
POST-RACIAL PROXIES:
RESURGENT STATE AND LOCAL ANTI-“ALIEN”
LAWS AND UNITY-REBUILDING FRAMES FOR
ANTIDISCRIMINATION VALUES

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ABSTRACT

Though unauthorized migration into the United States has diminished substantially since 2007, anti-“illegal alien” state and local laws and furor are flaring again. While one of the biggest worries regarding such “anti-alien” laws is the risk of racialized harm, courts invalidating overreaching statutes are relying on structural or procedural grounds, such as preemption and due process doctrines. This Article examines how these political and legal trends point to how proxies are used in a post-racial era to dance around race, in constructive, national unity-rebuilding as well as divisive, inflammatory ways. Anti-alien legislation is a proxy way to vent resurgent racialized anxieties and engage in friend-enemy politics founded on conflict with the “Other”—the foreign enemy within—in a time of economic and political turmoil. The approach of cutting back overreaching statutes using alternate frames of analysis, such as preemption rationales, to vindicate prior national commitments to balancing antidiscrimination with enforcement can be constructively deployed to fill gaps and blind spots in antidiscrimination doctrine, and to mitigate polarization by making shared interests and social cohesiveness rather than racial divergence of interests salient.

Equality norms can be framed and vindicated in a more palatable, legally tenable form, and tied to other interests to appeal more widely

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and ameliorate estrangement in a polarized polity. Legislation is invalidated not to “accommodate” the minorities against the majority will, but to preserve values such as the federal balance, or guard against arbitrary governmental power. The approach is also a technique of bridge-building across worldviews to appeal to hierarchs, who tend to be conservative supporters of tough legislation, as well as egalitarians, who value equality more highly. To be constructive, however, these alternate approaches must enfold antidiscrimination concerns and norms into the analysis rather than altogether elide the concerns. Moreover, in crafting decisions, courts have an important role to play in counteracting rather than amplifying the spread of conflation and misperception that fuel fierce friend-enemy politics.

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INTRODUCTION

Anti-immigrant legislation and furor are flaring again amid economic and political turmoil, though unauthorized migration has diminished substantially since 2007, when the recession dampened the draw of jobs.¹ There has been an explosion of immigration-related state

¹ See Jeffrey S. Passel & D’Vera Cohn, *U.S. Unauthorized Immigration Flows are Down Sharply Since Mid-Decade*, PEW HISPANIC CTR., i, iii, 1-2 (Sept. 1, 2010), <http://pewhispanic.org/files/reports/126.pdf> [hereinafter PEW HISPANIC CTR. 2010 REPORT] (reporting a two-thirds decrease in inflow of unauthorized migration between 2007-2009 compared to 2000-2005). Unauthorized migration tends to ebb and flow with the ups and downs of the economies of the United States and Mexico, where about sixty percent of undocumented migrants originate. See DOUGLAS S. MASSEY ET AL., BEYOND SMOKE AND MIRRORS: MEXICAN

and local legislation, with every state in regular session considering immigration-related legislation in the first half of 2010.² As of the end of June, there were 314 enacted laws and resolutions in 44 states—a 21% increase since 2009.³ The imagery of rampant hordes of “illegals”—now a noun in the national parlance⁴—remains the frame through which current law is shaped and viewed, though the unauthorized population decreased by a million between 2007 and 2009 and the flow of unauthorized immigrants is down about 70%.⁵ Recent flashpoints in the battle include Arizona’s controversial Senate Bill 1070, passed this summer and partially preliminarily enjoined three months later, with suits pending.⁶ Nearly twenty states have signaled desire to follow Arizona’s path, though whether such political posturing will produce law remains to be seen.⁷ Other controversial proposals circulate, such as the elimination of birthright citizenship or branding the birth certificates of “anchor babies,” a biologicistic metaphor of anxiety over pregnant foreigners illegally entering the United States to implant babies who become birthright citizens able to petition for more foreign relatives to come.⁸ Further fueling the fervor is the imagery of

IMMIGRATION IN AN ERA OF ECONOMIC INTEGRATION 111 (2002); Jeffrey S. Passel & Roberto Suro, *Rise, Peak, and Decline: Trends in U.S. Immigration 1992-2004*, PEW HISPANIC CTR., 2-3, 10-11 (Sept. 27, 2005), <http://pewhispanic.org/files/reports/53.pdf>.

² Immigrant Policy Project, *2010 Immigration-Related Laws and Resolutions in the States, January-June 2010*, NAT’L CONF. ST. LEGISLATURES (July 20, 2010), <http://www.ncsl.org/default.aspx?TabId=20881>.

³ *Id.*

⁴ See OXFORD ENGLISH DICTIONARY ONLINE (2010), <http://oed.com> (defining the noun “illegal” to mean “illegal immigrant”). The notion of “illegal” as a human identity has even controversially seeped across borders and language into the Spanish “los ilegales.” See, e.g., Rafael Cardona, Opinión, *Ilegales o indocumentados*, LA CRÓNICA DE HOY (Mex.) (Aug. 2, 2010, 2:50 AM), http://www.cronica.com.mx/nota.php?id_notas=522908 (critiquing concept).

⁵ Compare PEW HISPANIC CTR. 2010 REPORT, *supra* note 1, at i-ii, 1 (noting the dramatic decline in unauthorized immigration and a million less living in the U.S.), with, e.g., Russell Pearce, *Enough is Enough*, <http://www.russellpearce.com> (follow “SB 1070” hyperlink) (last visited Oct. 8, 2010). Senator Russell Pearce, the sponsor of controversial Arizona Senate Bill 1070, explained his impetus for the bill: “We have been overrun [M]illions more will come behind them, and we will be over run to the point that there will no longer be a United States of America How long will it be before we will be just like Mexico?” *Id.*

⁶ *United States v. Arizona*, 703 F. Supp. 2d 980, 985, 987, 1008 (D. Ariz. 2010).

⁷ Jerry Markon & Robert Barnes, *Arizona Appeals Judge’s Ruling on Immigration Law*, WASH. POST, July 30, 2010, at A03; see also Michael W. Savage, *Oklahoma, South Carolina and Utah May Follow Arizona’s Lead on Immigration Law*, WASH. POST, July 8, 2010, at A04 (noting that most of the proposed measures are not likely to be adopted or signed by governors but that legislators in Oklahoma, South Carolina and Utah indicate that there is a realistic chance of passing similar legislation when they reconvene in 2011).

⁸ See, e.g., Julia Preston, *Citizenship as Birthright is Challenged on the Right*, N.Y. TIMES, Aug. 7, 2010, at A8 (reporting on Senator Lindsey Graham’s proposal to eliminate birthright citizenship for children of illegal immigrants because, in his words, “[w]e can’t just have people swimming across the river having children here,” and frustration over “anchor babies”); Alia Beard Rau, *Migrant Hard-Liners’ Next Target: High Court*, ARIZ. REPUBLIC, Sept. 12, 2010, at A1 (reporting on Arizona proposal to add notation to birth certificates of children of illegal immigrants denoting this status).

the unauthorized migrant spreading lurid violent crimes like a contagion, particularly in border areas⁹—though crime rates in border towns and Arizona have been flat or decreasing¹⁰ and a new study involving time-series analyses suggests that violent crime rates decreased the most in cities with the greatest immigrant inflows between 1990 and 2000.¹¹

While one of the biggest worries regarding such “anti-illegal” or “anti-alien” laws is the risk of racialized harm, courts invalidating overreaching statutes are relying on alternate frames: mainly preemption¹² and, to a lesser extent, due process doctrines.¹³ This Article examines how these trends in our political and legal scene illustrate how proxies are used in an avowedly “post-racial” society to dance around race, in both destructive and potentially constructive ways. Anti-alien legislation is a proxy way to vent resurgent racialized anxieties and engage in friend-enemy politics founded on conflict with the “Other”—the foreign enemy within—in a time of economic and political turmoil. The approach of cutting back overreaching statutes using alternate, unity-reinforcing frames of analysis to vindicate equality values can be constructively deployed to fill gaps and blind spots in antidiscrimination doctrine. Further, this approach can mitigate polarization by making convergent interests and social cohesiveness, rather than racial divergence of interests, salient. Structural, procedural, or interpretive grounds, such as preemption and due process doctrines, can be alternate frames for making prior national commitment to antidiscrimination values salient. Equality norms can be framed and

⁹ See, e.g., Mary De Ming Fan, *The Immigration-Terrorism Illusory Correlation and Racist Mistake*, 10 HARV. LATINO L. REV. 33, 40-47 (2007) (examining how cascades in mistaken perception and conflation of immigrants with crime and dangerousness are catalyzed); Christopher Dickey, *Reading, Ranting and Arithmetic*, NEWSWEEK, May 27, 2010, <http://www.newsweek.com/2010/05/27/reading-ranting-and-arithmetic.html> (referencing claims of an “illegal-alien crime wave” and Arizona Governor Jan Brewer’s claim that “[w]e’ve been inundated with criminal activity”); Francis Fukuyama, *Immigrants and Crime: Time for a Sensible Debate*, WALL ST. J., July 26, 2010, at A15 (noting the “widespread perception of a strong link between immigrants and crime”).

¹⁰ Dennis Wagner, *Violence is Not Up on Arizona Border*, ARIZ. REPUBLIC, May 2, 2010, at A1.

¹¹ Tim Wadsworth, *Is Immigration Responsible for the Crime Drop? An Assessment of the Influence of Immigration on Changes in Violent Crime Between 1990 and 2000*, 91 SOC. SCI. Q. 531, 532-33, 548-49 (2010).

¹² See *Chamber of Commerce v. Edmondson*, 594 F.3d 742, 765-69 (10th Cir. 2010); *Lozano v. City of Hazleton*, No. 07-3531, 2010 WL 3504538, at *32-46 (3d Cir. Sept. 9, 2010); *United States v. Arizona*, 703 F. Supp. 2d 980, 992-1006 (D. Ariz. 2010); *Villas at Parkside Partners v. City of Farmers Branch (Farmers Branch III)*, 701 F. Supp. 2d 835, 851-59 (N.D. Tex. 2010); *Villas at Parkside Partners v. City of Farmers Branch (Farmers Branch II)*, 577 F. Supp. 2d 858, 866-76 (N.D. Tex. 2008); *Garrett v. City of Escondido*, 465 F. Supp. 2d 1043, 1056-57 (S.D. Cal. 2006). But see *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856, 866-67 (9th Cir. 2008, amended 2009) (finding no preemption of state laws criminalizing employment of undocumented workers), cert. granted sub nom. *Chamber of Commerce v. Candelaria*, 130 S. Ct. 3498 (2010).

¹³ See *Farmers Branch II*, 577 F. Supp. 2d at 876-77; *Garrett*, 465 F. Supp. 2d at 1057-59.

vindicated in a more palatable, legally tenable form, and tied to other interests to appeal more widely and ameliorate estrangement in a polarized polity.

The approach may also appeal internally as well as externally within the decisionmaking process to judicial centrists who value equality principles in light of the need to foster social cohesion and avoid division. In an important new article analyzing the jurisprudence of race-based remedies for inequality, Reva Siegel illuminates how “racial moderates” on the Supreme Court adhere to an “antibalkanization perspective” that “privileges laws that expressively affirm universalism and commonality rather than difference and division.”¹⁴ This preference for approaches that ameliorate estrangement and division may also influence the approach taken to claims of harm posed by laws facially framed in terms of immigration status, but that have a tense relationship with race.

The use of alternate frames that make interest convergence rather than division salient is also a technique of bridge-building across worldviews to appeal to hierarchs and individualists, who tend to be conservative supporters of tough legislation, as well as egalitarians, who value equality more highly. Legislation is invalidated not to “accommodate” the minorities against the majority will, but to preserve values such as the federal balance or guard against arbitrary governmental power.

To be constructive, however, these alternate approaches must enfold antidiscrimination concerns and norms into the analysis rather than altogether elide address of the concerns. Moreover, courts adjudicating based on data and reason at an institutional remove from the fierce political fray have an important role in providing a calming, rational voice of authority to counteract the spread of conflation and misperception that fuel fierce friend-enemy politics.

This Article proceeds in three parts. Part I contrasts the friend-enemy politics and legislation of our contemporary scene with the state and local legislation and furor against the Chinese during the turbulent politics of the last quarter of the nineteenth century. Part II analyzes the resurgent state and local anti-“alien” laws of our times. Part III examines how recent decisions cutting back on state and local laws overreaching into the domain of immigration and posing the risk of racialized harms are founded on alternate grounds to antidiscrimination. Part III concludes by theorizing the import of these alternate frames to make shared interests, rather than racial difference, salient and help

¹⁴ Reva Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. (forthcoming 2011) (manuscript at 3, 25) (on file with *Cardozo Law Review*). See also *infra* Part III.B (situating the analysis in the literature).

build bridges between dissonant worldviews to navigate the profoundly polarized politics and legislation of our times.

I. FRIEND-ENEMY POLITICS

In another society under strain, riven by economic woes and fierce doubt, Carl Schmitt argued that the fundamental distinction on which political life rests is that of friend and enemy.¹⁵ The enemy is “the other, the stranger; and it is sufficient for his nature that he is, in a specially intense way, existentially something different and alien, so that in the extreme case, conflicts with him are possible.”¹⁶ As for the friend side of the equation, the “us” in a democratic polity, Schmitt argued that homogeneity was crucial and necessitated—“if the need arises—elimination or eradication of heterogeneity.”¹⁷ He cited as examples the expulsion of the Greeks from Turkey and the prevalence of national laws, such as those of Australia at the time, restricting immigrants to the “right type of settler.”¹⁸ While homogeneity can be defined in different ways in a pluralistic society with many faiths, ideologies and worldviews, these examples illustrate that ethnicity was a salient feature for Schmitt.

Contemporary morality may have parted ways with Schmitt in some regards,¹⁹ but his insights remain important in part because he openly voiced a logic that flares with particular ferocity when the nation is in the grips of economic travails and doubts. In the past and our present, the political²⁰ and the polity reinvigorates in times of doubt and turmoil through conflict with the “Other” and attempts to purge this foreign enemy within. Dissident political groups try to rouse support against current power holders using a rallying point of threat with an

¹⁵ CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* 26 (George Schwab trans., 1996).

¹⁶ *Id.* at 27.

¹⁷ CARL SCHMITT, *THE CRISIS OF PARLIAMENTARY DEMOCRACY* 9-12 (Ellen Kennedy trans., 1985); see also Chantal Mouffe, *Carl Schmitt and the Paradox of Liberal Democracy*, in *THE CHALLENGE OF CARL SCHMITT* 38, 47 (Chantal Mouffe ed., 1999) (explaining that Schmitt conceived of homogeneity as the necessary bond for a democracy and the construction of an “us”).

¹⁸ SCHMITT, *THE CRISIS OF PARLIAMENTARY DEMOCRACY*, *supra* note 17, at 9 (quoting HUGO GROTIUS, *DE JURE BELLI AC PACIS*, bk. I, ch. 3, § 6 (2d ed., Amsterdam 1631)).

¹⁹ Carl Schmitt, was, after all the “Crown Jurist of the Third Reich,” though his ideas have transcended his history to influence poststructuralist thinkers. See JAN-WERNER MÜLLER, *A DANGEROUS MIND: CARL SCHMITT IN POST-WAR EUROPEAN THOUGHT* 3, 39-51, 238-41 (2003).

²⁰ I use the name “the political,” after Schmitt’s *das politische*, to convey the realm of political life. For an interesting exegesis of the notion of “the political” and the use of the noun, see David Ames Curtis, *Translator’s Foreword* to JEAN-MARC COICAUD, *LEGITIMACY AND POLITICS: A CONTRIBUTION TO THE STUDY OF POLITICAL RIGHT AND POLITICAL RESPONSIBILITY*, at xiii-xiv (David Ames Curtis ed. & trans., 1997).

explicitly or implicitly racialized face. This process of pronounced differentiation is a means through which faith and fervor in an “us” as an identity is regenerated despite the travails of the times.²¹

Those vilified and used to define the boundary between our national “us” and the threatening “Other” have historically taken different—generally raced—forms. Nativists of the past have vilified the Italians, Jews, Eastern Europeans, Irish, Blacks, Japanese and Chinese, among others.²² Demonstrating the acutely racialized nature of animosity, out-group Caucasians were often not perceived as white, but as degraded “swarthy types” in the Social Darwinian scale.²³ In this multi-textured history of animosity, the story of the intensification of hostility and state and local laws against the Chinese in California around the time of the severe recession of the 1870s has resonance with, and insight for, our contemporary political and legal scene.

A. *Déjà Vu Politics*

In 1878, Representative Horace Davis of California said of the “Chinaman”:

Twenty-eight years ago the pioneer Chinaman was welcomed with an eager curiosity, but with no foresight of the eventful consequences of his coming. To-day, he is found in every village, in every mining camp, utterly an alien in the body-politic, and like some foreign substance in the human body, breeding fever and unrest till that system is relieved of its unwelcome presence.²⁴

Times had been getting tougher since the boom years of the 1850s, when the Chinese were drawn to the goldfields, swamps and mountains

²¹ Cf. Christian Calliess, *Europe As Transnational Law—The Transnationalization of Values by European Law*, 10 GERMAN L.J. 1367, 1370 (2009). Calliess explained:

As we know from sociology and social psychology, the development of identity also may (or possibly even has to) be linked with differentiation, namely the necessary distinction between “Us and Them”. . . . [N]othing supports the evolution of a group identity more effectively than a common enemy. This is exactly the kind of identity development which appears (within the context of State theory) in Carl Schmitt’s notorious “friend-enemy scheme.”

Id.

²² See, e.g., KAREN BRODKIN, HOW JEWS BECAME WHITE FOLKS & WHAT THAT SAYS ABOUT RACE IN AMERICA 25-52 (2002); IAN HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 27-28, 35-37 (2006); SALVATORE J. LAGUMINA, WOP! A DOCUMENTARY HISTORY OF ANTI-ITALIAN DISCRIMINATION 11-15 (2d ed. 1999).

²³ LAGUMINA, *supra* note 22, at 14-16. Italians, for example, were variously referred to as “the Chinese of Europe,” “dagoes,” and “guineas”—a probable reference to slaves from West Africa. MICHAEL BARONE, THE NEW AMERICANS: HOW THE MELTING POT CAN WORK AGAIN 143 (2001).

²⁴ 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>.

of California to clear the land and lay the tracks for the then-expanding economy. By the time of the severe recession that seized the United States in the 1870s, “many thousands of unemployed men” were saying “with great bitterness that but for their presence work and bread would be plenty.”²⁵ The very frugality and industriousness of the Chinese were turned as arguments against them; they 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.²⁶ Opponents warned that masses of Chinese would render America an “Asiatic state”²⁷ 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.”²⁸ The fear over the racial transformation of California presents a parallel with contemporary fears, voiced, for example, by Senator Russell Pearce, sponsor of Arizona Senate Bill 1070, of America being “overrun” by “illegal aliens” and transformed into Mexico.²⁹

In another tactic with parallels to our present, the vilified alien “Chinaman” was associated with crime, with advocates of anti-Chinese

²⁵ *Id.*; 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”).

²⁶ 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).

²⁷ Davis Speech, *supra* note 24, at 8.

²⁸ Sargent Speech, *supra* note 26, at 4.

²⁹ Pearce, *supra* note 5 (asking rhetorically: “How long will it be before we will be just like Mexico?”).

legislation warning that China was sending masses of its unwanted criminals.³⁰ The Chinese were accused of, among other things, selling and buying their women, gambling, prostitution, thievery, and violence against whites.³¹ Like anti-immigrant advocates today,³² anti-Chinese advocates pointed to incarceration statistics to back their claim. For example, a report by the California Senate stated that the inference that “a large proportion of criminals” were among the Chinese was “abundantly sustained” by the fact that “of five hundred and forty-five of the foreign criminals in our State Prison, one hundred and ninety-eight are Chinese—nearly two-fifths of the whole—while our jails and reformatories swarm with the lower grade of malefactors.”³³ The report also deplored the costs of incarcerating Chinese criminals.³⁴

In a third striking parallel with our present, fractious political groups campaigned against the presidential administration tenuously in power by whipping up anti-immigrant sentiment. In the last quarter of the nineteenth century, national politics was closely divided, with control of Congress and the presidency frequently shifting between the two parties.³⁵ Two “minority presidents” failed to win a majority of the vote and two presidents were elected on close splits, with a bare majority of less than 25,000 votes.³⁶ In an example of the tactics of the anti-administration reform politics of the era, 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.”³⁷ They castigated the Republican presidents for opposing their calls to purge the Chinese, ignoring their “pleading for deliverance.”³⁸ Compare this with the outcry against the national government by the Tea Party, Minutemen and other groups criticizing the alleged failure to stem the

³⁰ *E.g.*, 1877 SENATE OF CAL. REPORT, *supra* note 26, 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 26, at 7, 8-9.

³¹ 1877 SENATE OF CAL. REPORT, *supra* note 26, at 5, 20-31 (women in servitude); Winn Valedictory Address, *supra* note 26, at 5 (describing gambling dens and “other dark dens where crimes that cannot be named are habitually committed”).

³² *See, e.g.*, *Border States Deal with More Illegal Immigrant Crime than Most, Data Suggest*, FOXNEWS.COM, Apr. 30, 2010, <http://www.foxnews.com/politics/2010/04/29/border-states-dealing-illegal-immigrant-crime-data-suggests>.

³³ 1877 SENATE OF CAL. REPORT, *supra* note 26, at 4.

³⁴ *Id.* at 4, 28.

³⁵ ELMER CLARENCE SANDMEYER, *THE ANTI-CHINESE MOVEMENT IN CALIFORNIA* 111 (Illini Books 1991) (1939).

³⁶ *Id.*

³⁷ 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>.

³⁸ *Id.* at 2-3.

“invasion” over the United States-Mexico border.³⁹ In a similarly fractious political environment, after a grinding recession and closely divided politics, when national politicians were forced to “champion[] legislative measures which they otherwise might have opposed,”⁴⁰ the infamous Chinese Exclusion Act of 1882, banning Chinese laborers from immigrating and any Chinese from naturalizing,⁴¹ was passed.

B. *Déjà Vu Laws*

The Chinese Exclusion Act of 1882 is often cited as the paradigmatic piece of anti-Chinese legislation.⁴² Well before the Chinese Exclusion Act, however, state and local laws were deployed in an attempt to expel the Chinese both directly, as well as through indirect methods, such as licensing, housing and criminal laws.

Some avenues of anti-immigrant legislation were closed to the states early on, but that did not prevent repeated tries. In 1949, the Supreme Court held in *The Passenger Cases* that states may not interfere with the federal power to regulate foreign commerce by imposing passenger head taxes on ships entering a port.⁴³ In one of eight opinions in the case, Justice McLean suggested that while “the municipal power of a State cannot prohibit the introduction of foreigners 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.”⁴⁴ Apparently acting on this suggestion, in 1852 the California legislature enacted a law requiring a bond of \$500 per non-citizen passenger.⁴⁵ By 1855, however, the

³⁹ For a fieldwork-based portrait of critiques of the federal government by groups such as the Minutemen, see Mary D. Fan, *When Deterrence and Death Mitigation Fall Short: Fantasy and Fetishes as Gap-Fillers in Border Regulation*, 42 LAW & SOC'Y REV. 701 (2008). See also, e.g., John M. Broder, *The Nation: Border War; Immigration, From a Simmer to a Scream*, N.Y. TIMES, May 21, 2006, § 4, at 41; Marc Lacey, *Taking Their Fight on Illegal Immigrants to the Arizona Border*, N.Y. TIMES, Aug. 16, 2010, at A9.

⁴⁰ SANDMEYER, *supra* note 35, at 111.

⁴¹ Chinese Exclusion Act, ch. 126, §§ 1, 14, 22 Stat. 58 (1882). The Act also made it a misdemeanor to bring in Chinese laborers. *Id.* § 2.

⁴² See, e.g., Roger Daniels, *Foreword* to SANDMEYER, *supra* note 35, at 3 (stating that the legislation “mark[ed] the beginning of a period of more than eight decades (1882-1965) in which the immigration policy of the United States was officially racist”). A point of difference on dates: From Congress's first legislation on citizenship in 1790, limiting naturalization to “white persons,” immigration law was raced. For an excellent account of the racial identity litigation that ensued by people seeking entry into the national community, see LÓPEZ, *supra* note 22.

⁴³ *Smith v. Turner (The Passenger Cases)*, 48 U.S. (7 How.) 283 (1849).

⁴⁴ *Id.* at 406 (McLean, J.).

⁴⁵ 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

legislature had gotten bolder and enacted a direct tax titled “An Act to Discourage the Immigration to this State of Persons Who Cannot Become Citizens Thereof”⁴⁶—in other words, a tax to discourage the immigration of non-whites, because, since 1790, Congress had limited naturalization to “a free white person.”⁴⁷ The 1855 California law required ship masters or owners to pay a fifty dollar head tax for any person “incompetent” to become a citizen.⁴⁸ This unsubtle law was struck down two years later by the California Supreme Court in *People v. Downer*.⁴⁹ *Downer* arose out of an action to exact \$12,750 in head tax against the owners of the ship “Stephen Baldwin” for bearing 250 Chinese passengers.⁵⁰ 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.⁵¹

Undaunted, the California legislature in 1858 enacted another unsubtle law in an attempt to steer immigration policy—“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.⁵² The act made it a misdemeanor, punishable by fine or imprisonment for not less than three months nor more than a year, for Chinese to land or to bring Chinese in.⁵³ When California attempted to enforce the law, the California Supreme Court declared it void and unconstitutional in an opinion never reported.⁵⁴

In 1875, the U.S. Supreme Court invalidated a modified version of the California statute requiring the posting of a \$500 bond per Chinese woman who the Commissioner of Immigration, in his discretion, deemed at risk of being a “lewd and debauched” person.⁵⁵ Justice Field, riding circuit, had earlier ordered the release of Chinese women held under the statute, 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

Supreme Court two decades later in *State v. Steamship Constitution*, 42 Cal. 578, 589-90 (1872), as an impermissible interference in foreign commerce.

⁴⁶ 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.

⁴⁷ Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103, *repealed by* Act of Jan. 29, 1795, ch. 20, 1 Stat. 414.

⁴⁸ § 1, 1855 Cal. Stat. at 194.

⁴⁹ 7 Cal. 169 (1857).

⁵⁰ *Id.* at 169.

⁵¹ *Id.* at 171.

⁵² 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.

⁵³ *Id.* §§ 1-2.

⁵⁴ *See* *Lin Sing v. Washburn*, 20 Cal. 534, 538 (1862) (recounting that the Supreme Court informed counsel of this history from the bench).

⁵⁵ *Chy Lung v. Freeman*, 92 U.S. 275, 276 (1875).

subject to state control or interference.”⁵⁶ Enfolded in Justice Field’s analysis were burgeoning equality concerns. He stated that anti-Chinese feelings could not “justify any legislation for their exclusion, which might not be adopted against the inhabitants of the most favored nations of the Caucasian race, and of Christian faith.”⁵⁷ He deplored the discrimination in laws ostensibly aimed at debauched women that are “shocked when a frail child of China is landed on our shores, and yet allow[] the bedizened and painted harlot of other countries to parade our streets and open her hells in broad day, without molestation and without censure.”⁵⁸ He concluded that an alternative basis for invalidating the legislation was the newly enacted legislation of 1870, implementing the equal protection guarantee of the recently adopted Fourteenth Amendment.⁵⁹ In *Chy Lung v. Freeman*, a unanimous Court ruled that the law impermissibly interfered with the power of Congress to regulate commerce with foreign nations, reasoning in essence that one state could not inflict nationwide externalities marring foreign relations and trade.⁶⁰

While the Court did not address the discrimination argument Justice Field had eloquently sketched earlier, the Court obliquely deplored the “extraordinary statute” that gave the Commissioner arbitrary discretion to require bonds for any passenger that looked to him to be an “idiot” or a potential “pauper” or “lewd woman.”⁶¹ Such unbounded discretion opened the door to “systematic extortion of the grossest kind,” the Court wrote.⁶² The specter of discrimination was thus obliquely acknowledged in the guise of concern over the law’s conferral of open-ended discretion through vague terms. *Chy Lung*’s arbitrariness analysis was thus an intriguing precursor to vagueness doctrine cases a century later, such as *Papachristou v. Jacksonville*, which addressed antidiscrimination concerns in the guise of arbitrariness and vagueness analysis.⁶³

The legislature and localities also tried alternative ways to drive out the Chinese, such as licensing, taxes, employment and housing laws. In May 1852, the California legislature revived a tax on foreign miners that had previously been used to drive out Latin American miners,⁶⁴

⁵⁶ *In re Ah Fong*, 1 F. Cas. 213, 216 (C.C.D. Cal. 1874).

⁵⁷ *Id.* at 217.

⁵⁸ *Id.*

⁵⁹ *Id.* at 218.

⁶⁰ *Chy Lung*, 92 U.S. at 278-80.

⁶¹ *Id.* at 277-78.

⁶² *Id.* at 278.

⁶³ *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972) (invalidating on vagueness grounds an anti-vagrancy ordinance that permitted arrests on grounds such as “loafing,” being a “vagrant,” and “wandering or strolling” without apparent “lawful purpose or object”).

⁶⁴ Doris Marion Wright, *The Making of Cosmopolitan California: An Analysis of Immigration 1848-1870*, 19 CAL. HIST. SOC’Y Q. 323, 330 (1940).

assessing a three dollar per month license fee on foreign miners.⁶⁵ By 1855—“perhaps the high-water mark of anti-Chinese sentiment in the legislature for the entire decade”—harsher measures were being debated, with a committee of the California assembly recommending an outright ban on Chinese miners.⁶⁶ The extreme proposal failed, but taxes were doubled to six dollars per month, with annual increases of two dollars per month for foreigners “ineligible to become citizens of the United States”—a vast and spiraling sum that had the manifest object “to drive the subjects of it—the Chinese—from the State,” as lawyers for the Chinese recounted.⁶⁷ The amount was later reduced to four dollars per month at the urging of businessmen desiring trade with China, and missionaries repelled by racism and hopeful of gaining Chinese Christian converts.⁶⁸ Despite the failure of the statewide outright ban on Chinese miners, some local mining districts enacted bans on “Asiatics” or the Chinese in their bylaws.⁶⁹

In 1862, another anti-Chinese tax of \$2.50 per Chinese person was passed. 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,”⁷⁰ the legislation was dubbed the “Anti-Coolie Act.”⁷¹ That same year, a fractured California Supreme Court identified the law for what it was—yet another strategy to drive out the Chinese—and struck it down as an impermissible interference with the federal power to regulate commerce, including federal laws permitting the flow of foreign peoples.⁷²

California was particularly hard-hit by the 1870s recession, the worst the fledgling nation had experienced, and widespread unemployment, mortgage foreclosures, and homelessness stirred radical reactions and calls for state constitutional reform.⁷³ The anti-Chinese campaign was intensifying, stirred by rabble-rousers such as Dennis

⁶⁵ 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.

⁶⁶ CHARLES J. MCCLAIN, *IN SEARCH OF EQUALITY: THE CHINESE STRUGGLE AGAINST DISCRIMINATION IN NINETEENTH-CENTURY AMERICA* 17 (1994).

⁶⁷ See *Lin Sing v. Washburn*, 20 Cal. 534, 536 (1862) (summarizing the account of anti-Chinese laws by lawyers for Lin Sing).

⁶⁸ MCCLAIN, *supra* note 66, at 18-20.

⁶⁹ See Mark Kanazawa, *Immigration, Exclusion, and Taxation: Anti-Chinese Legislation in Gold Rush California*, 65 J. ECON. HIST. 779, 783 (2005).

⁷⁰ 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. The Act exempted those engaged in the manufacture of sugar, rice, coffee and tea. *Id.*

⁷¹ THE ROCKY ROAD TO LIBERTY: A DOCUMENTED HISTORY OF CHINESE IMMIGRATION AND EXCLUSION 215 (Sen Hu & Jieli Dong eds., 2010).

⁷² *Lin Sing*, 20 Cal. at 565-66, 575-80.

⁷³ See Harry N. Scheiber, *Race, Radicalism, and Reform: Historical Perspective on the 1879 California Constitution*, 17 HASTINGS CONST. L.Q. 35, 36-37 (1989).

Kearney of the self-styled "Workingmen's Party."⁷⁴ The resulting revised California Constitution of 1879 included an article, simply titled "Chinese," that captured the anti-Chinese friend-enemy politics of the times. The provision is striking to read in comparison to contemporary accusations about "illegal aliens." Section 1 of the "Chinese" article 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"⁷⁵ Sections 2 and 3 forbade 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."⁷⁶ Lest there be any doubt about the intent of the article and the politics of fear on which it was founded, the final section declared: "The presence of foreigners ineligible to become citizens of the United States is 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."⁷⁷

In response, the legislature enacted laws criminalizing the employment of Chinese on pain of fines, imprisonment of at least two hundred days and up to two years, and forfeiture of the corporate charter, franchise and privileges upon second conviction.⁷⁸ Businessman Tiburcio Parrott was imprisoned for an alleged violation of the law.⁷⁹ He appealed his conviction, arguing first that the anti-Chinese law was void because it violated the Fourteenth Amendment and legislation implementing the equal protection guarantee.⁸⁰ Two judges wrote for the federal Circuit Court for the District of California, which invalidated the conviction and voided the anti-Chinese employment laws. Judge Hoffman noted, in an early interest-tying type of argument, that the law "might equally well have forbidden the employment of Irish, or Germans, or Americans, or persons of color, or it might have required the employment of any of these classes of persons to the exclusion of the rest."⁸¹ He primarily grounded his decision not in the violation of the rights of the Chinese, but rather in the violation of the rights of corporations, many of which he noted had ceased operations or faced closure if the anti-Chinese laws were

⁷⁴ *Id.* at 39-40.

⁷⁵ CAL. CONST., art. XIX, § 1 (repealed Nov. 4, 1952).

⁷⁶ *Id.* §§ 2-3.

⁷⁷ *Id.* § 4.

⁷⁸ See *In re Tiburcio Parrott*, 1 F. 481, 483-84 (C.C.D. Cal. 1880) (summarizing laws at issue).

⁷⁹ *Id.* at 483.

⁸⁰ *Id.* at 484.

⁸¹ *Id.* at 491 (Hoffman, J.).

enforced.⁸² He held that the right of corporations “to utilize their property, by employing such laborers as they choose” could not be overridden by the prohibited purpose of driving the Chinese out.⁸³ Judge Sawyer, in contrast, was less shy about directly ruling that the California law was in violation of treaty protections, as well as the Fourteenth Amendment and laws implementing the Fourteenth Amendment that gave “all persons” the “same right” to make and enforce contracts and enjoy “full and equal benefit of all laws.”⁸⁴

Another legal battle was also brewing regarding a housing law that swept Chinese en masse into prisons, where under a municipal ordinance their queues—long, low ponytails that custom dictated Chinese men wear lest misfortune and disgrace befall them—were cut off. The 1876 law criminalized any person sleeping or lodging in a room or apartment with less than five hundred cubic feet of space as well as landlords renting such accommodations.⁸⁵ Because Chinese were often packed into such quarters, many faced fines or jail. Once in jail, under what was dubbed the “Queue Ordinance,” the queues of Chinese men were shaved off, a mark of disgrace in the traditions of the Chinese.⁸⁶ Justice Field, again riding circuit, invalidated the Queue Ordinance as both additional punishment not authorized by statute and a violation of the Fourteenth Amendment’s equal protection guarantee because the ordinance was undisputedly targeting the Chinese and was not enforced against any other persons.⁸⁷ In concluding the decision, Justice Field noted the deep hostility against the Chinese, but again admonished California that “[w]hatever is done by way of exclusion” beyond the exclusion of paupers, the diseased and others likely to be a burden and thus able to be expelled in a state’s self-defense “must come from the general government.”⁸⁸

Perhaps most famously, in 1886, the U.S. Supreme Court intervened in *Yick Wo v. Hopkins*⁸⁹ to invalidate the selective prosecution of Chinese laundry operators. *Yick Wo* involved a San Francisco ordinance that criminalized the operation of laundries in wood buildings—where the vast majority of laundries were housed—without consent of the board of supervisors, whose “arbitrary” discretion to consent was a matter of “mere will” unguided by

⁸² *Id.* at 492-93.

⁸³ *Id.* at 493-99.

⁸⁴ *Id.* at 501-10 (Sawyer, J.).

⁸⁵ Act of Apr. 3, 1876, ch. 496, §§ 1-2, 1876 Cal. Stat. 759, 759.

⁸⁶ See *Ho Ah Kow v. Nunan*, 12 F. Cas. 252, 253, 255 (C.C.D. Cal. 1879) (describing such a case).

⁸⁷ *Id.* at 253-56.

⁸⁸ *Id.* at 256.

⁸⁹ 118 U.S. 356 (1886).

standards.⁹⁰ This standardless authority was used to put Chinese laundry owners out of business through withholding of consent and imprisonment, while non-Chinese owners were allowed to operate.⁹¹

The Supreme Court famously held:

Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution.⁹²

Apparently undaunted, and still unsatisfied despite passage of the 1882 Chinese Exclusion Act, San Francisco resorted to a more draconian measure in the guise of a housing ordinance. The 1890 ordinance forbade Chinese from living or conducting business in the city except in a prescribed area, and required removal of Chinese from their homes to this racialized ghetto.⁹³ In a brief but evocative decision invalidating the ordinance, Circuit Judge Sawyer wrote:

The obvious purpose . . . is, for forcibly driv[ing] out a whole community of twenty-odd thousand people . . . from a whole section of the city which they have inhabited, and in which they have carried on all kinds of business . . . for more than 40 years. Many of them were born there, in their own houses, and are citizens of the United States This, besides being discrimination, against the Chinese, and unequal in its operation as between them and all others, is simply an arbitrary confiscation of their homes and property, a depriving them if [sic] it, without due process or any process of law. . . .

That this ordinance is a direct violation, of, not only, the express provisions of the constitution of the United States, in several particulars, but also of the express provisions of our several treaties with China, and of the statutes of the United States, is so obvious, that I shall not waste more time, or words in discussing the matter.⁹⁴

Habits of hatred die hard and more anti-Chinese laws would follow, even after these repeated repudiations.⁹⁵ This plethora of state and local laws before the turn of the century shows the creativity and variability of laws used to vent racialized anxieties and challenge and intervene in federal immigration policy.

⁹⁰ *Id.* at 368.

⁹¹ *Id.* at 374.

⁹² *Id.* at 373-74.

⁹³ See *In re Lee Sing*, 43 F. 359, 359 (C.C.N.D. Cal. 1890) (reproducing ordinance).

⁹⁴ *Id.* at 361.

⁹⁵ See, e.g., *Wong Wai v. Williamson*, 103 F. 1 (C.C.N.D. Cal. 1900) (invalidating municipal law requiring Chinese to be inoculated with dangerous bubonic plague serum and quarantining the Chinese).

II. THE RESURGENCE OF STATE AND LOCAL ANTI-“ALIEN” LAWS

Part of the point of examining the history of unruly state and local passions is to show how even as law evolves, new forms can be vehicles for old, forbidden impulses to drive out racially distinctive others. The lesson is important for our avowedly “post-racial” times when racialized anxieties cannot be voiced openly aloud and must be dressed in legitimizing constructs that still pursue old goals. From this history, we can draw lessons as people socialized in the popular politics and fierce legal controversies of our present.

The tale of our present need not be told in painstaking detail because we live it now as members of the polity and consumers of everyday stories of the revived campaign against the “illegal alien.” The “illegal alien” is a convenient, ostensibly a-racial construct still imbued with strongly racialized anxieties. Scholars have noted that despite the seeming cleansing of explicit racial reference from the term alien, it is suffused with racialized perception, used to refer to “undocumented Mexicans,” and draws on “stereotypes about Mexicans as criminals.”⁹⁶ Resurgent anti-“alien” state and local laws are also fueled by anxieties regarding an influx of Mexican and other Latino people. Two prominent examples in the legal news and potential pattern legislation for other anti-“alien” laws are the ordinances of the City of Hazleton and Arizona’s Senate Bill 1070. These state and local laws vent anger over inflows of Latinos through strategies directed in form at “illegal aliens,” but that in practice create a hostile environment for the racially distinctive to dampen their population.⁹⁷

A. *The Hazleton Model*

As the Third Circuit recently recounted, the City of Hazleton, Pennsylvania, formerly having a population of 23,000, swelled by approximately 10,000 people between 2000 and 2007, mostly “due to an influx of Latino families.”⁹⁸ The newcomers included a mix of

⁹⁶ Kevin R. Johnson, *The New Nativism: Something Old, Something New, Something Borrowed, 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 (2004) (tracing the history of how Mexicans emerged as “the iconic illegal alien”).

⁹⁷ *Cf. Lozano v. City of Hazleton*, No. 07-3531, 2010 WL 3504538, at *42 (3d Cir. Sept. 9, 2010) (“We recognize, of course, that Hazleton’s housing provisions neither control actual physical entry into the City, nor physically expel persons from it. Nonetheless, in essence, that is precisely what they attempt to do.” (internal quotation marks and brackets omitted)).

⁹⁸ *Id.* at *1.

citizens, lawful permanent residents, and undocumented immigrants, generally moving from New York and New Jersey to Pennsylvania.⁹⁹ Beginning in July 2006, the Hazleton City Council began enacting a series of ordinances to address accusations that “aliens lacking lawful status were to blame” for a host of problems such as overburdening social services, including public education and health care, dampening wages and job availability, aggravating crime and disorder, introducing dangerous criminal gangs, and saddling the public with increased incarceration costs.¹⁰⁰ While the city’s expert reports¹⁰¹ were careful to refer to the impact of the “immigrants” or “illegal aliens” as an abstract a-racial construct, it was clearly a proxy for concern over Latinos. For example, an expert report for Hazleton referred to the large increase in public school enrollment and dramatic increase in the number of English as a Second Language students in concluding, “[t]he taxpayers of Hazleton have felt the result of illegal immigration.”¹⁰² This line of logic shows the conflation of Latino influx with illegal immigration.

Beginning in July 2006, the City of Hazleton began enacting ordinances venting its displeasure with the surge of newcomers. The first, titled the “Illegal Immigration Relief Act Ordinance,” prohibited employing or harboring undocumented aliens in the city.¹⁰³ The “Tenant Registration Ordinance” followed in August 2006 and mandated that tenants secure an occupancy permit, which required proof of lawful citizenship or residency.¹⁰⁴

Several plaintiffs filed suit in August 2006 challenging the Registration and Illegal Immigration Ordinances.¹⁰⁵ The Illegal Immigration Ordinance was subsequently supplanted in September 2006 by the “Illegal Immigration Relief Act Ordinance” and “Official English Ordinance,” and was again amended in December 2006 and during the 2007 trial.¹⁰⁶ As amended, the Illegal Immigration

⁹⁹ *Id.*

¹⁰⁰ *Id.*; Expert Report & Affidavit of George J. Borjas, The Labor Mkt. Impact of Immigration, *Lozano*, 2010 WL 3504538 (No. 06CV01586); Expert Report & Affidavit of Steven A. Camarota, Illegal Immigration’s Impact on Pub. Educ. & Cmty., *Lozano*, 2010 WL 3504538, (No. 06CV01586) [hereinafter Camarota Report]; Expert Report & Affidavit of Jared L. Lewis, *Lozano*, 2010 WL 3504538 (No. 06CV01586); Expert Report & Affidavit of John L. Martin, Statement Regarding the Fiscal Impact of Illegal Aliens, *Lozano*, 2010 WL 3504538 (No. 06CV01586).

¹⁰¹ See *supra* note 100.

¹⁰² Camarota Report, *supra* note 100.

¹⁰³ Hazleton, Pa., Ordinance 2006-10 (July 13, 2006), available at <http://www.clearinghouse.net/chDocs/public/IM-PA-0001-0003.pdf>.

¹⁰⁴ Hazleton, Pa., Ordinance 2006-13 (Aug. 15, 2006), available at <http://www.clearinghouse.net/chDocs/public/IM-PA-0001-0020.pdf>.

¹⁰⁵ Complaint, *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477 (M.D. Pa. 2007) (No. 3:06cv1586).

¹⁰⁶ Hazleton, Pa., Ordinance 2006-18 (Sept. 21, 2006), available at <http://www.clearinghouse.net/chDocs/public/IM-PA-0001-0010.pdf>, as amended by Hazleton, Pa.,

Ordinance began by declaring that “illegal aliens harm the health, safety and welfare of authorized US workers and legal residents”; heighten crime rates; overburden public services such as hospitals, “increasing their cost and diminishing their availability to legal residents”; and generally “diminish[] our overall quality of life.”¹⁰⁷ This text echoed some of the accusations of Hazleton’s mayor, Lou Barletta, who argued that “the small-town quality of life we had come to enjoy was being destroyed by criminal aliens who were driving up our crime rate,” draining social services, and taking away jobs.¹⁰⁸ Mayor Barletta was an advocate of strategies to induce “self-deport[ation].”¹⁰⁹

With echoes of the 1880 San Francisco municipal laws that leveraged the power of regulating corporations to bar the employment of Chinese,¹¹⁰ Hazleton’s Illegal Immigration Ordinance leveraged the licensing power to bar employment of illegal aliens.¹¹¹ Under the ordinance, business owners must submit sworn affidavits affirming that they do not knowingly employ unlawful workers and face suspension of their business permit if an undocumented employee is discovered and not terminated within three days.¹¹² Upon a second or subsequent violation, the permit is suspended for twenty days.¹¹³ A safe harbor is offered as incentive for employers to check immigration status using the “Basic Pilot Program,”¹¹⁴ also known as E-Verify. E-Verify is a federal trial program that is more effective than the regular I-9 verification process in catching those unauthorized to work, but has resulted in “unintentional discrimination” against foreign-born naturalized citizens and work-authorized individuals because of high nonconfirmation rates due to database problems.¹¹⁵ The E-Verify system is Internet based and electronically checks Social Security Administration and Department of Homeland Security records in determining employment eligibility.¹¹⁶ The leveraging of the licensing power took advantage of a savings

Ordinance 2006-40 (Dec. 28, 2006), available at <http://www.clearinghouse.net/chDocs/public/IM-PA-0001-0016.pdf>, and Hazleton, Pa., Ordinance 2007-6 (Mar. 21, 2007), available at <http://www.aclupa.org/downloads/hazletonord607.pdf>.

¹⁰⁷ *Id.* § 2(C).

¹⁰⁸ Press Release, Lou Barletta, Mayor, City of Hazleton (Sept. 9, 2010), available at <http://www.smalltowndefenders.com>.

¹⁰⁹ *Id.* (“[T]he main line of defense against illegal immigration is to eliminate the availability of jobs to illegal aliens. If illegal aliens have no place to work, they will self-deport.”).

¹¹⁰ See *infra* Part I.B.

¹¹¹ Ordinance 2006-18, § 4.

¹¹² *Id.*

¹¹³ *Id.* § 4(B)(7).

¹¹⁴ *Id.* § 4(B)(5).

¹¹⁵ See U.S. CITIZENSHIP & IMMIGRATION SERVS., REPORT TO CONGRESS ON THE BASIC PILOT PROGRAM 3 (2004), available at <http://www.iwj.org/doc/USCIS%20report%20Basic%20Pilot%2006-04.pdf>.

¹¹⁶ See *Ariz. Contractors Ass’n v. Napolitano*, 526 F. Supp. 2d 968, 973 (D. Ariz. 2007) (describing the E-Verify system).

clause for “licensing and similar laws” in the express preemption provision of the federal Immigration Reform and Control Act (IRCA) regulating the employment of undocumented workers.¹¹⁷

Besides the employment provisions, the Illegal Immigration Ordinance also created the offense of “harboring illegal aliens” for providing housing to illegal aliens knowingly or in reckless disregard of the fact of illegal alien status.¹¹⁸ Failure to evict illegal aliens within five business days of written notice results in denial or suspension of a rental license and \$250 fines for subsequent violations.¹¹⁹ These housing provisions are further supplemented by the Registration Ordinance, which requires tenants to obtain occupancy permits upon proof of, among other things, “legal citizenship and/or residency.”¹²⁰

Private and public surveillance is used to enforce the ordinances. Any city resident, business owner or official may initiate a complaint regarding illegal aliens being employed or housed.¹²¹ Until the city amended it in the course of the trial, the ordinance provided, “[a] complaint which alleges a violation *solely or primarily* on the basis of national origin, ethnicity, or race shall be deemed invalid and shall not be enforced.”¹²² In the course of the trial, the ordinance was amended to provide, “[a] complaint which alleges a violation on the basis of national origin, ethnicity or race shall be deemed invalid and shall not be enforced.”¹²³ Despite the intense controversy over the small municipality’s laws, described as the “nation’s strictest” and “designed to make the city one of the most hostile in the country for illegal immigrants,”¹²⁴ numerous state and local laws now have “provisions that are either identical or similar to provisions in Hazleton’s ordinances.”¹²⁵

¹¹⁷ See 8 U.S.C. § 1324a(h)(2) (2006) (“The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.”).

¹¹⁸ Ordinance 2006-18, § 5.

¹¹⁹ *Id.* § 5(B)(4), (8).

¹²⁰ Hazleton, Pa., Ordinance 2006-13, § 7(B)(1)(g) (Aug. 15, 2006).

¹²¹ Ordinance 2006-18, § 4(B)(1), 5(B)(1).

¹²² *Id.* §§ 4(B)(2), 5(B)(2) (emphasis added).

¹²³ Hazleton, Pa., Ordinance 2007-6, §§ 4(B)(2), 5(B)(2) (Mar. 21, 2007), available at <http://www.aclupa.org/downloads/hazletonord607.pdf>.

¹²⁴ Associated Press, *Pennsylvania Town Enacts Strict Illegal Immigration Ordinance*, FOXNEWS.COM (July 14, 2006), <http://www.foxnews.com/story/0,2933,203513,00.html> (also quoting opponent arguing that the ordinance would make Hazleton “the first Nazi city in the country”).

¹²⁵ *Lozano v. City of Hazleton*, No. 07-3531, 2010 WL 3504538, at *24 (3d Cir. Sept. 9, 2010).

B. *Arizona's Approaches*

In the toughness and controversy contest, Arizona's Senate Bill 1070, enacted this summer, has seized the title from Hazleton.¹²⁶ The stated purpose of the Arizona bill is to attain "attrition through enforcement"—that is, to grind down the population of unlawful aliens and their economic activity.¹²⁷ Even before the headline-grabbing legislation, however, Arizona had made a foray into investigating and adjudicating, as well as sanctioning, immigration law violations in legislation similar to, but in some aspects even more aggressive than, Hazleton's regulation of the employment of undocumented persons couched as a licensing law.

1. State Investigation and Adjudication of Employers

During the earlier anti-immigrant political broil that seized the nation, Arizona enacted the Legal Arizona Workers Act of 2007.¹²⁸ That legislation also sought to leverage the state licensing power and the savings clause in the express preemption provision of IRCA for "licensing and similar laws"¹²⁹ into the expansive power to investigate, adjudicate, and sanction the employment of unauthorized workers.

The legislation not only imposes potentially more severe state sanctions for employing undocumented workers, but also prescribes more aggressive state procedures for investigating and adjudicating suspected undocumented workers than federal law. The Arizona law makes it a state law offense to "knowingly" or "intentionally" employ "an unauthorized alien" and requires Arizona's Attorney General to create anonymous complaint forms for alleging that a business is employing an unauthorized alien.¹³⁰ Upon receiving such an anonymous complaint duly filed on the prescribed form, the state Attorney General *must* investigate and, if the complaint is not "false and frivolous," must, among other things, notify the relevant county attorney to bring a state law enforcement action.¹³¹ Though the state law incorporates the federal law definition of "unauthorized alien" and

¹²⁶ See Randal C. Archibold, *Arizona Enacts Stringent Law on Immigration*, N.Y. TIMES, Apr. 24, 2010, at A1 (terming the law "the nation's toughest bill on illegal immigration").

¹²⁷ S.B. 1070, 49th Leg., 2d Sess. § 1 (Ariz. 2010).

¹²⁸ ARIZ. REV. STAT. ANN. §§ 23-211 to 23-216 (2010).

¹²⁹ 8 U.S.C. § 1324a(h)(2) (2006).

¹³⁰ §§ 23-212(A)-(B), -212.01(A)-(B).

¹³¹ §§ 23-212(B)-(D), -212.01(B)-(D) (couching the duty to investigate duly filed anonymous complaints in the mandatory "shall").

directs the state court to “consider only the federal government’s determination pursuant to United States Code § 1373(c),” which provides for federal checks of citizenship and immigration status, the federal determination creates only a “rebuttable presumption of the employee’s lawful status.”¹³² Thus, under the Arizona law, an anonymous complaint can lead to a mandatory investigation and adjudication in state court, which may reach a conclusion regarding authorization to work different from the federal determination.

In another departure from the federal immigration investigation and enforcement scheme, the Arizona law mandates that employers verify employment eligibility of new hires using the E-Verify system after December 31, 2007.¹³³ Registration and participation in the E-Verify program in general is further mandatory for employers who receive “any grant, loan or performance-based incentive” from any state governmental entity after September 30, 2008.¹³⁴ These provisions are thus even more aggressive than an incentives-based strategy and flatly require use of the E-Verify system though it is only a voluntary pilot program under federal law in part because of concerns for the risk of error and resultant discrimination.¹³⁵

On the sanction side, penalties for a first-time knowing or intentional violation include: mandated quarterly reporting of new hires for a probation period of three years for knowing violations and five years for intentional violations; required termination of all unauthorized aliens; and submission of an affidavit confirming the termination and commitment not to knowingly or intentionally hire an unauthorized alien.¹³⁶ For a first-time intentional violation, the business license is also mandatorily suspended for a minimum of ten days, while for a first-time knowing violation, the court has discretion to suspend the business license for a maximum of ten days.¹³⁷ The business license is permanently revoked upon a second knowing or intentional violation.¹³⁸ The legislation thus levies what then-Arizona Governor Janet Napolitano called a “business death penalty” by stripping businesses of their licenses, defined broadly to include, for example, foundational documents necessary to existence such as articles of incorporation.¹³⁹

¹³² §§ 23-212(H), -212.01(H).

¹³³ § 23-214(A).

¹³⁴ § 23-214(B).

¹³⁵ See *supra* text accompanying notes 114-15.

¹³⁶ § 23-212(F)(1), -212.01(F)(1).

¹³⁷ *Id.*

¹³⁸ §§ 23-212(F)(3), -212.01(F)(3).

¹³⁹ § 23-211(9) (defining license to mean “any agency permit, certificate, approval, registration, charter or similar form of authorization that is required by law and that is issued by any agency for the purposes of operating a business in this state,” and to include, for example, articles of incorporation or certificates of partnership); Greg Stohr, ‘Business Death Penalty’ for Hiring Illegal Aliens Unites Obama, Companies, BLOOMBERG (Dec. 8, 2010, 12:01 AM),

2. “Attrition Through Enforcement” and the Police Surveillance State

Even while the constitutionality of the earlier foray into immigration law investigation and enforcement was pending before the U.S. Supreme Court,¹⁴⁰ Arizona enacted the even more aggressive Arizona Senate Bill 1070.¹⁴¹ The latest Arizona legislation was fueled by incendiary politics painting Arizona as a state under siege and equating immigration with rampant crime. For example, Arizona Governor Jan Brewer took to the airwaves to proclaim, “We cannot afford all this illegal immigration and everything that comes with it, everything from the crime and to the drugs and the kidnappings and the extortion and the beheadings and the fact that people can't feel safe in their community. It's wrong! It's wrong!”¹⁴² The tragic and highly emotionally salient shooting of Arizona rancher Robert Krentz by a suspected illegal border crosser was used to amplify the prevalent “illegal alien crime wave” theme,¹⁴³ though the tragedy was a relative anomaly and a Border Patrol spokesman reported he was unaware of any illegal alien having murdered a U.S. citizen in the region for more than a decade.¹⁴⁴ Paul Babeu, president of the Arizona Sheriff's Association and an elected official with political incentives, also helped sound the crime and immigration alarm, telling FOX News that criminal “illegals” were to blame for Arizona having “the highest crime rates in America.”¹⁴⁵

In reality, Arizona is experiencing an equally or even greater decline in crime than the national average.¹⁴⁶ Graphs 1 and 2 plot crime

<http://bx.businessweek.com/business-and-the-supreme-court/view?url=http%3A%2F%2Fwww.bloomberg.com%2Fnews%2F2010-12-08%2F-business-death-penalty-immigrant-case-unites-obama-companies.html>.

¹⁴⁰ See *Chamber of Commerce v. Candelaria*, 130 S. Ct. 3498 (2010) (granting certiorari). For the procedural history, see *infra* text accompanying notes 198-204. This subpart lays the foundation for later analysis by explaining key provisions and the evolution of strategy.

¹⁴¹ S.B. 1070, 49th Leg., 2d Sess. § 1 (Ariz. 2010).

¹⁴² *On the Record with Greta Van Susteren: Arizona Continues Immigration Battle—Part 1* (FOX News television broadcast June 16, 2010) (interviewing Gov. Jan Brewer) (transcript available at 2010 WLNR 12337754).

¹⁴³ See, e.g., R. Cort Kirkwood, *Crime Wave*, NEW AM., Jan. 8, 2007, at 18 (example of theme); Andrew Purcell, *Panic over Mexican Drug War Fuels US Anti-Immigration Drive*, SUNDAY HERALD (Glasgow), Aug. 1, 2010, at 34 (reporting on theme).

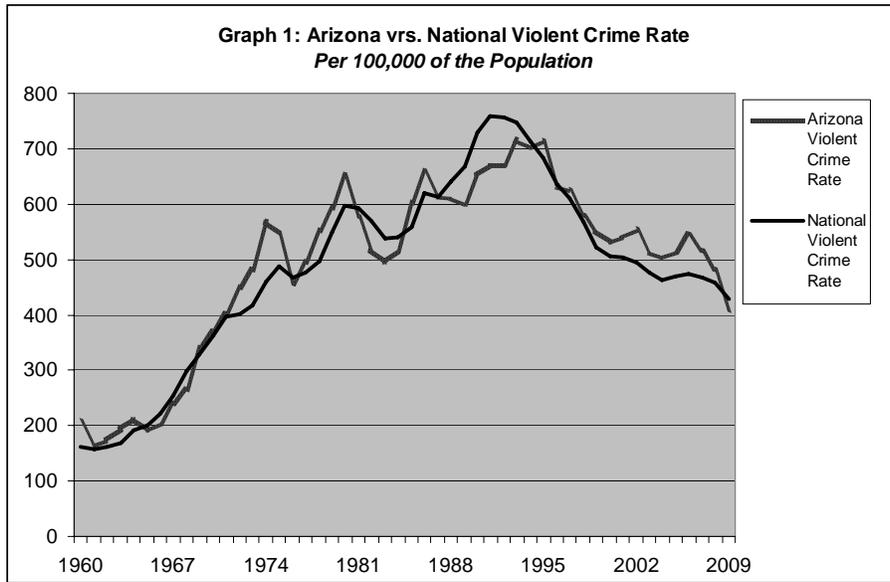
¹⁴⁴ Dennis Wagner, *Rancher's Murder Fuels Firestorm*, ARIZ. REPUBLIC, Mar. 30, 2010, at B1.

¹⁴⁵ See *FOX News, AZ Gov: Signs Immigration Bill into Law* (FOX television broadcast Apr. 23, 2010), available at <http://www.youtube.com/watch?v=YENGkp6IRE0> (interviewing Paul Babeu, President, Arizona Sheriff's Association).

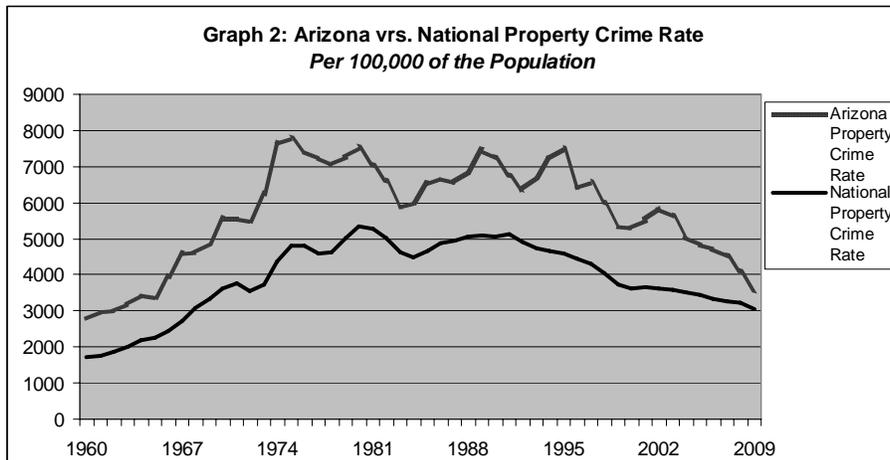
¹⁴⁶ Nicholas Riccardi, *Playing the Crime Card in Arizona: Both Sides in the Illegal-Immigration Debate Have Statistics to Bolster Their Cases*, L.A. TIMES, May 3, 2010, at A10.

rate data from the FBI's Uniform Crime Reports for Arizona compared to the nation as a whole.

Graph 1.



Graph 2.



As depicted in the graphs, in reality, Arizona's crime rate, like that of the nation overall, has been falling dramatically in recent years. Indeed, in 2009, Arizona enjoyed a lower violent crime rate than the nation overall. Arizona's property crime rate has also been dropping. And while the curve for Arizona's property crime rate has been higher than the national average, by 2009, the gap was narrowing because Arizona has been experiencing a steeper decline in property crimes than the national average. Moreover, crime rates have been flat in Arizona border towns whose denizens and officials express bemusement at the political imagery of rampant violence besetting their communities.¹⁴⁷

Indeed, sociologists have argued that rather than aggravating crime, immigrants have a "protective" effect against crime because of such factors as their diluting violent street culture with new norms, downplaying violence as the appropriate response to perceived slights, having strong family and ethnic ties, and revitalizing abandoned or malaised neighborhoods.¹⁴⁸ A new study using pooled cross-sectional time-series data found that cities with the greatest declines in homicides and robberies had the largest influx of immigrants.¹⁴⁹

But perception—and social cascades of misperception spurred by opinion leaders—are what count in politics. And the immigration-crime paradigm helped spur passage of Arizona Senate Bill 1070, the fierce product of fierce politics. Bill co-sponsor State Representative John Kavanagh furthered the theme of anti-illegal immigrant legislation as a public safety measure, saying of the undocumented, "[t]hey bring a lot of crime with them."¹⁵⁰ Public safety professionals, however, explain that the perverse effect of Arizona Senate Bill 1070 is to undermine public safety by eroding the delicate trust that police professionals have built with immigrant communities to create intelligence-gathering and crime-fighting partnerships and prevent predation on vulnerable undocumented persons.¹⁵¹

¹⁴⁷ Wagner, *supra* note 10.

¹⁴⁸ Robert J. Sampson, *Rethinking Crime and Immigration*, CONTEXTS, Winter 2008, at 28, 29-33, available at http://contexts.org/articles/files/2008/01/contexts_winter08_sampson.pdf; Wadsworth, *supra* note 11, at 535-38.

¹⁴⁹ Wadsworth, *supra* note 11, at 544-46, 549-50.

¹⁵⁰ Riccardi, *supra* note 146.

¹⁵¹ 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 the 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); Alia Beard Rau & JJ Hensley, *Police Weighing Bill's Impact*, ARIZ. REPUBLIC, Apr. 22, 2010, at A1 (noting concern of former Mesa, Arizona Police Chief that legislation would have "catastrophic impacts on community policing").

From the wisdom of experience in the field, many police agencies have realized the need to promote positive communication and trust with immigrant communities and have operated under “non-cooperation” laws—ordinances and directives providing that state and local police are not in the business of enforcing federal immigration law.¹⁵² The agreements avoid the problem of valuable intelligence being lost¹⁵³ due to witnesses’ fear to step forward and crime victims’ fear to turn to police.¹⁵⁴ The Arizona law upended this delicate balance by barring state and local police from declining to enforce federal immigration law.¹⁵⁵

Perhaps most controversially, the Arizona law requires that law enforcement officers in any lawful stop, detention or arrest attempt to 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.”¹⁵⁶ As originally enacted, the law provided that officers “may not *solely* consider race, color or national origin,”¹⁵⁷ apparently taking advantage of 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.¹⁵⁸ *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 aliens.”¹⁵⁹ In response to the firestorm of controversy, the Arizona legislature

¹⁵² See Brief of Amicus Curiae the Center on the Administration of Criminal Law in Support of Plaintiff’s Motion for a Preliminary Injunction at 11, *United States v. Arizona*, No. 10-1413 (D. Ariz. July 8, 2010), available at http://www.law.nyu.edu/ecm_dlv2/groups/public/@nyu_law_website_centers_center_on_administration_of_criminal_law/documents/documents/ecm_pro_066096.pdf (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).

¹⁵³ 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).

¹⁵⁴ 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).

¹⁵⁵ S.B. 1070, 49th Leg., 2d Sess. § 2(A) (Ariz. 2010)

¹⁵⁶ *Id.* § 2(B).

¹⁵⁷ *Id.* (emphasis added).

¹⁵⁸ *United States v. Brignoni-Ponce*, 422 U.S. 873, 886-87 (1975).

¹⁵⁹ *Id.*; see also Gabriel J. Chin & Kevin R. Johnson, *Profiling’s Enabler: High Court Ruling Underpins Arizona Immigration Law*, WASH. POST, July 13, 2010, at A15 (critiquing the *Brignoni-Ponce* decision and its consequences).

amended Senate Bill 1070 to delete the adjective “solely.”¹⁶⁰ 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”¹⁶¹—which under *Brignoni-Ponce* means what the law said before: that race can be a relevant but not a sole factor.¹⁶² The amendment gave Arizona some cover, however, in the political and legal battles ahead. Indeed, the District Court of Arizona apparently read the revision without taking into account the proviso “except to the extent permitted by the . . . Constitution” and analyzed the law for preliminary injunction purposes as if it barred consideration of race, color or national origin.¹⁶³

The Arizona law also has a rather clumsily worded requirement that “[a]ny person who is arrested shall have the person’s immigration status determined before the person is released.”¹⁶⁴ Read literally, the provision means that Arizona officials would be flooding the federal Law Enforcement Support Center, which processes immigration status checks, with requests because every arrest would necessitate a query.¹⁶⁵ In later litigation, Arizona’s lawyers tried to rewrite the law through post-hoc interpretation to mean that only where there is reasonable suspicion that an arrestee is an alien must there be a check, but the attempt was rejected.¹⁶⁶

A host of other provisions in the Arizona law are mirror images—in some instances imperfectly so—of federal immigration crimes in an attempt to further thrust Arizona into the administration of immigration law and policy.¹⁶⁷ The state law criminalizes failure to carry alien registration documents, transporting aliens, inducing aliens to enter Arizona, and employing illegal aliens, among other acts.¹⁶⁸ Further thrusting state and local officers into immigration law enforcement, the law authorizes officers to perform a warrantless arrest on probable cause to believe that the arrestee “has committed any public offense that makes the person removable from the United States.”¹⁶⁹ The Act also goes further than federal law in criminalizing the act of applying for

¹⁶⁰ H.B. 2162, 49th Leg., 2d Sess. § 3(B) (Ariz. 2010), available at <http://www.azleg.gov/FormatDocument.asp?inDoc=/legtext/49leg/2r/bills/hb2162c.htm>.

¹⁶¹ *Id.*

¹⁶² *Brignoni-Ponce*, 422 U.S. at 886-87.

¹⁶³ *United States v. Arizona*, 703 F. Supp. 2d 980, 989 (D. Ariz. 2010).

¹⁶⁴ S.B. 1070, 49th Leg., 2d Sess. § 2(B) (Ariz. 2010).

¹⁶⁵ 703 F. Supp. 2d at 995.

¹⁶⁶ *Id.* at 994-96.

¹⁶⁷ For a cogent critique of the mirror-image approach to state and local immigration criminalization, see Gabriel J. Chin & Marc L. Miller, *Cracked Mirror: SB1070 and Other State Regulation of Immigration Through Criminal Law* 33-34 (Ariz. Legal Studies, Discussion Paper No. 10-25), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1648685.

¹⁶⁸ Ariz. S.B. 1070, §§ 3, 5, 7-13.

¹⁶⁹ *Id.* § 6.

work, soliciting work, or performing work by an undocumented person.¹⁷⁰

In short, while Hazleton tried to create a hostile environment for unwanted inflows of Latinos by reaching into the workplace and home and enabling citizen complainants, Arizona's law transformed the police—willingly or not—into the ominous embodiment of unwelcome, particularly for Latinos, whose race has been deemed relevant to reasonable suspicion of alienage.¹⁷¹ Decades ago, the Supreme Court explained that in enacting a uniform national immigration system, Congress manifested the purpose of leaving the law-abiding “free from the possibility of inquisitorial practices and police surveillance”¹⁷² Arizona's laws—part of a growing patchwork of state intervention in immigration policy that threatens to sweep up lawfully present immigrants and even U.S. citizens¹⁷³—upends both the delicate balance of police and community trust and the goal of averting the problems of a patchwork of police surveillance states.

III. THE VIRTUES OF ALTERNATE FRAMES FOR VINDICATING EQUALITY VALUES

While fears of racialized harms spark the strongest fury regarding the state and local anti-immigrant laws, the firmer foundation for legal challenges are the stodgier, less controversy-riddled federalism doctrines of preemption and, potentially, due process. The Equal Protection Clause has a very high hurdle for plaintiffs to surmount, requiring proof of discriminatory intent behind the law¹⁷⁴ or discrimination in the claimant's case if discriminatory application is alleged.¹⁷⁵ Savvy officials socialized in contemporary forms and

¹⁷⁰ *Id.* § 5.

¹⁷¹ *Id.* § 2(B) (providing that officials may not base reasonable suspicion on race, color or national origin “except to the extent permitted by the United States or Arizona Constitution”); *see also* *United States v. Brignoni-Ponce*, 422 U.S. 873, 886-87 (1975) (stating that Mexican “race” can be relevant albeit not sole factor in establishing reasonable suspicion).

¹⁷² *Hines v. Davidowitz*, 312 U.S. 52, 74 (1941).

¹⁷³ *See* *United States v. Arizona*, 703 F. Supp. 2d 980, 995-96 & n.7 (D. Ariz. 2010) (noting that at least eighteen states are aiming to follow Arizona and that the laws would increase “the intrusion of police presence into the lives of legally-present aliens (and even United States citizens), who will necessarily be swept up”).

¹⁷⁴ *See, e.g.,* *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (requiring, to establish discriminatory intent, proof that the decisionmaker chose “a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group”); *Washington v. Davis*, 426 U.S. 229, 240-45 (1976) (requiring proof of “a racially discriminatory purpose” and holding that showing substantial disproportionate impact alone is insufficient).

¹⁷⁵ *See, e.g.,* *McCleskey v. Kemp*, 481 U.S. 279, 290-98 (1987) (holding that sophisticated statistical study is insufficient; there must be evidence specific to the claimant's case).

conventions of behavior generally no longer provide such blatant evidence.

Moreover, the Equal Protection Clause's conscious purpose standard altogether neglects the problems of implicit bias or racialized anxieties and angers that are unconscious or not fully acknowledged to ourselves that nonetheless generate racialized harm.¹⁷⁶ Constitutional criminal procedure protections also offer no succor for racial harms because criminal procedure doctrine simply directs claimants to the strictures and blind spots of equal protection doctrine.¹⁷⁷ Indeed, to the extent courts have invalidated overreaching state and local laws, the bases have been preemption¹⁷⁸ and, in two trial courts, due process doctrines.¹⁷⁹

A. *Preemption and Due Process as Alternate Frames*

The Third Circuit's recent decision in *Lozano v. City of Hazleton* is an exemplar of how preemption analysis can be an alternate frame for vindicating antidiscrimination values. Preemption doctrine stems from the Supremacy Clause of the Constitution, providing that "the Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."¹⁸⁰ Preemption can be express, when Congress declares the metes and bounds of preemption, or implied because (1) it is impossible to comply with both state and federal law, (2) state law poses an "obstacle" to accomplishing and executing Congress's

¹⁷⁶ See, e.g., Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1, 5-7 & nn.10-20 (2006); Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969 (2006); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987). For an overview of the findings in social psychology on implicit bias, see, for example, Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1497-1530 (2005).

¹⁷⁷ An oft-critiqued exemplar of this approach is *Whren v. United States*, 517 U.S. 806 (1996), in which the Court declined to review allegations of racial profiling.

¹⁷⁸ See *Lozano v. City of Hazleton*, No. 07-3531, 2010 WL 3504538, at *33-42 (3d Cir. Sept. 9, 2010); *Chamber of Commerce v. Edmondson*, 594 F.3d 742, 765-67, 769 (10th Cir. 2010); *United States v. Arizona*, 703 F. Supp. 2d 980, 991-1007 (D. Ariz. 2010); *Villas at Parkside Partners v. City of Farmers Branch (Farmers Branch III)*, 701 F. Supp. 2d 835, 851-59 (N.D. Tex. 2010); *Villas at Parkside Partners v. City of Farmers Branch (Farmers Branch II)*, 577 F. Supp. 2d 858, 866-75 (N.D. Tex. 2008); *Garrett v. City of Escondido*, 465 F. Supp. 2d 1043, 1056-57 (S.D. Cal. 2006). But see *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856, 866-67 (9th Cir. 2009) (finding no preemption of state laws criminalizing employment of undocumented workers), cert. granted sub nom. *Chamber of Commerce v. Candelaria*, 130 S. Ct. 3498 (2010).

¹⁷⁹ *Farmers Branch II*, 577 F. Supp. 2d at 877-79; *Garrett*, 465 F. Supp. 2d at 1058-59.

¹⁸⁰ U.S. CONST. art. VI, cl. 2.

purposes, or (3) Congressional intent to occupy the field can be inferred.¹⁸¹ The *Lozano* court found implied preemption of Hazleton's employment provisions because of conflict with the carefully calibrated balance between immigration law enforcement, antidiscrimination values, and employer interests that Congress struck in the IRCA.¹⁸²

The *Lozano* court detailed how Congress in enacting IRCA wrought a compromise that "at every level balances specifically chosen measures discouraging illegal employment with measures to protect those who might be adversely affected."¹⁸³ Congress heard numerous witnesses testify regarding deep concern about the risk of employment discrimination against Hispanic-Americans and other minorities and deemed antidiscrimination measures essential.¹⁸⁴ Numerous provisions of the resulting federal law were calibrated to address the concerns, including the establishment of an office to handle discrimination charges¹⁸⁵ and the prescribing of civil penalties for discrimination.¹⁸⁶ The *Lozano* court explained that not only did the Hazleton ordinance provide employers with fewer procedural protections than IRCA, but it also coerced the use of E-Verify, which was only a voluntary program under federal law, because its efficacy in catching unauthorized workers came at the cost of potential discrimination against foreign-born persons due to database problems discerning their status.¹⁸⁷ Moreover, Hazleton's ordinance upset the balance struck by Congress between enforcement and antidiscrimination by imposing additional sanctions on employers for hiring undocumented workers without providing the antidiscrimination protections afforded by federal law.¹⁸⁸

Regarding the housing provisions, the judges declined to "bury [their] heads in the sand ostrich-like ignoring the reality" of the ordinance's aim—which in essence was to expel people from the city.¹⁸⁹ The court held that the Hazleton ordinance impermissibly attempted to prohibit residency based on a "snapshot" of immigration status without regard to whether a final order of removal had or would issue.¹⁹⁰ The court invalidated this usurpation of the federal power to determine the conditions under which people may remain in the

¹⁸¹ See, e.g., *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541 (2001); *United States v. Locke*, 529 U.S. 89, 107-10 (2000); *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 152-53 (1982).

¹⁸² *Lozano*, 2010 WL 3504538, at *33-42.

¹⁸³ *Id.* at *33 (quoting *Nat'l Ctr. For Immigrants' Rights, Inc. v. Immigration & Naturalization Serv.*, 913 F.2d 1350, 1366 (9th Cir. 1990)).

¹⁸⁴ H.R. REP. NO. 99-682(I), at 22-23 (1986), reprinted in 1986 U.S.C.C.A.N. 5649, 5672-73.

¹⁸⁵ 8 U.S.C. § 1324b(c)-(d) (2006).

¹⁸⁶ *Id.* § 1324b(g)(2)(B)(iv)(I)-(III).

¹⁸⁷ *Lozano*, 2010 WL 3504538, at *35-36.

¹⁸⁸ *Id.* at *38.

¹⁸⁹ *Lozano*, 2010 WL 3504538, at *41-42.

¹⁹⁰ *Id.* at *42.

country. Hazleton, however frustrated and angry over the influx of Latinos to the city, could not assert a power to expel in the guise of housing ordinances.

The technique of enfolding antidiscrimination concerns into the preemption analysis bears an intriguing contrast to what Nelson Tebbe and Robert Tsai have called “hedging.”¹⁹¹ This analytical move blurs the boundaries between the chosen basis of decision and a secondary rationale.¹⁹² Such an approach may plant the seeds of an alternate rationale to blossom later, when the transition has been eased with an approach that has a broader base of support at the time.

In contrast to *Lozano*'s enfolding of antidiscrimination values into its preemption analysis, the Tenth Circuit's recent decision in *Chamber of Commerce v. Edmondson*¹⁹³ represents a more hesitant approach. The *Edmondson* court affirmed a preliminary injunction against provisions requiring employers to verify the legal status of independent contractors and making it an actionable “discriminatory practice” to discharge a U.S. citizen or permanent resident alien while retaining someone the employer knows or “reasonably should have known, is an unauthorized alien” unless employers use E-Verify, with its attendant higher risk of discrimination.¹⁹⁴ The Tenth Circuit reasoned that exposing employers to suit for back pay, costs, attorneys' fees, reinstatement, and cease and desist orders constituted a “sanction” that IRCA expressly preempted.¹⁹⁵ The requirement that the status of independent contractors be verified was impliedly preempted, the Tenth Circuit reasoned, because it upset the careful balance struck in IRCA that excluded independent contractors from verification requirements.¹⁹⁶ Judge Lucero would have gone further and held that the mandate that employers use the pilot E-Verify system on pain of ineligibility for state contracts also upset the carefully calibrated federal scheme balancing antidiscrimination concerns with enforcement concerns.¹⁹⁷ Because there was not a majority for Judge Lucero's position, however, the preemption analysis largely elided antidiscrimination concerns.

At the other end of the spectrum from the Third Circuit's exemplar and the Tenth Circuit's hesitant middle ground is the Ninth Circuit's decision in *Chicanos Por La Causa, Inc. v. Napolitano*.¹⁹⁸ The plaintiffs in that case challenged Arizona's 2007 Legal Arizona

¹⁹¹ Nelson Tebbe & Robert L. Tsai, *Constitutional Borrowing*, 108 MICH. L. REV. 459, 475-78 (2010).

¹⁹² *Id.* at 476.

¹⁹³ 594 F.3d 742 (10th Cir. 2010).

¹⁹⁴ *Id.* at 753-55, 765-67, 769.

¹⁹⁵ *Id.* at 765.

¹⁹⁶ *Id.* at 769.

¹⁹⁷ *Id.* at 768-69.

¹⁹⁸ 558 F.3d 856 (9th Cir. 2009).

Worker's Act, detailed in Part II.B.1.¹⁹⁹ Trying to advance antidiscrimination norms through preemption analysis, the plaintiffs argued that the forced use of E-Verify upset the federal balance of antidiscrimination values with enforcement aims that Congress established by making E-Verify optional and I-9 verification the default.²⁰⁰ The Ninth Circuit gave the argument short shrift, however, curtly dismissing it in a sentence: "This argument fails because Congress requires employers to use either E-Verify or I-9, and appellants have not shown that E-Verify results in any greater discrimination than I-9."²⁰¹ This cursory dismissal without further analysis contrasts sharply with the careful analysis the Third Circuit offered of the discrimination risks and error rates of E-Verify.

In another conflict preemption argument with antidiscrimination overtones, the plaintiffs argued that the harsher sanctions under the Arizona law than the monetary sanctions under federal law also upset the delicate federal balance between antidiscrimination and enforcement by giving employers strong incentive to discriminate.²⁰² The panel dismissed the argument, writing briefly that the argument was "essentially speculative, as no complaint has yet been filed under the Act and we have before us no record reflecting the Act's effect on employers."²⁰³ The dismissal overlooks that the incentives to discriminate operate at the opaque and discretionary front end of the employment decision and can steer action based on the mere threat before any prosecution, and potentially unbeknownst to the applicant.

The Supreme Court has granted certiorari in *Chicanos Por La Causa*, now captioned *Chamber of Commerce v. Whiting*, offering the prospect of revision.²⁰⁴ At oral argument in the case, Justice Breyer was eloquently attuned to how the Arizona law upset the delicate balance between antidiscrimination protection and enforcement set by federal law. He told counsel for Arizona:

The main—the main anomaly it seemed to me to be this, that in the Federal Act, as—that was the first point that the [petitioner] Chamber [of Commerce] made, that it's a fairly careful balance. There are a group of people in Arizona, they may look as if they come from Mexico or speak with an Hispanic accent, and you are not certain whether they in fact are illegals or that they are legal. Now, think of that category.

Congress has passed a statute that gives the employer just as much incentive to verify, so there is no discrimination, as to dismiss, so

¹⁹⁹ See also *id.* at 860, 866.

²⁰⁰ *Id.*

²⁰¹ *Id.* at 867.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Chamber of Commerce v. Candelaria*, 130 S. Ct. 3498 (2010).

there is no illegal hiring. It's absolutely balanced. A \$1,000 fine for the one, a \$1,000 fine for the other.

So Arizona comes along and says: I'll tell you what, if you discriminate, you know what happens to you, nothing? But if you hire an illegal immigrant, your business is dead. That's just one thing they do. Now, how can you reconcile that intent to prevent discrimination against people because of their appearance or accent—how do you reconcile that with Arizona's law?

If you are a businessman, every incentive under that law is to call close questions against hiring this person. Under the Federal law every incentive is to look at it carefully.²⁰⁵

Justice Breyer was also attuned to the error rate of E-Verify and the impact of mandatory use on applicants, stating:

And I was worried about the E[-Verify] review which it seemed to require because it seemed to me in 20 percent of the cases where the notice is, this guy is not authorized; we don't have any record that he is authorized to work—20 percent of those are wrong and he is authorized to work.

So the employer who follows that is really going to fire 20 percent of the people who will be absolutely entitled to work.²⁰⁶

Justice Kennedy also expressed concern over the mandatory use of the E-Verify system, telling counsel for Arizona:

But you are taking the mechanism that Congress said will be a pilot program that is optional and you are making it mandatory. It seems to me that's almost a classic example of a State doing something that is inconsistent with a Federal requirement.²⁰⁷

Justice Sotomayor's questioning highlighted that the Arizona statute does not merely impose an additional licensing sanction—it usurps the federal power to investigate and adjudicate as well.²⁰⁸ This usurpation of the investigative and adjudicative power also raises antidiscrimination concerns relevant to conflict preemption analysis. Mandatory investigation of anonymous complaints filed pursuant to the state procedure poses the risk of harassment, fear, and further surveillance of people of color who may be targeted because of appearance or language and misperceived to be undocumented persons.

Also pending further review is the District of Arizona's recent decision in *United States v. Arizona*, which preliminarily enjoined the most controversial aspects of Arizona Senate Bill 1070 on preemption

²⁰⁵ Transcript of Oral Argument at 31-32, *Chamber of Commerce v. Whiting*, No. 09-115 (U.S. Dec. 8, 2010) (Breyer, J.), available at 2010 WL 4974382.

²⁰⁶ *Id.* at 36.

²⁰⁷ *Id.* at 38 (Kennedy, J.).

²⁰⁸ *Id.* at 15, 17 (Sotomayor, J.); see also *id.* at 53-54 (responding to Justice Sotomayor's queries).

grounds. Antidiscrimination norms did not expressly enter the district court's analysis, though the court was quite cognizant of the concerns²⁰⁹ and they arguably influenced its preemption analysis. Among several provisions enjoined,²¹⁰ the court ruled that the provision mandating immigration checks of every arrestee's status was likely preempted because it conflicted with congressional intent not to subject those lawfully present to "inquisitorial practices and police surveillance" and would divert federal resources, including the status-checking Law Enforcement Support Center, away from federal law enforcement priorities.²¹¹ As to the controversial provision on immigration status determination during lawful stops, detentions or arrests, the court similarly reasoned that the burden of processing status check requests and the risk of subjecting lawfully present people to "inquisitorial practices and police surveillance" were grounds for likely conflict preemption.²¹² Situated in the eye of the storm—Arizona—the district court appeared to take special care to try to couch invalidation of these controversial provisions in terms of the imperiled interests of all.

Due process doctrines such as the void-for-vagueness principle and procedural protections before deprivation of a property interest also present alternate avenues to vindicate equality interests.²¹³ Thus far, however, the Due Process Clause is a path less taken in decisions concerning state and local anti-immigrant laws, with few examples. The Southern District of California preliminarily enjoined an Escondido law similar to the Hazleton housing law on both preemption and due process grounds. The court reasoned that the Due Process Clause was affronted because no administrative review was afforded to landlords or tenants of the designation of illegal alien status and order to evict before the deprivation of the interest in tenancy and subjection of landlords to penalties.²¹⁴ Perhaps wary of due process challenges, Hazleton's revision of its Illegal Immigration Relief Act Ordinance subsequently

²⁰⁹ See *United States v. Arizona*, 703 F. Supp. 2d 980, 997 n.11 (D. Ariz. 2010) (noting pending racial profiling claims).

²¹⁰ The district court also enjoined as likely preempted provisions imposing different penalties than federal law for failure to carry immigration documents, provisions going further than federal law in criminalizing the act of working or looking for work by an undocumented person, and provisions permitting police officers to make warrantless arrests based on probable cause to believe the person has committed a public offense rendering the person removable. *Id.* at 998-1002, 1004-06.

²¹¹ *Id.* at 993-97.

²¹² *Id.* at 996-98.

²¹³ For accounts of how the vagueness doctrine has been used to curb legislative invasion of constitutional norms and values such as freedom of expression and equality, see, for example, Tammy W. Sun, *Equality by Other Means: The Substantive Foundations of the Vagueness Doctrine*, 46 HARV. C.R.-C.L. L. REV. (forthcoming 2010) (on file with *Cardozo Law Review*); Anthony Amsterdam, Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

²¹⁴ *Garrett v. City of Escondido*, 465 F. Supp. 2d 1043, 1058-59 (S.D. Cal. 2006).

tacked on a new section providing, among other things, procedures for appeal.²¹⁵ The Northern District of Texas held as void for vagueness a housing ordinance requiring the “owner and/or property manager” to verify immigration status of tenants by requiring “submission of evidence of citizenship or eligible immigration status.”²¹⁶ The court found the ordinance unacceptably vague because of the lack of specificity and uncertainty as to what documents sufficed and what constituted “eligible immigration status.”²¹⁷ While thus far not as widely used in the anti-“alien” cases, due process doctrines can be illuminating, alternate frames for vindicating antidiscrimination values; they underscore the generalized dangers of arbitrary and unchecked government power.

B. *Making Shared Interests Rather than Racial Difference Salient*

One of the virtues of alternate frames for vindicating antidiscrimination values is the ability to bridge across disparate worldviews. Someone with a hierarchical worldview, for example, might value federalism principles even if the protection of underprivileged minorities does not have strong appeal. Someone with an individualistic orientation may find resonant due process concerns against arbitrary and unchecked government power—whereas the notion that individual interests should give way to antidiscrimination and equality interests could be riling. Alternate frames for antidiscrimination norms can thus help communicate the import of these interests to those who are skeptical or downright hostile—and who therefore may be important forces behind norm-pushing tough legislation.²¹⁸

Alternate frames can also make shared interests, rather than racial difference and divergence of interests, salient, which helps to ameliorate inflamed perceptions. We become particularly parochial and polarized during times of economic and political turmoil, and resort to the politics of ferocity towards the threatening Other to rally a fearful, fractured,

²¹⁵ Hazleton, Pa., Ordinance 2006-40, § 7(F) (Dec. 28, 2006), available at <http://www.clearinghouse.net/chDocs/public/IM-PA-0001-0016.pdf>.

²¹⁶ *Villas at Parkside Partners v. City of Farmers Branch (Farmers Branch II)*, 577 F. Supp. 2d 858, 862, 876-77 (N.D. Tex. 2008).

²¹⁷ *Id.*

²¹⁸ Compare Dan Kahan’s argument that law and policy should be infused with a surfeit of meanings—an approach he calls “expressive overdetermination”—so that divergent worldviews can be simultaneously affirmed and people in a pluralistic society can deliberate with rather than past each other. Dan M. Kahan, *The Cognitively Illiberal State*, 60 STAN. L. REV. 115, 145-48 (2007).

and doubting polity. Racial differentiation and divergence of interests become particularly relevant, and can operate as blinders. Negative stereotypes can be particularly pronounced. Studies have found that an “ego threat” to self-regard activates negative ethnic stereotypes and heightens prejudice against out-groups.²¹⁹ Social psychologists have theorized that part of the function of negative stereotypes is to help bolster self-regard.²²⁰ It is particularly important in such times for law to help deactivate the tendency to resort to heightened out-group vilification and to remind us of common ground and interest convergence.²²¹

The Third Circuit’s decision in *Lozano* accomplished this aim of artfully reframing equality in a more palatable, less polarizing form. By ruling that Hazleton disrupted the antidiscrimination-enforcement balance carefully struck by the national polity, the court rendered antidiscrimination norms majoritarian. Vindicating antidiscrimination norms did not entail a countermajoritarian pitting of an out-group’s interests against the desires of an already-riled polity. Rather, vindicating antidiscrimination interests focused on vindicating the shared interest in federal structure, and not allowing a patchwork of rogue jurisdictions to undermine a carefully crafted national balance. The District of Arizona, more cautiously, tried to underscore that Arizona Senate Bill 1070’s most controversial provisions implicated the interests of citizens as well as aliens.

Why should the palatability of bases for decisions matter to courts, which, after all, are customarily conceived as set above the political fray?²²² To be effective and realized in reality, decisions need to be socially contextualized. For the values implanted by courts to be realized in practice, they must take root and be accepted by the polity.

²¹⁹ See, e.g., Steven Fein & Steven J. Spencer, *Prejudice as Self-Image Maintenance: Affirming the Self Through Derogating Others*, 73 J. PERSONALITY & SOC. PSYCHOL. 31 (1997).

²²⁰ See, e.g., *id.*; Lennart J. Renkema et al., *Terror Management and Stereotyping: Why Do People Stereotype when Mortality Is Salient?*, 34 PERSONALITY & SOC. PSYCHOL. BULL. 553 (2008).

²²¹ And it is important for scholars to remind us of interest-tying and convergence across groups. Members of formerly vilified groups that historically bore the brunt of racialized hostility and accusations of danger and criminality may now be leading the charge against newcomers. Empathy is sometimes in short supply among those who enjoy the benefits of changed times and new villains.

²²² This customary portrait has long been challenged by political scientists and constitutional commentators who contend that public demand, political majorities, and elite national opinion powerfully influence Supreme Court decisionmaking. See, e.g., LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 240-41, 250-51 (2004); ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* 260-61 (Sanford Levinson ed., 5th ed. 2010); Jack M. Balkin, *What Brown Teaches Us About Constitutional Theory*, 90 VA. L. REV. 1537, 1538-46 (2004); Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 280-81, 283-89 (1957), reprinted in 50 EMORY L.J. 563, 565-66, 568-575 (2001); Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596, 2606-08 (2003).

Part of the art of crafting a judgment is to implant ideas that cultivate affinity among those who disagree, as Robert Tsai has illuminated in his work on judicial metaphors and linguistic framing.²²³ Reva Siegel and Robert Post have advised that judges adjudicating some of the most heated questions in our society must craft their standards carefully, cognizant of the risk of backlash and resistance that entrench the very attitudes and legislation that their decisions are trying to ameliorate.²²⁴ The risk of resistance and divergence between pronouncement and practice is particularly acute on polarizing issues in polarized times.

Commentators have argued in different registers about the value of grounding equality interventions in shared interests.²²⁵ In the context of the black struggle for equality, Derrick Bell argued that progress towards racial equality “will be accommodated only when it converges with the interests of whites.”²²⁶ He recalled how couching the import of enforcing school desegregation orders in terms of federalism principles and respect for the courts’ role of interpreting law had more widespread appeal.²²⁷ In contrast, racial divergence in interests would undermine realization of equality protections, despite normative commitments and claims.²²⁸ Early campaigners for civil rights also apparently recognized the import of making interest-convergence arguments. For example, countering the spate of anti-Chinese laws, Dr. J.G. Kerr wrote, “In this warfare against the Chinese, the rights and liberty of the white man are just as much at stake as those of the Chinaman. Both must stand or fall

²²³ ROBERT L. TSAI, *ELOQUENCE & REASON: CREATING A FIRST AMENDMENT CULTURE* 44-48 (2008).

²²⁴ Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 374 (2007); Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 HARV. L. REV. 1470, 1545-46 (2004).

²²⁵ *E.g.*, Elizabeth F. Emens, *Integrating Accommodation*, 156 U. PA. L. REV. 839, 895-96 (2008) (arguing for framing disability accommodations in terms of third-party benefits that are “more broadly beneficial”); Richard T. Ford, *Hopeless Constitutionalism, Hopeful Pragmatism*, in *THE CONSTITUTION IN 2020*, at 143, 151-52 (Jack M. Balkin & Reva B. Siegel eds., 2009) (“I suspect that the best—perhaps the only—way to frame a broad constitutional vision that will both appeal to a majority of Americans and satisfy traditional left-liberal objectives (. . . social esteem for racial, religious, and sexual minorities; and so on) will be to tell a story that emphasizes what joins us as a political community.”); Vicki Schultz, *Life’s Work*, 100 COLUM. L. REV. 1881, 1937-38 (2000) (explaining the import of shifting discourse on work-related rights from “one that emphasized work-related rights for some people as members of particular demographic groups (racial and ethnic minorities, women, the elderly, gays and lesbians, people with disabilities, welfare mothers, the working poor, and so on) into one that emphasized work-related rights for all people as members of the broad community of citizens”).

²²⁶ Derrick A. Bell, Jr., Comment, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980). The proposition, though controversial in its time, has proved to have powerful explanatory force in an array of contexts. See Cynthia Lee, *Cultural Convergence: Interest Convergence Theory Meets the Cultural Defense*, 49 ARIZ. L. REV. 911, 922-38 (2007) (analyzing examples).

²²⁷ Bell, *supra* note 226, at 530.

²²⁸ *Id.* at 523, 528.

together.”²²⁹ While Bell’s theory was positivistic, describing the world as it *is* rather than *ought* to be, there are prescriptive ramifications from the insight about behavior. As a pragmatic matter, choosing frames that make interest convergence salient is a way to better secure necessary majoritarian support for decisions vindicating equality values.

Besides appealing externally to the polity, alternate frames that make social cohesion and interest convergence salient may also appeal internally to judicial centrists. In a forthcoming article on the trajectory of antidiscrimination law, Reva Siegel charts how centrists on the Supreme Court have adhered to what she terms an antibalkanization perspective,²³⁰ a third alternative to the anticlassification and antisubordination views that have cleaved antidiscrimination law.²³¹ In her account, the antibalkanization view emerged in cases addressing governmental attempts to rectify race equality; it is sensitive to the need to constrain the forms of intervention to promote social cohesiveness and ameliorate resentment and estrangement.²³² Judicial decisionmaking is often a group project wherein internal consensus as well as external consensus must be cultivated. A more palatable pathway that underscores interest convergence rather than difference may thus have the double benefit of securing broader judicial as well as popular support.

The danger of alternate frames is that they may be used to avoid addressing altogether what is often the biggest concern regarding anti-immigrant laws—the risk of racialized harms. Indeed, particularly in polarized and fierce times and contexts, there may be a desire to eschew or elide the vexing and ire-rousing concerns. Who wants to open Pandora’s Box, or even slightly raise the lid, when times are tough enough? This approach, however, allows wounds to fester wholly unaided. It emboldens the angry and anxious to enact intensifying and multifarious vehicles of venting ire at the expense of out-groups. Alternate frames are constructive rather than destructive when they take into account antidiscrimination concerns and address them in ways that are more palatable across worldviews and less polarizing—not when they ignore some of the biggest concerns altogether.

²²⁹ J.G. KERR, *THE CHINESE QUESTION ANALYZED* 5 (1877), available at <http://www.oac.cdlib.org/ark:/13030/hb009n96wp/?order=2&brand=oac4>.

²³⁰ Siegel, *supra* note 14. Professor Siegel draws, in part, on Justice O’Connor’s opinion for the Court in *Shaw v. Reno*, 509 U.S. 630 (1993), describing the “lasting harm to our society” posed by racial classifications. *Id.* at 657. Racial classifications, Justice O’Connor warned, “may balkanize us into competing racial factions; [they] threaten[] to carry us further from the goal of a political system in which race no longer matters . . .” *Id.*

²³¹ Siegel, *supra* note 14 (manuscript at 10-26).

²³² *Id.* (manuscript at 25-26).

C. Counteracting Cascades of Misperception

In addressing the legislative products of the politics of demonization, courts also have an important role to play in counteracting cascades of misperception that are catalyzed in fierce friend-enemy politics. A prime example of a social cascade of misperception was the immigration-crime linkage and arousal of alarm, despite crime data giving good cause for calm, that helped fuel passage of Arizona Senate Bill 1070, discussed in Part II.B.2. Courts removed from the political fray have the luxury of deliberation and reason, and can use the megaphone of the courts to counteract social cascades of misperception rather than reinforce them. This calls for an ethic of care in crafting decisions that bear on the politics of demonization to prevent amplifying and reproducing a potentially incorrect narrative and construct.

To take an example, the opening line of Judge Bolton's decision in *United States v. Arizona* seems to echo—and thereby legitimize—the alarmist narrative behind Arizona Senate Bill 1070. The decision begins by stating that the law was enacted “[a]gainst a backdrop of rampant illegal immigration, escalating drug and human trafficking crimes, and serious public safety concerns.”²³³ The way in which a decision is crafted and framed matters as much as the substance of the result reached. The opening clause of *United States v. Arizona* is, from this perspective, unfortunate because it helps promulgate constructs and claims that may be more a product of overheated misperception than reality, based on the data discussed in Part II.B.2. The opening presents a pronounced contrast to the Third Circuit's approach of framing Hazleton's laws and its stated rationales in terms of the larger context of racialized anxieties in a time of social change.²³⁴

There is much at stake in defusing and counteracting misperception. Politics of demonization are dangerous because they can entrench harmful, racialized misperception, playing on cognitive weaknesses. As discussed, the ostensibly race-neutral construct of the “illegal alien” is suffused with racialized perception that “draws on stereotypes about Mexicans as criminals”²³⁵ and “the iconic illegal alien.”²³⁶ Alarmist narratives further spread and aggravate the risk of racialized hostility and harm.

²³³ *United States v. Arizona*, 703 F. Supp. 2d 980, 985 (D. Ariz. 2010).

²³⁴ See *supra* text accompanying notes 97-104.

²³⁵ See Johnson, *supra* note 96, at 171 (discussing stereotypes of Mexicans as criminals).

²³⁶ See NGAI, *supra* note 96 (tracing the history of how Mexicans emerged as “the iconic illegal alien”).

The salient feature of racial distinctiveness in minorities can contribute to distorted perceptions of correlation with negative traits such as criminality.²³⁷ This formation of what is called in the social psychology literature an “illusory correlation” is due to how distinctiveness and infrequency distort our judgment, leading us to link racially salient people with salient negative behaviors and to overestimate the association because both are infrequently encountered and strikingly salient in their joint infrequency.²³⁸ Illusory correlations in perception are aggravated by expectancy-based mechanisms and confirmation biases that render us resistant to data contrary to our stereotypes and selectively attuned to belief-confirming information, while we discount or discard information that does not fit the view.²³⁹ We are particularly susceptible to hostile misperception in times of social strain and national self-doubt—like that precipitated by our present economic turmoil—because, as social psychologists have posited, “ego threat” to self-regard activates negative ethnic stereotypes to bolster self-regard.²⁴⁰

We cannot sanitize incendiary and conflationary speech without overrunning our cultural and constitutional commitments to free-wheeling debate. But the megaphone of the courts, through the crafting of decisions, can and should be used to correct and counteract the spread of conflation and misperception—in addition to curtailing legislative overreaching. Particularly in times of fierce politics of anxiety and blame, we must be attuned to the realities and risks of group stigmatization and potential racialized harm. We must recognize the import of ameliorating inflamed and distorted politics and perception, as well as overreaching legislation.

CONCLUSION

History’s repetitions, in different registers and legal forms, teach us the dangers of overreaching state and local laws used to vent frustrations on out-groups whose members are either overtly or implicitly racialized. In such times of fierce politics, the form and mode of judicial intervention to curb divisive and destructive excesses matters. We must be attentive to how to manage the inflammation of

²³⁷ See Klaus Fiedler, *Illusory Correlations: A Simple Associative Algorithm Provides a Convergent Account of Seemingly Divergent Paradigms*, 4 REV. GEN. PSYCHOL. 25, 34 (2000) (reviewing literature).

²³⁸ *Id.* at 32, 34.

²³⁹ See STANLEY WOLL, *EVERYDAY THINKING: MEMORY, REASONING AND JUDGMENT IN THE REAL WORLD* 379-80 (2002) (reviewing literature).

²⁴⁰ See *supra* text accompanying notes 219-20.

feeling that gives rise to the surge of problematic laws. Unity-reinforcing frames of analysis such as preemption doctrine can be deployed in a manner that renders salient, in a more palatable fashion, previous national commitments to antidiscrimination values. This helps foster the polarization-amelioration and cooperation necessary to curb the excesses and inflamed perceptions of the times.