

# REBELLIOUS STATE CRIMMIGRATION ENFORCEMENT AND THE FOREIGN AFFAIRS POWER

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ABSTRACT

*The propriety of a new breed of state laws interfering in immigration enforcement is pending before the Supreme Court and the lower courts. These laws typically incorporate federal standards related to the criminalization of immigration (“cimmigration”), but diverge aggressively from federal enforcement policy. Enacting states argue that the legislation is merely a species of “cooperative federalism” that does not trespass upon the federal power over foreign affairs, foreign commerce, and nationality rules since the laws mirror federal standards. This Article challenges the formalist mirror theory assumptions behind the new laws and argues that inconsistent state crimmigration enforcement policy and resulting foreign affairs complications render the new spate of immigration policing laws infirm. The Article argues for the need to give due weight to statements of interest by the executive on the foreign affairs implications of rebellious state crimmigration enforcement.*

*The Article argues that the caste-carving approach of the “attrition through enforcement” multi-front attack strategy behind the laws contravenes national immigration enforcement policy and strains foreign relations. The analysis provides a basis for distinguishing the Supreme Court’s recent decision in Chamber of Commerce v. Whiting, which upheld a state employer licensing regulation, from the current spate of legislation pending in the courts. The distinction that makes a difference is conflict with a national enforcement policy calibrated to avoid turning suspected foreign nationals into untouchable caste-like “subjects of suspicion and abuse,” thereby marring community and international relations. The analysis in the crimmigration context also enriches our understanding of what cooperative—and uncooperative—federalism*

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*enforcement means and the dangers of the phenomenon in areas of special national concern fraught with localized animosity.*

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## INTRODUCTION

The theory that state laws creating immigration offenses avoid trespass on the federal power over foreign affairs,<sup>1</sup> foreign commerce,<sup>2</sup> and nationality rules<sup>3</sup> as long as state laws mirror and enforce federal standards has gone viral.<sup>4</sup> In a heated pre-election-year summer, several states

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1. See, e.g., *Dep't of Navy v. Egan*, 484 U.S. 518, 530 (1988) (collecting cases on the deference to the President on matters involving foreign affairs and national security and hesitance to intrude on executive authority); *Haig v. Agee*, 453 U.S. 280, 293–94 (1981) (describing “the generally accepted view that foreign policy was the province and responsibility of the Executive”).

2. See U.S. CONST. art. I, § 8, cl. 1, 3 (“The Congress shall have Power . . . To regulate Commerce with foreign Nations . . .”); see also, e.g., *Chy Lung v. Freeman*, 92 U.S. 275, 278–80 (1875) (invalidating California statute imposing onerous bond on certain immigrants to deter entry because the U.S. Constitution reserves to the federal government alone the power to regulate commerce with foreign nations, craft regulations, and determine the manner of execution).

3. See U.S. CONST. art. I, § 8, cl. 1, 4 (“The Congress shall have Power . . . To establish a uniform Rule of Naturalization . . .”).

4. See, e.g., *2011 Immigration-Related Laws, Bills and Resolutions in the States: Jan. 1–March 31, 2011*, NAT'L CONF. OF ST. LEGISLATURES, <http://www.ncsl.org/default.aspx?tabid=13114> (last visited May 26, 2012) (reporting on “an unprecedented rate” of state immigration legislation and 267 bills introduced in forty-two state legislatures on immigration law enforcement, primarily addressing immigration status checks on a lawful stop or detention); see also Brief of Amici Curiae States of Michigan, Alabama, Florida, Idaho, Louisiana, Nebraska, Northern Mariana Islands, Pennsylvania,

passed laws emboldened by this “mirror theory”<sup>5</sup> even as Arizona petitioned the Supreme Court for review of the Ninth Circuit’s injunction against its internationally controversial template law.<sup>6</sup> The Supreme Court granted certiorari on the question of the constitutionality of Arizona Senate Bill 1070.<sup>7</sup> A host of lawsuits are pending against similar state immigration legislation, including a suit by the United States against Alabama’s even more aggressive enactment.<sup>8</sup> The oft-proffered rallying call of interventionist states is that if the federal government will not enforce its immigration laws to the satisfaction of the dissident states, then the states can and will step in by creating their own criminal immigration laws and civil disabilities.<sup>9</sup>

Emboldened by the mirror theory, states argue that they are merely engaging in “cooperative enforcement,” not inconsistent legislation.<sup>10</sup> The standard argument is that as long as the constraints and duties imposed on

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South Carolina, South Dakota, Texas, and Virginia in Support of Defendants-Appellants at 19, *United States v. Arizona*, 641 F.3d 339 (9th Cir. 2011) (No. 10-16645) [hereinafter Brief of Amici Curiae States] (“A State’s enforcement of Congressionally-approved immigration standards does not establish new immigrations standards.”); Brief Amici Curiae of Members of Congress in Support of Appellants and Partially Reversing the District Court at 26, *United States v. Arizona*, 641 F.3d 339 (9th Cir. 2011) (No. 10-16645) (brief of sixty-six members of Congress) (“Because S.B. 1070 mirrors federal immigration provisions, its plainly legitimate sweep is indisputable, and a facial challenge cannot succeed.”).

5. *See, e.g.*, Beason-Hammon Alabama Taxpayer and Citizen Protection Act, H.B. 56, 2011 Leg., Reg. Sess. §§ 4–5, 13–18 (2011); Illegal Immigration Reform and Enforcement Act of 2011, H.B. 87, 151st Gen. Assemb., Reg. Sess. §§ 3, 7–8, 20 (Ga. 2011); S.B. 590, 117th Gen. Assemb., 1st Reg. Sess. §§ 5, 16–26, 21, 24 (Ind. 2011); Utah Illegal Immigration Enforcement Act of 2011, H.B. 497, 2011 Gen. Sess. §§ 3, 4, 8, 10, 11 (2011).

6. *See United States v. Arizona*, 641 F.3d 339 (9th Cir. 2011) (affirming injunction against implementation in part of Arizona Senate Bill 1070), *petition for cert. filed*, 2011 WL 3562633 (U.S. Aug. 10, 2011) (No. 11-182).

7. *Arizona v. United States*, 132 S. Ct. 845 (2011).

8. *E.g.*, *United States v. Alabama*, 443 F. App’x 411 (11th Cir. 2011); *Hispanic Interest Coal. v. Bentley*, No. 5:11-cv-02484-SLB, 2011 WL 5516953 (N.D. Ala. Sept. 28, 2011); *Ga. Latino Alliance for Human Rights v. Deal*, 793 F. Supp. 2d 1317 (N.D. Ga. 2011); *Buquer v. City of Indianapolis*, 797 F. Supp. 2d 905 (S.D. Ind. 2011); *Parsley v. Bentley*, No. 5:11-cv-2736-SLB (N.D. Ala. Aug. 1, 2011); *United States v. Alabama*, 813 F. Supp. 2d 1282 (N.D. Ala. 2011); *Utah Coal. of La Raza v. Herbert*, No. 2:11-cv-401, 2011 WL 7143098 (D. Utah May 11, 2011).

9. *See, e.g.*, Appellants’ Opening Brief at 1, 12, *United States v. Arizona*, 641 F.3d 339 (9th Cir. 2011) (No. 10-16645) (explaining that Arizona Senate Bill 1070 was enacted amid a backdrop of alleged federal “non-enforcement of the federal immigration laws” and supplements in light of the Department of Homeland Security’s alleged “inability (or unwillingness) to enforce the federal immigration laws effectively”); Brief of Amici Curiae States, *supra* note 4, at 6 (deploring the executive branch’s challenge to Arizona Senate Bill 1070 as seeking to prolong a “regulatory scheme whereby the executive branch may continue to selectively enforce—or selectively not enforce—the laws enacted by Congress”).

10. *See, e.g.*, Appellants’ Opening Brief, *supra* note 9, at 16 (arguing that Arizona Senate Bill 1070 constitutes permissible “cooperative enforcement”); Brief of Amici Curiae States, *supra* note 4, at 25 (similar).

regulated people and entities by state immigration regulation are essentially the same as federal law, there is no constitutional infirmity.<sup>11</sup> The legal and popular debate is largely being framed by this formalist lens that focuses on congruence between the legal standards on the books. “Cooperation” is shallowly defined as mere formal congruence in standards between those defined by Congress and those enforced by the states. But the life of the law is more than its formal reflection.<sup>12</sup> Executive enforcement policy brings the law into being in reality.<sup>13</sup>

In our tripartite system of checks and balances, the President and executive enforcement policy play a crucial role in shaping the law in reality.<sup>14</sup> Enforcement is a relatively neglected issue in the federalism literature, which largely focuses on regulatory power.<sup>15</sup> Executive enforcement policy is particularly important when it comes to crimmigration—the criminalization of immigration—because executive discretion balances sensitive foreign affairs considerations that the constitutional structure entrusts to the national executive.<sup>16</sup> Foreign affairs concerns are especially sensitive when it comes to states directing criminal law enforcement to focus on suspected non-nationals because this sparks other nations’ fears that their members—whether lawfully or unlawfully present in the United States—will be demonized and treated as criminals because of national origin, language, culture, and race.<sup>17</sup>

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11. This notion is the brainchild of current Kansas Secretary of State and former law professor Kris Kobach, who describes himself as the “intellectual architect of the fight against illegal immigration.” KRIS KOBACH FOR SECRETARY OF STATE, <http://www.kriskobach.org/> (last visited May 26, 2012). Kobach provided states a playbook for how to achieve “attrition through enforcement” while “avoid[ing] federal preemption” in “a field in which the federal government enjoys plenary authority under Article I of the U.S. Constitution” through strategies such as “enacting state-level crimes that mirror federal immigration crimes.” Kris W. Kobach, *Reinforcing the Rule of Law: What States Can and Should Do to Reduce Illegal Immigration*, 22 GEO. IMMIGR. L.J. 459, 464, 465, 472 (2008); see also Kris W. Kobach, *Attrition Through Enforcement: A Rational Approach to Illegal Immigration*, 15 TULSA J. COMP. & INT’L L. 155, 157–63 (2008) [hereinafter Kobach, *Attrition Through Enforcement*] (expanding on attrition through enforcement strategy).

12. Cf. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1881) (explaining that the law is animated by the “felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men”).

13. See *infra* Part I.A.

14. See U.S. CONST. art. II, § 3 (providing that it is the President’s role to “take Care that the Laws be faithfully executed”).

15. Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698, 702 (2011).

16. See *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489–90 (1999) (describing “prosecutorial discretion” as “a special province of the executive” ill-suited for inquiry and noting how the concerns are all the more acute in the immigration context because of the risk of revealing foreign policy objectives and foreign intelligence).

17. E.g., *Mexico Roundup: Reactions to Approval of Arizona’s SB 1070, on 27 Apr. 10*, WORLD NEWS CONNECTION, Apr. 27, 2010 (collecting numerous articles expressing protest by Mexican leaders over the criminalization provisions in Arizona Senate Bill 1070 and concerns that the law will

This Article challenges the standard mirror theory assumptions and argues that inconsistent state crimmigration enforcement policy and resulting foreign affairs complications render infirm the spate of new state immigration policing laws. Though federalism controversies predominantly focus on state power to regulate, one must not overlook the power to define enforcement policy.<sup>18</sup> This Article argues that conflicting state immigration enforcement policy impermissibly intrudes on the national executive's foreign affairs power, even if the formally prescribed constraints on regulated persons are mirror images. State intervention in immigration enforcement cannot duck below the Constitution's carefully calibrated balance by mirroring form while trammeling the point of national supremacy.

Divergent enforcement policies imperil sensitive foreign affairs and national security interests that constitute the rationale for national supremacy.<sup>19</sup> Plenary power over foreign affairs has been vigorously decried as a basis for stripping immigrants of protections and shielding discriminatory immigration laws from judicial review.<sup>20</sup> This Article argues, however, that plenary power principles counsel for judicial intervention when the states trammel on federal immigration enforcement authority to the detriment of the conduct of foreign affairs.

This Article distinguishes the new state immigration laws seeking "attrition through enforcement," which transform suspected undocumented workers into an untouchable caste, from the Legal Arizona Workers Act, a

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permit "discrimination," "persecution," and "racial hatred" against people of Mexican origin as well as Hispanics generally); see also *infra* Part I.B for analysis of repeated diplomatic protests.

18. See Gillian E. Metzger, *Administrative Law As the New Federalism*, 57 DUKE L.J. 2023, 2026 n.4 (2007) (noting the tendency to view "preserving state regulatory autonomy as central to the project of federalism").

19. See *infra* Parts I.B and II.A for examples and analyses.

20. See, e.g., Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1868 (2007) (noting that the plenary power doctrine frequently conflicts with the due process rights of non-citizens); Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 12–21 (1998) (illuminating the racially discriminatory origins of the plenary power doctrine); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 255–56, 261–79 (discussing how the plenary power doctrine has averted judicial review of the impoverishment of immigrant rights and racially discriminatory immigration policies); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 549–60 (1990) (analyzing the burdens on aliens raising constitutional claims because of the plenary power doctrine and how constitutional norms have to be vindicated in stealth); Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power over Immigration*, 86 N.C. L. REV. 1557, 1572 (2008) (tracing how the plenary power doctrine permits vast power over non-citizens unbridled by the Constitution or courts and "restrained only by the frail Due Process Clause").

statute regulating employer licensing that was recently upheld in *Chamber of Commerce v. Whiting*.<sup>21</sup> The distinction that makes a difference is conflict with a national enforcement policy calibrated to avoid turning suspected foreign nationals into untouchable caste-like “subjects of suspicion and abuse,” thereby marring community and international relations.<sup>22</sup> The conflict is manifested by the rare phenomenon of direct challenges to the state immigration legislation by the United States and filings documenting impairment of foreign relations, an area of traditional federal dominance.<sup>23</sup>

The account of the complex calculus of crimmigration enforcement policy redresses the impoverished understanding of national executive discretion advanced by states defending intrusive immigration laws. States contend that “resources and obstruction at the state or local law enforcement level” account for what they view as a suboptimal level of national immigration enforcement.<sup>24</sup> On this assumption, advocates of state immigration criminalization argue that they are merely cooperating to enhance enforcement rather than acting at odds with the national executive, and express shock that the national executive has moved to enjoin state immigration laws.<sup>25</sup> This oft-proffered argument misses the point that the national executive’s crimmigration prosecutorial policies must balance much more complex factors—including foreign policy—in determining the optimal level of enforcement.<sup>26</sup>

The analysis in the immigration context also enriches our understanding of what cooperative—and uncooperative—enforcement means. Formal congruency in legal standards for regulated persons and entities does not render federalism cooperative when enforcement policies and duties on law enforcement officers are at odds between the state and federal government. The immigration context is a prime example of the import of congruity in enforcement policy for the cooperative federalism claim to ring true because of the foreign policy concerns at stake.

Part I argues that despite the claim of “cooperative federalism” by defenders of the state laws, the state enactments are about uncooperative

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21. *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011).

22. *See infra* Part I.

23. *See infra* Parts I.C and III.B.

24. *See, e.g.*, Appellants’ Opening Brief, *supra* note 9, at 6.

25. *See, e.g.*, Petition for a Writ of Certiorari at 3, *Arizona v. United States*, No. 11-182 (U.S. Aug. 10, 2011) (“The legislation authorizes cooperative law enforcement and imposes sanctions that consciously parallel federal law. Despite that effort, the United States took the extraordinary step of initiating a suit to enjoin the law on its face before it ever took effect.”).

26. *See infra* Part I.

enforcement challenging federal policy's balance of enforcement; protection for racial, cultural, and linguistic communities; and foreign policy commitments. Part II explores the dangers of rebellious state overenforcement contravening national enforcement policy through a caste-carving strategy that imperils foreign policy objectives. Part III explores how plenary power doctrine, though oft critiqued as protection stripping and a basis for judicial nonintervention, can inform in our contemporary context judicial intervention against overreaching state laws. This Part also argues for the need to give substantial weight to statements by the Executive on the propriety of state immigration control interventions because of sensitive foreign affairs implications.

#### I. DISSENTING STATE CRIMMIGRATION ENFORCEMENT

While the focus of public and legal contestation is often on the content of the formal laws, it is in the opaque zone of prosecution and executive enforcement policy-making that the law that gets lived is forged.<sup>27</sup> The vast breadth and span of criminal laws on everything from holding a marijuana cigarette to giving a ride to an undocumented immigrant make enforcement policy crucial to defining the law experienced in reality.<sup>28</sup> Not everyone who falls within the wide span of the criminal law is prosecuted—even when caught.<sup>29</sup> Nor is the investigative line pushed to the constitutional limit to ferret out and arrest every possible transgressor.<sup>30</sup> Authorities exercise judgment in deciding which categories

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27. See Lemos, *supra* note 15 (noting focus on formal laws in federalism literature and the need for attention to enforcement); Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 129–32, 174–89 (2008) (illuminating how prosecutorial policies and internal norms operate like law in a world where the law on the books accounts for only some of how the law in reality operates).

28. For a sample of the rich body of literature on the broad, deep, and ever-expanding reach of modern criminal law, see, e.g., Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 766–80 (2005); Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 726 (2005); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 523–26 (2001).

29. For intriguing work on prosecutorial declinations, see, e.g., Richard S. Frase, *The Decision To File Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 U. CHI. L. REV. 246, 247–78 (1980) (presenting data on federal prosecutorial declination decisions); Miller & Wright, *supra* note 27, at 134–54 (analyzing data on declinations by the New Orleans District Attorney's Office); Michael Edmund O'Neill, *Understanding Federal Prosecutorial Declinations: An Empirical Analysis of Predictive Factors*, 41 AM. CRIM. L. REV. 1439, 1444–84 (2004) (presenting data on main factors for declination by federal prosecutors); Michael Edmund O'Neill, *When Prosecutors Don't: Trends in Federal Prosecutorial Declinations*, 79 NOTRE DAME L. REV. 221, 225, 251–75 (2003) (analyzing data on declinations by federal prosecutors).

30. For some of the wealth of work on police discretion not to arrest, see, e.g., KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 5, 85 (1969) [hereinafter DAVIS, *DISCRETIONARY JUSTICE*] (finding that the law that is actually applied is based on officer discretion

of cases are worth the fiscal and community costs of investigation and prosecution, and what degree or level of investigation and prosecution is warranted.<sup>31</sup>

In the criminal context, enforcement judgment is typically locally tailored to be more responsive to community concerns and context.<sup>32</sup> Even in areas of concurrent federal jurisdiction, such as securities or antitrust, oftentimes elected local enforcers may be more attuned to regional or local impact, have better information access, and pursue more ambitious reform, such as former New York Attorney General Eliot Spitzer's campaign against Wall Street misdealing.<sup>33</sup> In the typical criminal context, the benefits of localism do not come at the cost of wreaking negative national externalities. Cleaning up the local burglary gang, heroin ring, or bid-rigging racketeering enterprise, for example, improves the local community without undermining countervailing national interests.<sup>34</sup> Indeed, local campaigns may even have collateral national benefits, such as the tobacco probe by former Mississippi Attorney General Mike Moore that massed into a forty-state movement, resulted in a large settlement, changed industry practices, and led to a criminal investigation.<sup>35</sup>

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rather than the law on the books); KENNETH CULP DAVIS, *POLICE DISCRETION* 50–55 (1975) (interviewing Chicago police officers to examine reasons for nonarrest and finding that despite legislative mandate for “full enforcement,” officers on the beat hold much discretion over the decision); MORTIMER R. KADISH & SANFORD H. KADISH, *DISCRETION TO DISOBEY: A STUDY OF LAWFUL DEPARTURES FROM LEGAL RULES* 73–80 (1973) (analyzing police decisions not to arrest for offenses as part of legitimate exercises of discretion); WAYNE R. LAFAVE, *ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY* 98–126 (Frank J. Remington ed., 1965) (studying reasons for arrest and nonarrest and how police dealt with plethora of criminal laws to enforce); William Terrill & Eugene A. Paoline III, *Nonarrest Decision Making in Police-Citizen Encounters*, 10 *POLICE Q.* 308, 309–26 (2007) (conducting qualitative and quantitative research on factors influencing the police decision not to arrest).

31. See, e.g., LAFAVE, *supra* note 30, at 129 (noting the influence of community interests in determining whether to arrest); Joseph Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 *YALE L.J.* 543, 559 (1960) (noting that even when mandated, “[f]ull enforcement . . . is not a realistic expectation” because authorities must act in accord with constitutional constraints, budgetary limitations, and competing interests (emphasis omitted)); O’Neill, *When Prosecutors Don’t*, *supra* note 29, at 225 (noting that scarcity of resources makes judicious exercise of discretion particularly important).

32. See, e.g., *United States v. Lopez*, 514 U.S. 549, 561 & n.3 (1995) (explaining that the states traditionally have had primary authority over criminal law enforcement); Stephen F. Smith, *Localism and Capital Punishment*, 64 *VAND. L. REV. EN BANC* 105, 110–12 (2011) (praising the virtues of localism in criminal law enforcement in ensuring responsiveness “to the values, priorities, and felt needs of local communities”).

33. See, e.g., Lemos, *supra* note 15, at 721–27 (describing virtues of local enforcement).

34. See, e.g., Sally Roberts & Colleen McCarthy, *Brokers Convicted in Bid-Rigging Trial*, *BUS. INS.*, Feb. 25, 2008, at 1 (reporting on bid-rigging convictions obtained by New York prosecutors against executives though civil racketeering claims were dismissed); Pervaiz Shallwani, *Heroin Ring Is Busted*, *WALL ST. J.*, Jan. 14, 2012, at A17.

35. See, e.g., Lemos, *supra* note 15, at 733 (describing benefits of such campaigns); *Frontline*:



When it comes to the criminalization of immigration, however, the balance of power and discretion is inverted because immigration implicates foreign relations policy, which is constitutionally committed to the federal government.<sup>36</sup> The nation's constitutional structure does not permit a few fierce states attempting to intervene in immigration enforcement to undermine the larger interest of the nation in functional foreign policy facilitating beneficial trade and international cooperation.<sup>37</sup> As the Supreme Court ruled in another time of anti-immigrant furor and state intervention in immigration regulation:

The passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the States. It has the power to regulate commerce with foreign nations: the responsibility for the character of these regulations, and for the manner of their execution, belongs solely to the national government. If it be otherwise, a single State can, at her pleasure, embroil us in disastrous quarrels with other nations.<sup>38</sup>

For more than a century, states largely heeded the Court's clear "keep out" message to states seeking to regulate immigration.<sup>39</sup> Attempts to intervene have instead shifted to challenging federal enforcement policy and, most recently, aggressively and directly legislating to superimpose the immigration enforcement policy of a few states over national policy, to the objection of federal enforcers.<sup>40</sup>

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*Inside the Tobacco Deal* (PBS television broadcast May 12, 1998), available at <http://www.pbs.org/wgbh/pages/frontline/shows/settlement/> (detailing tobacco litigation story).

36. See, e.g., *Chae Chan Ping v. United States*, 130 U.S. 581, 606 (1889) ("For local interests the several states of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power.").

37. See, e.g., *Nyquist v. Mauclet*, 432 U.S. 1, 10 (1977) ("Control over immigration and naturalization is entrusted exclusively to the Federal Government, and a State has no power to interfere.").

38. *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875).

39. See, e.g., Gabriel J. Chin & Marc L. Miller, *The Unconstitutionality of State Regulation of Immigration through Criminal Law*, 61 DUKE L.J. 251, 268–69 (2011) (noting that "for more than 130 years, few scholars or state legislatures, and virtually no courts, imagined that states could develop their own immigration policies," and until recently "states avoided even the implicit claim that they could craft their own general immigration law or enforce federal immigration law in state courts").

40. For examples of legislation, see *supra* note 5. For objections by the United States to recent state immigration interventions, see, e.g., Complaint, *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010) (No. 2:10-CV-01413); Plaintiff United States of America's Reply in Support of Motion for Preliminary Injunction, *Hispanic Interest Coalition v. Bentley*, 2011 WL 5516953 (N.D. Ala. Sept. 28, 2011) (No. 5:11-CV-02484-SLB).

### A. *The Battle over Crimmigration Enforcement Policy*

Legal and political polemic surrounding state attempts to intervene in immigration regulation frequently alleges that the federal government has “failed to enforce the immigration laws.”<sup>41</sup> On its face, the claim is inaccurate: the federal government has extensively enforced immigration laws, increasingly through criminal sanctions, which has led to massive ramp-ups in immigration prosecutions.<sup>42</sup> The number of immigration prosecutions surged by 552 percent between 1994 and 2003: from 2,452 cases to 15,997 cases.<sup>43</sup> The high number of immigration prosecutions has continued, increasing 117.6 percent between 2005 and 2010<sup>44</sup>—though the rate of undocumented immigration has dramatically receded by nearly two-thirds between 2007 and 2009 compared to the period 2000 to 2005.<sup>45</sup> The strength of the U.S. economy is a crucial factor influencing the ebb and flow of unauthorized migration.<sup>46</sup> As the U.S. economy goes down, so

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41. *E.g.*, *Texas v. United States*, 106 F.3d 661, 667 (5th Cir. 1997); *Chiles v. United States*, 69 F.3d 1094, 1096 (11th Cir. 1995); Appellants’ Reply Brief at 9, *Arizona v. United States*, 641 F.3d 339 (9th Cir. 1995) (No. 10-16645); Brief Amicus Curiae of Alan C. Nelson Foundation of Americans for Responsible Immigration in Support of Appellants Pete Wilson et al. at 7, *League of United Latin American Citizens v. Wilson*, 131 F.3d 1297 (9th Cir. 1997) (No. 97-55388); Brief of Amicus Curiae American Unity Legal Defense Fund, Inc. in Support of Appellants and Reversal at 2–3, *United States v. Arizona*, 641 F.3d 339 (9th Cir. 2011) (No. 10-16645); *see also, e.g.*, Press Release, Speaker Hubbard Responds to Effort to Overturn New Immigration Law, July 8, 2011, *available at* <http://www.rephubbard.com/Articles/Article.aspx?ai=85> (“If the federal government won’t enforce its own laws and protect Alabama, we must protect ourselves.”); Press Release, SC on the Brink of Passing Arizona-Style Illegal Immigration Law, June 21, 2011, *available at* <http://bobbyharrell.com/2011/06/21/release-house-vote-sends-immigration-bill-to-gov%E2%80%99s-desk/#more-1173> (“If Washington refuses to effectively support our law enforcement officers by enforcing immigration laws, it is left up to the states to stand up and do what is right.”).

42. *See, e.g.*, Ingrid V. Eagley, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1283 n.14, 1301, 1322–37 (2010) (describing the fast-tracking of immigration prosecutions); Mary De Ming Fan, *Disciplining Criminal Justice: The Peril Amid the Promise of Numbers*, 26 YALE L. & POL’Y REV. 1, 36–41 (2007) (providing data on surges in immigration prosecution and imprisonment for immigration offenses).

43. *See* MARK MOTIVANS, U.S. DEP’T OF JUSTICE, FEDERAL CRIMINAL JUSTICE TRENDS, 2003: FEDERAL JUSTICE STATISTICS PROGRAM, at 48 tbl. A.7 (2006), *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/fcjt03.pdf> (tabulating case category totals for 1994 and 2003).

44. *Immigration Prosecutions for September 2010*, TRAC IMMIGR., <http://trac.syr.edu/tracreports/bulletins/immigration/monthlysep10/fil/> (last visited May 26, 2012).

45. *See* JEFFREY S. PASSEL & D’VERA COHN, PEW HISPANIC CTR., U.S. UNAUTHORIZED IMMIGRATION FLOWS ARE DOWN SHARPLY SINCE MID-DECADE i (2010), *available at* <http://pewhispanic.org/files/reports/126.pdf>.

46. JEFFREY S. PASSEL & ROBERTO SURO, PEW HISPANIC CTR., RISE, PEAK, AND DECLINE: TRENDS IN U.S. IMMIGRATION 1992–2004 (2005), *available at* <http://pewhispanic.org/files/reports/53.pdf>.

too does the allure of braving the increasingly bristling gauntlet to migrate without authorization.<sup>47</sup>

Parsing past polemic, the real point of disagreement is not over federal nonenforcement. Rather, the state contestation is over how aggressively to enforce the immigration laws and what environment of intimidation enforcers should seek to establish.<sup>48</sup> Before the recent wave of direct legislative intervention, states such as Arizona, California, Florida, New Jersey, New York, and Texas had taken the indirect path of suing the United States over enforcement policy.<sup>49</sup> The suits alleged that federal officials had failed to enforce the immigration laws and requested reimbursement for services to the undocumented.<sup>50</sup> Courts dismissed the state challenges on the grounds of failure to state a colorable claim and as nonjusticiable political questions.<sup>51</sup>

Courts uniformly held that nowhere did the Constitution or statutory laws impose a duty on the national government to enforce immigration to the level of the dissident states' liking, on pain of monetary damages.<sup>52</sup> Immigration policy is constitutionally committed to Congress and the national executive; the level of adequate enforcement or whether the government has allegedly neglected to protect against an "alien invasion" is a nonjusticiable political question.<sup>53</sup> Even had the claims been justiciable, moreover, "[c]ourts must give special deference to congressional and executive branch policy choices pertaining to immigration."<sup>54</sup> The Supreme Court has emphatically reiterated and long

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47. DOUGLAS S. MASSEY ET AL., *BEYOND SMOKE AND MIRRORS: MEXICAN IMMIGRATION IN AN ERA OF ECONOMIC INTEGRATION* 111 (2002).

48. See, e.g., Support Our Law Enforcement and Safe Neighborhoods Act, S.B. 1070, 49th Leg., 2d Reg. Sess. § 2 (Ariz. 2010) (stating goal of "attrition through enforcement"); Kobach, *Attrition Through Enforcement*, *supra* note 11, at 163 ("The time has come to make attrition through enforcement the nationwide strategy of the federal government."); David A. Selden et al., *Placing S.B. 1070 and Racial Profiling into Context, and What S.B. 1070 Reveals About the Legislative Process in Arizona*, 43 ARIZ. ST. L.J. 523, 544 n.53 (2011) (suggesting that the intent of the framers of anti-immigrant legislation is to create an atmosphere of terror to drive out undocumented immigrants and Latinos more generally).

49. *Arizona v. United States*, 104 F.3d 1095 (9th Cir. 1997); *California v. United States*, 104 F.3d 1086 (9th Cir. 1997); *Chiles v. United States*, 69 F.3d 1094 (11th Cir. 1995); *New Jersey v. United States*, 91 F.3d 463 (3d Cir. 1996); *Padavan v. United States*, 82 F.3d 23 (2d Cir. 1996); *Texas v. United States*, 106 F.3d 661 (5th Cir. 1997).

50. See, e.g., *Texas*, 106 F.3d at 667 (summarizing claims).

51. *Arizona*, 104 F.3d at 1096; *California*, 104 F.3d at 1092, 1095; *Chiles*, 69 F.3d at 1096; *New Jersey*, 91 F.3d at 469; *Padavan*, 82 F.3d at 29; *Texas*, 106 F.3d at 665, 667.

52. *California*, 104 F.3d at 1091–95; *Chiles*, 69 F.3d at 1097; *New Jersey*, 91 F.3d at 466–69; *Padavan*, 82 F.3d at 26–29; *Texas*, 106 F.3d at 665–67.

53. *California*, 104 F.3d at 1091; *Chiles*, 69 F.3d at 1097; *New Jersey*, 91 F.3d at 470; *Padavan*, 82 F.3d at 27; *Texas*, 106 F.3d at 665, 667.

54. *Texas*, 106 F.3d at 665.

recognized “the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control.”<sup>55</sup>

The striking aspect of the new state immigration laws is the direct and unabashed attempt to hijack the federal power to set immigration enforcement policy. The intellectual author of the strategy behind the spate of new laws, former law professor and current Kansas Secretary of State Kris Kobach, has deplored that “the national immigration policy for the last decade has been one of triage—incarcerate alien smugglers and deport aliens involved in violent crimes, but do virtually nothing to enforce the law against garden-variety illegal aliens.”<sup>56</sup> He mapped a strategy through which states could enact “mirror” state immigration laws that were formally similar to federal standards but really served as a vehicle for launching a competing enforcement policy, which he dubbed “attrition through enforcement.”<sup>57</sup> The idea was to get immigrants to “self-deport” by making it hard for suspected undocumented people to live everyday life, from getting a ride from someone to walking or driving down a street without having police demand papers.<sup>58</sup>

While the wave of laws built on this strategy vary somewhat in their details, they generally launch a multi-front attack to create an environment of totalizing hostility, from criminalizing renting or giving rides to suspected aliens, to conscripting police into immigration checks during everyday law enforcement, such as traffic stops, to criminalizing job-seeking and mere presence by unlawful aliens.<sup>59</sup> A shared feature of the

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55. *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (citing numerous cases reinforcing this doctrine).

56. Kobach, *Attrition Through Enforcement*, *supra* note 11, at 156.

57. *Id.* at 157–63.

58. *Id.*

59. *See, e.g.*, Beason-Hammon Alabama Taxpayer and Citizen Protection Act, H.B. 56, 2011 Leg., Reg. Sess. §§ 4–5, 12–18 (2011) (requiring upon any lawful stop, such as a traffic stop, that law enforcement officers who have reasonable suspicion that the subject of a lawful stop, detention, or arrest is unlawfully in the United States to check immigration status with federal authorities; criminalizing “harbor[ing]” and transport of aliens in “reckless disregard” of alienage; penalizing employment-seeking by undocumented workers and employers that hire such workers; and requiring school officials to determine the immigration status of children); Illegal Immigration Reform and Enforcement Act of 2011, H.B. 87, 151st Gen. Assemb., Reg. Sess. §§ 3, 7–8, 20 (Ga. 2011) (authorizing officers to check immigration status where authorities have probable cause to believe the subject has committed an offense and the suspect is unable to supply specified identity documents, and providing immunity for officers who in good faith perform such immigration checks; criminalizing giving undocumented aliens rides; deterring employment of potential undocumented workers; and establishing a state “Immigration Enforcement Review Board”); S.B. 590, 117th Gen. Assemb., 1st Reg. Sess. §§ 5, 16–26, 21, 24 (Ind. 2011) (requiring officers who make a lawful stop, detention or arrest to verify citizenship or immigration status from federal immigration authorities if there is reasonable suspicion the person stopped, detained or arrested is an unlawfully present alien; permitting

new laws is forcing state and local police, willing or not, into immigration surveillance.<sup>60</sup> The goal, as Arizona State Senator Russell Pearce—the sponsor of the Arizona template law that sparked a host of new legislation—described it, is to create an “unfriendly” environment with the hope that “they will pick up and leave.”<sup>61</sup> Or as Arizona State Representative John Kavanagh, another bill sponsor, put it, “it’s about creating so much fear they will leave on their own.”<sup>62</sup> Similarly, Alabama State Representative Micky Hammon, co-sponsor of the even more aggressive Alabama House Bill 56, said the basic idea was to make illegal aliens’ lives “difficult and they will deport themselves.”<sup>63</sup> While the strategy is crafted with avoidance of formal regulatory preemption in

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arrests by state officers on probable cause to believe the person is an alien who is subject to a removal order or if other prescribed circumstances exist; and deterring renting to, or employing, unlawfully present persons); Utah Illegal Immigration Enforcement Act of 2011, H.B. 497, 2011 Gen. Sess. §§ 3, 4, 8, 10, 11 (2011) (providing for immigration status checks of people lawfully stopped, arrested or detained where such subjects cannot provide documents presumptively indicating legal status; requiring immigration status checks for distribution of public benefits; criminalizing transportation or harboring of suspected undocumented aliens and providing for warrantless arrests based on reasonable cause to believe subject is an unlawful alien).

60. *E.g.*, Ala. H.B. 56 §§ 5, 12, 18 (prohibiting, limiting or restricting enforcement of federal immigration laws and requiring full enforcement of federal criminal immigration law to the extent permitted by law; requiring that law enforcement officers who have reasonable suspicion that the subject of a lawful stop, detention or arrest is unlawfully in the United States check immigration status with federal authorities; and requiring reasonable efforts to determine citizenship upon arrest for driving without a license); Support Our Law Enforcement and Safe Neighborhoods Act, S.B. 1070, 49th Leg., 2d Reg. Sess. § 2(A)–(B) (Ariz. 2010) (forbidding law enforcement from adopting a policy “that limits or restricts the enforcement of federal immigration laws to less than the full extent permitted by federal law” and requiring that “for any lawful contact” by law enforcement officials “where reasonable suspicion exists that the person is an alien who is unlawfully present in the United States, a reasonable attempt shall be made, when practicable, to determine the immigration status of the person”); Ind. S.B. 590 §§ 2–3 (prohibiting restrictions on immigration status investigations and requiring law enforcement officers making a lawful stop, detention or arrest to request verification of citizenship or immigration status if there is reasonable suspicion to believe the individual is an unlawfully present alien); Utah H.B. 497 §§ 3, 6 (requiring officers conducting any lawful stop, detention or arrest to verify immigration status if documents indicating immigration status are not supplied and to investigate potential smuggling or transportation of illegal aliens based on reasonable suspicion of the offense and forbidding limitations or restrictions on state or local enforcement investigating immigration offenses); *cf.* Ga. H.B. 87 § 8 (forbidding prohibitions on law enforcement exchanging immigration status information and authorizing immigration status checks “during any investigation of a criminal suspect by a peace officer, when such officer has probable cause to believe that a suspect has committed a criminal violation”).

61. Amanda Lee Myers, *Arizona Pushes Illegal to Leave*, LONG BEACH PRESS TELEGRAPH, Dec. 23, 2007, at 10A.

62. *Many Migrants, Legal and Illegal, Say They’re Planning to Leave State*, ARIZ. REPUBLIC, Apr. 28, 2010, at A1.

63. Kim Chandler, *House to Vote on Immigration Bill: Opponents Say It’s Unconstitutional*, BIRMINGHAM NEWS, Apr. 5, 2011, at 3.

mind, it is unabashedly and boldly about contradicting perceived federal enforcement policy.<sup>64</sup>

### *B. National Enforcement Policy and Externalities Management*

The precise content of national enforcement guidelines is hard to obtain. Officials guard investigation and prosecution guidelines closely—and are accorded wide berth by courts to do so—because revelation of precisely which kinds of cases will be pursued or not would undermine criminal law’s deterrent value, chill law enforcement, embolden law-breakers, and trigger time-consuming litigation over the exercise of prosecutorial discretion, which is ill-suited for judicial review.<sup>65</sup> The opacity surrounding prosecutorial guidelines is vigorously critiqued.<sup>66</sup> There are pragmatic deterrence reasons, however, to maintain popular focus on the broad scope of criminal law and to hope we “pay no attention to that man behind the curtain”<sup>67</sup>—the law enforcement discretion narrowing the scope of what actually is investigated and prosecuted in reality.

For example, from a cost-efficient deterrence perspective, it is better to have the public focus on the law’s general prohibition against shoplifting and leave shadowy what cases will actually get investigated and prosecuted. If, for example, people knew that only shoplifters who take more than twenty dollars worth of goods will be investigated and prosecuted because police have a lot of more important safety priorities to balance, it would be open season for poaching candy bars and other small,

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64. See *supra* notes 41 and 56 and accompanying text.

65. The Supreme Court has explained:

[T]he decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution’s general deterrence value, the Government’s enforcement priorities, and the case’s relationship to the Government’s overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake. Judicial supervision in this area, moreover, entails systemic costs of particular concern. Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor’s motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government’s enforcement policy.

Wayte v. United States, 470 U.S. 598, 607 (1985).

66. See, e.g., DAVIS, DISCRETIONARY JUSTICE, *supra* note 30, at 225 (arguing that prosecutorial discretion should be reined in by requiring public promulgation of guidelines indicating criteria for determining which cases will be prosecuted or declined); Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. REV. 1, 10–18, 25–28 (1971) (arguing for publicizing quasi-legislative internal policy guidelines to control prosecutorial discretion); David A. Sklansky, *Starr, Singleton, and the Prosecutor’s Role*, 26 FORDHAM URB. L.J. 509, 537 (1999) (arguing for publicizing prosecution policies to promote dialogue and review).

67. THE WIZARD OF OZ (Metro-Goldwyn-Mayer 1939).

cheap, tempting sundries. The focus on the broader law and fantasy of omniscient enforcement enables a broader scope of regulation while the discretion to decline to investigate or prosecute ensures that limited resources are deployed most effectively to achieve long-range goals. One would not want resources unwisely drained by mechanically processing the vast array of everyday, small-time transgressors because there would be insufficient ability to pursue more serious crimes and longer-range targets that pose greater public dangers.<sup>68</sup>

Publicly available guidelines give broadly worded, open-textured factors but generally do not disclose the precise calculus defining which cases law enforcement officials will not pursue. For example, the U.S. Department of Justice's U.S. Attorneys' Manual explains very generally:

A. The attorney for the government should commence or recommend Federal prosecution if he/she believes that the person's conduct constitutes a Federal offense and that the admissible evidence will probably be sufficient to obtain and sustain a conviction, unless, in his/her judgment, prosecution should be declined because:

1. No substantial Federal interest would be served by prosecution;
2. The person is subject to effective prosecution in another jurisdiction; or
3. There exists an adequate non-criminal alternative to prosecution.<sup>69</sup>

The Comment advises: "Merely because the attorney for the government believes that a person's conduct constitutes a Federal offense and that the admissible evidence will be sufficient to obtain and sustain a conviction, does not mean that he/she necessarily should initiate or recommend prosecution."<sup>70</sup> Open-textured standards like "no substantial Federal interest would be served" are fleshed in by more factors, including:

1. Federal law enforcement priorities;
2. The nature and seriousness of the offense;

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68. For illuminating commentaries from jurists on the front lines, see, e.g., Juan R. Torruella, *The "War on Drugs": One Judge's Attempt at a Rational Discussion*, 14 YALE J. ON REG. 235, 256 (1997) (offering judicial perspective about the futility of mopping up an inexhaustible supply of the poor serving as drug mules rather than pursuing the more culpable).

69. U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-27.220 (2009), available at [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/27mcrn.htm#9-27.220](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/27mcrn.htm#9-27.220).

70. *Id.* § 9-27.220 cmt.

3. The deterrent effect of prosecution;
4. The person's culpability in connection with the offense;
5. The person's history with respect to criminal activity;
6. The person's willingness to cooperate in the investigation or prosecution of others; and
7. The probable sentence or other consequences if the person is convicted.<sup>71</sup>

U.S. Attorneys, district attorneys, and other unit leaders may prescribe much more specific guidelines for line prosecutors screening cases.<sup>72</sup> For example, prosecution guidelines might specify declination of drug cases if quantities are under a certain amount or declination of immigration cases if there are no violent or repeat felonies in the individual's record. The precise formula, however, is generally not subject to release.<sup>73</sup>

Statements by law enforcement officials and enforcement campaigns give glimpses, however, of prosecution priorities and the complex calculus of factors balanced to determine who is pursued and who is "cut loose."<sup>74</sup> In the crimmigration enforcement context, as in the exercise of criminal enforcement discretion generally, individuals with serious criminal records or whose activities may endanger safety are frequently openly identified as priority targets.<sup>75</sup> Immigrations and Customs Enforcement and Customs and Border Patrol have programs targeting human smugglers, affiliates of drug trafficking organizations, and undocumented individuals with prior

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71. *Id.* § 9-27.230.

72. Michael A. Simons, *Prosecutorial Discretion and Prosecution Guidelines: A Case Study in Controlling Federalization*, 75 N.Y.U. L. REV. 893, 956 (2000) (discussing statute-specific guidelines).

73. *See, e.g.*, *United States v. Zimmerman*, 967 F.2d 596 (9th Cir. 1992) (unpublished mem. op.) (referring to denied request for disclosure of internal investigation and prosecution policies); Abrams, *supra* note 66, at 25–33 (noting that the historical general practice is not to publish prosecutorial policy and the myriad reasons for this position).

74. Oft-used law enforcement lingo for declinations, reflecting an apparent general predilection for fishing. *Cf.* Timothy J. McGinty, "Straight Release": *Justice Delayed, Justice Denied*, 48 CLEV. ST. L. REV. 235, 270 (2000) (discussing how police face pressures "to arrest or cut loose").

75. *See, e.g.*, Press Release, Immigration & Customs Enforcement, ICE Operation Targeting At-Large Violent Convicted Criminal Aliens Nets 95 Arrests (Dec. 13, 2010) [hereinafter ICE, Targeting At-Large Violent Criminal Aliens], available at <http://www.ice.gov/news/releases/1012/101213miami.htm> ("Arresting convicted criminals and immigration fugitives is a top priority for ICE ERO [Office of Enforcement and Removal Operations]"); Press Release, Immigration and Customs Enforcement, ICE Arrests 77 in Operation Targeting Criminal Aliens and Immigration Fugitives (Jan. 21, 2011), available at <http://www.ice.gov/news/releases/1101/110121grandrapids.htm> (describing priorities of "arresting and removing at-large criminal aliens" and top priority focus on "aliens who pose a threat to national security and public safety, including members of transnational street gangs and child sex offenders").



violent felony convictions.<sup>76</sup> As is also often the case, for the reasons delineated above, the specific target of enforcement actions is not openly stated. But as the waves of immigration raids and deportations against “garden-variety” undocumented workers demonstrate, the federal government has done substantially more than “virtually nothing.”<sup>77</sup> Contrary to Kobach’s accusation, everyday undocumented people have also been deported en masse.<sup>78</sup> Federal officials have also deployed a geographically-focused prosecution program, called “Operation Streamline,” to rapidly prosecute undocumented border-crossers in hot spots such as Arizona.<sup>79</sup>

In going after everyday people, however, executive officials must balance sensitive community and foreign policy concerns. President Obama, the current national enforcer-in-chief, explained the balancing of community interests:

Americans are right to be frustrated, including folks along border states. But the answer isn’t to undermine fundamental principles that define us as a nation. We can’t start singling out people because of who they look like, or how they talk, or how they dress. We can’t turn law-abiding American citizens—and law-abiding immigrants—into subjects of suspicion and abuse.<sup>80</sup>

President Obama assured Mexican President Vicente Fox after the passage of the controversial Arizona Senate Bill 1070:

And I want everyone, American and Mexican, to know my administration is taking a very close look at the Arizona law. We’re examining any implications, especially for civil rights. Because in the United States of America, no law-abiding person—be they an

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76. Declaration of David V. Aguilar, Deputy Comm’r, U.S. Customs & Border Protection at 7, *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010) (No. 2:10-CV-01413); ICE, Targeting At-Large Violent Criminal Aliens, *supra* note 75.

77. See text at *supra* note 56.

78. See, e.g., Leisy J. Abrego, *Legal Consciousness of Undocumented Latinos: Fears and Stigma as Barriers to Claims-Making for First- and 1.5-Generation Immigrants*, 45 L. & SOC’Y REV. 337, 354–55, 360–62 (2011) (describing immigrant fears stemming from surges in raids at work and school, such as the dramatic Postville, Iowa, raids and raids in California schools); Raquel Aldana, *Of Katz and “Aliens”: Privacy Expectations and the Immigration Raids*, 41 U.C. DAVIS L. REV. 1081, 1092–96 (2008) (describing ramp-up in worksite immigration raids in 2006 and the example of raids on six Swift & Company meatpacking plants).

79. Declaration of David V. Aguilar, *supra* note 76, at 7.

80. David Jackson, *Obama Again Promotes “Comprehensive” Immigration Bill—So What Now?*, USA TODAY (May 6, 2010, 12:52 PM), <http://content.usatoday.com/communities/theoval/post/2010/05/obama-re-affirms-support-for-comprehensive-immigration-reform/1>.

American citizen, a legal immigrant, or a visitor or tourist from Mexico—should ever be subject to suspicion simply because of what they look like.<sup>81</sup>

National leaders have been sensitive to the need to calibrate the means and level of enforcement in a manner that will not convert people of a particular—often racially, culturally, and linguistically marked—appearance into a suspect and subjugated caste.

Immigration enforcement policy is also directly informed by foreign policy. Deputy Secretary of State William J. Burns has explained:

U.S. immigration law—and our uniform foreign policy regarding the treatment of foreign nationals—has provided that the unlawful presence of a foreign national, in itself, ordinarily will not lead to that foreign national's criminal arrest, incarceration, or other punitive measures (e.g., legislated homelessness) but instead to civil removal proceedings. Unlawful presence is a basis for removal, not retribution. This is a policy that is understood internationally, that is consonant with multilateral resolutions expressing the view that an individual's migration status should not in itself be a crime, and that is both important to and supported by foreign governments. This policy has been the subject of repeated international discussions, and is firmly grounded in the United States' human rights commitments as well as our interest in having our own citizens treated humanely when abroad.<sup>82</sup>

Enforcement policy also observes the longstanding goal, recognized by the Supreme Court, of balancing the need “to ‘leave [aliens] free from the possibility of inquisitorial practices and police surveillance that might . . . affect our international relations’ and undermine ‘our traditional policy of not treating aliens as a thing apart.’”<sup>83</sup> The need to pursue enforcement in a manner that does not create a suspect and maltreated caste also has important foreign policy implications because of the risk of marred relations and retaliation by other nations if their nationals are maltreated.<sup>84</sup>

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81. Press Release, White House, Remarks by President Obama and President Calderón of Mexico at Joint Press Availability (May 19, 2010), *available at* <http://www.whitehouse.gov/the-press-office/remarks-president-obama-and-president-calder-n-mexico-joint-press-availability>.

82. Declaration of William J. Burns, Deputy Sec'y of State ¶ 35, *United States v. Alabama*, 813 F. Supp. 2d 1282 (N.D. Ala. 2011) (No. 2:11-CV-2746-SLB).

83. See Brief for Appellee at 47, *United States v. Arizona*, 641 F.3d 339 (9th Cir. 2010) (No. 10-16645) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 73-74 (1941)).

84. See Declaration of James B. Steinberg, Deputy Sec'y of State at 2-5, *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010) (No. 2:10-CV-01413).

## II. THE DANGERS OF UNCOOPERATIVE CRIMMIGRATION OVERENFORCEMENT

Despite claims of “cooperative federalism” by defenders of the new spate of state immigration legislation, examining the dissenting states’ approaches through the enforcement lens illuminates the reality of uncooperative enforcement. Uncooperative enforcement is a relatively neglected area of examination.<sup>85</sup> A few recent forays have begun to examine how federal laws allowing for state enforcement may give the states opportunity to compete with and dissent from federal enforcement policy.<sup>86</sup> The analyses call to mind as analogy James C. Scott’s classic anthropological account of how subordinated groups, such as servants and serfs, covertly resist and critique domination while seeming to dutifully perform the roles prescribed by the official power structure.<sup>87</sup> The two central articles on uncooperative enforcement celebrate the potential for enhancing participatory democracy by allowing local enforcers, while enforcing federal law, to experiment, pursue more aggressive strategies or neglected priorities, satisfy diverse and differing local tastes for enforcement, and provide an outlet for dissent.<sup>88</sup>

But there is an important distinction between allowing the states an outlet by design under federal law and states staging a power-grab, sidestepping the deliberation and safeguards supplied by federal delegation. The dangers of states mutinying and seizing enforcement power from the federal government to pursue uncooperative enforcement policies remain little examined.<sup>89</sup> The consequences of rebellious state crimmigration enforcement bring the dangers of uncooperative enforcement for the national interest sharply into focus.

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85. See Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1258 (2009) (noting surprising neglect in federalism literature of how states implementing federal mandates can be a dissenter, rival, and challenger); Lemos, *supra* note 15, at 702 (critiquing neglect of states as enforcers in federalism literature focused on regulatory power).

86. See, e.g., Bulman-Pozen & Gerken, *supra* note 85; Lemos, *supra* note 15.

87. See generally JAMES C. SCOTT, *DOMINATION AND THE ARTS OF RESISTANCE: HIDDEN TRANSCRIPTS* (1992) (offering a canonical account of covert resistance by subordinated groups).

88. Bulman-Pozen & Gerken, *supra* note 85, at 1285–93; Lemos, *supra* note 15, at 746–48, 753.

89. Lemos recognizes the risk of overenforcement and disuniformity but argues that “such concerns have relatively little purchase in most of the areas where state enforcement exists today.” Lemos, *supra* note 15, at 764. She declines to examine the case of immigration because she views them as unauthorized enforcement outside the purview of her study. *Id.* at 700 n.5.

### A. Caste-Carving State Immigration Enforcement

The new breed of state legislation emboldened by the controversial Arizona Senate Bill 1070 contravenes national enforcement policy, which guards against both the carving of subjugated castes and foreign relations impairment. The fundamental aim of the “attrition through enforcement” approach is a multi-pronged attack on suspected undocumented people that makes it hard to find housing, get a job, or even get a ride from a neighbor or walk down the street without having one’s right to exist in the United States questioned.<sup>90</sup>

This totalizing strategy of harnessing criminal law as well as imposing civil disabilities to create a hostile environment and untouchable caste driven to “self-deport” distinguishes the new breed of law from predecessors.<sup>91</sup> The framers of the law term the “they” to be driven out “the illegals”—a label so prevalent that it is now a noun in the English language.<sup>92</sup> But, in practice, legal immigrants and even U.S. citizens are being driven out by the environment of hostility and unwelcome the legislation creates.<sup>93</sup> The caste reaches beyond the category of formal illegal status because of prevalent heuristics—cognitive rules of thumb relying on stereotypes—based on race, language, and culture for who is a foreigner and who belongs.<sup>94</sup>

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90. See *supra* note 59.

91. See, e.g., *Shortfalls of the 1986 Immigration Reform Legislation: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Security, and Int’l Law of the H. Comm. on the Judiciary*, 110th Cong. 75 (2007) (prepared testimony of Rosemary Jenks, Director of Government Relations, NumbersUSA) (“That solution is comprehensive enforcement, which many have called ‘attrition through enforcement.’ Everywhere enforcement has been seriously tried, we have seen predictable results: the message goes out to the illegal-alien community that a crackdown is underway, and behavior changes.”); Luige del Puerto, *Arizona Senate Primary Pits Pearce vs. Gibbons*, ARIZ. CAPITOL TIMES, Aug. 22, 2008 (describing debate between competing Arizona political candidates over the “attrition by enforcement” strategy of “making things so miserable for immigrants in the hope that they would self deport”); Myers, *supra* note 61 (“‘It’s attrition by enforcement,’ [Ariz. Sen. Russell Pearce, sponsor of S.B. 1070] said. ‘As you make this an unfriendly state for lawbreakers, I’m hoping they will pick up and leave.’”); Susan Palmer, *Waiting for Reform*, REGISTER-GUARD (Eugene, Ore.), Aug. 6, 2007, at A1 (quoting Bob Dane, communications director for the Federation for American Immigration Reform, as saying, “[Stronger enforcement] makes it more difficult to live, work and travel here. It makes it easier to self deport.”); Howard Witt, *Where Have the Immigrants Gone?*, CHI. TRIBUNE, Feb. 10, 2008, at 3 (quoting Oklahoma State Representative Randy Terrill as saying, “All you have to do is enforce the law, deny them the jobs, deny them the public benefits, give state and local law enforcement the ability to enforce federal immigration law, and the illegal aliens will simply self-deport”).

92. *Many Migrants, Legal and Illegal, Say They Are Planning to Leave State*, *supra* note 62.

93. *Id.*

94. Scholars have noted that the formally aracial term “alien” is saturated with racialized perception of “undocumented Mexicans” and “stereotypes about Mexicans as criminals.” See, e.g., Kevin R. Johnson, *The New Nativism: Something Old, Something New, Something Borrowed*,

In a contemporary context, where more than half of the foreign-born population in the United States is either from Mexico or south and east Asia,<sup>95</sup> national origin, race, culture, and language are often used as overly broad proxies for illegal status.<sup>96</sup> The anti-alien laws therefore broadly impact people perceived for racial, cultural, or linguistic reasons as foreign—even though they are lawfully present or even citizens—made to feel unwelcome and suspect in their home nation. The concern over racialized suspicion cuts across party lines, into the heart of an increasingly mixed-race America. Poignantly, for example, former Republican Florida Governor Jeb Bush worried that his mixed-race children, born of a mother from Mexico, would look suspicious walking down a street in Phoenix.<sup>97</sup>

While the laws blend civil and criminal regulatory schemes, it is the conscription of police and deployment of state immigration criminalization—against non-citizens *and* citizens who might offer a neighborly ride or rent a room—that creates an atmosphere of hostile surveillance and renders suspected undocumented people an untouchable caste. The laws upend the experience and judgment of law enforcement honed from policing in immigrant communities. Through long experience in the field, many state and local police agencies have realized the need to foster trust with immigrant communities and have done so through “non-cooperation” policies—ordinances and directives providing that state and local police are not in the business of enforcing federal immigration law.<sup>98</sup>

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*Something Blue*, in IMMIGRANTS OUT! THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES 165, 171 (Juan F. Perea ed., 1997); *see also, e.g.*, MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 58 (2003) (tracing the history of how Mexicans emerged as “iconic illegal aliens”).

95. According to the most recent census data available, in 2009, Mexico exceeded all other nations and regions as the biggest source of the foreign-born population. *See* PEW HISPANIC CTR., STATISTICAL PORTRAIT OF THE FOREIGN-BORN POPULATION IN THE UNITED STATES, 2009, at tbl. 1 (2011), available at <http://pewhispanic.org/files/factsheets/foreignborn2009/2009%20FB%20Profile%20Final.pdf> (tabulating data from the Census Bureau’s American Community Survey). After Mexico, which accounted for 29.9 percent of the foreign-born population, the regional category of south and east Asia accounted for 24.1 percent. *Id.* Forty-four percent of the foreign-born population was from Mexico, Central America, or Latin America. *Id.*

96. *See supra* note 94 and accompanying text.

97. Kirk Mitchell, *Jeb Bush: States Look Wrong Way at Border Issue*, DENVER POST, Dec. 5, 2010, at B1.

98. *See* United States v. Arizona, 703 F. Supp. 2d 980 (D. Ariz. 2010) (No. 2:10-CV-01413) (noting that at least seventy-three cities, towns, counties, and states, including Los Angeles, D.C., Seattle, San Francisco, and New York City, have at various times had such “non-cooperation” provisions to encourage community trust); *Amicus Curiae* Brief Submitted by the Center on the Administration of Criminal Law in Support of Appellee-Plaintiff The United States of America at 11, United States v. Arizona, 641 F.3d 339 (9th Cir. 2011) (No. 10-16645).

The policies are fashioned to ameliorate the problems of valuable intelligence being lost because of witnesses fearing to step forward<sup>99</sup> and crime victims fearing to turn to police.<sup>100</sup> The new state immigration laws override these police policies and generally conscript state and local police, even if unwilling, into enforcing federal immigration law.<sup>101</sup> To add fiercer teeth, some of the laws give disgruntled citizens a cause of action to sue police for perceived policies limiting or restricting enforcement of federal immigration law.<sup>102</sup> Public safety professionals have protested that the conscription undermines public safety by eroding the delicate trust built with immigrant communities to foster intelligence gathering and crime fighting, and prevent predation on vulnerable undocumented persons.<sup>103</sup>

The laws impose new duties on state and local police to check immigration status and enforce immigration laws. Arizona Senate Bill 1070, for example, requires that law enforcement officers in any “lawful contact” determine immigration status if “reasonable suspicion exists that the person is an alien who is unlawfully present” unless “the determination may hinder or obstruct an investigation.”<sup>104</sup> The Arizona law also

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99. The concern about intelligence being lost for lack of trust of police is particularly acute as community policing turns to national security policing in immigrant Muslim communities. *See, e.g.*, Jytte Klausen, *British Counter-Terrorism After 7/7: Adapting Community Policing to the Fight Against Domestic Terrorism*, 35 J. ETHNIC & MIGRATION STUD. 403 (2009); Basia Spalek, *Community Policing, Trust, and Muslim Communities in Relation to “New Terrorism”*, 38 POL. & POL’Y 789 (2010).

100. *See* David A. Harris, *The War on Terror, Local Police, and Immigration Enforcement: A Curious Tale of Police Power in Post-9/11 America*, 38 RUTGERS L.J. 1, 36–43 (2006); Orde F. Kittrie, *Federalism, Deportation, and Crime Victims Afraid to Call the Police*, 91 IOWA L. REV. 1449, 1476–90 (2006); Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373, 1381–91 (2006).

101. *See supra* note 60.

102. *E.g.*, Beason-Hammon Alabama Taxpayer and Citizen Protection Act, H.B. 56, 2011 Leg., Reg. Sess. § 5(d) (2011) (allowing U.S. citizens and lawfully present aliens resident in Alabama to sue for civil penalties); Support Our Law Enforcement and Safe Neighborhoods Act, S.B. 1070, 49th Leg., 2d Reg. Sess. § 2(G) (Ariz. 2010) (permitting civil suits to challenge alleged policies restricting state or local enforcement of immigration law for monetary penalties); S.B. 590, 117th Gen. Assemb., 1st Reg. Sess. § 2 (Ind. 2011) (giving cause of action to persons domiciled in Indiana).

103. *See, e.g.*, Randal C. Archibold, *Arizona’s Effort to Bolster Local Immigration Authority Divides Law Enforcement*, N.Y. TIMES, Apr. 22, 2010, at A16 (noting concerns of opponents, such as the Arizona Association of Chiefs of Police, and division among law enforcement community over the legislation); Tim Gaynor, *Arizona Police Officer Challenges Migrant Law*, REUTERS, June 5, 2010, available at <http://www.reuters.com/article/idUSTRE6541T320100605> (reporting concern among police chiefs and beat officers in Hispanic communities); *Police Weighing Bill’s Impact*, ARIZ. REPUBLIC, Apr. 22, 2010, at A1 (noting concern of former Mesa Police Chief that the legislation would have “catastrophic impacts on community policing”).

104. Support Our Law Enforcement and Safe Neighborhoods Act, S.B. 1070, 49th Leg., 2d Reg. Sess. § 2(B) (Ariz. 2010).

authorizes state and local police to engage in warrantless arrests based on probable cause of civil removability.<sup>105</sup> Alabama House Bill 56 similarly requires that on “any lawful stop, detention, or arrest” a reasonable attempt must be made to determine citizenship and immigration status where reasonable suspicion exists that the person is an alien who is unlawfully present unless the determination would hinder or obstruct an investigation.<sup>106</sup> Other recently enacted laws also levy similar mandates on police.<sup>107</sup> In a world of many traffic regulations and a vast universe of reasons that may be cited as suspicion for a stop,<sup>108</sup> the laws mean omnipresent immigration regulation by state and local police.

When it comes to amorphous standards such as reasonable suspicion and probable cause, the looming specter of race has shadowed the standard, even before *Terry v. Ohio* found two black men repeatedly walking past a store window and conferring with a white man constituted reasonable suspicion.<sup>109</sup> As originally enacted, the template Arizona law on police checks and reasonable suspicion provided that officers “may not solely consider race, color or national origin.”<sup>110</sup> The proviso draws on the Supreme Court’s 1975 decision in *United States v. Brignoni-Ponce* providing that race can be a relevant—albeit not sole—factor in establishing reasonable suspicion of alienage.<sup>111</sup> *Brignoni-Ponce* held that “[t]he likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor, but standing alone it does not justify stopping all Mexican-Americans to ask if they are

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105. *Id.* § 2(E).

106. Ala. H.B. 56 § 12(a).

107. *E.g.*, Utah Illegal Immigration Enforcement Act of 2011, H.B. 497, 2011 Gen. Sess. § 3 (2011) (requiring officers conducting any lawful stop, detention or arrest to verify immigration status if documents indicating immigration status are not supplied); Ind. S.B. 590 § 3 (requiring law enforcement officers making a lawful stop, detention or arrest to request verification of citizenship or immigration status if there is reasonable suspicion to believe the individual is an unlawfully present alien).

108. *See* *Whren v. United States*, 517 U.S. 806, 808, 810 (1996) (noting the myriad spongy traffic laws that give police bases for a stop, including driving at a perceived “unreasonable speed,” driving too slow, or appearing not to give “full time and attention” to driving); *Terry v. Ohio*, 392 U.S. 1, 30 (1968) (finding reasonable suspicion based on observations of two black men walking repeatedly past a store window and conferring with a third white man).

109. *Terry*, 392 U.S. at 14 n.11 (noting that stop and frisk tactics were a “major source of friction between police and minority groups”).

110. *See* Ariz. S.B. 1070 § 2(B) (“A law enforcement official or agency of this state or a county, city, town or other political subdivision of this state may not solely consider race, color or national origin in implementing the requirements of this subsection except to the extent permitted by the United States or Arizona Constitution.”).

111. *United States v. Brignoni-Ponce*, 422 U.S. 873, 886–87 (1975).

aliens.”<sup>112</sup> As controversy and litigation loomed, the Arizona legislature amended Senate Bill 1070 to delete the adjective “solely.”<sup>113</sup> As amended, the law provides that officials may not consider race, color, or national origin “except to the extent permitted by the United States or Arizona Constitution.”<sup>114</sup> As the Constitution has been interpreted in *Brignoni-Ponce*, that means race can be a relevant factor, but not the sole factor. The allowance for race as a basis of suspicion is what the law openly said before, now obscured with a legal sleight of hand to provide cover.<sup>115</sup>

The disguise was so clever that the District Court of Arizona apparently read the revision without taking into account the proviso “except to the extent permitted by the . . . Constitution” and discussed the law for preliminary injunction purposes as if it barred consideration of race, color, or national origin.<sup>116</sup> The sleight of hand has slipped into subsequent laws in states such as Alabama, Georgia, and Utah,<sup>117</sup> though Indiana has declined to do so.<sup>118</sup> Thus, the state immigration laws create an atmosphere of unwelcome for anyone who might be suspected of being a foreign national in a nation where race has been deemed a relevant factor for suspicion of unbelonging.

While state and local police are transfigured into the central emblem of unwelcome, the state laws also deploy criminal laws to chill private interaction with suspected undocumented people. Private citizens are deterred through the threat of criminal conviction by state laws criminalizing transporting or harboring illegal aliens.<sup>119</sup> A neighborly act

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112. *Id.*; see also Kevin R. Johnson & Gabriel J. Chin, *Profiling's Unlikely Enabler: A High Court Ruling Underpins Ariz. Law*, WASH. POST, July 13, 2010, at A15 (critiquing the *Brignoni-Ponce* decision and its consequences).

113. H.B. 2162, 49th Leg., 2d Reg. Sess. § 3(B) (Ariz. 2010).

114. *Id.*

115. See *Brignoni-Ponce*, 422 U.S. at 886–87.

116. *United States v. Arizona*, 703 F. Supp. 2d 980, 989 (D. Ariz. 2010).

117. *E.g.*, Beason-Hammon Alabama Taxpayer and Citizen Protection Act, H.B. 56, 2011 Leg., Reg. Sess. § 12(c) (2011) (“A law enforcement officer may not consider race, color, or national origin in implementing the requirements of this section except to the extent permitted by the United States Constitution or the Constitution of Alabama of 1901.”); Illegal Immigration Reform and Enforcement Act of 2011, H.B. 87, 151st Gen. Assemb., Reg. Sess. § 8 (Ga. 2011) (“A peace officer shall not consider race, color, or national origin in implementing the requirements of this Code section except to the extent permitted by the Constitutions of Georgia and the United States.”); Utah Illegal Immigration Enforcement Act of 2011, H.B. 497, 2011 Gen. Sess. § 3(5) (2011) (“A law enforcement officer may not consider race, color, or national origin in implementing this section, except to the extent permitted by the constitutions of the United States and this state.”).

118. See S.B. 590, 117th Gen. Assemb., 1st Reg. Sess. § 3 (Ind. 2011) (“This chapter shall be enforced without regard to race, religion, gender, ethnicity, or national origin.”).

119. *E.g.*, Ind. S.B. 590 § 5 (incorporating federal prohibitions on transporting or attempting to transport an alien or harboring an alien knowing or in reckless disregard of the fact that the alien has come to, entered or remains in the United States in violation of law); Ga. H.B. 87 § 7 (providing that



such as giving someone a ride—“transporting”—may incur criminal consequences.

Some states also define harboring broadly—potentially even more broadly than federal law. Georgia, for example, defines harboring to mean “any conduct that tends to substantially help an illegal alien to remain in the United States” with exclusions for such humanitarian or emergency situations such as services to infants, children or crime victims or emergency services.<sup>120</sup> Among the most aggressive of the new laws, Alabama House Bill 56 criminalizes providing housing by defining that conduct as criminal harboring.<sup>121</sup> The risk of creating a generally hostile atmosphere for people perceived as foreign—whether legally present or not—is aggravated by the fact that some of the state laws criminalize transportation or harboring based on reckless disregard of alienage.<sup>122</sup> Criminal laws are thus used to chill everyday hospitality among the general public—at least when it comes to interacting with people who might be perceived as foreign.

Thus the new laws’ strategy of creating a hostile and fear-ridden environment carve an overbroad caste of untouchables based on suspicion of unbelonging, which is racially, linguistically, and culturally marked. The immigration enforcement strategy of the states is to make unlawful presence a matter for multi-pronged totalizing retribution, rather than removal, contrary to national enforcement policy and foreign policy commitments.<sup>123</sup>

### *B. Foreign Policy Impairment*

The flurry of diplomatic protests, threats of boycott, and impaired cooperation demonstrates the foreign policy externalities imposed by a

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“[a] person who, while committing another criminal offense, knowingly and intentionally transports or moves an illegal alien in a motor vehicle for the purpose of furthering the illegal presence of the alien in the United States” or those who, while “acting in violation of another criminal offense and who knowingly conceals, harbors, or shields an illegal alien from detection . . . when such person knows that the person . . . is an illegal alien” are guilty of crimes); Utah H.B. 497 § 10 (criminalizing transportation, moving or attempting to move or harboring an alien for commercial advantage or private financial knowing or in reckless disregard of the fact that the alien is unlawfully present).

120. Ga. H.B. 87 § 7.

121. Ala. H.B. 56 § 12(4) (criminalizing “[h]arbor[ing] an alien unlawfully present in the United States by entering into a rental agreement . . . with an alien to provide accommodations, if the person knows or recklessly disregards the fact that the alien is unlawfully present in the United States.”).

122. *E.g., id.*; Utah H.B. 497 § 10.

123. *See generally* Declaration of William J. Burns, *supra* note 82 (describing transgression of federal immigration policy, informed by foreign policy and relations).

few highly vehement dissident states.<sup>124</sup> The impact in international relations, perception, and cooperation was immediate. After Arizona enacted Senate Bill 1070, Mexican President Felipe Calderón denounced the law as “inhumane, unacceptable, discriminatory and unfair” and an “obstacle” to cooperation with the United States to finding solutions to shared transnational problems.<sup>125</sup> The Mexican Ambassador Arturo Sarukhan tweeted that the law was “racial discrimination” and said that Mexico would “use every diplomatic, political, and economic resource at hand to respond to the signing of the bill.”<sup>126</sup> The implications are substantial because Mexico is the third largest trading partner of the United States and the second largest purchaser of U.S. exports.<sup>127</sup>

Mexico also took the unusual step of issuing a caution to its citizens regarding travel to Arizona, warning Mexican travelers that they faced “a political environment adverse to communities of migrants and all Mexican visitors” and “it should be assumed that any Mexican citizen could be bothered and questioned for no other reason at any moment.”<sup>128</sup> Mexican politicians discussed a potential boycott but ultimately determined instead to pursue legal actions.<sup>129</sup> Mexican Foreign Secretary Patricia Espinosa Cantellano said the bill “affects relations between Arizona and Mexico and forces the Mexican Government to review the feasibility and usefulness of cooperation agreements” with Arizona.<sup>130</sup>

Denunciations also came from across the Americas. The twelve-member Union of South American Nations summit expressed concern the law would “legitimize racist attitudes” against immigrants to the United States, the vast majority of whom are Latin Americans.<sup>131</sup> The Secretary-General of the Organization of American States, José Miguel Insulza, also decried the law as “clearly discriminatory.”<sup>132</sup> Mexican President Calderón

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124. See *Mexico Roundup*, *supra* note 17 (collecting international outcry).

125. *Id.*; *President Felipe Calderón, Mexican Congress Denounce New Arizona Law Targeting Undocumented Immigrants*, SOURCEMEX ECON. NEWS & ANALYSIS ON MEX., Apr. 28, 2010.

126. Silvia Otero, *Mexican Ambassador Calls Arizona’s SB1070 ‘Racial Discrimination’*, WORLD NEWS CONNECTION, Apr. 27, 2010.

127. M. ANGELES VILLARREAL, CONG. RESEARCH SERV., RL32934, U.S.-MEXICO ECONOMIC RELATIONS: TRENDS, ISSUES, AND IMPLICATIONS 1–5 (2012), available at <http://www.fas.org/sgp/cts/row/RL32934.pdf>.

128. *President Felipe Calderón*, *supra* note 125.

129. *Mexican Daily Declares Boycott Unviable, Calls for Legal Action Against Arizona Law*, WORLD NEWS CONNECTION, Apr. 28, 2010.

130. Otero, *supra* note 126.

131. *South American Summit Slams Arizona Immigration Law*, AGENCE FRANCE-PRESSE, May 4, 2010, available at <http://www.france24.com/en/20100504-south-american-summit-slams-arizona-immigration-law>.

132. *President Felipe Calderón*, *supra* note 125.

indicated that the law was not being viewed as business as usual as both Mexican political parties united to consider retaliatory measures.<sup>133</sup> In protest, Mexico postponed approval of a U.S.-Mexico agreement on international emergency cooperation on natural disasters and accidents.<sup>134</sup>

Faced with the international outpouring of dismay, President Obama strongly criticized the legislation, even though presidents very rarely critique state legislation.<sup>135</sup> Like other world leaders, President Obama's strongest apparent concern was over the deployment of criminal law and police to conduct immigration surveillance based on suspicion of foreignness. In a speech, the President underscored that immigration enforcement must not subject people to suspicion based on appearance.<sup>136</sup> The presidential conciliatory statement was widely cited by protesting foreign leaders, spreading some salve over inflamed relations.<sup>137</sup>

The subsequent passage of new legislation emboldened by Arizona's example in states such as Georgia, Alabama, and South Carolina further impaired relations, however. With each new law, the Mexican Foreign Ministry issued statements of mounting concern over strained relations.<sup>138</sup> When Utah joined the spate of dissident legislation, the Mexican Embassy reiterated in increasingly stronger language:

Utah's actions on this specific issue are detrimental to the robust relationship that Mexico and the United States have built as partners and neighbors in such important issues as enhancing economic competitiveness and trade, cooperating against transnational organized crime, promoting clean energy and combating climate change, and creating a more modern and efficient border. As has unfortunately been the case in other states in this country, where similar bills have been enacted, the Government of Mexico is concerned about the adverse impact initiatives such as Utah's HB 497 may have on the breadth and scope of our bilateral relationship.<sup>139</sup>

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133. *Id.*

134. *Id.*

135. Archibold, *supra* note 103.

136. *See supra* notes 80–81 and accompanying text.

137. *See, e.g., Mexico Roundup, supra* note 17 (citing examples).

138. *See, e.g.,* Press Release, Ministry of Foreign Affairs, The Mexican Government Regrets Passage of HB 87 in Georgia (May 13, 2011); Press Release, Ministry of Foreign Affairs, The Mexican Government Regrets that HB56 Has Been Signed Into Law in Alabama (June 9, 2011); Press Release, Ministry of Foreign Affairs, The Government of Mexico Regrets that S20 Has Been Signed into Law in South Carolina (June 28, 2011).

139. Press Release, Statement by the Embassy of Mexico on Lawsuit Filed Against HB 497 in

In briefs filed in pending lawsuits against the legislation, Mexico underscored that the legislation “adversely impacts U.S.–Mexico bilateral relations, Mexican citizens and other people of Latin-American descent present in Arizona.”<sup>140</sup> Mexico noted that cross-border collaboration on issues of mutual concern, such as stemming the violence from drug-trafficking organizations, was threatened by the atmosphere of hostility and mistrust occasioned by the divergent state policies.<sup>141</sup> The “grave concerns” expressed by Mexico were echoed by the governments of Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Paraguay, Peru, and Uruguay, demonstrating the ripple effect in impaired foreign relations.<sup>142</sup>

### III. PLENARY POWER AS A PROTECTION AGAINST STATE OVERENFORCEMENT

The foreign policy consequences of the new breed of state immigration intervention beget the question of whether the plenary power cases of the past have bearing on our present. A distinguished array of scholars, including Jennifer Chacón, G. Jack Chin, Stephen H. Legomsky, Hiroshi Motomura, Juliet Stumpf, and others, have illuminated how the doctrine of plenary power over immigration has worked to strip non-citizens of constitutional protections, shield racial discrimination, and justify judicial nonintervention.<sup>143</sup> In our contemporary context, however, the principles used to justify plenary power can be a basis for protection against the new strategy of dissentient state laws encroaching on executive enforcement policy.

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Utah (May 3, 2011).

140. *E.g.*, Brief of Amicus Curiae United Mexican States in Support of Plaintiff-Appellee at 2, *United States v. Arizona*, 641 F.3d 339 (9th Cir. 2011) (No. 10-16645); *see also* Brief of the United Mexican States As *Amicus Curiae* In Support of Plaintiffs’ Complaint for Declaratory and Injunctive Relief at 2, *Hispanic Interest Coalition v. Bentley*, 2011 WL 5516953 (N.D. Ala. Sept. 28, 2011) (No. 5:11-CV-02484-SLB).

141. *E.g.*, Brief of Amicus Curiae United Mexican States in Support of Plaintiff-Appellee, *supra* note 140, at 11–12; *see also* Brief of the United Mexican States As *Amicus Curiae* In Support of Plaintiffs’ Complaint for Declaratory and Injunctive Relief, *supra* note 140, at 7–10 (describing impairment of bilateral collaboration on diverse issues such as trade and emergency preparedness).

142. *See Amicus Curiae* Brief of the United Mexican States in Support of Respondents at 1, *Arizona v. United States*, No. 11-182 (U.S. Mar. 26, 2012); Motion of Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Panama, Paraguay, Peru and Uruguay for Leave to Join the United Mexican States as *Amici Curiae* in Support of Respondent at 1, *Arizona v. United States*, No. 11-182 (U.S. Mar. 26, 2012).

143. *See supra* note 20.

A. *A Bulwark Against Localized Animosity*

The plenary power cases are usually taken as a “keep out” sign to the judiciary when it comes to decisions by executive officials to exclude or expel aliens. One of the strongest rationales for judicial hesitance to intervene is potential interference in the management of foreign relations, entrusted to the national executive. Justifying its deference to executive discretion in Asian alien expulsion and exclusion cases, the Supreme Court explained in *Fong Yue Ting v. United States*:

The power to exclude or to expel aliens, being a power affecting international relations, is vested in the political departments of the government . . . to be executed by the executive authority . . . except so far as the judicial department has been authorized by treaty or by statute, or is required by the paramount law of the Constitution, to intervene.<sup>144</sup>

The twentieth-century Supreme Court further underscored the need for deference to the national executive’s enforcement discretion—and not just Congress—because of foreign affairs implications, writing:

The exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation. When Congress prescribes a procedure concerning the admissibility of aliens, it is not dealing alone with a legislative power. It is implementing an inherent executive power.<sup>145</sup>

Plenary power doctrine generally is associated with judicial nonintervention in controversial cases of expelling or excluding racially or politically defined undesirables with minimal process.<sup>146</sup> The principles that animate the plenary power doctrine, however, have sparked vigorous judicial intervention when states vent parochial animosities. In choosing

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144. *Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893).

145. *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950) (citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893)).

146. *See, e.g., Harisiades v. Shaughnessy*, 342 U.S. 580, 588–89, 591 (1952) (affirming deportation of longstanding residents based on retroactive application of an anti-communist statute by explaining that ameliorating the harsh consequences was “a subject for international diplomacy” that “must be entrusted to the branches of the Government in control of our international relations and treaty-making powers” because “any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government”).

between the alien and the national government, plenary power doctrine directs deference to the national government, to the detriment of the alien. In choosing between conflicting state and federal immigration enforcement policies, however, the foreign affairs concerns behind the plenary power doctrine call for deference to the national executive. These principles of power may inure to the benefit of the alien in striking down conflicting state policies and laws.

This reading is well-anchored in precedent. During another period of furious state attempts to intervene in immigration enforcement in the late nineteenth century, the Supreme Court in *Chy Lung v. Freeman* and *Smith v. Turner* firmly struck down state anti-alien laws.<sup>147</sup> Defenders of the new breed of laws argue that the past cases invalidating state interference with the national power over immigration do not apply to the new laws.<sup>148</sup> The states base their arguments of validity on the claim that they do not add to or subtract from federal standards for alien admissibility—assuming that superficial formal congruence is all that matters.<sup>149</sup> However, the historical context surrounding the key case of *Chy Lung v. Freeman* reveals a richer analysis and the potential for the plenary power doctrine to serve as a bulwark—albeit as unstable and mercurial as national politics—against local animosity.

The bogeyman of the era leading up to *Chy Lung* was the “Chinaman” (and woman, typically viewed as a debauched prostitute or paramour).<sup>150</sup> In echoes of the present, times were getting tougher since the boom of the

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147. *Chy Lung v. Freeman*, 92 U.S. 275, 277 (1875) (invalidating California law imposing hefty bond of \$500 in gold on arriving shipping passengers the state-appointed “Commissioner of Immigration” determines “is lunatic, idiotic, deaf, dumb, blind, crippled, or infirm” or otherwise “is likely to become a public charge, or has been a pauper in any other country, or is from sickness or disease . . . a public charge, or likely soon to become so, or is a convicted criminal, or a lewd or debauched woman”); *Smith v. Turner (The Passenger Cases)*, 48 U.S. 283, 284 (1849) (invalidating a New York head tax of \$1.50 on every arriving cabin passenger and one dollar on every arriving steerage passenger as improper interference with the federal power to coordinate regulation of foreign commerce).

148. See, e.g., Brief of Amicus Curiae Justice and Freedom Fund in Support of the Appellants Seeking to Reverse the District Court Opinion at 5, *United States v. Arizona*, 641 F.3d 339 (9th Cir. 2011) (No. 10-16645) (arguing that *Chy Lung* and *Henderson* do not apply because “[t]he law is premised on federal definitions and does not ‘add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States’” (quoting *De Canas v. Bica*, 424 U.S. 351, 358 n.6 (1976))).

149. *Id.*

150. For an illuminating history, see, e.g., Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641, 652–64 (2005). Part of the following discussion of the history surrounding the key cases draws heavily from Mary D. Fan, *Post-Racial Proxies: Resurgent State and Local Anti-"Alien" Laws and Unity-Rebuilding Frames for Antidiscrimination Values*, 32 CARDOZO L. REV. 905 (2011) on interest-convergence between immigrant out-groups. This subsection reads the history through the lens of rebellious enforcement.

1850s drew Chinese to the goldfields, swamps, and mountains of America to clear the land and lay the tracks for a rapidly expanding economy.<sup>151</sup> When severe recession seized the United States in the 1870s, “many thousands of unemployed men” were saying “with great bitterness that but for [the Chinaman’s] presence work and bread would be plenty.”<sup>152</sup> The Chinese were accused of degrading labor and displacing white workers, of being by nature “voluntary slaves,” capable of subsisting and living cheaply like vermin and sending their wages back to China rather than spending them in the United States.<sup>153</sup>

Anger was particularly fierce in California, which had larger concentrations of Chinese workers. Anti-Chinese campaigners warned that masses of Chinese would render America an “Asiatic state”<sup>154</sup> and that in San Francisco, “the constant dashing of a dark wave of immigration making daily more and more inroad on the white portion of the city” was an “invasion” that threatened to render San Francisco a “purely Asiatic city unless some means are devised to avert this calamity.”<sup>155</sup> The fear over the racial transformation of California presents a parallel with contemporary fears, as voiced by Senator Russell Pearce—sponsor of

151. On the “[c]oming to Gold Mountain,” see, e.g., HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* 16 (2006).

152. Congressman Horace Davis, Speech on Chinese Immigration in the House of Representatives 3 (June 8, 1878) [hereinafter Davis, Speech], available at <http://content.cdlib.org/ark:/13030/hb7h4nb21q/?order=3&brand=calisphere>; see also, e.g., An Address from the Workingmen of San Francisco to Their Brothers Throughout the Pacific Coast 2 (Aug. 16, 1888), available at <http://content.cdlib.org/ark:/13030/hb7199n8g9/?order=2&brand=oac> (summarizing recession-decades’ animosity towards the Chinese, accusing them of bringing blight wherever they spread so that “white laborers all over the State were not wanted except at starving rates of wages” and the “cities soon became crowded with white men seeking employment”).

153. See, e.g., COMM. OF SENATE OF CAL., *CHINESE IMMIGRATION: THE SOCIAL, MORAL AND POLITICAL EFFECT OF CHINESE IMMIGRATION* 7, 41 (1877) [hereinafter 1877 SENATE OF CAL. REPORT], available at <http://content.cdlib.org/ark:/13030/hb538nb0d6/?order=2&brand=oac> (referring to the Chinese as “voluntary slaves” subsisting “like vermin”); JOSEPH M. KINLEY, *REMARKS ON CHINESE IMMIGRATION* 1, 3–5, 11 (1877), available at <http://www.oac.cdlib.org/ark:/13030/hb3d5n996b/?order=2&brand=oac4> (quasi-slave labor); Senator Aaron A. Sargent, Speech on Immigration of Chinese in the United States Senate 1, 6 (May 2, 1876) [hereinafter Sargent, Speech], available at <http://www.oac.cdlib.org/ark:/13030/hb0j49n3vp/?order=2&brand=oac4> (explaining that the “very industries” of “this strange and dangerously unassimilative people” were a vice displacing white workers); Gen. A.M. Winn, President, Mechanics’ State Council of California, Valedictory Address 4–5 (Jan. 11, 1871) [hereinafter Winn, Valedictory Address], available at <http://www.oac.cdlib.org/ark:/13030/hb2779n54f/?order=2&brand=oac4> (decrying the futility of competing against nomads with no families to support, packed into squalid living conditions and toiling endlessly without spending); cf. AUGUSTUS LAYRES, *EVIDENCE OF PUBLIC OPINION ON THE PACIFIC COAST IN FAVOR OF CHINESE IMMIGRATION* 10–11 (1879), available at <http://www.oac.cdlib.org/ark:/13030/hb8j49n9mf/?order=2&brand=oac4> (noting, in a pro-Chinese pamphlet, the irony that the very docility, industriousness, and frugality of the Chinese were arguments against them).

154. Davis, Speech, *supra* note 152, at 8.

155. Sargent, Speech, *supra* note 153, at 4.

Arizona Senate Bill 1070—of America being “overrun” by “illegal aliens” and transformed into Mexico.<sup>156</sup> Reminiscent of present-day tactics, the vilified alien “Chinaman” was depicted as a reservoir of crime—anti-Chinese advocates accused China of sending to America masses of its unwanted criminals.<sup>157</sup> The crimes associated with the “Chinamen” included selling and buying their women, gambling, prostitution, thievery, and violence against whites.<sup>158</sup>

In another echo of present-day fierce politics, political opponents campaigned against a weakened presidential administration by whipping up anti-immigrant sentiment. National politics of the age was closely divided, with shifting control of Congress and the presidency between sparring political parties.<sup>159</sup> Two presidents were elected on close splits, with a bare majority of less than 25,000 votes, and two “minority presidents” failed to win a majority of the vote.<sup>160</sup> Prefiguring present-day politics saturated with cries for deliverance from an alleged “alien invasion,” a “Committee of Fifty” assembled in San Francisco decried the President and national government for “wantonly den[ying] to the people of the Pacific . . . relief from a scourge that menaces their very existence”—the “invasion of the subjects of the Mongolian empire.”<sup>161</sup>

In this fractious broil, state and local laws were deployed in an attempt to expel the Chinese both directly and indirectly through licensing, housing, and criminal laws. In 1849, the Supreme Court held in *The Passenger Cases* that states may not intrude on the federal power to regulate foreign commerce by imposing passenger head taxes on ships entering a port.<sup>162</sup> Anti-Chinese legislatures repeatedly attempted end-runs around prohibitions against interference. Justice McLean, author of one of the eight opinions in *The Passenger Cases*, suggested that while “the municipal power of a State cannot prohibit the introduction of foreigners

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156. Russell Pearce, *Arizona Takes the Lead on Illegal Immigration Enforcement*, SOC. CONTRACT, Summer 2010, at 244, 246 (2010) (asking rhetorically: “How long will it be before we will be just like Mexico?”).

157. E.g., 1877 SENATE OF CAL. REPORT, *supra* note 153, at 31–32; Philip A. Roach, Senator of the District of Monterey and Santa Cruz, Minority Report on the Bill to Enforce Contracts for Labor Within the State of California (Mar. 20, 1852), *reprinted in* Winn, Valedictory Address, *supra* note 153, at 7, 8–9.

158. 1877 SENATE OF CAL. REPORT, *supra* note 153, at 5, 20–31 (women in servitude); Winn, Valedictory Address, *supra* note 153, at 5 (describing gambling dens and “other dark dens where crimes that cannot be named are habitually committed”).

159. ELMER CLARENCE SANDMEYER, *THE ANTI-CHINESE MOVEMENT IN CALIFORNIA* 111 (1939).

160. *Id.*

161. ADDRESS BY THE COMMITTEE OF FIFTY TO THE PEOPLE 1 (n.d.), *available at* <http://www.oac.cdlib.org/ark:/13030/hb7t1nb2fw/?order=2&brand=oac4>.

162. *Smith v. Turner (The Passenger Cases)*, 48 U.S. 283 (1849).



brought to this country under the authority of Congress,” the state could “guard its citizens against diseases and paupers” by denying foreigners residence unless “security” was posted “to indemnify the public should they become paupers.”<sup>163</sup> Seizing on this suggestion, the California legislature in 1852 enacted a law requiring a bond of \$500 per non-citizen passenger.<sup>164</sup>

By 1855, the legislature grew bolder and enacted a direct tax titled “An Act to Discourage the Immigration to this State of Persons Who Cannot Become Citizens Thereof”<sup>165</sup> aimed at deterring immigration by non-whites, who could not become citizens because Congress had limited naturalization to “a free white person.”<sup>166</sup> The law required shipmasters or owners to pay a prohibitively-high fifty dollar head tax for bringing in persons “incompetent” to become a citizen—that is, non-whites.<sup>167</sup> The California Supreme Court struck down the law two years later in *People v. Downer*.<sup>168</sup> *Downer* involved California’s attempt to levy \$12,750 in head taxes on a ship bearing 250 Chinese passengers.<sup>169</sup> On the authority of *The Passenger Cases*, the California Supreme Court ruled that the capitation tax was an impermissible interference with the federal power to regulate foreign commerce.<sup>170</sup>

In 1858, the California legislature tried again to steer immigration policy via a state law, titled “An Act to Prevent the Further Immigration of Chinese or Mongolians to this State”—which forbade Chinese or Mongolians from entering the state or its ports.<sup>171</sup> The act subjected Chinese landing in the state and their transporters to fines or imprisonment for not less than three months nor more than a year.<sup>172</sup> In an opinion never

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163. *Id.* at 406 (McLean, J.).

164. Act of May 3, 1852, ch. 36, §§ 1–2, 1852 Cal. Stat. 78, 78–79, *repealed by* Act of Apr. 27, 1945, ch. 111, § 5, 1945 Cal. Stat. 424, 465. The 1852 Act was struck down by the California Supreme Court two decades later in *State v. Steamship Constitution*, 42 Cal. 578, 589–90 (1872), as an impermissible interference in foreign commerce.

165. Act of Apr. 28, 1855, ch. 153, §§ 1–2, 1855 Cal. Stat. 194, *repealed by* Act of Mar. 30, 1955, ch. 46, § 1, 1955 Cal. Stat. 487, 487–88.

166. Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103, *repealed by* Act of Jan. 29, 1795, ch. 20, 1 Stat. 414.

167. § 1, 1855 Cal. Stat. at 194.

168. *People v. Downer*, 7 Cal. 169 (1857).

169. *Id.* at 169.

170. *Id.* at 171.

171. Act of Apr. 26, 1858, ch. 313, § 1, 1858 Cal. Stat. 295, 295–96, *repealed by* Act of Mar. 30, 1955, ch. 46, § 1, 1955 Cal. Stat. 487, 487–88.

172. *Id.* §§ 1–2.

reported, the California Supreme Court declared that law unconstitutional too.<sup>173</sup>

Seeking alternative ways to drive out the Chinese, the state legislature turned to licensing, taxes, employment, and housing laws. The legislature revived a license fee of three dollars per month tax on foreign miners,<sup>174</sup> an approach previously used to drive out Latin American miners.<sup>175</sup> Unsatisfied, a committee of the California Assembly recommended an outright ban on Chinese miners by 1855—“perhaps the high-water mark of anti-Chinese sentiment in the legislature for the entire decade.”<sup>176</sup> Though the proposal failed, the legislature doubled taxes to six dollars per month, with annual increases of two dollars per month for foreigners “ineligible to become citizens of the United States”<sup>177</sup>—a prohibitively high and expanding sum that had the manifest object “to drive the subjects of it—the Chinese—from the State.”<sup>178</sup> Businessmen worried about the impact on trade with China and missionaries repelled by the racism of the law later succeeded in reducing the amount to four dollars per month.<sup>179</sup>

In 1862, the legislature levied another anti-Chinese tax in legislation formally titled “An Act to Protect Free White Labor Against Competition with Chinese Coolie Labor, and to Discourage the Immigration of the Chinese into the State of California,”<sup>180</sup> and dubbed the “Anti-Coolie Act.”<sup>181</sup> The same year, the California Supreme Court struck down the latest attempt to drive out the Chinese as an impermissible interference with the federal power to regulate commerce, including the flow of foreign peoples.<sup>182</sup>

Concerned about the increasingly hostile environment, the Chinese government in 1867 asked American minister Anson Burlingame to head a

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173. *See* *Lin Sing v. Washburn*, 20 Cal. 534, 538 (1862) (recounting that the Supreme Court informed counsel of this history from the bench).

174. Act of May 4, 1852, ch. 37, § 6, 1852 Cal. Stat. 84, 85, *repealed by* Act of Apr. 26, 1939, ch. 93, 1939 Cal. Stat. 1067, 1215.

175. Doris Marion Wright, *The Making of Cosmopolitan California: An Analysis of Immigration 1848–1870*, 19 CAL. HIST. SOC’Y Q. 323, 330 (1940).

176. CHARLES J. MCCLAIN, *IN SEARCH OF EQUALITY: THE CHINESE STRUGGLE AGAINST DISCRIMINATION IN NINETEENTH-CENTURY AMERICA* 17 (1994).

177. *Lin Sing v. Washburn*, 20 Cal. 534, 536 (1862) (quoting Act of Apr. 30, 1855, ch. 174, 1855 Cal. Stat. 216).

178. *See id.* (summarizing the account of anti-Chinese laws by lawyers for *Lin Sing*).

179. MCCLAIN, *supra* note 176, at 18–20.

180. Act of Apr. 26, 1862, ch. 339, § 1, 1862 Cal. Stat. 462, 462, *repealed by* Act of May 16, 1939, ch. 154, 1939 Cal. Stat. 1274, 1376 (exempting those engaged in the manufacture of sugar, rice, coffee, and tea).

181. THE ROCKY ROAD TO LIBERTY: A DOCUMENTED HISTORY OF CHINESE IMMIGRATION AND EXCLUSION 215 (Sen Hu & Jieliin Dong eds., 2010).

182. *Lin Sing*, 20 Cal. at 565–66, 575–80.

goodwill delegation to the United States.<sup>183</sup> Burlingame brokered the Burlingame Treaty in 1868.<sup>184</sup> Facilitated by American hopes for opening up trading opportunities through friendlier relations with the Chinese,<sup>185</sup> the treaty recognized “the mutual advantage of the free migration and emigration” of Chinese and American nationals and provided that “Chinese subjects visiting or residing in the United States shall enjoy the same privileges, immunities, and exemptions in respect to travel or residence, as may there be enjoyed by the citizens or subjects of the most favored nation.”<sup>186</sup>

Though desire for trade shaped more hospitable national immigration policy, intense anti-Chinese animosity in a few states, prominently California, fomented conflicting policies. California was particularly reeling from the 1870s recession, which was the worst the nation had experienced.<sup>187</sup> Playing on the unrest sparked by widespread unemployment, mortgage foreclosures, and homelessness, radicals called for extreme anti-Chinese measures and related constitutional reforms.<sup>188</sup> Rabble-rousers such as Dennis Kearney of the self-styled “Workingmen’s Party,” led fierce anti-Chinese campaigns.<sup>189</sup> The politics of anger gave rise to the California Constitution of 1879, which included an article, simply titled “Chinese.”<sup>190</sup> The new constitutional provision directed the legislature to protect against “the burdens and evils arising from the presence of aliens who are or may become vagrants, paupers, mendicants, criminals, or invalids afflicted with contagious or infectious diseases, and from aliens otherwise dangerous or detrimental to the well-being or peace of the State . . . .”<sup>191</sup> The provision also barred corporations from employing any Chinese or Mongolian and forbade the employment of Chinese in any state, county, municipal, or other public work “except in punishment for crime.”<sup>192</sup> The state’s new provision declared: “The presence of foreigners ineligible to become citizens of the United States is

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183. For a history, see, e.g., *Chae Chan Ping v. United States*, 130 U.S. 581, 592 (1889); Charles J. McClain, Jr., *The Chinese Struggle for Civil Rights in Nineteenth Century America: The First Phase, 1850–1870*, 72 CAL. L. REV. 529, 561 (1984).

184. McClain, *supra* note 183, at 561.

185. *Chae Chan Ping*, 130 U.S. at 592.

186. Treaty of Trade, Consuls, and Emigration, U.S.-China, July 28, 1868, 16 Stat. 739, 740.

187. Harry N. Scheiber, *Race, Radicalism, and Reform: Historical Perspective on the 1879 California Constitution*, 17 HASTINGS CONST. L.Q. 35, 36–37 (1989).

188. *Id.*

189. *Id.* at 39–40.

190. CAL. CONST., art. XIX, § 1 (repealed Nov. 4, 1952).

191. *Id.*

192. *Id.* §§ 2–3.

declared to be dangerous to the well-being of the State, and the Legislature shall discourage their immigration by all the means within its power.”<sup>193</sup>

In this environment of repeated state defiance and divergence from federal immigration policy, the Supreme Court decided the central case of *Chy Lung v. Freeman*. At issue in the case was a California statute levying a \$500 bond on any incoming ship passenger that a state-appointed “Commissioner of Immigration” designated as “lunatic, idiotic, deaf, dumb, blind, crippled, or infirm” or otherwise “likely to become a public charge, or has been a pauper in any other country, or is from sickness or disease . . . a public charge, or likely soon to become so, or is a convicted criminal or a lewd or debauched woman.”<sup>194</sup> In those days, Supreme Court Justices would “ride circuit,” travelling through the states to staff circuit courts in the absence of an intermediate tier of appellate judges to staff the circuit courts.<sup>195</sup> Justice Field, riding circuit, had earlier ordered the release of Chinese women detained under the provision, ruling that “the intercourse of foreigners with our people, their immigration to this country and residence therein, is exclusively within the jurisdiction of the general government, and is not subject to state control or interference.”<sup>196</sup>

In *Chy Lung*, the Court unanimously ruled that the law impermissibly intruded on the power of Congress to regulate commerce with foreign nations.<sup>197</sup> Concern over interference with foreign relations shaped the Court’s reasoning. The Court observed, “[I]f citizens of our own government were treated by any foreign nation as subjects of the Emperor of China have been actually treated under this law, no administration could withstand the call for a demand on such government for redress.”<sup>198</sup> The Court struck down California’s latest attempt to usurp the federal power to regulate admission of foreign nationals in the guise of a head tax, underscoring the risk of imperiling foreign relations. The Court explained that the nation’s constitutional structure guarded against the risk that “a single State can, at her pleasure, embroil us in disastrous quarrels with other nations.”<sup>199</sup>

History reverberates in our times of fierce politics, a strained economy, a Congress rapidly shifting between closely divided parties, and a

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193. *Id.* § 4.

194. *Chy Lung v. Freeman*, 92 U.S. 275, 277 (1875).

195. For a history, see, e.g., David R. Stras, *Why Supreme Court Justices Should Ride Circuit Again*, 91 MINN. L. REV. 1710, 1715–17 (2007) (discussing virtues of circuit riding).

196. *In re Ah Fong*, 1 F. Cas. 213, 216 (C.C.D. Cal. 1874).

197. *Chy Lung*, 92 U.S. at 278–80.

198. *Id.* at 279.

199. *Id.* at 280.

president besieged by these challenges. States have shifted their stratagems and adopted another form of law as guise for intervening in immigration control. The same dangers to foreign relations inhere in and invalidate the present enactments.<sup>200</sup>

### *B. Giving Due Weight to Executive Statements of Interest*

This Article is not an unqualified paean of deference to national enforcement policy. National policy, informed by the needs of the nation, can be wiser than that of disgruntled states focused on parochial prejudices. But history also teaches that the bulwark of the concept of plenary power is as mercurial as national politics. Congress overruled the protections and enforcement policy embedded in the Burlingame Treaty through the Chinese Exclusion Act of 1882.<sup>201</sup> The national executive is best situated to balance competing foreign policy interests, but the national executive also is subject to the vicissitudes of Congress. Unless and until Congress intervenes to check executive enforcement judgment, however, substantial weight should be accorded the position of the national executive charged with executing immigration policy and managing foreign affairs.

The issue of the weight due to executive branch statements on the propriety of state immigration offenses and enforcement is an important one because the Obama administration has opposed the new state immigration laws. Faced with managing the foreign policy ramifications of the aggressive state legislation, the federal government has taken the unusual step of suing to enjoin the two most internationally controversial and aggressive of the new breed of state laws, the immigration laws in Alabama and Arizona.<sup>202</sup> The complaints and declarations by executive officials document the foreign policy consequences of the spate of laws. Deputy Secretary of State Burns attested that the divergent state policies do not merely rouse ire from foreign nations—they renege on foreign policy commitments by the United States to other nations.<sup>203</sup> Deputy

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200. *Cf.* *United States v. Arizona*, 641 F.3d 339, 366–69 (9th Cir. 2011) (Noonan, J., concurring) (writing that Arizona Senate Bill 1070 is unconstitutional because of its expressed state policy of diminishing the number of unlawful immigrants, conflicting with national immigration policy—a subset of foreign policy).

201. *See* *Chae Chan Ping v. United States*, 130 U.S. 581, 592 (1889) (giving history and ruling that the Act trumps the Treaty’s protections).

202. Complaint, *United States v. Alabama*, 813 F. Supp. 2d 1282 (N.D. Ala. 2011) (No. 2:11-CV-2746-SLB); Complaint, *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010) (No. 2:10-CV-01413).

203. Declaration of William J. Burns, *supra* note 82, ¶ 34.

Secretary Burns reported that these states' actions have harmed the interests of the whole nation by risking retaliatory reciprocal treatment of U.S. citizens abroad; antagonizing foreign nations; and impairing cooperation in counterterrorism, counternarcotics, and trade.<sup>204</sup> The Obama Administration continues to oppose the state interference before the Supreme Court, following the grant of certiorari in the widely watched *Arizona v. United States*.<sup>205</sup>

The Supreme Court opined in dicta in *Sosa v. Alvarez-Machain* that “there is a strong argument that federal courts should give serious weight to the executive branch’s view of the case’s impact on foreign policy.”<sup>206</sup> The Court also noted, however, that another approach could be case-specific deference to the political branches.<sup>207</sup> In *Republic of Austria v. Altmann*, the Supreme Court indicated that U.S. government statements on foreign policy implications that are particularized to the petitioners and conduct in a case “might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy.”<sup>208</sup> *Altmann*’s guidance was dicta too, however, because the government did not issue a particularized opinion in the case. Against this backdrop of ambiguity, the lower courts tend to accord deference to Statements of Interest by the United States regarding foreign policy.<sup>209</sup>

Outside the foreign policy or national security domains of special executive competence, however, deference is less frequent or predictable. This is demonstrated by the Supreme Court’s recent decision in *Chamber of Commerce v. Whiting*, regarding a challenge by the Chamber of Commerce to the Legal Arizona Workers Act.<sup>210</sup> The law makes it a state-law offense to “knowingly” or “intentionally” employ “an unauthorized alien” defined by incorporating the federal-law definition of illegal status.<sup>211</sup> The law also mandates that employers verify the employment

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204. *Id.* ¶ 10.

205. *See Arizona v. United States*, 132 S. Ct. 845 (2011).

206. 542 U.S. 692, 733 n.21 (2004).

207. *Id.*

208. 541 U.S. 677, 702 (2004).

209. *See, e.g., Whiteman v. Dorotheum GmbH & Co.*, 431 F.3d 57, 59 (2d Cir. 2005) (deferring to Statement of Interest in dismissing suit seeking to recover against Austria for Nazi-era deprivations on political question grounds); *Hwang Geum Joo v. Japan*, 413 F.3d 45, 48 (D.C. Cir. 2005) (deferring to Statement of Interest in dismissing suit against Japan brought by former World War II-era “comfort women” conscripted into sexual slavery); *Kadic v. Karadzic*, 70 F.3d 232, 250 (2d Cir. 1995) (allowing suit by Bosnian victims to proceed and noting that the United States, far from opposing the suit, sent a letter indicating it could proceed).

210. *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1985 (2011).

211. ARIZ. REV. STAT. ANN. §§ 23-212(A)–(B) (1995 & 2011 Supp.).

eligibility of new hires using the E-Verify system.<sup>212</sup> Under federal law, E-Verify is only a voluntary-use pilot program, in part because of concerns for the risk of error and resultant discrimination. The mandates are backed by penalties centered on licensing revocation, relying on a savings clause for “licensing and similar laws” in the express preemption provision of the federal Immigration Reform and Control Act.

The Supreme Court ruled the Legal Arizona Workers Act was valid under the licensing savings clause even though the United States filed an amicus curiae brief arguing the Arizona employment law was preempted.<sup>213</sup> In upholding the law, the Court selectively relied on parts of the government’s brief and past statements.<sup>214</sup> The Chamber of Commerce argued that the Arizona Act’s mandate requiring employers use the federal E-Verify system to check employee status conflicted with the more flexible federal scheme that offered E-Verify as an optional alternative verification system.<sup>215</sup> In rejecting that contention, the majority underscored that the United States had pointed to Arizona’s mandate regarding use of E-Verify as a permissible use of the system.<sup>216</sup> In the plurality portion of the opinion,<sup>217</sup> Chief Justice Roberts relied on representations by the United States as amicus curiae that the E-Verify system could accommodate the increased use by Arizona and other states of E-Verify and that E-Verify had a successful accuracy and participant satisfaction record.<sup>218</sup>

The crucial differences between the new breed of laws pending before the courts and the act upheld in *Whiting* are the comprehensive caste-creation strategy and impingement on the foreign relations power posed by the new laws. The new breed of laws are a multi-front totalizing attack directed at creating a suspect caste—and are far more intrusive than mere “[r]egulating in-state businesses through licensing laws[, which] has never been considered such an area of dominant federal concern.”<sup>219</sup> In objecting to the new laws, U.S. enforcers are not merely advancing contrary statutory interpretation on a question of statutory preemption. The United

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212. *Id.* § 23-214(A).

213. *Whiting*, 131 S. Ct. at 1981; Brief for the United States as Amicus Curiae, Chamber of Commerce v. *Whiting*, 131 S. Ct. 1968 (2011) (No. 09-115).

214. *Whiting*, 131 S. Ct. at 1985.

215. *Id.*

216. *Id.*

217. Justice Thomas did not join Part III.B of the opinion, which discusses the claim of obstacle preemption based on overburdening the E-Verify system.

218. *Whiting*, 131 S. Ct. at 1986 (plurality opinion) (quoting Brief for the United States as Amicus Curiae, *supra* note 213, at 31, 34).

219. *Id.* at 1983.

States is attempting to ameliorate the adverse impact on foreign policy, an area of traditional national dominance.<sup>220</sup> Accordingly, substantial deference is due the statements of interest regarding foreign policy submitted by the United States and particularized to the new state laws intervening in, and contravening, federal enforcement policy.

#### CONCLUSION

Enforcement policy defines the immigration law that operates in reality, and the Constitution's structural balance was crafted to govern in reality. The structural balance allocating foreign affairs power to the national government was struck based on the lessons of experience. Under the failed Articles of Confederation, the fledgling nation suffered the consequences of a conflicting patchwork of policies regarding foreign intercourse and quickly chose a wiser long-term course.<sup>221</sup> The nation learns and jurisprudence develops from the lessons of experience. Recent experience and the lessons of the past have shown the need to protect against rebellious interference that undermines the greater interests of the nation against creation of a suspect denigrated caste and imperilment of foreign policy interests.

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220.

While under our constitution and form of government the great mass of local matters is controlled by local authorities, the United States, in their relation to foreign countries and their subjects or citizens, are one nation, invested with powers . . . the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory.

*Chae Chan Ping v. United States*, 130 U.S. 581, 604 (1889).

221.

To guard against the recurrence of these evils, the Constitution has conferred on Congress the power to regulate commerce with foreign nations, and among the States. That, as regards our intercourse with other nations and with one another, we might be one people,—not a mere confederacy of sovereign States for the purposes of defence or aggression.

*Smith v. Turner (The Passenger Cases)*, 48 U.S. 283, 462 (1849).