See id.* at 366 (Noonan, J., concurring).

[60] *Id.* at 344 (majority opinion).

[61] Ariz. Rev. Stat. Ann. § 11-1051(B) (Supp. 2010).

[62] *Id.* § 13-1509(A).

[63] *Id.* § 13-2928(C).

[64] *Id.* § 13-3883(A)(5).

[65] *Arizona*, 641 F.3d at 344; *id.* at 383 (Bea, J., concurring in part, dissenting in part).

[66] *Id.* at 369, 371–72, 383, 390–91 (Bea, J., concurring in part, dissenting in part).

[67] 8 U.S.C. §§ 1101–1537 (2006).

[68] *See Arizona*, 641 F.3d at 348–50, 364–65; INA § 287(g), 8 U.S.C. § 1357(g) (2006).

thus created a mechanism for state and local governments—with the appropriate degree of federal oversight determined by Congress and left for implementation by the Executive Branch—to assist the U.S. government in immigration enforcement.[69]

For critical analyses of what are known as § 287(g) agreements, which allow state and local police with federal training and oversight to assist in the enforcement of the U.S. immigration laws, see Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563, 1582–86 (2010); Carrie L. Arnold, Note, *Racial Profiling in Immigration Enforcement: State and Local Agreements to Enforce Federal Immigration Law*, 49 ARIZ. L. REV. 113 (2007); *see also* Mimi E. Tsankov & Christina J. Martin, *Measured Enforcement: A Policy Shift in the ICE 287(g) Program*, 31 U. LA VERNE L. REV. 403, 422–28 (2010) (evaluating the implementation of the Department of Homeland Security's model "Agreement for State and Local Immigration Enforcement Partnerships"); Michael J. Wishnie, *State and Local Policy Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084 (2004) (examining the implication of local police enforcement's alleged "inherent authority" under federal law to make immigration arrests).

[69] "Secure Communities," a controversial federal program touted by the Obama Administration, also promotes cooperation between state and local police agencies with the federal government as part of an aggressive effort to remove "serious" criminal offenders from the United States. *See* JENA BAKER MCNEILL, HERITAGE FOUND., SECURE COMMUNITIES: A MODEL FOR OBAMA'S 2010 IMMIGRATION ENFORCEMENT STRATEGY (Jan. 6, 2010) (describing operation of "Secure Communities"). Despite the claim by the Obama Administration that the information-sharing program would focus on criminal offenders who posed a serious danger to the public, "Immigration and Customs Enforcement records show that a vast majority, 79 percent, of people deported under Secure Communities had no criminal records or had been picked up for low-level offenses, like traffic violations and juvenile mischief." Editorial, *Immigration Bait and Switch*, N.Y. TIMES, Aug. 18, 2010, at A22; *see* Kavitha Rajagopalan, Op-Ed., *Deportation Program Casts Too Wide a Net: Secure Communities Is Doing More Than Sending the Worst Illegal Immigrants Home*, NEWSDAY, June 24, 2011, at A34 ("Secure Communities purports to search for repeat illegal immigrant offenders or those charged with major crimes. In practice, most people deported under the program have had no criminal record at all and were picked up on minor offenses, like speeding."); *see also* AARTI KOHLI ET AL., SECURE COMMUNITIES BY THE NUMBERS: AN ANALYSIS OF DEMOGRAPHICS AND DUE PROCESS (The Chief Justice Earl Warrant Institute on Law & Social Policy, ed. Oct. 2011) (reporting on research data suggesting that Secure Communities has disparate impacts on Latina/os); Shadi Masri, Current Developments, Development in the Executive Branch, *ICE's Initiation of Secure Communities Program Draws More Criticism Than Praise*, 25 GEO. IMMIGR. L.J. 533, 535–36 (2011) (summarizing criticisms of the Secure Communities Program). After implementation of Secure Communities, the Obama Administration generated considerable controversy when it announced that the program was mandatory and that states and local law enforcement agencies could not opt out of participation. *See* Bob Egelko, *Advocates Blast Change in U.S. Fingerprint Policy*, S.F. CHRON., Aug. 9, 2011, at C1 (reporting ICE's position that state and local governments cannot withdraw from Secure Communities).

There has been a more general controversy over whether state and local police can decide for law enforcement reasons not to participate in federal immigration enforcement

A. THE IMPACT OF *WHITING* ON *UNITED STATES V. ARIZONA* AND S.B. 1070

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

At the outset, several important distinctions are readily apparent between *Arizona* and *Whiting*. The circuit court characterized S.B. 1070 as Arizona's "own immigration law enforcement policy,"[70] which ominously suggests that the law intrudes on the "unquestionably exclusively federal power" to regulate immigration as declared in *De Canas*.[71] The statement of a state immigration policy of "attrition through enforcement," as well as the breadth of its enforcement provisions, makes it clear that S.B. 1070 most definitely is not a narrow business licensing statute akin to the Legal Arizona Workers Act.[72] Rather, the

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efforts. *See generally* Rose Cuison Villazor, *What is a "Sanctuary"?*, 61 SMU L. REV. 133 (2008) (analyzing precisely the meaning of various municipal "sanctuary" ordinances involving treatment of immigrants and the controversy surrounding them); Rose Cuison Villazor, *"Sanctuary Cities" and Local Citizenship*, 37 FORD. URBAN L.J. 573 (2010) (examining ways in which local "sanctuary laws" demonstrate the tension between notions of national and local citizenship); 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); Jennifer M. Hansen, Comment, *Sanctuary's Demise: The Unintended Effects of State and Local Enforcement of Immigration Law*, 10 SCHOLAR 289 (2008) (seeing local enforcement of immigration laws as a threat to sanctuary cities). 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 crime investigation. *See* Huyen Pham, *The Constitutional Right Not to Cooperate?: Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373, 1375 (2006) (noting local police department concerns).

[70] *Arizona*, 641 F.3d at 343.

[71] *See supra* note 16 and accompanying text.

[72] *See supra* notes 40, 43–47 and accompanying text.

Arizona law, by design and clear intent, is a much broader omnibus immigration *enforcement* bill.

Another distinction between *Arizona* and *Whiting* may figure into the Court's analysis of the constitutionality of S.B. 1070. In *Arizona*, the U.S. government, not a private party, challenged the law and contended that the state of Arizona is intruding on its *federal* power to regulate immigration.[73] The fact that the U.S. government itself has made the claim of federal supremacy places the case in a very different position than *Whiting*, in which the Chamber of Commerce, a private association of businesses collectively pursuing commercial interests, contended that a state had usurped the immigration power of the federal government.[74] Indeed, the Court in *Whiting* identified several points of dispute between the parties in which the U.S. government agreed with the state of Arizona's positions.[75] At bottom, the Supreme Court would seem much more likely to take seriously the U.S. government's claim of federal supremacy than a similar claim by the Chamber of Commerce.

B. WHAT WILL HAPPEN IN THE SUPREME COURT IN *ARIZONA V. UNITED STATES*?

The Supreme Court granted the state of Arizona's petition for certiorari in *Arizona* and is poised to address the constitutionality of S.B. 1070.[76] Although always hazardous to speculate about how the Court will decide a case, let me outline some possibilities.

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[73] Complaint at 1, United States v. Arizona, 703 F. Supp. 2d 980 (D. Ariz. 2010) (No. 2:10CV01413), 2010 WL 2653363.

[74] *See supra* note 43 and accompanying text. The U.S. government also challenged the tough Alabama immigration law on federal preemption grounds. *See* Richard Fausset, *U.S. Sues over Immigration Law*, L.A. TIMES, Aug. 2, 2011, at A5 (discussing the federal government's argument that the Alabama law "exceeds a state's role with respect to aliens"). In a ruling that is on appeal, the district court upheld the bulk of the law. *See* United States v. Alabama, No. 2:11-CV-2746-SLB, 2011 WL 4582818, at *1 (N.D. Ala. Oct. 5, 2011).

[75] *See* Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 1985–87 (2011) (noting that, contrary to the contentions of the Chamber of Commerce, the U.S. government stated that the E-Verify system could accommodate increased usage as required by the Arizona law and that E-Verify was the best means available to determine employee eligibility).

[76] Arizona v. United States, 132 S. Ct. 845 (2011).

One possibility would have been for the Court to grant the petition for certiorari, vacate the Ninth Circuit's decision, and remand the case for further consideration in light of *Whiting*. This is the precise approach that the Court took with respect to a Third Circuit decision invalidating a controversial immigration ordinance enacted by Hazleton, Pennsylvania.[77] Although the Third Circuit decided the case on federal preemption grounds, the Hazleton ordinance goes well-beyond the state business licensing law at issue in *Whiting*. Indeed, the ordinance goes so far as to prohibit landlords from renting to undocumented immigrants.[78]

Deciding not to go this route, the Court granted certiorari and presumably will decide the case on the merits. Justice Kagan recused herself from the decision to grant certiori.[79] As in many difficult cases, an important determinant of the Court's decision on the merits of *Arizona* appears to be Justice Kennedy. If he, as he did in *Whiting*, sides with Chief Justice Roberts and Justices Scalia, Alito, and Thomas, there likely will be a five Justice majority (as in *Whiting*) in favor of reversing the Ninth Circuit and upholding S.B. 1070.

Justice Kennedy has written opinions holding that federal law preempts state law when the specific federal law at issue justifies

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[77] *See* City of Hazleton v. Lozano, 131 S. Ct. 2958 (2011).

[78] *See* Fan, *supra* note 4, at 924 (describing how the Hazelton ordinance makes it a criminal offense to knowingly or recklessly provide housing to an undocumented immigrant); 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, 12–13 (2007) (noting that Hazelton copied its ordinance from a failed ordinance in San Bernardino, California); *see also* Aoki & Shuford, *supra* note 39, at 17–27 (critically analyzing state and local efforts to regulate immigration); Rigel C. Oliveri, *Between a Rock and a Hard Place: Landlords, Latinos, Anti-Illegal Immigrant Ordinances, and Housing Discrimination*, 62 VAND. L. REV. 55 (2009) (questioning local ordinances seeking to prohibit landlords from renting to undocumented immigrants).

[79] *Arizona*, 132 S. Ct. at 845. Justice Kagan also recused herself in *Whiting*. *See supra* note 56 and accompanying text. As Solicitor General, Justice Kagan may have been involved in the decision of whether to bring the lawsuit in *Arizona*. Although normally the office limits its representation of the U.S. government to actions in the Supreme Court, an attorney from the Solicitor General's office in a rare move argued the case for the United States in the district court. *See* Jerry Markon, *In Immigration Uproar, an Attorney with Subtlety: Kneedler Brings Experience, Apolitical Reputation to Job Arguing Against Ariz. Law*, WASH. POST, July 31, 2010, at A3 (noting how Edwin S. Kneedler of the Solicitor General's office argued the U.S. government's position on the Arizona law).

that conclusion.[80] He appears to decide preemption cases on a case-by-case basis. Unlike the Arizona law at issue in *Whiting*, S.B. 1070, by its own admission, "make[s] attrition through enforcement" official state immigration policy, arguably a significant—and intentional—intrusion on federal immigration power.[81]

If Justice Kennedy sides with the Ninth Circuit's majority in whole or in part, he presumably would join Justices Ginsburg, Breyer, and Sotomayor—the dissenters in *Whiting*. In that event, there likely would be a 4-to-4 split on the Court, which would mean affirmance of the Ninth Circuit decision by an equally divided Court.[82]

Alternatively, Justice Kennedy (and possibly other Justices)—as a compromise of sorts—could conclude, as Judge Bea did in his dissent in the Ninth Circuit,[83] that only two of the four provisions subject to the injunction are preempted by federal immigration law. That likely would result in an equally divided 4-to-4 Court affirming the enjoining of two provisions and a 5-to-3 majority reversing the injunction on the other two provisions.

C. THE CIVIL RIGHTS ISSUES LIKELY TO BE IGNORED

One extremely important set of issues persist that, however the Supreme Court decides *Arizona*, probably will not be squarely addressed. As Justice Breyer touched on in his dissent in *Whiting*,[84] *Arizona*—as well as many of the other cases addressing the constitutionality of state and local immigration laws—arguably have civil rights implications for communities of color.

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[80] *See* United States v. Locke, 529 U.S. 89, 94 (2000) (holding that a Washington oil tanker regulation was preempted by federal law); Boggs v. Boggs, 520 U.S. 833, 836 (1997) (ruling that the Employee Retirement Income Security Act preempted state community property law addressing interests in pension plan benefits).

[81] *See supra* notes 59–64 and accompanying text.

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

[83] *See supra* text accompanying note 66.

[84] *See supra* text accompanying note 51.

This very well could explain precisely why the debate over the laws is so frequently heated.

For example, one of the most controversial features of S.B. 1070, which was struck down by the Ninth Circuit, is section 2(B)'s requirement that state and local police verify the immigration status of persons whom they have a "reasonable suspicion" to believe are undocumented.[85] It remains unclear what might legitimately lead to such suspicion. Consequently, some observers expressed fears that enforcement of section 2(B) and its "reasonable suspicion" standard would increase racial profiling of Latina/os in Arizona.[86]

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

Moreover, Maricopa County, Arizona, Sheriff Joe Arpaio—dubbed "America's Toughest Sheriff" and vocal supporter of aggressive local enforcement of the immigration laws—is regularly accused of flagrant violations of the civil rights of Latina/os and

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[85] *See supra* notes 60–61.

[86] *See* Randal C. Archibold, *Arizona Law is Stoking Unease Among Latinos*, N.Y. TIMES, May 28, 2010, at A11 (describing concerns among the Latina/o community about S.B. 1070); Gabriel J. Chin & Kevin R. Johnson, Op-Ed., *Profiling's Unlikely Enabler: A High Court Ruling Underpins Ariz. Law*, WASH. POST, July 13, 2010, at A15 (analyzing concerns with racial profiling if S.B. 1070's provisions are implemented). Racial profiling is a more general problem that afflicts U.S. immigration enforcement. *See generally* Kevin R. Johnson, *The Case Against Race Profiling in Immigration Enforcement*, 78 WASH. U. L.Q. 675 (2000) (scrutinizing racial profiling in U.S. immigration enforcement).

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

[88] *See* OFFICE OF THE ATTORNEY GENERAL GRANT WOODS, STATE OF ARIZONA, RESULTS OF THE CHANDLER SURVEY 1–2 (1997) (noting civil rights concerns with the Chandler Roundup).

immigrants.[89] As one law professor described, "Sheriff Joe Arpaio . . . [ran] the most notorious of [the] local programs [to enforce the U.S. immigration laws], in which he houses immigrants in tents, marches them through the streets in black and white striped prison clothing, sowing terror throughout the Latino community."[90] In December 2011, the Department of Justice issued a report that is nothing less than a stinging indictment of the rampant violations of the civil rights of immigrants and Latina/os by the Maricopa County Sheriff's Office. It specifically found that "Sheriff Arpaio has promoted a culture of bias in his organization and clearly communicated to his officers that biased policing would not only be tolerated, but encouraged."[91]

For better or worse, the Supreme Court likely will not directly address the potential for racial profiling or any of the other civil rights deprivations raised by Arizona's S.B. 1070 (and immigration enforcement generally). This in large part stems from the fact that the Obama Administration framed the primary constitutional challenge to S.B. 1070 in *Arizona*, as well as the other lawsuits it has brought challenging state immigration enforcement laws, on federal preemption grounds.[92] The complaint of the United States challenging Arizona's law fails to include an Equal Protection

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[89] *See* Jacques Billeaud, *Feds Sue Arizona Sheriff in Civil Rights Probe*, WASH. TIMES, Sept. 2, 2010, *available at* http://www.washingtontimes.com/news/2010/sep/2/feds-sue-arizona-sheriff-civil-rights-probe/?page=all (reporting on the U.S. government's lawsuit against Sheriff Arpaio for refusing to produce documents in a civil rights investigation); William Finnegan, *Sheriff Joe*, NEW YORKER, July 20, 2009, at 42, 49 (reporting on the controversy surrounding Sheriff Arpaio and the persistent accusations that his office violates the civil rights of Latina/o immigrants and citizens); Jerry Markon & Stephanie McCrummen, *Justice Threatens to Sue Arizona Sheriff*, WASH. POST, Aug. 18, 2010, at A1 ("Justice Department officials in Washington have issued a rare threat to sue Maricopa County Sheriff Joe Arpaio if he does not cooperate with their investigation of whether he discriminates against Hispanics."). *See generally* 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 how law stereotypes of Latino criminality contributed to the killing of a Latino male by Phoenix police).

[90] Barbara Hines, T*he Right to Migrate as a Human Right: The Current Argentine Immigration Law*, 43 CORNELL INT'L L.J. 471, 492 (2010) (footnote omitted).

[91] *See* Letter from Thomas E. Perez, Assistant Attorney General, U.S. Department of Justice Civil Rights Division, to Bill Montgomery, Maricopa County Attorney (Dec. 15, 2011), *available at* http://www.justice.gov/crt/about/spl/documents/mcso_findletter_12-15-11.pdf.

[92] *See supra* notes 73–74 and accompanying text.

claim under the Fourteenth Amendment based on the possible discriminatory impacts of S.B. 1070.[93] The Supremacy Clause and federal preemption arguments are in certain respects more straightforward and easier for the U.S. government to prevail upon than rights-based claims, while also avoiding the charge that the Administration is playing the proverbial "race card."[94]

D. THE IMPLICATIONS OF *ARIZONA*

Arizona unquestionably raises complex policy, civil rights, international human rights, and other important issues.[95] Nonetheless, we are likely to see the Supreme Court approach the case, as it did in *Whiting*, in a lawyer-like fashion and apply the relevant federal preemption precedent to the specific provisions of the Arizona immigration law. Even if ultimately reaching different conclusions, its approach will likely mirror that of the Ninth Circuit.

A technical preemption-based legal approach may ultimately be somewhat unsatisfying to immigrant and civil rights advocates.

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[93] Equal Protection claims are difficult to prevail upon because the Supreme Court has required that, to establish a constitutional violation, the state actor act with a "discriminatory intent." *See* Washington v. Davis, 426 U.S. 229, 237–48 (1976) (holding that state action resulting in a disparate racial impact did not necessarily violate the Equal Protection Clause of the Fourteenth Amendment unless adopted or maintained with a "discriminatory intent"). Many commentators have criticized the discriminatory intent standard for ignoring discrimination based on unconscious or implicit racial bias. *See, e.g.*, Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1, 8–9 (2006) (contending that existing Equal Protection jurisprudence does not effectively prohibit discrimination based on unconscious bias); Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969, 978 (2006) (same); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1164–65 (1995) (same); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 323 (1987) ("[E]qual Protection doctrine must find a way to come to grips with unconscious racism.").

[94] *See* Johnson, *supra* note 29, at 18 (noting that the U.S. government avoided allegations of engaging in racial politics by limiting its constitutional challenges to federal preemption claims).

[95] These issues and others are discussed in the contributions to an on-line symposium on *Arizona* on SCOTUSblog. *See Special Feature: Immigration*, SCOTUSBLOG, http://www.scotusblog.com/category/special-features/immigration (last visited Apr. 12, 2012) (listing symposium contributions).

Still, it is exactly what we would expect a court of law, especially a conservative Supreme Court, to do. In any event, such an approach by this Court seems inevitable, especially given the deeply contested nature of modern U.S. immigration law and its enforcement.

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

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

At the same time, many voters across the country are frustrated with the current enforcement of the U.S. immigration laws. Vocal frustrations have increased with the severe economic downturn and tightening state and local budgets.[100] Just as we should not

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[96] *See* Rogers Smith, *The Constitutionality of "Attrition Through Enforcement,"* SCOTUSBLOG (July 13, 2011, 11:43 AM), http://www.scotusblog.com/2011/07/the-constitutionality-of-"attrition-through-enforcement"/.

[97] S.B. 1070 49th Leg., 2d Reg. Sess. (Ariz. 2010).

[98] *See supra* notes 29, 36 and accompanying text.

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

[100] *See supra* notes 29–33 and accompanying text.

disregard the pleas of those who fear the civil rights implications of immigration enforcement, we should not ignore the claims of those who fear the perceived problems caused by immigration, immigrants, and the alleged failure of the U.S. government to enforce the rule of law.[101] Recognizing this political reality, most supporters of comprehensive immigration reform advocate additional enforcement measures as a central plank for reform.[102]

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

For Congress to enact true immigration reform, what the nation needs is an open and fair discussion, based on the facts, of the issues surrounding U.S. immigration law and its enforcement. Academics, policymakers, and commentators should strive to promote and facilitate such a discussion of the issues,[105] not foment divisions among us through mean-spirited sloganeering.[106]

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[101] This claim seems dubious in light of the Obama Administration's aggressive enforcement efforts. *See supra* note 69 and accompanying text; Johnson, *supra* note 29, at 24 (criticizing the Obama Administration's singular focus on increased immigration enforcement).

[102] *See* Johnson, *supra* note 29, at 22–23 (reviewing the general contours of many comprehensive immigration reform proposals).

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

[104] *See supra* note 33.

[105] *See generally* Kevin R. Johnson, *It's the Economy, Stupid: The Hijacking of the Debate over Immigration Reform by Monsters, Ghosts, and Goblins (or the War on Drugs, War on Terror, Narcoterrorists, Etc.)*, 13 CHAPMAN L. REV. 583 (2010) (concluding that the "time is ripe for a sober discussion of immigration reform").

[106] *See, e.g.*, PETER BRIMELOW, ALIEN NATION: COMMON SENSE ABOUT AMERICA'S IMMIGRATION DISASTER (1995) (opining that lax U.S. immigration laws are destroying the American nation); VICTOR DAVIS HANSON, MEXIFORNIA: A STATE OF BECOMING (2003)

Careful analysis, learning about and adhering to the facts, and listening to peoples' concerns, whether one agrees with them or not, are what are necessary to move meaningful reform forward.

V. IMMIGRATION AND CIVIL RIGHTS

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

Later chapters of U.S. immigration history, such as the "repatriation" of persons of Mexican ancestry—including hundreds of thousands of U.S. citizens—during the Great Depression,[109] deportations of communist party members during the McCarthy era,[110] exploitation of Mexican workers through the Bracero Program,[111] the mass arrests, detentions, and removals of Muslim

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(decrying the impacts that Mexican immigrants are having in California); MICHELLE MALKIN, INVASION: HOW AMERICA STILL WELCOMES TERRORISTS, CRIMINALS, AND OTHER FOREIGN MENACES TO OUR SHORES 3 (2002) (alleging that current U.S. immigration laws are "avenues for death and destruction"); Carol Swain, *Why the Court Should Uphold S.B. 1070*, SCOTUSBLOG (July 14, 2011, 9:11 AM), http://www.scotusblog.com/2011/07/why-the-court-should-uphold-s-b-1070/ (linking without substantiation Arizona's crime, homelessness, and unemployment rate to undocumented immigration).

[107] *See generally* JOHNSON, *supra* note 37 (reviewing the intersection of immigration and civil rights in the U.S. immigration laws).

[108] *See, e.g.*, The Chinese Exclusion Case, 130 U.S. 581, 603 (1889) (upholding discriminatory immigration law excluding most Chinese immigrants from the United States). *See generally* LUCY E. SALYER, LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW (1995) (studying the harsh impacts of the Chinese exclusion laws); Kevin R. Johnson, *Minorities, Immigrant and Otherwise*, 118 YALE L.J. POCKET PART 77 (2008) (noting how the Supreme Court has justified racially discriminatory immigration laws by invocation of the "plenary power" doctrine).

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

[110] *See, e.g.*, Galvan v. Press, 347 U.S. 522, 528–32 (1954) (upholding deportation based on a lawful permanent resident's prior membership in a communist organization); Harisiades v. Shaughnessy, 342 U.S. 580, 591–92 (1952) (same).

[111] *See generally* KITTY CALAVITA, INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION, AND THE I.N.S. (1992) (analyzing and criticizing guest worker program known

and Arab noncitizens after the attacks on September 11, 2001,[112] and the raids, detention, and removal of noncitizens in contemporary times,[113] all demonstrate how the nation at various times has violated the basic civil rights of noncitizens as well as U.S. citizens of certain national origin ancestries.

Modern immigration raises civil rights issues that differ in salient ways from those that dominated the legal and social segregation of Jim Crow America. Modern immigration clearly implicates issues of race and class in new and different ways than the past.[114] Moreover, immigration enforcement has disparate impacts on communities of color.[115] Undocumented workers are exploited in the workplace, with a new Jim Crow alive and well in racially-segregated labor markets.[116]

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

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as Bracero Program); ERNESTO GALARZA, MERCHANTS OF LABOR: THE MEXICAN BRACERO STORY (1964) (same).

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

[113] *See generally* JOHNSON, *supra* note 37 (offering a history of removal and exclusion of unpopular groups of noncitizens from the United States).

[114] *See id.* at 2 (noting that immigrants who share characteristics with disfavored groups in the United States are often excluded).

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

[116] *See* Karla Mari McKanders, *Sustaining Tiered Personhood: Jim Crow and Anti-Immigrant Laws*, 26 HARV. J. ON RACIAL & ETHNIC JUST. 163, 163 (2010) ("[S]tate and local anti-immigrant laws lead to segregation, exclusion, and degradation of Latinos from American society in the same way that Jim Crow laws excluded African Americans from membership in social, political, and economic institutions within the United States and relegated them to second-class citizenship.").

[117] *See supra* Parts III–IV.

[118] *See* Kim Severson, *Immigrants Are Subject of Tough Bill in Georgia*, N.Y. TIMES, Apr. 16, 2011, at A14; *see also* Richard Fausset, *Georgia Moves Toward Law Like Arizona's*, L.A.

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

Of course, federal immigration regulation also implicates race and civil rights issues. However, it is one national government regulating immigration, not a patchwork of laws from fifty different states. The national government is less likely to be commandeered by nativist and racist elements than state and local governments. Still, those concerned with the civil rights consequences of immigration regulation and enforcement always

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TIMES, Apr. 15, 2011, at AA1 (reporting on Georgia law and quoting a legislator: " 'We're a law-abiding state. . . . And we want people to abide by the laws.' "). The core immigration enforcement provisions of the Georgia immigration law, known as House Bill 87, were invalidated by the district court in *Georgia Latino Alliance for Human Rights v. Deal*, 793 F. Supp. 2d 1317 (N.D. Ga. 2011), appeal pending. Similar laws in Alabama and South Carolina also have been challenged by the U.S. government. *See* United States v. Bentley, 2011 U.S. Dist. Lexis 112362 (N.D. Ala. Sept. 28, 2011), appeal pending; Complaint, United States v. Haley, No. 2:11-CV-02779 (D.S.C. Oct. 31, 2011).

In addition, the Georgia Board of Regents in 2010 barred undocumented students from Georgia's most selective public colleges and universities. *See* Laura Diamond, *Colleges Will Bar Illegal Students*, ATL. J.-CONST., Oct. 14, 2010, at 1A.

[119] *See, e.g.*, Chamber of Commerce v. Edmondson, 594 F.3d 742, 765–66 (10th Cir. 2010) (holding that federal law preempted two Oklahoma immigration laws); Lozano v. City of Hazleton, 620 F.3d 170, 224 (3d Cir. 2010), *vacated and remanded* 131 S. Ct. 2958 (2011) (concluding that federal law preempted the city's housing ordinances forbidding renting or leasing to undocumented immigrants); Villas at Parkside Partners v. City of Farmers Branch, 701 F. Supp. 2d 835, 838–39 (N.D. Tex. 2010) (ruling that federal law preempted a local residential licensing scheme that would revoke the licenses of those determined to be "not lawfully present" in the country); Garrett v. City of Escondido, 465 F. Supp. 2d 1043, 1057 (S.D. Cal. 2006) (finding that serious questions existed as to whether federal law preempted a city ordinance prohibiting the rental of realty to undocumented immigrants).

[120] *See* 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, 309 (2009) (" 'States' rights' were code words for resistance to the federal government's efforts to desegregate schools and Civil Rights laws that protected the rights of African Americans.").

need to be vigilant with the civil rights impacts of a uniform national system of immigration regulation. Even if the Supreme Court ultimately bars efforts to regulate immigration as seen in Arizona's S.B. 1070, efforts to protect immigrants from the excesses of the exercise of federal power over immigration will be necessary.

VI. CONCLUSION

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