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 soil1—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, Fast: 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.

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

3. Leslie Espinosa & 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. Martinez, 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


\(^7\) See infra Part I.

\(^8\) See infra Part II.
the biological or innate inferiority of people of color. 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. 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.

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.” 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).


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).

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

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. This claim is frequently buttressed with the


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

15. 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, Naroterrorists, 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 Ire 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-encoding" Colorblind
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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?” 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.” 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. 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. 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.

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

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.


22. See infra Parts 1.B, II.
borders,” the immigration laws in question are replete with racially disparate consequences and outcomes. 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. 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.


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. 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.

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. 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; indeed, with respect to immigration, the Obama administration arguably has emphasized enforcement over almost all else. Ongoing, if not growing, concerns with the class and race of many of today’s immigrants, as well as more legitimate grievances over other matters, such as the unequal distribution of the costs and benefits of immigration between the federal

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, 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, 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. 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.”

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.


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.

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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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).


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


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 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 provoked harsh condemnation from the President of Mexico. Previous state immigration measures, such as California’s Proposition 187, also generated criticism from high levels of the Mexican government.

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, 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. 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.

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


41. See infra Part I.B.


43. See infra text accompanying notes 45–47.


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

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, have increased the cooperation of state and local governments with the federal immigration authorities in enforcing the U.S. immigration laws.

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. “Criminal aliens,” of course, are among the most unpopular subsets of all noncitizens, with precious few defenders in the political process. 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.”

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
consequences, these enforcement operations redirected migrants toward the United States-Mexico border in the southern part of the state.\textsuperscript{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.”\textsuperscript{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 . . . .”\textsuperscript{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.\textsuperscript{59}

On its face, “aliens” is a race-neutral term borrowed from the U.S. immigration laws.\textsuperscript{60} However, in the context of the modern immigration demographics of Arizona, the terminology\textsuperscript{61} serves as thinly disguised code for

\textsuperscript{56} See infra text accompanying notes 190–91.


\textsuperscript{58} See Ariz. S.B. 1070, supra note 57, § 1 (emphasis added).

\textsuperscript{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”).


Another pejorative that is regularly employed by restrictionists in the modern immigration debate is “anchor babies.” See, e.g., Kevin Alexander Gray, \textit{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, \textit{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, \textit{Terror Babies, Anchor Babies, and Beanie Babies}, OH MY, GH 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. 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. 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, because noncitizens at the time (and the
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. 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.

As predicted by some prognosticators, 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. 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. 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, or the portion of Section 5 that makes it a crime under certain circumstances for a motor vehicle to pick up day laborers—were not subject to the injunction and went into effect.

Although vehemently criticized by the supporters of the Arizona law, 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.” 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.


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


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.


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—one of the central, and most controversial, portions of the Arizona law—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.

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. 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. 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. 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.

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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.
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.  

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

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

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82. See supra text accompanying notes 32–34.
84. 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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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. Rodriguez, 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[1] (“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).

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

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).


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).


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, 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. State and local enforcement must be done consistent with federal law and enforcement priorities and with appropriate federal oversight.

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. 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, 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. 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.
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, and by directly assisting state and local governments with the costs of immigration. 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. 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.
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. 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. 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. 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.

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. The extension was ultimately little more than a symbolic gesture at immigration reform and one that few would contend has

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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 immigrants115 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

114. See infra text accompanying notes 160–87.
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, 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. In the summer of 2010, President Obama made a speech calling for Congress to pass comprehensive immigration reform. 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 has a direct and palpable impact on the greater Latina/o community, including many U.S. citizens of Latina/o descent. 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.

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. 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.

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. 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


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.

\(^ {128}\) 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. Much of that opposition is legalistic and moralistic in tone. 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. 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.

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” of American social life. Conversely, the failure to adopt a legalization program will ensure that the undocumented continue life at the margins.


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.


135. See infra text accompanying notes 164–72.


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 and will be subject to continued exploitation in the workplace. 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.

It was estimated that, as of March 2008, approximately 11.9 million undocumented immigrants lived in the United States. The number appears to have declined somewhat since then because of the downturn in the American economy. What appears to have remained roughly constant is that...
approximately sixty percent of all undocumented immigrants originate from Mexico.  

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. 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, 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.

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. At a fundamental level, many, probably most, undocumented immigrants come to the United States to work, not to access the public benefit system, commit crime, or have “anchor babies”—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. 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 States153—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 reform155—will disparately impact Latina/os. This substantial cost to Latina/os warrants discussion in any proposal calling for increased immigration enforcement.

Specifically, removals and border apprehensions tend to fall squarely on
Latina/os; other heightened enforcement efforts are likely to do so as well.\(^\text{156}\) 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.\(^\text{157}\) 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,\(^\text{158}\) 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.\(^\text{159}\) 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.\(^\text{160}\) 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.\(^\text{161}\)

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.\(^\text{162}\) Such a poison pill might indefinitely delay passage of comprehensive immigration reform.

\(^\text{156}\) See Johnson, supra note 117, at 1608.
\(^\text{157}\) See infra text accompanying notes 188–90.
\(^\text{158}\) See supra text accompanying notes 3–8.
\(^\text{159}\) See infra text accompanying notes 195–97.
\(^\text{161}\) See supra text accompanying notes 128–31.
\(^\text{162}\) 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. 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 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. More enforcement legislation and measures followed that major reform. 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. Deportations of noncitizens from the United States have been hitting record levels for a number of years.

163. See supra text accompanying notes 117–18.
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. RODRIGUEZ, 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.”).
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

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>Number of Removals</th>
<th>Undocumented Population</th>
</tr>
</thead>
<tbody>
<tr>
<td>2008</td>
<td>358,886(^{168})</td>
<td>11.9 million(^{169})</td>
</tr>
<tr>
<td>1990</td>
<td>30,039(^{170})</td>
<td>5 million(^{171})</td>
</tr>
</tbody>
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169. *See PASSEL & COHN, supra note 140.*


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. 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. 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.


173. See supra text accompanying notes 117–18; Aníl 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.”).

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.\textsuperscript{175} Previous immigration reforms have unsuccessfully attempted to address the magnet of jobs. Most significantly, the Immigration Reform and Control Act of 1986\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{179} Put simply, the U.S. economy relies on undocumented labor.\textsuperscript{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.\textsuperscript{181}

\begin{itemize}
\item \textsuperscript{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, \textit{Globalization and the Border: Trade, Labor, Migration, and Agricultural Production in Mexico}, 41 MCGEORGE L. REV. 867 (2010).
\item \textsuperscript{176} Pub. L. No. 99-603, 100 Stat. 3359 (1986).
\item \textsuperscript{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. EspenAzor, \textit{The Illusory Provisions of Sanctions: The Immigration Reform and Control Act of 1986}, 8 GEO. IMMIGR. L.J. 343 (1994) (concluding that the termination of employer sanctions is the most expedient way of remedying the increased racial discrimination caused by the enforcement of employer sanctions); Huyen Pham, \textit{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, \textit{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).
\item \textsuperscript{178} See JOHNSON, supra note 31, at 169–70.
\item \textsuperscript{179} See id. at 174.
\item \textsuperscript{180} See JOHNSON, supra note 31, at 119–25 (2007).
\item \textsuperscript{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).
\end{itemize}
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. 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. 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, 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. 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, 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.

182. See Johnson, supra note 31, at 183–86.
183. See supra note 168 and accompanying text.
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. 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. 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.

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

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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 Fail 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. 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. The phenomenon is not limited to the sex industry as the media frequently sensationalizes. Rather, human trafficking is a more general labor migration problem.

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. 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.


191. See generally Jennifer M. Chacón, Tensions and Trade-Off: 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.


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.\(^\text{194}\)

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.\(^\text{195}\) 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.”\(^\text{196}\) 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.\(^\text{197}\)

To many observers, several other aspects of the current U.S. immigration laws result in particularly unfair impacts on immigrants,\(^\text{198}\) especially Latina/os and their U.S. citizen family members. Abuses in immigrant detention often make the news,\(^\text{199}\) as do deportations of generally law-abiding long-term residents.\(^\text{200}\) The

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\(^{194}\) See id. at 113–14.

\(^{195}\) See JOHNSON, supra note 31, at 129–30.


\(^{197}\) 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.”).

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. 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. 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


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.

costs of an increasing immigrant population). In 2010, police found it necessary to respond to a spate of hate crimes directed at Mexican immigrants on Staten Island. 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.

Racism and xenophobia to some degree often infect the public debate over immigration in the United States. 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. 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. 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. Restrictionists regularly seek to capitalize on public fears—racial, economic, cultural, social, environmental, and others—about immigration and immigrants.

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. A fast-and-loose (and, at times, false) characterization of the alleged problems caused by immigration and immigrants—such as contending that immigrants are

205. See Johnson, supra note 16, at 611–12.
208. See id.
209. See supra notes 204–07 and accompanying text.
211. See id.
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.

214. For critical analysis of the “alien invasion” trope commonly invoked by immigration alarmists, see Ediberto Román, The Alien Invasion?, 45 HOU.S. 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”).


217. See supra Part I.A.


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 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. Similar state and local political agitation about immigration in recent years also appear to have contributed to ever-increasing federal immigration enforcement.

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. 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.


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.

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.

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.