A Case Study of Color-Blindness: 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 a divisive topic 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 not born on American soil[1]—has been accused by immigration extremists of failing to

1. The claim of this vocal minority is that President Obama is not eligible for the Presidency because 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. President Obama's eligibility for the presidency has been repeatedly challenged on the grounds that, despite public records showing that he was born in Hawaii, he allegedly was born outside of the United States. *See* Dana Milbank, *President Alien, and Other Tales From the Fringe*, WASH. POST, Dec. 9, 2008, at A3; Frank Rich, Op-Ed., *The Obama Haters' Silent Enablers*, N.Y. TIMES, Jun. 14, 2009, at 8. There is even a website devoted to the so-called birther movement, *see* THE BIRTHERS, http://www.birthers.org/ (last visited Sept. 26, 2011), to which CNN's Lou Dobbs gave mainstream credence on his prime-time 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 alleged to be a foreigner, President Obama has been claimed to be Muslim, even though he emphatically states that he is a Christian. *See* Angie Drobnic Holan, *Fact: Obama Isn't a Muslim*, ST. PETERSBURG TIMES, Aug. 27, 2010, at A1 ("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

enforce the U.S. immigration laws and, in fact, secretly plotting to grant a much-maligned "amnesty"[2] 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. In this country, immigration laws readily provide color-blind, facially neutral proxies that are often conveniently employed by groups that, among other things, seek to target persons of particular races and classes, specifically working class Latina/os, for immigration investigation, enforcement, and prosecution. 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.[3]

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.[4] Indeed, immigration law, by permitting the unfavorable treatment of noncitizens—a convenient, albeit imperfect, proxy for race—allows for racial discrimination in the aggregate, without the need for the express (and delegitimizing) reliance on race, on a massive scale.[5] 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 law allows 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.

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magazine poll also released last week found even more people—24 percent—said he was a Muslim."). Combined with his race and alleged foreigner status, misconceptions about President Obama's religion contribute to the views among some that he is an illegitimate outsider. *See* Samuel G. Freedman, *In Untruths About Obama, Echoes of a Distant Time*, N.Y. TIMES, Nov. 1, 2008, at A21.

2. *See infra* text accompanying notes 132–35 (discussing intense public controversy over proposals for an "amnesty" of undocumented immigrants).

3. Leslie Espinoza & Angela P. Harris, *Afterword: Embracing the Tar-Baby—LatCrit Theory and the Sticky Mess of Race*, 85 CALIF. 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.").

4. *See infra* Parts I, II.

5. 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, 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).

In this regard, the color-blind, pro-law enforcement approach[6] to the debate over immigration serves a noteworthy 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 passed by the Arizona legislature in 2010 that was designed to address the state's perceived immigration crisis. Opponents of comprehensive immigration reform also seek to achieve racially disparate ends through facially neutral measures.[7] When the color-blind approach prevails, it effectively assists in ensuring racially disparate impacts of the operation of the immigration laws.[8]

Part I of the Article offers 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 immigration reform. In so doing, this Part explains how, given the racial demographics of immigration to the United States today, debates over laws permitting discrimination based on a person's immigration status allow for coded discussions about race and the civil rights of immigrants and people of color generally.

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, although facially neutral, will injure people of color both inside and outside the United States.

One might wonder why race, even though it may animate the positions advocated by some restrictionists, tends to be buried in the modern debate about immigration. The answer is relatively simple. Times unquestionably have changed, though perhaps not as much as suggested by those who assert that the election of a Black President marks the beginning of a new postracial America. In contrast to the heyday of Jim Crow, today people in polite company rarely contend that racial discrimination in the immigration laws—or in law generally—can be justified by

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6. 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* 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 race in U.S. history); 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)); Julian Wonjung Park, Comment, *A More Meaningful Citizenship Test? Unmasking the Construction of a Universalist, Principle-Based Citizenship Ideology,* 96 CALIF. L. REV. 999, 1025 (2008) (criticizing the theory of color-blindness for ignoring, rather than confronting, issues of race and racial discrimination).

7. *See infra* Part I.

8. *See infra* Part II.

the biological or innate inferiority of people of color.[9] Indeed, the demise of Jim Crow, combined with the civil rights movement, contributed to the removal of the most blatant forms of racial discrimination from the U.S. immigration laws in 1965.[10] However, racism still exists in the modern United States and in recent years has arguably been transferred or displaced from domestic minorities to immigrants of color.[11]

It often is argued that immigrants, especially those who are "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. Rather, it is only a desire to "enforce the law" and "secure the borders." The harsh treatment of immigrants has disparate racial impacts. However, this treatment is not expressly justified by discredited notions of racial inferiority, which certainly would bring out in force those committed to 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, shifting population demographics and changing 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, or virtually anything and everything.

I. THE TUMULTUOUS IMMIGRATION DEBATE OF THE TWENTY-FIRST CENTURY

Many Americans, like the White House, believe that the current U.S. immigration system is nothing less than "broken."[12] Consequently, for most of the twenty-first century, Congress has debated what has come to be characterized as

9. For example, Samuel Huntington, in lamenting the "Hispanization" of immigration, 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).

10. For discussion of the Immigration Act of 1965 and its impacts on the demographics of modern immigration, see Immigration Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (1965); 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).

11. 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).

12. *See* President Barack Obama, Remarks by the President on Comprehensive Immigration Reform (July 1, 2010), *available at* http://www.whitehouse.gov/the-press-office/remarks-president-comprehensive-immigration-reform.

"comprehensive immigration reform,"[13] although the many reform proposals out there in fact vary widely.[14] A more general, and often overheated, debate over immigration continues to rage on a daily basis in cities and towns across the United States.[15] Unfortunately, the public debate is not always conducted at a particularly—some might claim minimally—sophisticated level.[16]

Supporters of increased immigration enforcement of many different varieties often insist—and vigorously protest any claims to the contrary—that they are not the least bit anti-immigrant, anti-Mexican, or racist. Rather they contend that they simply are anti-"illegal" immigrant.[17] This claim is frequently buttressed with the

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13. *See infra* text accompanying notes 125–28 (discussing the common components of many comprehensive immigration reform proposals). For analysis of various immigration reform proposals and their failure, see MARC R. ROSENBLUM, MIGRATION POLICY INST., "COMPREHENSIVE" LEGISLATION VS. FUNDAMENTAL REFORM: THE LIMITS OF CURRENT IMMIGRATION PROPOSALS (2006) (analyzing critically then-current 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 immigration reform debate); 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 just the last few years, see BILL ONG HING, DEPORTING OUR SOULS: VALUES, MORALITY, AND IMMIGRATION POLICY 17–38 (2006).

14. For a summary of some of the commonalities of comprehensive immigration reform proposals, see *infra* text accompanying notes 128–31.

15. *See infra* text accompanying notes 24–55.

16. *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 hyperbolic, and counterproductive, rhetoric all too common in the modern debate over immigration in the United States).

17. *See, e.g.*, Lawrence Downes, *What Part of "Illegal" Don't You Understand?*, N.Y. TIMES, Oct. 28, 2007, at C11 ("Meanwhile, out 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."); Ruben Navarrette Jr., *No Such Thing as a Good Immigrant*, SAN DIEGO UNION-TRIB., 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 regularly 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 have been slightly below the surface of the clamor for tougher enforcement of the criminal laws. *See* Richard Dvorak, *Cracking the Code: "De-coding" Colorblind*

all-too-common rebuke to any suggested reform that arguably benefits undocumented immigrants or even to the minimalist claim that they have rights: "What part of illegal don't you understand?"[18] 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 play the "race card" and quickly dismiss and disregard any and all claims of the proenforcement crowd as "racist" and "nativist."[19] 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 in the United States. Latina/os, a group that has grown dramatically as a percentage of the overall U.S. population (and as a political force) over the last fifty years, have strenuously advocated for immigration reform and support reform by a wide margin.[20] This has been relatively constant over time and seems unlikely to change in the immediate future.

The reason for the decidedly proreform tilt among Latina/os is pretty straightforward. The enforcement of the U.S. immigration laws disparately affects Latina/os, U.S. citizens as well as immigrants and potential immigrants.[21] 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 immigration reform legislation.[22]

This Part of the Article considers recent developments on the immigration front lines. These developments tell volumes about the true meaning and impacts of the facially neutral, generally raceless 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

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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 60, and George Bush's Willie Horton television advertisements, which suggested that his Democratic opponent had released a violent Black criminal from prison).

18. *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.'").

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

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

21. *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).

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

borders," the immigration laws in question are replete with racially disparate consequences and outcomes.[23] 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 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.[24] One reason for the vigor of those efforts is 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 immigration measures in response to frustration over the failure of Congress to enact comprehensive immigration reform.

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23. For critical analysis of the role of race in the history of the U.S. immigration laws through to modern times, 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). On the need for legal scholarship to investigate more closely the salience of race to the formation and enforcement of immigration law, 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 (2000).

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 in 1924 of the national-origins quotas system, which 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 R. 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). An insightful philosophical explanation for American law's harsh treatment of immigrants, as well as people of color generally, can be found in George A. Martinez, *Race, American Law and the State of Nature*, 112 W. VA. L. REV. 799 (2010).

24. *See* JENNIFER BAILEY, NAT'L CONFERENCE OF STATE LEGISLATURES, 2010 IMMIGRATION-RELATED BILLS AND RESOLUTIONS IN THE STATES (JANUARY-MARCH 2010) (Ann Morse ed., 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.

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.[25] To illustrate, consider that in the much publicized 2009 raid on the meat and poultry processing plant in rural Postville, Iowa, more than ninety-five percent of the immigrant workers arrested were from Guatemala and Mexico.[26]

Tensions 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 is no longer limited to the West and large urban cities in the East, as historically had been the case over much of the course 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.[27] Such claims are commonplace despite the fact that deportations and detentions of noncitizens by the U.S. government have reached record highs for several years running;[28] indeed, with respect to immigration, the Obama administration arguably has emphasized enforcement over almost all else.[29] Ongoing, if not growing, concerns with the class and race of many of today's immigrants,[30] as well as more legitimate grievances over other matters, such as the unequal distribution of the costs and benefits of immigration between the federal

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25. *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, 136–40 (2009).

26. *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).

27. *See* Jeremy Duda, *Arizona Gov. Brewer Lauded by the Right, Jeered by the Left*, ARIZ. CAPITOL TIMES, July 22, 2010, at X (quoting Arizona Governor Jan Brewer's 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 . . . .").

28. *See infra* text accompanying notes 168–71.

29. *See infra* text accompanying notes 117–18.

30. *See* Johnson, *supra* note 26, at 23–30. Some of 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, 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); 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 . . . aimed at expelling immigrant residents . . . and anti-loitering ordinances in communities . . . targeting congregations of immigrant day laborers") (footnotes omitted); Ernesto Hernández-Lopez, LA's Taco Truck War: How LA Cooks Food Culture Contests (Sept. 2, 2010) (unpublished draft) (on file with author), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1694747 (analyzing critically efforts to regulate taco trucks in Los Angeles County).

and state and local governments,[31] 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 on the modern U.S. immigration landscape. For more than a century,[32] the conventional wisdom was that federal power over immigration is exclusive, leaving relatively 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.[33] The classic modern—and most emphatic—statement of federal supremacy over immigration can be found in the Court's 1976 decision in *DeCanas v. Bica*: "Power to regulate immigration is *unquestionably exclusively a federal power*."[34]

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 responding to the proper role of state and local governments vis-à-vis the federal government in the regulation of immigration and immigrants.[35] Shortly after

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

32. 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).

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

34. 424 U.S. 351, 354 (1976) (emphasis added) (citations omitted). At the same time, the Court found that the California law in question—in that case barring 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 on the scope of state and local power over immigration in the lower courts.

The flip side of the coin is that the federal government has been said to have "plenary power" over immigration, with limited judicial review of substantive immigration decisions. *See* Kevin R. Johnson, *Minorities, Immigrant and Otherwise*, 118 YALE L.J. POCKET PART 77 (2008), *available at* http://yalelawjournal.org/2008/10/28/johnson.html. *See generally* KEVIN R. JOHNSON ET AL., UNDERSTANDING IMMIGRATION LAW 101–15 (2009) (summarizing the scope of federal power to regulate immigration).

35. *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 a 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 a 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 an Arizona law denying business licenses to employers that employed undocumented immigrant workers was not preempted by federal

Arizona passed its infamous immigration law known as S.B. 1070, the Supreme Court granted *certiorari* on a federal preemption case that dealt with a narrow provision of the U.S. immigration laws that permitted state regulation of business licenses; however, in its decision the Court did not generally clarify the respective roles of the federal and state governments in immigration regulation.[36]

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,[37] 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 practical reasoning behind the federal preemption of state immigration laws is simple. The nation needs a uniform set of national immigration rules, not a patchwork of fifty different systems of immigration regulation.[38] A national immigration scheme also is needed in part so that individual states do not simply shift migration from their state to other states.[39]

For similar reasons, the Supreme Court has made it clear that the states cannot conduct their own foreign policies.[40] Only the federal government may

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immigration law), *amended by* 558 F.3d 856 (9th Cir. 2009), *aff'd*, Chamber of Commerce v. Whiting, 131 S. Ct 1968 (2011).

36. *See Chicanos Por La Causa, Inc.*, 544 F.3d 976 (holding that an Arizona law denying business licenses to employers that employed undocumented immigrant workers was not preempted by federal immigration law), *amended by* 558 F.3d 856 (9th Cir. 2009), *aff'd by* Chamber of Commerce v. Whiting, 131 S. Ct 1968 (2011).

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

38. Importantly, the Supreme Court reached that conclusion long ago. *See supra* text accompanying notes 33–34.

39. *See* Sergio Quintana, *Immigrants Might Leave Arizona but Not the Country*, Story on *All Things Considered*, NAT'L PUB. RADIO, Aug. 27, 2010, 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 when those requirements interfered with the right to travel).

40. *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 foreign affairs power of the federal government); *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 (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

articulate a U.S. foreign policy. 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[41] provoked harsh condemnation from the President of Mexico.[42] Previous state immigration measures, such as California's Proposition 187,[43] also generated criticism from high levels of the Mexican government.[44]

California's Proposition 187 would have, among other things, 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,[45] 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.[46] Thus, Arizona 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.[47]

Over the last few years, there has been considerable scholarly ferment concerning the role of state and local governments in regulating immigration and immigrants.[48] There also has been much debate on the ground about the topic as state and local governments have passed immigration laws.

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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.").

41. *See infra* Part I.B.

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

43. *See infra* text accompanying notes 45–47.

44. *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).

45. *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).

46. *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))).

47. *See infra* text accompanying notes 56–82.

48. 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*

To explore the contours of the ongoing debate, compare two distinctly different perspectives on state and local involvement in immigration. 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.[49] From a very different perspective, advocates of strict enforcement of the immigration laws regularly rail on "sanctuary cities," that is, cities that, believing it to be better law enforcement policy, restrict the exchange of information by local police and other local governmental agencies with federal immigration authorities.[50]

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. *See, e.g.*, 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); 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, *Immigration-Related State and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement,* 2007 U. CHI. LEGAL F. 27 (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); *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).

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

50. *See* Rose Cuison Villazor, *What Is a "Sanctuary"?*, 61 SMU 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 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).

Although questioned on policy grounds, state and local cooperation with the federal government in immigration enforcement has increased significantly over the last decade. The memoranda of understanding entered into under Immigration & Nationality Act § 287(g), coupled with enforcement-oriented immigration legislation passed by Congress in 1996,[51] have increased the cooperation of state and local governments with the federal immigration authorities in enforcing the U.S. immigration laws.[52]

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—at least ostensibly—to remove serious criminal offenders from the United States.[53] "Criminal aliens," of course, are among the most unpopular subsets of all noncitizens, with precious few defenders in the political process.[54] 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."[55]

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

Perhaps the most well-known recent example of an effort of a state 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 federal enforcement operations first put into place in El Paso, Texas and San Diego, California in the 1990s. Among other

51. *See infra* note 166 (citing authority).

52. *See* Immigration & Nationality Act (INA) § 287(g) (codified as amended at 8 U.S.C. § 1357(g) (2006)). For critical analysis of 287(g) agreements, which allow state and local police with federal 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 (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 Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084 (2004) (examining the implication of local police enforcement's "inherent authority" under federal law to make immigration arrests).

53. *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.

54. *See* Johnson, *Public Benefits and Immigration*, *supra* note 45, at 1531–34.

55. Editorial, *Immigration Bait and Switch*, N.Y. TIMES, Aug. 17, 2010, at A22.

consequences, these enforcement operations redirected migrants toward the United States-Mexico border in the southern part of the state.[56]

Over time, public concerns in Arizona over immigration grew and 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."[57] Known popularly as S.B. 1070, the law includes provisions that proponents and opponents of the Arizona law agreed make it the toughest enforcement-oriented state or local immigration measure currently in existence. Not surprisingly, the law sparked 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* . . . ."[58] 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.[59]

On its face, "aliens" is a race-neutral term borrowed from the U.S. immigration laws.[60] However, in the context of the modern immigration demographics of Arizona, the terminology[61] serves as thinly disguised code for

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56. *See infra* text accompanying notes 190–91.

57. S.B. 1070, 49th Leg., 2d Reg. Sess. § 1 (Ariz. 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).

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

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

60. *See* INA § 101(a)(3) (codified as amended at 8 U.S.C. § 1101(a)(3) (2006)) ("The term 'alien' means any person not a citizen or national of the United States.").

61. More generally, 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 (1996–1997) (analyzing how the term "alien" used to refer to noncitizens in the Immigration & Nationality Act adversely affects their treatment 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 (W. Va.), Sept. 2, 2010, at 4A (criticizing Senator Lindsey Graham's threat to revisit birthright citizenship under the Fourteenth 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.*, 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 Fourteenth 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

Mexican and Central American immigrants.[62] 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.[63] This presumably is why Latina/os across the United States reacted so negatively, and passionately, to S.B. 1070.

The use of code from the U.S. immigration and nationality laws as a surreptitious—and color-blind and facially neutral—way to discriminate on the basis of race would not be without historical precedent. Popular in the West in the early twentieth century, discriminatory state laws known as the "alien land laws" borrowed from U.S. immigration and nationality law to prohibit the ownership of certain real property by "aliens ineligible to citizenship." In operation, the land laws targeted immigrants from Asia,[64] because noncitizens at the time (and the

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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, contributed to the recent debate over 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, s*ee* Gebe Martinez et al., *Birthright Citizenship Debate Is a Thinly Veiled Attack on Immigrant Mothers*, CENTER FOR AM. 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 in the Fourteenth Amendment, see Garrett Epps, *The Citizenship Clause: A "Legislative History,"* 60 AM. U. L. REV. 331 (2010).

62. In this way, the Arizona law was enacted with similar racial code as was seen in California, where Governor Pete Wilson, who was running for reelection, ran nightly television advertisements in support of Proposition 187 stating ominously "[t]hey keep coming," accompanied by dark news footage of persons appearing to be scrambling to cross the United States-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.

63. *See Arizona QuickFacts*, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/04000.html (last updated Dec. 23, 2011).

64. *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 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 (2010) (critically analyzing major Supreme Court decision invalidating application of California's Alien Land Law).

dominant—and most unpopular group—of immigrants of that era were from Japan) had to be "white" to be eligible for naturalization under the U.S. nationality laws.[65] The alien land laws, it has been argued, served as a prelude to the infamous internment of persons of Japanese ancestry during World War II, now a dark stain on the American memory.[66]

As predicted by some prognosticators,[67] 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 Arizona S.B. 1070.[68] 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 preempted by federal law.[69] Those parts of the law not directly intruding on the federal power to regulate immigration—such as the prohibition on Arizona officials from limiting enforcement of the U.S. immigration laws,[70] or the portion of Section 5 that makes it a crime under certain circumstances for a motor vehicle to pick up day laborers[71]—were not subject to the injunction and went into effect.

Although vehemently criticized by the supporters of the Arizona law,[72] the district court ruling acknowledged the legitimate concerns of the Arizona legislature with the current circumstances of 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."[73] Consistent with sensitivity to the state's legitimate interests, the court carefully analyzed each section of the Arizona law and scrutinized whether the specific provision intruded on the federal power to regulate immigration.[74]

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65. *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).

66. *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 (Aspen Publishers 2001).

67. 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.

68. *See* United States v. Arizona, 703 F. Supp. 2d 980 (D. Ariz. 2010), *aff'd*, 641 F.3d 339 (9th Cir.), *cert. granted*, 132 S. Ct. 845 (2011).

69. *See id.* at 986–87.

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

71. *See* Ariz. S.B. 1070, *supra* note 57, § 5; *see United States v. Arizona*, 703 F. Supp. 2d at 986.

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

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

74. *See supra* text accompanying notes 67–71.

In essence, the court found that the U.S. government is likely to prevail on its claims that the portions of the Arizona law that most directly purport to regulate immigration are preempted by federal law. Importantly, the court concluded that the portion of Section 2[75]—one of the central, and most controversial, portions of the Arizona law[76]—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 preempted by federal law.[77]

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*.[78] In actions filed before the one filed by the U.S. Department of Justice, civil rights organizations had made similar federal preemption arguments in separate challenges to the Arizona law.[79] However, the argument that a state law is preempted 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 representing private, or at least nongovernmental, parties.

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 to the portions of S.B. 1070 that were most vulnerable to a federal preemption claim.[80] In this regard, the U.S. government studiously avoided alleging that the law would result in racial profiling or racial discrimination, thereby attempting to minimize any controversy and claims that it was engaging in racial politics or, put colloquially, "playing the race card." Moreover, the Department of Justice assigned a seasoned 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 court in Arizona, an extraordinary step that unquestionably signaled to the district court the great importance of the case to the federal government.[81]

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

76. *See infra* text accompanying notes 83–95.

77. *See United States v. Arizona*, 703 F. Supp. 2d at 987. Previously, the language had been broader and applied to any "lawful contact" by police with persons. *See id.* at 994.

78. *See id.* at 980.

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

80. *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).

81. *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.

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* was upheld by the Ninth Circuit and, in my estimation, stands a good chance of surviving its upcoming review by the U.S. Supreme Court. The ruling follows relevant precedent, is consistent with the conventional wisdom, and is firmly within the constitutional mainstream.[82]

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.[83] Such claims carry special force in light of the history of discrimination against Latina/os in the state of Arizona.[84]

For many years, state and local law enforcement authorities in Arizona have been subject to complaints of discrimination against Latina/os.[85] Despite claims of racial neutrality, a focus on immigration status in virtually any law often

82. *See supra* text accompanying notes 32–34.

83. *See* Gabriel J. Chin & Kevin R. Johnson, *Profiling's Unlikely Enabler: A High Court Ruling Underpins Arizona Immigration Law*, WASH. POST, July 13, 2010, at A15, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/07/12/AR2010071204049.html.

84. *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); 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 Legal Arizona Worker's Act for harsher employer sanctions provisions than under federal law, but lacking antidiscrimination measures that exist under federal law); 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); Jerry Markon & Stephanie McCrummen, *Justice Threatens to Sue Arizona Sheriff,* WASH. POST, Aug. 18, 2010, at A1, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/08/17/AR20100817036 37.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."); 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 leading 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 but resulting in detrimental barriers to education); *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).

85. *See supra* note 84 (citing authorities).

generates fears among Latina/os, who are frequently stereotyped as "foreigners,"[86] that enforcement in fact will be based on 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—especially undocumented immigrants, a majority of whom are Latina/o—to the United States.

Noticeably, 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 directly from the nature of the U.S. government's relatively narrow federal supremacy 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 frequently employed by restrictionists in the modern debate over immigration. Defenders of S.B. 1070 aggressively claim the law has nothing to do with 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 agreed.[93] Given

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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). *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).

87. *See supra* text accompanying notes 3–8 (mentioning concept of discrimination by proxy). Similarly, Arizona saw a racially polarized debate over an English-only law passed by voters that had national origin consequences. *See* Cristina M. Rodríguez, *Language Diversity in the Workplace*, 100 NW. U. L. REV. 1689, 1742 (2006); *see also* 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) (discussing the approval by voters of amendment to the Arizona Constitution making English the official language of Arizona and prohibiting state employees from using non-English languages in performing their official duties, which the Arizona Supreme Court struck down).

88. *See* Randal C. Archibold, *Preemption, Not Profiling, in Challenge to Arizona*, N.Y. TIMES, July 8, 2010, at A15 (noting that U.S. government was not 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* Ariz. S.B. 1070, *supra* note 57, § 2(J) ("This section [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*

that judicial endorsement, it should not be surprising that law enforcement authorities have regularly been charged with engaging in a pattern and practice of racial profiling, with "Mexican" appearance as its touchstone in immigration enforcement.[94]

Consequently, racial profiling is likely to be exacerbated—and, at a minimum, expanded—if state and local law enforcement officers are permitted to enforce the U.S. immigration laws. The risks are especially great if these officers are not adequately and appropriately 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 the Arizona law has been that S.B. 1070 simply "mirrors" federal law and therefore cannot be unconstitutional.[96] However, as the district court found in *United States v. Arizona*,[97] the Arizona law

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Whren v. United States *and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005 (2010) (analyzing how Supreme Court decisions in effect sanctioned 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 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, 2009 WL 825787, *5 (D. Minn. Mar. 27, 2009) ("[R]ace may be properly considered by an official in making the determination to stop an individual to inquire about his immigration status.") (citing Brignoni-Ponce, 422 U.S. at 886–87).

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

94. *See* 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.'" (quoting ELIZABETH HULL, WITHOUT JUSTICE FOR ALL: THE CONSTITUTIONAL RIGHTS OF ALIENS 107 (1985))); *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, *Ariz. 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 980, 1000 (D. Ariz. 2010), *aff'd*, 641 F.3d 339 (9th Cir.), *cert. granted*, 132 S. Ct. 845 (2011). For analysis of the complexities of states seeking to criminalize violations of federal immigration law, see Gabriel J. Chin & Marc L. Miller, *The Unconstitutionality of State Regulation of Immigration Through Criminal Law* (Univ. of Ariz., Arizona Legal Studies Discussion Paper No. 10-25, 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1648685.

criminalizes conduct related to immigration that is *not* criminalized by federal law, thus on its face going beyond—and 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. However, immigration regulation in the modern era has been viewed as exclusively a federal power.[99] State and local enforcement must be done consistent with federal law and 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, it is worth noting in attempting to gain a better understanding of the vehemence of the reaction of many Latina/os to S.B. 1070.

4. Conclusion

Until the Arizona legislature intervened, immigration reform and immigration, after hitting a high-water 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, Arizona's S.B. 1070 returned immigration to the front pages of newspapers across the country—indeed, around the world. After the Arizona legislature passed the law, for example, opponents across the country made impassioned pleas for economic boycotts of the state.[103] The law also triggered a renewed heated national debate over immigration.

Like it or not, Arizona's S.B. 1070 reflected the deep and wide public concern with undocumented immigration and perceived deficiencies in immigration enforcement in the United States. Nonetheless, this Article contends that the proper way to respond to the problems 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

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

99. *See supra* text accompanying notes 32–33.

100. *See* Immigration and Nationality Act (INA) § 287(g), 8 U.S.C. § 1357(g) (2006). For example, under § 287(g) agreements, state and local law enforcement officers agree to receive federal training in order to assist the federal government in enforcing 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).

102. *See infra* text accompanying notes 111–14.

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

regulations.[104]

Put differently, Congress could do much to calm immigration tensions in states and localities across the United States by passing meaningful immigration reform that addresses the true causes of the undocumented migration of workers, such as 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 likely will continue. Given the broad public concern, politicians, if not immigrants and citizens, have much to gain both personally and 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 and 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 twenty-first century debating immigration reform, albeit in fits and starts. Initially, after the tragic events of September 11, 2001, a flurry of legislative activity resulting in the passage of two acts of Congress significantly tightened the U.S. immigration laws in the name of the national security.[107] In addition, a myriad of immigration-related steps were taken by the Bush administration in the name of the "war on terror" after September 11, many of which were harshly criticized for their negative civil rights consequences.[108]

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

105. *See infra* text accompanying notes 146–53.

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, 2005, Pub. L. No. 109-13, 119 Stat. 231, 302–24 (2005) (codified as amended in scattered sections of 8 U.S.C.); 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) (codified as amended in scattered sections of 8 U.S.C., 12 U.S.C., 15 U.S.C., 18 U.S.C., 20 U.S.C., 31 U.S.C., 42 U.S.C., 47 U.S.C., 49 U.S.C, 50 U.S.C).

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. SURV. AM. L. 295 (2002); 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"*

Right or wrong, the concerns over immigration became dominated by national security concerns in the wake of September 11. Consequently, the debate over immigration reform and border security very 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 to do whatsoever with terror and terrorism.[110] This raises the question whether those with a restrictionist political agenda exploited security concerns to justify a general crackdown on immigrants.

A few years after September 11, 2001, Congress considered immigration reform legislation going beyond that focused on national security. In December 2005, the House of Representatives passed the Sensenbrenner Bill, which included many enforcement-oriented provisions, including the criminalization of the mere status of being undocumented. The harshness of the bill resulted in unprecedented—because decidedly proimmigrant—mass marches 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 comprehensive immigration reform bill that included a legalization program. Congress, however, ultimately failed to enact it, or any other compromise bill, into law.[112]

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

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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 Damage 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 CRIM. L. BULL. 550, 563–75 (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 111, at 103–04. The inability of Latina/os to enact immigration reform in part results from the limits on Latina/o political power due to the fact that a significant number are not U.S. citizens. *See generally* Kevin R. Johnson, *A Handicapped, Not "Sleeping," Giant: The Devastating Impact of the Initiative Process on Latina/o and Immigrant Communities*, 96 CALIF. L. REV. 1259 (2008).

113. *See* Secure Fence Act of 2006, Pub. L. No. 109-367, 120 Stat. 2638 (2006) (codified as amended at 8 U.S.C. § 1103 (2006)).

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. In addition to stating that the administration supported reform of the immigration laws, as a U.S. senator Obama had previously demonstrated consistent support for immigrant causes; in the face of strong criticism, he advocated for driver's license eligibility for undocumented immigrants[115] and 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.

However, the initial optimism about the possibility for meaningful immigration reform during the Obama administration has dimmed in light of the administration's initial steps on immigration, which have focused primarily 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 into 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] In the name of calming tensions along the United States-Mexico border, the Obama administration in spring 2010, after the Arizona legislature enacted S.B. 1070, deployed more than a thousand National Guard troops to the region.[118]

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114. *See infra* text accompanying notes 160–87.

115. *See* Patricia Smith, *Whose 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), *available at* http://teacher.scholastic.com/scholasticnews/indepth/upfront/features/index.asp?article=f110308_10issues.

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*, 55 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). A version of the DREAM Act failed to get out of 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, *available at* http://articles.latimes.com/2010/dec/18/news/la-pn-senate-dream-20101219.

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*, BOS. GLOBE, May 26, 2010, at 11. For an analysis of the Obama administration's immigration and civil rights agenda in the early part of his presidency, see Cristina M.

Some lawmakers, particularly Latina/o members of Congress,[119] continue to advocate for Congress to pass some form of 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 speech calling for Congress to pass comprehensive immigration reform.[121] However, the fall 2010 midterm elections cooled interest in Congress for immigration reform, though it remained deeply controversial and divisive among the public at large.

Despite the apparent 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 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 modern 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 of 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 the current U.S. immigration laws.[125] We saw the same general phenomenon with respect to the disparate racial impacts of the Arizona law, 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 a most 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

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Rodríguez, *The Early Obama Administration: Immigration and the Civil Rights Agenda*, 6 STAN. J. C.R. & C.L. 125 (2010).

119. *See, e.g.*, Press Release from Rep. Luis V. Gutierrez, 4th Dist. Ill., *Immigration Reform Still Possible This Year* (July 14, 2010), *available at* http://www.gutierrez.house.gov/index.php?view=article&catid=43%3A2010-press-releases&id=598%3Arep-gutierrez-qimmigration-reform-still-possible-this-yearq&format=pdf&option=com_content&Itemid=55.

120. *See* Gary Martin, *Obama Makes His Case for Immigration Reform*, HOUS. CHRON., July 2, 2010, at A1.

121. *See id.*

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

123. *See* Aoki & Johnson, *supra* note 21.

124. *See* Johnson, *supra* note 26.

125. *See supra* text accompanying notes 3–8.

126. *See supra* text accompanying notes 96–101.

127. *See supra* text accompanying notes 3–8.

respond to the legitimate concerns of those directly affected by the disparate racial impacts.

II. THE RACIALLY DISPARATE IMPACTS OF THE FAILURE OF COMPREHENSIVE IMMIGRATION 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, and indeed probably is the most politically popular.[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 in 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 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 failure of Congress to enact some kind of comprehensive immigration reform.

A. The Clear Losses for Latina/os If Comprehensive Immigration Reform Is Not Enacted.

This section of the Article identifies some obvious 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 based on race, 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.

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128. *See supra* note 13 (citing authorities analyzing various comprehensive immigration reform proposals).

129. *See* Johnson, *supra* note 117, at 1608.

130. See Johnson, *supra* note 26, at 13–15. *See generally* JOHNSON, *supra* note 31 (advocating for more liberalized U.S. immigration law).

131. *See infra* text accompanying notes 132–45.

1. The Maintenance of a Racial Caste of Undocumented Immigrants

Often denigrated and delegitimized by its opponents as an unjust "amnesty" for lawbreakers and criminals, any proposal to regularize the status of undocumented immigrants has encountered stiff, as well as 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 of 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, such a program for long-term residents is a necessary ingredient of comprehensive immigration reform. Such an amnesty for undocumented immigrants would not be unprecedented in American history. Amnesty, for example, 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 and learning English, would bring millions of undocumented immigrants in from the "shadows"[136] of American social life. Conversely, the failure to adopt a legalization program will ensure that the undocumented continue life at the margins.

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

133. *See supra* note 132 and accompanying text. To the best of my knowledge, tax, parking ticket, or even 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 164–72.

136. President George W. Bush, Remarks by the President on Immigration Policy (Jan. 7, 2004) (transcript available at http://georgewbush-whitehouse.archives.gov/news/releases/2004/01/20040107-3.html) (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 firsthand account by journalist working with undocumented immigrants in various low wage jobs in challenging conditions across the United States).

Some might object to the requirement of learning English for legalization as 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 CALIF. L. REV. 1259 (1997) (analyzing the historical demand for assimilation placed on persons of Mexican ancestry in the United States).

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

It was estimated that, as of March 2008, approximately 11.9 million undocumented immigrants lived in the United States.[140] The number appears to have declined somewhat since then because of the downturn in the American economy.[141] What appears to have remained roughly constant is that

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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); Harv. L. Rev., *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 195–97.

139. Undocumented immigrants are not eligible for driver's licenses in most 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."); María Pabón López, *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 (MAPPING RACISIMS) (2003)); KEVIN R. JOHNSON, THE "HUDDLED MASSES" MYTH: IMMIGRATION AND CIVIL RIGHTS (2003); 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—and possibly even removal—if they are pulled over by the 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.

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

approximately sixty percent of all undocumented immigrants originate from Mexico.[142]

The statistics suggest that a legalization program would benefit many undocumented 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 affect 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. As we learned with 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 by journeying to the United States to work.[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 said to fail 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 last half of the twentieth century.[146] At a fundamental level, many, probably most, undocumented immigrants come to the United States to work,[147] not to access the public benefit system, commit crime, or have "anchor babies"[148]—which are 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

142. *See supra* notes 140–41 (citing authorities).

143. *See infra* note 172 and accompanying text (discussing prevalence of mixed immigration status families among Latina/os in the United States).

144. *See infra* text accompanying notes 164–72.

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 144–45; *see also* BILL ONG HING, ETHICAL BORDERS: NAFTA, GLOBALIZATION, AND MEXICAN MIGRATION (2010) (analyzing the impacts of labor flows to the United States from Mexico created by the North American Free Trade Agreement (NAFTA) and offering recommendations on steps to reduce those flows and gain control of labor migration

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 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 recourse to remedies under the law to ensure the enforcement of labor protections. Employers thus will continue to have access to exploitable—and readily disposable—labor.

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-skilled and medium-skilled workers to the United States would serve to reduce the growth of a new undocumented population 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 flows of undocumented migrants.

Given that currently sixty 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 of the U.S. immigration laws would disproportionately benefit people of color who want to come to the United States lawfully to work. Conversely, a failure to reform 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

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from Mexico).

150. *See* Johnson, *supra* note 26, at 13–15.
151. *See infra* text accompanying notes 195–97.
152. *See* Johnson, *supra* note 26, at 13–15.
153. *See supra* text accompanying notes 144–45.
154. *See infra* text accompanying notes 160–223.
155. *See supra* text accompanying notes 117–18.

Latina/os; other heightened enforcement efforts are likely to do so as well.[156] Thousands of Mexican citizens have died along the United States-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 jobs and work 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 all 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 and Customs Enforcement officers.[160] There also are continued calls for extending the fence along the United States-Mexico border and increasing 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 multifaceted immigration reform proposal.[161]

Along these lines, some have claimed 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 poison pill might indefinitely delay passage of comprehensive immigration reform.

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156. *See* Johnson, *supra* note 117, at 1608.

157. *See infra* text accompanying notes 188–90.

158. *See supra* text accompanying notes 3–8.

159. *See infra* text accompanying notes 195–97.

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 as part of 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 128–31.

162. *See supra* text accompanying notes 132–45.

Even without comprehensive immigration reform, the nation has experienced increased enforcement activity in both the waning years of the Bush administration and throughout 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 of enhanced enforcement measures (including provisions allowing for the imposition of civil sanctions on the employers of undocumented workers), amnesty for undocumented immigrants, and guest worker programs.[165] More enforcement legislation and 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"; both phenomena have been much discussed in immigration law scholarship.[167] Deportations of noncitizens from the United States have been hitting record levels for a number of years.

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163. *See supra* text accompanying notes 117–18.

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

165. *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"—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. *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).

TABLE 1. Comparison of Removals and Total Undocumented Population

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 show, the U.S. government has dramatically increased the number of removals of noncitizens by more than tenfold in less than twenty years. Over the same time period, the undocumented population has not diminished in size. *In fact, it has roughly doubled.* This is a telling 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 huge fiscal and human costs, have been. Keep in mind that deportations of noncitizens often have negative impacts on families and children, including many U.S. citizen children who may be effectively deported when one or both parents are.[172] Increased enforcement imposes more human and fiscal costs

168. *See* U.S. DEP'T OF HOMELAND SEC., 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" removals. *See* Press Release, Dep't of Homeland Sec., 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, ICE set a record for overall removals of illegal aliens, with more than 392,000 removals nationwide.*") (emphasis added).

169. *See* PASSEL & COHN, *supra* note 140.

170. U.S. DEP'T OF HOMELAND SEC., 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 SERV., ESTIMATES OF THE UNDOCUMENTED POPULATION RESIDING IN THE UNITED STATES: OCTOBER 1996, at 2 (Aug. 1997).

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*

but offers few tangible immigration benefits, enforcement or otherwise.

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 sufficient enforcement has been put into place.[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 the U.S. citizen members of their families.

One might ask the entirely logical question of why there has been an increase in undocumented immigrants despite the dramatic ramp-up in immigration

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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 subject of families and immigration. *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, *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); 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).

173. *See supra* text accompanying notes 117–18; 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 use stricter interior enforcement and 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.

enforcement for more than two decades. 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 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 marking the beginning of the end of 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 restaurants, homes, construction sites, 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.[180]

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 sufficiently low (so as not to incorrectly disqualify excessive numbers of lawful workers from employment) to survive legal challenge.[181]

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175. *See* Johnson, *supra* note 117, at 1610–17. Perhaps ironically, 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 (2010).

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

177. For critical analysis of the nation's failed experience with 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).

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

179. *See id.* at 174.

180. *See* JOHNSON, *supra* note 31, at 119–25 (2007).

181. *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).

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, which would cost billions of dollars, to remove nearly eleven to twelve million undocumented immigrants from the country—and millions of workers from the U.S. economy.[182] 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.[183] Even with ever-increasing interior enforcement and skyrocketing border enforcement budgets, the undocumented population has more than doubled since the mid-1990s. Enforcement measures, including hundreds of thousands of removals a year and the raiding of workplaces,[184] although causing much human suffering and misery, at most have put nothing more than a small dent in the rapid growth of the undocumented population in the United States.[185]

This bears repeating: record numbers of deportations year after year, the extension of the fence along the United States-Mexico border, dramatically increased use of detention, the criminalization, along with heightened prosecution, of immigration offenses,[186] and vastly expanded enforcement efforts over decades have not significantly reduced undocumented immigration. They in fact have been accompanied by a dramatic increase in the undocumented immigrant population in the United States.

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182. *See* JOHNSON, *supra* note 31, at 183–86.

183. *See supra* note 168 and accompanying text.

184. *See, e.g.*, I.N.S. v. Delgado, 466 U.S. 210, 211–12 (1984); I.N.S. 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); 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); 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.").

The Obama administration has moved away from workplace raids of suspected employers of undocumented immigrants, which the Bush administration had increased in number, 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).

185. *See supra* notes 168–71 and accompanying text.

186. *See* JOHNSON, *supra* note 31, at 178–79.

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.[187] Unfortunately, the human consequences of the enforcement of the U.S. immigration laws are often ignored in discussing the need for ever-greater immigration enforcement. 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 United States-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 generally resulting from increased border enforcement.

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

The failure of immigration reform and continued incentives for undocumented immigration will result in continued costs of this type imposed on real people. They may not be U.S. citizens, but they are people nonetheless. 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—almost all of them from Mexico and Central America—along the United States-Mexico border.[188] 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.[189]

Border enforcement operations, such as Operation Gatekeeper and Operation Hold the Line put into place along the United States-Mexico border in

187. *See supra* notes 128–31 and accompanying text.

188. *See* JOHNSON, *supra* note 31, at 111–16; *see also* 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); 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 three times as many deaths at the U.S.-Mexico border than in 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).

189. *See infra* notes 190–91 (citing authorities).

the mid-1990s, have redirected migrants from crossing in urban areas, namely San Diego, California, and El Paso, Texas, to more isolated and geographically dangerous locations, including the deserts of southern Arizona.[190] 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.

When discussing border enforcement and increased enforcement, proponents and opponents 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.

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. Rather, human trafficking is a more general labor migration problem.[192]

Greater enforcement of the United States-Mexico border has resulted in dramatic increases in smuggling fees as the U.S. government has increased the barriers to entry, with the amount smugglers charge rising from a few hundred dollars per migrant in the early 1990s to thousands of dollars per crossing today.[193]

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190. *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).

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 and successes of the law's ability to protect victims of human trafficking); 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 (2010) (studying the conflation of prostitution and "other" human trafficking). *See id.* at 755 (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."). For the purposes used here, the 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.

As a result, criminal organizations have entered into the lucrative business of human trafficking. Consequently, we have seen increasing reports of indentured and involuntary servitude, colloquially known as slavery, 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. Workers in one market are exploited while those in the other market face shrinking job opportunities as employers pursuing rational economic ends shift jobs from the "legal" (and more expensive) to the "illegal" (and less expensive) labor markets.[197]

To many observers, several other aspects of the current U.S. immigration laws result in particularly unfair impacts on immigrants,[198] especially Latina/os and 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

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).

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

198. *See* Johnson, *supra* note 117, 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 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

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 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, racial profiling in immigration enforcement does not appear to be a matter of public concern. There does not appear to be much visible effort to eliminate it, or even to consider profiling in immigration enforcement to be a civil rights concern. Concerns with 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

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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 custody procedures in detention in comparison to due process standards of international law); 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 or injured (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* note 116 and accompanying text (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), ruled that a state could not effectively deny access to a public K-12 education to undocumented immigrant students.

202. *See supra* text accompanying notes 83–95.

203. *See supra* notes 83–95 and accompanying text.

204. *See* Lozano v. Hazleton, 620 F.3d 170 (3d Cir. 2010) (invalidating most of city immigration ordinance on federal preemption grounds), *vacated*, 131 S. Ct. 2958 (2011).

costs of an increasing 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 forty percent from 2003 to 2007.[207]

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 at the same historical moment as public concern and emotion have erupted over immigration and Congress has failed 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, calm, respect, and a commitment to reasonable dialogue and the exchange of ideas are critically important.[210] Unfortunately, some advocates of restrictionist immigration laws and policies often seek to inflame anti-immigrant sentiment to build political support for a stringent immigration agenda.[211] Restrictionists regularly seek to capitalize on public fears—racial, economic, cultural, social, environmental, and others—about immigration and immigrants.[212]

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

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205. *See* Johnson, *supra* note 16, at 611–12.

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* S. Poverty Law Ctr., *Anti-Latino Hate Crimes Rise for Fourth Year in a Row*, HATEWATCH (Oct. 29, 2008) http://www.splcenter.org/blog/2008/10/29/anti-latino-hate-crimes-rise-for-fourth-year.

208. *See id.*

209. *See supra* notes 204–07 and accompanying text.

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, http://www.vdare.com (last visited Aug. 31, 2010); Michelle Malkin, http://michellemalkin.com (last visited Aug. 31, 2010).

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

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 an anti-immigrant landmark.[216] Arizona's S.B. 1070, which combined fiery rhetoric with legitimate concerns, is a more recent example.[217] Along these lines, Joe Arpaio, Sheriff of Maricopa County, Arizona and popularly known as "America's Toughest Sheriff," has vowed, regardless of its legality, to 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. Racism 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.

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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 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/2010814297_apusarizonasheriffprotest.html; JJ Hensley, *Activists Aim to Continue Fight Despite Election Results*, ARIZ. REP., Nov. 7, 2008, at 1; *supra* note 83 and accompanying text. Because of the years of political agitation and harsh, at times violent, rhetoric in Arizona, the tragic shooting Gabrielle Giffords was not altogether surprising to many observers. *See* Marc Lacey & David M. Herszenhorn, *Congresswoman Critical, 6 Dead in Tucson Rampage*, BOS. GLOBE, Jan. 9, 2011, at 1.

219. *See Anti-Immigration Groups*, SOUTHERN POVERTY LAW CENTER, http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2001/spring/blood-on-the-border/anti-immigration- (last visited Dec. 31, 2011).

220. *See supra* notes 43–46 and accompanying text.

The passage of the measure led to aggressive federal action by the Clinton administration to tighten the border. Passage of Proposition 187 also 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 political agitation about immigration in recent years also appear to have contributed to ever-increasing federal immigration enforcement.[223]

With the failure of comprehensive immigration reform, the eruption of racism and hate directed at 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

Put simply, border enforcement has human consequences on the civil rights of Latina/o citizens and immigrants, ranging from deaths to 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. However, any proposal for increased enforcement must be carefully scrutinized to ensure that its costs—including the human costs—are outweighed by its benefits.[224] 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 of Congress 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 the enactment of state and local immigration laws like Arizona's

221. *See supra* note 166 (citing laws). For criticism of some of the impacts of the reform legislation, see HING, *supra* note 13.

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

223. *See supra* notes 56–59 and accompanying text. 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 commitment—symbolic more than anything because the measure will unlikely decrease undocumented immigration in any meaningful way—to border enforcement. *See supra* notes 116–17 and accompanying text.

224. *Cf.* 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 discriminatory measures taken by U.S. government in its "war on terror" as well as the potential security benefits).

S.B. 1070, will have disparate racial impacts on Latina/o citizens and noncitizens. 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 the passionate, racially polarized debate over immigration reform and immigrants that the United States has experienced over more than a decade. To fully understand the debate over immigration reform and to rationally weigh the possible policy alternatives for reform, we must first acknowledge the racially disparate impacts of the operation of the current immigration laws.[225]

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.[226] In addition, more 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.[227]

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 again that the goal is not to pursue racist ends, nor to accomplish racially disparate impacts, but 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.

The claim of restrictionists that they only want to "enforce the law" and "secure our borders" cannot change the fact that, at a most 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 simplistic, catchy slogans will not make them go away.

Nor will ignorance of the 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.

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225. *See* Johnson, *supra* note 117, at 1635–37.
226. *See supra* text accompanying notes 146–53.
227. *See supra* Part II.

The results of the facially neutral nature of much of the debate over immigration 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. 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.

In the end, the nation must recognize the disparate racial impacts of the law and its maintenance and seek to fashion immigration laws and solutions that promote social justice, instead of maintaining, expanding, and reinforcing 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.