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Foreword : Policing Immigration After Arizona

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FOREWORD

POLICING IMMIGRATION AFTER *ARIZONA*

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The Supreme Court's June 25, 2012, decision in the case of *Arizona v. United States*[1] has already generated a wave of scholarly commentary.[2] The emerging consensus is that the ruling was a significant victory for proponents of federal primacy in immigration law. The Court rejected the voguish notion that states have inherent authority to enforce immigration laws and laid to rest the argument that states could enter the immigration policymaking sphere by purporting to mirror federal immigration law.[3] In striking down three of the four challenged provisions of Arizona's controversial Senate Bill ("S.B.") 1070,[4] the Supreme

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

2. *See, e.g.*, Jennifer M. Chacón, *The Transformation of Immigration Federalism*, 21 WM. & MARY BILL RTS. J. 577 (2012) [hereinafter Chacón, *Transformation of Immigration Federalism*]; Jennifer M. Chacón, *Arizona's S.B. 1070 in the U.S. Supreme Court: Who Won, Why, and What Now?*, 2012 EMERGING ISSUES 6515 (July 3, 2012) [hereinafter Chacón, *Arizona's S.B. 1070*]; Lauren Gilbert, Patchwork Immigration Laws and Federal Enforcement Priorities (June 26, 2012) (unpublished manuscript), *available at* http://www.ssrn.com/abstract=2093486; Lucas Guttentag, *Immigration Preemption and the Limits of States Power: Reflections on* Arizona v. United States, 9 STAN. J. C.R. &. C.L. 1 (2013); Kevin R. Johnson, *Online Symposium: The Debate Over Immigration Reform Is Not Over Until Its Over*, SCOTUSBLOG (June 25, 2012, 8:14 PM), http://www.scotusblog.com/2012/06/online-symposium-the-debate-over-immigration-reform-is-not-over-until-its-over; David Martin, *Reading* Arizona, 98 VA. L. REV. IN BRIEF 41 (2012), http://www.virginialawreview.org/inbrief.php?s=inbrief&p=2012/07/15/reading_arizona.

3. *See* Chacón, *Arizona's S.B. 1070*, *supra* note 2; Guttentag, *supra* note 2; Martin, *supra* note 2.

4. *Arizona*, 132 S. Ct. at 2510; S.B. 1070, 49th Leg., 2d Sess. (Ariz. 2010), *available at* http://www.azleg.gov/legtext/49leg/2r/bills/sb1070s.pdf [hereinafter S.B. 1070].

Court reaffirmed the federal government's "significant power to regulate immigration."[5]

The ruling, however, does not signal an end to state-level participation in immigration enforcement. State and local officials will continue to cooperate in immigration enforcement—whether by choice or compulsion—as a result of the federal government's Secure Communities program, under which state and local arrest data is automatically checked against a federal immigration database.[6] Moreover, because law enforcement arrests are an important screening mechanism for determining who will be targeted for immigration enforcement, state and local officials will still have much of the "discretion that matters" when it comes to shaping immigration enforcement.[7] The Court's opinion in *Arizona* did not fully acknowledge or account for the changing nature of immigration enforcement. Consequently, the formal reiteration of federal power will not necessarily ensure federal primacy in all aspects of immigration enforcement.[8]

The articles in this symposium wrestle with these and other themes that have emerged in the wake of the *Arizona* decision. All four authors share the general view that the decision was a significant reassertion of federal power in immigration policy. But each author also offers some unique insights about the significance of the decision. The four articles can be grouped into two distinct subsets. Two of the articles focus on the effects of the *Arizona* decision on immigration enforcement policies generally.[9] The other two articles focus on a specific issue that the Court deliberately declined to address in the Arizona decision: racial

5. *Arizona*, 132 S. Ct. at 2510.

6. *See* Adam B. Cox & Thomas J. Miles, *Policing Immigration* (NYU Ctr. for Law, Econ. and Org., Working Paper No. 12-48, 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2109820 (discussing the roll-out of the Secure Communities program).

7. Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819 *passim* (2011).

8. *See* Chacón, *Transformation of Immigration Federalism*, *supra* note 2, at 581.

9. *See* Melissa Keaney & Alvaro Huerta, *Restrictionist States Rebuked: How* Arizona v. United States *Reins in States on Immigration*, 3 WAKE FOREST J.L. & POL'Y 249 (2013); Christopher N. Lasch, *Preempting Immigration Detainer Enforcement Under* Arizona v. United States, 3 WAKE FOREST J.L. & POL'Y 281 (2013).

profiling.[10] I have divided the discussion in this introduction accordingly.

I. AFTER *ARIZONA*: UNDERSTANDING WHAT THE DECISION MEANS FOR IMMIGRATION ENFORCEMENT

In their article *Restrictionist States Rebuked, How* Arizona v. United States *Reins in States on Immigration,* attorneys Melissa Keaney and Alvaro Huerta discuss the practical implications of the *Arizona* decision. They use their article to explain that the way forward for states wishing to enact state-level immigration restrictions is extremely narrow after *Arizona.* They suggest that states stay out of the business of restrictionist immigration policies and focus on immigrant integration efforts.

Keaney and Huerta first describe S.B. 1070, the Arizona bill that prompted the litigation, and Alabama's House Bill 56, a copycat bill that went much further than the Arizona law in its efforts to insert the state into the realm of immigration enforcement.[11] The authors explain that these bills were enacted against the backdrop of Congressional inaction in reforming the nation's admissions policies. They note that Congress has not overhauled U.S. immigration laws since 1986, when it passed the Immigration Reform and Control Act ("IRCA").[12] In the decades since that time, the IRCA framework has not produced the promised result of eliminating unauthorized migration through more effective workplace enforcement. Instead, the unauthorized population has grown to well over ten million people, prompting states and localities to enact a wave of anti-immigrant legislation. At the state level, the most notable early response was California's Proposition 187.[13] Although that law never went into effect, Congress ultimately enacted comparable welfare limitations through national legislation in the mid-1990s.[14] The authors note

10. *See* Kristina M. Campbell, *(Un)Reasonable Suspicion: Racial Profiling in Immigration Enforcement After* Arizona v. United States, 3 WAKE FOREST J.L. & POL'Y 367 (2013); Karla Mari McKanders, *Federal Preemption and Immigrants' Rights,* 3 WAKE FOREST J.L. & POL'Y 333 (2013).

11. Keaney & Huerta, *supra* note 9, at 249–50.

12. *Id.* at 252.

13. *Id.* at 251–52.

14. *Id.* at 254–55.

that subsequent efforts to rationalize and reform immigration law have failed to garner sufficient support in Congress.[15]

Although not mentioned by the authors, it is also significant that Congress funded a massive increase in the enforcement of existing immigration laws—both at the border and in the interior—even as it failed to undertake any effort to rationalize what is widely viewed as a flawed immigration system.[16] The "formidable machinery" of immigration enforcement included the creation and staffing of what is now the largest law enforcement agency in the country, Immigration and Customs Enforcement ("ICE"), as well as the nation's fastest-growing segment of detention.[17] The ebbs and flows of unauthorized migration have been largely unresponsive to these enforcement efforts. Instead, migration flow appears to be most closely tied to economic developments.[18] But immigration policy makers continue to emphasize border enforcement as the critical first step toward comprehensive reform.[19] Notwithstanding questions of

15. *Id.* at 254–55.

16. *See, e.g.*, DORIS MEISSNER ET AL., MIGRATION POLICY INSTITUTE, IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY (2013), *available at* http://www.migrationpolicy.org/pubs/enforcementpillars.pdf (describing the tremendous expansion of immigration enforcement efforts in recent years); Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563 (2010) (charting the massive growth in enforcement spending over the past two decades) [hereinafter Chacón, *A Diversion of Attention*].

17. *See generally* Keaney & Huerta, *supra* note 9.

18. *See, e.g.*, NAT'L RESEARCH COUNCIL, COMM. ON ESTIMATING COSTS OF IMMIGRATION ENFORCEMENT IN THE DEP'T OF JUSTICE, BUDGETING FOR IMMIGRATION ENFORCEMENT: A PATH TO BETTER PERFORMANCE (Steve Redburn et al. eds., 2011), *available at* http://www.nap.edu/catalog.php?record_id=13271.

19. *See, e.g.*, S. 744 at §§ 1101–1116 (leading off a massive comprehensive immigration reform bill with a section on border security benchmarks and initiatives); *see also* Press Release, Senator Schumer et al., Bipartisan Framework for Comprehensive Immigration Reform (Jan. 29, 2013), http://www.c-span.org/uploadedFiles/Content/Documents/Bipartisan-Framework-For-Immigration-Reform.pdf ("Creating a Path to Citizenship for Unauthorized Immigrants Already Here That Is Contingent Upon Securing the Border and Combating Visa Overstays"); Marc Caputo, *Obama's Immigration Reform Frays Nerves, But Shows Similarities With Marco Rubio's Plan*, MIAMI HERALD, Feb. 8, 2013, *available at* http://www.miamiherald.com/2013/02/18/3241425/president-obamas-immigration-reform.html#posting (describing Senator Marco Rubio's concerns about what is missing from the Obama Administration's leaked immigration bill, including "more border security" and "improved tracking of immigrants who overstay their visas"). For criticisms of this approach see, for example, GREG CHENN & SU KIM, AM. IMMIGRATION LAWYERS ASSOC., BORDER SECURITY: MOVING BEYOND PAST BENCHMARKS (AILA InfoNet Doc. No. 13013051, posted Jan. 30, 2013) (documenting that most of the triggers that would have been included in previous comprehensive immigration reform

efficacy, it is beyond dispute that federal immigration enforcement efforts reached unprecedented levels during this period, and this important fact sheds additional light on the history that Keaney and Huerta provide.

In spite of the unprecedented federal enforcement buildup of the past two decades, as Keaney and Huerta observe, states have recently developed their own immigration control legislation, justifying these efforts as necessary responses to purported gaps in federal efforts.[20] Notably, although lawmakers introduced immigration enforcement measures in many sub-federal jurisdictions, very few of these measures were actually enacted into law.[21] Two notable examples of legislation that did pass are Arizona's S.B. 1070 and Alabama's House Bill ("H.B.") 56.

After providing background on these restrictive sub-federal immigration regulations, Keaney and Huerta provide a detailed discussion of the case law that governs the sub-federal regulation of immigration.[22] Earlier cases established that the federal government has the exclusive power to determine immigration policy[23] but also made clear that states can exercise their traditional police powers in ways that may affect immigrant residents.[24] On the other hand, as Keaney and Huerta point out, enforcement of immigration law is not an exercise of traditional police power; it crosses the line into impermissible state involvement in immigration policy.[25] Keaney and Huerta note that guidance from the Department of Justice was quite clear on this point until a 2002 memorandum issued by the Office of Legal Counsel articulated a broader, and legally questionable, understanding of state and local officials' power to enforce federal immigration laws.[26] Pushing the logic of this memo even further,

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proposals have already been met and exceeded); Wayne A. Cornelius, *Are Border Enforcement Triggers Necessary?*, CIR 2013 BLOG (Mar. 8, 2013), http://ccis.ucsd.edu/2013/03/are-border-enforcement-triggers-necessary (questioning the wisdom and efficacy of including such triggers in reform legislation).

20. Keaney & Huerta, *supra* note 9, at 255–56.

21. *Id.* at 256.

22. *Id.* at 259–69.

23. Hines v. Davidowitz, 312 U.S. 52, 62 (1941).

24. De Canas v. Bica, 424 U.S. 351, 356 (1976).

25. Keaney & Huerta, *supra* note 9, at 262–63.

26. *Id.* at 264–65.

Arizona and other states attempted to insert themselves fully into the immigration enforcement process. Keaney and Huerta conclude that the Supreme Court largely shut these efforts down in its *Arizona* decision.[27] Their article describes the S.B. 1070 litigation and dissects the Court's decision in *Arizona*, emphasizing the ways in which that decision narrowly circumscribes state participation in immigration regulation and cooperative enforcement.[28]

Keaney and Huerta conclude that, after *Arizona*, "as a practical matter, state laws survive only where there is evidence that Congress will tolerate the interference inherent in the state activity, even if specific federal statutory authorization or approval is not required."[29] Thus, S.B. 1070's section 2(B) survived when read very narrowly, but the Court is unlikely to uphold broader efforts to criminalize migration or enforce immigration laws. In light of this fact, Keaney and Huerta urge states to stay out of the costly and fruitless business of enacting restrictive immigration legislation.[30] Instead, they recommend that states and localities consider immigrant-friendly bills, such as California's TRUST Act,[31] which takes aim at what many state officials see as the overbroad arrest reporting system created by the federal Secure Communities program. They note that other integrative and immigrant-friendly bills are possible to imagine, and that local organizations can do more to promote them.[32]

The question that the authors leave for the reader is: how are we to square these immigrant-friendly bills with the strong notions of federal preemption articulated in *Arizona*? After all, the Obama Administration did not hesitate to file a brief in the matter of Sergio Garcia, arguing that states like California could not admit unauthorized immigrant residents to the bar of the state, relying on the *Arizona* decision to make this argument.[33] Like the

27. *Id.* at 271.

28. *Id.* at 271–74; *accord* Guttentag, *supra* note 2, at 45; Lasch, *supra* note 9, at 320; Martin, *supra* note 2, at 47.

29. Keaney & Huerta, *supra* note 9, at 275–76.

30. *Id.* at 276–77.

31. *Id.* at 278.

32. *Id.* at 278–79.

33. Brief for The United States of America as Amicus Curiae *passim*, *In re* Sergio C. Garcia, No. S202512 (Cal. Aug. 3, 2012), 2012 WL 3822246 *passim*. Arguably, California's decision to admit Sergio C. Garcia, an unauthorized immigrant, to the state bar is a quintessentially integrative measure undertaken in the heart of state licensing authority.

immigrants' rights organizations litigating the *Arizona* case, the federal government relied on principles of preemption in its amicus brief, but here, preemption was used to oppose a state's integrationist effort. It is, I think, possible and indeed desirable to articulate a substantive understanding of preemption that allows for integrative laws, including those that would allow for Sergio Garcia's admission to the California bar, while simultaneously precluding state efforts to investigate and arrest noncitizens on the basis of their immigration status. But it would be helpful for advocates and scholars to fully articulate the framework for rights-protective preemption. Keaney and Huerta are well-situated to develop such a legal framework in both advocacy and scholarship, and I hope that they will embrace the challenge.

Keaney and Huerta are focused on the big-picture lessons that states and localities can glean from the *Arizona* decision, but Christopher N. Lasch is focused on one specific enforcement mechanism that is affected by the decision: immigration detainers. With his article *Preempting Immigration Detainer Enforcement Under* Arizona v. United States, Lasch once again makes an important contribution to discussions over modes of intergovernmental cooperation in immigration enforcement. While noting the complexity of the matter, like Keaney and Huerta, Lasch generally views the Supreme Court's decision in *Arizona v. United States* as a decisive reassertion of federal primacy in the realm of immigration enforcement.[34] However, Lasch notes realistically that even after the *Arizona* decision, sub-federal agencies continue to play a significant role in immigration enforcement through compliance with federal immigration detainers.[35] Detainers are requests, issued by the federal immigration enforcement agency to other law enforcement agencies, asking that the agency detain the noncitizen for a specified period so as to give immigration enforcement agents more time to bring the individual into ICE custody. Lasch argues that the *Arizona* case provides further evidence that these detainers are constitutionally infirm.

This seems like the very type of measure that Keaney and Huerta advocate for, and yet, the Obama Administration is using the *Arizona* decision as a basis for invalidating the decision. *See id.* at 11, 13 (relying on *Arizona* in arguments against the legality of Garcia's bar admission).

34. Lasch, *supra* note 9, at 281.

35. *Id.* at 282.

In an earlier article, Lasch argued that the reasoning of *Arizona* required the conclusion that federal detainers exceeded *federal* constitutional authority.[36] In his article in this journal issue, he reflects on the other side of the equation, using the reasoning of the *Arizona* case to illustrate that voluntary compliance with detainers by sub-federal agents also exceeds *states'* constitutional authority.[37] Having previously concluded that federal detainers exceed the scope of federal power, Lasch now argues that the only possible legal justifications for compliance with such detainers must come from state power to enforce immigration laws—power that he argues clearly does not exist in the wake of *Arizona.*

Lasch begins his article by discussing the way in which detainers operate and by explaining the rise of detainers as a central feature of the nation's immigration enforcement efforts.[38] He notes that serious arguments have been made that challenge the legal authority of the federal government to *require* sub-federal entities to honor detainers, but here asks whether states that opt to honor detainers in their discretion can legally do so.[39] To answer the question, he explores both states' civil immigration law enforcement powers and criminal immigration law enforcement powers,[40] and concludes that neither set of powers justifies detaining noncitizens solely on the basis of federally issued immigration detainers.

The significance of the civil-criminal distinction in immigration law is explained by both Keaney and Huerta,[41] and by Lasch. At least until 2002, the widely accepted wisdom was that state officials lacked inherent authority to enforce immigration laws and were not authorized to enforce civil immigration laws, but that they could conduct arrests for violations of criminal immigration provisions.[42] Although proponents of S.B. 1070 took a more expansive view of state enforcement authority, Lasch

36. Christopher N. Lasch, *Immigration Detainers After* Arizona v. United States, 46 LOY. L.A. L. REV. __ (forthcoming 2013).

37. Lasch, *supra* note 9, at 284.

38. *Id.* at 286–87.

39. *Id.* at 288.

40. *Id.* at 291.

41. Keaney & Huerta, *supra* note 9, at 264–65 (discussing the civil-criminal distinctions made in the 1996 Office of Legal Counsel memo).

42. *Id.* at 265.

shares the view of other commentators[43] that the Court's reasoning in *Arizona* is inconsistent with theories espousing the position that states have inherent authority to enforce immigration laws independent of Congressional actions.[44] Out of caution, he nevertheless starts his analysis with the more conservative assumption that states have some inherent state power.[45] Even so, he concludes that states lack the power to enforce federal immigration detainers.

With regard to civil immigration enforcement, Lasch reminds the reader that "*Arizona* teaches that state officials may not make arrests in circumstances where federal officials themselves lack arrest authority."[46] Lasch notes that federal detainer regulation purports to empower states to detain noncitizens in a host of situations where the federal government itself would lack the power to arrest—such as cases where there is no probable cause to believe that an individual has violated civil immigration law and where there is no likelihood of escape before the issuance of a warrant.[47] Since federal officials must adhere to these arrest limits, the analysis the *Arizona* Court used in striking down section 6 of S.B. 1070 suggests that state officials must do so as well.[48] Moreover, Lasch explains that detainer authority in some cases exceeds the powers delegated to state officials by the Immigration and Nationality Act ("INA") section 287(g),[49] and that such authority cannot be justified as a form of "cooperation" with federal officials engaged in enforcement, any more than the arrest authority provided by section 6 of S.B. 1070 could be sustained as a form of cooperative enforcement.[50]

Having established the fact that the enforcement of at least some subset of federal detainers exceeds the state's constitutional powers, Lasch considers whether selective enforcement of

43. *See, e.g.*, Martin, *supra* note 2, at 41 (concluding that *Arizona* foreclosed the notion that states had inherent authority to enforce immigration law); Guttentag, *supra* note 2, at 35–42; *see also* Gabriel J. Chin & Marc L. Miller, *The Unconstitutionality of State Regulation of Immigration Through Criminal Law*, 61 DUKE L.J. 251 (2011) (providing a pre-*Arizona* exposition of the legal fallacies of the mirror image theory).

44. Lasch, *supra* note 9, at 284–85 n.18.

45. *Id.* at 284, 293.

46. *Id.* at 295.

47. *Id.*

48. *Id.*

49. 8 U.S.C. § 1357 (2006).

50. Lasch, *supra* note 9, at 299–301.

detainers (for example, enforcement of only those detainers that can be justified as constitutional after *Arizona*) could be constitutional. However, he concludes that the discretionary, selective enforcement of detainers runs afoul of the Supreme Court's decision in *Arizona* precisely because it *is* discretionary and selective, and therefore inconsistent with the development of uniform national immigration enforcement policies.[51]

Once he concludes that states cannot constitutionally comply with detainers in the enforcement of civil immigration laws, he considers whether the situation might be different where criminal law is concerned.[52] Here, again, he finds authority lacking. Because presence without authorization is not itself a crime, civil immigration detainers "are not likely to contain sufficient information to justify prolonged detention for *criminal* enforcement."[53] As Lasch illustrates in detail, the detainer regulation does not require evidence or even suspicion of criminal activity,[54] and in many cases, there simply will not be any evidence of criminal violations.[55] He demonstrates that the *Arizona* Court's conclusion that federal law imposes clear limits on civil arrest authority applies with equal force to criminal arrest authority.[56] He also notes that there are two existing legal frameworks that establish the means by which federal officials can obtain prisoners in state and local custody for the purposes of criminal prosecution—the writ of habeas corpus *ad prosequendum* and the Interstate Agreement on Detainers—and that the use of immigration detainers falls outside of those frameworks and therefore appears to be an extralegal means of achieving criminal law enforcement.[57]

Indeed, Lasch argues that the use of the civil detainer should be read as a signal that the U.S. is *not* pursuing a criminal prosecution and is instead pursuing the path of civil removal.[58] Lasch notes that in striking down section 5(C) of S.B. 1070, *Arizona* made it plain that states cannot use criminal law means to

51. *Id.* at 301–311.
52. *Id.* at 313.
53. *Id.* at 315 (emphasis added).
54. *Id.* at 316.
55. *Id.* at 316–17.
56. *Id.* at 318–20.
57. *Id.* at 322–25.
58. *Id.* at 325–27.

attain the ends of civil immigration enforcement.[59] Finally, Lasch notes that because the civil-criminal line in immigration is so difficult to determine, asking state and local officials to decide when it is appropriate to honor a detainer as a lawful exercise of criminal arrest authority as opposed to an unauthorized exercise of civil arrest authority would simply be unworkable.[60] Ultimately, Lasch concludes that the reliance of state and local officials on civil immigration detainers cannot be justified in the service of enforcing either civil or criminal immigration law.

Lasch has performed an important service in scrutinizing immigration detainers. They are a common and pervasive feature of the immigration enforcement landscape. But his trenchant analysis, both here and elsewhere, exposes the troubling truth that, not only are detainers not a natural and unquestionable feature of this landscape, but they are unlawful as currently structured. The federal government exceeds its power when it requires states to comply with detainer requests. And states and localities also exceed their own power when they comply—or comply selectively—with such requests.

II. BEYOND *ARIZONA*: WHAT TO DO ABOUT RACIAL PROFILING

Keaney, Huerta, and Lasch offer important insights on the legal and policy implications of *Arizona*. The remaining two articles in the symposium shift the focus away from the implications of *Arizona* and turn toward the great elephant in the room in the *Arizona* discussion: racial profiling.[61]

Karla Mari McKanders widens the inquiry around immigration enforcement so that it focuses not just upon the preemption analysis that drove the *Arizona* decision but also includes equal protection questions that the Court has largely ignored in resolving immigration enforcement questions. In her article *Federal Preemption and Immigrants' Rights*, McKanders explores the preemption analysis used by the Court in *Arizona* but

59. *Id.* at 326.

60. *Id.* at 327.

61. For a discussion of the Court's refusal to address issues of racial profiling, see, for example, Chacón, *Transformation of Immigration Federalism*, *supra* note 2, at 577–82; Lucas Guttentag, *Online Symposium: Strong On Theory While Profiling Ignored*, SCOTUSBLOG (June 25, 2012, 7:03 PM), http://www.scotusblog.com/2012/06/online-symposium-strong-on-theory-while-profiling-ignored; Johnson, *supra* note 2.

also highlights the limits of preemption in addressing some of the second-wave litigation in the post-*Arizona* era. Like Keaney and Huerta, McKanders sketches out the state laws that gave rise to the recent bout of litigation, with particular attention to Arizona's S.B. 1070 and Alabama's H.B. 56,[62] noting that S.B. 1070 was struck down on preemption grounds.[63] Preemption is the typical route by which courts have invalidated state regulation of immigration. As McKanders notes, in the sphere of federal immigration regulation, discrimination claims have been largely unavailing,[64] and some would claim comparable discriminatory powers for the states as well.[65]

McKanders then evaluates the role of equal protection analysis in evaluating the legitimacy of immigration regulation. Despite the fact that these immigration laws have clear civil rights implications, she notes the reluctance of scholars to center equal protection analysis in their challenges to these statutes.[66] Because the concerns that often drive the litigation against restrictionist measures such as S.B. 1070 are actually concerns about discrimination, McKanders suggests that it is time to reconsider the possible utility of equal protection analysis in the wake of *Arizona*.[67]

Unfortunately, McKanders finds that the equal protection doctrine has evolved in ways that have made it incredibly difficult for litigants to successfully advance equal protection claims against anti-immigrant measures.[68] Although there is evidence of discriminatory intent in the framing and passage of at least some of these laws, and a lack of evidence supporting the purported public safety and economic objectives that are used to justify the laws, courts often have found comparable evidence insufficient to establish the discriminatory intent needed to establish a successful equal protection claim.[69] Litigants have continued to press such

62. McKanders, *supra* note 10, at 336–38.

63. *Id.* at 339.

64. *Id.* at 340–42.

65. *Id.* at 342.

66. *Id.* at 344–48.

67. *Id.* at 348.

68. *Id.* at 350 ("Today, with state anti-immigrant statutes, courts are not likely to find an equal protection violation.").

69. *Id.* at 353 (discussing the court's refusal to find an equal protection violation in a challenge to a restrictionist ordinance enacted in the town of Hazelton, Pennsylvania).

claims, most recently and (thus far) successfully in the case of *Valle del Sol v. Whiting*, in which plaintiffs alleged that unlawful discrimination against Latinos was a "motivating" factor behind S.B. 1070.[70] But the high standard of discriminatory intent typically has proven difficult to meet in cases that involve laws that populations targeted on the basis of immigration status rather than race, no matter how tightly the two categories might correlate.

McKanders notes that restrictionist laws such as S.B. 1070 have also generated equal protection claims based on the racial profiling engendered by the laws.[71] She notes, once again, that the legal bar for establishing racial discrimination in these contexts is almost insurmountably high, pointing to the Court's decision in *McCleskey v. Kemp*[72] as emblematic of the Court's refusal to acknowledge clear evidence of disparate impact as sufficient to establish the discriminatory intent needed to sustain an equal protection claim.[73] McKanders also notes that the problem is compounded by the Court's Fourth Amendment jurisprudence, which has sanctioned the use of race in immigration policing in cases like *United States v. Brignoni-Ponce* and *United States v. Martinez-Fuerte*.[74] By making clear the fact that the use of race in immigration policing is appropriate, these cases further diminish the possibility of successful equal protection claims based on racial profiling in immigration enforcement.

Indeed, although McKanders does not expressly address this fact, one thing that is striking about the Court's decision in *Arizona* is the degree to which the Court blurred the line between federal immigration enforcement officers, and state and local law enforcement when discussing the power of the latter group of officers to conduct immigration-related stops.[75] Given the permissiveness with which the Court has treated the use of race in immigration policing, the Court's disregard of the distinction suggests that the same loose standards for the use of race in policing could arguably apply to state officials' determinations of

70. *Id.* at 352.

71. *Id.* at 353–54.

72. 481 U.S. 279 (1987).

73. McKanders, *supra* note 10, at 354.

74. *Id.* at 359–60; United States v. Brigoni-Ponce, 422 U.S. 873 (1975); United States v. Martinez-Fuerte, 428 U.S. 543 (1976).

75. Chacón, *Transformation of Immigration*, *supra* note 2, at 611–14 (2012).

"reasonable suspicion" of unauthorized immigration status when those officials are implementing S.B. 1070's section 2(B).[76] Unless the Court wishes to sanction the widespread expansion of racial profiling, in upcoming cases it will need to clarify that the standards that the Court has articulated with regard to the use of race by federal immigration officers do not apply to state officials. The existing profiling case law assumes a degree of immigration training that state and local officials simply do not have.[77]

McKanders notes that, at this point, there are lawsuits in a number of jurisdictions raising equal protection claims against immigration laws that allow immigration status determinations to be made by state and local officers.[78] As McKanders suggests, a great deal of investigative discretion actually goes into the process of making stops on the basis of immigration status. Meanwhile, sub-federal immigration legislation does not provide meaningful guidelines for the new policing tasks that officials are asked to assume, and the training materials that govern implementation suggest that the laws will be implemented with "'great reliance on implicit attitudes and stereotypes.'"[79] This is disheartening, but even more troubling is the absence of legal remedy when the policing strategies give rise to profiling. Given the state of the law, McKanders thinks that reliance on stereotypes in formulating "reasonable suspicion" of unlawful immigration status is not likely to rise to the level of an equal protection violation, despite the inevitable racial profiling that will occur.[80] Ultimately, McKanders is pessimistic about the ability of contemporary equal protection jurisprudence to offer protection for individuals who raise genuine claims of discrimination arising out of restrictionist immigration legislation. She suggests that courts ought to take a different approach to these kinds of claims. Given her trenchant diagnosis of the problem, her readers would also benefit from concrete suggestions about how the court might develop a more useful framework for evaluating the genuine discriminatory harms of these kinds of laws.

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76. *Id.*

77. *Id.*

78. McKanders, *supra* note 10, at 361–63.

79. *Id.* at 364 (quoting Jason A. Nier et al., *Can Racial Profiling Be Avoided Under Arizona Immigration Law? Lessons Learned from Subtle Bias Research and Anti-Discrimination Law*, 12 ANALYSES SOC. ISSUES & PUB. POL'Y 5, 11 (2012)).

80. *Id.*

Kristina M. Campbell's *(Un)Reasonable Suspicion: Racial Profiling in Immigration Enforcement After* Arizona v. United States also tackles the profiling problem, and she is perhaps a bit more sanguine than McKanders about the ability of current equal protection doctrine to provide redress in at least some cases of discriminatory policing. In the article, she explains why the "'reasonable suspicion' requirement of S.B. 1070's section 2(B) . . . will give rise to stops, detentions, and arrests based on constitutionally impermissible factors such as race, color, and ethnicity" and will "ultimately stymie the efforts of Arizona and other jurisdictions to enact state-level immigration enforcement laws."[81] Campbell first describes the S.B. 1070 litigation, including the decisions of the Federal District Court of Arizona, the Ninth Circuit, and ultimately, the Supreme Court.[82] After describing the Supreme Court's reasoning in striking down three of the four challenged provisions of S.B. 1070, Campbell then focuses her attention on the provision that the Court upheld, section 2(B).[83]

Section 2(B) of S.B. 1070 actually has two distinct parts. First, it requires officers, when practicable, to request proof of status during otherwise lawful seizures upon "reasonable suspicion" that a person was unlawfully present. Second, it requires the determination of an individual's immigration status before the person is released after a lawful arrest. Campbell's analysis focuses on the first provision, under which agents should contact federal officials during an otherwise lawful stop if they develop reasonable suspicion that the person they have detained lacks legal immigration status. As McKanders notes, notwithstanding the Court's unwillingness to address the matter anticipatorily, the invitation to agents to police in this way will inevitably lead to the exercise of judgment in ways that are tainted by racial stereotypes.[84] Campbell focuses on the fact that even where plausible allegations of discrimination are made, it is not clear what kind of remedies will exist for noncitizens whose rights are violated. After *INS v. Lopez-Mendoza*, immigration judges need

81. Campbell, *supra* note 10, at 367–68.

82. *Id.*

83. *Id.* at 384.

84. McKanders, *supra* note 10, at 360–61.

not suppress evidence seized in violation of the Fourth Amendment unless the violation was "egregious."[85]

Although the linkage between *Lopez-Mendoza*'s egregiousness standard and state-level immigration enforcement is only lightly sketched in Campbell's article, it is clear that the general absence of the suppression remedy in removal proceedings after *Lopez-Mendoza* reduces the costs to law enforcement of making unlawful, racially motivated stops, since evidence acquired during such stops often may not be suppressed in removal proceedings.[86] But since evidence can be suppressed in egregious cases, Campbell engages in efforts to elaborate on what that standard requires. Campbell points to recent Third Circuit case law which articulates a totality of the circumstances approach to egregiousness that she believes could help litigants secure suppression in removal proceedings arising out of discriminatory law enforcement efforts.[87] Courts applying this standard have an opportunity to reinvigorate the use of suppression as a disincentive to profiling in immigration policing.

Like McKanders, Campbell also notes that there are a number of civil rights cases that have been litigated in tandem with the preemption claims brought against S.B. 1070. Campbell discusses the *Friendly House/Valle del Sol* litigation that is also addressed by McKanders,[88] and also discusses *Ortega-Melendres v. Arpaio*, a lawsuit alleging that Maricopa County Sheriff Joe Arpaio engaged in a pattern and practice of profiling Latinos in his jurisdiction.[89] The plaintiffs in the *Ortega-Melendres* case had argued that Sheriff Arpaio systematically targeted Latinos on the basis of "reasonable suspicion" that they were undocumented and therefore present in violation of Arizona's antismuggling laws.[90]

85. Campbell, *supra* note 10, at 385.

86. Chacón, *A Diversion of Attention*, *supra* note 16, at 1611–14. Interestingly, the *Arizona* court also pruned back a potentially thorny issue that emerged in *Lopez-Mendoza*. In that case, the Court suggested in dicta that illegal entry was a continuing violation such that individuals who entered without inspection were committing an ongoing crime. The Court in *Arizona* rejected that notion: "The foundational premise of *Arizona* is a refutation of *Lopez-Mendoza*'s dictum, namely that 'it is not a crime for a removable alien to remain in the United States.'" Guttentag, *supra* note 2, at 44, quoting Arizona v. United States, 132 S. Ct. 2492, 2505 (2012).

87. Campbell, *supra* note 10, at 386–88.

88. *Id.* at 391–93.

89. *Id.* at 389–91.

90. *Id.* at 390.

The early litigation triumphs of these plaintiffs suggest that there is at least some possibility of successful equal protection litigation in the most extreme cases of racial profiling undertaken in the service of immigration enforcement. Campbell hopefully suggests that, as courts reject the notion that "reasonable suspicion" of unlawful immigration status can ever be the basis of legitimate law enforcement stops by state and local actors, states will move away from their efforts to control immigration policy through state and local laws.[91]

McKanders and Campbell both make it clear that the concerns about the racial animus and racially discriminatory policing helped to drive the *Arizona* litigation. Preemption arguments stood in for these more immediate concerns because, as the *Arizona* decision demonstrates, the preemption doctrine was a more direct route to the injunction of many potentially discriminatory restrictionist provisions.[92] But Campbell and McKanders remind the reader that, while the preemption litigation headed off some potentially discriminatory enforcement practices, it did not eliminate those practices. And once litigants are faced with bringing equal protection challenges, the jurisprudence is strewn with obstacles that might impede the development of viable legal claims even where the discriminatory intent and effects of these laws seem apparent.

McKanders and Campbell have done a good job of highlighting the equal protection concerns that laws like S.B. 1070 present. It would be extremely helpful to both scholars and litigants if McKanders and Campbell take the opportunity in future work to provide additional analysis that helps to explain the key to (thus far) successful litigation strategies like the one pursued in the *Ortega-Melendres* case, and to identify ways that other litigants might similarly deploy the equal protection doctrine to fight against immigration laws that reify racial hierarchy and sanction race-based discrimination.

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91. *Id.* at 394.

92. *See* Johnson, *supra* note 2. For a more detailed discussion of the ways in which preemption stands in for substantive individual rights claims in immigration cases, see Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 DUKE L.J. 1723, 1929–36 (2010).

III. CONCLUSIONS

The four articles in this symposium provide useful reflections on the state of immigration regulation and enforcement in the post-*Arizona* world. The authors do important work in tracing out the limits that the *Arizona* decision imposes on state-level immigration restrictions and on certain enforcement practices, and by highlighting the shortcomings of the litigation and the future need for effective equal protection advocacy. As evidenced by this collection of articles, although the *Arizona* decision has sharply curtailed state and local immigration enforcement, it has not ended the need for scholarly attention to the topic. These articles offer important contributions to the ongoing dialogue.