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FEDERAL PREEMPTION AND IMMIGRANTS' RIGHTS

KARLA MARI MCKANDERS†

INTRODUCTION

Jose Angel Vargas is a lawful permanent resident of the United States living in Phoenix. Vargas, who is Latino and speaks very little English, is a member of the day laborer organization Tonatierra's Centro Macehualli. He has lawfully and peacefully solicited work there and on public street corners. Mr. Vargas would like to continue soliciting work this way, but is very worried that he will be detained by the police under S.B. 1070 due to his Latino appearance, the fact that he cannot speak with a police officer in English and because he solicits work alongside others who do not have authorization to work in the United States. He was already arrested for trespassing once before in Arizona, in March 2009, while soliciting work on a corner near 25th Street and Bell Road in North Phoenix. While the charges were ultimately dropped, Mr. Vargas is still fearful of encounters with the police.¹

Jesus Cuauhtémoc Villa is a resident of the state of New Mexico who is currently attending Arizona State University. The state of New Mexico does not require proof of U.S. citizenship or immigration status to obtain a driver's license. Villa does not have a U.S. passport and does not want to risk losing his birth certificate by carrying it with him. He worries about traveling in Arizona without a valid form of identification that would prove his citizenship to police if he is pulled over. If he cannot supply proof upon demand, Arizona law enforcement would be required to arrest and detain him.²

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1. *Some of the Plaintiffs Challenge SB 1070*, AM. CIV. LIBERTIES UNION, <http://www.aclu.org/immigrants-rights-racial-justice/some-plaintiffs-challenging-sb-1070> (last visited Mar. 30, 2013).

2. *Valle del Sol v. Whiting et al.: Challenging SB 1070 - Arizona's Racial Profiling Law*, AM. CIV. LIBERTIES UNION, <http://www.aclu.org/immigrants-rights/valle-del-sol-v-whiting-et-al> (last visited Mar. 30, 2013).

Recently, immigration scholars have focused on the relationship between federal, state, and local governments in regulating immigration to the exclusion of civil rights issues. States and localities assert that they should be able to use their Tenth Amendment police powers to regulate unauthorized immigrants within their borders, while the federal government claims exclusivity in the area of immigration law and policy. In the middle of this debate, there is the question of whether states abrogate individual civil rights and civil liberties when exercising their police powers to regulate immigration.

The *Arizona v. United States*³ case directly addressed the preemption of an Arizona statute, Senate Bill (“S.B.”) 1070, by federal immigration law. In this case, the Court found that all of the provisions of Arizona’s statute were preempted with the exception of § 2(B) of S.B. 1070,⁴ or the “Show Me Your Papers Law.” Since the Supreme Court in *Arizona v. United States* upheld states’ and localities’ abilities to mandate that officers take reasonable steps to verify the immigration status of persons during arrests and stops,⁵ the question of whether this practice will result in racial, ethnic, and national origin profiling in violation of the Equal Protection Clause of the Fourteenth Amendment has been widely debated. There are many constitutional equal protection concerns regarding laws similar to Arizona’s S.B. 1070 that are being challenged in federal court. For example, at the same time the federal government was challenging S.B. 1070 on preemption grounds, *Valle del Sol v. Whiting* was filed challenging S.B. 1070 on constitutional equal protection grounds.⁶

The balance between individual civil rights and liberties and immigration regulation has been ongoing at the federal level. As early as 1893, the Supreme Court in *Fong Yue Ting v. United States* considered whether a federal immigration law permitted the

3. *Arizona v. United States*, 132 S. Ct. 2492 (2012).

4. *Id.* at 2510.

5. *Id.* at 2507.

6. Plaintiffs’ Proposed Motion for Preliminary Injunction and Memorandum of Points and Authorities in Support at 11, *Valle del Sol v. Whiting*, 846 F. Supp. 2d 1053 (D. Ariz. 2012) (No. CV-10-01061-PHX-SRB), available at <http://www.nilc.org/document.html?id=787>, *aff’d*, No. 12-15688, 2013 WL 781704 (9th Cir. Mar. 4, 2013) [hereinafter Plaintiffs’ Proposed Motion for Preliminary Injunction].

federal government to exercise exclusive power over immigration and exclude Chinese immigrants in a highly discriminatory manner.⁷ In *Fong*, the Supreme Court found that a sovereign nation has the power to exclude any class of aliens, even if it does so in a highly discriminatory fashion.⁸

These two cases, *Arizona* and *Fong*, are examples of state and federal legislative actions that discriminated against certain immigrant populations. In *Arizona*, the Court was faced with the conflict created when a state government exercised immigration power in a manner similar to the federal government.⁹ With the Supreme Court's holding in *Arizona*, the debate has shifted to the state level. This decision upheld a state's ability to screen for immigration violations and to enact laws regulating unauthorized immigration.¹⁰ Questions remain, such as whether, in exercising their police powers, states are now permitted to use unfettered discriminatory criteria in the name of protecting their state from unauthorized immigrants. Furthermore, can states exercise their police powers for corrupt uses such as discrimination? Finally, is there a discriminatory animus behind the enactment of state and local immigration laws that differentiate between the complex categories of immigrants.

This article takes a detailed look at these complex issues of federalism and individual rights in the context of immigration regulation.¹¹ The first section of the paper is an overview of Arizona's S.B. 1070 and copycat legislation, which require state and local law enforcement to make a determination regarding a person's immigration status when reasonable suspicion exists that the person is unlawfully present. The second section critiques the notion of providing states and localities unfettered discretion to determine the immigration status of individuals during routine stops. This section examines the implications of a policy where states, as sovereigns, are given the power to regulate immigration within their borders. The last section analyzes why equal protection challenges under the Fourteenth Amendment have not

7. *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

8. *Id.* at 707.

9. *Arizona*, 132 S. Ct. at 2497.

10. *Id.* at 2507, 2510.

11. This article does not address Fourth Amendment concerns with the Show Me Your Papers Laws.

been raised to challenge laws providing state and local officials with the power to make immigration determinations. It specifically examines the Arizona case, *Valle del Sol v. Arizona*, and how equal protection claims were raised in response to the Show Me Your Papers Provisions of S.B. 1070.

I. SHOW ME YOUR PAPERS LAWS

The purpose of Arizona's S.B. 1070 is "attrition through enforcement."¹² "The goal is to make life so difficult for undocumented immigrants—and their unwanted 'networks of relatives, friends and countrymen'—that they will all leave the state."¹³ This paper focuses on Section 2 of S.B. 1070, which creates a new section of Arizona Statute § 11-1051. The new section requires a police officer who has conducted a "lawful stop, detention or arrest . . . in the enforcement of any other law or ordinance of a county, city or town or [the State of Arizona]" to make a "reasonable attempt" to determine the immigration status of the person who has been stopped, detained, or arrested whenever "reasonable suspicion exists that the person is an alien and is unlawfully present."¹⁴ The statute also provides that "[a]ny person who is arrested shall have the person's immigration status determined before the person is released."¹⁵ "This section requires the continued detention of an individual even if the sole reason for detention is status verification."¹⁶ Arizona Statute § 11-1051 authorizes "officers to detain and transport a person who is determined by the officer to be an unauthorized immigrant to a federal facility, including a facility outside the officers' jurisdiction, upon receiving verification from federal authorities

12. S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010), available at <http://www.azleg.gov/legtext/49leg/2r/bills/sb1070s.pdf>.

13. Lucas Guttentag, *Discrimination, Preemption and Arizona's Immigration Law: A Broader View*, 65 STAN. L. REV. ONLINE 1, 2 (2012), http://www.stanfordlawreview.org/sites/default/files/online/articles/Guttentag_65_Stan._L._Rev._1.pdf (quoting Brief for the States of New York et al. as Amici Curiae in Support of Respondent at 17–18, *Arizona v. United States*, 132 S. Ct. 2492 (2012) (No. 11-182)).

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

15. *Id.*

16. Complaint for Declaratory and Injunctive Relief at 32, *Friendly House v. Whiting*, 846 F. Supp. 2d 1053 (D. Ariz. 2012) (No. CV 10-1061), *aff'd sub nom Valle del Sol v. Whiting*, No. 12-15688, 2013 WL 781704 (9th Cir. Mar. 4, 2013).

that the person is 'unlawfully present.'¹⁷ "This section does not require an officer to have any other justification under state law to detain the individual."¹⁸ The proponents of S.B. 1070 argue that it will not result in racial profiling because the statute provides that "this state may not consider race, color or national origin in implementing the requirements of this subsection except to the extent permitted by the United States or Arizona Constitution."¹⁹

States and localities argue that the federal government is not properly enforcing federal immigration laws such as the Immigration and Nationality Act ("INA") § 1357(a) which gives U.S. Immigration and Customs Enforcement ("ICE") the power to question an individual about their immigration status.²⁰ The INA also gives ICE the power to arrest individuals who are believed to be in the country unlawfully.²¹ The Show Me Your Papers Laws copy INA § 1357(a) at the state and local level by providing local and state police officers the power to stop, question and detain a person regarding their immigration status.²²

In June 2011, Alabama passed an immigration bill titled, "Beason-Hammon Alabama Taxpayer and Citizen Protection Act," or House Bill ("H.B.") 56.²³ H.B. 56 is modeled on Arizona's Immigration Act.²⁴ This Act is thought to be stricter than Arizona's S.B. 1070.²⁵ Like S.B. 1070, the Alabama law requires police to similarly make a reasonable attempt to determine a person's immigration status if police have "reasonable suspicion," in the midst of any legal stop, detention, or arrest, that a person is an

17. *Id.* at 33 (citing § 11-1051(D)).

18. Complaint for Declaratory and Injunctive Relief, *supra* note 16, at 33.

19. § 11-1051(B).

20. Immigration and Nationality Act § 287(a), 8 U.S.C. § 1357(a) (2006).

21. *Id.*

22. *Compare id.*, with S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010), available at <http://www.azleg.gov/legtext/49leg/2r/bills/sb1070s.pdf>.

23. Beason-Hammon Alabama Taxpayer and Citizen Protection Act, H.B. 56, 2011 Reg. Sess. (Ala. 2011), available at <http://immigration.alabama.gov/docs/Immigration-AL-Law-2011-Highlighted.pdf> (codified at ALA. CODE §§ 31-13-1 to -35 (2011)).

24. *Compare id.*, with ARIZ. REV. STAT. ANN. § 11-1051(B) (2010).

25. See William Arrocha, *From Arizona's S.B. 1070 to Georgia's H.B. 87 and Alabama's H.B. 56: Exacerbating the Other and Generating New Discourses and Practices of Segregation*, 48 CAL. W. L. REV. 245, 277 (2012) (referring to H.B. 56 as "the toughest immigration law in the country"); Ida Danielle Mashburn-Myrick, *Giving "The Help" the Silent Treatment: How Alabama's New Immigration Law Punishes Domestic Workers, Ignores Certain Employers, and Shortchanges Us All*, 64 ALA. L. REV. 443, 444 (2012).

immigrant unlawfully present in the United States.²⁶ An exemption is provided if such action would hinder an official investigation of some kind.²⁷ “[Alabama] Governor Robert Bentley touted H.B. 56 as ‘the strongest immigration bill in the country’ and a co-sponsor of the bill boasted that it regulates ‘every aspect of a person’s life.’”²⁸ The American Civil Liberties Union (“ACLU”) alleges that H.B. 56 is “[a] shocking throwback to the days of de jure segregation, [and] H.B. 56 attempts to make a class of individuals non-persons in the eyes of the law. If it goes into effect, it will deny immigrants and Alabamans of color their most basic rights.”²⁹

This law goes even further than Arizona’s law in that it authorizes the Alabama Department of Homeland Security to hire and maintain its own immigration police force.³⁰ Like Arizona’s S.B. 1070, H.B. 56 § 12(a) requires a law enforcement officer to make a reasonable attempt, when practicable, to determine the citizenship and immigration status of a person stopped, detained or arrested when reasonable suspicion exists that the person is an alien who is unlawfully present in the United States.³¹ Further, H.B. 56 § 18 amends Alabama Code § 32-6-9 to include a provision which provides that if a person is arrested for driving without a license, and the officer is unable to determine that the person has a valid driver’s license, the person must be transported to the nearest magistrate, a reasonable effort shall be made to determine the citizenship of the driver, and if found to be unlawfully present in the United States, the driver shall be detained until prosecution or until handed over to federal immigration authorities.³² This statute essentially deputizes state and local officials to act as federal immigration agents.

Georgia’s law, H.B. 87, the Illegal Immigration Reform and Enforcement Act of 2011, mirrors provisions of Arizona’s

26. H.B. 56 § 12(a).

27. *Id.*

28. Complaint for Declaratory and Injunctive Relief at *2, Hispanic Interest Coal. of Ala. v. Bentley, 2011 WL 5516953 (N.D. Ala. 2011) (No. 5:11-CV-02484-SLB), 2011 WL 2654277.

29. *Preliminary Analysis of HB 56, “Alabama Taxpayer and Citizen Protection Act”*, AM. CIV. LIBERTIES UNION, <http://www.aclu.org/immigrants-rights/analysis-hb-56-alabama-taxpayer-and-citizen-protection-act> (last visited Mar. 30, 2013).

30. H.B. 56 § 22.

31. H.B. 56 § 12(a).

32. H.B. 56 § 18.

controversial S.B. 1070.³³ H.B. 87 empowers local police officers to check the immigration status of anyone suspected of violating any law, including a traffic violation.³⁴ Similarly, the state of Indiana passed S.B. 590, which also mirrors S.B. 1070.³⁵ The Indiana law requires law enforcement officers to verify the immigration or citizenship status of individuals in certain situations.³⁶ South Carolina enacted a law, S.B. 20,³⁷ that established the country's first state-level immigration enforcement unit.³⁸ The South Carolina legislature allocated \$1.3 million to establish the unit, which has hired six of twelve agents and spent more than \$400,000.³⁹ In 2011, the Utah legislature passed its immigration law, H.B. 497.⁴⁰ The Utah law requires police to verify the immigration status of people arrested for felonies and class A misdemeanors as well as those booked into jail on class B and class C misdemeanors.⁴¹ It also provides that officers may attempt to verify the status of people who are detained for class B and class C misdemeanors.⁴²

S.B. 1070 was challenged in *Arizona v. United States*.⁴³ In this case, the U.S. Supreme Court held that all of the provisions of S.B. 1070, except for the Show Me Your Papers Provision, were constitutionally preempted.⁴⁴ The majority of the Court found that the Show Me Your Papers Provision did not run afoul of federal law because the federal government retains the discretion that matters most—the discretion to enforce the INA in particular cases.⁴⁵ The *Arizona* decision did not resolve the question of

33. GA. CODE ANN. § 17-5-100 (Supp. 2012).

34. *Id.*

35. IND. CODE ANN. § 11-10-1-2 (LexisNexis Supp. 2012).

36. *Id.*

37. S.C. CODE ANN. § 23-6-60 (Supp. 2012).

38. See *South Carolina Immigration Unit May Not Ask About Status*, FOX NEWS LATINO (Aug. 14, 2012), <http://www.latino.foxnews.com/latino/news/2012/08/14/south-carolina-immigration-unit-may-not-ask-about-status/#ixzz2BVUQnOt1>.

39. *Id.*

40. UTAH CODE ANN. § 76-9-1003 (LexisNexis 2012).

41. *Id.*

42. See Marjorie Cortez, *Legal Challenge Over Utah Immigration Law Nearing End, Attorney General Mark Shurtleff Says*, DESERET NEWS (Oct. 10, 2012, 12:17 PM), <http://www.deseretnews.com/article/865564169/Legal-challenge-over-Utah-immigration-law-nearing-end-Attorney-General-Mark-Shurtleff-says.html?pg=all>.

43. *Arizona v. United States*, 132 S. Ct. 2492 (2012).

44. *Id.* at 2492.

45. *Id.* at 2508.

whether the remaining provision violates the Equal Protection Clause of the Fourteenth Amendment. This question is currently being litigated in *Valle del Sol v. Whiting*.⁴⁶

II. SHIELDING FEDERAL AND STATE IMMIGRATION POLICIES FROM SUBSTANTIVE CONSTITUTIONAL REVIEW

Courts have not been very generous in granting relief from federal immigration statutes based on the Equal Protection Clause under the Fourteenth Amendment. Specifically, the Plenary Powers Doctrine has shielded congressional immigration determinations from substantive constitutional review.⁴⁷ The Plenary Powers Doctrine is a court's refusal to review federal immigration statutes for compliance with substantive constitutional standards.⁴⁸ This standard originates from a belief that a country, as a sovereign, has the ability to create laws that are in their own interest. "Traditionally immigration laws are considered a nation's prerogative[,] as a nation-state has the ability to discriminate against who is permitted to enter."⁴⁹

Many immigration scholars have debated the validity of the Plenary Powers Doctrine because it originated from a part of our nation's history where Chinese were excluded in a discriminatory fashion from the country based on their race.⁵⁰ Specifically, in *Chae Chan Ping v. United States*, the Court found:

46. See Plaintiffs' Proposed Motion for Preliminary Injunction, *supra* note 6, at 2.

47. Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 255 (1984).

48. *Id.*; see also Gerald M. Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 SUP. CT. REV. 275, 276 (1977) ("[T]he federal government has plenary power to control the admission and exclusion of aliens and to dictate the terms and conditions under which they may live in the United States.").

49. Karla Mari McKanders, *Unforgiving of Those Who Trespass Against U.S.: State Laws Criminalizing Immigration Status*, 12 LOY. J. PUB. INT. L. 331, 334 (2011) (citing *Chae Chan Ping v. United States*, 130 U.S. 531, 603-04 (1889)).

50. See Susan M. Akram, *Scheherazade Meets Kafka: Two Dozen Sordid Tales of Ideological Exclusion*, 14 GEO. IMMIGR. L.J. 51, 59 (1999); T. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 AM. J. INT'L L. 862, 862-63 (1989); Richard F. Hahn, *Constitutional Limits on the Power to Exclude Aliens*, 82 COLUM. L. REV. 957, 960-61 (1982); Kevin R. Johnson, *The Antiterrorism Act, the Immigration Reform Act, and Ideological Regulation in the Immigration Laws: Important Lessons for Citizens and Noncitizens*, 28 ST. MARY'S L.J. 833, 843 (1997); Legomsky, *supra* note 47, at 255 ("[T]he Court has declined to review federal immigration statuses for compliance with substantive constitutional restraints [under plenary power deference to Congress]."); Philip Monrad, *Ideological Exclusion, Plenary Power, and the PLO*, 77 CALIF. L. REV. 831, 852-55 (1989); Steven R. Shapiro, *Ideological*

That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. . . . If it could not exclude aliens it would be to that extent subject to the control of another power.⁵¹

Chae Chan Ping and past immigration laws demonstrate that:

[T]he United States has not utilized neutral, egalitarian methods to decide which persons are admitted into the country. . . . Government immigration policies have historically excluded persons in a sometimes arbitrary and discriminatory fashion. The characteristics used to exclude undesirable persons have been based on a person's race and nationality ([e.g.,] Chinese [E]xclusion Act); religion (Catholic); and their economic standing (public charge concept).⁵²

“[D]epending on the time period, immigration laws can reinforce stereotypes about which immigrant populations are deserving of membership.”⁵³ “[T]he history of America's immigration laws gives us insight into categories of people who were undesirable during a particular moment in our nation's history and justification for closely monitoring the constitutionality of laws that target immigrant populations.”⁵⁴

The concern is shifting discretion to the states to make immigration determinations, similar to the federal government. An argument has been made that if the federal government, as a

Exclusions: Closing the Border to Political Dissidents, 100 HARV. L. REV. 930, 942 (1987); Peter J. Spiro, *Explaining the End of Plenary Power*, 16 GEO. IMMIGR. L.J. 339, 340, 342 (2002).

51. *Chae Chan Ping v. United States*, 130 U.S. 531, 603–04 (1889).

52. McKanders, *supra* note 49, at 339.

53. *Id.*

54. *Id.*

sovereign, can exclude immigrants in a discriminatory fashion, then states under their police powers may have similar authority to use discriminatory tactics to exclude unauthorized immigrants.⁵⁵ The basis of this argument is that if states are demi-sovereigns, then they should have the power to exclude persons from their territory. Hence, interfering with the state's ability to exclude unauthorized immigrants from its borders infringes on its rights as a sovereign. This argument is supported with the fact that at the beginning of the forming of our nation, states were responsible for regulating immigration.⁵⁶ Justice Scalia is a proponent of this theory.⁵⁷ He indicates that “[a]s a sovereign, Arizona has the inherent power to exclude persons from its territory, subject only to those limitations expressed in the Constitution or constitutionally imposed by Congress.”⁵⁸ “I accept that as a valid exercise of federal power—not because of the Naturalization Clause (it has no necessary connection to citizenship) but because it is an inherent attribute of sovereignty no less for the United States than for the States.”⁵⁹ The Supreme Court of the United States has said that it is an “accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions.”⁶⁰ It is argued that:

In light of the predominance of federal immigration restrictions in modern times, it is easy to lose sight of the States' traditional role in regulating immigration—and to overlook their sovereign prerogative to do so. I accept as a given that State regulation is excluded by the Constitution when (1) it has been prohibited by a valid federal law, or (2) it conflicts with federal regulation—

55. *Arizona v. United States*, 132 S. Ct. 2492, 2511 (2012).

56. *Id.* at 2511–12.

57. *Id.* at 2511 (Scalia, J., concurring in part and dissenting in part) (“Today’s opinion . . . deprives states of what most would consider the defining characteristic of sovereignty: the power to exclude from the sovereign’s territory people who have no right to be there.”).

58. *Id.*

59. *Id.* at 2514.

60. *Id.* (citing *Fong Yue Ting v. United States*, 149 U.S. 698, 705 (1893) (quoting *Ekiu v. United States*, 142 U.S. 651, 659 (1892))).

when for example, it admits those whom federal regulation would exclude, or excludes those whom federal regulation would admit.⁶¹

Under the state sovereignty argument, the remaining provisions of S.B. 1070 that are not preempted by federal law would necessarily be given deference.

The concern is that if states under their Tenth Amendment police powers are given a similar type of deference as a sovereign, they too will be permitted to discriminate against whomever they would like to exclude from their state based on race, ethnicity, or national origin.⁶² Further, there is a concern with the resources that state and local police departments have to enforce immigration laws.⁶³ The fear is that S.B. 1070-like laws place too much responsibility on state and local law enforcement agencies.⁶⁴ In addition, passing these laws could lead to a race to the bottom wherein states will see who can pass the strictest immigration laws, and where both noncitizens and citizens who look or sound foreign may be excluded from that state.⁶⁵

Opposition to the state sovereignty argument also purports that our country could revert back to the late nineteenth century when states regulated immigration.⁶⁶ During this period, states

61. *Id.*

62. See Anil Kalhan, *Immigration Enforcement and Federalism After September 11, 2001*, in IMMIGRATION, INTEGRATION, AND SECURITY: AMERICA AND EUROPE IN COMPARATIVE PERSPECTIVE 181, 185 (Ariane Chebel d'Appollonia & Simon Reich eds., 2008), available at <http://digital.library.pitt.edu/cgi-bin/t/text/text-idx?idno=31735062135896;view=toc;c=pittpress> (explaining that federal preemption proponents believe preemption acts as a safeguard against state violations of individual rights); Karla Mari McKanders, *The Constitutionality of State and Local Laws Targeting Immigrants*, 31 U. ARK. LITTLE ROCK L. REV. 579, 599–600 (2009).

63. Kalhan, *supra* note 62, at 196.

64. *Id.* at 195; see also *Arizona*, 132 S. Ct. at 2506 (“[S.B. 1070] attempts to provide state officers even greater authority to arrest aliens on the basis of possible removability than Congress has given to trained federal immigration officers.”); McKanders, *supra* note 49, at 354–55 (explaining that under S.B. 1070, local police officers will be asked to determine a person’s immigration status, a function normally reserved for judges and immigration officials).

65. McKanders, *supra* note 62, at 600; Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 CONN. L. REV. 1627, 1639 (1997).

66. See generally Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833, 1840–83 (1993) (explaining that in the century before 1875, states implemented immigration policies by regulating public health, slavery, racial subordination, and the movement of criminals and the poor).

enacted many discriminatory immigration laws that targeted unpopular groups.⁶⁷ These groups included criminals, the poor, persons with mental and physical illnesses and disabilities, and certain racial groups—namely African American slaves and free migrants.⁶⁸ These groups of people were considered undesirable, and therefore, excludable from states. States today should be prevented from enacting similar legislation or facially neutral legislation that has a disparate impact on immigrants or those who look or sound foreign, causing the exclusion of so called undesirable groups from states and localities.

III. FEDERALISM CHALLENGES TO STATE IMMIGRATION LAWS: THE COMPETING INTERESTS OF PREEMPTION AND EQUAL PROTECTION DOCTRINES

To date, most scholarship has focused on the preemption issues surrounding state and local immigration laws while excluding the civil rights implications.⁶⁹ It is only recently with the

67. *See id.* at 1841–82.

68. *Id.* at 1883.

69. Kalhan, *supra* note 62, at 198; *see also, e.g.*, Laurel R. Boatright, “Clear Eye for the State Guy”: Clarifying Authority and Trusting Federalism to Increase Nonfederal Assistance with Immigration Enforcement, 84 TEX. L. REV. 1633, 1651–58 (2006) (discussing federal preemption of state immigration laws); Ingrid V. Eagly, *Local Immigration Prosecution: A Study of Arizona Before SB 1070*, 58 UCLA L. REV. 1749, 1806 (2011) (discussing conflict preemption and Arizona’s S.B. 1070); Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787, 798 (2008) (discussing the blurring line between national and state governments with respect to immigration laws); McKanders, *supra* note 62, at 590–91 (discussing preemption of state and local immigration laws under Supreme Court precedent); McKanders, *supra* note 49, at 345–52 (2011) (arguing the Immigration and Nationality Act precludes states from enacting immigration laws under the federal preemption doctrine); 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, 48–49 (2007) (arguing that Congress must begin to explicitly preempt state immigration laws); Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373, 1376–77 (2006) (discussing whether the federal government may require state governments to cooperate in enforcement of immigration laws under the federal preemption doctrine); Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 620–26 (2008) (discussing federal preemption and state immigration regulation); L. Darnell Weeden, *Local Laws Restricting The Freedom of Undocumented Immigrants as Violations of Equal Protection and Principles of Federal Preemption*, 52 ST. LOUIS U. L.J. 479, 491–97 (2008) (explaining that the power to regulate immigration has historically and constitutionally been entrusted to the federal government). *But see* Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power Over Immigration*, 86 N.C. L. REV. 1557, 1606–08 (2008) (discussing the constitutionality of state immigration laws under the Equal Protection Clause as well as the federal preemption doctrine); Tiffany

upholding of the Show Me Your Papers Provision of S.B. 1070 that scholars are beginning to analyze the racial profiling and civil rights implications of having state and local law enforcement officers check the immigration status of those suspected to be foreign.⁷⁰

Recent lawsuits also omit discussion of the civil rights implications of the state and local laws. The lawsuits typically focus on the preemption issues to the exclusion of civil rights and racial profiling issues.⁷¹ Further, claims of disparate impact discrimination are not ripe for review before the statute has gone into effect.⁷² Immigration scholar Kevin Johnson explains:

[F]ederal primacy over immigration does not mean that civil rights concerns disappear from the field just because the federal government is regulating immigration. Current heated controversies over various federal immigration enforcement programs belie such a claim. However, the potential civil rights deprivations at the state and local levels are likely to be greater because of the fact that nativist and racist sentiments are more likely to prevail [at this level]. Such sentiments are more likely to dominate local politics than the political process at the national level.⁷³

Walters Kleinert, Comment, *Local and State Enforcement of Immigration Law: An Equal Protection Analysis*, 55 DEPAUL L. REV. 1103 (2006) (discussing the Equal Protection Clause and state immigration regulations).

70. See, e.g., Guttentag, *supra* note 13, at 5 (arguing civil rights implications should be considered in federal preemption analyses of state and local immigration laws because “[d]iscrimination against and profiling of [immigrant populations] is a violation of the principle embodied in [§ 1981]”); Kevin R. Johnson, *Immigration and Civil Rights: State and Local Efforts to Regulate Immigration*, 46 GA. L. REV. 609, 630–32 (2012) (examining the civil rights implications of S.B. 1070 despite the Obama Administration’s failure to challenge the law on Equal Protection grounds).

71. See, e.g., Guttentag, *supra* note 13, at 1 n.1 (explaining that before oral argument began in *Arizona v. United States*, Chief Justice Roberts demanded the attorneys concede: “No part of your argument has to do with racial or ethnic profiling, does it?” (citing Transcript of Oral Argument at 34, *Arizona v. United States*, 132 S. Ct. 2492 (2012) (No. 11-182), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-182.pdf)).

72. See *Texas v. United States*, 523 U.S. 296, 300 (1998) (holding a pre-enforcement claim is not ripe for review if it rests upon contingent future events that may not occur as anticipated or may not occur at all).

73. Johnson, *supra* note 70, at 619.

Underlying Johnson's statement is the belief that the local political process is dominated by more discriminatory sentiments. This means, to some extent, that those sentiments become codified within the law. Under this theory, one could argue that the anti-immigrant sentiment at the state level is being codified into the many state laws that mimic the Show Me Your Papers Laws.

The Equal Protection Clause under the Fourteenth Amendment requires states to provide equal protection under the law to all persons residing in its jurisdiction.⁷⁴ Recently, there have been two types of equal protection challenges to the state and local immigration laws before the Supreme Court. The first challenge is that the legislators who enacted the laws had a discriminatory intent in enacting the laws.⁷⁵ The second challenge is that the implementation of the laws is conducted in a discriminatory manner against both citizens and noncitizens, which causes racial profiling.⁷⁶

In each of the states passing Show Me Your Papers Laws, lawsuits have been filed challenging the constitutionality of the laws.⁷⁷ The lawsuits are brought on both federal preemption and equal protection grounds.⁷⁸ The lawsuit against the Utah law asserts that "[t]he likelihood that plaintiffs will be targeted for law enforcement scrutiny is especially acute because they belong to racial or national origin minority groups, speak foreign languages

74. U.S. CONST. amend. XIV, § 1; see Geoffrey Heeren, *Persons Who Are Not the People: The Changing Rights of Immigrants in the United States*, 44 COLUM. HUM. RTS. L. REV. (forthcoming 2013) (questioning whether Equal Protection Clause applies equally to both citizens and noncitizens).

75. *E.g.*, First Amended Complaint for Declaratory and Injunctive Relief at 56, *Friendly House v. Whiting*, 846 F. Supp. 2d 1053 (D. Ariz. 2012) (No. CV 10-1061-PHX-SRB), 2011 WL 5267286, *aff'd sub nom Valle del Sol v. Whiting*, No. 12-15688, 2013 WL 781704 (9th Cir. Mar. 4, 2013).

76. *E.g., id.*

77. *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010); *Ga. Latino Alliance for Human Rights v. Deal*, 793 F. Supp. 2d 1317 (N.D. Ga. 2011); *United States v. Alabama*, 813 F. Supp. 2d 1282 (N.D. Ala. 2011); *Utah Coal. of La Raza v. Herbert*, No. 2:11-CV-401CW, 2011 WL 7143098 (D. Utah 2011); *Union Benefica Mexicana v. Ind.*, Civ. No. 211-CV-482, 2012 WL 2049917 (N.D. Ind. 2012).

78. See Complaint at 23, *Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010) (No. 2:10-CV-01413-NVW); Plaintiff-Bishops' First Amended Complaint at 32-33, *Hispanic Interest Coal. of Ala. v. Bentley*, 2011 WL 5516953 (N.D. Ala. 2011) (No. 110-CV-2736), 2011 WL 3801841; First Amended Complaint for Declaratory and Injunctive Relief, *supra* note 75, at 55-56.

or foreign-accented English and/or lack H.B. 497's qualifying identity documents—characteristics they cannot easily change.”⁷⁹ In most cases, however, federal courts are not even evaluating the equal protection challenges because the laws are being challenged on preemption grounds.

During oral argument before the Supreme Court in *Arizona v. United States*, “[i]n its challenge, the administration did not argue that it violated equal-protection principles. At the Supreme Court argument in April [2012], Solicitor General Donald B. Verrilli Jr. acknowledged that the federal case was not based on racial or ethnic profiling.”⁸⁰

There are very few scholars that have advocated for the application of the Equal Protection Doctrine to state and local immigration ordinances to protect both documented and undocumented immigrants.⁸¹ In the past, the preemption analysis has been criticized as a strictly structural standard in that it does not take into account an individual's human and civil rights because it only considers which governmental body is best suited to regulate immigration.⁸² Immigration scholar Geoffrey Heeren argues that “the shift away from equal protection as a mode of analysis might reflect a decreased willingness to recognize noncitizens as members of civil society.”⁸³ He cites the *Plyler v. Doe* Supreme Court case as an example of where the Court considered both preemption and equal protection claims.⁸⁴ “Although courts

79. Cortez, *supra* note 42.

80. Adam Liptak, *Court Splits Immigration Law Verdicts; Upholds Hotly Debated Centerpiece*, 8-0, N.Y. TIMES, June 26, 2012, at A1, available at http://www.nytimes.com/2012/06/26/us/supreme-court-rejects-part-of-arizona-immigration-law.html?pagewanted=all&_r=0.

81. See, e.g., Weeden, *supra* note 69, at 488 (“[A] strict scrutiny rationale [should apply] to any immigrant, regardless of his or her immigration status, who has become a target of hostile local government policy.”); see also Kai Bartolomeo, *Immigration and the Constitutionality of Local Self Help: Escondido's Undocumented Immigrant Rental Ban*, 17 S. CAL. REV. L. & SOC. JUST. 855 (2008) (arguing for the application of the Equal Protection Doctrine to anti-immigrant rental ordinances because of their affect on undocumented children).

82. See Harold Hongju Koh, *Equality with a Human Face: Justice Blackmun and the Equal Protection of Aliens*, 8 HAMLINE L. REV. 51, 84 (1985).

83. Heeren, *supra* note 74 (manuscript at 1) (arguing that during the Burger Supreme Court era, individual rights invoked by the Arizona laws would be more pertinent than structural immigration questions).

84. *Id.* (manuscript at 8) (discussing how the equal protection basis of discriminatory classifications in terms of immigrant access to licensing, education, financial aid, bar admission, and state welfare benefits, whereas this articles focuses on

are willing to enforce the federal government's power to preempt state immigration law and to deeply probe the rationality of immigration decisions, they are less likely to concede what was once a given—that immigrants are largely entitled to equal treatment."⁸⁵ Further, as a litigation strategy to defeat the Show Me Your Papers Laws, lawyers are using the preemption doctrine.⁸⁶ After the Supreme Court in *United States v. Arizona* left the Show Me Your Papers Provision intact, there is now a reason to move beyond the Preemption Doctrine and examine the equal protection implications of these laws.

A. Equal Protection Jurisprudence in Immigration Law

There have been very few equal protection challenges under the Fourteenth Amendment of the Constitution to both state and federal laws that target immigrants. The federal government statutes that classify based on alienage are given heightened protections. During the late 1970s, a series of cases were brought challenging both federal and state provisions that classify based on alienage. The states argued "that the federal government should not be permitted to discriminate in ways foreclosed to the states by the Fourteenth Amendment."⁸⁷

When examining state and local statutes that classify on the basis of alienage, the Supreme Court has held that alienage classifications receive strict scrutiny.⁸⁸ In *Graham v. Richardson*, the Court held that states could not discriminate against resident aliens in providing welfare benefits.⁸⁹ The state classification was subjected to strict scrutiny in that the Court found state alienage classifications could only be upheld if justified by some compelling state interest.⁹⁰ In addition, the Supreme Court has held that alienage classifications based in public official jobs are permissible

disparate impact discrimination where it is necessary to prove intentional conduct (citing *Plyler v. Dow*, 457 U.S. 202, 208–09 (2012)).

85. *Id.* (manuscript at 9).

86. *See, e.g., id.* (manuscript at 11) ("While agency skepticism and federalism are intriguing tools for non-citizens to appeal to conservative judges, they are poor substitutes for individual rights like equal protection.")

87. Gerald M. Rosenberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 Sup. Ct. Rev. 275, 278 (1977).

88. *Graham v. Richardson*, 403 U.S. 365, 375–76 (1971).

89. *Id.* at 382–83.

90. *Id.* at 375–76.

when there is a compelling state reason for the classification.⁹¹ Further, in *Plyler v. Doe*, the Supreme Court held that the protections of the Fourteenth Amendment apply to undocumented immigrant children who bear no responsibility for their parents bringing them to the United States.⁹² Some scholars have inferred that *Plyler's* protections would extend to all undocumented immigrants, but the Supreme Court has not yet decided this issue.⁹³

The issue with current state laws, similar to the Show Me Your Papers Laws, is that they are facially neutral and do not classify based on alienage. The Show Me Your Papers Law, on its face, applies equally to all persons who are stopped in that they can be checked for their immigration status. A similar equal protection question was before the Supreme Court in *Yick Wo v. Hopkins*.⁹⁴ In this case, the state of California enacted facially neutral laundry laws that had a disparate impact on Chinese immigrants.⁹⁵ The law required specific permission to operate a laundry. People of Chinese ancestry owned 240 of the 320 laundries in the city.⁹⁶ The Supreme Court held that it was impermissible to discriminate against minority immigrants in the country.⁹⁷ The Court stated:

Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons

91. See *Ambach v. Norwick*, 441 U.S. 68, 68 (1979) (upholding law barring aliens from jobs as public school teachers); *Foley v. Connelie*, 435 U.S. 291, 299–300 (1978) (refusing to apply strict scrutiny to the New York requirement that police officers be US citizens); *Hampton v. Mow Sun Wong*, 426 U.S. 88, 88 (1976) (invalidating federal civil service rule barring employment of lawful permanent resident); *Sugarman v. Dougall*, 413 U.S. 634, 634 (1973) (invalidating rule preventing noncitizens from state civil service); *Graham*, 403 U.S. at 371–72 (1971) (Arizona state welfare scheme); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 410 (1948) (invalidating rule prohibiting fishing licenses to anyone not a U.S. citizen).

92. *Plyler v. Doe*, 457 U.S. 202, 202 (1982).

93. See *id.*

94. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

95. *Id.* at 357–59.

96. *Id.* at 358–59.

97. *Id.* at 374.

in similar circumstances, . . . [then it constitutes] denial of equal justice⁹⁸

Here, there was a malicious intent and the law disparately impacted Chinese people; accordingly there was an equal protection violation.

B. Challenging the Discriminatory Intent of State Legislators

Today, with state anti-immigrant statutes, courts are not likely to find an equal protection violation. Arizona's Show Me Your Papers Laws are currently being challenged on equal protection grounds in the Arizona federal courts. In *Valle del Sol v. Whiting*, the plaintiffs allege that S.B. 1070 violates the equal protection clause of the Fourteenth Amendment of the Constitution.⁹⁹ Specifically, the complaint states that the U.S. Constitution provides, "No State shall . . . deny any person within its jurisdiction the equal protection of the laws."¹⁰⁰ The plaintiffs assert that:

SB 1070 was enacted with the purpose and intent to discriminate against race and national origin minorities SB 1070 impermissibly and invidiously targets Plaintiffs who are racial and national origin minorities, including Latinos, residing or traveling in Arizona and subjects them to stops, detentions, questioning, and arrests because of their race and/or national origin.¹⁰¹

They argue that S.B. 1070 "violates the Equal Protection Clause because 'racial or national origin discrimination was a motivating factor in its enactment.'"¹⁰²

98. *Id.* at 373-74.

99. Complaint for Declaratory and Injunctive Relief, *supra* note 16, at 6.

100. *Id.* at 56.

101. *Id.*

102. Mariano Castillo, *Civil Rights Groups Seek New Injunction Against Arizona Immigration Law*, CNN (July 18, 2012), <http://www.cnn.com/2012/07/18/us/arizona-immigration-challenge/index.html>.

Specifically, it is argued that discriminatory intent in the drafting of the law, and statements by local law enforcement officials, indicate that some individuals' detentions will be prolonged during otherwise lawful stops.¹⁰³ In order to prove discriminatory intent in the drafting of the law, the Plaintiffs are required to show admissible circumstantial evidence of discriminatory intent.¹⁰⁴

[The] factors include whether: (1) the legislative history, especially contemporaneous statements by members of the legislature, evidences discrimination; (2) the "historical background" or "sequence of events leading up to the challenged decision" evidences discrimination; (3) the challenged decision has a disproportionate impact on a protected group; and (4) there were substantive or procedural departures from usual decision making criteria.¹⁰⁵

In 2006, Hazleton, Pennsylvania, became the focus of an example of cases challenging a local statute on equal protection grounds.¹⁰⁶ Hazleton was the first municipality in the country to pass an anti-immigrant ordinance that started the flood of recent state immigration laws during the 2000s.¹⁰⁷ The city of Hazleton alleged that the immigrant population's presence led to higher crime rates, fiscal hardship, burdens on public services, and a diminishing quality of life within the city.¹⁰⁸ During the trial, Hazleton's mayor denied discriminatory intent in passing the law.¹⁰⁹ The trial court found that the ordinances were passed to address public safety, crimes, and community resources expended on policing, education, and health care.¹¹⁰ Accordingly, the

103. Plaintiffs' Proposed Motion for Preliminary Injunction, *supra* note 6, at 7.

104. *Id.* at 11.

105. *Id.* at 11–12 (citing *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 266–68 (1977)).

106. *See* McKanders, *supra* note 69, at 3.

107. *Id.* at 12–13.

108. Illegal Immigration Relief Act Ordinance, HAZLETON, PA., ORDINANCE 2006-18 (2006).

109. *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 540 (M.D. Pa. 2007).

110. *Id.* at 541 ("Discriminatory intent 'implies that the decision-maker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite

district court dismissed the plaintiffs' equal protection claim.¹¹¹ Even though the equal protection challenge failed, the Mayor did not present objective evidence to prove that immigrants had an adverse impact on the city or its capability to provide safety and services for its inhabitants.¹¹² The court found that the plaintiffs could not demonstrate discriminatory intent in passing the amended Hazleton's Illegal Immigration Relief Act ordinance ("IIRA").¹¹³ Plaintiffs also argued that IIRA improperly allowed the City to consider race, ethnicity, or national origin in enforcing it.¹¹⁴ Again the court found that the ordinances did not implicate a fundamental right or use a suspect classification.¹¹⁵ IIRA's enforcement provisions were facially neutral "since they declare that no complaint that uses race, ethnicity or national origin will be enforced."¹¹⁶

In the complaint in *Valle del Sol*, the plaintiffs allege that unlawful discrimination was a "substantial" or "motivating" factor behind S.B. 1070's enactment.¹¹⁷ The plaintiffs allege that discriminatory animus permeated the sequence of events leading up to the passage of S.B. 1070.¹¹⁸ They allege that "[k]ey legislators relied on invented 'facts' about the costs and dangers of 'illegal immigration,' conflated Latinos generally or certain U.S. citizen children with 'illegal aliens,' and used thinly veiled code words that, in context, plainly reveal a discriminatory motive."¹¹⁹ The plaintiffs point to statements made by Arizona Senator Russell Pearce and Representative Al Melvin to demonstrate a racial animus.¹²⁰ For example, the plaintiffs stated that Senator Pearce "claimed that 'Phoenix [is] number two in the world for

of,' its adverse effects upon an identifiable group.") (citing *Antonelli v. New Jersey*, 419 F.3d 267, 274 (3d Cir. 2005)).

111. *Id.* at 542.

112. *See id.* at 556 (rejecting the equal protection claim); *see also Doe v. Village of Mamaroneck*, 462 F. Supp. 2d 520, 545 (S.D.N.Y. 2006) (finding that the city's stated purpose for passing day laborer laws could not be directly proven with objective statistical evidence).

113. *Lozano*, 496 F. Supp. 2d at 540.

114. *Id.* at 542.

115. *Id.*

116. *Id.*; *see also Doe*, 462 F. Supp. 2d at 543-44.

117. Plaintiffs' Proposed Motion for Preliminary Injunction, *supra* note 6, at 11-12.

118. *Id.* at 12.

119. *Id.*

120. *Id.* at 13.

kidnappings . . . [and is] the home invasion, carjacking, [and] identity theft capital of the nation” and that “there was no factual basis” to prove these alleged facts.¹²¹ Senator Pearce also claimed, “‘67 percent’ of law enforcement officers killed in ‘the last few years’ have been murdered by illegal aliens.”¹²² In addition, Senator Huppenthal, another Arizona State Senator, made similar claims at the press conference to introduce S.B. 1070.¹²³ Plaintiffs also allege that the “legislators repeatedly conflated Latinos, Spanish-speaking individuals, and the children of unauthorized immigrants with ‘illegal aliens,’ thereby demonstrating that their attempts to punish and harass ‘illegal aliens’ were also directed at these larger groups.”¹²⁴ Plaintiffs cite evidence that during the legislative proceedings on S.B. 1070 “legislators frequently conflated ‘Hispanic’ or ‘Mexican’ with ‘undocumented,’ as if members of one of the former two groups were necessarily members of the last.”¹²⁵ The legislators made comments regarding the need for protection from a foreign invasion, and statements like “[w]e have seen parts of our neighborhoods nuclear bombed by the effects of illegal immigration.”¹²⁶

It is not certain whether these claims will be able to meet the high standard of showing intentional discrimination. Like *Hazelton*, a case where there were many allegations of discriminatory comments, here the legislators have similarly made discriminatory comments. In this case, it will be hard to determine whether these statements were false and made with a malicious intent, which is a very high burden. Thus, given equal protection jurisprudence, it is not likely that this case will proceed very far or become a precedent case for equal protection jurisprudence.

C. State Immigration Laws, Discriminatory Impact, and Racial Profiling

The most prevalent allegation to state Show Me Your Papers Laws are that they cause racial profiling in violation of the Equal Protection Clause of the Fourteenth Amendment. When it

121. *Id.* at 14–15.

122. *Id.* at 15 (citations omitted).

123. *Id.* at 15–16.

124. *Id.* at 17.

125. *Id.* at 18.

126. *Id.* at 22 (statement by Arizona State Senator John Huppenthal).

is alleged that a statute which is facially neutral has a disproportionate impact upon a racial minority or other group entitled to protection under the Fourteenth Amendment of the Constitution, the complainant must show intent or motive to discriminate and also a disproportionate impact.¹²⁷ “The Supreme Court has explained that a claimant alleging selective enforcement of a facially neutral criminal law must demonstrate that the challenged law enforcement practice ‘had a discriminatory effect and that it was motivated by a discriminatory purpose.’”¹²⁸ This is an increasingly difficult burden to satisfy.

The most predominant example of how difficult it is to meet this standard is evidenced in *McCleskey v. Kemp*.¹²⁹ In this case, the plaintiffs argued that the death penalty had a disparate impact on African Americans.¹³⁰ They had the statistics to demonstrate that the death penalty was disproportionately applied against African Americans; however, the Court found that in addition to showing disparate impact, the plaintiffs were required to show that the individual administrators of the death penalty had a discriminatory intent to enforce the death penalty against individual plaintiffs.¹³¹ This heightened standard makes it extremely difficult to prove that there is discriminatory enforcement of facially neutral policies. In the instance of the Show Me Your Papers Laws, there will be a similar difficulty in showing intent beyond what the statistics may state regarding who is subjected to prolonged detentions to determine their immigration status.

For example, it is very hard to prove the intentional discrimination element for equal protection claims with a facially neutral statute. Perhaps the only blatant example of intentional discrimination with local law enforcement of immigration laws can be found in Maricopa County, Arizona. As part of its focus on immigration enforcement, Maricopa County Sheriff's Office

127. *Washington v. Davis*, 426 U.S. 229, 242 (1976) (holding that a classification having a potential impact, absent showing of discriminatory purpose, is subject to review under the lenient, rationality standard); *see also* *Wayte v. United States*, 470 U.S. 598, 608–09 (1985) (finding no discriminatory purpose shown).

128. *Farm Labor Org. Comm. v. Ohio State Highway Patrol*, 308 F.3d 523, 533–34 (6th Cir. 2002) (quoting *Wayte*, 470 U.S. at 608 (1985)).

129. *McCleskey v. Kemp*, 481 U.S. 279 (1987).

130. *Id.* at 291.

131. *Id.* at 297–98.

(“MCSO”) found that “during eight MCSO so-called ‘crime suppression operations’ studied, MCSO deputies engaged in selective enforcement of the traffic law, and that the majority of drivers and passengers arrested were Latino even in predominantly White areas.”¹³² MCSO was the subject of a civil rights investigation by the Department of Justice.¹³³ The outcome of the investigation found:

[R]easonable cause to believe that MCSO engages in a pattern or practice of unconstitutional policing. Specifically, [the Department of Justice found] that MCSO, through the actions of its deputies, supervisory staff, and command staff, engages in the racial profiling of Latinos; unlawfully stops, detains, and arrests Latinos; and unlawfully retaliates against individuals who complain about or criticize MCSO’s policies or practices, all in violation of Section 14141. MCSO’s discriminatory police conduct additionally violates Title VI and its implementing regulations.¹³⁴

Racial profiling in the implementation of an immigration enforcement program creates “a ‘wall of distrust’ between MCSO officers and Maricopa County’s Latino residents—a wall of distrust that has significantly compromised MCSO’s ability to provide police protection to Maricopa County’s Latino residents.”¹³⁵

Without evidence of intentional discrimination or purposeful conduct, the equal protection claim will fail. In an aberrant case where intentional discrimination was found, *FLOC v. Ohio State Patrol*, the plaintiffs met their burden of showing purposeful conduct and discriminatory effect.¹³⁶ Plaintiffs had

132. Complaint for Declaratory and Injunctive Relief, *supra* note 16, at 50–51 (citing Daniel Gonzalez, *Sheriff’s Office Says Race Plays No Role in Who Gets Pulled Over*, ARIZ. REPUBLIC (Oct. 5, 2008, 12:00 AM), <http://www.azcentral.com/news/articles/2008/10/05/20081005arpaio profiling1005.html>).

133. See Letter from Thomas E. Percz, Assistant At’y Gen., to Bill Montgomery, Maricopa Cnty. At’y, 1 (Dec. 15, 2011), available at http://www.justice.gov/crt/about/spl/documents/mcso_findletter_12-15-11.pdf.

134. *Id.* at 2.

135. *Id.*

136. *Farm Labor Org. Comm. v. Ohio State Highway Patrol*, 308 F.3d 523, 551 (6th Cir. 2002).

presented sufficient evidence from which a trier of fact could find that the defendants, police officers, acted with a discriminatory purpose and did not initiate immigration investigations of non-Hispanics motorists who were otherwise similarly situated to the plaintiffs.¹³⁷ In *FLOC*, the plaintiffs were stopped for a burned out headlight, detained, and had their green cards confiscated.¹³⁸ Defendant police officer targeted them solely based on their immigration status and their being Hispanic.¹³⁹ The officer defendant moved for summary judgment on the basis that they had a racially neutral reason for inquiring about the plaintiffs' immigration status, namely their difficulties in speaking and understanding English.¹⁴⁰ The court upheld the district court's grant of summary judgment in favor of the plaintiffs.¹⁴¹ However, this is an aberrant case, and it remains extremely difficult to prove intent.

In addition, the Department of Justice's Civil Rights Division sued the Sheriff's Office of Alamance County, North Carolina.¹⁴² The complaint alleges that the County routinely discriminated against and targeted Latinos for enforcement action in violation of the U.S. Constitution and Section 14141 of the Violent Crime Control and Law Enforcement Act of 1994.¹⁴³ Specifically, the complaint alleges that:

[Alamance County Sheriff's] deputies routinely target Latinos for stops during roving traffic enforcement operations. A 2012 statistical study commissioned by the United States Department of Justice ("DOJ") illustrates this discriminatory practice. The study indicates, for example, that a Latino driver in Alamance County is as much as ten times more likely than a similarly situated non-

137. *Id.* at 539.

138. *Id.* at 532-34.

139. *Id.* at 533.

140. *Id.*

141. *Id.* at 551.

142. Complaint, *United States v. Johnson*, No. 1:12-CV-01349 (M.D.N.C. Dec. 20, 2012), available at <http://www.justice.gov/iso/opa/resources/55620121220953110360.pdf>.

143. *Id.*

Latino driver to be stopped by an ACSO deputy for committing a traffic infraction.¹⁴⁴

In this case, it is also alleged that the sheriff made statements to his officers instructing “his staff to ‘go out there and catch me some Mexicans,’ and directed deputies to ‘arrest Hispanics’—but not others—for minor infractions.”¹⁴⁵ It is also alleged that the Sheriff “directs his deputies to target predominantly Latino neighborhoods for increased enforcement.”¹⁴⁶ The case is still under review, and it will be interesting to see if this case meets the high burden of proving discriminatory intent.

Analogous to the *FLOC* and Alamance County cases, the argument is that the discretionary element of the Show Me Your Papers Laws leaves the door open for the discriminatory application of the laws to Latinos and other groups who are perceived as immigrants. S.B. 1070’s Show Me Your Papers Provision and other similar laws provide police the power to conduct a reasonable detention to determine immigration status. Many immigrant advocates are concerned that “SB 1070 will cause widespread racial profiling and will subject many persons of color—including countless U.S. citizens, and non-citizens who have federal permission to remain in the United States—to unlawful interrogations, searches, seizures and arrests.”¹⁴⁷ For example, law professor Marjorie Cohn notes that:

Immigration status cannot be determined merely by a person’s appearance. Indeed, when Arizona Governor Janice Brewer, who signed S.B. 1070 into law, was asked what criteria will be used to determine reasonable suspicion that a person is not lawfully in the United States, she answered, “I do

144. *Id.* at 2.

145. *Id.* at 6–7.

146. *Id.* at 9.

147. Complaint for Declaratory and Injunctive Relief, *supra* note 16, at 6; *see also* Morgan Cloud, *Quakers, Slaves and the Founders: Profiling to Save the Union*, 73 *MISS. L.J.* 369, 369 (2003) (stating that the Department of Justice defines racial profiling as the use of race or ethnicity as a criterion in conducting stops, searches, and other law enforcement investigative procedures) (citing CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, *GUIDANCE REGARDING THE USE OF RACE BY FEDERAL LAW ENFORCEMENT AGENCIES* (2003), available at http://www.justice.gov/crt/about/spl/documents/guidance_on_race.pdf).

not know what an illegal immigrant looks like.”¹⁴⁸

Also, “[DHS] Secretary Napolitano has referred to racial profiling as ‘illegal’ and ‘repugnant to the law.’”¹⁴⁹

Further, “[u]nlawful presence’ is not apparent from physical presence or language, but rather is a legal status established by operation of a complex set of immigration laws.”¹⁵⁰ “Under federal law, the following groups may be authorized to remain in the U.S.: ‘refugees, asylees, persons granted withholding of deportation, parolees, persons protected by family unity status, persons present under temporary protected status . . . and battered immigrant women and children.’”¹⁵¹

Also, 8 U.S.C. § 1251(a) creates an administrative body to adjudicate deportation claims to determine who is unlawfully present in the United States.¹⁵² This provision establishes the procedure and vests the administrative body with the “sole and exclusive procedure for determining the deportability of an alien.”¹⁵³ The procedure requires, among other things, that only a “special inquiry officer” (an immigration judge) may conduct deportation proceedings. The Immigration and Nationality Act’s accompanying regulations require “[e]very proceeding to determine the deportability of an alien in the United States [to be] commenced by the filing of an order to show cause with the Office of the Immigration Judge.”¹⁵⁴ The authority to issue such orders is delegated to a discrete list of federal officers.¹⁵⁵ Only specified federal officials can commence deportation proceedings,

148. Marjorie Cohn, *Racial Profiling Legalized in Arizona*, 1 COLUM. J. RACE & L. 168, 169 (2012) (citing AmericasVoiceTV, *Gov. Jan Brewer (R-AZ) doesn't know what an "illegal immigrant" looks like*, YOUTUBE (Apr. 23, 2010), <http://www.youtube.com/watch?v=F2VSGEWzEW0>).

149. AM. IMMIGRATION LAW. ASS'N., IMMIGRATION ENFORCEMENT OFF TARGET: MINOR OFFENSES WITH MAJOR CONSEQUENCES 8 (2011), available at <http://www.aila.org/content/fileviewer.aspx?docid=36646&linkid=236762>.

150. Cohn, *supra* note 148, at 177.

151. McKanders, *supra* note 69, at 33.

152. The statute 8 U.S.C. § 1251(a) is now 8 U.S.C. § 1227(a), which states that “[a]ny alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens” 8 U.S.C. § 1227(a) (2008).

153. Omnibus Consolidated Appropriations Act for Fiscal Year 1997, 8 U.S.C. § 1252(b) (1996).

154. 8 C.F.R. § 242.1 (1998); *see also* 8 U.S.C. § 1252 (1996).

155. 8 C.F.R. § 242.1(a) (1998); *see also* 8 U.S.C. § 1252 (1996).

and only an immigration judge in deportation proceedings can determine that an alien is deportable and order the alien to leave the United States.¹⁵⁶ In some circumstances, the federal district courts can issue a judicial order of removal against a defendant who is deportable.¹⁵⁷ Then, after a final order of deportation issues, only the Attorney General may effect the alien's departure from the United States.¹⁵⁸ Typically, an immigration judge or immigration officer will look at a set of criteria under the Immigration and Nationality Act to make a determination about whether a person fits within one of these complex categories, as one cannot tell from looking at someone whether they belong in one of these legally determined categories. For example, by just looking at someone and asking no detailed legal questions, it is not easy to determine whether he or she may be an asylum seeker and afraid to return to their country of origin. There is a fear that instead of using legal criteria to determine someone's immigration status, racial criteria will be used against anyone who looks or sounds foreign.

The Supreme Court in *Brignoni v. Ponce* further heightened the standard for showing discriminatory intent, authorizing border police officers near borders to use factors such as race to determine whether to stop someone for an immigration violation.¹⁵⁹ In another Supreme Court case, *United States v. Martinez-Fuerte*, the Supreme Court granted border patrol agents the right to stop and question people "of apparent Mexican ancestry" at an immigration checkpoint located on a public

156. 8 C.F.R. § 242.1 (1998).

157. 8 U.S.C. § 1228(c)(1) (2008) ("Notwithstanding any other provision of this chapter, a United States district court shall have jurisdiction to enter a judicial order of removal at the time of sentencing against an alien who is deportable, if such an order has been requested by the United States Attorney with the concurrence of the Commissioner and if the court chooses to exercise such jurisdiction."); see also 18 U.S.C. § 3583(d) (2008) ("If an alien defendant is subject to deportation, the court may provide, as a condition of supervised release, that he be deported and remain outside the United States, and may order that he be delivered to a duly authorized immigration official for such deportation.").

158. 8 U.S.C. § 1252(c) (1998). See generally *Lcague of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755 (C.D. Cal. 1995) (citing 8 C.F.R. § 242.1(a), 8 U.S.C. 1252).

159. *United States v. Brignoni-Ponce*, 422 U.S. 873, 878–80 (1975); see also César Cuauhtémoc García Hernández, *La Migra in the Mirror: Immigration Enforcement and Racial Profiling on the Texas Border*, 23 NOTRE DAME J.L. ETHICS & PUB. POL'Y 167 (2009) (discussing *Brignoni-Ponce* and its progeny, which permit Border Patrol officers to stop and question people who appear to be Mexican near the border).

highway approximately 100 miles from the nearest border.¹⁶⁰ In critiquing the two Supreme Court cases, immigration scholar César Cuauhtémoc García Hernández, indicates:

[t]he significance of the language in *Brignoni-Ponce*—“Mexican appearance”—and *Martinez-Fuerte*—“of apparent Mexican ancestry”—cannot be overstated. With those words the Supreme Court launched the modern immigration control regime in which the targeting of anyone who appears “Mexican” is sanctioned. It then became the role of immigration officers to determine exactly what it means to be of “Mexican appearance.”¹⁶¹

The complexity of determining immigration status, even for federal authorities, places into question how state and local officials will exercise discretion in determining who is unlawfully present when making a stop. The Secretary of the Department of Homeland Security, Janet Napolitano, stated that “SB 1070 ‘is a very difficult bill to enforce in a racially neutral way. . . . I think it does and can invite racial profiling.’”¹⁶² Further, Attorney General Eric Holder stated:

implementation of SB 1070 will lead to “a situation where people are racially profiled, and that could lead to a wedge drawn between certain communities and law enforcement, which leads to the problem of people in those communities not willing to interact with people in law enforcement, not willing to share information, not willing to be witnesses where law enforcement needs them.”¹⁶³

Social science research has also found:

a lack of thorough training and ineffective testing procedures for detecting discrimination[] will likely

160. *United States v. Martinez-Fuerte*, 428 U.S. 543, 563 (1976).

161. García Hernández, *supra* note 159, at 184.

162. Complaint for Declaratory and Injunctive Relief, *supra* note 16, at 47.

163. *Id.* at 48.

result in many Latinos being illegally targeted on the basis of their race. Certain actions, such as more effective training and monitoring, can realistically be expected to help mitigate discrimination. . . . Moreover, these safeguards, while helpful, are not likely to completely eliminate biased outcomes.¹⁶⁴

In their social science study, Nier, Gaertner, Nier and Dovidio found that more subtle forms of discrimination, like in the Arizona Show Me Your Papers Laws, are hard to combat when “the majority of antidiscrimination law is structured to combat overt bias and focuses on curbing intentional discrimination, whereas research has emphasized that some forms of discrimination can occur without conscious intent.”¹⁶⁵ The article found that the following factors will impact whether racial profiling is used when stopping persons to determine their immigration status: (1) decisions made under time pressure foster subtle bias, and (2) ambiguity promotes subtle bias.¹⁶⁶

The American Immigration Lawyer’s Association conducted a study as well, which found that when the enforcement of immigration is left to local law enforcement agencies, there is a higher likelihood of racial profiling and unlawful pre-textual stops.¹⁶⁷ Specifically, the report demonstrated how “[t]he explicit comments by the law enforcement officers as well as the trivial nature of the violation or lack of violation are powerful indications that the individuals were targeted based on their race or ethnicity for the purpose of enforcing immigration law.”¹⁶⁸

For example, in the case *Young Apartments, Inc. v. Town of Jupiter*, the city passed a law which provided citizens with the right to submit a complaint alleging that a landlord rented to an undocumented immigrant.¹⁶⁹ The Jupiter law gave complaining citizens total discretion to determine who may be authorized or

164. Jason A. Nier et al., *Can Racial Profiling Be Avoided Under Arizona Immigration Law? Lessons Learned from Subtle Bias Research and Anti-Discrimination Law*, 12 ANALYSES SOC. ISSUES & PUB. POL’Y 5, 17 (2012).

165. *Id.* at 9.

166. *Id.* at 9–11.

167. AM. IMMIGRATION LAWYERS ASS’N, *supra* note 149, at 8.

168. *Id.* at 9.

169. *Young Apartments, Inc. v. Town of Jupiter*, 539 F.3d 1027, 1034 (11th Cir. 2008).

unauthorized to be in the country.¹⁷⁰ It was alleged that this discretion opened the door for profiling individuals that community members believed were undocumented and unwanted in the community.¹⁷¹ Also, in *Georgia Latino Alliance for Human Rights v. Deal*,¹⁷² the plaintiffs alleged that the Georgia statute violated the Equal Protection and Due Process Clauses of the Constitution by unlawfully discriminating against people who hold certain kinds of identity documents.¹⁷³ In this case, the complaint stated that “Plaintiff Jaypaul Singh, a U.S. citizen of South Asian descent, permanently resides in the State of Washington. Singh is attending law school and will be residing in Atlanta, Georgia for the summer while he works as a law clerk in the city.”¹⁷⁴ He has a driver’s license from the State of Washington, but Washington does not verify immigration status before issuing a license.¹⁷⁵ His Washington license will not be enough under the new Georgia law to verify his immigration status.¹⁷⁶ Accordingly, Singh fears that he will be subjected to a long detention while the police are trying to figure out his immigration status.¹⁷⁷

The lawsuit in Utah, *Utah Coalition of La Raza v. Herbert*, also alleged that the statute violates the Equal Protection Clause of the Constitution because it encourages racial profiling of Latinos and anyone who looks or sounds foreign to the officer.¹⁷⁸ Plaintiff Milton Ivan Salazar-Gomez, a resident of west Salt Lake City, Utah, fears that he will be racially profiled.¹⁷⁹ He has lived in the United

170. *Id.* at 1033; *see also* McKanders, *supra* note 62, at 588 (“The Jupiter laws gave the complainant total discretion to determine who may be legal and illegal.”).

171. *Young Apartments*, 539 F.3d at 1034; *see also* McKanders, *supra* note 62, at 588 (“This discretion opens the doors to profiling individuals that community members believe are undocumented immigrants.”).

172. *Ga. Latino Alliance for Human Rights v. Deal*, 793 F. Supp. 2d 1317 (N.D. Ga. 2011).

173. *Id.* at 1323.

174. Complaint for Declaratory and Injunctive Relief at 31, *Ga. Latino Alliance for Human Rights v. Deal*, 793 F. Supp. 2d 1317 (N.D. Ga. 2011) (No. 1:11-CV-1804-TWT), 2011 WL 2150744.

175. *Id.*

176. *Id.*

177. *Id.*

178. *Utah Coalition of La Raza v. Herbert*, AM. CIVIL LIBERTIES UNION, <http://www.aclu.org/immigrants-rights/utah-coalition-la-raza-v-herbert> (last visited Mar. 30, 2013).

179. Complaint for Declaratory and Injunctive Relief at 14–15, *Utah Coal. of La Raza v. Herbert*, No. 2:11-CV-401CW, 2011 WL 1822595 (D. Utah May 3, 2011).

States for nearly his entire life. “He is a Mexican national who was brought by his parents to the United States when he was ten months old.”¹⁸⁰

In August 2010, he was stopped by a sheriff’s deputy because the registration tags on his car had expired. Although the deputy did not ticket Mr. Salazar-Gomez for the expired tags, he did turn Mr. Salazar-Gomez over to federal immigration officials. After two months in immigration detention, Mr. Salazar-Gomez was ordered released after he paid an immigration bond. Mr. Salazar-Gomez’s immigration case is moving forward and he is contesting his removability from the United States. Mr. Salazar-Gomez is extremely fearful of being stopped and detained by local law enforcement officers if HB 497 takes effect because although he has a Utah driving privilege card he has no document that he could produce to satisfy law enforcement officers that he is known to federal immigration officials but has been ordered release on bond.¹⁸¹

These cases demonstrate that many issues are raised when state and local law enforcement agencies become involved in the enforcement of immigration laws, especially when they are using their discretion to determine whether a person is in the country lawfully. In regards to S.B. 1070:

First, law-enforcement officers must make a judgment of “reasonable suspicion” of criminal activity in order to make a lawful stop, which was the case prior to the enactment of SB 1070. . . . [A] second layer of judgments must be made by law enforcement officers; they must now also determine whether they have a reasonable suspicion that the individual is in the country illegally.¹⁸²

180. *Id.*

181. *Id.* at 15.

182. Nier et al., *supra* note 164, at 11.

The Arizona officers have only been given minimal guidance on how to determine if someone is in the country lawfully.¹⁸³ First, they have been instructed to look for a valid driver's license, as only someone who is in the country lawfully is able to obtain an Arizona driver's license.¹⁸⁴ Then, officers are told to examine the totality of the circumstances in making a determination that someone is unlawfully within the country.¹⁸⁵ Commentators assert the standard is too vague:

In the absence of a more concrete standard, the judgments made by law-enforcement officials are likely to be quite subjective. This ambiguity [regarding] the specific information that should be sought and how this information should be used in making a determination of reasonable suspicion will likely result in great reliance on implicit attitudes and stereotypes.¹⁸⁶

This, however, falls short of the intentional discrimination standard and does not address unconscious bias that may be present.

The plaintiffs in the *Valle del Sol v. Whiting* case allege that “the legislature enacted S.B. 1070 in the face of testimony and evidence that § 2(B)’s standard—‘reasonable suspicion’ of unlawful presence—would lead to the profiling of Latinos and those who appear Mexican.”¹⁸⁷ The plaintiffs also allege that it was the legislature’s intent to codify the police’s practices of the Maricopa County and Sheriff Arpaio, which was investigated by the Department of Justice for racial profiling.¹⁸⁸ The case is still being litigated. It is a matter of time before the court rules on whether the Show Me Your Papers Laws have a discriminatory impact on both Latino immigrants and U.S. citizens and if the officers have a discriminatory intent when enforcing the S.B. 1070

183. ARIZ. PEACE OFFICER STANDARDS AND TRAINING BD., LAW ENFORCEMENT TRAINING ON IMMIGRATION LAWS—2010 TRAINING PROGRAM OUTLINE, available at http://www.azpost.gov/bulletins/1070_Outline.pdf (last accessed Mar. 30, 2013).

184. *Id.*

185. *Id.*

186. Nier et al., *supra* note 164, at 11; see also Kalhan, *supra* note 62, at 3.

187. Plaintiffs’ Proposed Motion for Preliminary Injunction, *supra* note 6, at 27.

188. *Id.*

laws. There are not many federal courts that have specifically addressed the issue of whether Show Me Your Papers Laws discriminate against both noncitizens and citizens who look or sound foreign because this standard is very hard to satisfy.

CONCLUSION

Courts have fallen short in fully addressing how Show Me Your Papers Laws infringe on immigrant individual rights. It is not likely that disparate impact cases will be an effective way to dismantle discriminatory practices against immigrants. Preemption grounds simply address the structural concerns of the state taking on immigration matters that traditionally belong to the federal government. It is equally important to change the underlying stereotypes about immigrants, specifically Latino immigrants, in addition to preemption issues. Otherwise, discrimination against individuals who look or sound foreign will continue. The allegations and anecdotal evidence must now be tested in a court to determine whether legislatures have acted in a discriminatory manner in enacting the laws, or whether the laws have a discriminatory impact on immigrants or those who look or sound foreign.

