

IMMIGRATION REFORM: A REFLECTION ON ARIZONA BILL 1070 AND BEYOND

*Sonny Behrends**

John Shee is an elderly resident of the state of Arizona.¹ Shee is also a United States citizen.² In April 2010, shortly after the Arizona legislature passed “Support Our Law Enforcement and Safe Neighborhoods Act,” commonly referred to as SOLESNA or SB 1070, Arizona police officers stopped Shee twice while he was driving to a birthday party.³ The officers demanded that he produce his “papers” and verify that he was in fact a legal resident of the United States.⁴ In each incident, the officers demanded that Shee also produce his verification of residency.⁵ What was the rationale for the stop and demand? It was not that Shee had violated any traffic laws. Instead, it was because Shee had dark skin—he is of Spanish and Chinese descent.⁶

Unfortunately, Shee’s story is not unique. Officers are stopping people who fit the illegal immigrant profile every day. Some of these individuals are in the United States legally. Many are not, and illegal immigration continues to be a major problem in the United States. There are between thirteen and twenty million illegal immigrants within the United States today.⁷ However, experts surmise that the actual number may never be fully known.⁸ Immigration problems trouble

* Attorney, Ellis, Li & McKinstry PLLC; Regent University School of Law (2012); Vanguard University (2009); I would like to thank my wife, Whitney, for being my inspiration and support; my father, Clint, for being my mentor and modeling Christ to me; and my sister, Kristen, for being my best friend and role model.

¹ *Some of the Plaintiffs Challenging SB 1070*, AM. C.L. UNION, <http://www.aclu.org/immigrants-rights-racial-justice/some-plaintiffs-challenging-sb-1070> (last visited Sept. 9, 2012).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ See generally *Illegal Immigration*, U.S. IMMIGR. SUPPORT, <http://www.usimmigrationsupport.org/illegal-immigration.html> (last visited Sept. 10, 2012).

⁸ *Id.*

American citizens, and voters demand that any serious presidential candidate address the issue to secure their vote. States such as Arizona have responded to the problem by passing legislation attempting to slow down the seemingly never-ending flow of illegal immigrants into the United States.⁹ The bill allows Arizona police to stop and question suspected illegal immigrants, essentially lowering the bar for “reasonable suspicion” and raising serious constitutional issues.

Illegal immigration is certainly on American citizens’ hearts and minds. The issue has struck the very core of the American conscience. Politicians have advocated for building walls on the border or asking illegal immigrants to voluntarily leave. States around the nation have followed Arizona’s lead and have attempted to curb the flow of illegal immigrants into the country by passing anti-immigration laws.¹⁰

Make no mistake: illegal immigration and how America deals with it has the power to largely define an entire generation and the future of the nation. Before researching for this project, I never really considered the potentially massive issue that immigration is and will continue to be if it is not dealt with in the proper manner. People—in their teens, twenties, and thirties need to understand how our elected officials—often those in their forties, fifties and sixties—are sending a clear message as to what we think about the value of life and the rule of law. Republican and Democrat politicians have confused the issue. Political ideologies have once again drawn Americans’ attention away from the true issue—people. For conservatives, immigration reform is an opportunity to reclaim America’s worldview on the value of human life. For liberals, it is an opportunity to ensure that no one is unfairly denied access to the American dream based solely on the color of his skin or nation of origin.

This note attempts to provide a basic framework for resolving the immigration problems plaguing the United States while giving a brief overview of state legislation on immigration. Further, it attempts to propose some potential alternatives that reflect a worldview that acknowledges that human beings, regardless of their nationality, are always the priority. Part I of this note attempts to lay some foundational

⁹ See *infra* note 10.

¹⁰ See Beason-Hammon Alabama Taxpayer and Citizen Protection Act, 2011 Ala. Acts 535; Illegal Immigration Reform and Enforcement Act of 2011, 2011 Ga. Laws 252 (to be codified in scattered titles of GA. CODE ANN.); 2011 Ind. Acts 171 (to be codified in scattered titles of IND. CODE); Illegal Immigration Enforcement Act, 2011 Utah Laws 21, as amended Act of Mar. 15, 2011, 2011 Utah Laws 18 [hereinafter State Anti-Immigration Laws].

principles that will provide the framework by which immigration laws will be viewed against and by which all analysis will flow. Part II of this note will look at the history and major provisions of Arizona's SB 1070 and similar laws. Part III of this note will attempt to address the various constitutional issues with SB 1070 and similar laws, such as federal preemption, Equal Protection, and Fourth Amendment issues. Finally, Part IV will attempt to apply those foundational principles discussed in Part I to immigration reform and the enactment of immigration laws.

I. FOUNDATIONAL PRINCIPLES

Foundational principles are profoundly influential. They shade the lens through which one views the world. Foundational principles provide the launching point for all analysis. In the legal profession, opinions vary with regard to the foundational principles of the law. Scholars may cite the Code of Hammurabi or the English common law as the foundation for the law today. Practicing attorneys may cite theories of justice as the foundation for all law. Still others may not even be concerned with identifying foundational principles of the law, but are more concerned with the utility of the law for the day or the situation. But the foundational principles of the law are crucial to the proper application and creation of the law today. In order to thoroughly understand the foundational principles of this analysis, one should examine (1) the theory of the Natural Law, (2) the theory that each individual has value, and (3) the principle that as people of value, each person must be accountable for the wrongful acts he commits.

A. *The Baseline: The Natural Law*

Natural Law is a difficult theory to define. Scholars such as Thomas Aquinas, Francisco Suarez, Richard Hooker, Thomas Hobbes, Hugo Grotius and John Locke subscribed to the theory. Aquinas defined the Natural Law as participation of the Eternal Law in the Natural Law.¹¹ The Eternal Law, in Aquinas' estimation, is God's law or God's perfect will for the human race.¹² This law is unknowable to man.¹³ Man's law, however, includes imprints of God's Eternal Law that allows humans to seek justice.¹⁴ Thus, under Aquinas' view,

¹¹ See THOMAS AQUINAS, TREATISE ON LAW 15 (Gateway Ed. 1960).

¹² *Id.*

¹³ *See id.*

¹⁴ *Id.*

man's law can reflect components of God's law, but it cannot ever completely embody God's law. An example of this is seen in almost every society's outlawing of the taking human life.

William Blackstone, a revered legal mind and commentator on the English common law, subscribed to a similar school of thought.¹⁵ Blackstone termed God's perfect will for man as the "Law of Nature."¹⁶ Man's law can never fully and completely comport with this law, but God's Law of Nature is best discovered through His word, the Bible.¹⁷

Historically, man's interpretation of the Natural Law has come from the Bible.¹⁸ Although the Bible is the source of much debate in modern culture, it can provide a healthy and powerful tool to develop a framework to solve the immigration issues that are plaguing America.

B. The Basics: Every Person Has Value

The Bible has a lot to say about immigration. God's words to Israel were clear and unequivocal: treat *all* people with love and respect, regardless of their nationality. This theme is consistent throughout the Old and New Testament.

In Exodus 22:21 it says, "[y]ou shall not wrong a sojourner or oppress him, for you were sojourners in the land of Egypt."¹⁹ Leviticus 19:34 asserts, "[y]ou shall treat the stranger who sojourns with you as the native among you, and you shall love him as yourself, for you were strangers in the land of Egypt."²⁰ The New Testament similarly echoes these strong commands to love strangers and aliens.²¹

It is clear throughout the Bible and Jesus' life that Christians (and mankind as a whole) should treat immigrants as valuable, because they

¹⁵ See Bradley P. Jacob, *The Bible and the Constitution*, 17 TRINITY L. REV. 1, 4 (2011).

¹⁶ *Id.*

¹⁷ *Id.* at 4–5.

¹⁸ Referencing the Bible for the principles it contains. These principles teach people to treat others as they want to be treated. These principles demand that people respect authorities and pay their taxes. These principles can be directly applied to the immigration debate and provide a framework to help solve the issue.

¹⁹ *Exodus* 22:21 (English Standard).

²⁰ *Leviticus* 19:34 (English Standard).

²¹ See *Hebrews* 13:1 (telling believers to love the sojourner); *Matthew* 25:43 (Jesus likening himself to a sojourner and rebuking those who did not show him love); *Romans* 12:13 (explaining that Christians should be hospitable and show love to the sojourner).

are made in God's image. Why is this respect for immigrants such a central principle in the Bible? Because God treasures life. In Genesis 1:26–27, God created man in "His own image."²² He literally breathed life into human beings.²³ God forbids murder because He created mankind in His image.²⁴ The entire biblical story affirms the value of human life. The New Testament's depiction of Christ becoming man and dying for mankind confirms this powerful truth.²⁵

C. Affirming the Value of the Individual: The Theory of "Just Desserts"

The Bible explains that God is perfectly just.²⁶ Jesus' life is the best example of God's perfect justice. Isaiah 53:5 states, "He was wounded for our transgressions, He was bruised for our iniquities; The chastisement for our peace was upon Him, and by His stripes we are healed."²⁷ The Bible is clear that Christ came to the world to offer His life as the ransom for mankind.²⁸ Where there is a wrong, there must be some sort of recompense for the act.

This idea of "just desserts" affirms the dignity of human life. C.S. Lewis explained that when people engage in wrongful acts, society must punish them as an affirmation of that person's value.²⁹ To do otherwise would significantly undermine that person's humanity and hurt the society as a whole.³⁰

This note is not intended to delve into theories of punishment. However, it is important for foundational principles to begin at the same place: all human life is valuable and thus, each person must pay for his wrongful acts. To ignore a person's wrongful acts does a disservice to that individual and society as a whole. Punishment is meant to right a wrong that was done to society and affirm the humanity of the offender. These basic principles of the Natural Law serve as the launching point for real immigration reform; the type of reform that occurs in the hearts and minds of people. This type of reform eventually will change the laws and prejudices of a nation.

²² *Genesis* 1:26–27 (English Standard).

²³ *Genesis* 2:7.

²⁴ *Genesis* 9:6.

²⁵ *See Romans* 5:8, 2:25–26; *John* 1:14.

²⁶ *Psalms* 19:9, 111:7; *Hebrews* 2:2.

²⁷ *Isaiah* 53:5 (New King James).

²⁸ *Matthew* 20:28.

²⁹ *See* C.S. LEWIS, *THE PROBLEM OF PAIN*, 93–94 (2001).

³⁰ *Id.*

II. SB 1070: THE BACKGROUND AND KEY PROVISIONS

Numerous states have attempted to pass anti-immigration laws.³¹ Arizona's SB 1070 received a lot of attention as one of the toughest state laws on immigration. In fact, SB 1070 is one of the most hotly debated laws in recent memory. Arizona's attempt to get a handle on illegal immigration has sparked tempers throughout the nation and the world. In order to completely understand SB 1070 and the immigration debate as a whole, one should (1) look to the background leading to the passing of Arizona's SB 1070, and (2) evaluate the key provisions of SB 1070.

A. SB 1070: The Background

Arizona's immigration policy has a long and interesting history. Many speculate as to the cause of the Arizona legislature's strong statement in SB 1070. It may have been in response to some serious economic issues plaguing the state.³² Others point to the well-documented murder of one of the state's well-known and wealthy cattle ranchers.³³ Officials apprehend hundreds of thousands of illegal aliens each year in Arizona.³⁴ It is clear that Arizona's geographical position as a gateway to the nation is one contributing factor. Whatever the reasons may be, it is important to note that the Arizona legislature sought to pass similar laws in 2006 and again in 2008.³⁵ Then Governor Janet Napolitano vetoed both bills.³⁶ SB 1070 was the perfect storm of discontentment, and political pundits pressured the legislature to enact the law.

³¹ State Anti-Immigration Laws, *supra* note 10.

³² Dan Nowicki, *Arizona Immigration Law Ripples Through History*, U.S. Politics, ARIZ. REPUBLIC (July 25, 2010, 12:00 AM), <http://www.azcentral.com/arizonarepublic/news/articles/2010/07/25/20100725immigration-law-history-politics.html>.

³³ *Id.*

³⁴ *Arizona v. United States*, 567 U.S. 1, 6 (2012) (citing DEP'T OF HOMELAND SEC., OFF. OF IMMIGR. STAT., 2010 Y.B. ON IMMIGR. STAT. 93 (2011) (Table 35)).

³⁵ Randal C. Archibold, *Arizona Governor Vetoes Illegal Immigration Bill*, N.Y. TIMES, June 7, 2006, at A21.

³⁶ Nowicki, *supra* note 32.

B. SB 1070: The Highlights

SB 1070 has been a lightning rod of criticism.³⁷ Governor Jan Brewer signed the bill into law in April 2010.³⁸ The bill stated that Arizona had “a compelling interest in the cooperative enforcement of federal immigration laws throughout [the state].”³⁹ The law’s stated purpose is to discourage and stop aliens from illegally entering, and engaging in economic activities within, the state.⁴⁰ The law asserts that the intent of the act is to “discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States.”⁴¹

The act requires a state law enforcement agent who has a “reasonable suspicion” that an individual is an illegal alien to request proof that the individual is within the United States lawfully.⁴² The officer’s initial stop of the individual must have been lawful.⁴³

The law is especially unique in one aspect. Most statutes mandating action by officials provide for internal remedies and punishments. SB 1070, however, allows private citizens to sue local officials for failing to enforce the immigration laws.⁴⁴ The law allows any legal resident of Arizona to sue any county, city, or state official for limiting the enforcement of federal immigration laws.⁴⁵ The act also makes it illegal to transport an alien in furtherance of that alien’s illegal presence within the country.⁴⁶

Within a week of signing SB 1070, and likely due to the public outcry, Arizona House Bill 2162 (HB 2162) was passed to help alleviate the major concerns of racial profiling and the broad discretion of enforcement officers.⁴⁷ In signing HB 2162, Governor Jan Brewer sought to make it clear that racial profiling is illegal, except where permitted under the United States and Arizona State Constitutions.⁴⁸

³⁷ Randal C. Archibold, *Arizona Enacts Stringent Law on Immigration*, N.Y. TIMES, Apr. 24, 2010, at A1.

³⁸ *Id.*

³⁹ S.B. 1070, 49th Leg., 2d Reg. Sess., 2010 Ariz. Sess. Laws 1.

⁴⁰ *Arizona v. United States*, 132 S. Ct. 2492, 2498 (2012); see ARIZ. REV. STAT. ANN. § 11-1051 (2012).

⁴¹ S.B. 1070, 49th Leg., 2d Reg. Sess., 2010 Ariz. Sess. Laws 1.

⁴² S.B. 1070, 49th Leg., 2d Reg. Sess., 2010 Ariz. Sess. Laws 1.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ See S.B. 1070, 49th Leg., 2d Reg. Sess., 2010 Ariz. Sess. Laws 1 § 2(G).

⁴⁶ S.B. 1070, 49th Leg., 2d Reg. Sess., 2010 Ariz. Sess. Laws 1.

⁴⁷ *Id.*

⁴⁸ *Id.*

House Bill 2162 amends SB 1070 by ensuring that no law enforcement agent is to engage in racial profiling, and law enforcement is not to question anyone they have not legally stopped, detained or arrested.⁴⁹ This differed from SB 1070's "contact" standard.⁵⁰ Still, some criticized the act as being too broad, permitting deportation for minor city ordinance violations such as barking dogs, or permitting stops for indefinite offenses.⁵¹

III. THE CONSTITUTIONAL ISSUES SURROUNDING SB 1070 AND SIMILAR LAWS: (1) FEDERAL PREEMPTION, (2) FOURTH AMENDMENT, AND (3) EQUAL PROTECTION ISSUES

Americans have roundly criticized Arizona's SB 1070 and other state immigration laws as unconstitutional. The criticism has focused primarily on three separate constitutional infirmities. In order to craft a remedy to the immigration issues plaguing the United States, one should examine whether, (1) SB 1070 is preempted by the federal government, (2) SB 1070's "reasonable suspicion" standard violates Fourth Amendment dictates, and (3) SB 1070 violates the Equal Protection Clause.

A. Federal Preemption: Is State Action with Regard to Immigration Preempted by the Federal Government?

The best argument against state law on immigration focuses on federal preemption. The heart of the preemption argument is that it is the federal government's responsibility to regulate and control foreign policy.⁵² If states can create laws that tend to single out a particular people group, they can place a host of foreign policy problems into the federal government's hands. America's foreign policy, as the argument goes, is substantially hurt by laws like SB 1070.⁵³ Further, some argue that Arizona's law potentially violates the United States' human

⁴⁹ *Id.*

⁵⁰ Casey Newton & Ginger Rough, *Arizona Governor Signs Bill Revising New Immigration Law*, ARIZ. REPUBLIC (May 1, 2010, 12:00 AM), <http://www.azcentral.com/news/election/azelections/articles/2010/04/30/20100430arizona-immigration-law-governor-signs-revised-bill.html>.

⁵¹ *Id.*

⁵² COMM. ON IMMIGR. AND NATIONALITY L., N.Y. CITY B., REP. ON THE CONSTITUTIONALITY OF ARIZ. IMMIGR. L. S.B. 1070 7 (2010) [hereinafter N.Y. CITY B.].

⁵³ *Id.* at 8.

rights responsibilities.⁵⁴ These concerns have led SB 1070's detractors to assert that Arizona's action is preempted by the Constitution and other federal statutes.

The touchstone of preemption is always Congressional intent.⁵⁵ There are two general types of preemption, express and implied. Express preemption arises when Congress passes an act that directly states its intention to supersede or preempt a state law in the area that the laws regulate.⁵⁶ But even if a statute contains an express preemption section, courts must endeavor to discover whether the scope and nature of Congress' action with regard to the state law is appropriate.⁵⁷ Congress has not explicitly stated its intention to preempt state legislation on immigration.⁵⁸ Thus, express preemption is not really a valid argument yet.

Implied preemption is triggered when there is no explicit or direct statement that preempts state law.⁵⁹ There are two types of implied preemption. The first is conflict preemption. Conflict preemption applies when a law directly conflicts with the federal law such that a citizen could not observe both, or when the state law hinders the execution of the full purposes of the federal law.⁶⁰ The second type of implied preemption is termed field preemption. Field preemption occurs when Congress passes an act that is so pervasive and thorough that Congress' intent to leave states virtually no room for supplementation preempts the state action on the matter.⁶¹

Conflict preemption arguments stem from the Supremacy Clause of the United States Constitution.⁶² The Supremacy Clause invalidates any state law that interferes with or is contrary to federal law.⁶³ As noted, preemption generally, and especially implied preemption, con-

⁵⁴ See Eliane Engeler, *UN Human Rights Experts Say Arizona Immigration Law Could Violate International Standards*, COMMON DREAMS, <https://www.commondreams.org/headline/2010/05/11> (last visited Aug. 25, 2012).

⁵⁵ *English v. Gen. Elec. Co.*, 496 U.S. 72, 78–79 (1990) (“Preemption fundamentally is a question of congressional intent. . .”).

⁵⁶ See, e.g., *id.*; *Pac. Gas & Elec. Co. v. State Energy Res. Conserv. & Dev. Comm'n*, 461 U.S. 190, 203 (1983).

⁵⁷ *Altria Grp. v. Good*, 555 U.S. 70, 76 (2008).

⁵⁸ *English*, 496 U.S. at 78–79.

⁵⁹ See generally *id.* at 79.

⁶⁰ See *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

⁶¹ *English*, 496 U.S. at 79.

⁶² *Id.* at 77–79, n.5.

⁶³ *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 517–18 (M.D. Pa. 2007).

sists of two prongs.⁶⁴ First, Congress' ultimate purpose is the touchstone in every preemption situation.⁶⁵ The second prong requires a historical analysis.⁶⁶ If the area in which Congress is legislating is one states typically occupy, the court must presume the police power of the state will override the federal action.⁶⁷ This presumption prevails unless Congress' clear and manifest purpose is to override the state's police power.⁶⁸

One of the seminal cases involving the doctrine of preemption is *Hines v. Davidowitz*.⁶⁹ The United States Supreme Court explained that there are serious implications with regard to state immigration laws in the United States.⁷⁰ The Court explained, "[a]mong those treaties [that the United States government has entered into, there] have been many which not only promised and guaranteed broad rights and privileges to aliens sojourning in our own territory, but secured reciprocal promises and guarantees for our own citizens while in other lands."⁷¹ Clearly, the Court sought to draw a clear connection between immigration and federal foreign policy power. The Court even noted the potential for discrimination and the need to fight against it.⁷² Those who oppose SB 1070 point to the Court's words finding that states may not enact laws that are inconsistent with the position of the federal government when the federal government has enacted laws and provided a scheme for the registration of immigrants.⁷³

The federal government has enacted a detailed framework in which to deal with immigration.⁷⁴ Through the Immigration and Nationality Act ("INA"), the federal government has empowered the Department of Justice and the Department of Homeland Security to enforce and administer immigration laws.⁷⁵ The INA contains a system by which aliens register and are monitored.⁷⁶ The INA also provides various actions that the federal government may take to deport illegal

⁶⁴ *Medtronic*, 518 U.S. at 485.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Hines v. Davidowitz*, 312 U.S. 52 (1941).

⁷⁰ *Id.* at 64.

⁷¹ *Id.* at 64–65.

⁷² *Id.* at 65.

⁷³ *Id.* at 67.

⁷⁴ *United States v. Arizona*, 703 F. Supp. 2d 980, 987–88 (D. Ariz. 2010), *aff'd*, 641 F.3d 339 (9th Cir. 2011).

⁷⁵ *Id.* at 987–88.

⁷⁶ 8 U.S.C. §§ 1201(b), 1301–1306 (2006).

aliens.⁷⁷ Thus, the federal government has a system in place to deal with illegal aliens, and states are not permitted to pass legislation that infringes upon or is inconsistent with that system.

State immigration law detractors point to *Chy Lung v. Freeman*⁷⁸ to argue that such laws are unconstitutional. In *Chy Lung*, the Court overruled a California statute that forbade immigration by prostitutes from foreign countries.⁷⁹ The Court explained that permitting state legislation on immigration would be inconsistent with principles of federalism, such as the federal government's sole responsibility to oversee foreign policy and declare war.⁸⁰ The Court's strongest language proclaims that, "[t]he 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."⁸¹

Finally and most pointedly, in *United States v. Arizona*, the Supreme Court held that §§ 3, 5(C), and 6 of SB 1070 are preempted.⁸² The Court found that § 3, which created a new state misdemeanor for failing to complete or carry an alien registration document in violation of federal law, intruded upon federal regulation of alien registration.⁸³ The Court explained that the statutory framework in § 3 was akin to the framework in *Hines*, and that the federal government fully occupies the alien registration field.⁸⁴ The Court rebuffed Arizona's argument that § 3 was not preempted because it mirrored federal law objectives and adopted federal law substantive standards.⁸⁵ The Court crystalized the heart of preemption doctrine by explaining that state intrusion into an area occupied by the federal government is prohibited, as well as noting that § 3 was at odds with federal regulations.⁸⁶ The Court also held that § 5(C), which enacts a state criminal prohibition where no federal criminal prohibition exists, was preempted.⁸⁷ Section 5(C) makes it a misdemeanor under state law for an illegal alien to knowingly apply for, solicit, or perform work within Arizona, while federal law only punishes the employer of an illegal immi-

⁷⁷ *United States v. Arizona*, 703 F. Supp. 2d at 988.

⁷⁸ *Chy Lung v. Freeman*, 92 U.S. 275 (1875).

⁷⁹ *Id.* at 281.

⁸⁰ *Id.* at 280.

⁸¹ *Id.*

⁸² *Arizona v. United States*, 132 S. Ct. at 2501–07.

⁸³ *Id.* at 2501–02.

⁸⁴ *Id.* at 2502.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Arizona v. United States*, 132 S. Ct. at 2503–05.

grant.⁸⁸ The Court explained that the Immigration Reform and Control Act of 1986 (IRCA) is a comprehensive scheme that preempted state criminal penalties relating to regulating illegal alien employment.⁸⁹ The Court noted that Congress refused to include criminal penalties and thus, states must not attempt to impose such penalties.⁹⁰ Finally, the Court held that § 6, which allows Arizona officers to approach and arrest persons whom the officers have probable cause to believe that have committed an offense that makes them deportable, intrudes upon the federal government's discretion over the removal process.⁹¹ Arizona argued that such action was permitted under 8 U.S.C. § 1357(g)(10)(B), which allows state actors to "cooperate" with the federal government in the identification, apprehension, detention and removal of illegal aliens.⁹² The Court acknowledged the ambiguity of the "cooperation" statute, but refused to stretch such ambiguity to allow state actors such sweeping powers as Arizona argued.⁹³

The Court in *Arizona* refused to decide whether § 2(B) (requiring officers to make a reasonable effort to determine the immigration status of any person they stop, detain or arrest on another basis if the officer has a reasonable suspicion that the person is illegally present) is preempted without any state court interpretation.⁹⁴ However, it clearly explained that the deck is stacked against states in their attempts to pass legislation regarding immigration.⁹⁵ The Court noted that immigration policy determines the destiny of the nation.⁹⁶

Simply stating that the federal government has employed a complex system for immigration thus preempting state law ignores the reality and depth of the actual problem that illegal immigration poses. The federal government has not done enough to stop illegal immigration and its massive impact. Further, the laws which it fails to enforce are inadequate to solve this massive problem. Some argue that states have the power to deal with immigration under the broad police power

⁸⁸ *Id.* at 2503.

⁸⁹ *Id.* at 2504.

⁹⁰ *Id.*

⁹¹ *Arizona v. United States*, 132 S. Ct. at 2505-06.

⁹² *Id.* at 2507.

⁹³ *Id.*

⁹⁴ *Id.* at 2511.

⁹⁵ *See generally id.* at 2504-07.

⁹⁶ *Id.* at 2510.

granted by the Constitution.⁹⁷ This police power grants the state the sovereign right “to protect the lives, health, morals, comfort, and general welfare of the people”⁹⁸ This power comes from principles of federalism that are seen throughout the Constitution, rather than the federal government.⁹⁹

Senate Bill 1070 and similar anti-illegal immigration law supporters are demanding that Congress’ consistent refusal to act on immigration permits state action on the topic. They point to cases like *Meuhler v. Mena*.¹⁰⁰ In *Muehler*, the Court held that officers may question a lawfully detained individual about his immigration status.¹⁰¹ The Court found that such questioning, regardless of the existence of a reasonable suspicion, does not implicate the Fourth Amendment.¹⁰² The officer simply must have detained the individual legally.¹⁰³

In *United States v. Vasquez-Alvarez*,¹⁰⁴ the Tenth Circuit Court of Appeals held that officers may arrest individuals who admit they are illegally present in the United States.¹⁰⁵ The court rebuked the argument that the INA barred such arrests.¹⁰⁶ The court explained that the INA was not intended to shackle local law enforcement’s power in dealing with illegal immigration, but to slightly alter the already robust power of the local authorities, encouraging them to work more closely with federal officials.¹⁰⁷

In *Gonzalez v. City of Peoria*,¹⁰⁸ the Ninth Circuit Court of Appeals held that city law enforcement may question and arrest people

⁹⁷ See Nicholas D. Michaud, *From 287 (G) to SB 1070: The Decline of the Federal Immigration Partnership and the Rise of State-Level Enforcement*, 52 ARIZ. L. REV. 1083, 1087 (2010).

⁹⁸ *Manigault v. Springs*, 199 U.S. 473, 480 (1905).

⁹⁹ Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179, 199–201 (2005).

¹⁰⁰ *Muehler v. Mena*, 544 U.S. 93 (2005).

¹⁰¹ *Id.* at 100–01.

¹⁰² *Id.* at 101.

¹⁰³ *Id.*

¹⁰⁴ *United States v. Vasquez-Alvarez*, 176 F.3d 1294 (10th Cir. 1999).

¹⁰⁵ *Id.* at 1299.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 1298–99.

¹⁰⁸ *Gonzales v. City of Peoria*, 722 F.2d 468 (9th Cir. 1983), *overruled by* *Hodgers-Durgin v. De La Vina*, 199 F.3d 1037 (9th Cir. 1999) (*overruling Gonzales* on other grounds).

who violate federal criminal immigration laws.¹⁰⁹ The court explained that although immigration regulation is “unquestionably an exclusive federal power,” it is similarly clear that this federal power does not preempt any and every state action relating to illegal aliens.¹¹⁰ The City argued that it had the authority to enforce federal criminal immigration laws, and the court held that such an exercise of authority was properly limited.¹¹¹ The court explained that the civil provisions of the INA inferred Congress’ intent to preempt state authority over issues such as length of stay, deportation, and residential status.¹¹² The court explained that Congress limited the regulatory scheme of the INA relating to the criminal provisions, thus granting state power over the criminal activity of illegal aliens.¹¹³

Senate Bill 1070 supporters’ reliance on *Gonzales* is limited, however. The court limited local immigration authority by explaining that arrests are only valid if they are sanctioned by state law that is consistent with federal law.¹¹⁴ The court stated that a local officer may not assume that an alien has violated federal law if he fails to present proper documentation.¹¹⁵ The court demanded that officers have probable cause before arresting aliens for violations of immigration laws.¹¹⁶ A failure to present documentation does not provide grounds by itself to support probable cause.¹¹⁷

Even in the cases that SB 1070 supporters rely on, the courts have clearly stated that immigration is an exclusive federal power. This exclusive power does not preclude and preempt every state action as it relates to aliens. However, it does cast a cloud of speculation over the state action. The Ninth Circuit’s holding in *Arizona* appears to be properly based on established precedent. But, it is similarly clear that not all state action relating to immigration is preempted. Arizona’s desperate attempt to get a hold on rampant illegal immigration may be characterized as what happens when good people see the federal gov-

¹⁰⁹ *Id.* at 474.

¹¹⁰ *Gonzales*, 722 F.2d at 474.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* at 475.

¹¹⁴ *Id.* at 476–77.

¹¹⁵ *Gonzales*, 722 F.2d at 476.

¹¹⁶ *Id.* at 477.

¹¹⁷ *Id.* at 475.

ernment doing nothing to address a serious issue.¹¹⁸ The drafters of SB 1070 clearly attempted to carefully avoid federal preemption while providing a meaningful barrier to rampant illegal immigration. Despite this, the law's scope appears to be too broad with sections clearly preempted. It is certainly conceivable that Arizona or the host of states that have attempted to pass immigration regulation laws could craft a law that avoids preemption, but Equal Protection questions will continue to persist.

B. The Fourth Amendment: Is a "Reasonable Suspicion" Enough?

Section 2(B) is the center piece of SB 1070.¹¹⁹ It provides that whenever a local or state law enforcement official makes a legally permissible stop or arrest of a person, a reasonable attempt must be made to determine the person's immigration status.¹²⁰ This mandated reasonable attempt must come when the officer has a reasonable suspicion that the person is an alien who is currently illegally present within the United States.¹²¹ The initial stop, detention or arrest must arise from violations of local or state law.¹²² House Bill 2162 clarifies SB 1070 by prohibiting the consideration of a suspect's race or national origin as a factor in the stop.¹²³ However, any racial profiling permitted under the United States Constitution and Arizona's Constitution is permitted by SB 1070.¹²⁴ Senate Bill 1070's detractors argue that the reasonable suspicion standard articulated in the law is simply too broad and violates the Fourth Amendment, and that racial profiling should not be permitted to be a factor in the officer's determination of the existence of a reasonable suspicion.

¹¹⁸ Stephanie Condon, *Lindsey Graham: I Think Arizona Immigration Law is Unconstitutional*, CBS NEWS (Apr. 27, 2010, 1:57 PM), http://www.cbsnews.com/2102-503544_162-20003549.html.

¹¹⁹ S.B. 1070, 49th Leg., 2d Reg. Sess., 2010 Ariz. Sess. Laws 1. This law as amended by HB 2162 previously gave law enforcement officers the ability to make arrests without a warrant if the suspect is reasonably believed to have committed an offense in public which makes the suspect deportable. This provision has been moved in SB 1070's amended version (HB 2162), yet it apparently remains central to the law.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² N.Y. CITY B., *supra* note 52, at 4.

¹²³ *Id.*

¹²⁴ *Id.* at 5.

Senate Bill 1070's critics assert that the reasonable suspicion standard articulated in SB 1070 and clarified in HB 2162 allows racial profiling.¹²⁵ House Bill 2162 amends SB 1070 by clarifying that race, color and national origin may not be considered in determining whether the officer has a reasonable suspicion.¹²⁶ However, HB 2162 allows race to be considered to the extent that is allowed by the United States Constitution and Arizona's Constitution.¹²⁷ Under Supreme Court precedent, race is a permissible consideration in immigration law enforcement.¹²⁸ The Court has found that the likelihood of any given person of Hispanic ancestry being an immigrant is high enough to make the Hispanic appearance a relevant factor in law enforcement determinations regarding immigration law.¹²⁹ Although an individual's race may be one of many factors considered by law enforcement, it may not be the sole basis justifying a stop.¹³⁰ Further, as noted above, SB 1070, as amended in HB 2162, creates an independent state offense with stiff sanctions for violations of 8 U.S.C §§ 1304(e) and 1306(a).¹³¹ These federal statutes mandate that aliens register and carry the necessary identifying paperwork.¹³² Critics argue that Arizona's inclusion and revamping of the sanctions of these federal provisions essentially allows law enforcement officials to make initial stops based solely on suspect's foreign appearance.¹³³ The statute also provides officers with the ability to make warrantless arrests of any immigrant who has committed a public offense which would render him deportable.¹³⁴

Proponents of SB 1070 place reliance on HB 2162's amendment of the law mandating that an officer may not question a suspect unless

¹²⁵ Dan Nowicki, *Arizona Immigration Law Ripples Through History*, U.S. Politics, ARIZONA REPUBLIC (July 25, 2010, 12:00AM), <http://www.azcentral.com/arizonarepublic/news/articles/2010/07/25/20100725immigration-law-history-politics.html>.

¹²⁶ H.B. 2162, 49th Leg., 2d Reg. Sess., 2010 Ariz. Sess. Laws 1 ("A law enforcement official or agency of this state or a county, city, town or other political subdivision of this state may not consider race, color or national origin in the enforcement section except to the extent permitted by the United States or Arizona Constitution.").

¹²⁷ *Id.*

¹²⁸ *Id.* at 22.

¹²⁹ *United States v. Brignoni-Ponce*, 422 U.S. 873, 886–87 (1975).

¹³⁰ *N.Y. CITY B.*, *supra* note 52, at 22; *see also Arizona*, 132 S. Ct. at 2502.

¹³¹ *N.Y. CITY B.*, *supra* note 52, at 23; *see also Arizona*, 132 S. Ct. at 2502.

¹³² *See* 8 U.S.C. §§ 1304(e), 1306(a).

¹³³ *N.Y. CITY B.*, *supra* note 52, at 23.

¹³⁴ 2010 S.B. 1070, 49th Leg., 2d Reg. Sess., 2010 Ariz. Sess. Laws 1.

the initial stop of the suspect was lawful.¹³⁵ This reliance is misplaced, however. Arizona's essentially mirroring of federal documentation laws allows officers to stop individuals suspected of not carrying sufficient immigration documentation.¹³⁶

Under SB 1070 and HB 2162, law enforcement officials have broad and undefined power to stop, detain and arrest individuals that are suspected of violating federal and state immigration laws. The very heart of the Fourth Amendment is reasonableness.¹³⁷ America's founders sought to craft the Fourth Amendment in an effort to provide knowable and accountable law enforcement tactics.¹³⁸ Senate Bill 1070 and its amended version seen in HB 2162 simply fail under these standards. The law does not provide society with an ability to know what officers will be considering and what courts will accept as a basis for "reasonable suspicion." Although a certain level of racial profiling is accepted under Supreme Court precedent, it is not permitted to be the officer's sole consideration.¹³⁹ Under SB 1070 and HB 2162 officers are permitted and, according to some dissenters, encouraged to use race or national origin as the sole basis for detaining and arresting immigrants.¹⁴⁰

C. *The Equal Protection Clause: Does "All" People Really Mean All People?*

Section 2(B) of SB 1070 directs officers to question individuals that they reasonably suspect are in the United States illegally.¹⁴¹ The officer is required to make a reasonable attempt to determine the immigration status of any person that the officer has legally stopped and reasonably believes is an alien.¹⁴² This section of the law, already ruled as unconstitutional by the Federal District Court for the District of Arizona and the Court of Appeals for the Ninth Circuit, is what much of the uproar is about.¹⁴³ Opponents of SB 1070 argue that this

¹³⁵ Newton & Rough, *supra* note 50.

¹³⁶ 2010 S.B. 1070, 49th Leg., 2d Reg. Sess., 2010 Ariz. Sess. Laws 1.

¹³⁷ *See* Terry v. Ohio, 392 U.S. 1, 19 (1968).

¹³⁸ *Id.* at 11–12.

¹³⁹ United States v. Brignoni-Ponce, 422 U.S. 873, 886–87 (1975).

¹⁴⁰ Randal C. Archibold, *Arizona Enacts Stringent Law on Immigration*, N.Y. TIMES, Apr. 24, 2010, at A1.

¹⁴¹ S.B. 1070, 49th Leg., 2d Reg. Sess., 2010 Ariz. Sess. Laws 1.

¹⁴² *Id.*

¹⁴³ *See* United States v. Arizona, 641 F.3d 339 (9th Cir. 2011).

section encourages racial profiling.¹⁴⁴ Those critics ask how an officer can have a reasonable suspicion that an individual is an illegal immigrant or demand proof of residency without engaging in racial profiling.¹⁴⁵ It is a valid, common sense question. In order to understand whether SB 1070 violates the Equal Protection Clause, one must understand what level of scrutiny will be applied to the law.

The Equal Protection Clause demands that “no state shall . . . deny to any person within its jurisdiction the equal protection of the laws.”¹⁴⁶ This is essentially a mandate that similarly-situated people be treated alike.¹⁴⁷ “The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.”¹⁴⁸ The general rule however, is disregarded when a statute draws a classification by race, alienage or national origin.¹⁴⁹ The Court has established that those factors are so seldom relevant to the achievement of any legitimate state interest that laws making distinctions on those factors are deemed to reflect prejudice.¹⁵⁰ As such, those laws are subjected to a much more critical eye.¹⁵¹ In fact, laws that make distinctions based on race, alienage or national origin must serve a compelling state interest.¹⁵² This is entitled “strict scrutiny.”¹⁵³ Few statutes pass strict scrutiny.¹⁵⁴

Intermediate scrutiny requires that the state action be exceedingly persuasive.¹⁵⁵ In order to overcome intermediate scrutiny, the state action must further an important government interest in a way that is substantially related to that interest.¹⁵⁶ Intermediate scrutiny is typically reserved for statutes that discriminate on the basis of gender.¹⁵⁷ In-

¹⁴⁴ Newton & Rough, *supra* note 50.

¹⁴⁵ *Id.*

¹⁴⁶ U.S. CONST. amend. XIV, § 1.

¹⁴⁷ *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439–40 (1985).

¹⁴⁸ *Id.* at 440.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964).

¹⁵³ *Id.*

¹⁵⁴ Educating About Immigration, *Arizona’s SB 1070 and State Policing of Immigration*, CONST. RTS. FOUND., <http://www.crfimmigrationed.org/index.php/stuff/arizonas-sb1070-and-state-policing-of-immigration> (last visited Sept. 13, 2012).

¹⁵⁵ *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

¹⁵⁶ *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 721 (1982).

¹⁵⁷ *Craig v. Boren*, 429 U.S. 190, 218–19 (1976) (Rehnquist, J., dissenting).

intermediate scrutiny essentially looks at the state action with a suspicious eye.¹⁵⁸

Rational basis scrutiny simply requires that the state action is not irrational or arbitrary.¹⁵⁹ The rational basis standard of review gives a heavy presumption that the government action is legitimate.¹⁶⁰ The standard requires that the state action be rationally related to a governmental interest.¹⁶¹ State action is usually affirmed under the rational basis standard.¹⁶²

The Court has applied a heightened rational basis scrutiny on several occasions.¹⁶³ This standard is termed “rational basis with teeth.”¹⁶⁴ In cases in which the Court has purported to apply the rational basis standard and yet struck down the state action, the Court has typically demanded that the state present its rationale rather than make up its own hypothetical rationale.¹⁶⁵ A careful reading of *City of Cleburne*, *Romer*, *Plyler* and arguably *Lawrence v. Texas*¹⁶⁶ will reveal that the Court seemed to look at the state action with a suspicious eye, much like it does under the intermediate standard.

The Court has sent mixed signals over the years on which standard it will apply to illegal immigrants. In recent years, however, the Court has explained that it will draw a clear and dramatic distinction between legal immigrants and illegal immigrants. In *Plyler*,¹⁶⁷ the Court struck down a Texas statute that denied free public education to illegal immigrant children.¹⁶⁸ In 1975, the Texas legislature revised its education laws to withhold any state funds from local school districts for the education of children who were not “legally admitted” to the coun-

¹⁵⁸ *Id.* at 461.

¹⁵⁹ *See Tuan Anh Nguyen v. INS*, 533 U.S. 53, 76 (2001) (O’Connor, J., dissenting).

¹⁶⁰ *See id.* at 77.

¹⁶¹ *Id.* at 77.

¹⁶² 9 West’s Fed. Admin. Prac. § 11288 (3d ed.) (“When employed, the rational basis test usually results in a court upholding the constitutionality of the law, as the test gives great deference to the legislative branch”).

¹⁶³ *See, e.g., Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985), *Romer v. Evans*, 517 U.S. 620 (1996), *Plyler v. Doe*, 457 U.S. 202 (1982), *Lawrence v. Texas*, 539 U.S. 558 (2003).

¹⁶⁴ David O. Stewart, *A Growing Equal Protection Clause?*, 71 A.B.A. J. 108, 112 (1985); *see also City of Cleburne*, 473 U.S. at 441.

¹⁶⁵ *See Romer v. Evans*, 517 U.S. 620, 635 (1996).

¹⁶⁶ *See generally Lawrence v. Texas*, 539 U.S. 558 (2003).

¹⁶⁷ *Plyler v. Doe*, 457 U.S. 202, 230 (1982).

¹⁶⁸ *Id.* at 205, 230.

try.¹⁶⁹ A class action suit was filed on behalf of a group of young Mexican school-age children.¹⁷⁰ Texas asserted that its purpose for the law was not discriminatory, but rather an attempt to plug the leak that was the “drain” on the school district.¹⁷¹ Texas admitted that the action did not drastically improve the educational system, but simply was aimed at saving the district money.¹⁷²

The Court flatly and unequivocally rejected that illegal immigrants are not protected by the Equal Protection Clause.¹⁷³ The Court could not have been clearer: the Equal Protection Clause applies to all people within the United States.¹⁷⁴ Despite the Court’s language of equality, the Court noted that the immigration status of an individual is constitutionally relevant.¹⁷⁵ The Court explained that an illegal “alien[] cannot be treated as a suspect class simply because their presence” within our nation violates federal law.¹⁷⁶

As the Court’s jurisprudence has developed, it is clear that the Court is less likely to apply anything more than rational basis when reviewing state action that discriminates against illegal immigrants. The Court’s rationale for this low standard appears to center on the fact that illegal immigrants are just that: illegal. It would be unreasonable to fault the Court for making such a distinction. One would think that it is certainly reasonable to refuse to extend the exact same protection to those individuals who for their own benefit have willfully chosen to disregard the law. However, there are some troubling issues with this reasoning.

As noted above, the Equal Protection Clause states that no state shall deny any person within its jurisdiction the equal protection of the law. The inclusion of “any” person without any modifiers appears to establish the Framers’ intent to protect all people within the state’s jurisdiction. *Plyler* explicitly stated that these protections extend to illegal immigrants.¹⁷⁷ A true textual interpretation would apply the Equal Protection Clause equally to all people, rather than make distinctions based on the immigration status of the individual.

¹⁶⁹ *Id.* at 205.

¹⁷⁰ *Id.* at 206.

¹⁷¹ *Id.* at 207.

¹⁷² *Id.*

¹⁷³ *Id.* at 210.

¹⁷⁴ *Id.* at 212.

¹⁷⁵ *Id.* at 223.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 212.

Even if the Court's consistent application of the rational basis standard is acceptable, it unnecessarily excludes innocent victims out from the security of the Equal Protection Clause. As stated earlier, between eight and thirteen million illegal aliens are currently within United States borders.¹⁷⁸ It is not clear what percentage of those individuals are children, innocent parties in their parents' disregard of the law. However, 340,000 out of the 4.3 million babies born within the United States are born of illegal immigrants.¹⁷⁹ Even the Court has recognized that the children of illegal immigrants should not be treated as harshly as the individual who intentionally violates immigration laws.¹⁸⁰

There are some troubling issues with SB 1070 and the federal government's handling of immigration. The cases are clear: the federal government has preempted SB 1070, and the rational basis standard of review will likely be applied to SB 1070. In spite of this, legal scholars should seek to analyze whether these principles are rightly applied. One must ask what states are expected to do when the federal government simply refuses to fight against illegal immigration. Likewise, one must seriously question whether it was the Framers' intent to guarantee equal protection to all people within the state's jurisdiction or only American citizens. These are troubling issues that must be analyzed by each person. Regardless of the conclusion each person comes to, it is abundantly clear that America has a serious problem that will be best addressed by applying foundational principles to the immigration conundrum.

IV. APPLYING FOUNDATIONAL PRINCIPLES TO RESOLVE THE ISSUE

It is obvious that constitutional issues abound when addressing illegal immigration. Despite this, the foundational principles addressing the value of each sojourner remain consistent. In order to craft a remedy to the immigration situation in light of these principles, one must first understand the depth of the problem by (1) examining the economic effect ordinances similar to SB 1070 have caused, (2) the finan-

¹⁷⁸ *Birthright Citizenship* (2010), FED'N FOR AM. IMMIGR. REFORM, <http://www.fairus.org/issue/birthrightcitizenship?A=SearchResult&SearchID=2566097&ObjectID=5123842&ObjectType=35> (last visited Sept. 9, 2012) [hereinafter *Birthright Citizenship*].

¹⁷⁹ Stephanie Condon, *Huckabee: Don't Punish Children of Illegal Immigrants*, CBS NEWS (Aug. 12, 2010, 12:10 PM), http://www.cbsnews.com/8301-503544_162-20013462-503544.html?tag=mncol;lst;10.

¹⁸⁰ *Plyler*, 457 U.S. at 238.

cial downturn the nation now faces, and (3) a potential framework that may help alleviate some of the pressure of illegal immigration.

A. *The Problem: By the Numbers*

The Federation for American Immigration Reform states that illegal immigration costs American taxpayers over \$113 billion per year.¹⁸¹ As stated above, there are an estimated eight to thirteen million undocumented immigrants in the United States today. Other sources estimate that this number is even higher.¹⁸² Illegal immigrants give birth to an estimated 300,000 babies a year.¹⁸³ Most of these “anchor babies” are delivered with resources paid for by the American people.¹⁸⁴

Although the cost of illegal immigration is staggering, the cost of enforcing SB 1070 and similar laws is stunning. For instance, the cost of detaining and incarcerating an individual is about \$79 per person per day.¹⁸⁵ In some counties the cost of jail maintenance and operations is roughly 25% of every dollar taxed.¹⁸⁶ Local jails have been forced to house more illegal immigrants, thus forcing the incarceration costs onto local citizens.¹⁸⁷ Some of these costs are reimbursed by the

¹⁸¹ *Illegal Immigration a \$113 Billion a Year Drain on U.S. Taxpayers*, FED’N FOR AM. IMMIGR. REFORM (July 6, 2010), <http://www.fairus.org/news/illegal-immigration-a-113-billion-a-year-drain-on-u-s-taxpayers>.

¹⁸² *Illegal Immigration Statistics in the United States*, ILLEGAL IMMIGR. STAT., <http://www.illegalimmigrationstatistics.org/illegal-immigration-in-the-united-states/> (last visited Sept. 9, 2012).

¹⁸³ Byron Pitts, *Illegal Immigration Births—At Your Expense*, CBS NEWS (Feb. 11, 2009, 3:08 PM), <http://www.cbsnews.com/stories/2008/04/07/eveningnews/main4000401.shtml>.

¹⁸⁴ Immigration Issues, *Birthright Citizenship (2010)*, FED’N FOR AM. IMMIGR. REFORM, <http://www.fairus.org/issue/birthrightcitizenship?A=SearchResult&SearchID=2566097&ObjectID=5123842&ObjectType=35> (last visited Sept. 9, 2012).

¹⁸⁵ Jennifer Warren, *One in 31: The Long Reach of American Corrections*, PEW CTR. ON THE STATES 12 (Mar. 2009), http://www.pewstates.org/uploadedFiles/PCS_Assets/2009/PSPP_1in31_report_FINAL_WEB_3-26-09.pdf.

¹⁸⁶ See Alex Piquero, *Cost-Benefit Analysis for Jail Alternatives and Jail*, FLA. ST. UNIV. COL. CRIMINOLOGY & CRIM. JUST. (Oct. 2010), <http://www.criminologycenter.fsu.edu/p/pdf/pretrial/Broward%20Co.%20Cost%20Benefit%20Analysis%202010.pdf>.

¹⁸⁷ *Immigrants Behind Bars: How, Why and How Much?* NAT’L IMMIGR. F. (Mar. 2011), http://www.immigrationforum.org/images/uploads/2011/Immigrants_in_Local_Jails.pdf.

federal State Criminal Alien Assistance Program.¹⁸⁸ This program has poured millions of dollars of taxpayer money back into the states to reimburse for costs of incarcerating aliens.¹⁸⁹

Even more troubling are the number of cities and states that have attempted to deal with illegal immigration rather than rely on the federal government. In America's worst recession since the 1930s, municipalities seeking to implement deterrents on illegal immigration are faced with shouldering the burden of significant costs.¹⁹⁰ For instance, in Hazleton, Pennsylvania, the city council passed the "Illegal Immigration Relief Act Ordinance," as well as several other city ordinances that sought to limit the flood of illegal immigrants that were pouring into the city.¹⁹¹ Some of the penalties for violating these ordinances included \$100 fines for any landlord who rented to an illegal immigrant and revocation of business licenses for any business owner who employed an illegal immigrant.¹⁹² The ordinances also imposed stiff sanctions on any non-profit organization that "aided or abetted" illegal immigrants.¹⁹³ In Farmers Branch, Texas, the city council passed a measure mandating apartment owners to check the immigration status of tenants.¹⁹⁴ Violations of this ordinance were met with \$500 per day sanctions.¹⁹⁵ "The council also made English the city's official language."¹⁹⁶ Finally, in Prince William County, Virginia, county officials adopted a law that denied county services to those who were unable to prove lawful residency.¹⁹⁷ Similar to SB 1070, the ordinance required officers to check the immigration status of everyone detained or stopped for a traffic violation if they had probable cause to believe that person had entered the country illegally.¹⁹⁸ The county trained

¹⁸⁸ State Criminal Alien Assistance Program, *FY 2012 SCAAP Guidelines and Application*, BUREAU JUST. ASSISTANCE, 1 (2012), https://www.bja.gov/Funding/12SCAAP_Guidelines.pdf.

¹⁸⁹ *Id.*

¹⁹⁰ Phil Oliff et al., *States Continue to Feel Recession's Impact*, CTR. ON BUDGET AND POL'Y PRIORITIES 7 (June 3, 2012), <http://www.cbpp.org/files/2-8-08sfp.pdf>.

¹⁹¹ Gebe Martinez, *Unconstitutional and Costly*, CTR. FOR AM. PROGRESS, 7 (Jan. 2011), http://www.americanprogress.org/wp-content/uploads/issues/2011/01/pdf/cost_of_enforcement.pdf.

¹⁹² *Id.*

¹⁹³ *Id.* at 8.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 9.

¹⁹⁸ *Id.*

officers before the law went into effect and installed cameras in squad cars to guard against racial profiling.¹⁹⁹

The opposition to the Hazleton law was swift and fierce. Opponents drew in the National Chamber Litigation Center.²⁰⁰ The cost of litigating the issue has been nearly crippling for the county.²⁰¹ The small town has tallied up over \$5 million in costs relating to the ordinance.²⁰² Not only this, but the town has struggled to get its insurer to pay for plaintiffs' successful claims against the city.²⁰³ In a severe economic downturn, citizens of Hazleton were thrust into a position demanding that they decide between other valuable city services or enforcement and the eventual legal defense of an immigration ordinance.

In Farmers Branch, the costs have tallied up to \$4 million and rising.²⁰⁴ The town of 26,000 has been forced to defend the law and will soon be paying the fees for a costly appeal of the lower court's decision to strike down the law.²⁰⁵ The town has been forced to cut city officials' pay, as well as privatize normally public services, such as the city's library system.²⁰⁶ Citizens in Farmers Branch have called for city officials to give up the fight.²⁰⁷

In Prince William County, the total price tag for initiating the ordinances has only tallied \$1.3 million.²⁰⁸ This comparatively small price was due to then Police Chief Charlie Deane.²⁰⁹ Deane presented county officials with the daunting potential costs of the ordinances.²¹⁰ He cited increased taxes to pay for the costs of the newly installed vid-

¹⁹⁹ *Id.*

²⁰⁰ Press Release, Nat'l Chamber Litig. Ctr., Chamber Joins ACLU in Challenging Hazleton, Pennsylvania's Immigration Ordinance (Apr. 6, 2007) (on file with author).

²⁰¹ Martinez, *supra* note 191, at 16.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.* at 17.

²⁰⁵ Dianne Sols, *Farmers Branch Files Federal Appeal on Immigration Ordinance*, DALLAS MORNING NEWS (Jan. 6, 2011), <http://www.dallasnews.com/news/community-news/carrollton-farmers-branch/headlines/20110106-farmers-branch-files-federal-appeal-on-immigration-ordinance.ece>.

²⁰⁶ Dianne Sols, *Farmers Branch Residents Protest Privatization of Manske Library*, DALLAS MORNING NEWS (Sept. 8, 2010), <http://www.dallasnews.com/news/community-news/carrollton-farmers-branch/headlines/20100907-Farmers-Branch-residents-protest-privatization-of-1304.ece>.

²⁰⁷ *Id.*

²⁰⁸ Martinez, *supra* note 191, at 18.

²⁰⁹ *Id.*

²¹⁰ *Id.*

eo cameras on police cruisers, severely damaged relations between the community and police and the very real possibility of a torrent of racism directed at the county's Hispanic community.²¹¹ Although most of these factors did not have a clear monetary price tag, the county quickly scaled back the ordinances, heeding Deane's advice.²¹² Despite this, the county still pays approximately \$700,000 each year to train the officers in the criminal alien unit.²¹³

B. The Nation's Financial Issues: Is Fighting Illegal Immigration Really Worth It?

The nation's financial woes have forced states to severely cut back. Of the 48 states that released initial budget proposals for the 2012 fiscal year, each proposed significant cuts to education programs, health care and other important services.²¹⁴ "Forty-four states [] project budget shortfalls totaling \$112 billion."²¹⁵ In the states that have projected as far out as 2013, there is an estimated \$55 billion shortfall.²¹⁶ The consequences of these shortfalls have already been felt in tax hikes across the nation.²¹⁷ Not only have states raised taxes, but they are dramatically cutting services.²¹⁸ Experts estimate that these shortfalls will ultimately cost the economy 360,000 jobs in 2013.²¹⁹

In light of the staggering costs of deporting and incarcerating illegal immigrants, Americans are being forced to choose between important social services and protecting its borders. Many Americans are in difficult financial situations and have focused their concerns and attention to other areas. It is possible to make great strides in dealing with the immigration problem without further crippling the economy. As noted above, illegal immigration is one of the contributors to the poor American economy. But the resolution would likely not be simply jail-

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ Michael Leachman et al., *Governors are proposing Further Deep Cuts in Services, Likely Harming Their Economies*, CTR. ON BUDGET & POL'Y PRIORITIES, 1 (Mar. 21, 2011), <http://www.cbpp.org/files/2-4-11sfp.pdf>.

²¹⁵ Ryan Holeywell, *How Real is the Bankruptcy Threat?*, GOVERNING.COM (May 2011), http://www.governing.com/templates/gov_print_article?id=120856059.

²¹⁶ Oliff et al., *supra* note 190, at 2.

²¹⁷ *Id.* at 3.

²¹⁸ *Id.* at 5-6.

²¹⁹ *Id.* at 6.

ing or deporting aliens. Americans must tap into the creative nature that has made this nation the greatest nation the world has ever known.

C. Some Potential Remedies: Affirming the Dignity Without Draining the Economy

America is in a difficult position. Faced with the greatest recession since 1930, the nation must prioritize the multiple troubling issues it now faces. As the health care debate rages, families continue to be forced out of their homes due to wide-sweeping foreclosures. Public education has taken hits and there appears to be an ever-present fear that America's economy will collapse at any moment. Throughout this turmoil, the immigration issue has slid down the list of "to do's" for most politicians. Americans seem to be less concerned with the borders and more concerned with their wallets, however, these two concerns are not always competing. America can craft a solution to the illegal immigration issue, a problem that has chipped away at the economy for years, by attempting to affirm the humanity of each immigrant. Resolving the issue will not be easy, but it will be worth it in the long run.

America must find a way to avoid the extreme costs of detaining, processing and "shipping out" each illegal immigrant. One potential proposal would involve employing the assistance of the nation's employers and medical providers. By utilizing employers and medical providers, America could gain a better grasp on the depth of the immigration problem. Of course gaining the cooperation of these entities would entail a release of any potential liability or punishment for the employer or the immigrant. This refusal to levy punishment would ensure that immigrants were encouraged to come forward. After "registering," immigrants would be given the option to spend considerable time serving in a civil service type of position or paying a considerable fine.

The option of civil service could be structured in such a fashion so that it would not demean the individual. The individual could be given a list of positions where the local municipality needs assistance. These positions could range from city park cleanup crews, road maintenance or city transit maintenance. Just like American citizens, illegal immigrants have tremendous abilities. These abilities should be used as restitution for their illegal entry into the United States. Those immigrants that have businesses, such as an auto mechanic shop or restaurant, should use those abilities to help pay the community back for the cost of their crime. For instance, immigrants who own restaurants should

be given the opportunity to provide meals for the city's homeless community as restitution.

The payment of a fine should also be an option. This fine should reflect at least a portion of the cost that the particular immigrant cost the community by his illegal act. This amount could be determined by a thorough registration process. It is crucial that the fine be an amount that is reasonable. Fines that are too great will simply be ignored. However, fines that are reasonable will provide an opportunity for restitution and healing. Similar to child support payments, the municipality could garnish wages when needed. Although the cost of immigration may greatly exceed the amount of the fine, it could be a useful tool to generate some revenue while allowing the immigrant to feel as if he has paid his debt to the community.

Similarly, this process will aid in the registration and identification of illegal immigrants. It will provide an opportunity for the government to properly tax the individual. It will also enable the immigrant to properly and completely assimilate into American culture through the process of paying taxes. Yet again, although this addition to the economy may seem small, it would likely produce at least some revenue. Even if half of the estimated 20 million immigrants are registered and subsequently paying taxes, this would provide a substantial amount of revenue for the American economy.

CONCLUSION

I recently had the honor of listening to a keynote speech from former United States Attorney General John Ashcroft. There were two things that I will never forget. General Ashcroft explained that freedom suffers when the law is unclear. He also explained that America is a nation unlike any other the world has ever seen in that the will of the people is imposed upon the government. This differs from almost every other government known to man because governments tend to impose their will on the people, or the elite impose their will on the people. General Ashcroft's wisdom has fierce implications for immigration reform in America.

Federal law on immigration is convoluted and ineffective. The negative impact of these inept laws is compounded by the fact that they are not enforced. Freedom suffers because of these ambiguities and ineptitudes. American citizens and illegal immigrant freedom suffers. Congress must understand the desperate need for immigration reform. Our President, Republican or Democrat, must understand and

bear the responsibility of enforcing these laws. Freedom depends upon it.

The will of the people not only needs to be imposed upon the government, but the will of the people needs to conform to a proper perspective. This “proper perspective” is that every person has unfathomable value. This value demands that Americans treat immigrants with value. It similarly demands that Americans hold themselves and immigrants responsible for the laws broken. This value paradigm must be the foundational principles that inform immigration reform.

Arizona’s SB 1070 and the anti-immigration laws of other states do not properly find their roots in these foundational principles. It is apparent that SB 1070, as amended HB 2162, fails on multiple grounds. In *Arizona*, the Court held that most of SB 1070 is preempted.²²⁰ The Court will likely find that immigration is not an area that states have typically occupied and that the Constitution vests this power in the federal government. Although state action regarding immigration is not completely barred, it also appears as if Congress’ clear intent is to control nearly every component of immigration. Even if the Court finds that the law is not preempted, the Court should find various other constitutional infirmities. First, SB 1070 and its amendments found in HB 2162 may run afoul of the Fourth Amendment’s standards. The broad and nebulous standards providing officers grounds to stop, detain and arrest immigrants cut directly against the Fourth Amendment’s purpose. Furthermore, race, color and national origin must not be the sole basis justifying a stop. The Court is very likely to find that the Arizona legislature’s attempt to control immigration allows race to be the sole factor justifying a stop. Despite these uncomfortable racial classifications implicitly permitted by SB 1070, the Court is not likely to find that the law violates the Equal Protection Clause. If the Court employs the rational basis standard, it is unlikely that the Court will strike down SB 1070. However, if the Court applies the rational basis standard with teeth seen in *Romer*, the Court may strike down the law under the Equal Protection Clause.

Even though the proposed solutions contained within this note are not flawless, the foundational principles remain true: any remedy must be tailored to each individual’s value by treating them with respect and holding them accountable. This note is intended to serve as a call to liberals and conservatives to remember that people, regardless of their ethnicity or immigration status, are more valuable than anything else

²²⁰ *Arizona v. United States*, 132 S. Ct. at 2510 (holding that Sections 3, 5(c), and 6 are preempted).

in this world. Both ends of the political spectrum must realize this truth and commit to let this worldview, these foundational principles, guide the discussion of remedying America's immigration problems.